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Spousal Maintenance Strategies

Determining Type and Duration, Defining Income, Anticipating Modification and Ensuring Enforceability

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Part I: History of Spousal Support

Once upon a time . . . Alimony.

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Types of Alimony

- ◆ Permanent vs. Temporary
- ◆ Periodic vs. Lump Sum
- ◆ Rehabilitative (time limited)

History

- ◆ Before 1950: Marriage is forever
 - Husband at fault: marital standard of living
 - Wife at fault: no alimony
 - No fault: no divorce!

Problem 1

◆ No fault divorce

- Divorce without a villain
- Marriage not necessarily permanent
- No lifetime duty of support

Problem 2

- ◆ Women's Movement
 - Women can work
 - No lifetime duty of support

Questions Presented

- ◆ No punishment?
- ◆ No lifetime duty of support?
- ◆ What *IS* alimony then?

New basis: NEED

- ◆ All women do not need alimony forever
- ◆ Some women need alimony sometimes
- ◆ Need already relevant to amount of alimony
- ◆ Need now basis of alimony

So, what is this?

- ◆ Alimony
- ◆ Maintenance
- ◆ Spousal support
- ◆ Compensating payments (ALI)

Constitutional concerns

- ◆ Orr v. Orr, 440 U.S. 268 (1979)
- ◆ Equal protection
- ◆ Men have needs, too

What is "Need"

- ◆ Reasonable need
- ◆ Avoid starvation?
- ◆ Marital standard of living?
- ◆ Something in between?

Guideline 1: Duration of Marriage

- ◆ Long marriage: marital standard of living
- ◆ Otherwise reasonable need
- ◆ Avoiding starvation standard avoided

What is a “long” marriage?

- ◆ Varies by state
- ◆ No firm limits
- ◆ 20 plus years usually considered long marriage
- ◆ 5 minus years usually considered short marriage
- ◆ Gave rise to “gray area” marriage idea in Florida

Marital Standard of Living

- ◆ Separate Expense Sheet
- ◆ Testimony of Client
- ◆ Other's Spouse's expenses

"Gray Area" Marriages

- ◆ 5-20 years
- ◆ More need if:
 - Career sacrifice (children)
 - Contribution to earning capacity
 - Fault

Guideline 2: Recipient Must Work

- ◆ Meet needs with own income
- ◆ Anyone can work
- ◆ Everyone should work

Recipient's Income

- ◆ Actual income
- ◆ Imputed Income

Imputed Income: Early False Steps

- ◆ Everyone can work
- ◆ Education is Easy
- ◆ Earning income is Easy!

Falling off a cliff

- ◆ Earning income is easy
- ◆ most recipient's can work
- ◆ Working = no need
- ◆ Rehabilitative alimony (“first wave”)

Uniform Marriage and Divorce Act sec. 308

- ◆ Alimony only if recipient “is unable to support himself through appropriate employment”

Theory Meets Reality

- ◆ Older homemaker can't work
- ◆ Education is sometimes difficult
- ◆ Education is often expensive
- ◆ Too much rehabilitative alimony

Fundamental Causes I

- ◆ Measuring earning capacity is hard
- ◆ No evidence = wrong answer
- ◆ Judges are not experts
- ◆ Earning capacity is a question of fact
- ◆ vocational experts

Fundamental Causes II

- ◆ Answers without reasons
- ◆ Trial court discretion
- ◆ Discretion = no effective appellate review
- ◆ Discretion = inconsistency = less settlement
- ◆ Child support guidelines

A Different Direction: Second Wave Reform

- ◆ Vocational experts
- ◆ findings of fact = show your work
- ◆ Spousal support guidelines

Need for proof

- ◆ In re Marriage of Cohn (California, 1998):

Figures for earning capacity cannot be drawn from thin air

They must have some tangible evidentiary foundation

Vocational Experts

- ◆ Be specific
- ◆ Job is available NOW
- ◆ Spouse would be hired to fill that job
- ◆ Rehabilitative plan (Florida)

Guidelines without Guidelines

- ◆ Appellate case law
- ◆ Temporary support guidelines
- ◆ Guidelines from other states

Pa. R. Civ. P. 1910-16-4(a)

- ◆ With children: 30% difference in incomes
- ◆ Without children: 40% difference in incomes

Va. Code Ann. Sec. 16.1-278.17:1

- ◆ With children: 28% P – 58% R
- ◆ Without children: 30% P – 50% R
- ◆ P = payor, R = recipient

The Future of Alimony

- ◆ Less discretion
- ◆ More vocational experts
- ◆ More guidelines



Part II: Income

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Part II: Income

- II: Determination of Income
 - What constitutes income
 - Finding the income
 - Imputed income (earning capacity)
 - Working with vocational experts



What Constitutes Income

- Start with your child support guidelines
- States don't want a different definition of income for child support and spousal support
- Not limited to federal taxation definition of income



What Constitutes Income

- Wages and salary (including overtime, second jobs)
- Investment, interest, inheritances
- Trust and estate income
- Capital gains
- Income from stock options (that hasn't already been divided in the divorce)
- Social security benefits



What Constitutes Income

- Veterans' benefits
- Military personnel benefits
- Gifts, prizes, grants, lottery winnings
- Income of new spouse (to extent it lessens own expenses)
- Expense reimbursements
- Self-employment income
- Retained earnings



What Constitutes Income

- Pension benefits (to extent has not been divided in divorce)
- In some states, is both property *and* income
- Note on income from business: is not double dipping to value business using future income, and then use future income for spousal support



Finding the Income

- Discovery
- Indirect proof of income
 - Sources and application of funds computation: Hidden income is flagged by comparing income to expenses
 - If one's expenses are \$20,000 per month but the only known sources of income amount to \$10,000 per month then there must be hidden income



Finding the Income

- Indirect proof of income
 - Percentage Mark-Up Analysis
 - The mark up (margin) in a business is the amount added to the cost of an item for sale. Average mark ups can be determined through interrogatory or deposition. This computation can be enhanced by corroboration of industry averages and bank deposits.



Finding the Income

- Net worth expenditures
- Establish assets and liabilities at two fixed points in time. Income is measure by the degree to which net worth has increased.
- The assets consist of cash and cash equivalents such as brokerage accounts, mutual funds, government bonds, accounts and notes receivable. Fixed assets, such as buildings, machinery and equipment, must be incorporated in the computation at cost.



Finding the Income

- Net worth expenditures
 - There may be certain items that are not defined as assets but should be added to the net worth increases since they represent funds which may have been created by income. They could be vacation travel, weekend cottage rentals and gifts. Non-income items such as gifts or inheritances may actually reduce the income in this methodology so you must take these into consideration so as to attempt to obtain the most accurate and realistic income calculation.



Finding the Income

- Bank Deposits

- This method involves summing up all deposits and credits to all known bank accounts of the subject. Adjustments are made to reflect exchanges between bank; non-income deposits such as loans and gifts; sales of capital assets; checks issued to cash which may have been available for redeposit; and cash on hand at the beginning of the period. If certain precautions are taken, total deposits can be considered to represent income.



Imputed Income

- Imputation of income as a matter of law: not working to “earning capacity”: the amount a party could earn if he or she is making all reasonable voluntary efforts to maximize income
- Five factors:
 - Earnings history
 - Education
 - Occupational qualifications
 - Physical and mental condition
 - Job opportunities in appropriate geographic area



Working with a Vocational Expert

- Increasing recognition that a judge can't know a person's earning capacity without evidence
- Satisfy the key elements of evidence
 - Relevance (appropriate to the "station in life")
 - May be advisable to have expert with medical qualifications
 - Personal knowledge (even other spouse can testify in this regard)
 - Primary source material essential (what jobs are available)
 - Judicial notice



Part III: The Factors

- Start with statute
- State statutes point to over sixty different factors in calculating awards of alimony, but only a handful are endorsed by a majority, and from these factors a general national consensus can be gleaned.



The Factors

- Length of marriage (39 of 40 states that list criteria)
- Eleven other factors endorsed by majority of states:
 - Physical and mental health, age
 - Standard of living enjoyed during marriage
 - Need and ability to pay
 - Property division and financial resources of parties
 - Earning capacity
 - Rehabilitation
 - Presence of child



The Factors

- Fifteen other considerations listed by at least one-quarter of the jurisdictions
 - Contributions as a homemaker to the education, career, or earning potential of the spouse
 - Fault
 - Skills, educational and employment history of the couple
 - Income
 - Debts and financial obligations;
 - Tax consequences of any award



The Factors

- Continued
 - Ancillary sources of income and the probability of the recipient becoming self-supporting (along with the cost of the requisite rehabilitative training)
 - Future impairment of career caused by an absence from the job market



The Factors

- Think of factors as two categories:
 - Chronology: look to past, present situation, future circumstances
 - Contribution: financial input into the marital enterprise, personal relationship and the non-economic contributions of the parties within the marriage



Standard of Living During the Marriage

- *Crews v. Crews*, 164 N.J. 11, 16, 751 A.2d 524 (2000): The standard of living experienced during the marriage is the “touchstone” of the alimony award, and its importance “cannot be overstated.”
- Even the American Law Institute’s Principles of the Law of Family Dissolution, which adopts a compensatory theory of spousal support, incorporates the tenet of maintaining marital standard of living.



Marital Standard of Living

- “New Jersey Association of Professional Mediators (NJAPM) Recommendations for Drafting Lifestyle Statements in Light of The Crews Decision”
- *www.fairdivorce.com/FormLifestyleStatement.pdf*



Marital Standard of Living

- Artificially High and Low Standards of Living
- Needs of be objectively reasonable
- Again, the forensic accountant is key

Spousal Maintenance

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Modification of Alimony



Typical Reasons for Alimony Modification

A variety of events may call for an alimony modification. These may include:

- An increase or involuntary decrease in the supporting spouse's income
- An increase or decrease in the recipient's income
- An increase in the cost of living
- A disability that affects either spouse
- A financial emergency (for example, a large medical bill) that affects either spouse
- The recipient's loss of his or her home
- The recipient's cohabitation with another person
- The remarriage of the supporting spouse
- A change in state laws

Current Climate for Modifications

2009 survey of the American Academy of Matrimonial Lawyers (AAML):

- 39% of the nation's top divorce attorneys cite an increase in modifications being made to child support payments.
- 42% of the members report a rise in the number of changes made to alimony payments.

Nonjudicial Modification

- Self-executing clauses of original agreements
 - COLA
 - Escalators
 - Automatic increases or reductions
- Agreed-upon modifications (either before or after case is filed; then embodied in new Order entered by consent)

Actions for Modification Generally

- Substantial change in income or financial status of either former spouse
- New action (jurisdiction and venue)
- WHAT can be modified?
 - Amount of future installments
 - Duration?
 - No retroactive modification of installments after due date

Actions for Modification Generally,

- Discretion of court
- Temporary modification (*pendente lite*)
- “Frequent filer” restrictions

Requirements for Modification

- Final decree awarding permanent alimony
- The alimony is payable in installments (periodic)
 - Periodic payments for uncertain time (death or remarriage) is revisable
 - Exact number and amount of payments WITHOUT other limitations is lump-sum alimony and not modifiable
 - “Terminable allocations” v. “Fixed allocations”

Requirements for Modification

- There has been required change in condition
- The change occurred since the date of the last order
- Periodic limitations (Georgia: two years from date of final order on a previous petition by same former spouse)
- Future automatic modification provision in decree does not prevent modification

Cohabitation as a Change of Condition

- “Live-in Lover” Law / Meretricious Relationship
- Basis for modification NOT termination in Georgia (different results in other states?)
- Parties can agree to automatic termination in event of cohabitation by recipient
- Meretricious + continuous and open (mere periodic sexual encounters are insufficient)

Cohabitation Factors

1. Establishment of a common residence;
2. Long term intimate or romantic involvement;
3. Shared assets or common bank accounts;
4. Joint contribution to household expenses;
and
5. Recognition of the relationship by the community.

Waiver of modification rights

- Right to modify can be waived by either spouse
- Georgia requirements
 - Express waiver referring specifically to that right
 - Clear waiver language referring to right of modification
 - “No magic words”

Waiver of modification rights

- Approved language
 - "The parties hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein, based upon a change in the income or financial status of either party."
 - *Varn v. Varn*, 242 Ga. 309 (1) (248 SE2d 667) (1978)

Effect of Prenuptial or Postnuptial Agreements on Alimony



Restrictions on Waiver of Alimony In Postnuptial Agreements



Enforcement of Alimony



Enforcement as Judgment

- Levy/Execution
- Garnishment
- Wage garnishment

QDRO

A QDRO is:

- A domestic relations order ("DRO")(see below for definition)
- That creates or recognized the existence of an "Alternate Payee's" right to receive, or assigns to an Alternate Payee the right to receive, all or a portion of the benefits payable with respect to a participant under a qualified retirement plan and
- That includes certain information and meets certain other requirements.

QDRO

A DRO is:

- A judgment, decree or order (including the approval of a property settlement agreement)
- That is made pursuant to state domestic relations law (including community property law and
- That relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child or other dependent of a participant.

QDRO

Did you know that:

- There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve a Domestic Relations Order ("DRO").
- Alternate Payee's who are involved in domestic relations proceedings are entitled to access the plan and participant benefit information (such as summary plan description, relevant plan documents, statement of participant's benefit entitlements) sufficient to prepare a QDRO before submission of a DRO. However, the plan administrator may condition disclosure on a prospective Alternate Payee providing sufficient information to reasonably establish that the request is being made in connection with a domestic relations matter.

Contempt



Contempt: Types

- Civil
- Criminal

Civil Contempt: Nature and Purpose of Remedy

- Judgments for alimony carry an obligation to society
- More than a private debt
- Subjects obligated spouse to contempt
- Not imprisonment for debt
- Purpose is remedial rather than punitive

Requirements of a Claim

- Judgment/order entered by the court
- Wilful refusal
- Ability to pay
- Violations of spirit as well as letter of decree

Defenses

- Inability to pay
- Void judgment and decree
- Supplemental payments
- Reliance on agreement
- Vagueness

Appointed Attorneys in Civil Contempt Cases



A Word About UIFSA



