

Report of the American Academy of Matrimonial Lawyers on
Considerations when Determining Alimony, Spousal Support or Maintenance
Approved by Board of Governors
March 9, 2007

Introduction

The mission of the American Academy of Matrimonial Lawyers is "[T]o encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." In 2003 President Sandra Joan Morris appointed a Commission (AAML Commission) to critically review the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION : ANALYSIS AND RECOMMENDATIONS (2002) (PRINCIPLES), to analyze the PRINCIPLES and to make recommendations consistent with the mission of the Academy. The Commission's first project was the Academy's Model for A Parenting Plan which was adopted in November 2004 and published in 2005.¹

After concluding the Parenting Plan the Commission focused on spousal support (also referred to as alimony or maintenance) which remains a difficult issue for practitioners, judges, legislatures and litigants. The ALI Commission conducted a review of Chapter 5 of the PRINCIPLES on Compensatory Payments. The PRINCIPLES are premised on the theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission. The AAML Commission also considered extensive feedback from members of the Academy which was gathered through a national survey, a general meeting of the membership and a discussion session that followed an AAML Commission CLE presentation on the issue.

After considering all these sources of information the Commission concluded that there are two significant and related problems associated with the setting of spousal support. The first is a lack of consistency resulting in a perception of unfairness. From this flows the second problem, which is an inability to accurately predict an outcome in any given case. This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases because without a reliable method of prediction clients are in a quandary.

In response to these concerns, many jurisdictions have adopted a formula approach to setting spousal support. While this approach may appear similar to that used to set child support, there are important differences because the factors for determining spousal support are significantly different than those applicable to setting child support awards. The AAML Commission recognized these differences and its approach for recommending both the amount and length of a spousal support award reflect and respond to the challenges of arriving at a fair result in these cases.

¹ See, Mary Kay Kisthardt, *The AAML Model for A Parenting Plan*, 19 J Am. Acad. Matrim. Law 223 (2005)

The proposed considerations are designed to be used in conjunction with state statutes that first determine eligibility for an award. They are not intended to replace existing state public policy regarding eligibility for an award. In addition, the factors that are listed as deviations are intended to address the considerations for setting an amount and duration of an award found in most states' statutes. These recommendations are ones that the Commission hopes Academy members can utilize in advocating for a fair result for their clients. It is further hoped that the approach outlined here will be adopted by judicial officers and state legislatures as they attempt to provide consistent, predictable and equitable results.

Background

The origins of alimony date back to the English common law system. Historically there were two remedies from the bonds of marriage. Although an absolute divorce was theoretically possible it required an act of Parliament and was therefore hardly ever used. More commonly a plea was made to the ecclesiastical courts for a separation from mensa et thoro (bed and board). The action was akin to our current day separation. A husband who secured such a divorce retained the right to control his wife's property and the corresponding duty to support his wife. When Parliament authorized the courts to grant absolute divorces, the concept of alimony remained and was adopted by the colonies.

The initial rationale based on a fault based system of divorce appeared to be two-fold. First, alimony was seen as damages for breach of the marital contract reflected in the fact that in most states it was only available to the innocent and injured spouse. The other rationale appears to have been the assumption that women would be unable to support themselves through employment. Although these rationales were undermined by the acceptance of no-fault divorce and the rejection of gender stereotyping, the practical reality of women's financial dependency remained in many marriages.

With the advent of no-fault divorce, alimony lost its punitive rationale. The UNIFORM MARRIAGE AND DIVORCE ACT (UMDA) changed the character of these awards to one that was almost exclusively needs based and at the same time gave spousal support a new name: maintenance. The marital standard of living was only one of six factors relied upon in making awards under the UMDA where the focus was now on "self-support" even if it was at a substantially lower level than existed during the marriage. In addition, when awards were made they were generally only for a short term, sufficient to allow the dependent spouse to become "self-supporting". This "first wave" of spousal support reform often left wives, who were frequently the financially dependent spouses in long term marriages, without permanent support.

In response to the denial of long term awards for those most in need of them, the "second wave" of reform took place in the 1990's and expanded the factors justifying an award beyond "need". This new legislation encouraged courts to base awards more on the unique facts of a case and less on broad assumptions about need and the obligation to

become self-supporting in spite of the loss of earning capacity that often occurs in long term marriages. The use of vocational experts to measure earning capacity became more widespread and there were attempts to quantify the value of various aspects of homemaker services as part of a support award. Many courts rejected these latter attempts. Maintenance was sometimes awarded for “rehabilitative” purposes such as providing income for the time it takes the recipient to acquire skills or education necessary to become self-supporting. Additional rationales for maintenance included contract principles such as expectation or quasi-contract doctrines like restitution or unjust enrichment. Left unanswered however, was the critical question of the measure of the dependent spouse’s basic entitlement to support. Is it at the marital standard of living (as provided in the common law) or is it at some other level based on “need”?

The current trend is to provide support based on factors that include need, and in some states, fault. But “need” remains an elusive concept. Is it the marital standard of living? Is it subsistence level? Is it a transfer of money to provide income sufficient to acquire skills or training to become self-supporting? Is it the equitable division of the marital stream of income?

An alternative theory to need-based awards is one premised on “contribution”. Here the idea of marriage as an economic partnership, which is the theoretical basis for a sharing of the partnership’s assets under the rubric of equitable distribution, can also be used as a basis for compensating a spouse for contributions made to the partnership.

The American Law Institute in its PRINCIPLES focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage. The ALI guidelines are premised on the fact that when a marriage is dissolved there are usually losses associated with it such as lost employment opportunities or opportunities to acquire education or training in order to increase earning capacity. The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners. The PRINCIPLES assume a loss of earning capacity when one parent has been the primary caregiver of the children. They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage. Finally, under the PRINCIPLES, compensation could be awarded based on a loss of a return on an investment in human capital (where one spouse has supported the other through school). This would be most important in the vast majority of states that do not recognize enhanced earning capacity or a degree or license as a divisible marital partnership asset.

While these different approaches to alimony reflected in various states may lead to a disparity in result from state to state, what is more troubling is the tendency to see very disparate results within a jurisdiction where the judges are supposedly applying the same statute. These disparate results have led many jurisdictions to adopt formulas in an effort to provide both consistency and predictability.

The AAML Commission Recommendations

The AAML Commission studied approaches used in many jurisdictions. While there are certainly many variations, there are two factors that are considerations in virtually all jurisdictions - income of the parties and the length of the marriage. Seeking to provide a formula that Academy members could use regardless of where they practice, the Commission chose to utilize these two universal factors. It should be noted that the application of the proposed AAML considerations yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions.

The AAML Commission recognizes that the amount arrived at may not always reflect the unique circumstances of the parties. Therefore, deviation factors are used to address the more common situations where an adjustment would need to be made.

The recommendations are:

Amount:

Unless one of the deviation factors listed below applies, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income not to exceed 40 % of the combined gross income of the parties.

Length:

Unless one of the deviation factors listed below applies, the duration of the award is arrived at by multiplying the length of the marriage by the following factors: 0-3 years (.3); 3-10 (.5); 10-20 years (.75), over 20 years, permanent alimony.

“Gross Income” is defined by a state's definition of gross income under the child support guidelines, including actual and imputed income.

The spousal support payment is calculated before child support is determined.

This method of spousal support calculation does not apply to cases in which the combined gross income of the parties exceeds \$1,000,000 a year.

Deviation factors:

The following circumstances may require an adjustment to the recommended amount or duration:

- 1) A spouse is the primary caretaker of a dependent minor or a disabled adult child;
- 2) A spouse has pre-existing court-ordered support obligations;

- 3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);
- 4) A spouse has unusual needs;
- 5) A spouses' age or health;
- 6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;
- 7) A spouse has received a disproportionate share of the marital estate;
- 8) There are unusual tax consequences;
- 9) Other circumstances that make application of these considerations inequitable;
- 10) The parties have agreed otherwise.

The Appendix to this report contains examples of the application of the recommendations to several fact patterns.

Respectfully Submitted,

Mary Kay Kisthardt, Reporter

November 2006

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