ISSUES SUBJECT TO MODIFICATION IN FAMILY LAW: A NEW MODEL

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ABSTRACT

Legal systems in the United States have accepted that issues of child support, custody, and alimony may be modified, even after final judgment or agreement between parties. The standard for when modification is appropriate is the occurrence of a “substantial change in circumstances.” This unclear standard contributes to prolonged litigation, causes family disputes to remain open, and violates the fundamental principles of finality and res judicata. However, the issue of property distribution, although very much interrelated with matters subject to modification, cannot be relitigated along with them. This Article challenges both aspects of the current practice.

This Article presents two opposing arguments as a basis for a new model that attempts to achieve a good, fair, and more efficient balance of competing interests. One argument suggests broadening the application of issues subject to modification, and applying it to the distribution of property as well. The second argument, on the other hand, suggests eliminating relitigation and applying, instead, the principle used for the legal system in general: res judicata. A new model suggests both following an intermediate path and adopting the system of periodic payments from tort law, with its accompanying fixed legislative rules for relitigation and modification. The model proposes defining the present substantial change in circumstances standard through clear guidelines for modification. The Article further suggests enhancing this model with an innovative approach called “effective support.” This approach ensures the

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consideration of property matters that are involved in issues subject to modification, while also preventing their relitigation. Any modification of support will relate to all of the effective support and not only to the amount of an actual monetary payment. The new model is fairer from the perspective of tax considerations, recognizes the significance of intangible property, avoids the need for indemnification stipulations, prevents the sale of family property; is consistent with the principle of “clean break,” and assists both the couple and the legal system in delineating a clear and stable roadmap with respect to disputes following divorce.

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I. INTRODUCTION

In legal systems throughout the United States, family law includes an exceptional practice: modification of certain matters that have already been adjudicated. This practice allows litigants to reinitiate legal proceedings that would otherwise have been settled, provided that the standard of a “substantial change in circumstances” is met. This practice deviates from the principles of res judicata and the finality of judgments. Most significantly, the vague standard for relitigation worsens an already problematic and ongoing connection between the spouses, in violation of the principle of a “clean break.” Modification has also resulted in the development of indemnification stipulations within divorce agreements. These indemnifications delay the completion of the divorce settlement and are detrimental to the economic efficiency that the legal system seeks to promote.

The practice of modification and relitigation goes largely unnoticed because it is relevant only in postdivorce proceedings. The purpose of this Article is to review the appropriateness, justification, and scope of the modification practice with its change of circumstances standard, as well as its corresponding relationship with other issues in family law that are not subject to modification—particularly the distribution of marital property. After analyzing this practice and highlighting its weaknesses as reflected in two opposing arguments, I will offer a new model that may better address the conflicting interests. This model may bring about greater certainty, clarity, and predictability; lessen the amount of litigation in family disputes; delineate a clear plan of action for resolving future conflicts; and more fairly consider the involvement of property distribution in matters subject

2. See, e.g., Lay v. Lay, 912 S.W.2d 466, 472 (Mo. 1995) (discussing spouses’ separation agreement, which provided that “the party found to be in default in any enforcement proceedings would be responsible for reasonable attorney fees”).
5. See discussion infra Parts II–III.
6. See discussion infra Part IV.A–B.
7. See discussion infra Part IV.C.
to modification. In this way, it may even decrease the level of tension subsequent to divorce proceedings that eventually becomes engrained in the lives of the spouses, their children, and even in the entire community.

II. ISSUES SUBJECT TO MODIFICATION IN FAMILY LAW

In family law, certain issues are excluded from the principles of res judicata and the finality of judgments. In those instances, a litigant may reinitiate a proceeding in a matter that has already been decided, provided that—and here is the critical condition—the litigant shows a substantial change in circumstances. The change of circumstances standard is intended to prevent unnecessary litigation for the couple and their children. The important question discussed in this Article is whether this standard accomplishes its objective. The clearest instances of the practice of modification are in matters of child custody and visitation. Several

8. The doctrine of res judicata states “that a cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal.” Foster v. The Richard Busted, 100 Mass. 409, 412 (1868); accord Cnty. of Wayne v. City of Detroit, 590 N.W.2d 619, 620–621 (Mich. Ct. App. 1998) (“Under the doctrine of res judicata, ‘a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.’” (quoting BLACK’S LAW DICTIONARY 1305 (6th ed. 1990)); see also Steakley & Howell, supra note 3, at 355–57.

9. Professor Joan G. Wexler, in the context of child custody modifications, states:

Each of the approaches to modification applications . . . represents an attempt to balance competing policy interests. Trying to balance the policies behind the res judicata doctrine on the one hand, and the policies in favor of making the best-advised contemporary determination of the child’s welfare on the other, the traditional changed circumstances doctrine holds that not just any changed circumstances, but only substantial ones, should warrant changing custody.

Joan G. Wexler, Rethinking the Modification of Child Custody Decrees, 94 YALE L.J. 757, 779 (1985); see also Sally Burnett Sharp, Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?, 68 VA. L. REV. 1263, 1264 n.9 (1982) (“The change of circumstances standard is based on principles of res judicata.”).

10. See Richard Montes et al., The Changed-Circumstance Rule and the Best Interest of the Child, L.A. LAW., Dec. 2001, at 12, 12 (“[O]ne of the purposes of the [changed-circumstance] rule is to recognize the finality of judgments and protect the parties and the child from harmful and needless relitigation of the issues of custody and visitation.”).

11. See Sharp, supra note 9, at 1264 (“[I]t is elemental that courts have continuing jurisdiction over matters affecting children, and therefore they may always
fundamental reasons form the rationale for preserving the rights to future modification only with respect to these issues, as opposed to other areas of litigation. First, traditional adjudication usually requires the determination of past acts and facts, and not a prediction of future events. In most litigation, the result depends upon the court’s determination that some event did or did not take place at an earlier time. However, custody litigation attempts to predict the future rather than to understand the past. Second, “custody disputes . . . require ‘person oriented,’ not ‘act oriented,’ determinations.” In custody disputes, “a court must evaluate the attitudes, dispositions, capacities, and shortcomings of each parent [in order] to apply the best-interest standard.” Third, evaluating the best interests of the child requires a prediction based “in part on the future behavior of the parties.” However, most disputes resolved by adjudication do not require appraisals of future relationships. In short, adjudication in custody disputes looks forward toward the continuation of the family in the future, instead of looking back at its past.

Certain legal systems have addressed these issues in legislation, in addition to judicial decisions, and have permitted the courts to modify previously issued orders. For example, the law in Alaska states:

An award of custody of a child or visitation with the child may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child.

modify the custodial provisions of a decree.” (footnote omitted)).

13. Id. at 250–51.
14. Id. at 251.
15. Id. at 250.
16. Id. at 251 (emphasis omitted).
17. Id. at 252.
18. Id. at 253.
19. Wexler, supra note 9, at 760.
20. ALASKA STAT. § 25.20.110(a) (2012); accord Lee v. Cox, 790 P.2d 1359, 1361 (Alaska 1990); Garding v. Garding, 767 P.2d 183, 184–85 (Alaska 1989). Other countries beyond the United States use standards similar to the changed-circumstances and best-interests rules when considering custody orders. See, e.g., Divorce Act, R.S.C. 1985, c. 3, s. 17(5) (Can.) (providing that before making a variation to a custody order, “the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child . . . [and] the court shall take into consideration only the best interests of the child”); Sampson v Hartnett (No. 10) (2007)
The authority of the court to modify orders also applies to child support awards, based upon the same rationale. This practice is also customary with respect to alimony. Indeed, every U.S. state permits its courts to modify alimony awards when a party can demonstrate a change in circumstances.

215 Fam LR 155, 164 (Austl.) (explaining the need to consider the child’s best interests, as well as whether an order is “reasonably practicable,” when making parenting orders). Although many courts must consider the child’s best interests foremost in parental custody orders, when third-party visitation rights are concerned (including grandparents or adult siblings) such consideration must often be balanced with the parents’ own parental rights. See generally Melissa Curry, Who Gets to Visit? A History of Third-Party Visitation Rights in Family Court, 16 J. CONTEMP. LEGAL ISSUES 289 (2007) (discussing the interaction of parental decisionmaking rights, third-party visitation, and the best interests of the child).

21. See, e.g., WIS. STAT. ANN. § 767.59(1f) (West 2009) (providing that a modification of a child support order may be made only if there has been a substantial change in circumstances affecting the parties). The change in circumstances standard is also used in other countries when courts consider modifications of child support orders. For example, in Malaysia,

[it] is common ground that [the Law Reform (Marriage and Divorce) Act of 1976] gives[s] to the court a general power to vary or rescind any subsisting periodical payments for the wife and/or the children of the marriage where it is satisfied that . . . there has been any material change in the circumstances.


Despite the prevalence of alimony modification across the United States, its continued presence in family law jurisprudence has been questioned by academics. For example, Professor Robert Kirkman Collins has argued

[op] of the three financial issues raised by divorce—asset division, child support, and spousal maintenance—the question of alimony is typically the least predictable and the most contentious. With assets, judges even in equitable distribution jurisdictions tend to apply a presumption of equal division in most marriages of significant duration . . . . On the issue of child support, while there remains room for bargaining by higher-income parents, most couples settle within the shadow, if not by strict application, of statutory child support guidelines. Only with regard to alimony is there no fixed frame of reference for discussions.

Spousal support negotiations are particularly difficult because of the
Interestingly, these courts are typically authorized to modify not only previously issued decrees, but also written agreements between the spouses, regardless of whether they are incorporated into decrees. For example, Florida law states:

When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes . . . , either party may apply . . . for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances . . . .

absence of any objective standard for judging fairness or predicting outcomes. Statutes simply list factors for trial courts to consider without providing any guidance as to how the judge should weigh or apply them.


23. FLA. STAT. ANN. § 61.14(1)(a) (West 2012); accord Armstrong v. Armstrong, 544 P.2d 941, 943 (Cal. 1976) (“When a child support agreement is incorporated in a child support order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement’s language to the contrary.” (citing CAL. CIV. CODE § 4811 (1976))). However, some states apply a different standard for modification between decrees and agreements. The Supreme Court of Kansas, for instance, has held that when

a custody decree is entered in a default proceeding, and the facts are not substantially developed and presented to the court, the trial court may later, in its discretion, admit and consider evidence as to facts existing at the time of the earlier order, and upon the full presentation of the facts the court may enter any order which could have been made at the initial hearing whether a “change in circumstances” has since occurred or not.

Hill v. Hill, 620 P.2d 1114, 1119 (Kan. 1980). Thus, a consensual award is always subject to judicial review under a pure best interests standard, but if initial custody was awarded after litigation, the traditional modification test applies. See id.; Wexler, supra note 9, at 767–68. Kansas is one of several jurisdictions that rejected the changed-circumstances rule for nonlitigated decrees. See Stewart v. Stewart, 383 P.2d 617, 619–20 (Idaho 1963); Hill, 620 P.2d at 1119; Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 768 (N.Y. 1982); Kolb v. Kolb, 324 N.W.2d 279, 283 (S.D. 1982); Elmer v. Elmer, 776 P.2d 599, 603 (Utah 1989); McDaniel v. McDaniel, 539 P.2d 699, 701 (Wash. Ct. App. 1975); Wendland v. Wendland, 138 N.W.2d 185, 191–92 (Wis. 1965). But see Kraft v. Kraft (In re Marriage of Kraft), 868 N.E.2d 1181, 1188–89 (Ind. Ct. App. 2007) (holding that regardless of whether child support was based on a court hearing or a mediated agreement, the change in circumstances standard should be interpreted in the same
In North Carolina, agreements between spouses must preserve the rights to future modification on three issues:

It is the policy of this [s]tate to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support.24

Furthermore, a stipulation agreed upon by the parties is unenforceable on grounds of public policy.25 Thus, a trial court will always be able to modify a child support agreement regardless of a stipulation between the parties.26

III. BARGAINING AND INDEMNIFICATION IN DIVORCE AGREEMENTS

In 1984, the U.S. Congress noted its concern about possible harm to the rights of children if custodial parents are not awarded adequate child support.27 The determination of low amounts of support places a heavy burden on American assistance organizations.28 Thus, Congress conditioned its aid to states and assistance organizations on the determination of clear child support guidelines.29 In 1988, Congress further demanded that these guidelines be given the validity of a presumption in a legal proceeding, so that whoever wishes to change them must provide written justification.30 In light of these requirements, guidelines have been defined in each of the states.31 The amount of basic child support is way).

25. See, e.g., id. at §§ 50-42.1(c), -56.
calculated as a certain percentage of parental income, which differs significantly among the states. Thus, in all 50 states, clear standards and guidelines have been determined and legislated for calculating child support and enforcing payment.

In some states, child support might differ from the guidelines as a result of other elements in the parties' financial settlement. For example, the obligor may consent to compromises in the distribution of property, or agree that the custodial parent remain in the marital home, in exchange for a lower amount of child support than that determined by the guidelines. The spouses could maintain this approach by setting contractual limitations upon the right to modify child support. Some courts have questioned such efforts to restrict the court's authority to modify child support due to a party's change in circumstances. These courts seem to take into consideration that such agreements might have undesirable impacts upon the well-being of children. Certain opinions even determine that parents

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34. See, e.g., id.

35. See, e.g., Guille v. Guille, 492 A.2d 175, 179 (Conn. 1985) (“Although [the agreement] may have been effective to define permanently the support obligations of the divorcing parties as between themselves, [it cannot] be held binding as to their minor children, who were unrepresented during both the negotiation of the stipulation and the dissolution proceedings.”); Lieberman v. Lieberman, 568 A.2d 1157, 1163 (Md. Ct. Spec. App. 1990) (“A parent cannot agree to preclude a child's right to support by the other parent, or the right to have that support modified in appropriate circumstances.”); Brenneman v. Brenneman, No. WD-90-33, 1991 WL 49998, at *5 (Ohio Ct. App. Apr. 5, 1991) (“[T]he obligor parent cannot, by means of his own contract, totally relieve himself/herself of the obligation to support a minor child and the custodial parent cannot barter away the child’s right to that support.”); In re Marriage of Wood, 806 P.2d 722, 723 (Or. Ct. App. 1991) (“Parents cannot, by their agreement, avoid the continuing obligation to contribute to the support of their children.”); see also Elliot L. Epstein, The Enforceability of Extra-Statutory and Repudiated Divorce Settlement Agreements, 8 ME. B.J. 144, 145 (1993) (discussing policy concerns surrounding such extra-statutory settlement agreements).

36. One Maryland court noted that such agreements jeopardize the child's best interest in not becoming a ward of the state:

The [s]tate has a vested interest in requiring a responsible parent to support his or her child. Otherwise, the [s]tate could be responsible in whole or in part for the support of a minor child, even though a parent is financially able to meet those obligations. We hold that a parent may not, even potentially, shift the burden of support to the [s]tate.
may not restrict a court’s ability to modify child support.\textsuperscript{37}

Because family law includes issues subject to future modification, and courts tend not to enforce a stipulation limiting such modification, one spouse (or that spouse’s legal counsel) may be concerned that the other will request a modification of the agreement’s terms, and in that way disrupt the balance of interests achieved by the settlement. Therefore, in some jurisdictions, including the Israeli legal system, it is common practice for the spouse who is concerned about future claims to attempt to seek protection within the divorce agreement itself, through an indemnification stipulation.\textsuperscript{38} It establishes that if one of the spouses initiates a future modification proceeding, then that party also promises to indemnify the other spouse, whether by financial payment or by return of a portion of the property received under the terms of the divorce agreement.\textsuperscript{39} The goal of the stipulation for indemnification is preventative: it aims to block in advance future claims for modification of the terms of the agreement.\textsuperscript{40} When the stipulation does not succeed in doing so, and a claim is brought after the divorce to adjust one of the matters subject to modification, the defendant spouse has no other choice but to require implementation of the indemnification as well.

\textit{Lieberman}, 568 A.2d at 1163–64.

\textsuperscript{37} See, e.g., Mora v. Mora, 861 S.W.2d 226, 228 (Mo. Ct. App. 1993) ("Only a court of law has the power to alter future child support payments."); Comeaux v. Comeaux, 767 S.W.2d 500, 503 (Tex. App. 1989) ("We reject the sterile concept that, if the child support payments [provided in an agreement] are approved in the divorce decree, the same cannot be . . . attacked collaterally once the judgment is final. . . . [S]uch conceptualistic, unrealistic thinking is simply out of place in the modern-day world of numerous, tragic divorces involving minor children."); Grimes v. Grimes, 621 A.2d 211, 214 (Vt. 1992).

\textsuperscript{38} See, e.g., DN 4/82 Kot v. Kot 38(3) PD 197 [1984] (Isr.).

\textsuperscript{39} The following is an example of an indemnification stipulation in an agreement incident to divorce:

In the event [wife] should ever petition any [c]ourt of competent jurisdiction for support and maintenance of [the children], and should a Court grant any such child support award, the said [wife] hereby covenants and agrees to pay directly to [husband], any amount of support that he is directed to pay to any party. In other words, [wife] is agreeing to hold harmless [Husband] from the payment of any amount of child support, regardless of the circumstances under which he is paying same.

\textit{Kelley}, 449 S.E.2d at 55–56 (alterations in original).

\textsuperscript{40} Sometimes the indemnification mechanism is ensured by a guarantee. See, e.g., DN 4/82 Kot v. Kot 38(3) PD 197 [1984] (Isr.).
For example, it is not unusual for the noncustodial spouse to have difficulty providing monthly child support or alimony payments. Therefore, in some divorce agreements, the couple consents to a less-than-customary amount of child support or alimony, and agrees that this amount will not be increased in any way whatsoever. In exchange, the noncustodial spouse transfers his or her portion of the family home to the custodial spouse. In order to ensure the custodial spouse’s obligation not to increase the amount of child support or alimony, the indemnification stipulation is formulated so that if the custodial spouse breaches this obligation, and files suit for modification of the child support or alimony, the obligor will be indemnified.

When the custodial spouse brings a claim to increase child support, the court will generally grant the request if it is in accordance with the child’s best interests and the substantial change in circumstances standard. The noncustodial spouse then asks the court to implement the indemnification stipulation, which protects that spouse’s interests, and attempts to regain half of the home. However, the court avoids ruling on the property matter (half of the home) in the second proceeding because under most legal systems, the distribution of property is not subject to future modification, and an order issued with respect to property division is a final order—even if the circumstances with regard to other matters

41. This happens even in light of the guidelines. See, e.g., Kraft v. Kraft (In re Marriage of Kraft), 868 N.E.2d 1181, 1183 (Ind. Ct. App. 2007) (“This agreement is a compromise between the parties of several competing positions expressed during mediation and may not be consistent with the Indiana Child Support Guidelines.”).

42. See, e.g., Kelley, 449 S.E.2d at 55.

43. See, e.g., id.; HCJ 8638/03 Amir v. Supreme Rabbinical Court (Apr. 6, 2006), Nevo Legal Database (by subscription) (Isr.).

44. See, e.g., Kelley, 449 S.E.2d at 55–56. Ultimately, the Supreme Court of Virginia did not look favorably upon including this type of provision in an agreement incident to divorce:

Clearly, the parties contracted away the husband’s legal duty to support his children and, in effect, placed upon the wife the sole duty of support. Additionally, the wife’s ability to contribute to the support of the children was adversely affected. Thus, the children’s rights to receive support from both parents were substantially abridged, and the court’s power to decree support was diminished. We hold, therefore, that the challenged provision of the agreement is null and void because it is violative of clearly established law.

Id. at 56.
IV. ISSUES SUBJECT TO MODIFICATION—A NEW MODEL

This Article reexamines the appropriate use of the change in circumstances standard, and the practice of modification and relitigation in general, as well as its interrelationship with the distribution of marital property, as described in the previous section. I will present two arguments in support of a new model that represents another balance among modification issues and other issues in a divorce dispute.

A. Argument I: Broadening Issues Subject to Modification to Include Property Distribution

1. A Theoretical View

It seems that the legal rationale at the basis of issues subject to modification is also applicable to the distribution of property. The customary reasons for categorizing a matter as subject to modification also hold true with respect to the distribution of marital property. For example, the classification of child support as an issue subject to modification is explained as follows:

By its nature, this matter is different in its purpose from other

45. See, e.g., MO. ANN. STAT. § 452.330(5) (West 2003) (“The court’s order as it affects distribution of marital property shall be a final order not subject to modification . . . .”); Rosato v. Rosato, 822 A.2d 974, 979 (Conn. App. Ct. 2003) (“[T]he assignment of property may only be made at the time of the marital dissolution and it is not thereafter subject to modification . . . .”); Ricciuti v. Ricciuti, No. FA0004353345, 2003 WL 21716434, at *1 (Conn. Super. Ct. July 7, 2003) (“Pensions are treated as property in financial orders in a dissolution, and are therefore nonmodifiable.” (citations omitted)); Ratliff v. Ratliff, No. 97APF10-1294, 1998 WL 514039, at *6 (Ohio Ct. App. Aug. 18, 1998) (“The division of marital assets pursuant to [Revised Code §] 3105.17.1 does not provide for modification due to change of circumstance . . . .”); see also NORMA HARWOOD, A WOMAN’S LEGAL GUIDE TO SEPARATION AND DIVORCE IN ALL 50 STATES 34 (1985) (“There is one other steadfast rule recognized by all courts in all states: No part of a court-ordered property division can later be changed by the court unless the court expressly reserves the power in the original decree.”).

46. See supra notes 12–18 and accompanying text (discussing the rationale for allowing modification of custody orders).
obligations for payment of money. Generally, when a monetary claim is brought before a court the judge’s work is completed with the issuing of a decision. However, with respect to child support, the payment obligation may change even subsequent to the judgment. If the father’s income decreases, he is allowed to request that the court decrease the amount of support that he is obligated to pay. If the child’s needs increase, the custodial mother may demand an increase in the child support that was allocated to her. Every change in circumstances that is a factor in determining the amount of the obligation justifies returning to the court which will reexamine its decision.\footnote{HCJ 59/53 Housman v. Director of Jerusalem Center for Execution of Judgments 7 PD 1142, 1147 [1953] (Isr.).}

This paragraph apparently explains why the possibility of relitigating child support must be preserved.\footnote{See id.} However, the deeper one looks into it, the more it seems that there is no true distinction between a determination of child support and a decision regarding the distribution of marital property. In the equitable distribution of marital property, courts consider the mutual contributions of the spouses, their professional status at the time of separation, the abilities they acquired during the marriage, and the misconduct of either of the parties; and accordingly the court fashions the division of property.\footnote{For example, the Uniform Marriage and Divorce Act provides that, in distributing marital property,}

\[\text{[t]he court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, . . . and the opportunity of each for future acquisition of capital assets and income.}\]

\text{UNIF. MARRIAGE & DIVORCE ACT § 307 Alt. A, 9A U.L.A. 288 (1998).} Courts across the United States use similar factors to determine whether the distribution of marital property, if not equal, is equitable. \text{See, e.g., Giammarco v. Giammarco, 959 A.2d 531, 534 (R.I. 2008). In one such case, the Supreme Court of North Dakota explained why the trial court awarded the husband nearly $4,500 more property than the wife:}

\text{This marriage was of relatively short duration, and . . . [the husband] brought considerably more property into the marriage . . . . At the time of the hearing [the wife] was earning more than [the husband]. Furthermore, [the husband] is 43 years old while [the wife] is only 27 years old, so [the wife] has both greater income and presumably more years to accumulate an estate. Therefore, the [trial] court could have concluded [the husband] has a greater need to be awarded additional property now.}
property in the event of a change in circumstances in order to rebalance the strengths of the spouses. It seems fair to continue to grant an additional advantage to the weaker spouse whose weakness results from having waived professional development during the marriage. If the income of the husband decreases, he should be permitted to request that the court readjust the property distribution. If the needs of the wife increase, she should be entitled to demand an increase in the property that was transferred to her. After all, the property distribution was formed in accordance with particular circumstances. When those circumstances change, the original distribution of property may no longer be equitable because it does not take into account the later occurrences. Therefore, it becomes appropriate to adjust the distribution of property.50

The argument that child support and custody are classified as matters subject to modification because they deal with the best interests of the child, unlike distribution of property, which focuses only on the relationship between the parents, may be refuted by two counterarguments. First, the protection of the child may be ensured through the principle of the right of a minor to independent status.51 Second, judicial decisions classify alimony as a matter subject to modification.52 The customary rationale for this is that the matter involves an ongoing relationship, as well as decisions that determine future rights


50. The well-known determination that distribution of property is not modifiable appears to be incorrect, at least in Alaska and in connection with a pension. See ALASKA R. CIV. P. 60(b)(6); Lowe v. Lowe, 817 P.2d 453, 458–59 (Alaska 1991) (noting that a party is entitled to modify the distribution of property in a final divorce decree under “extraordinary circumstances” based on four factors: “(1) the fundamental, underlying assumption of the dissolution agreement has been destroyed; (2) the parties’ property division was poorly thought out; (3) the property division was reached without the benefit of counsel; and (4) the [asset in controversy] was the parties’ principal asset”); Gearhart v. Gearhart, No. 17725, 1999 WL 1043894, at *3 (Ohio Ct. App. Nov. 19, 1999) (noting that modification of the distribution of a pension “can be granted when confusion arises over the interpretation of a particular clause of the [order]” or when the original order “did not contemplate unforeseen contingencies and leads to absurd and unintended results”).

51. See Simcox v. Simcox, 546 N.E.2d 609, 611 (Ill. 1989) (“[C]hildren are not privies of their parents [in dissolution proceedings], because the interests of children are not properly represented in such proceedings.”); Guillermo v. Guillermo, 252 N.Y.S.2d 171, 181 (Fam. Ct. 1964) (“No parent should be able to bind a child by buying matrimonial freedom at the price of selling a child’s material or other security, even if a court approves such agreement. . . . No child support decree should be sacrosanct if ‘incidental’ to, and inequitably incidental to, the problems of adults.”).

52. See supra notes 22–23 and accompanying text.
and obligations. Therefore, changes in the needs of the obligee or in the earning capacity of the obligor serve as justifications to relitigate and modify an earlier judgment to meet the changed circumstances. Thus, what is in the best interests of the child is not the exclusive factor for designating which matters are subject to modification.

In fact, marital property distribution as alimony is also a decision that determines future rights and obligations. Property distribution defines which property will remain in the hands of each of the spouses and where they will live, so that it is not only a determination regarding the past but also relates to the future. Property distribution can become unjust in light of future changes. Changes in an obligee’s needs or in an obligor’s earning capacity should serve as grounds for redetermining property distribution. If one of the spouses ceases to earn an income and the original property distribution took earning capacity into consideration, it is necessary to modify a judgment even though it is included in the property distribution.

Furthermore, a number of recent foreign family court decisions have dealt with the distribution of career assets and earning capacity, which are clearly matters of property. They ruled that in these matters it is appropriate to determine renewable, periodic payments that are modifiable when there is a change in circumstances. Property distribution is a decision that anticipates the future, and, as such, it should take into consideration a change in a spouse’s circumstances. Just as a support payment is subject to modification, property distribution—or at least a portion of the parameters that make up the claim for property distribution—should also be subject to change.

The ideological closeness between the concepts of property distribution and alimony is reflected in Professor Ira Ellman’s proposal

53. Cf. supra notes 12–18 and accompanying text (discussing similar rationale for allowing modifications of custody orders).
56. For example, a change of circumstances should not relate merely to future earning capacity but also to a change in mortgage payments. See Passamano v. Passamano, 612 A.2d 141, 143 (Conn. App. Ct. 1992) (“The order to pay the mortgage and real estate taxes on the house was not a property award because it did not alter the parties’ respective ownership interests. . . . Because this order resulted from the defendant’s continuing duty to support his family, it is . . . modifiable.” (emphasis added)), rev’d, 634 A.2d 891 (Conn. 1993).
that the concept of alimony should be replaced with a new mechanism of compensation for loss of career, which is clearly a matter of property.\textsuperscript{57} Furthermore, Professor Rosen Zvi clearly explains:

In litigation regarding the rights of spouses, at the time of their separation the determination of support payments must take into consideration the distribution of property, and the reverse is also true. To a certain extent, after the divorce the determination of alimony may also serve as a means to correct or complete the property distribution in an individual case. English Law and Australian Law went even farther and established the granting of support after divorce in one-time payments. In that way, they brought the two issues very close together. Moreover, under these legal systems, that include judicial discretion regarding the distribution of property during divorce, there is no longer any separation, either in the proceedings or in the judgment, between these two factors. The considerations that the court must weigh in these two issues are identical or very closely related. In that way, granting alimony through a one-time payment can serve the purpose of adjusting property within the family. The system of discretion has a double advantage: It prevents artificial division at the time of the decision making in two complementary areas, and it allows for the settlement at one time of all the economic questions between the spouses. Satisfaction of all the needs requires weighing all the different resources available to the family.\textsuperscript{58}

The courts therefore recognize the distribution of property as a matter in which circumstances are subject to change, and thus provide for the option of periodic and modifiable payments.\textsuperscript{59} Therefore, the basis for associating the “characteristic of finality” with property distribution is not that firm.\textsuperscript{60} When viewed as a practical determination, it raises other troubling concerns as well.

2. \textit{A Practical View}

A divorce settlement usually weighs all the relevant issues and interests. It is an economic package, with a reciprocal relationship among

\textsuperscript{59} See, e.g., FA (Jer) 4623/04 Anonymous v. Anonymous, para. 24 (Aug. 26, 2007), Nevo Legal Database (by subscription) (Isr.).
\textsuperscript{60} Id.
its elements. Property distribution is determined according to its relationship with the other matters under discussion. Those matters, in turn, are considered with respect to their relationships with property distribution. Thus, for example, the division of property is sometimes interrelated with child custody: the custodial spouses may receive a larger portion of the property than they would have received had they not taken on this responsibility. Sometimes the level of child support is decreased from the presumptive guideline amount in exchange for transferring a larger portion of the property to the custodial parent. The determination of the amount of spousal support also takes the property distribution into account. Moreover, it is not always easy to distinguish whether a payment from one spouse to the other is made in connection with the distribution of property, or is perhaps related to alimony. In one case, the voluntary

61. See Carbone, supra note 1, at 194–95. But see Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 Calif. L. Rev. 615, 626 (1992) (suggesting that the gender-neutral best interests rule leads women, who typically “care more about having custody than do men,” to “trad[e] away claims for support and property” to ensure custody).

62. Courts often have little power to modify such agreements absent changed circumstances. For example, Texas law provides:

If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order’s rendition.


63. In Ohio, for instance, when considering

whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, . . .

the court shall consider . . .

the income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code [governing the equitable division of marital property] . . .


64. Some states use cumbersome tests to distinguish these payments. For example, the Supreme Court of North Dakota has noted several

[factors which may indicate that the payments are distributions of property include: payments that do not terminate after the obligee dies; payments that continue even after obligee remarries; excluding the payments in controversy, a large disparity in the property divided which is otherwise unexplained; [and]
agreement to contribute to the expenses of the child, postdivorce, was not characterized either as spousal maintenance or as child support,\textsuperscript{65} even though it was.\textsuperscript{66} Sometimes, property distribution also takes into consideration the amount of support paid to the wife, until the time that the property is divided,\textsuperscript{67} as well as a variety of other factors.\textsuperscript{68}

It is therefore unreasonable to divide up divorce agreements or decrees and view only certain issues as subject to future modification, while treating others as impossible to change. Any change in one of the elements of the agreement should require a change in the other elements, since they are all interrelated. The property settlement and spousal support can impact the child support obligation. Any system for modifying child support should view a divorce settlement as a financial package.

Indeed, in some foreign legal systems, courts have determined that when there is a change of circumstances, it is appropriate to modify a property settlement if it is interconnected with a maintenance order.\textsuperscript{69}
Furthermore, in Indiana, when issues subject to modification are combined with other matters, property distribution must be modified due to the change in circumstances. In addition, other courts have provided that if the parties consent to modify their agreement in the event of a change in circumstances, the court should enforce this condition, even with respect to property distribution. Moreover, if a court order reserves its right to change the division of property in the future, it has the authority to do so.

It also seems that as a matter of legal policy, property distribution should be categorized among those issues subject to modification, and its adjustment permitted due to a change of circumstances. Furthermore, the possibility of change may serve as an internal defense mechanism. It is not impossible to avoid the need for various indemnification provisions, as well

example, [a] consent order for a property settlement is a final order. However, if the said consent order is inextricably interwoven with [a] maintenance order, the court has discretion to amend [it].” (citation omitted)).

See Dewbrew v. Dewbrew, 849 N.E.2d 636, 646 (Ind. Ct. App. 2006). Although the Indiana Court of Appeals determined that the property division in this case was ambiguous and had to be remanded to the trial court, the court noted that notwithstanding that conclusion, it

would nevertheless have remanded this case to the trial court for recalculation of the entire division of marital property based on [the court’s] partial modification of the property settlement agreement in terms of child support and spousal maintenance. It is well established that a partial modification of a property settlement agreement will likely upset the division of property equation in the divorce decree. The adjustment of one asset or liability may require the adjustment of another to avoid an inequitable result or may require the reconsideration of the entire division of property. Id. (citing Dusenberry v. Dusenberry, 625 N.E.2d 458, 461 (Ind. Ct. App. 1993)).

See, e.g., Hale v. Hale, No. 2936-M, 2000 WL 109101, at *4 (Ohio Ct. App. Jan. 26, 2000) (“Although the trial court cannot modify a division of property, the parties themselves may modify the property division. . . . Such an order [enforcing a postdecree modification by the parties] does not violate the principle that the court does not have jurisdiction to modify a property division.” (citation omitted) (citing Myers v. Myers, No. 16696, 1994 WL 687202, at *2 (Ohio Ct. App. Dec. 7, 1994))).

HARWOOD, supra note 45.

In some states, courts have noted that modification can apply to property issues. See, e.g., Osborne v. Osborne, 428 N.E.2d 810, 816 (Mass. 1981) (noting that antenuptial agreements settling alimony and property rights of the parties postdivorce are only enforceable if (1) the agreement is fair and reasonable at the time of enforcement, (2) the agreement is subject to judicial modification the same as if it had been entered into after the marriage subject to divorce, and (3) the agreement does not contravene public policy by unreasonably encouraging divorce).
as the need for finding guarantors to ensure such indemnifications. The party wishing to modify a matter subject to change in circumstances, such as child support, will carefully consider doing so, knowing that the modification may also influence the interrelated division of property. It seems this internal defense mechanism is preferable to the practice of indemnification stipulations, and will be more beneficial in helping to avoid repeated proceedings.

According to this first argument, the recognition of issues subject to modification should be broadened and applied to property distribution. This argument suggests a better—and certainly fairer—balance among the existing interests within family law. Under the present system, some issues in divorce are designated as subject to modification in the event of a substantial change of circumstances, while others are designated as final and unchanging. This situation does not properly balance competing interests.

The following section will present a contrasting argument that is also likely, in its own way, to better maintain a balance among the interests in family law, and even to contribute to resolving other aspects of a marital controversy as well. This argument will be guided by the aspiration of a couple to shorten, as much as possible, the path to the full and effective elimination of their relationship and the establishment of a clean break.

B. Argument II: Eliminating Modification in Divorce Settlements

The categorization of certain issues in family law as subject to modification in the event of a substantial change in circumstances was developed many years ago. This created an exception that is taken for granted. This practice requires renewed review in light of developments in family law and in the entire legal system. If one steps back a little from family law, modification may be viewed more broadly through the general

74. See supra notes 38–44 and accompanying text (discussing the use of indemnification clauses as a possible defense in divorce agreements against subsequent modification).

75. See, e.g., Crater v. Crater, 67 P. 1049, 1050 (Cal. 1902) (“It is well established that in divorce proceedings the court has the power to vary and modify its decree as to the custody of the minor children from time to time as circumstances change.”). While this is the standard for most modifications, see supra Part II, the Uniform Marriage and Divorce Act adopted a stricter standard for child support modification: modification is permitted only when the circumstances of the parties have changed so much that the order has become unconscionable. See UNIF. MARRIAGE & DIVORCE ACT § 316(a), 9A U.L.A. 102 (1998).
values of civil procedure, such as effectiveness, certainty, finality, and predictability. Questions then arise as to why the courts accept issues subject to modification as a concept that cannot be reversed. Normative harmony needs to be established among all the branches of the law, and this practice in family law should be discontinued. Moreover, if we also consider the emergence of the clean break theory and the "no fault divorce" philosophy, it seems that the time has come to eliminate the practice of designating issues as subject to modification. Today, judicial decisions in divorce disputes are not final rulings but may be reopened from time to time, hindering the spouses from setting out in new directions. It is difficult to say that the substantial change in circumstances requirement serves any practical role as a filter, blocking any petitions for modification. First, although it is possible that the burden of the change in circumstances standard will result in the denial of the claim, without any fixed rules, the requirement does not prevent, in advance, the claim's submission to the court. In that way, litigation expenses also increase. Second, the decision with respect to a change in circumstances is subject to broad judicial discretion. In addition, judicial systems, including family

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76. See Stephen Goldstein, The Influences of Constitutional Principles on Civil Procedure in Israel, 17 ISR. L. REV. 467, 481 (1982); Lawrence B. Solum, Procedural Justice, 78 S. CAL. L. REV. 181, 188 (2004) ("[F]rom the ex ante point of view, procedure has another role—to guide action after the formal legal proceedings have ended and the judgment has become final. This is the real work of procedure—to guide primary conduct after the judgment is rendered." (footnote omitted)).


78. See supra Part II.


80. For example, a family court in New York exercised this broad discretion when it ruled, even though there was justification in its words, that the “freedom” obtained through the divorce is in itself a change in circumstances:

As soon as the parent’s marital freedom is adjudicated, the parent’s ‘circumstances’ thereby ipso facto are changed by the new freedom itself.
courts, are already burdened with very heavy caseloads. The current vague standard of substantial change in circumstances potentially increases that caseload. The benefit of categorizing issues as subject to modification to suit changing circumstances may not even be preferable over the costs resulting from that classification. The following subpart questions the practice of modification from three perspectives.

1. **The Perspective of Contractual Obligations: Breach of Agreements**

   A distinct interest of every legal system is that the parties involved in a dispute will settle their differences by agreement. If that is true regarding any conflict, it is even more so in a family law dispute that affects sensitive third parties—the children of the couple. Therefore, the legal system is expected to ensure the agreements between parties to a conflict will be preserved and will not be altered or subject to cancellation, except under

   Having been safely separated, divorced or the marriage annulled, the parent for the first time is in a radically ‘changed’ position—to litigate freely, to strive vigorously for an equitable order of support without fear of refusal by the other parent to cooperate in the separation, divorce or annulment by consenting to appear, or by declining to controvert the proof. Here in the Family Court, the judge is for the first time given both sides of the circumstances as contended for by the respective parents, and he can find the facts as they are rather than as a separation agreement and mute parents made them appear to another court.


   An announcer for a soap opera would bill this proceeding as yet another episode in the continuing saga of the Rand family . . . . Unfortunately, this is not a soap opera. Real people are involved; and, for the fourth time in less than seven years an appellate court of this State is called upon to resolve the post-marital financial disputes between these warring parties. Would only that [their daughter] have had the benefit of the fortune invested in this seemingly interminable litigation.


   Aside from the disadvantages and costs that will be detailed below, we should not forget that the possibility of modifying payments downward may sometimes also harm the recipient of the support—for example, when an event occurs that lowers the income of the obligor.

extraordinary circumstances. Otherwise, the parties will not be motivated to resolve their dispute by agreement and will need to resort to the complex process of the judicial system. This interest accompanies and guides judicial decisions, including those in matters of family law. A divorce agreement usually covers many issues of controversy, and it needs to be examined in its entirety. One must believe it will be stable and reliable in order to develop agreed upon arrangements between parties who are unable to resolve their dispute. Otherwise, there will be little value to the divorce agreement, and the agreement will only be an interim stage before returning to the court.

In light of this interest in establishing stability and credibility in divorce settlements, it is unclear why the courts and the legislatures continue to support the practice of modification. The adverse consequences of this practice must be considered seriously: it complicates the litigation procedures; allows one party not to honor an agreement with the other party; enables one side to be in breach of an agreement without it being considered a breach; transforms family law agreements into conditional agreements; or may bring about an unjust result, abuse, uncertainty, lack of confidence, and even more undesirable consequences. This practice incentivizes spouses not to reach agreements. Without an effort to settle their differences, the dispute remains open, and the parties are left with an unresolved conflict. This uncertain condition of “separation without separation”—or of not achieving a clean break—imposes difficulties upon the couple and upon their children who may remain subject to legal proceedings for a number of years. This situation also goes against the best interests of the child. For the child's benefit, it is preferable that the parents resolve their dispute willingly and by agreement. Without a stable agreement, the dispute will be determined

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84. See, e.g., CA 5490/92 (Jer) Pegas v. Pegas (Dec. 29, 1994), Nevo Legal Database (by subscription) (Isr.).
85. See, e.g., Rand, 392 A.2d at 1150 (noting the couple’s divorce decree was in front of the appellate court for the fourth time in seven years).
86. CA 4515/92 (Jer) Stein v. Stein (June 13, 1994), Nevo Legal Database (by subscription) (Isr.).
87. See, e.g., Rand, 392 A.2d at 1150.
88. As Justice Elon of the Supreme Court of Israel noted,

Giving effect to and honoring these agreements, essentially, are in the best interests of the minor. It is good and desirable also from the perspective of his welfare and education, that the arrangement of financial matters between his parents, who are separated from one another, each going his own way and to
through a demanding—and oftentimes consuming—judicial process.89

If spouses nevertheless decide to enter into an agreement, they will do all they are able to avoid the risks that may arise from it. Individuals who are apprehensive about a future claim due to the vague change in circumstances standard will insist on defense mechanisms such as indemnification stipulations.90 It is customary in some jurisdictions to ensure such provisions by the signatures of third-party guarantors.91 This requirement makes completing the agreement all the more complicated. It is not easy to find a third-party guarantor for an indemnification, effective upon any claim related to a change in circumstances. Courts have also looked unfavorably upon certain indemnification stipulations.92 In a number of rulings, it intervened in the contractual freedom of the parties, cancelled the provisions, and left a party to the contract exposed to damages arising from the change in circumstances practice without the ability to properly protect that party’s own interests.93

2. The Perspective of Public Policy: The Ongoing Destructive Relationship

The general approach of the courts, reflected in the concept of res judicata, holds that the litigant needs to be given protection from repeatedly dealing with the same matter after it has already been decided.94 The litigants should be able to go their own way, make plans with certainty, and follow a clear process without concern they may be called to court an additional time by an adversary.95 Thus, for example, in Hasal v. Hasal, the

CA 255/81 Kot v. Kot 36(1) PD 236, 243 [1981] (Isr.).
89. See, e.g., Rand, 392 A.2d at 1150.
90. See supra notes 38–44 and accompanying text.
91. See, e.g., CA 4262/96 Wayeh v. Wayeh 51(5) PD 231 [1997] (Isr.).
92. See, e.g., Kelley v. Kelley, 449 S.E.2d 55, 56 (Va. 1994) (holding the indemnification provision was null and void because it both abridged the rights of the child and diminished the court’s power against established law); CA 4262/96 Wayeh v. Wayeh 51(5) DD 231 [1997] (Isr.) (holding that both the indemnification stipulation and the guarantee were void for public policy reasons).
93. See, e.g., Kelley, 449 S.E.2d at 56; CA 4262/96 Wayeh v. Wayeh 51(5) DD 231 [1997] (Isr.).
94. See Steakley & Howell, supra note 3, at 355.
95. As Justice Abella of the Supreme Court of Canada argued,
wife requested annual calculations of the profits from a business registered in her husband’s name. She argued that, due to their joint efforts in establishing the “tree” during the marriage, there was no reason she should not benefit from her share of the “fruits” after the divorce. These were among the considerations of the court that denied her request:

Another reason to discontinue giving spouses their portions of the “fruits” of formerly joint property is to avoid forcing couples who have separated to prolong their relationship. A monetary arrangement that connects the spouses to one another after their separation is not desirable, and it unnecessarily lengthens the difficult process of separation . In this area, experience also teaches that it is preferable for the separated spouses to quickly, completely, and finally divide their property, without leaving traces of open issues for them to go back and dig through.

Thus, even though it is reasonable to assume the immediate annual calculation will be fairer, the Supreme Court of Israel prefers the values of certainty and planning for the future (expressed in the finality of judgments principle) over the value of fairer distribution of property (expressed in the principle of substantive change in circumstances). This clear attempt to “avoid preserving any economic connection between the parties” contradicts the designation of issues subject to modification that, instead, creates a permanent and interdependent connection between them.

While some issues, like custody and access, have an inherent fluidity that tracks a child’s evolutionary needs, and while support may vary if a material change in circumstance occurs, property matters can usually be ascertained with sufficient clarity to permit the parties to exit from a marriage with an economic map delineating clearly marked boundaries. No matter the issue, subject always to the transcendent duty of fairness, the goal is to create enough certainty that each spouse can make personal and financial decisions about the future based on legitimate and enforceable expectations.


97. Id.
98. Id.
99. See id.
100. If the court found it correct to separate property between the spouses, why did it not do the same with respect to support? See id. This question becomes stronger in light of the ideological closeness between payment of support and distribution of property. See supra notes 66–73 and accompanying text. This does not necessarily mean that the support will be paid in a one-time payment. There may be problems that cause cash flow difficulties for the individual obligated to make payment.
Moreover, maintaining an economic connection between the spouses may be harmful to the public interest of their rehabilitation after separation. Although Professor Nina Zaltzman wrote the following with respect to tort law, it is appropriate to the matter before us as well:

[This approach] opens before each of the litigants the means with which to bother the other with capricious claims regarding “substantial change in circumstances.” In that way, not only is the principle of finality of judgments significantly harmed, but public policy may be harmed with respect to the rehabilitation of the injured. It is easy to imagine that the latter will not have the motivation to be rehabilitated as long as he can bring a claim against the person who harmed him, on the one hand, or as long as he expects to be constantly followed by his adversary, who is seeking to find any grounds to claim a decrease in compensation, on the other hand.101

In our context, it is easy to imagine that noncustodial spouses who owe child support and alimony will not be motivated to rehabilitate and to increase their income since that may expose them to a claim for increased support due to a change in circumstances.102 Indeed, courts have expressed concern that modification of child support could encourage underemployment.103 In the same way, the custodial spouse may not be motivated to rehabilitate oneself and increase household income after the

However, it is certainly possible to determine monthly payments, which are not subject to modification, or a single amount divided into several installments. These considerations brought about the development in English law of the clean break doctrine. See Dunford v. Dunford, [1980] 1 W.L.R. 5, 9 (C.A.) (U.K.). According to this approach, an effort should be made to achieve complete separation after divorce, and to prefer a single payment over ongoing support payments following divorce. See, e.g., id. 101. NINA ZALTZMAN, MA’A EH-BET-DIN BE-HALIKH EZRA I [RES JUDICATA IN CIVIL PROCEEDINGS] 295 (1991).

102. This argument is not intended to conflict with research that shows that the standard of living of the husband significantly increases after divorce. See, e.g., LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 339 (1985) (“Men experience a 42 percent improvement in their [postdivorce] standard of living, while women experience a 73 percent decline.” (emphasis omitted)). First, it is possible that the standard of living of the wife could increase even more if she does not fear prosecution. Second, although the level of support will be determined from available income, legal expenses increase as litigation over a divorce continues, decreasing the income available for support.

divorce because that may expose the party to a claim for decreasing child support or alimony. Classifying these matters as issues subject to modification is therefore harmful to the public interest in the rehabilitation of the family with its two new households.\textsuperscript{104} It encourages the parties to not rehabilitate, and perhaps, even worsen their situations.\textsuperscript{105} It is unfortunate enough that when judicial proceedings are first initiated and then become ongoing, spouses may attempt to hide their income and their property in order to influence the amount of support awarded. Legal systems should not encourage extending this unhealthy period and transforming it into a routine way of life.

3. \textit{The Perspective of Normative Harmony: Monetary Claims and Family Law Disputes}

The rationale at the basis for determining that certain issues are subject to modification is likely to be relevant both with respect to tort matters and to monetary disputes in general. Actually, the same justifications raised above for classifying property distribution as an issue subject to modification\textsuperscript{106} are applicable to a significant portion of regular monetary disputes and tort matters. Even in each of those areas, however, the compensation awarded may or may not forecast future needs. If in the future it proves to be inadequate, there may be reason to adjust the compensation, especially following circumstances affecting, for example, earning capacity or mobility. Moreover, the same rationale provided in academic literature and judicial decisions in support of periodic payment in tort, may also be used to justify the designation of monetary claims and certain tort claims as issues subject to modification.\textsuperscript{107} Therefore, it is unclear why the legal system chose to distinguish between monetary claims and matters of family law, applying the principle of finality to the former while subjecting the latter to modification.

And from an opposite point of view, the rationale at the foundation of res judicata, applicable to every monetary dispute, holds true for family law as well. The principle of the \textit{functus officio} (“having performed his or her office”)\textsuperscript{108} is intended to ensure an end to proceedings and disputes

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\textsuperscript{104.} See FamilC (CD) 28050/04 A.G. v. A.M (Mar. 20, 2006), Nevo Legal Database (by subscription) (Isr.).  \\
\textsuperscript{105.} See, e.g., id.  \\
\textsuperscript{106.} See supra Part IV.A.  \\
\textsuperscript{108.} BLACK’S LAW DICTIONARY 743 (9th ed. 2009).
\end{flushleft}
between parties in order to achieve certainty and legal security, and to avoid calling upon litigants after the completion of legal procedures.\textsuperscript{109} It is also intended to ensure that the judicial system does not need to repeatedly deal with previously determined matters while many other cases are awaiting initial litigation.\textsuperscript{110} Family law is not immune to the disadvantages of multiple proceedings. It also needs to ensure the stability and certainty of the binding power of a judicial act, even after a substantive change in circumstances. It is certainly possible to understand that exceptional institutions in family law developed out of the unique qualities of family disputes,\textsuperscript{111} but those unique characteristics have nothing to do with not applying res judicata. It therefore seems fitting to review the justifications for disrupting normative harmony and applying different rules to matters of such similar and close natures.

Even the attempt to avoid creating exceptional doctrines within the legal system by securing the possibility of relitigation through existing principles raises other challenges.\textsuperscript{112} Zaltzman explains:

Without a specific provision in the contract itself, making it subject to change, from the nature of a contract, the court reads into it an implied provision that a change in circumstances allows for a return to judicial proceedings . . . . What is the nature of this provision that the court reads into the agreement and thus “imposes” on the parties a situation of uncertainty in the future . . . a possibility that is doubtful whether the parties were really prepared to consider when they drew up the contract, since they themselves specifically avoided relating to it . . . [and what] when the sides explicitly expressed their opinion that they want to in that way put an end to the legal proceedings? Doesn’t that indicate that in that way the parties specifically rejected the possibility of including an implied provision that conflicts in content, with what they specifically agreed upon?\textsuperscript{113}

Therefore, by relying upon existing doctrines it is difficult to find theoretical justification for the possibility of relitigation in the future. In addition, the same implied provision “forced” upon the parties can be read into every tort decree, and just as it is incorrect in tort law, it is also

\begin{thebibliography}{99}
\bibitem{110} See \textit{id}.
\bibitem{111} See \textit{supra} notes 12–18 and accompanying text.
\bibitem{112} See ZALTZMAN, \textit{supra} note 101, at 209.
\bibitem{113} \textit{Id.} at 290.
\end{thebibliography}
incorrect in family law.

4. The Limitations of Modifying Judicial Decisions

Different legal systems have dealt with the question of what constitutes a change in circumstances that justifies modifying a previously issued order. Indeed, the lower courts have broad discretion in this matter, and their decisions will not be easily overturned on appeal. This broad discretion brought about different interpretations of the change in circumstances standard, resulting in a lack of normative uniformity. In certain U.S. states, court rulings have even determined that the change of circumstances standard is not a “strict” standard, and prior decisions can be modified, even without regard to this principle. There is no need to

114. See Ada Orakwusi, Child Custody, Visitation and Termination of Parental Rights, 8 GEO. J. GENDER & L. 619, 632–33 & nn.70–83 (2007) (offering examples of how various states have applied the change in circumstances standard).

115. See id. at 632.

116. See, e.g., Pridgeon v. Superior Court, 655 P.2d 1, 3 (Ariz. 1982) (“The trial court has broad discretion to determine whether a change of circumstances has occurred. . . . [Its] decision will not be reversed absent a clear abuse of discretion.” (citation omitted)); Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (“We set aside judgments [of modifications] only when they are clearly erroneous, and will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment.” (citing In re Marriage of Richardson, 622 N.E.2d 178, 179 (Ind. 1993))).


118. As Judge Richard Montes, Harold Cohn, and Shelly Albaum have noted:

The changed-circumstance rule is a judicially created doctrine rooted in the concept of res judicata. The intent of the rule is to supplement the statutorily mandated ‘best interest of the child’ standard by recognizing the child’s right to stability and continuity in his or her living arrangements. In the application of the rule, however, what is or is not a change of circumstances has been inconsistently defined, ill-defined, and most often not defined at all.

Montes, supra note 10.

119. See, e.g., Goto v. Goto, 338 P.2d 450, 453 (Cal. 1959). Professor Wexler has noted that states have attached this standard from both sides:

Despite its apparent rationality, the changed circumstances standard has been rejected by some courts and legislatures on the ground that the interests of the children far outweigh the policies behind the res judicata doctrine, and that therefore a pure best interests standard is preferable. Criticism of the traditional standard has also come from the opposite pole,
emphasize the importance of clarity of court rulings in matters dealing with couples and their children during the crisis of separation and the extent to which certainty and stability are essential to the parties involved. The use of the vague standard of substantive change of circumstances, without clear guidance, only intensifies the difficulty.

Therefore, several legal systems that were not satisfied with this current standard for modification found different ways to limit it. One approach is to make it difficult to reinitiate a proceeding due to a change in circumstances, even if the change is substantive. Additionally, in Ohio, a court is not authorized to modify the amount of alimony or its duration if the agreement between the spouses did not specifically authorize the court to do so, or in the case of a judicial decree, if the alimony or duration was not explicitly authorized by the court order, no modifications can be made.

Other systems ruled that certain circumstances discussed and foreseen during the original agreement process (or in the first court decision) will not serve as a basis for initiating procedures due to a change in circumstances.

with the assertion that there is no inconsistency between res judicata policies and an individual child’s best interests; children are more likely to fare best when left with their current custodian.

Wexler, supra note 9.

120. As the Supreme Court of Canada has described,

the preliminary threshold test ensures that child support orders will not be reassessed by courts anytime a change, however minimal, occurs in the circumstances of the parties or their children. This approach recognizes the value in some degree of certainty and stability between the parties. Parties must be encouraged to settle their difficulties without coming before the courts on each and every occasion.


121. OHIO REV. CODE ANN. § 3105.18(E) (LexisNexis Supp. 2013). This is different from the Israeli legal system, which does not require specific consent in order for a court to be authorized to modify a previous order; it is sufficient that the parties or the order were silent. See CA 363/81 Fayga v. Fayga 36(3) PD 187 [1982] (Isr.). If, in their agreement, the sides explicitly restrict the possibility of change it will be of no effect because agreements in these matters are seen as inherently including the possibility of modification. See id.

Courts in Texas have also taken the approach of making relitigation more difficult when initiated on the basis of a change in salary or in the economic status of one of the spouses. 123 At the same time, Texas courts have held that an alimony that was incorporated into the final divorce decree and became a part of the final judgment is binding on the parties and is interpreted under general contract law. 124 “Absent consent of the parties, the provisions of the agreement will not be modified or set aside except for fraud, accident, or mutual mistake of fact.” 125

C. A New Model: An Intermediate Path—Comprehensive Legislative Rules for Modification

The preceding sections presented two opposing arguments. The first argument favors broadening the practice of designating issues subject to modification and including within it the distribution of marital property. 126 In contrast, the second argument prefers completely eliminating the practice of modification and relitigation, and applying the principle of res judicata to all issues in family law. 127 The advantages of the first argument (flexibility, adjustment of payments, etc.) are the disadvantages of the second. The disadvantages of the first (multiple proceedings, lack of certainty, discouragement of rehabilitation, etc.) are the advantages of the second.

These conflicting considerations may be resolved through an intermediate model that incorporates advantages found in the first two arguments. In fact, the rationale for the two arguments forms the basis for the new model. In proposing a new model, it is essential to consider that while nonmodifiable child support and alimony orders would preserve the obligor’s incentives and the finality of judgment, 128 they could also be undesirable in several other respects. First, it is unjust that an obligor will continue making the same level of payments if the obligor becomes

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125. Id. (citing Boyd v. Boyd, 545 S.W.2d 520, 523 (Tex. Civ. App. 1976)). Some states specifically allow the parties to agree to have their alimony terms not subject to review. See, e.g., MINN. STAT. § 518.552(5) (2006).
126. See supra Part IV.A.
127. See supra Part IV.B.
128. See supra Part IV.B.2–3.
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unemployed or ill. Second, child support might be decreased when the obligor has to support additional children. Third, a system that will not increase the obligation for a child who develops special needs, places the entire burden of all such costs on the custodial parent. Fourth, it may be fitting to change the amount of spousal support when the obligee, for example, remarries or becomes unemployed. Therefore, a system for modifying child support and alimony seems both fair and even unavoidable. The intended purposes of child support and alimony are to address the needs of the children and the spouse, to balance the standards of living in the two households, and to protect children from negative financial impacts of divorce. Some possibility for modification must be made available in order to achieve each of these purposes.

1. Defining the Changed-Circumstances Standard Through Fixed Legislative Rules

The principles of the new model should be based on setting fixed legislative rules for modification that are not subject to judicial discretion. Such rules would include, among other considerations, time requirements restricting the modification of an order due to a change in circumstances. For example, under Wisconsin law, unless a party can show physical or emotional harm to the child’s best interests, a custody order can only be relitigated after a period of two years. Montana, on the other hand, restricts certain modifications for a two-year period. Texas limits modification for a period of three years. In Indiana, modification is restricted for only one year. Minnesota law specifies time periods that


130. WIS. STAT. ANN. § 767.451(1)(a) (West 2009). After the two-year period, these orders may be modified upon a substantial change in circumstances if in the best interests of the child. Id. § 767.451(1)(b).

131. See MONT. CODE ANN. § 40-4-208(2)(a) (2013) (providing that modifications to a divorce decree, other than modifications relating to maintenance or support, may only be made within two years of the decree).

132. See TEX. FAM. CODE ANN. § 156.401(a) (West Supp. 2013) (providing that if circumstances have not materially and substantially changed, a child support order can only be modified after three years and if the award differs from the guidelines by 20 percent or $100).

133. IND. CODE ANN. § 31-16-8-1(b) (LexisNexis 2007) (providing that, absent substantial, continuing, and unreasonable changed circumstances, maintenance and child support may only be modified if the child support amount differs from the
may vary, depending upon certain circumstances.134

Other legal systems have legislated not only a time period before allowing relitigation, but also a restriction on the extent of the modification. For example, Texas law sets forth that the court may modify an order when the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with the child support guidelines.135 Indiana law provides a similar formula,136 as do additional states.137

However, an in-depth look at those legal systems shows that the vague substantial change in circumstances standard is retained in their legislation.138 This standard is still a very important factor, and may in itself result in a modification of a previous order.139 Alongside this standard, and always as an alternative, fixed rules were also established for modifying a previous order.140 These two options for modification, the discretionary and the mandatory, are not cumulative, but alternative.141 Thus, according to the first option, the court still has broad discretion, without clear guidance as to when a previous order may be modified.

The vague change in circumstances standard encourages actions for modification in an attempt to implement the court’s discretion and avoid the alternative fixed rules.142 Moreover, if the spouses originally agree upon guidelines by 20 percent and it has been at least 12 months since the order or last modification).

134. See Minn. Stat. Ann. § 518.18(a)–(b) (West 2006) (stating a general rule of one year from an initial custody order before filing any petition for modification, and two years between one petition for modification and a subsequent one); see also Unif. Marriage & Divorce Act § 409(a), 9A U.L.A. 439 (1998) (providing a general rule of no modification until two years after custody order).


141. See, e.g., Ind. Code Ann. § 31-16-8-1(b).

an amount of child support in the order that differs from the guidelines, there are no fixed rules for modification of the order at all, and only the changed-circumstances standard will apply.143

The desirable balance between fixed rules and discretion has been repeatedly considered in Anglo-American law.144 Family law commentators have also examined the issue.145 Judges traditionally have been granted broad discretion under American family law.146 Some family law scholars have proposed restricting this discretion.147 Critics note that a system of discretion may have undesirable consequences. First, results are less predictable, thereby discouraging early settlement and increasing litigation costs.148 Second, discretionary judgments may be somewhat influenced by a judge’s personal beliefs and biases, thus resulting in inconsistent results.149 Different results could, in turn, be detrimental to the public’s trust in the judicial system.150 However, a system allowing significant judicial discretion is more flexible and able to respond to changing social needs without
discretionary changed-circumstances rule). Unlike my proposal, Sorenson concluded that the best interests of the child standard should replace the change in circumstances standard. See id. at 99. However, I suggest that the best interests of the child standard is no less problematic with respect to judicial discretion. See also Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. CHI. L. REV. 1, 43–44 (1987) (arguing the best interests of the child standard is problematically indeterminate).

143. TEX. FAM. CODE § 156.401(a-1).


146. See Mnookin, supra note 12, at 262.

147. See, e.g., id. (“More rule-like standards would avoid or mitigate some obvious disadvantages of adjudication by an indeterminate principle.”); Elster, supra note 142, at 36–43 (suggesting three alternatives to the best interests principle: “(1) a return to the maternal presumption rule; (2) a primary caretaker presumption; and (3) some form of compromise between the parents . . . [including] the choice of a custodial parent by the flip of a coin”).

148. Mnookin, supra note 12, at 262.

149. Id. at 263.

150. See id. (“Because of the scope of discretion under [an indeterminate] standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society . . . .”).
legislative action. 151 Therefore, a discretionary system is able to respond more rapidly to social change and to encourage creativity.

On the other hand, the resulting predictability of rules reduces litigation costs and assists settlement. 152 Rules require decisionmakers to treat similar cases alike, thus decreasing arbitrariness or bias. However, fixed rules are a somewhat strict regulatory device, intended to be technically implemented. Fixed rules set forth in a statute may only be changed by the lengthy process of legislative amendment. When rules are set forth by the legislature, the legislature determines important policy choices. However, a policy of discretion generally enables judges to make such choices. It is very unusual to find a regulatory system that either includes a “pure” rule or allows for unlimited discretion.

The acceptance of child support guidelines shows a preference for rules more than discretion. Guidelines are presumptive standards presently used in all states in determining an initial child support award. 153 However, there are no true guidelines for the modification of those awards; modification is usually determined according to the first statutory alternative, the vague change in circumstances standard—which is dependent upon broad judicial discretion. 154 It is more appropriate to define the change in circumstances standard by fixed rules that would provide guidance in the implementation of judicial discretion.

To establish greater certainty, an objective standard for what constitutes a substantial change in circumstances should be determined by clear, presumptive rules. For example, a policy could presume a substantial change in circumstances if a child support award calculated under the then current rules would vary by more than a defined percentage from the initial award. 155 Indeed, even the several states that have legislated what

151. See Kaplow, supra note 144, at 616–17.
154. See supra notes 138–43 and accompanying text.
155. See, e.g., COLO. REV. STAT. § 14-10-122(b) (2013) (providing that a less-than-10-percent change is not a substantial and continuing change in circumstances); CONN. GEN. STAT. ANN. § 46b-86(a) (West 2009) (providing that a less-than-15-percent deviation is not a substantial change); KY. REV. STAT. ANN. § 403.213(2) (LexisNexis 2010) (same). Although more states define when a modification can occur based upon
constitutes a change in circumstances have only considered some of the relevant aspects. They have requested limits to judicial discretion in order to preserve uniformity and clarity of judgments. For example, in Alaska, a change in circumstances is presumed if it reflects an amount 15 percent above or below the support payment determined in the original decree.156

Another example is in Florida, where a parent’s residence is considered to have been changed only when the new residence is 50 miles away from the place of residence determined in a previous decree.157 In Wisconsin, statutory law determines when certain matters may be considered a change in circumstances, restricting judicial discretion.158 Canadian law also establishes rules for defining changes in circumstances that allow for the modification of a previous child support order.159 These

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156. ALASKA R. CIV. P. 90.3(h)(1).
158. The Wisconsin law provides:

[159. WIS. STAT. ANN. § 767.451(1) (West 2009).]
159. For example, the Canadian Divorce Act of 1985 states:

Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Divorce Act, R.S.C. 1985, c. 3, s. 17(4) (Can.). Canada’s Federal Child Support Guidelines then provide that a change in circumstances occurs in three specific (yet also broad) instances:

(a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in
legal systems redefined the change in circumstances standard through guidelines and did not merely add them as alternatives to modification.

In order to ease the strict requirements of a standard defined by rules, payments could be linked to the cost of living index. This linkage could be adjusted automatically, without requiring additional legal proceedings. Otherwise, inflation might cause the actual value of the payments to erode over time.\textsuperscript{160} This erosion would obviously have substantial negative effects on the standard of living for the custodial parent and the child.\textsuperscript{161} However, linkage could preserve the value of the payments and its psychological impact might also result in decreased relitigation.

The determination of guidelines for modification requires the consideration of an additional issue: will the guidelines for modification of child support focus on the child’s needs or, perhaps, on the parents’ incomes? In my opinion, the initial determination should take into consideration both the needs of the child and the incomes of the parents. However, with respect to modification, the focus must be only on the changing needs of the child, not on the changing incomes of the parents. Focusing on the parents’ incomes could result in underemployment, hidden employment, concealment of income, or lack of motivation to rehabilitate oneself and increase one’s salary. It could also create an ongoing and interdependent connection between the spouses, resulting in a significant amount of tension. The standard for modifying child support should be “needs-based.” This standard determines child support according to evidence of the child’s expenses rather than the incomes of the parents. Modification should focus exclusively upon the needs of the child. If the needs change significantly—in a specified percentage above the calculation that was made when the order was issued—then there is reason for seeking modification. This model is closer to the best interests of the child principle since it concentrates on the child’s needs, and not on the parents’ incomes.

\begin{itemize}
  \item \textit{(b)} in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
  \item \textit{(c)} in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the [Divorce Act].
\end{itemize}

\textit{Federal Child Support Guidelines, SOR/97-175 s. 14 (Can.).}

\textsuperscript{160.} Phelps & Miller, \textit{supra} note 28, at 210.

\textsuperscript{161.} \textit{See id.}
The percentage-of-income model implies that a child has a right to a certain portion of the obligor’s income, while the needs-based standard is focused, instead, on meeting the child’s own needs. This approach is also appropriate, with the necessary changes, for spousal support modifications. Although automatic adjustment mechanisms, such as a percentage of the obligor’s income, will decrease the need for postdecree modification, they will not eliminate it altogether.\footnote{It is of interest to note that courts have approved orders that set a maximum amount that the obligation can increase, regardless of how much the obligor’s income increases. \textit{See, e.g.}, Edwards v. Edwards, 665 P.2d 883, 884–86 (Wash. 1983) (“[T]he trial judge must set a maximum dollar amount, \textit{relating to the children’s need}, above which the support award cannot rise.” (emphasis added)).}

Moreover, modification of support payments in accordance with the obligor’s income could also result in calculations of the parents’ earning potentials.\footnote{\textit{See Phelps & Miller, supra} note 28, at 218–19.} Such calculations would dramatically broaden the court’s discretion,\footnote{\textit{See} id.} with all of the related concerns discussed above.\footnote{\textit{See supra} notes 146–51 and accompanying text.} For example, a California court may exercise its discretion to attribute income to either party.\footnote{The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent’s income, consistent with the best interests of the children.” \textsc{Cal. Fam. Code} § 4058(b) (West 2013).} Therefore, child support may be determined by the parents’ earning capacity instead of by their actual earnings.\footnote{\textit{Id.}; \textit{see, e.g.}, Othman v. Hinman (\textit{In re Marriage of Hinman}), 64 Cal. Rptr. 2d 383, 389 (Ct. App. 1997); \textit{accord} Schlakman v. Schlakman, 886 N.Y.S.2d 758, 759 (App. Div. 2009).} Moreover, a change in circumstances could include anything impacting the finances of either party, for example a shift in the stock market and, thus, in the finances of a shareholder. However, the dependence of the support amount on the parents’ incomes could bring about a situation in which every change in the value of the stock market could result in a claim for modification due to a change in circumstances. It may also be detrimental to the well being of the child if a change in the value of the market results in a claim to reduce the amount of child support.

A fluctuation in the value of the stock market should not necessarily result in a modification of the support payment. Investors in securities know that their investments are measured over time. It is unreasonable to allow every change in value to bring along with it a claim to increase or decrease the level of support payments. The obligor that invests in stocks...
would not want the court to restrict the ability to invest in the stock market and order the obligor to put aside a portion of that money for child or spousal support. In the same way, the obligor must absorb and manage losses, rather than allow those dependent upon support payments to suffer from the market fluctuations.

The adoption of fixed rules for defining the change in circumstances standard as the sole standard for modification would be helpful both to legal systems and to litigants. It would establish a more precise system for the modification of judgments and could also prevent unnecessary postdivorce litigation. An exclusive, objective standard for the modification of child support would be beneficial. Both the parties and the judge would more accurately recognize when modification is appropriate.

2. The Effective Support Approach

The following approach is intended to complete the foregoing model and help ensure a fair result when a court decides a modification request. The underlying principle should be that the distribution of property is a final decision that generally cannot be relitigated. The discussion of the second argument, above, describes the justifications for this view. However, in cases when property distribution is closely interrelated with issues customarily subject to modification, then the modification of those issues may also result in an adjustment to the property matter as well. An example of such a case would be when part of the property is transferred as a support payment and the actual distribution of property does not conform to customary practice. It is both possible and preferable to avoid relitigation of property matters by implementing an approach that I refer to as “effective support.”

When preparing the agreement, the couple should define the amount of effective child or spousal support. The couple must formulate the child support or alimony and indicate that it is a certain effective amount. This amount is made up of two portions. The first portion is paid and transferred monthly to the custodial parent for the benefit of the minor or the spouse. The second portion is paid at the time of the agreement by the transfer of property to the custodial parent or to the spouse. When the court considers a modification, it will not compare the new modified amount, then being sought, with the amount of support actually paid. Rather, it will compare it with the entire amount of effective support,

168. See supra Part IV.B.
169. See supra notes 49–50 and accompanying text.
including both the portion actually paid and the additional portion transferred as property. If the court finds that the amount of support should be increased, the calculation will take into consideration the entire amount of effective support, not only the amount actually paid. Only such an approach prevents relitigation of the distribution of property in a just way. It also preserves the balance of interests that the spouses achieved at the time of formulating their agreement.170

This approach may be illustrated further with the help of an example. If the parties agree that the level of child support for their two children is $2,000 per month, they must specifically indicate that in their agreement. This is the amount of effective support. Next the parties must designate how payment will be made. For example, they could indicate that $1,000 will be a monetary monthly payment, and $1,000 will be paid by the transfer of property to the custodial parent. A subsequent claim for modification will have to relate to the amount of effective support, which is $2,000, and not to the support that was actually paid in the amount of $1,000. If the modification meets the legislative guidelines and the court determines that there is reason to increase the amount of support to $2,500, it will require payment only of the difference between $2,000 and the new amount to be paid in light of the change that occurred. Thus, the obligor will increase the payment amount by only $500. The court will not order the payment of the difference between $1,000 and the new amount, $2,500. Through this process, the court does not relitigate the division of property. Instead, it recognizes the earlier agreement between the parties and considers the involvement of property with issues subject to modification.

This approach allows the parties greater freedom in negotiating a divorce agreement without concern that the courts may ignore the arrangements they agree upon.171 Sometimes, the spouse obligated to pay support does not have the direct means to make payments, but can exchange that with the distribution of property. The effective support approach allows the spouse to do so and makes it easier for the parties to reach an agreement. This approach may also prevent the various types of indemnification provisions that arise, among other reasons, out of concern that the court might disregard the transfer of property as part of the support payment.172

This approach is also preferable from the perspective of preserving
the value of the family’s property. If the court does not take into consideration the transfer of property between the parties in exchange for the support obligation, the parties will be forced to sell all or part of their property for cash. Generally, the sale of property during divorce proceedings is not beneficial to the family. The value received for the property is usually lower than its value in a sale between a willing buyer and a willing seller. The effective support model prevents the sale of the couple’s property and retains the property within the family. This better preserves the value of the property rather than selling it during divorce.

This approach is also more appropriate from a tax perspective. The contractual determination of effective support, and not the amount of support actually paid, entitles the payor to take tax deductions for payments in the amount of effective support. If the payor gave up his or her portion of the home in exchange for the entire amount of support, that must be calculated for tax purposes as an expense related to support and be deducted from the payor’s income accordingly. This certainly leads to a more just result than ignoring the true nature of the transaction between the parties.


174. See 26 U.S.C. §§ 71, 215 (1982). Professor Mary Ann Glendon has succinctly summarized how these sections addressing the federal tax effects of alimony work together:

Under federal income tax law, “alimony” is deductible by the payor-spouse and taxable to the recipient. Child support is neither deductible by the payor nor taxable to the payee. When the payor-spouse earns significantly more than the recipient, the tax consequences for both are usually minimized (and more income made available for both) by designating the payments as alimony. . . . The domestic relations tax provisions of the Deficit Reduction Act of 1984 have now established a federal standard for determining what types of payments will qualify as alimony and what will be considered child support. Within broad limits, however, the parties are still given substantial freedom to allocate the tax consequences of periodic payments.

Glendon, supra note 145, at 1174 n.24 (citations omitted).

175. However, section 71 of the Internal Revenue Code currently only allows taxpayers to deduct “alimony,” which is specifically defined as a cash payment. See 26 U.S.C. §§ 71(b)(1). This section would need to be amended in order to include the value of the portion of the home given up by the taxpayer as “alimony” and allow this deduction.
Another option for dealing with the interrelationship between property matters and support issues is to contractually allow modification of the property distribution. This is an option that has been put into practice. In Indiana, for example, property distributions (as well as payments constituting property distributions) are modifiable if permitted by a contractual provision between the parties.\textsuperscript{176} I suggest that as long as the current legal situation is not changed in accordance with my proposed approach, attorneys should consider this option in formulating the agreement. When the amount of support is low due to the transfer of property, the parties should specifically state that matters of property distribution may also be modified. The courts should enforce such a condition as part of the agreement between the parties.

An additional option relating to the interrelationship between property matters and support issues is to establish a condition that child support shall not be relitigated. However, the court generally does not enforce such provisions because they may be detrimental to the child.\textsuperscript{177} Similarly, an agreement restricting the modification of below-guideline child support should only be accepted by the court upon its confirmation that the agreement was freely made and that the custodial parent received some substantial economic concession from the other parent.\textsuperscript{178}

This proposed approach creates a more desirable balance among competing interests, permits the restriction of issues subject to modification, leaves the matter of property as one that is not subject to change, and allows modifications to be made in accordance with fixed rules as stated above, without ignoring the transfer of property from one party to

\begin{itemize}
\item \textsuperscript{176} IND. CODE ANN. § 31-15-2-17(c) (LexisNexis 2007).
\item \textsuperscript{177} See supra Part II.
\item \textsuperscript{178} Similarly, under California law, the court shall not approve a stipulated agreement for child support below the guideline formula amount unless the parties declare all of the following:
\begin{itemize}
\item They are fully informed of their rights concerning child support.
\item The order is being agreed to without coercion or duress.
\item The agreement is in the best interests of the children involved.
\item The needs of the children will be adequately met by the stipulated amount.
\item The right to support has not been assigned to the county . . . and no public assistance application is pending.
\end{itemize}
\end{itemize}
\textsuperscript{CAL. FAM. CODE § 4065(a)(1)–(5) (West 2013).}
the other.

3. **The Tort Model**

The proposed model can also be based on and inspired by the existing model of periodic payment as is found in Israeli tort law. In matters involving “continuing expenses,” the Israeli legislature allows the court to award compensation to the injured party in periodic payments as monthly support payments.\(^\text{179}\) Also, in tort law, a past decision may, in the future, be unjust to either of the parties. Therefore, the legal system has a clear interest in adjusting compensation to changed circumstances. In order to balance these interests, the court did not create an exceptional practice, such as in the determination of issues subject to modification based on a discretionary standard.\(^\text{180}\) Instead, the balance in tort is achieved by legislating clear criteria for adjusting compensation through periodic payments.\(^\text{181}\) In order to avoid an abundance of litigation and to ensure greater certainty, a number of rules must be met before bringing a claim for an increase in payments. For example, Regulation 2 of the Compensation Regulations sets forth as follows:

Request for increase in payments:

2. (a) The victim is entitled to request that the court increase payments awarded if the two following conditions are fulfilled:

   (1) The condition deteriorated, including earning capacity, as a result of the traffic accident. . . .

   (2) Six months have elapsed since the last decision in his matter.\(^\text{182}\)

The modification is not subject to the vague changed-circumstances standard. Instead, the regulations set fixed and clear rules determining the extent of the deterioration that allows for a claim for modification.\(^\text{183}\) Moreover, not every deterioration or substantial change in circumstances

\(^{179}.\) See Road Accident Victims Compensation Law, 5735-1975, 780 LSI 234, § 6 (1975) (Isr.); see also Road Accident Victims Compensation (Periodic Payment), 1978, KT 3815, 706 (Isr.) [hereinafter Compensation Regulations].


\(^{181}.\) See id. at 652.

\(^{182}.\) Road Accident Victims Compensation Law, § 6.

\(^{183}.\) Regulation 1(1) of the Compensation Regulations states: “The victim will lose, as a result of the traffic accident, 40 [percent] or more of his future earning ability.” Compensation Regulations, 706.
can bring about a claim for increased payments—the deterioration must be directly connected to a traffic accident.\textsuperscript{184} The regulations set a minimum time period before reinitiating a claim.\textsuperscript{185} In addition, not every party is entitled to request modification. A claim for modification may only be brought by the victim, and not by the party liable for the injury.\textsuperscript{186} This restriction is designed to protect the interest of the injured to undergo rehabilitation, without concern for constantly being under surveillance by an insurance company.\textsuperscript{187}

This model creates an appropriate balance between the interests of the parties in tort law, and can be adapted to family law as well. It is not desirable to rely on the substantial change in circumstances standard that is completely dependent upon the broad discretion of the court and leaves the parties with a lack of legal clarity.\textsuperscript{188} When there is no defined “cooling off period” prior to relitigation, no restriction as to the extent of the change and its causes, and the claim can be for either an increase or decrease in a support payment, the dispute actually remains open. It is more correct to determine criteria and restrictive provisions in family law, as in the tort model. It is more appropriate to determine, for example, that the possibility of adjusting the amount of support will only be the right of the minor. This limitation will at least allow the custodial parent to be economically rehabilitated without concern over an exposure to a claim for decreasing support. In tort law, one must focus on the worsening condition of the injured, and not on the improvement of the injured’s condition or the economic strength of the insurance company.\textsuperscript{189} So, too, in family law, one must focus only on the additional needs of the child, and not on the argument that the child’s needs decreased, or on the economic ability of the obligor. The two latter considerations cannot be the basis for a claim for modification.

\begin{itemize}
\item \textsuperscript{184} If the deterioration derives or results from changes in economic circumstances or from the elimination of an economic field without any connection to the accident, the victim will not be able to request an increase in payments. \textit{Id.}
\item \textsuperscript{185} Similarly, section 6 of the Compensation Law states that payments are linked to the Consumer Price Index, and in that way the possibility of further litigation due to inflationary changes is prevented in advance. Road Accident Victims Compensation Law, § 6.
\item \textsuperscript{186} Road Accident Victims Compensation Law, § 6.
\item \textsuperscript{187} See \textit{Mor}, supra note 180, at 652.
\item \textsuperscript{188} See supra Part IV.C.1.
\item \textsuperscript{189} See \textit{generally} 86 C.J.S. Torts § 1 (2006).
\end{itemize}
Aside from these advantages, there is no doubt that stricter, legislated rules with respect to a future change will result in greater care while determining the provisions of a divorce agreement. They will bring about a serious attempt to relate at that time to possible future occurrences, and to provide in advance for resolving them. It is also possible that this greater stringency may encourage creative solutions by the couples. Such a model is certainly preferable over the present one, in which an attorney might advise clients that the agreement is just an intermediate stage, and that they do not have to make the effort to think about every eventuality, since the agreement may be modified.

Within this intermediate model, it is also possible to develop various alternatives among the two arguments presented above. Here, too, the different systems existing worldwide in tort law can be a source of inspiration. The President of the Supreme Court of Israel, Aharon Barak, wrote the following in the Brada case:

Most of the Civil Law countries (such as Germany, Italy) take the approach of periodic payments, that are modifiable in the future . . . . In a number of systems, an intermediate approach is customary, whether by awarding a one-time payment, subject to change with a change in circumstances (such as Norway, Denmark), or whether by awarding a periodic payment, that is subject to change only in exceptional circumstances (such as France, Belgium).

On that basis, I suggest that one portion of the support payment be made as a periodic payment. That payment should only be modifiable by linking it to the cost of living index, or by meeting clear legislative rules applicable in exceptional circumstances. The other portion of the support

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190. See More, supra note 180, at 653 (“It can be assumed that in the Israeli system in which the original defendant does not have the right for reconsideration, the judges will warn that the judgment is final from the perspective of the defendant.”).

191. As Professor Mor noted,

In France and in Switzerland, for example, there is a huge gap between the written word in the legislation and the customary practice. Despite that in theory the norm there is determining compensation in periodic payments, more than 99% of the instances end with a one-time compensation payment, whether through settlements outside of court or by settlements in court. That is the obvious result in light of the position of all the relevant entities that prefer this sort of compensation.

Id. at 661.

192. CA 357/80 Naim v. Brada 36(3) PD 762 [1982] (Isr.).
obligation should be paid as a one-time fixed payment, not subject to any change.

V. CONCLUSION

A customary ruling in U.S. legal systems is that child support, child custody, and alimony are subject to modification, and may be relitigated upon the occurrence of a substantial change in circumstances. At the same time, marital property distribution is not subject to modification, and as such, may not be relitigated. An analysis of the rationale for defining issues subject to modification, and an examination of divorce agreements in which issues subject to modification are interrelated with marital property distribution, raise questions as to the fairness of this practice and the desirable standard for modification.

This Article challenges the present practice allowing for the modification of certain matters in family law, according to the vague changed-circumstances standard. This standard is subject to broad judicial discretion, and generally lacks guidance for its implementation. As a result, a number of problematic issues arise, including multiple litigations, lack of certainty, lack of fairness, lack of normative uniformity, deterring completion of the dispute by agreement, and deterring rehabilitation. Even more so, other matters that are interrelated with and dependent upon the issues subject to modification are not subject to change at all.

This Article presents two arguments as a basis for a new model that seeks to balance the conflicting interests in family law issues. One argument suggests broadening the application of the modification practice to all the issues that are part of a divorce dispute, especially marital property distribution. A second argument suggests, to the contrary, completely eliminating this practice, and instead, applying to family law two principles that apply to every branch of law, res judicata and the finality of judgments. A new model suggests an intermediate path between these arguments. It incorporates their advantages, and suggests that the changed-circumstances standard be defined through fixed legislative rules. This model is inspired by the system of periodic payments in tort law, along with its provisions that serve to restrict repeated litigation. Included among these fixed rules are a time restriction before reinitiating a claim, a legislative definition and limitation of the change, and a restriction as to which of the parties may initiate future proceedings. To complete the model, when property distribution is deeply interrelated with issues subject to modification, this Article suggests an innovative approach of effective support.
This approach requires the spouses to explicitly define in their agreement an amount of effective support. They also must designate the portion of that support to be paid monthly, and the portion to be paid through a transfer of property. Accordingly, a claim for modification will relate to the entire amount of effective support, and not only to the amount actually paid. Thus, without relitigating the division of property, the court considers the involvement of property matters in issues subject to modification.

This model, with both its components (guidance for defining the changed circumstances standard and the effective support approach), is consistent with the principle of achieving a clean break and likely to be helpful both to couples and to the legal system in setting a clearer and more stable path with respect to disputes following divorce.