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## A Commendable Goal: Public Policy and the Fate of Spousal Support After 1996

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# A COMMENDABLE GOAL: PUBLIC POLICY AND THE FATE OF SPOUSAL SUPPORT AFTER 1996

## I. INTRODUCTION

When one thinks of a contemporary marriage, chances are one pictures two working individuals sharing the financial responsibilities of running a household.<sup>1</sup> Since the 1960s, women have made a number of milestone accomplishments, particularly in the workforce.<sup>2</sup> Naturally, with such evolvement the marital dynamic changes as well. The perception of the past is that one spouse, usually the wife, sacrificed her career for childrearing and social responsibilities connected to her husband's job.<sup>3</sup> Or, perhaps, she sacrificed further education to take a job that provided financial support while her husband attained a professional degree.<sup>4</sup> Either way, the wife was usually the

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1. In the traditional American family, the roles of husband and wife, and for that matter mother and father, were such that the husband provided the financial support for the family while the wife took care of the house and children. With the advent of the modern American family, however, this traditional assumption has been replaced by the two paycheck family; instead of the husband being the sole provider of financial support, both spouses are now contributing to the needs of the family. See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 276-78 (1997).

2. As for women's participation in the workforce, a number of factors can be credited with the upsurge, including: "(1) more effective means of birth control and the trend toward fewer children; (2) the increased life expectancy of women; (3) the greater number of college-educated women; and (4) the widespread use of labor-saving devices in the home." EDITORIAL RESEARCH REPORTS ON THE WOMEN'S MOVEMENT: ACHIEVEMENTS AND EFFECTS ON THE WOMEN'S MOVEMENT 25 (Hoyt Gimlin ed. 1977) [hereinafter EDITORIAL RESEARCH REPORTS ON THE WOMEN'S MOVEMENT].

3. See Swisher, *supra* note 1, at 277.

4. See, e.g., Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2267-79 (discussing the treatment of wife's claims to their husbands' professional degrees in marital dissolution proceedings); Susan Klebanoff, Comment, *To Love and Obey 'Til Graduation Day—The Professional Degree in Light of the Uniform Marital Property Act*, 34 AM. U. L. REV. 839 (1985) (analyzing whether a professional degree attained by a husband is considered property in marital dissolution proceedings).

one foregoing her career in favor of domestic duties. Today, however, more and more women are seeking their own professional careers rather than stepping into the role of full-time housewife or mother.<sup>5</sup>

Women's increased participation in the workforce has altered the ways in which courts look at the alimony, or spousal support, issue in marital dissolution proceedings. To gain a perspective on this issue, consider that between 1980 and 1994 there were approximately 2.3 million marriages per year in the United States.<sup>6</sup> Unfortunately, there were in excess of 1.1 million divorces per year for that same time period.<sup>7</sup> In California alone that number exceeded 100 thousand per year.<sup>8</sup>

In assessing spousal support in marital dissolution proceedings, California courts consider a variety of factors enumerated in Family Code section 4320.<sup>9</sup> These factors include each spouse's need, the duration of the marriage, and the age and health of the parties.<sup>10</sup> While spousal support is not mandatory, the Family Code requires courts to weigh each of these factors against the marital standard of living, and each spouse's respective needs and abilities.<sup>11</sup> Yet, because each case

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5. See EDITORIAL RESEARCH REPORTS ON THE WOMEN'S MOVEMENT, *supra* note 2, at 6-7.

In the 1970s, the percentage of women electing to forego children increased, whereas women who chose to have children were doing so later in life. See Elaine Tyler May, *Myths & Realities of the American Family*, in 5 A HISTORY OF PRIVATE LIFE 539, 583 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer, trans., 1991). Furthermore, in the late 1980s, over 66% of children, ages 3-4 years old, were in daycare or nursery school. See *id.* at 587.

6. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996 107, No. 153 (116th ed. 1996) [hereinafter STATISTICAL ABSTRACT].

7. See *id.*

8. See *id.* According to the Statistical Abstract, the number of divorces in California for 1994 "[r]epresents or rounds to zero." *Id.*

9. See CAL. FAM. CODE § 4320 (West 1994 & Supp. 1998)(formerly CAL. CIV. CODE § 4801(a)(1)-(10)).

10. See *id.* § 4320(d),(f),(h).

11. See *id.* § 4330(a) (West Supp. 1998) (formerly CAL. CIV. CODE § 4801(a)). The section states:

(a) In a judgment of dissolution of marriage . . . the court may order a party to pay for the support of the other party an amount . . . that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances as provided in Chapter 2 (commencing with Section 4320).

*Id.*

presents a myriad of facts and circumstances, the legislature specifically gives courts broad discretion in determining spousal support.<sup>12</sup> Thus, while judges are not obligated to give any one factor more weight than another, they are nonetheless expected to engage in an ad hoc balancing process to achieve an equitable result.

In 1996 the California legislature passed Senate Bill 509 (SB 509 or 1996 Amendments) to amended sections 4320 and 4330 of the Family Code.<sup>13</sup> The authors of SB 509 sought to align existing law with current trends regarding divorced women in the workforce.<sup>14</sup> Towards this end, the authors felt the need to eliminate section 4320's tone towards supported spouses, finding that the current law "discourage[d] self-sufficiency and encourage[d] dependency."<sup>15</sup>

First, SB 509 created several new provisions for section 4320, subdivisions (j) and (k).<sup>16</sup> Of the two, subsection (k) has incited the most controversy because it codifies California's public policy goal that a supported spouse become self-supporting within a reasonable amount of time.<sup>17</sup> For purposes of the statute, the legislature defined "reasonable period of time" as generally half the duration of the marriage.<sup>18</sup> While the statute does not define "self-supporting," it tends to mean the ability to support oneself at a level close to that existing during the marriage.<sup>19</sup> In addition, since courts consider

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12. See WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW 6-214.4 (1997) [hereinafter PRACTICE GUIDE].

13. See SB 509, 1995-96 Reg. Sess., 1996 Cal. Stat. ch. 1163, § 1.

14. See CALIFORNIA ASSEMBLY COMM. ON JUD., REPORT ON SB 509, JUNE 19, 1996 HEARING, 1995-96 Reg. Sess. 3-4 [hereinafter JUNE 1996 REPORT ON SB 509]. According to committee reports, as of 1992 over 60% of divorced mothers were in the labor force, most of them holding down full-time jobs. See *id.* Proponents of SB 509 relied on statistics provided by the U.S. Department of Labor.

15. *Id.* at 4.

16. See CAL. FAM. CODE §§ 4320(j)-(l) (West Supp. 1998).

17. The provision states:

The goal that the supported party shall be self-supporting within a reasonable period of time. A "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section and the circumstances of the parties.

*Id.* § 4320(k).

18. See *id.*

19. According to Professor Joan Krauskopf, "Self-sufficiency connotes more than subsistence or partial support. The dependent recipient is declared self-sufficient when it is *fair* to require her alone to bear the entire remaining gap between income and reasonable needs." Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 583

other section 4320 factors in light of the marital standard of living, there is no reason to believe this factor should not be similarly treated.<sup>20</sup>

Second, the 1996 Amendments created a new subdivision to section 4330 as well. Originally, section 4330 contained only one provision, a provision that allowed a court to order one party to pay support to the other for whatever time the court deemed just and reasonable in light of section 4320's factors.<sup>21</sup> The new subdivision of section 4330 also codifies the public policy goal of self-support; it gives courts the discretion to consider a supported spouse's failure to make good faith efforts to become self-supporting as a change of circumstances sufficient to warrant modification or termination of spousal support.<sup>22</sup>

On February 20, 1997, Assembly Bill 400 (AB 400), sponsored by the Coalition for Family Equity, was introduced.<sup>23</sup> Numerous women's groups, including the National Organization for Women (NOW) and California Women Lawyers joined in support of the bill.<sup>24</sup> Authors of the bill sought to clarify SB 509 and remedy what they termed "anti-female" legislation.<sup>25</sup> AB 400 addressed three things: (1) that "self-supporting" should relate to the marital standard of living; (2) that marriages of long duration should be exempt from the self-supporting objective of section 4320(k); and (3) that courts should have discretion to warn a supported spouse to become self-sufficient under section 4330.<sup>26</sup> In addition, the authors of AB 400

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(1988).

20. See PRACTICE GUIDE, *supra* note 12, at 6-244.

21. Compare CAL. FAM. CODE § 4330 (West 1994), with CAL. FAM. CODE § 4330(a) (West Supp. 1998) (illustrating the changes to the statute following the enactment of SB 509).

22. Section 4330(b) reads as follows:

It is the goal of this state that each party shall make reasonable good faith efforts to become self-supporting as provided for in Section 4320. The failure to make reasonable good faith efforts, may be one of the factors considered by the court as a basis for modifying or terminating support.

*Id.*

23. See Complete Bill History: AB 400—Kuehl, reprinted in 2 ASSEMBLY WEEKLY HISTORY 289, 314 (Feb. 6, 1998) [hereinafter Complete Bill History of AB 400].

24. See CALIFORNIA ASSEMBLY COMM. ON JUD., REPORT ON AB 400, MAY 20, 1997 HEARING, 1997-98 Reg. Sess. 10 [hereinafter MAY 1997 REPORT ON AB 400]. The bill was supported by over a dozen womens' groups, comprising the professional, political, and religious arenas. See *id.*

25. Telephone Interview with Joanne Schulman, co-author of AB 400 (Sept. 25, 1997) [hereinafter Telephone Interview].

26. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 1.

wanted to cure the alleged contradiction the 1996 Amendments created with section 4336.<sup>27</sup> Section 4336 governs a court's retention of jurisdiction over spousal support in long-term marriages.<sup>28</sup> Since sections 4320(k) and 4330 now codify the public policy goal of self-support within half the duration of the marriage, AB 400 supporters argue that long-term marriages are no longer protected under section 4336.<sup>29</sup> Although AB 400 went through numerous committee hearings in both the Assembly and the Senate,<sup>30</sup> Governor Pete Wilson vetoed the bill on September 8, 1997, on the grounds that it incorrectly assumed the 1996 Amendments required courts to automatically terminate spousal support after half the duration of the marriage.<sup>31</sup>

This Comment explores the interplay of Family Code section 4320 with sections 4330 and 4336 by analyzing both statutory and decisional authority. In light of this interplay, this Comment argues that the revisionist perspective of AB 400 is unnecessary because current law adequately protects the displaced homemaker. Since a basic understanding of California family law is necessary to the following analysis, Part II discusses divorce law prior to 1970, the ultimate removal of marital fault from dissolution proceedings, and the effects of no-fault divorce on spousal support. Part III revisits the arguments of both SB 509 and AB 400 to map out the views of each camp to ensure a better understanding of the debate. Part IV focuses on the specific changes of SB 509 and applies them to the concerns voiced in AB 400, arguing that the displaced homemaker is indeed protected.

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27. Telephone Interview, *supra* note 25. See also MAY 1997 REPORT ON AB 400, *supra* note 24, at 7 (stating that the purpose of the bill is to resolve contradictions in the Family Code caused by the 1996 Amendments).

28. See CAL. FAM. CODE § 4336 (West 1994) (formerly CAL. CIV. CODE § 4801(d)).

29. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 1.

30. Hearings on AB 400 commenced on February 20, 1997, and ended with submission to Governor Wilson on August 27, 1997. See Complete Bill History on AB 400, *supra* note 23, at 314.

31. See Letter from Pete Wilson, Governor of California, to the California Assembly (Sept. 8, 1997), reprinted in 139 ASSEMBLY DAILY FILE 54 (1998) (vetoing AB 400) [hereinafter Letter from Pete Wilson].

## II. DIVORCE REFORM

### A. *Social Changes: The Feminist Movement and Women in the Workforce*

A number of social changes are credited with reforming divorce in the latter half of this century. Although longer life-spans and smaller families contributed to reshaping the concept of "family," the feminist movement and women's ever-growing participation in the workforce are perhaps the most significant changes.<sup>32</sup>

During the 1960s and 1970s there was a strong drive by women to gain legal equality with men.<sup>33</sup> For instance, in California, the Fair Employment Housing Act (FEHA) deemed sex a protected subclass, thereby shielding women from employment discrimination.<sup>34</sup> In 1971, the California Supreme Court declared sex a suspect class subject to strict scrutiny under equal protection.<sup>35</sup> On a national level, Title VII of the Civil Rights Act of 1964<sup>36</sup> outlawed sex discrimination, and the Equal Rights Amendment was at the forefront of social and political discourse.<sup>37</sup>

Since the feminist movement is more popularly connected with political battles,<sup>38</sup> its effects on divorce are less apparent. For instance, the feminist movement had a trickle-down effect on the family ideal and the traditional woman's role within society. The feminist rhetoric of equality played a large part in reforming the concept of marriage into a partnership of equals rather than a lifetime contract premised on the traditional male-dominated view.<sup>39</sup> As for the married woman, the feminist mantra of independence translated into economic terms, or the need for women to take responsibility for their own financial independence.<sup>40</sup> With regard to divorce, feminists

32. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 16-29 (1988). For example, Jacob notes that in 1900 the average life span for women was 48 years, as compared to 78 years in 1980. See *id.* at 16.

33. For a brief discussion of legal equality, see Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 302 (1987).

34. See CAL. GOV'T CODE § 12921 (West 1992).

35. See *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).

36. See 42 U.S.C. § 2000e-2 (1994).

37. See M. MARGARET CONWAY ET. AL., *WOMEN & PUBLIC POLICY: A REVOLUTION IN PROGRESS* 5-9 (1995).

38. See *id.* at 7.

39. See JACOB, *supra* note 32, at 23.

40. See *id.*

saw little problem with transitional, or rehabilitative, alimony as a way of assisting women in the transition from housewife to working woman without strapping her to an unsavory stereotype.<sup>41</sup> As author Herbert Jacob noted in *Silent Revolution*:

Most feminists in the 1960s and 1970s did not perceive any problem with transforming alimony (which presumed a continuing obligation of a husband to support his ex-wife until another man took up the responsibility) into a temporary and transitional maintenance payment, designed to allow a woman to take up the responsibility of caring for herself independently.<sup>42</sup>

Women's ever-increasing participation in the workforce—one result of feminists urging women to take a more active role in their financial well-being—significantly shaped the way divorce is perceived today. With employment, women embraced the feminist ideal of economic independence and, as a result, their financial dependence on men eroded. By the 1980s women worked in a wide range of occupations, including high-salaried professions traditionally reserved for men.<sup>43</sup> Moreover, from 1970 to 1990, the number of women participating in the workforce has increased at a rate greater than males.<sup>44</sup>

#### *B. Legal Changes: A Shift to No-Fault Divorce*

In 1970 California took a bold step by becoming the first state to eliminate fault as a prerequisite for divorce.<sup>45</sup> Historically, for one to obtain a divorce, he or she had to prove that the other spouse committed a marital offense. A showing of adultery or some form of mental or physical cruelty satisfied this requisite fault.<sup>46</sup> Yet, complaints of mere insolence or disagreeable character were insufficient.<sup>47</sup> In short, courts were not to be viewed as providing “cures for all the miseries of human life.”<sup>48</sup>

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41. *See id.* at 23-24.

42. *Id.* at 24.

43. *See id.* at 18.

44. *See* STATISTICAL ABSTRACT, *supra* note 6, at 395, No. 617.

45. *See* Family Law Act of 1969, 1969 Cal. Stat. 3312, 3323-30, ch. 1608, § 8, title 3 (repealed).

46. *See* Ovvie Miller, *California Divorce Reform After 25 Years*, 28 BEVERLY HILLS B. ASS'N J. 160, 161 (1994).

47. *See id.* at 160 (discussing *Waldron v. Waldron*, 85 Cal. 251, 24 P. 649 (1890)). In *Waldron*, the California Supreme Court reversed an alimony order because it felt that a husband's rude language was not cruel enough to constitute



As women altered their role in society, divorce reformers focused on the acrimonious nature of fault-based laws and rallied for change. The top reformers were not politicians, but rather a select group of lawyers, professors, judges, and psychiatrists arguing for reform based on professional experiences with the fault-based regime.<sup>49</sup> The no-fault agenda was the product of seven years of study and debate,<sup>50</sup> and the themes that emerged were as varied as their supporters. For instance, some no-fault supporters felt that removing fault would reduce the divorce rate and reinforce the family.<sup>51</sup> Others viewed divorce as an inevitable result of marital-relation breakdown and that, by removing fault, the divorce process would not be mired in hypocrisy.<sup>52</sup> Yet, regardless of these disparate expectations, most shared the common view that eliminating marital fault was necessary for the good of the public.<sup>53</sup>

Ultimately, the latter theme was the principal unifying factor for most reformers. As Herma Hill Kay, a key reformer and law professor, stated, "One of [the California reform effort's] major goals, and its most enduring achievement, was to free the administration of justice in divorce cases from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceedings."<sup>54</sup> This approach identified several problems, namely, that the requirement of fault turned divorce proceedings into an adversarial process. Fault forced spouses to resort to finger-pointing, while judges found themselves hosts to hotel detectives and public displays of private investigator work product.<sup>55</sup> Mudslinging and sordid-detailed accounts were common repartee in the courtroom.<sup>56</sup> Often, a showing of fault necessitated fraudulent testimony to disguise a husband and wife's mutual agreement to divorce.<sup>57</sup>

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fault. See *Waldron*, 85 Cal. at 265, 24 P. at 653.

48. Miller, *supra* note 46, at 160.

49. See JACOB, *supra* note 32, at 50-51.

50. See Kay, *supra* note 33, at 292.

51. See Miller, *supra* note 46, at 162.

52. See Kay, *supra* note 33, at 299-300.

53. See *id.* at 299.

54. *Id.*

55. See Stuart A. Brody, *California's Divorce Reform: Its Sociological Implications*, 1 PAC. L.J. 223, 231 (1970) (referring to a statement made by Senator Donald L. Grunsky, an author of the Family Law Act).

56. As one judge noted, "You heard some stuff that really got your attention." Miller, *supra* note 46, at 164 (quoting Judge Bill Hogoboom (retired)).

57. See JACOB, *supra* note 32, at 46-47.

California's Family Law Act of 1969 eliminated this need for tacking a desire for divorce on some bad act or concealing mutual consent.<sup>58</sup>

### C. No-Fault and its Effect on Spousal Support

Apart from reforming divorce laws to reflect "the realities of married life,"<sup>59</sup> reformers also desired the creation of laws that assessed the financial needs of divorced dependent spouses.<sup>60</sup> In a nation with a history for granting support according to fault, California became the first state to award spousal support based on each spouse's needs and abilities.

Before the implementation of no-fault, divorce did little to alter the financial bond between husband and wife. Fault-based divorce law was rooted in gender-specific terms wherein the husband provided financial support and the wife furnished domestic support.<sup>61</sup> For the most part, the law treated ex-spouses as if they remained married; the law obligated a husband to provide for his wife during marriage.<sup>62</sup> In keeping with this idea, even after divorce, a husband was often required to support his ex-wife either until death or remarriage if found at fault.<sup>63</sup> Fault-based divorce supported itself on the theory of obligation, an obligation stemming from both the social status of women and laws promulgating their subservient role,<sup>64</sup> as well as the notion that when a husband breaches a marital duty, his punishment is the continued support of his ex-wife.<sup>65</sup>

Because the Family Law Act eliminated marital fault as the basis for divorce, spousal support needed a new justification. Courts could no longer punish a husband for breaching a marital duty by forcing him to pay spousal support as compensation for divesting his wife of

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58. See generally Family Law Act of 1969, 1969 Cal. Stat. 3312, 3323-30, ch. 1608, § 8, title 3 (repealed) (removing fault as the prerequisite for divorce).

59. Kay, *supra* note 33, at 299.

60. See *id.*

61. See Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2311 (1994).

62. See Cynthia L. Greene, *Alimony Is Not Forever: Self-Sufficiency and Permanent Alimony*, 4 J. AM. ACAD. MATRIMONIAL LAW. 9, 10 (1988).

Black's Law Dictionary defines alimony as "the sustenance or support of the wife by her divorced husband and stems from the common-law right of the wife to support by her husband." BLACK'S LAW DICTIONARY 73 (6th ed. 1990).

63. See Regan, *supra* note 61, at 2310.

64. Professor Kay mentions numerous laws subordinating women prior to 1970, including their inability to manage the family's earnings, property or assets, as well as being prohibited from establishing credit in their own names. See Kay, *supra* note 33, at 293-97.

65. See Regan, *supra* note 61, at 2310.

her marital benefits.<sup>66</sup> Rather than the contractual relationship emphasized in the fault-based divorce system, marriage is now perceived as an economic partnership, a partnership based on the theory that each spouse contributes “equally valuable resources toward the acquisition of assets, and therefore is entitled to a portion of the fruits of this labor.”<sup>67</sup> Stretching this metaphor to its logical conclusion, upon dissolution of the partnership—here, dissolution of the marriage—assets are divided to enable each spouse to go his or her separate way. However, spousal support supplements accumulated assets where necessary.

The concept of marriage as a partnership, coupled with women’s social and economic advancement, gave permanent alimony a negative connotation. More and more courts refused to award lifetime support simply because two people chose to marry.<sup>68</sup> Previous articles discuss how some judges saw permanent alimony as giving wives “a perpetual pension”<sup>69</sup> from their former husbands’ income or fostering a stereotype of “alimony drones.”<sup>70</sup>

As permanent alimony fell out of favor, courts began awarding transitional support, or rehabilitative alimony.<sup>71</sup> This shift makes sense in the context of no-fault divorce. Because self-sufficiency is the goal, rehabilitative alimony provides support to enable a supported spouse to retrain or educate herself. Furthermore, rehabilitative alimony recognizes both the contributions of the supported spouse as well as the subsequent disadvantages he or she experienced following divorce. Specifically, the Family Code requires judges to consider a supported spouse’s earning ability under section 4320(g).<sup>72</sup> But, section 4320 subdivisions(a)(2),(b),(d), and (h)—which require a court to consider such issues as contributions made by the supported spouse to the other’s career, the age and health of the supported spouse, and the extent to which the supported spouse’s ability to earn

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66. *See id.* at 2313-14.

67. *Id.* at 2314.

68. *See* Greene, *supra* note 62, at 11.

69. *Id.* at 12 (citing *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 420, 136 Cal. Rptr. 635, 637 (1977)).

70. Krauskopf, *supra* note 19, at 574.

71. *See generally* Green, *supra* note 62, at 11-14 (discussing the rehabilitative alimony trend).

72. Section 4320(g) reads: “The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.” CAL. FAM. CODE § 4320(g) (West 1994 & Supp. 1998).

is hindered by her absence from the workforce—offset this element.<sup>73</sup> Yet, rehabilitative alimony may be insufficient to meet the needs of older homemakers in lengthy marriages.<sup>74</sup> Most often, these women gave up jobs and educational opportunities to become housewives and mothers.

The common criticism of rehabilitative alimony is that, while it may be sufficient for a younger wife to return to school or receive additional training, this is not necessarily true for older wives.<sup>75</sup> This criticism stems mainly from the belief that rehabilitative alimony assumes that a divorced woman can become self-sufficient. For example, Lenore Weitzman argues that in awarding transitional support, judges “overestimate the ease with which . . . a housewife can find an adequate job and become self-sufficient.”<sup>76</sup> Weitzman’s concern is justified, and she makes an excellent suggestion for curbing inequities that arise in applying the self-sufficiency standard. Because alimony depends upon a supported spouse’s earning potential, Weitzman suggests judges take four factors into consideration when making support orders: (1) evaluate the supported spouse’s salable skills and interests; (2) assess the state of the job market for those particular skills; (3) consider any additional training the supported spouse may need to hone these skills; and (4) recognize the long-term benefits to both parties when the supported spouse is engaged in a profitable and rewarding career.<sup>77</sup> Weitzman’s argument supports the current practice of judges ordering vocational exams to determine a

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73. The subdivisions state as follows:

(a)(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(d) The needs of each party based on the standard of living established during the marriage.

(h) The age and health of the parties.

*Id.* § 4320(a)(2),(b),(d), & (h).

74. See Krauskopf, *supra* note 19, at 579.

75. See *supra* notes 68-69 and accompanying text.

76. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 165-66 (1985).

77. See *id.* at 206-08.

supported spouse's needs and abilities pursuant to section 4331.<sup>78</sup> Judges then consider the results of this exam in light of section 4320(a)(1).<sup>79</sup>

### III. THE LEGISLATIVE BATTLE

#### A. SB 509: Codification of a Public Policy Goal

During 1996 and 1997, the issue of self-sufficiency was hotly debated among lawmakers in Sacramento. SB 509, which sought to amend existing law to take into account the changing conditions of divorce, initiated the debate.<sup>80</sup> Self-sufficiency was the primary intent.<sup>81</sup> According to data relied upon in SB 509, by 1992 80.3% of divorced mothers were employed.<sup>82</sup> Bill sponsors wanted the law codified to reflect "the public policy of encouraging parties to rebuild their lives and, within a reasonable length of time, to live self-sufficiently and with independence from each other."<sup>83</sup>

Enactment of SB 509 in 1996 affected the Family Code in two areas. First, the bill expanded section 4320 to include two additional factors that a court must consider in determining whether to award

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78. See CAL. FAM. CODE § 4331 (West 1994). The statute states in pertinent part:

(a) In a proceeding for the dissolution of marriage or for legal separation of the parties, the court may order a party to submit to an examination by a vocational counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living.

*Id.* § 4331(a).

79. Section 4320(a)(1) requires a court to consider "[t]he marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment." *Id.* § 4320(a)(1).

80. See JUNE 1996 REPORT ON SB 509, *supra* note 14, at 4.

81. Supporters of SB 509 argued that "[b]oth men and women find themselves supporting former spouses without any indication that the former spouse will ever be self-supporting. In some instances, current law appears to discourage self-sufficiency and encourage dependency." *Id.*

82. See CALIFORNIA ASSEMBLY COMM. ON JUD., REPORT ON SB 509, JULY 5, 1995 HEARING, 1995-96 Reg. Sess. 2 (relying on data issued by the U.S. Dept. of Labor, Bureau of Labor Statistics) [hereinafter JULY 1995 REPORT ON SB 509].

83. *Id.* at 5.

spousal support, subdivisions (j) and (k). Subdivision (j) directs judges to consider the hardships to each party.<sup>84</sup> Although section 4320's factors are measured in light of the marital standard of living, subdivision (j) reflects the economic realities of maintaining two households after divorce:

The standard of living enjoyed by a married couple is the result of the couple's combined income (two-thirds of adult women now work outside the home) flowing into a single household. When the couple separates and two households have to be maintained, there is clearly not enough money to provide both parties with the marital standard of living.<sup>85</sup>

While this example presupposes that both spouses are working, the need for self-sufficiency in a single-income family is even more crucial. Assuming that only the husband works, a single income maintains the family household. Upon divorce, if the husband still remains the sole supporter, he now must maintain two households on a budget previously used for one.

The need for self-sufficiency is even more significant if the husband is not a high-income earner. Weitzman's study illustrates a direct correlation between a housewife's alimony and her husband's income.<sup>86</sup> If there is not enough money to support both spouses, it seems only just that a housewife make efforts to become self-supporting. Or, where circumstances indicate an inability to be self-sufficient, a wife should at least contribute something to her support. For some, this position is overly harsh towards women who have never worked—the displaced homemaker. But what is more draconian: permitting a supported spouse to continue receiving alimony without making a good faith effort towards self-sufficiency—at a minimum to at least contribute to her support—simply because she did not work in the past, or, requiring that a supporting spouse maintain two households on a single income? A balance must be struck between husband and homemaker in the face of divorce. The 1996 Amendments codify this balance by protecting the supporting spouse

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84. See CAL. FAM. CODE § 4320(j) (West Supp. 1998).

85. MAY 1997 REPORT ON AB 400, *supra* note 24, at 8. This statement was made by opponents of AB 400.

86. See WEITZMAN, *supra* note 75, at 189. Weitzman's results are as follows: 64% of housewives who were married to men earning over \$30,000 per year received alimony, as opposed to 57% of housewives married to husbands earning between \$20,000-\$29,000 and 17% of housewives whose husbands earned under \$20,000. See *id.* Though it should be noted that this study was conducted in the 1970s, the use of the data shows a correlation between alimony and income.

from a supported spouse's lack of making a good faith effort towards self-sufficiency—section 4330(b)—and by recognizing that not all supported spouses will gain self-sufficiency within half the duration of the marriage—section 4320.

Subdivision (k) was the second factor added to section 4320 under the 1996 Amendments.<sup>87</sup> This factor codifies the public policy goal of self-sufficiency and gives an objective standard which requires a supported spouse to demonstrate self-sufficiency within a reasonable amount of time, or half the duration of the marriage.<sup>88</sup> This reasonable time frame, however, must not be construed as an absolute termination date; subdivision (k) should be treated like the remaining provisions, and is not intended to preempt other factors necessary for a just and equitable support order.<sup>89</sup>

SB 509 also expanded section 4330 to require a self-sufficiency admonition with every support order:

When making an order for spousal support, whether the order is for a specific amount or simply a reservation of jurisdiction, and except in the limited number of cases where the court determines that a party is unable to make such efforts, the court shall give the parties the following admonition:

“It is the goal of this state that each party shall make reasonable good faith efforts to become self-supporting as provided for in Section 4320. The failure to make reasonable good faith efforts, may be one of the factors considered by the court as a basis for modifying or terminating support.”<sup>90</sup>

The admonition, commonly referred to as a “*Gavron* warning” after *In re Marriage of Gavron*,<sup>91</sup> articulated the codified public policy goal of section 4320(k).

Opposition to SB 509 centered mainly around the alleged punitive effects of the self-sufficiency guidelines. Both the Family Law Section of the State Bar and the Coalition for Family Equity (CFE), which sponsored AB 400, criticized SB 509 as unnecessary, arguing that the factors of section 4320 already provided an incentive for

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87. See CAL. FAM. CODE § 4320(k) (West Supp. 1998).

88. See *id.*

89. See PRACTICE GUIDE, *supra* note 12, at 6-244.

90. CAL. FAM. CODE § 4330(b) (West Supp. 1998).

91. 203 Cal. App. 3d 705, 250 Cal. Rptr. 148 (1988).

self-sufficiency.<sup>92</sup> CFE further claimed that homemakers and mothers would be severely penalized given their general lack of employable skills.<sup>93</sup> The legislature disagreed, however, and enacted SB 509 in 1996.<sup>94</sup>

*B. Protecting the Displaced Homemaker: The Goal of AB 400*

Specifically addressing the changes of SB 509, the sponsors of AB 400 asserted three issues: (1) that "self-supporting" refer to the marital standard of living; (2) that marriages of long duration be shielded from section 4320(k)'s self-support objective; and (3) that section 4330's admonition be discretionary rather than required.<sup>95</sup> Supporters contended that SB 509 enacted anti-female legislation that worked to punish and impoverish older homemakers.<sup>96</sup>

By codifying public policy in section 4320(k), supporters of AB 400 argued that courts would inappropriately employ a "rule of thumb" measurement used in short-term marriages and apply it to those of long duration.<sup>97</sup> The measurement, as applied to short-term marriages, is that a supported party should receive spousal support for up to half the length of the marriage, at which time the party must become self-supporting.<sup>98</sup> Dubbing subdivision (k) an "implied threat,"<sup>99</sup> AB 400 supporters feared that the self-support guideline would lead many divorcees of long-term marriages "out to pasture,"<sup>100</sup> since they would generally be unable to meet this goal:

The sponsors of AB 400 contend that the new self-support guideline, and the judicial admonition which reinforces it, will compound the economic hardships already experienced by many divorced women, particularly older homemakers from long-term marriages and mothers with dependent children . . . . Imposing an arbitrary cut-off date on support payments is unnecessarily punitive and, in many cases, unrealistic.<sup>101</sup>

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92. See JULY 1995 REPORT ON SB 509, *supra* note 82, at 5-7.

93. See *id.* at 7.

94. See SB 509, 1995-96 Reg. Sess., 1996 Cal. Stat. ch. 1163, §§ 1-2.

95. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 1.

96. See *id.* at 7.

97. Telephone Interview, *supra* note 25.

98. See JULY 1995 REPORT ON SB 509, *supra* note 82, at 4-5.

99. MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

100. Telephone Interview, *supra* note 25.

101. MAY 1997 REPORT OF AB 400, *supra* note 24, at 7.



There are several difficulties with AB 400's position regarding section 4320(k)'s self-sufficiency guideline and section 4330's admonition. First, the rule of thumb measurement is just that, a rule of thumb: it "is simply a *baseline* measurement; it is *not* a presumptively-correct timeframe toward the goal of self-sufficiency . . . ."<sup>102</sup> Nowhere in the language of subdivision (k) are judges required to automatically terminate spousal support for any marriage, regardless of duration. In fact, the language emphasizes the exact opposite view: "However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section and the circumstances of the parties."<sup>103</sup> This sentence reveals that subdivision (k) does not impose an arbitrary termination date. Rather, it reminds judges that subdivision (k) is just one factor, in a list of many, that they must consider and weigh. Moreover, this phrase is particularly important for long-term marriages, since section 4320(f) covers duration.<sup>104</sup> There are eleven other factors a court must consider, including the catch-all subdivision (l), which enables a court to plug in any additional circumstances necessary for an equitable support order.<sup>105</sup> If a supported spouse is indeed incapable of self-sufficiency, either within the objective time or at all, this will be considered, and failure to do so could be an abuse of discretion.

An additional problem with AB 400 is that it drew a bright line for the statutory definition of a long-term marriage, which case law demonstrates is flexible.<sup>106</sup> Section 4336 presumes that a long-term marriage has a duration of more than ten years from the date of marriage to the date of separation.<sup>107</sup> But, according to the language of the statute, nothing prevents a court from deciding that a marriage of less than ten years is one of long duration.<sup>108</sup>

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102. PRACTICE GUIDE, *supra* note 12, at 6-244.

103. CAL. FAM. CODE § 4320(k) (West Supp. 1998).

104. *See id.* § 4320(f) (West 1994 & Supp. 1998).

105. *See id.* § 4320(l) (West Supp. 1998). Subdivision (l) allows a court to consider "[a]ny other factors [it] determines are just and equitable." *Id.* According to Hogoboom and King, this catch-all provision advances the Legislature's principal goal that courts exercise discretion in order to achieve a just and equitable result in each case. *See* PRACTICE GUIDE, *supra* note 12, at 6-245 to 6-246.

106. *See, e.g., In re Marriage of Neal*, 92 Cal. App. 3d 834, 846, 155 Cal. Rptr. 157, 164 (1979) (qualifying a seven year marriage as one of long duration); *In re Marriage of Heistermann*, 234 Cal. App. 3d 1195, 1197, 286 Cal. Rptr. 127, 129 (1991) (applying the rule to an eight year marriage).

107. *See* CAL. FAM. CODE § 4336(b) (West 1994).

108. *See id.*

Supporters of AB 400 wanted long-term marriages insulated from receiving the *Gavron* warning. The committee report states: "this bill now revises the 'Gavron' provision in section 4330, no longer requiring but granting the court discretion to warn . . . , taking into account the particular circumstances considered by the court pursuant to section 4320, *except* in a marriage of long duration."<sup>109</sup> Why should a middle-aged, college-educated female be exempted from the self-sufficiency guideline simply because her marriage happens to be classified as one of long duration? Furthermore, if judges are able to classify a marriage of seven years as long-term<sup>110</sup>—three years less than the statutory presumption—what is to limit them from reducing the duration even more? According to the United States Census Bureau, the median duration of marriages has increased from 6.7 years in 1970 to 7.2 years in 1990.<sup>111</sup> By completely insulating long-term marriages from ever receiving the self-sufficiency warning, we would adopt an inflexible standard inconsistent with the public policy goal.

Currently, courts control the application of subdivision (k)'s half the duration of the marriage rule given the legislative intent of judicial discretion. The legislature has a hands-off approach when it comes to the factors of section 4320. Courts are required to consider each factor, but they can weigh and balance according to the specific circumstances of the case. If the rule was intended to set an absolute termination date, then there would be no subdivision (k), but rather a separate and distinct provision. Instead, the legislature added the half-duration rule to section 4320, a section traditionally known for its deference to courts. AB 400's position to exempt long-term marriages eliminates this judicial discretion by chaining judges to a blanket exception.

#### IV. DOES THE CURRENT LAW PROVIDE ADEQUATE SUPPORT?

Although over a dozen women's interest groups supported AB 400, and it passed in both the Senate and the Assembly,<sup>112</sup> the bill nonetheless failed to overturn the 1996 Amendments. On September 8, 1997, Governor Wilson vetoed the bill by stating:

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109. MAY 1997 REPORT ON AB 400, *supra* note 24, at 5-6 (emphasis added).

110. See *Neal*, 92 Cal. App. 3d at 846, 155 Cal. Rptr. at 164.

111. See STATISTICAL ABSTRACT, *supra* note 6, at 105, No. 150.

112. On June 2, 1997, the Assembly voted 42-32 in favor of the bill while on August 4, 1997, the Senate voted 21-17. See Complete Bill History, *supra* note 23, at 314.

This bill assumes that [SB 509] require[s] the court to automatically terminate spousal support payments after a certain period of time, thereby creating economic hardships for particular recipients. They do no such thing. . . . Self-support within a reasonable period of time should be the goal of the supported party, but that is only one factor, among many others, to be considered by the court in ordering spousal support. In every instance the court is required to determine what is equitable based upon the particular circumstances of the case.<sup>113</sup>

Thus, the question now is: Does existing law protect the displaced homemaker? The following discussion addresses the concerns of AB 400 in light of existing law as amended by SB 509 in 1996.

### A. *The Factors of Section 4320*<sup>114</sup>

#### 1. Subdivision (a)

To begin, two of AB 400's concerns are addressed in the very first subdivision of section 4320. Subsection (a) focuses on each spouse's earning capacity and whether it "is sufficient to maintain the standard of living established during the marriage," taking into consideration such things as the spouse's skills and whether or not there is a market for them.<sup>115</sup> First, proponents of AB 400 argue that housewives will be denied adequate support because the combination of sections 4320(k) and 4330(b) impose severe economic hardship on a class of women already suffering from the financial effects of divorce.<sup>116</sup> According to these groups, such women "are among the most impoverished citizens in our state."<sup>117</sup> Yet, pursuant to section 4320(a), the court is required not only to look at the supported spouse's earning ability but to consider it in light of the marital standard of living.<sup>118</sup> Note, though, that the marital standard of living is not intended to set either a minimum or maximum amount for purposes of spousal support.<sup>119</sup> Thus, courts are free to order more or

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113. Letter from Pete Wilson, *supra* note 31, at 54.

114. This Comment deals only with those section 4320 factors impacted by AB 400.

115. CAL. FAM. CODE § 4320(a) (West 1994 & Supp. 1998).

116. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

117. *Id.*

118. See CAL. FAM. CODE § 4320(a).

119. See *In re Marriage of Smith*, 225 Cal. App. 3d 469, 484-85, 274 Cal. Rptr. 911, 919 (1990).

less support, depending on the remaining factors set out in the statute.<sup>120</sup>

Therefore, while it may be true that a supported spouse could support herself with a minimum wage job, the court is instead going to measure this against the marital standard of living, with concessions made for ability to earn and the hardships experienced by the parties. But there is also a certain amount of reasonableness that factors into a court's determination of the marital standard of living. A hypothetical in *In re Marriage of Smith*<sup>121</sup> aptly illustrates this point:

[I]f during a marriage two spouses and their seven children lived in a six-bedroom home, it would not be reasonable, upon a dissolution long after the children were grown and on their own, and the house sold, for the supported spouse to contend he or she was entitled to sufficient support to purchase a six-bedroom home in which he or she would live alone.<sup>122</sup>

A criticism of SB 509 voiced during committee hearings was that displaced homemakers could not be expected to "invent job qualifications they do not have."<sup>123</sup> Courts are, however, prohibited from speculating as to the supported spouse's abilities.<sup>124</sup> Instead, as emphasized previously, courts can order that a supported spouse undergo a vocational examination to enable them to make a proper assessment of the supported spouse's abilities. Even one SB 509 opponent recognized the vocational exam as an important tool in assisting judges in determining the feasibility of self-sufficiency.<sup>125</sup> The court in *In re Marriage of Baker*,<sup>126</sup> upheld a refusal to fix a termination because self-sufficiency could only be based on speculation.<sup>127</sup> The facts indicated that, although the wife was employed, she was unable to support herself at a standard similar to the one she enjoyed while married.<sup>128</sup> Moreover, the court was unable to ascertain at what point her future earnings would render her self-sufficient.<sup>129</sup> Thus, a court is not likely to set a spousal support termination date on the

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120. *See id.* at 484, 274 Cal. Rptr. at 919.

121. 225 Cal. App. 3d 469, 274 Cal. Rptr. 911 (1990).

122. *Id.* at 490 n.12, 274 Cal. Rptr. at 923 n.12.

123. JULY 1995 REPORT ON SB 509, *supra* note 82, at 7.

124. *See* PRACTICE GUIDE, *supra* note 12, at 6-215.

125. *See* JULY 1995 REPORT ON SB 509, *supra* note 82, at 6-7.

126. 3 Cal. App. 4th 491, 4 Cal. Rptr. 2d 553 (1992).

127. *See id.* at 498, 4 Cal. Rptr. 2d at 557.

128. *See id.* at 498, 4 Cal. Rptr. 2d at 556-57.

129. *See id.* at 499, 4 Cal. Rptr. 2d at 557.

grounds that the supported spouse will *probably* become self-supporting in "X" amount of time.

AB 400 supporters also argue that by forcing the supported spouse to become self-supporting, the legislature ignores the amount of time that an older homemaker has been out of the work-force or that many divorced women are not capable of achieving self-sufficiency.<sup>130</sup> However, subdivision (a)(2) of section 4320 specifies that, with regard to the supported spouse's earning capacity, courts are to consider "[t]he extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties."<sup>131</sup> Therefore, courts are required to consider a homemaker's absence from the work force by recognizing possible impairment of earning capabilities due to domestic duties.<sup>132</sup>

## 2. Subdivision (b)

It is not uncommon for the supported spouse to have at one time been the breadwinner of the family while the other spouse pursued a degree or acquired additional vocational training.<sup>133</sup> A concern is that provision (k) bars the supported spouse from realizing the benefits of her contribution to the other spouse's enhanced earning potential.<sup>134</sup> Section 4320(b), however, squarely addresses this issue in no uncertain terms. It requires courts to consider "[t]he extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party."<sup>135</sup> If the supported spouse in any way advanced the supporting spouse's ability to increase his or her earning potential, the supported spouse should realize this contribution via the court's application of section 4320(b).

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130. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

131. CAL. FAM. CODE § 4320(a)(2) (West 1994 & Supp. 1998).

132. See *In re Marriage of Smith & Ostler*, 223 Cal. App. 3d 33, 49, 272 Cal. Rptr. 560, 569-70 (1990) (holding that because the supported spouse had been a homemaker for 21 years, she should be reimbursed for this absence from the workplace).

133. See, e.g., *In re Marriage of Watt*, 214 Cal. App. 3d 340, 344, 262 Cal. Rptr. 783, 785 (1989).

134. See DOROTHY JONAS & BONNIE SLOAN, COALITION FOR FAMILY EQUITY, INFORMATION PACKET: ASSEMBLY BILL 400 (KUEHL), 3-4 (1997).

135. CAL. FAM. CODE § 4320(b) (West 1994 & Supp. 1998).

An illustrative case is *In re Marriage of Watt*,<sup>136</sup> where the appellate court overturned a lower court's refusal to weigh the wife's contribution to her husband's education.<sup>137</sup> Finding that the wife shouldered approximately sixty-four percent of the family's living expenses while her husband attended school,<sup>138</sup> the appellate court held that in "career-threshold marriage[s]"<sup>139</sup> the nonstudent spouse's contribution warrants "weighty consideration by the trial court in deciding the propriety and extent of a spousal support award."<sup>140</sup> The appellate court also chastised the lower court for its myopic application of section 4320 because it did not recognize the peculiar facts of the case or the need to apply section 4320 as a whole.<sup>141</sup> In determining spousal support, the lower court focused on the parties' actual standard of living and ignored the fact that the parties deliberately lived on a student budget with the expectation that the marital community would benefit from the immediate sacrifices of both parties.<sup>142</sup> "Although the phrase 'standard of living of the parties' perhaps at first glance appears unambiguous," noted the appellate court, "courts should look to the substance rather than the letter of the statute if absurd or unjust results follow from a literal interpretation."<sup>143</sup>

### 3. Subdivision (c)

Even if spouses live on a student budget, courts have the ability to consider future earnings under subdivision (c).<sup>144</sup> It is important to note that subdivision (b) is a companion provision to Family Code section 2641, aptly titled "Community contributions to education or training."<sup>145</sup> This section accounts for any loans a spouse may have taken for training or education and requires reimbursement to the community for any loan obtained during the marriage.<sup>146</sup> The rationale behind this policy is that, where one spouse works to enable the

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136. 214 Cal. App. 3d 340, 262 Cal. Rptr. 783 (1989).

137. *See id.* at 351, 262 Cal. Rptr. at 789.

138. *See id.* at 349, 262 Cal. Rptr. at 788.

139. *Id.* at 344, 262 Cal. Rptr. at 785.

140. *Id.* at 350, 262 Cal. Rptr. at 789.

141. *See id.* at 352, 262 Cal. Rptr. at 790.

142. *See id.* at 351-52, 262 Cal. Rptr. at 789-90.

143. *Id.* at 351-52, 262 Cal. Rptr. at 790.

144. Subdivision (c) reads: "The ability to pay of the supporting party, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." CAL. FAM. CODE § 4320(c) (West 1994 & Supp. 1998).

145. *See* CAL. FAM. CODE § 2641 (West 1994).

146. *See id.* § 2641(b)(2).

other to receive an education or training in pursuit of a career, it is usually with the expectation that the community will profit from such a decision.<sup>147</sup> In short, the working spouse, here the wife, should not lose out when the marriage is dissolved prior to the realization of any benefit, which the statute so provides.

As stated above, courts have the power to consider a supporting spouse's ability to earn under section 4320(c).<sup>148</sup> Therefore, while spousal support is typically based on the parties' respective present incomes, a court may instead choose to look at the supporting spouse's potential earnings. For example, in *In re Marriage of Smith & Ostler*,<sup>149</sup> the appellate court affirmed a spousal support order awarding a wife fifteen percent of her husband's future bonuses.<sup>150</sup>

#### 4. Subdivision (d)

Supporters of AB 400 contended that the recent amendments result in the further impoverishment of older divorced homemakers.<sup>151</sup> Section 4320(d), however, expressly requires a court to consider the needs of the supported spouse.<sup>152</sup> "Need" does not mean simply the bare necessities of life;<sup>153</sup> if so, a supported spouse accustomed to living on a grand estate could receive just enough money to pay rent on a studio. Rather, "'need' must also be judged in terms of the parties' *station in life* during marriage and before separation."<sup>154</sup> There is, however, nothing that requires a court to base need on the marital standard of living.<sup>155</sup> Courts traditionally order support in an amount necessary to enable the supported spouse to live at "substantially the same standard of living enjoyed" during the marriage.<sup>156</sup> To suggest

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147. See *Marriage of Watt*, 214 Cal. App. 3d at 352, 262 Cal. Rptr. at 790. The court stated: "the parties consciously subjected themselves to a student standard of living, on the expectation of future improvement for the community's benefit." *Id.*

148. See CAL. FAM. CODE § 4320(c).

149. 223 Cal. App. 3d 33, 272 Cal. Rptr. 560 (1990).

150. See *id.* at 50, 272 Cal. Rptr. at 570-71 (holding that the trial court did not abuse its discretion in awarding spousal support of \$3,000 per month plus 15% of the husband's annual gross cash bonus).

151. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

152. The subdivision states: "The needs of each party based on the standard of living established during the marriage." CAL. FAM. CODE § 4320(d).

153. See PRACTICE GUIDE, *supra* note 12, at 6-234.

154. *Id.* (citation omitted).

155. See *id.*

156. *Smith & Ostler*, 223 Cal. App. 3d at 41, 272 Cal. Rptr. at 564. See also *Marriage of Baker*, 3 Cal. App. 4th at 498, 4 Cal. Rptr. 2d at 557 (1992) (finding that the wife was unable to generate an income anywhere near the lifestyle she

that a supported spouse will receive *exactly* the same amount of support to continue carrying on in the same fashion as when married is to ignore that, due to marital dissolution, there are now two households that the supporting spouse is responsible for—his or her own, and his or her contribution to the supported spouse's household. It is important to remember though, that "need" is just one factor considered by the court; a supported spouse's "need" must nevertheless be weighed against the other section 4320 factors, including the ability to earn and the age and health of the parties.

#### 5. Subdivision (f)

A major argument in support of AB 400 was that section 4320(k)'s self-supporting directive denied long-term marriages retention of jurisdiction pursuant to section 4336.<sup>157</sup> Section 4336(a) authorizes courts to retain jurisdiction indefinitely over marital dissolution proceedings involving marriages of long duration.<sup>158</sup> Thus, either party can walk into court years later for purposes of modifying or terminating spousal support, whereas in short-term marriages the court will typically order support for a finite period. Supporters argued that the objective measurement inherently includes both short and long durational marriages, thereby creating a conflict between sections 4320 and 4336.<sup>159</sup> Prior to the 1996 Amendments, courts applied a rule of thumb durational measurement, similar to subdivision (k), to marriages of short duration.<sup>160</sup> AB 400 supporters contended that subdivision (k) extends this rule beyond its scope by applying it to marriages of long duration.<sup>161</sup>

Section 4336 only applies to retention of jurisdiction, not to the amount of support. Therefore, even if a supported spouse does become self-sufficient, the court may retain jurisdiction in order to determine the sustainability of her self-sufficiency. Moreover, section 4320(f) requires courts to consider marital duration for purposes of determining the amount of support.<sup>162</sup> There is a presumption that marriages of long duration make a stronger case for retaining

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enjoyed while married).

157. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 1.

158. See CAL. FAM. CODE § 4336(a) (West 1994).

159. See Telephone Interview, *supra* note 25. See also MAY 1997 REPORT ON AB 400, *supra* note 24, at 7 (stating that the purpose of the bill is to resolve contradictions in the Family Code caused by the 1996 Amendments).

160. Telephone Interview, *supra* note 25.

161. See *id.*

162. CAL. FAM. CODE § 4320(f) (West 1994 & Supp. 1998).



jurisdiction over spousal support, whereas marriages of short duration do not necessarily incur all of the concerns expressed by AB 400 supporters.<sup>163</sup> Yet, a rule of absolute exclusion would result in special protection for *all* marriages of long duration, regardless of the circumstances.

#### 6. Subdivision (g)

Section 4320(g) requires a court to consider “[t]he ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.”<sup>164</sup> While this Comment does not deal with child support issues, it is worth noting that section 4320(g) does consider the self-support guideline and its possible impact on a supported spouse’s child-rearing responsibilities. Moreover, the *Smith & Ostler* court awarded the wife enough support to cover her household and child care expenses while working towards her college degree.<sup>165</sup> Though she took care of the children during the marriage, staying at home full-time would be impossible in the face of the self-support guideline. The court recognized this by stating: “[S]he is entitled to the same accommodation—necessarily from outside sources—and such help should be considered an expense of acquiring her training and becoming a working mother.”<sup>166</sup>

#### 7. Subdivision (h)

Supporters of AB 400 are mainly concerned with women who have spent the better portion of their lives as homemakers; they contend that the public policy goal of self-sufficiency is “unnecessarily punitive” towards these women.<sup>167</sup> Yet, given that courts must consider the age and health of the parties pursuant to section 4320(h), requiring self-sufficiency when it plainly is not feasible to do so could be deemed an abuse of discretion.<sup>168</sup>

While spousal support is entrenched in statutory language and public policy concerns—as evidenced by the above factors—there is an emerging desire to see spouses become self-sufficient and progress

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163. Telephone Interview, *supra* note 25.

164. CAL. FAM. CODE § 4320(g).

165. *Smith & Ostler*, 223 Cal. App. 3d at 47, 272 Cal. Rptr. at 568.

166. *Id.* (citation omitted).

167. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

168. See CAL. FAM. CODE § 4320(h).

with their own lives.<sup>169</sup> Section 4320(k) codifies this public policy concern and deems “one-half the length of the marriage”<sup>170</sup> an adequate yardstick for becoming self-sufficient. Nevertheless, because marital dissolution cases are unique, the legislature gives the courts broad discretion, in the final clause, by enabling courts to grant support for a greater or lesser time under any of the other enumerated factors.<sup>171</sup> Governor Wilson’s veto message further substantiates this belief.<sup>172</sup>

For AB 400 supporters to argue that section 4320(k) gives courts the authority to terminate jurisdiction over spousal support issues in marriages of long duration is to assume that the remaining factors of section 4320 and section 4336 are insignificant in the face of the public policy goal. “[C]ases involving *lengthy* marriages where the supported spouse is not reasonably capable of self-support remain good law.”<sup>173</sup> Thus, the fear that homemakers will be “put out to pasture”<sup>174</sup> is unwarranted in light of the protections of section 4320’s factors.

### B. *The Gavron Warning of Section 4330(b)*

The 1996 Amendments require courts to warn support recipients of their obligation to become self-supporting. Furthermore, the failure to make reasonable, good faith efforts to become self-supporting is an adequate change of circumstances for purposes of modifying or terminating spousal support.<sup>175</sup> Supporters of AB 400 argued that section 4330’s admonition does two things. First, it requires judges to give the self-sufficiency admonition to all marriages, thereby eliminating their discretionary power.<sup>176</sup> By threatening wives of long-term marriages that support will be terminated unless they get a job, the mandate makes self-sufficiency “the determining factor in support awards.”<sup>177</sup> Second, the admonition removes an important procedural

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169. See JULY 1995 REPORT ON SB 509, *supra* note 82, at 5.

170. CAL. FAM. CODE § 4320(k) (West Supp. 1998).

171. See *id.* The final clause of subdivision (k) reads: “However, nothing in this section is intended to limit the court’s discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section and the circumstances of the parties.” *Id.*

172. See Letter from Pete Wilson, *supra* note 31, at 54.

173. PRACTICE GUIDE, *supra* note 12, at 6-245 (citations omitted).

174. Telephone Interview, *supra* note 25.

175. See CAL. FAM. CODE § 4330(b) (West Supp. 1998).

176. See MAY 1997 REPORT ON AB 400, *supra* note 24, at 5-6.

177. *Id.* at 7.

safeguard that a motion for modification or termination be based on a change of circumstances.<sup>178</sup>

While judges are indeed required to give the *Gavron* warning, they do so under a broad power. The phrase "the court shall give the parties the following admonition"<sup>179</sup> is preceded by an exceptions clause which addresses the very situation AB 400 supporters are concerned with: "except in the limited number of cases where the court determines that a party is unable to make such efforts . . ."<sup>180</sup> From this clause it is clear that a judge still retains the discretionary power to customize support awards. Though there is concern that self-sufficiency is left undefined,<sup>181</sup> when read in the context of other family law provisions—particularly section 4320—the ambiguity is consistent with the legislative intent to give courts broad power in making just and equitable support orders in light of the parties' unique circumstances.

Before the implementation of the 1996 Amendments, either spouse of a long-term marriage could petition the court for modification or termination of spousal support based on a "change of circumstances."<sup>182</sup> For example, a supported spouse could argue that her ex-husband's increased income constitutes a change of circumstances warranting an increase in spousal support. Section 4330's admonition now makes a supported party's lack of good faith efforts to become self-supporting a change of circumstances. AB 400 supporters insisted that this statutory alteration permits harassment litigation and may force wives to accept inadequate support due to the cost of defending themselves in court against allegations of bad faith.<sup>183</sup> This argument is shortsighted given the general legal impediment against harassing and frivolous lawsuits. While the concern itself is justified, California Code of Civil Procedure section 128.5 provides the desired protection by requiring parties to bring motions in good faith and with a reasonable basis.<sup>184</sup> The San Francisco Women's Lawyers

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178. *See id.*

179. CAL. FAM. CODE § 4330(b).

180. *Id.*

181. *See* MAY 1997 REPORT ON AB 400, *supra* note 24, at 7-8.

182. CAL. FAM. CODE § 4336(c) (West 1994).

183. *See* MAY 1997 REPORT ON AB 400, *supra* note 24, at 7.

184. *See* CAL. CODE CIV. PROC. § 128.5 (West 1982 & Supp. 1998). The statute states in pertinent part:

(a) Every trial court may order a party . . . to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause delay.

Association argued that the admonition allows for modification or termination of spousal support based simply on a "failure to make efforts to become self-supporting."<sup>185</sup> Yet, the statute defines what "efforts" constitute a change of circumstances: those made in bad faith.<sup>186</sup> In essence, section 4330's admonition balances the equities. This is a commendable rule, for why should one spouse be forced to underwrite another spouse's lifestyle when that person deliberately fails to become self-sufficient? This argument gains even more dramatic effect when one considers that a supporting party is prohibited from willfully reducing his or her income as a means of avoiding spousal support.<sup>187</sup> In light of AB 400's concern of harassment litigation, does it seem fair that a wife can bring her ex-husband—who has deliberately reduced his income in order to avoid paying support—into court and demand payment, but a husband is prohibited from using his ex-wife's willful refusal to be self-supporting as a basis for modifying or terminating support?

#### V. CONCLUSION

Codification of the public policy goal of self-sufficiency was not an act by the legislature to penalize homemakers. Nor was it insensitive maneuvering at their expense. Like the divorce reformers of the 1960s, supporters of SB 509 wanted the law to reflect contemporary norms: to consider both women's increased participation in the workforce as well as society's changing attitude toward spousal support.

The elimination of fault brought an array of changes to the divorce system and thus spousal support needed a new justification. Gone are the days of placing blame. In its place is a system of laws created to address, not a moral right to spousal support, but the economic needs and abilities of the parties—in effect, self-sufficiency.

The purpose of this Comment is not to alienate the displaced homemaker, for this class of women do need to be protected. This Comment illustrates that, although the law may encourage self-sufficiency, it recognizes that not all homemakers will meet this

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(b)(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

*Id.*

185. MAY 1997 REPORT ON AB 400, *supra* note 24, at 8.

186. See CAL. FAM. CODE § 4330(b) (West Supp. 1998).

187. See, e.g., *In re Marriage of Sinks*, 204 Cal. App. 3d 586, 594, 251 Cal. Rptr. 379, 383-84 (1988) (finding that the husband retired early in order to avoid paying spousal support).

objective within the timeframe provided. However, half the duration of the marriage is not an automatic rule, but merely a general standard seen as the most effective way of carrying out the public policy goal. Some women will be capable of self-support within half the duration, while others will not. But the law does not mandate automatic termination. Courts are required to consider *all* circumstances of the parties and failure to do so could constitute an abuse of discretion.

Supporters of AB 400 rallied for complete isolation of long-term marriages from receiving the *Gavron* warning. Statistics show that the length of marriages is increasing. As a result, more and more contemporary marriages would qualify for long-term marriage protection under AB 400. Such an absolute standard would shield more than just the working husband/housewife marriage that persisted in the past. Adopting such an inflexible rule is inconsistent with an otherwise commendable public policy goal.

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