SELF SUPPORT AS A BASIS FOR ALIMONY MODIFICATION

In what would seem to be a novel extension of precedent, the California Supreme Court in *Levitt v. Levitt* [1] has declared that remarriage of a husband plus the apparent ability of a wife to be self-supporting are sufficient "changed circumstances" to warrant alimony modification, without regard to the husband's ability to pay the original award and the wife's previous position in life.

In the *Levitt* case the parties were married in 1949 and had one child, Christopher. A month after the wife filed for a divorce the couple signed a property settlement agreement, which provided in a separate article for support and maintenance. The settlement was incorporated into the interlocutory judgment. In November, 1956, the parties stipulated that the decree be modified. Alimony was raised from $400 to $500 per month for the wife and from $225 to $250 for Christopher's support. Support of James, a son by the wife's previous marriage, was terminated, and the wife gave up her interest in the husband's net earnings which had been provided in the property settlement. In partial consideration thereof the husband agreed not to seek any modification concerning alimony except in the event of a substantial decrease from his 1956 income, which had amounted to $18,000. These stipulations were merged in the final decree.

Six years later the ex-husband sought modification of the order, including cessation of payments to his ex-wife or their reduction to a minimal amount. He stated that he had remarried and had one child by his present wife. He further alleged that plaintiff was able-bodied and capable of being self-supporting and that the continuance of support and maintenance by the defendant would place an undue burden on the defendant and put a premium on the plaintiff's remaining unmarried. The ex-husband did not state his financial worth or present income. At the time of the hearing the ex-wife was not employed, although years previously she had worked as a motion picture extra. The alimony payments were her sole source of income.

The trial court reduced alimony from $500 per month to a $1.00 token amount. The District Court of Appeals[2] reversed the decision stating that the husband was precluded from seeking a modification since his income had not fallen below $18,000 per year, and that he was still bound by his agreement not to seek modification of the alimony order unless this condition occurred. However, on further appeal the Supreme Court in February of 1965 upheld the trial court's reduction of alimony irrespective of the husband's earnings and the agreement made with regard thereto. The Court noted that the alimony order was nonintegrated and therefore

[1] 62 Cal.2d 477, 42 Cal.Rptr. 577 (1965).

[2] Levitt v. Levitt, 38 Cal.Rptr. 853 (Dist. Ct. App.) (1964).

modifiable "subject to the discretion of the court as justice may require."[3] Citing *Hough v. Hough,*[4] the Court further noted that Civil Code Section 139, which authorizes modification of support allowances, becomes an implied part of any such agreement whenever the agreement is merged in the decree. It was then concluded that the fact that the parties had stipulated that alimony payments would not be modified unless the defendant's income fell below $18,000 did not preclude the Court from ordering a modification of the decree. The ex-wife urged that even so, the trial court had abused its discretion to modify since it had deprived her of all support. However, in affirming the trial court's modification, the Supreme Court found sufficient changed circumstances to justify the discretion.

The question in this case is whether there were sufficient changed circumstances to warrant modification. Although in California the courts do not require a change in financial condition, the change must be a material one.[5] Thus the crucial question is what the courts consider "changed circumstances."

> Circumstances include practically every thing which has a bearing upon the present and prospective matters relating to the lives of both parties.[6]
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> It refers to the needs of both of the parties and the abilities of the parties to meet such needs. In measuring a set of circumstances the court should consider the property owned and the obligations to be met as well as the ability to earn and actual earnings.[7]

In the *Levitt* case the wife's needs had not diminished since the award had been made in 1956.[8] In reliance upon the award the wife had moved

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[3] Levitt v. Levitt, 62 Cal.2d 477, 42 Cal.Rptr. 577 (1965).

The contracting parties stated that the consideration for the execution of the agreement was the resolution of property claims and the settlement of rights to support and maintenance. However it was clearly stated "Husband and Wife in discharge of Husband's obligation to support and maintain Wife because of their marital and family relationship, hereby agree that Husband, by way of alimony and not as a part of a property settlement shall pay to Wife for alimony, support and maintenance so long as Wife is living and remains unmarried. . . ." It was this portion of the contract which the Supreme Court held made alimony separable from the division of property rights.

[4] Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15 (1945).

An integrated property settlement is non-modifiable by the courts. If, however, a portion of the agreement is in the nature of alimony and separable from the provision that divides the property, the court may modify such provision in accord with its powers over alimony generally.

[5] Grant v. Grant, 52 Cal.App.2d 359, 126 P.2d 130 (1942); Triest v. Triest, 67 Cal.App.2d 320, 154 P.2d 2 (1944); Friedman v. Friedman, 221 Cal.App.2d 217, 35 Cal.Rptr. 111 (1963); Annot., 18 A.L.R.2d 10, 10–19 (1951).

[6] Lamborn v. Lamborn, 80 Cal.App. 494, 251 Pac. 943 (1926).

[7] Becker v. Becker, 64 Cal.App.2d 239, 242, 148 P.2d 381, 383 (1944); see also Bratnober v. Bratnober, 48 Cal.2d 259, 309 P.2d 441 (1957); Webber v. Webber, 33 Cal.2d 153, 199 P.2d 934 (1948).

[8] The dissent does not feel that the ex-wife's apparent ability to be self-supporting is a sufficient changed condition. "The husband averred that in 1962, when the challenged modifi-

to Germany, where she was born, had leased a house and established foreign residence. In view of the rising cost of living in post-war Europe, her needs had probably increased. And although the court noted that the son was now four years older and lived with his mother only three months of the year,[9] this fact would seem to bear on the child support provision of the order and not directly upon the alimony paid to sustain the wife.

The husband's circumstances, however, had changed. He had remarried and had one child by his present wife. However, in *Reed v. Reed*[10] the court had said that although a husband's remarriage is a circumstance that may be considered in modifying alimony payments, it alone would not justify reducing the former wife's alimony if her need demanded its continuance. A husband's remarriage does not except him from providing for support unless it is shown that his ability to support his second wife has been impaired.[11] The husband in *Levitt* stated that he was undertaking more speculative employment since he was leaving a contract to write for television in order to free-lance; but he made neither a showing of his financial condition nor that his ability to support his second wife had been impaired. In some cases if the husband has remarried and requests a modification, the original award has been generously reduced where there was a showing by detailed financial statement of a genuine inability to pay the amount of the prior award.[12] However, a husband cannot use his remarriage as an excuse for reducing support to a former wife when he has the ability to pay,[13] and in the *Levitt* case the husband's income had not decreased since the time of the original award.

Thus, the Court relied on the fact that the ex-wife did not controvert the ex-husband's statement that she was able to work and be self-sufficient. However, it should be noted that an able-bodied wife's failure to seek employment has rarely been deemed sufficient circumstance to modify

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cation was made, his former wife was 'able-bodied and capable of being self-supporting'. So she was in 1956. There is not showing of a change of circumstance here. . . . Certainly, under the showing made, the former wife had a greater not a lesser need in 1962 than she had 10 years previously." Levitt v. Levitt, 62 Cal.2d 477, 485, 42 Cal.Rptr. 577, 583 (1965).

[9] *Id.* at 481, 42 Cal.Rptr. 577, 579 (1965).

[10] 128 Cal.App.2d 789, 276 P.2d 36 (1954).

[11] Long v. Long, 76 Cal.App.2d 716, 723, 173 P.2d 840, 844 (1946).

[12] Dean v. Dean, 59 Cal.2d 655, 31 Cal.Rptr. 64 (1963); Evans v. Evans, 173 Cal.App.2d 714, 343 P.2d 997 (1959); Reed v. Reed, 128 Cal.App.2d 789, 276 P.2d 36 (1954); but see Ralphs v. Ralphs, 86 Cal.App.2d 324, 194 P.2d 592 (1948); Van Cott v. Van Cott, 186 Cal. App.2d 539, 9 Cal.Rptr. 309 (1960).

[13] Green v. Hooser, 114 Cal.App.2d 211, 214, 250 P.2d 162, 164 (1952). There the trial court said "that *under the circumstances* the defendant could not use his remarriage . . . as a reason or excuse for reducing alimony." But it also stated "that it is and should be the law that where a petition is filed the only jurisdictional facts that must be alleged are the needs of the child and the ability of the defendant to pay."

alimony awards, let alone reduce them to a token amount.[14] In *Lamborn v. Lamborn,*[15] the court held that if the wife is able to work and she makes little or no effort to seek employment the court may take this into consideration. But the *Lamborn* case can be distinguished on three important points: 1) There the parties were both young and had only been married a short time. 2) No children were involved. 3) The defendant was a wage earner by daily labor.[16]

In the other authority cited by the *Levitt* court, where the wife had failed to seek employment *(Dean v. Dean*[17]*)*, the defendant showed a heavy deficit in trying to maintain the wife at the original award. In that case the wife had been a former teacher, and both of her children were beyond the need of her constant presence. And it remains questionable in the *Levitt* case whether the ex-wife could be considered able to provide self-support anywhere near the alimony payment of $500 per month when her previous business experience was limited to being a motion picture extra some ten years before.

The original award in the *Levitt* case was apparently granted on the recognized proposition that through the marriage contract a wife may establish a position in life and because of this an alimony order may be in excess of the wife's actual needs.[18] Apparently this proposition was ignored by the Supreme Court in upholding the decrease of alimony to a nominal fee. Of course, no matter what the ex-wife's status has been, the trial court should not award alimony in a sum inducing idleness.[19] However, in holding that remarriage of the ex-husband plus the apparent ability of the ex-wife to be self-supporting are sufficient changed circumstances to allow modification of an alimony order, the *Levitt* decision extends the *Lamborn* decision beyond its original intent. The factual situation in *Lamborn* is substantially different from the circumstances existing in the *Levitt* case. In *Lamborn,* the husband was a daily laborer; in the *Levitt* case the husband earned in excess of $18,000 per year. And in the *Lamborn* case the parties were both young, had been married for only a short time, and there were no children. Because of these differences, the *Lamborn* decision, which denied alimony to a wife who could become self-supporting, does not afford sufficient authority for *Levitt.* Nor does *Dean v. Dean,* where the husband showed a heavy deficit in trying to

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[14] Annot., 18 A.L.R.2d 10, 68 (1951).

[15] 80 Cal.App. 494, 251 P. 943 (1926).

[16] Webber v. Webber, 33 Cal.2d 153, 199 P.2d 934 (1948). The Lamborn decision is cited for the proposition that where the former husband is a *wage-earner by daily labor,* then the trial court should not award alimony inducing idleness on the part of the former wife.

[17] 59 Cal.2d 655, 31 Cal.Rptr. 64 (1963).

[18] 16 Cal.Jur.2d, *Divorce and Separation,* §202 (1954); Pope v. Pope, 102 Cal.App.2d 353, 227 P.2d 867 (1951).

[19] See Hofstader, *Common Sense About Alimony,* HARPERS, May 1958, pp. 68–70.

maintain the alimony order, supply a rational basis for the *Levitt* result.

It is suggested that the trial court in *Levitt,* in changing the alimony award to a nominal fee, abused its discretion under the circumstances. While, as the Supreme Court noted, the agreement of the husband not to seek modification unless his earnings fell below $18,000 was not completely binding on the parties due to Civil Code Section 139, yet this agreement should have been given heavy consideration. During the *Levitt* marriage the wife had apparently attained a position in life which the original award of $500 per month enabled her to maintain. No financial evidence was presented that this award was causing the husband financial distress. In fact, as noted in the decision, his income had been greater in each year than it had been when the original award was made.

While a court should not "induce idleness" by excessive awards, the award in the *Levitt* case was not excessive under all the circumstances. In holding that the remarriage of a husband plus the apparent ability of a wife to support herself are sufficient changed circumstances in themselves to warrant alimony modification, it is submitted that the *Levitt* decision has reached an undesirable conclusion which should not be expanded upon in future decisions based on similar factual situations.

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