

memo

To: JOCO Bar Family Law Section Bench Bar Maintenance Guidelines Committee
From: Mary Kay Kisthardt
Date: June 25, 2018
Re: Maintenance Guidelines

I. Policy Considerations

The policy rationales underlying the payment of spousal support continue to be elusive. Some commentators suggest that justifications include the need for damages for breach of the marriage contract, compensation, unpopularity of using taxpayer support for the lower-income spouse, and division of the economic benefits the marriage reaped.

A small number of states seem to perceive spousal support as primarily a means to remedy severe post-divorce hardship. No spousal support otherwise will be awarded, regardless of the marital duration or the difference in post-divorce incomes. In other states, such as California, courts seem to award post-divorce spousal support almost always if the parties' earnings are significantly different at divorce. In yet other states, spousal support is not common in short marriages but is estimated to be more frequently awarded in longer marriages where the parties' earnings at divorce differ significantly.

Some states, notably Massachusetts, Florida and South Carolina have attempted to address this issue by delineating several forms of maintenance that all reflect an underlying rationale. For instance in Massachusetts, there are several different types of alimony.

“General term alimony” is granted to a spouse who is economically dependent and will usually follow a moderate to long-term marriage. General term alimony terminates when either party dies, when the payor reaches “full retirement age” (as defined in the statute), on the recipient's remarriage, on a date fixed by court order, or perhaps if the recipient maintains a common household with a third party. The order is modifiable unless the parties agree otherwise.

“Presumptive duration” depends on the length of the marriage. After a marriage of twenty years or longer, alimony presumptively ends when the payor reaches full retirement age.

“Rehabilitative alimony” is granted to a spouse who is expected to be self-sufficient by a predicted time. It is available after any length marriage and is payable for up to five years. It is also available after child support ends. It terminates at a set date, upon the recipient's remarriage, or upon the death of either party. It is modifiable in amount and may be extended for compelling reasons if unforeseen events prevent the recipient from becoming self-supporting and the payor can continue to pay without “undue burden.” Because rehabilitative alimony may last longer than the presumptive limit on general term alimony for marriages of five years or less, this may be the most advantageous form for a recipient after a short marriage.

“Reimbursement alimony” is compensation for the recipient's contribution to the payor's financial resources. It is only available if the marriage lasted five years or less. It is not modifiable and is not subject to presumptive durational limits. Reimbursement alimony ends only upon the death of either party or a date certain, so it may be a good choice for a recipient who plans to remarry or live with a new partner.

“Transitional alimony” is granted to transition a recipient to a new location or an adjusted lifestyle after a marriage of five years or less. It terminates upon the death of either party or upon a date not more than three years after the divorce, and it is not modifiable or extendable. It may not be replaced with a different form of alimony.

Currently the Johnson County guidelines provide that the purposes of maintenance are two-fold: “(1) to help mitigate an economic imbalance in future earning power in light of the particular facts of each case, and (2) to assist in rehabilitation of one spouse’s ability to support himself/herself in the future. The primary factors to be considered in this analysis are the needs of one spouse and the ability of the other spouse to pay. The underlying principle of maintenance is that it is transitional in nature and is not intended to constitute a permanent lifestyle.”

In considering whether or not to modify the underlying policy, the committee might wish to review the considerations underlying guidelines in other jurisdictions such as those in New Mexico. They are as follows:

New Mexico Statewide Alimony Guidelines and Commentaries (Revised)

When Alimony Is Generally Appropriate

1. Assuming inadequate income and considering statutory factors, indefinite, modifiable alimony is usually appropriate when:

a. Recipient is disabled.

b. Recipient is fifty-five years or older and has not been employed full time outside the home for the previous five years or more.

c. The parties have a child with a significant mental or physical disability and the recipient is the primary care provider.

2. Marriage < 5 years: Usually no alimony, absent exceptional circumstances (see ¶ 3, below)

3. Marriages > 5 and < 10 years: In this category, there may be situations where alimony (assuming the payer has the ability to pay) would be appropriate using a reimbursement theory or a rehabilitative/transitional spousal support plan:

a. Recipient left a promising career or an exceptionally good-paying job, passed up a substantial job opportunity, or interrupted significant educational opportunities in favor of the marriage.

b. Recipient worked or used separate assets during the marriage to allow the other spouse to obtain professional job skills or advance education, which is not going to be used for the benefit of the community. At the very least there should be spousal support equal to recipient's community share of payer's student loans.

c. There are minor child(ren) under the age of five, and it is not practical for recipient to generate income in excess of work-related childcare costs, or both parties committed to one parent remaining home with the child(ren).

4. Marriages > 10 and < 20 years: In addition to the previously mentioned considerations for an alimony award, alimony in this category will primarily be based on roles assumed during the marriage and the resultant disparity in income or ability to earn, as well as the enumerated statutory factors.

5. Marriages > 20 years: The preceding comments also apply to marriages lasting twenty years or more.

When Alimony Generally Is Not Appropriate

The committee emphasized there is no restriction against an award of alimony in any case. These alimony guidelines were not intended to, and in no way can, replace judicial discretion in awarding

alimony. That said, the committee suggested alimony may not be appropriate in the following situations:

1. When the payer's income from all sources is less than \$20,000 annually. Absent other considerations, payer's ability to pay guideline spousal support may be limited by low income.
 2. No spousal support in marriages of less than five years absent exceptional circumstances.
 3. No spousal support should be expected in marriages of less than ten years where both parties are self-supporting with approximately equal career opportunities.
 4. No spousal support when a proposed recipient is cohabiting with someone other than the payer.
 5. No spousal support when parties' incomes consist of social security and pension income only, and their incomes are approximately equal.
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Probably the most frequent focus of changes in alimony statutes or polices has been a consideration on the effect of retirement. In South Carolina, the 2012 alimony law was changed to terminate alimony upon the payor's retirement.

The New Jersey's State Legislature amended its alimony statute in 2014 to provide a rebuttable presumption that alimony will terminate upon retirement. There a party may seek to terminate or modify his or her spousal support obligation based upon an actual or “prospective” retirement. In other words, the statute authorizes courts to consider a paying spouse's request for termination or modification of alimony when either (1) that person has actually retired or (2) he or she intends to retire but has not yet done so (in which case the court may establish conditions under which the modification or termination will be effective).

As noted above, Massachusetts’ general alimony also terminates on retirement.

II. Variation in guidelines

In those jurisdictions that have adopted guidelines the primary distinctions focus on how the amount is calculated and how the duration is determined.

A. Setting the amount

Unlike the Johnson County guidelines, many states tie the amount of support to be paid to the duration of the marriage. For instance in Vermont, maintenance is generally not available in marriages of less than five years. For marriages between five years and 10 years, the amount is set at 20 to 30% of the difference between the

parties income. For marriages between 10 and 15 years the amount increases to 30 to 40% of the difference and for marriages between 15 and 20 years, the percentage to be used is 40 to 50%. In marriages over 20 years the post divorce income approximates an equal sharing.

The guidelines used in Xenia, Ohio also reflect this pattern with marriages of 5 to 10 years using 25% of the difference as the factor for amount, 30% when the marriage is between 10 and 15 years and in marriages over 15 years the percentage that is awarded of the difference in income is generally 33%.

In other jurisdictions, the formula to determine the amount of the maintenance award does not vary depending upon the duration of the marriage. For instance in Colorado the guideline amount is determined by calculating 40% of the higher-earning party's monthly adjusted gross income and then subtracting 50% of the lower-earning party's monthly adjusted gross income. However, the guideline amount, when added to the recipient's gross income, may not exceed 40% of the combined monthly adjusted gross incomes of both parties. If the resulting amount of the recipient's gross income is more than 40% of the combined monthly adjusted gross incomes of both parties, the guideline amount should be reduced to satisfy the statutory cap.

In Illinois, under the guidelines, the amount of maintenance is calculated by taking 30 percent of the paying spouse's gross income and subtracting 20 percent of the receiving spouse's income. The guidelines also impose a limit to maintenance, as the amount may not result in the receiving spouse getting more than 40 percent of the combined income of the parties.

Massachusetts also created general rules for calculating the amount of alimony. Under the guidelines, alimony generally may not exceed the recipient's "need," which is 30% or 35% of the difference between the parties' gross incomes established at the time of the divorce.

B. Determining Duration

The New York guidelines recently enacted provide that, for marriages that did not last fifteen years, the support duration should be 15% to 30% of the marital duration. This gradually increases so that for marriages that lasted more than twenty years, the support duration should be 35% to 50% of the marital duration. In Maine, for those who have been married less than twenty years, the duration of post-divorce support should not exceed 50% of the marital duration. Pursuant to the informal Vermont Guidelines, for marriages lasting ten to fifteen years, the support duration should be 40% to 60% of the marital duration, which increases to 50% to 70% of the marital duration for marriages lasting fifteen to twenty years.

In Illinois, the duration of the award is calculated by multiplying the length of the marriage by the applicable factor. For marriages lasting: 0 to 5 years, the multiple is .20; for 5 to 10 years, the multiple is .40; for 10 to 15 years, the multiple is .60; for 15 to 20 years, the multiple is .80; and for 20 or more years, the court may either make the duration equal to the length of the marriage (i.e., a multiple of 1.0) or make maintenance permanent.

In Florida, the durational time frame of a marriage for purposes of an alimony award is now characterized by statute as short term--less than seven years of marriage; moderate term--between seven and seventeen years; and long term--more than seventeen years. An alimony award is no longer appropriate in a short-term marriage in the absence of special circumstances--in other words, a rebuttable presumption exists against an award of alimony in marriages of less than seven years--while an award of alimony in a long-term marriage is presumed to be appropriate by law. Specifically, however, the new amendment has lengthened the amount of time parties must be married before a party will have a strong claim for permanent alimony. As a result, the durational time limits of longer-term marriages are extremely important for purposes of seeking an award of permanent alimony. In New Jersey, in a marriage less than 20 years, alimony duration may not exceed that of the length of the marriage except in exceptional circumstances.

Therefore, in many states, one might generalize and say that the estimated duration was approximately 33% to 50% of the marital duration. It should be noted that Kansas is clearly in the minority when limiting the duration of alimony to 121 months; a factor that should be taken into consideration when fashioning guidelines.

C. Income Caps & The Impact of Child Support

A recent trend in guidelines is to place an income cap on their use. For instance, in Colorado the guideline apply only in marriages of three years or longer and where the combined gross income of the parties is \$360,000 or less. For marriages where the combined gross income exceeds \$360,000 annually, all relevant factors and circumstances are to be considered.

In New York, the guidelines apply only in cases where the payor's income does not exceed \$178,000. There, the first step in calculating maintenance under the guidelines is to determine each party's respective income, with a cap on the payor's income of \$178,000. For purposes of the maintenance guidelines, "income" is defined by the child support guidelines without subtracting maintenance paid to a party spouse in the instant action or proceeding. In determining income, the court shall also include income from income-producing property distributed or to be distributed in the action. The second step in calculating maintenance under the new guidelines is to apply one of two formulas using the parties' respective incomes. If the payor spouse *is not* paying child support to the payee (i.e., in situations where there are either no unemancipated children or the maintenance payor is also the custodial parent for child support purposes), then the following formula is used:

Calculate 30% of the payor's income (up to \$178,000) and then subtract 20% of the payee's income; calculate 40% of the parties' combined income (capping the payor's income at \$178,000) and then subtract the payee's income. Finally, compare the resulting amounts from Steps 1 and 2. The lesser amount will be the presumptive amount of maintenance.

New York uses a different percentage if child support is also going to be awarded. In those cases one would calculate 20% of the payor's income (up to \$178,000) and then subtract 25% of the payee's income; calculate 40% of the parties' combined income (capping the payor's income at \$178,000) and then subtract the payee's income and then compare the resulting amounts from Steps 1 and 2. The lesser amount will be the presumptive amount of maintenance.

Notwithstanding the formulas set forth above, the new statute still provides the court with flexibility to deviate from the presumptive amount of both temporary and post-divorce maintenance. Thus, the court may, in its discretion, adjust the award of maintenance in situations where (1) the payor's income exceeds the statutory cap or (2) the court finds that the guideline amount of maintenance would be unjust or inappropriate. If the court chooses to deviate in either of these situations, it must consider a list of factors set forth in the statute.

III. Other Considerations

A. Tax Effects

In Florida, under the 2010 amendments, a trial judge can consider three additional statutory factors in determining alimony: (1) the responsibilities each party has with regard to any minor children they have in common; (2) the tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment; and (3) the sources of income available to either party, including income available to either party through investments of any asset held by that party. One commentator suggested that these new factors will have the greatest impact on longer-term marriages where the parties have significant investment income.

A survey of articles concerning the impact of the recent tax changes concerning alimony all point to the conclusion that the non-deductibility of alimony will make negotiation more difficult. In a white paper drafted for the New Jersey legislature the following example and impact was noted:

“Current Tax Treatment: Spouse A now pays and deducts \$30,000 a year in alimony. Spouse A's income is federally taxed at 33 percent, so the deduction saves her \$9,900. Lower-earning Spouse B owes taxes on the alimony at a 15-percent rate, paying \$4,500 instead of the \$9,900 that would be due at Spouse A's rate. The two have saved \$5,400 between them, and the availability of the deduction to Spouse A makes more of her income available to her following the divorce.

Future Tax Treatment: Spouse A will pay \$30,000 per year in alimony plus \$9,000 in taxes. Spouse B will receive tax free income.

Impact:

1. The arbitrage created by the difference in tax rates has long served as a benefit to the spouse paying the alimony and has been a factor both in negotiating matrimonial settlements and in bridging the gap between the parties'

needs and their actual income. If alimony is no longer deductible, the ability of an ex-spouse to pay it will be limited by the need to pay other necessary fixed expenses such as child support payments and education expenses for children.

2. It is very difficult for divorcing couples to instantaneously make lifestyle adjustments that coincide with the sudden establishment of two households and the consequent reduction of discretionary income to each party. The two households created by a divorce simply cannot function as cheaply as the single household of an intact family. The present tax structure that helps ameliorate those burdens has now been eliminated.

3. The change in tax treatment that gives one party tax-free income creates a perverse disincentive to settle divorce cases because the potential alimony recipient is incentivized to hold out for the highest possible alimony award to maximize tax-free income. Conversely, the potential alimony payer is incentivized to fight to maximize the net income available to preserve their lifestyle. By eliminating the current tax treatment of alimony that splits the financial pain of the divorce, an already difficult and painful process is made even more agonizing by protracting the proceedings. Protracted divorce litigation is contrary to the well-established public policy that favors judicial economy and the settlement of disputes and likely to result in greater emotional trauma that adversely impacts the welfare of the litigants and the children of the marriage”.

Some solutions posed in the White paper are as follows:

1. “Emphasize Tax Considerations. Require judges to make tax considerations paramount in making an alimony award, such as requiring judges to use net income in determining the amount of alimony and replacing maintenance of the marital lifestyle with economic sustainability as the principal governing metric for the amount of the alimony award.

2. Cap Income Available for Alimony. Impose a cap on the amount of income available for alimony. In New Jersey, there has long been an informal “rule of thumb” capping the amount of an alimony award at 1/3 of the difference between the gross incomes of the alimony payer and the recipient. This “rule of thumb” could be enacted as law.

3. Guidelines. Establish guidelines for alimony below a certain income threshold as is presently done with similarly non-deductible child support so that income is preserved for the payer to have the ability to both pay taxes and maintain a lifestyle that is at least roughly commensurate with their personal labor and income. After December 31, 2018, alimony will receive the same tax treatment as child support and child support is determined by a legislated formula and guidelines; consequently, analogous policy considerations should inform the use of guidelines for the award of alimony. Child support guidelines ensure that there is a basic level of income set aside to meet the direct needs of the children of the marriage, while preserving sufficient income to maintain a household. In the same way, alimony guidelines would ensure that there is sufficient income available to satisfy tax obligations.

Many of the computer programs used to calculate guideline amounts take the tax consequence into consideration. These will need to be altered. In addition, the examples used by the AAML in explaining its alimony considerations use examples that rely on the current tax treatment of alimony.

B. Consider What the Judges are Actually Doing

A review of past local initiatives in the United States regarding spousal support might be useful. In Fairfax County, Virginia, and Maricopa County, Arizona, a group of lawyers attempted to fashion a set of rules regarding spousal support that reflected judicial practice in their counties. In Maricopa County, the lawyers then attempted to verify that the proposed set of rules reflected what most judges were actually doing. After this review, they modified the proposed rules in some ways to better reflect what judges actually were doing.