

**THE NEW YORK STATE LAW REVISION COMMISSION**

**PRELIMINARY REPORT**

**ON**

**MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS**

**June 11, 2010**

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## **I. Introduction**

At the request of the Chairwoman of the Assembly Judiciary Committee, the Honorable Helene E. Weinstein, we have conducted a preliminary examination of the statute governing maintenance in divorce proceedings.

The dissolution of a marriage involves three financial components: equitable distribution of marital assets, support for minor children, and maintenance, a stream of income to be paid by one spouse to the other following the divorce, in an amount and for a period of time settled on by the parties or awarded by the court. A finding of eligibility for maintenance is the key element for an award; if the court finds the individual to be eligible, the court will then determine the amount of the award and its duration.

Some divorcing parties, intent upon severing all ties, have no desire for maintenance; other individuals forego maintenance because the process of obtaining it is too complex. This complexity is compounded by a lack of predictability as to whether they will be granted maintenance and a lack of consistency in maintenance awards in marriages of similar length and economic circumstances. Still others are dissatisfied with the system because they received no award or believe their awards are inadequate. If New York were to adopt no-fault divorce, these same problems are likely to continue, and may in fact be exacerbated.

Anecdotal evidence suggests that problems with maintenance fall hardest on low income and middle income spouses who may or may not be represented by counsel. By contrast, parties in marriages involving substantial wealth can retain attorneys who will engage in extended settlement negotiations or litigation to secure maintenance. Still, there is no empirical evidence concerning the circumstances under which maintenance awards are made and the terms of those

awards.

Based on our preliminary review, we have concluded that any change in New York law regarding maintenance awards should occur only after a detailed study of all the maintenance related issues. Each of the elements of a maintenance award (eligibility, amount and duration) is a complex matter that warrants its own analysis. Given the current division in the appellate divisions regarding the role fault should play in maintenance awards,<sup>1</sup> consideration must also be given to the impact of the enactment of a no-fault divorce law on whether fault nonetheless would play a role in maintenance awards.

While substantial anecdotal evidence of problems with predictability of awards, and inconsistency in court awards exists, there is insufficient empirical data from which to draw meaningful and helpful conclusions. A complete study should include an empirical analysis of current practices in New York. Likewise, any study should include an analysis of how various methods used to address similar problems in other states would affect maintenance awards in New York.

We are prepared to undertake such a study should the Legislature request or direct us to do so.

This Preliminary Report reviews New York's current statutory and case law regarding maintenance awards, examines trends in the law governing maintenance across the country, and reviews current legislative proposals in New York and certain other jurisdictions.

## **II. New York**

### **A. Historical Background**

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<sup>1</sup> See discussion *infra* at p. 7-8.

Historically, alimony (the predecessor to maintenance in New York and elsewhere) formally entered New York's statutory law in 1813.<sup>2</sup> The statute provided for an award of alimony for a non-adulterous wife, a limitation that was ultimately eliminated.<sup>3</sup> Alimony was "viewed as a substitution for a husband's duty to support his wife,"<sup>4</sup> rather than an award of assets to which she had title.<sup>5</sup> When a wife was awarded alimony, she was entitled to support until her death or remarriage.<sup>6</sup> In determining the size of the award, courts looked primarily to the wife's needs and the husband's station in life.<sup>7</sup> The court also considered the husband's degree of fault and the wife's financial contribution to the marriage.<sup>8</sup>

While there is little evidence to suggest that the law gave a significant economic advantage to women,<sup>9</sup> alimony was viewed as "a divorced wife's primary economic

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<sup>2</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431, n. 213 (1988)(citing 1813 Laws of New York). Historically, alimony was connected to the husband's obligation to support his wife during the marriage and was available through the ecclesiastical courts as part of a separation. Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 428, n. 205 (1988). *See also*, Mary Kay Kisthardt, Barbara Ellen Handschu, *Setting Alimony: Prevailing Theories, Factors Courts Consider, Tips for Addressing the Issue*, 20 NO. 7 Matrim. Strategist 1, 1 (2002); J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 Calif. L. Rev. 1091, 1095 (1992).

<sup>3</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 430, n. 213 & 442-43 (1988).

<sup>4</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>5</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>6</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 431 (1988).

<sup>7</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 627 (1991).

<sup>8</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 627 (1991).

<sup>9</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 433 (1988).

entitlement”<sup>10</sup> until well into the 20<sup>th</sup> century. By the 1970s, however, the limitations of New York’s alimony statute had become clear.<sup>11</sup> The statute focused on the net needs of the dependent spouse and the ability of the other spouse to meet those needs but failed to address the potential of rehabilitation, namely, “fostering the future financial independence of a divorced spouse . . .

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## **B. Divorce Reform**

Advocates for divorce reform turned their attention to equitable distribution of marital assets as the major path to economic independence for the divorcing wife, with alimony playing a subordinate role.<sup>13</sup> When divorce reform occurred in 1980, marriage was viewed as an economic partnership to which both parties contribute as spouse, wage earner or homemaker, and from which assets acquired during the marriage would be distributed equitably.<sup>14</sup> At the same time,

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<sup>10</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 628 (1991).

<sup>11</sup> Timothy Tippins, *I New York Matrimonial Law and Practice* 6-3 (1984-2004).

<sup>12</sup> Timothy Tippins, *I New York Matrimonial Law and Practice* 6-3 (1984-2004). For example, in *Lewis v. Lewis*, 37 A.D.2d 725, 323 N.Y.S.2d 864 (2<sup>nd</sup> Dep’t 1971), the wife, employed during the marriage as a practical nurse at a salary of \$6,000, decided to return to college upon dissolution of the marriage, to obtain a Bachelor of Science degree in nursing. The trial court awarded alimony to assist her; however, the Appellate Division reversed, stating that the husband “should not be compelled to support [the wife] as she voluntarily left her well-paying position to seek a college degree and is therefore capable of being ‘self-supporting’ within the meaning of section 236 of the Domestic Relations Law.” 37 A.D.2d 725, 725, 323 N.Y.S.2d 864, 865. As one commentator notes, “[t]he fact that the wife’s ‘well-paying position’ yielded an annual income of approximately \$6,000 per year and her reasonable needs may have changed dramatically as a result of the marital breakup were simply not within the judicial purview in rendering an alimony determination.” Timothy Tippins, *I New York Matrimonial Law and Practice* 6-3 (1984-2004).

<sup>13</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 629 (1991). Advocates saw property distribution as a fairer alternative to alimony because courts awarded alimony infrequently, and when awards were made, the payor spouse frequently did not pay. *Id.* at 629-630. This shift also reflected a compromise by surrendering long term alimony for an immediate award of equitable distribution. Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 446 (1988).

<sup>14</sup> Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 445 & n. 279 (1988).

alimony was renamed “maintenance”<sup>15</sup> to demonstrate that the purpose of a post divorce support award was to allow a spouse an opportunity to achieve financial independence.<sup>16</sup> One commentator has observed that “[t]he new law’s operating premise [was that] that the dissolution of a marriage in this State is to be regarded as the winding up of a partnership, and . . . [also the] rehabilitating or supporting [of] a dependent spouse, i.e., one whose marketable skills, and therefore independence, have been sacrificed during the course of the marriage for the role of a homemaker.”<sup>17</sup> Not long after the 1980 reform, it had become apparent that the goal of rehabilitative maintenance was working against women who had been out of the work force during long term marriages and thus had no realistic hope of obtaining employment after a divorce. Thus, in 1986, the law was amended to recognize that “economic rehabilitation was not always possible and placed equal emphasis on the importance of achieving equity between the

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<sup>15</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev 621, 639 (1991). With the promulgation of the Uniform Marriage and Divorce Act (UMDA), alimony acquired the name “maintenance” on a national level. Mary Kay Kisthardt, *Re-thinking Alimony: the AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 65-66 (2008)(citing UMDA § 308, 9A U.L.A. 147, 347 (1987)).

<sup>16</sup> Timothy Tippins, *I New York Matrimonial Law and Practice* 6-3 - 6-4 (1984-2004). See Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 456-57 (1988)(indicating that the focus on rehabilitative maintenance arose out of the inaccurate perception that pre-1980 alimony awards were excessively generous and they should be curtailed.). In 1986, the law was amended to clarify that long term maintenance awards were to be considered. Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev 621, 641 & n. 80 (1991).

<sup>17</sup> Timothy Tippins, *I New York Matrimonial Law and Practice* 6-6 (1984-2004)(citing *Conner v. Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2<sup>nd</sup> Dept. 1983)(“[a]bsent agreement to the contrary, under the Partnership Law the rule is that, after repayment of whatever property he brought into the partnership, i.e., contributions of capital or advances, a partner is entitled to share equally in the profits and surplus earned through the efforts of all partners with such contributions. The distribution is equal and final. Rehabilitation is unavailable. No partner is entitled to remuneration for services rendered. A partner, therefore, has no claim to the specific performance of services of another partner, nor to damages for their loss, even though he may have sacrificed some of his more lucrative skills in order to advance the interests of the partnership (e.g., by performing administrative chores), thus enabling the other partner to enhance his marketable skills. Nor does a partner have a claim to another partner's future labors on the theory that such constitutes good will in which all partners must share upon dissolution.”)(citations omitted).

parties [by making the statute's primary focus] the standard of living of the parties established during the marriage.”<sup>18</sup>

### **C. Current Law – Domestic Relations Law § 236B**

As noted on page 3 of this Report, three issues are considered in awarding maintenance under section 236B of the Domestic Relations Law: eligibility, amount and duration. Eligibility is based on the parties' standard of living established during the marriage, the reasonable needs of the party lacking sufficient property and income, and the financial ability of the other party to meet those needs.<sup>19</sup> The court may also award interim or temporary maintenance during the pendency of the action.<sup>20</sup>

In determining the amount and duration of the award, the court must consider the following factors:

- (1) the income and property of the respective parties including marital property distributed pursuant to [equitable distribution];
- (2) the duration of the marriage and the age and health of both parties;
- (3) the present and future earning capacity of both parties;
- (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
- (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
- (6) the presence of children of the marriage in the respective homes of the parties;
- (7) the tax consequences to each party;
- (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (9) the wasteful dissipation of marital property by either spouse;
- (10) any transfer or encumbrance made in contemplation of a matrimonial action without

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<sup>18</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.3 (West 2009).

<sup>19</sup> Dom. Rel. Law §236B(6)(a).

<sup>20</sup> Dom. Rel. Law §236B(6)(a).



- fair consideration;  
(11) the loss of health insurance benefits upon dissolution of the marriage;<sup>21</sup> and  
(12) any other factor which the court shall expressly find to be just and proper.

These statutory factors are sufficiently nuanced to allow the court to consider the individual circumstances of the marriage. In making an award, the court must set out the factors upon which it relies.<sup>22</sup>

Although divorce in New York is still fault based, the statute is silent as to whether fault should be considered in determining maintenance. Commentators have suggested that the twelfth factor is a “wild card” that allows the court in its discretion to consider fault.<sup>23</sup> The decisions of the New York courts reflect a division on how to treat fault.<sup>24</sup> The First and Second Department generally do not consider fault; the Third Department considers fault as a factor; and the Fourth Department generally only considers egregious fault.<sup>25</sup>

#### **D. Problems of Predictability and Inconsistent Decisions**

Over time, achieving economic independence for a divorced spouse through equitable distribution of marital assets proved illusory for many because there were insufficient assets

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<sup>21</sup> The loss of health insurance was added as a factor to be considered in awarding maintenance in 2009. L.2009, c. 229, amending N.Y. Dom. Rel. L. §236B(6).

<sup>22</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.1 (West 2009).

<sup>23</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009); Isabel Marcus, Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State, 37 Buff. L. Rev. 376, 448, n. 284 (1988).

<sup>24</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009).

<sup>25</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.17 (West 2009). *See also* Marsha Garrison, Good Intentions Gone Awry, 57 Bklyn L. Rev. 621, 639 (1991)(what constitutes egregious fault depends on the court). *See generally* Harriet Newman Cohen and Tim James, Egregious to a Fault: When does Bad Behavior Affect Financial Determinations? New York Law Journal, July 28, 2008.

accumulated during the marriage to make that independence a reality.<sup>26</sup> Additionally, problems regarding predictability and consistency of maintenance awards began to emerge.<sup>27</sup> One of the reasons offered to explain the difficulty of achieving some measure of certainty regarding maintenance is that even though alimony has long been a feature of divorce law, there is little clarity as to “why either spouse should have a financial obligation to the other that survives marriage.”<sup>28</sup>

Eligibility for maintenance in New York is premised on need and the parties’ standard of living. That premise has been roundly criticized. Defining the standard of living upon which the need is based is difficult; determining which standard of living should control - the one at the beginning, middle or end of the marriage - is difficult.<sup>29</sup> “Should generous payor spouses be penalized in a divorce with a high alimony payment to meet the standard of living, when parsimonious spouses are rewarded? Should public policy define a ‘middle class’ standard when the payor spouse is able? Or a necessities standard?”<sup>30</sup>

The American Law Institute in promulgating its Principles of the Law of Family

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<sup>26</sup> Marsha Garrison, *Good Intentions Gone Awry*, 57 Bklyn L. Rev. 621, 639 (1991). *See also* Isabel Marcus, *Locked in and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 Buff. L. Rev. 376, 461-462 (1988).

<sup>27</sup> Marsha Garrison, *Reforming Divorce: What is Needed and What is Not*, 27 Pace L. Rev. 921, 925 (2007).

<sup>28</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 39 (2001)(paraphrasing Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989)).

<sup>29</sup> Victoria M. Ho and Jennifer J. Cohen, *Are Alimony Guidelines in Our Future?*, 15 NO. 11 Divorce Litig. 189 (November 2003).

<sup>30</sup> Victoria M. Ho and Jennifer J. Cohen, *Are Alimony Guidelines in Our Future?*, 15 NO. 11 Divorce Litig. 189 (November 2003).

Dissolution noted that “alimony has become a “residual category to provide remedies in a wide variety of cases that do not share any consistent pattern,” so it makes no sense to cobble together a definition of “need” to capture them all.<sup>31</sup> Requiring consideration of the standard of living established by the parties during the marriage has also been criticized as a unrealistic measure for life after divorce because the married couple living in one household has to establish two separate households after the divorce, each with all the costs formerly associated with one household.<sup>32</sup>

Another potential source of unpredictability and inconsistency is the unprioritized list of statutory factors which New York courts, as well as courts in virtually all other states, must consider in determining the amount and duration of an award. As a result, the award is left largely to the court’s discretion.<sup>33</sup> These factors are designed to promote individualized treatment, as it is generally accepted that the dissolution of a marriage is a complex matter, and that each marriage should receive nuanced treatment in light of its own particular circumstances.

Commentators have suggested that this “list of factors with no indication of relative weight and no over-arching guideline other than the vague admonition to be fair is virtually the

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<sup>31</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 27 (2002). See discussion *infra* at p. 14-16.

<sup>32</sup> Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.3 (West 2009).

<sup>33</sup> N.Y. Dom. Rel. Law §236B(6). See Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L.J. 23, 35 (2001)(noting that 40 states require their courts to consider a list of specific factors in awarding maintenance. The remaining ten offer a general admonishment to do what is just.).

same as providing no factors.”<sup>34</sup> Such a highly discretionary statute may, however, not be the only cause of these perceived problems. With an individualized approach, a lack of predictability may be inevitable. Reported decisions may not contain the complete record of all the pertinent factual circumstances that could explain divergent results, and the bench and the bar may not always be attuned to the statute’s nuances.<sup>35</sup>

Individualized treatment for each marriage on the one hand, and predictability and consistency on the other, are difficult to reconcile. In the brief time that we have been studying this issue, the conflict has become readily apparent.<sup>36</sup> The American Law Institute has commented that “[p]redictable results follow best from clear, determinate, easily applied rules. Individualized results generally are associated with open-ended standards allowing judges to respond to the infinite variety of individual circumstances that these cases present.”<sup>37</sup>

After a 20-month study, the 2006 Report of Chief Judge Kaye’s Matrimonial Commission concluded that its members were unable to resolve the problems regarding maintenance.<sup>38</sup> They

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<sup>34</sup> Marti E. Thurman, Maintenance: a Recognition of the Need for Guidelines, 33 U. Louisville J. Fam. L. 971 (1995)(citing Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1196 (1986)). See also Alan D. Scheinkman, New York Practice Series - New York Law of Domestic Relations §15.4 (West 2009)(“it is difficult to extrapolate clear guidelines even from cases involving similar facts.”).

<sup>35</sup> Christopher R. Musulin, Alimony Guidelines: Should New Jersey Adopt a Formula Approach for Spousal Support 1, n. 1 (March 18, 2009), available at <http://www.sjerseylawyer.com/CM/Custom/Article%20on%20Alimony%20for%20NJ.pdf>. Mr. Musulin indicates that there is no consensus in New Jersey as to what approach might resolve the perceived problem. Telephone call between Mr. Musulin and Rose Mary Bailly, June 8, 2010.

<sup>36</sup> Although we spoke to a number of practitioners and others experts on New York’s domestic relations law, time did not permit extensive interviews.

<sup>37</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 1-2 (2002).

<sup>38</sup> 2006 Report of Chief Judge Kaye’s Matrimonial Commission 66 (2006), <http://www.courts.state.ny.us/reports/matrimonialcommission>.

were, however, “largely in agreement that the issue deserved greater attention, study and research and, therefore, urges that this matter be addressed in the immediate future.”<sup>39</sup>

Moreover, while anecdotal evidence suggests that problems with maintenance are widespread, the actual number of divorces affected is unclear. At the present time, the Unified Court System collects some data regarding the financial components of a divorce. The data is collected from information provided on the Child Support Summary Form for the Supreme Court and Family Court for each proposed judgment or final order which includes a provision for child support.<sup>40</sup> The information includes the gross income of each party, the child support payment by each parent, any property allocated through equitable distribution, if maintenance is awarded, and, if so, the amount.<sup>41</sup>

While this information is valuable as far as it goes, additional data is needed to assess the current practices regarding maintenance awards. At the very least, the additional facts collected should include the age of each party, the length of the marriage, the duration of any maintenance award, whether the resulting award was the result of a settlement or a trial, and the county in which the divorce was granted. This data should be gathered in a way that preserves the confidentiality of the parties.<sup>42</sup>

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<sup>39</sup> 2006 Report of Chief Judge Kaye’s Matrimonial Commission 66 (2006), <http://www.courts.state.ny.us/reports/matrimonialcommission>.

<sup>40</sup> Form UCS-111, available at [http://www.nycourts.gov/litigants/divorce/forms\\_instructions/UCS-III.pdf](http://www.nycourts.gov/litigants/divorce/forms_instructions/UCS-III.pdf)

<sup>41</sup> N.Y. Jud. L. §216. The form is Form UCS-111.

<sup>42</sup> A similar recommendation for gathering information regarding implementation of the child support guidelines was made in the 2001 New York State Child Support Standards Act Quadrennial Evaluation. See David W. Dlugolecki, New York State Child Support Standards Act Quadrennial Evaluation x, June 2001.

Importantly, understanding the nature and substance of awards will better inform decisions about whether, and if so, how the law should be changed.<sup>43</sup>

Two proposals to amend the Domestic Relations Law regarding maintenance are currently under consideration in the New York State Legislature, A. 2580-C/S. 5667-B, and A 10984-A/S 7740-A. They will be reviewed in the context of trends regarding maintenance across the country and legislative proposals in other states.<sup>44</sup>

### **III. Developments in the Law of Maintenance**

Several trends regarding the law of maintenance seem to be emerging across the country. These include efforts to identify a rationale for awarding maintenance or alimony, and efforts to develop various formulas intended to provide predictability and consistency in maintenance awards.

#### **A. A Rationale for Maintenance**

Maintenance has been described as a “practice in need of a purpose.”<sup>45</sup> “Although alimony has long been a feature of divorce law, there is no one rationale for explaining why

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<sup>43</sup> Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 Bklyn L. Rev. 621 (1991). *See also* Alton A. Abramowitz, *New York’s Post-marital Compensation Guidelines*, 10 No. 2 N.Y. Fam. L. Monthly 1 (October 2008). In a telephone conversation with Christopher R. Musulin, Esq., author of *Alimony Guidelines: Should New Jersey Adopt a Formula Approach for Spousal Support* 1, n. 1 (March 18, 2009), available at <http://www.sjerseylawyer.com/CM/Custom/Article%20on%20Alimony%20for%20NJ.pdf>, Mr. Musulin indicates that the Alimony Committee, a standing committee within the Family Law Section of the New Jersey Bar is beginning to collect data on divorces as a preliminary step to address problems in New Jersey that similar to those in New York. Telephone call between Mr. Musulin and Rose Mary Bailly, June 8, 2010.

<sup>44</sup> *See discussion infra* at p.26-30.

<sup>45</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women’s L.J. 23, 35 (2001).

either spouse should have a financial obligation to the other that survives marriage.”<sup>46</sup>

One commentator has catalogued “ten overlapping explanations” as justifying the continued sharing of income post-divorce: coverture, need, ability to pay, contract, partnership, economic dislocation, personal dislocation, compensation, fault and taxpayer burden.<sup>47</sup> The first three explanations, coverture, need, and ability to pay, reflect the economic restrictions on the wife that resulted from her marital status.<sup>48</sup> Coverture, the duty of a husband to support his wife because “he owned and controlled all her property, all her earnings and her services,” no longer can be used as an explanation for alimony, since the wife no longer forfeits her property rights when she marries.<sup>49</sup> The explanation of need is that the amount of her support would be based on her needs, as limited by her former husband’s ability to pay.<sup>50</sup>

The next five explanations, contract, partnership, economic dislocation, personal dislocation, and compensation, reflect a less traditional view of alimony. Here, alimony is compensation: payments to “make a former spouse whole at the end of the marriage by rewarding efforts in homemaking, childrearing, interruption of a career, or contributions to the

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<sup>46</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 39 (2001)(paraphrasing Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989)).

<sup>47</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 39 (2001).

<sup>48</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 39 (2001).

<sup>49</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 40 (2001)(quoting Joan M. Krauskopf and Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L. J. 558, 563 (1974)).

<sup>50</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 39 (2001).

success of the other. These are based on theories of contract or partnership law, of economic or personal dislocation, and on general equitable principles of compensation.”<sup>51</sup>

The final two explanations, fault and the burden on taxpayers, explain alimony as a “deterrent to or punishment for marital misconduct, or as a pragmatic assignment of economic responsibility to a former spouse rather than to the taxpayers.”<sup>52</sup>

Two additional rationales, compensable losses and marital residues, deserve further discussion.

### 1. “Compensable Losses”

In 2000, after a ten year study of child custody, child support, equitable distribution, and alimony, the American Law Institute (ALI) adopted “Principles of the Law of Family Dissolution”<sup>53</sup> describing compensable losses as the underlying rationale for an alimony award.

The ALI concluded that the focus of maintenance should be the loss “that results at least in part from an unfair distribution of the financial losses arising from the marital failure,” and that therefore the justification for the payment is a remedy for the unfair distribution, not a remedy for need.<sup>54</sup> Accordingly, the ALI calls the remedy “compensation for loss,” and uses the

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<sup>51</sup> Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L.J. 23, 39-40 (2001).

<sup>52</sup> Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L.J. 23, 40 (2001).

<sup>53</sup> Lance Liebman, Director's Foreword, American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations xv (2002). The ALI decided to produce “principles” rather than the customary “restatement” because, considering how much of the law is statutory, guidance is needed for legislatures as well as for courts, and because “principles” seemed a more apt title for a study that considered the best interests of children, fairness to divorcing couples, and the economic claims of unmarried couples. *Id.*

<sup>54</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 27 (2002).



term "compensatory payment" instead of alimony, spousal support, or maintenance.<sup>55</sup>

The compensable losses recognized under the Principles are:

(a) A loss in the living standard experienced at dissolution by the spouse with less wealth or earning capacity in a marriage of significant duration,

(b) An earning-capacity loss incurred during marriage but continuing after dissolution and arising from one spouse's disproportionate share, during marriage, of the care of the marital children or of the children of either spouse.

(c) An earning-capacity loss incurred during marriage and continuing after dissolution, and arising from the care provided by one spouse to a sick, elderly, or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly.

(d) A loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity.

(e) An unfairly disproportionate disparity in the spouses' respective abilities to recover their pre-marital living standard after the dissolution of a short marriage.<sup>56</sup>

The fact that a loss is identified does not necessarily lead to reallocation unless a loss falls disproportionately on one spouse.<sup>57</sup>

In 2003, the American Academy of Matrimonial Lawyers (AAML) which had convened a commission to, among other things, review the ALI's Principles, rejected the ALI's theory that spousal support should be based exclusively on compensation for losses occurring as a result of the marriage and focused instead on the practical problems of inconsistency and unpredictability

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<sup>55</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 27 (2002).

<sup>56</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 799 (2002).

<sup>57</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 799 (2002).

of awards.<sup>58</sup>

In 2008, a study of the influence of the ALI Principles concluded that their impact on policymakers and courts has been negligible.<sup>59</sup>

## 2. Marital Residuals

A relatively recent rationale called “marital residuals” argues that “there should be some degree of sharing of post-divorce incomes to reflect the returns flowing from efforts made while the marital joint venture was operational – an equitable sharing of the residual economic benefits from work done during the marriage.”<sup>60</sup> To avoid an unjust enrichment to either spouse as a result of the marriage’s dissolution, this rationale combines “the conceptual framework of the needs (and ability to pay) rationales and the partnership theories . . . .”<sup>61</sup>

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Selecting the rationale upon which an award of maintenance in New York should be based is a daunting task. It involves evaluating all the rationales currently put forth and making difficult policy decisions which will make sense to divorcing spouses whose main concern is

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<sup>58</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

<sup>59</sup> Michael R. Clisham and Robin Fretwell Wilson, American Law Institute’s Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote, 24 Family Law Quarterly 573 (2008).

<sup>60</sup> Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women’s L.J. 23, 49 (2001).

<sup>61</sup> Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women’s L.J. 23, 49 (2001) (“In practice, however, it would obviate the need to struggle with amorphous questions of the nature and value of past personal contributions, and the equally problematic inquiries into defining and calculating future needs. Rather than attempt to share the *loss* stemming from marital dissolution, this approach seeks to establish a fair allocation of the residual *gains* accruing after the fact from the marital venture.”). This approach raises concerns in light of the fact that in New York enhanced earning capacity is treated as an asset under equitable distribution. See *O’Brien v. O’Brien*, 66 N.Y. 2d 576 (1985).

their own financial wherewithal. Nor will a chosen rationale necessarily address the concerns regarding predictability and consistency in alimony awards unless the manner for determining an award is supported by the underlying rationale.

## **B. Formulas**

Another trend is the development of formulas for calculating an award. These formulas include the American Law Institute (ALI)'s "Principles of the Law of Family Dissolution," the American Academy of Matrimonial Lawyers (AAML) Guidelines, Canadian Guidelines, and other mathematical formulas adopted to varying degrees in various jurisdictions.

### **1. The American Law Institute (ALI) Principles of the Law of Family Dissolution**

The Principles recognize five categories of what it calls "compensable losses" that either or both spouses may incur when the marriage dissolves.<sup>62</sup>

The formula for what some jurisdictions would call "rehabilitative maintenance"<sup>63</sup> is "half the amount necessary to allow the [payee] to recover his or her premarital living standard."<sup>64</sup>

For what some jurisdictions call "reimbursement maintenance,"<sup>65</sup> the ALI formula first

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<sup>62</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), Chapter 5, "Compensatory Spousal Payments."

<sup>63</sup> "An unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after the dissolution of a short marriage." American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), § 5.13.

<sup>64</sup> American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 897 (2002), § 5.13(3).

<sup>65</sup> "The loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity." American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), § 5.12.

determines the payor's total education and training costs by adding his or her share of the family living expenses during training, to the direct educational costs, then subtracts the payor's income during that period, any outstanding debts incurred during that period that are assigned to the payor, and expenditures made during that period from the payor's separate property, and adjusts for changes in the value of the dollar.<sup>66</sup>

For the other three, earning capacity losses arising from the care for children or others,<sup>67</sup> and a loss in living standard after a long marriage,<sup>68</sup> the approaches are not nearly as clear-cut. Here, the Principles create a series of presumptions, but do not translate them into concrete formulas. The Principles leave it to the states to provide the rules.

Thus, the formula for spousal support after a long marriage requires the state to determine the minimum marital duration and spousal income disparity that will determine entitlement to an award. To determine the amount, the state must supply a percentage to apply to the difference between the spouses' incomes. This percentage "should increase with the duration of the marriage until it reaches a maximum value set by the [state]."<sup>69</sup> The state must set minimum values for the age of the payee and length of the marriage for a presumption of indefinite support.

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<sup>66</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 889 (2002), § 5.12(4).

<sup>67</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), §§ 5.05 and 5.11. The formulas are found at §§ 5.05 and 5.06.

<sup>68</sup> "In a marriage of significant duration, the loss in living standard experienced at dissolution by the spouse with less wealth or earning capacity." American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), § 5.04.

<sup>69</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), § 5.04(3). The award amount is presumed to be in the form of periodic payments, calculated by applying a state-determined percentage to the difference between the spouses' incomes.

For fixed term support, the state must supply a factor to apply to the length of the marriage.<sup>70</sup>

The presumptions can be rebutted when the facts establish that the presumption's application to a particular case “would yield a substantial injustice.”<sup>71</sup>

The Principles provide illustrations of how various sections would play out depending on the rules established by the state but they do not offer specific percentages or other numerical factors.

The presumptions upon which the Principles rely have been criticized as overly vague,<sup>72</sup> and relatively easy to rebut, thus leading to inconsistent or unpredictable awards of maintenance.<sup>73</sup> The guidelines for rebutting the presumptions have also been described as “too fuzzy to be applied consistently.”<sup>74</sup>

One scholar comments favorably that the presumptions governing the duration and amount of the award would “unquestionably curb both the variation and reliance on private

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<sup>70</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002), § 5.06(1).

<sup>71</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 805 (2002), § 5.04(4).

<sup>72</sup> Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Consequences for Women*, 8 *Duke J. L. & Pol’y* 167, 174 (2001) (The author notes, for example, there is a presumption of entitlement when there are children of the marriage or of either spouse, the minor children have lived with the claimant for a specified minimum period, and the claimant’s earning capacity at dissolution is substantially less than that of the other spouse. The Principles provide no guidance as to determining whether one spouse’s earning capacity substantially exceeds the other’s, allowing for unpredictability even for this threshold issue.)

<sup>73</sup> Lara Lenzotti Kapalla, *Some Assembly Required: Why States Should not Adopt the ALI’s System of Presumptive Alimony Awards in its Current Form*, 2004 *Michigan St. L. Rev.* 207, 209-10. The author explains how two presumptions - awards for spouses experiencing a post-divorce drop in earnings, and awards for the primary caretakers of the couple’s children - can be rebutted under the two dominant views of presumptions. *Id.* at 217-231.

<sup>74</sup> Lara Lenzotti Kapalla, *Some Assembly Required: Why States Should not Adopt the ALI’s System of Presumptive Alimony Awards in its Current Form*, 2004 *Michigan St. L. Rev.* 207, 210.

values currently evident in judicial alimony decisions . . . and stand a good chance of reducing the variability of alimony outcomes in settled cases.”<sup>75</sup> Although this scholar says that the lack of specific percentages makes it difficult to evaluate winners and losers,<sup>76</sup> she finds that in general, application of the Principles should result in more awards to the “typical. . . recipient, a long-married, low income wife married to a high-income husband.”<sup>77</sup> But the Principles would largely ensure that “alimony becomes the norm among divorcing couples with children, even if the marriage is short.”<sup>78</sup>

## **2. American Academy of Matrimonial Lawyers (AAML) Guidelines**

Having rejected the ALI’s theory that spousal support should be based exclusively on compensation for losses resulting from the marriage, the AAML convened a commission to make recommendations regarding child and spousal support.<sup>79</sup>

Based on its national survey on spousal support, the Commission identified two widespread problems commonly raised about maintenance – the “lack of consistency resulting in a perception of unfairness,” and consequently, an inability to predict the outcome in any given

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<sup>75</sup> Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI principles Improve Current Outcomes?* 8 *Duke J. Gender L. and Pol’y* 119, 129 (2001).

<sup>76</sup> Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI principles Improve Current Outcomes?* 8 *Duke J. Gender L. and Pol’y* 119, 130 (2001).

<sup>77</sup> Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI principles Improve Current Outcomes?* 8 *Duke J. Gender L. and Pol’y* 119, 130 (2001).

<sup>78</sup> Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI principles Improve Current Outcomes?* 8 *Duke J. Gender L. and Pol’y* 119, 131 (2001).

<sup>79</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

case.<sup>80</sup>

The Commission developed guidelines for the duration and amount of the award that apply only after a determination of eligibility has been made in accordance with existing state law.<sup>81</sup> It studied approaches used in numerous jurisdictions, and found that two factors considered nearly everywhere are the incomes of the parties and the length of the marriage. Based on this conclusion, the Commission created formulas for determining the amount<sup>82</sup> and duration of maintenance, respectively.<sup>83</sup> Recognizing that the amount or duration arrived at through application of the formula may not reflect the “unique circumstances of the parties,” the Commission recommended deviation factors to address common situations in which adjustments would be appropriate.<sup>84</sup>

### **3. Canadian Guidelines**

The Advisory Guidelines issued by the Department of Justice in Canada are voluntary,

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<sup>80</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

<sup>81</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

<sup>82</sup> The formula would not apply in cases where the parties’ combined annual gross income exceeds \$1,000,000. 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

<sup>83</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

<sup>84</sup> 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, <http://www.aaml.org/go/library/articles/alimony-guidelines/>.

informal and advisory.<sup>85</sup> The Advisory Guidelines do not address the issue of eligibility, only the amount and duration of spousal support.<sup>86</sup> They were developed to mirror the results of reported decisions and negotiated settlements.<sup>87</sup>

The formula generally focuses on the disparity between the spouses' incomes. The basic formula for a marriage without minor children involves two formulas: the amount of the award is based on a percentage of the difference in incomes for each year of marriage, up to 37.5 to 5% to 50% for a marriage of 25 years or more;<sup>88</sup> the duration of the award "is .5 to 1 year of support for each year of marriage, with duration becoming indefinite after 20 years."<sup>89</sup> The formulas are in fact more complex than this brief statement would suggest.

#### **4. Other Mathematical Formulas**

Despite criticisms that mathematical formulas do not address different rationales for a maintenance award and do not account for the individual circumstances of a marriage,<sup>90</sup> numerical guidelines for calculating maintenance awards are currently used to varying degrees in

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<sup>85</sup> Carol Rogerson and Rollis Thompson, Canada – The Advisory Guidelines 17 Months Later (2006).

<sup>86</sup> Carol Rogerson and Rollis Thompson, Canada – The Advisory Guidelines 17 Months Later (2006).

<sup>87</sup> Carol Rogerson and Rollis Thompson, Canada – The Advisory Guidelines 17 Months Later (2006).

<sup>88</sup> Spousal Support Advisory Guidelines (July 2008), available at [http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG\\_eng.pdf](http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf).

<sup>89</sup> Spousal Support Advisory Guidelines (July 2008), available at [http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG\\_eng.pdf](http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/pdf/SSAG_eng.pdf).

<sup>90</sup> Mary Kay Kisthardt, Barbara Ellen Handschu, Setting Alimony: Prevailing Theories, Factors Courts Consider, Tips for Addressing the Issue, 20 NO. 7 Matrim. Strategist 1 (2002). Indeed, the formula in Maryland is not available to pro-se litigants because there is a concern that unrepresented individuals would be frustrated because the complexity of the issues would not be apparent from the formula.



different parts of the country.<sup>91</sup> The particulars of each formula, and its application to a series of three hypothetical divorces are included in a Table of Formulas, attached here as Appendix A.

Only one formula, that in Pennsylvania, is approved by statute for statewide use. The formula is authorized by statute, and promulgated by court rule, and subject to review every four years.<sup>92</sup> The formula can only be used to determine interim alimony.<sup>93</sup> Proposals to adopt the formula for determining final maintenance awards have not been successful.<sup>94</sup> The reasons for this lack of success are not readily available but hopefully further study will reveal them.

The other formulas have either been adopted by court rule or may be used voluntarily by the parties and in the court's discretion.

Two states, California and New Mexico, have adopted statewide formulas pursuant to court rule. California's formula applies only to interim alimony.

New Mexico's formula applies to final awards and is intended only as a starting point. "[The formula does] not change or create public policy. . . . Most importantly, [the formula is] not intended to replace the trial court's obligation to consider specific evidence, as well as all

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<sup>91</sup> Mary Kay Kisthardt, Re-thinking Alimony: the AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 J. Am. Acad. Matrim. Law. 61, 66 (2008).

<sup>92</sup> 23 Pa. C. S. §4322(a). The statute provides that the guideline shall be "established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly." The Supreme Court of Pennsylvania ordered the adoption of the particular mathematical formula in 1989. PA. Rule of Civil Procedure 1910.16-4(a).

<sup>93</sup> PA. Rule of Civil Procedure 1910.16-4(a).

<sup>94</sup> Brian C. Vertz, Support Guidelines and Alimony Pendente Lite, available at <http://www.bvsources.com/divorce/spousalsupport/>; Divorce Code – Recommended Amendments: Report of the Advisory Committee on Domestic Relations Law, April 1999 <http://jsg.legis.state.pa.us/DIVORCE.PDF>.

applicable statutory factors.”<sup>95</sup>

Practitioners and judges in Maricopa County, Arizona; Johnson County, Kansas; and Fairfax and Richmond, Virginia use formulas approved by court rule. The formula used in Fairfax and Richmond, Virginia applies only to interim awards.<sup>96</sup>

Formulas used voluntarily by the parties and in the court’s discretion are available in Maryland, Massachusetts, Michigan, and Nevada.<sup>97</sup> They are not endorsed by state statute or court rule.

Just this year, Maryland’s highest court (the Court of Appeals) in *Boemio v. Boemio*,<sup>98</sup> held that a trial court had not erred in consulting the AAML Guidelines as an aid when determining the amount and duration of an alimony award pursuant to the Maryland statute. The High Court stated that consulting the guideline was appropriate so long as the guideline did not diminish or eclipse the court’s exercise of its discretion, and that, in fact, the trial court judge had made it clear that the guideline was not a substitute for an analysis of the statutory factors. The court concluded that the trial court had discretion to consult guidelines promulgated by a reliable and neutral source, such as the AAML, that do not conflict with or undermine any of the

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<sup>95</sup> New Mexico Alimony Guidelines and Commentaries (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

<sup>96</sup> See Appendix A.

<sup>97</sup> See Appendix A.

<sup>98</sup> *Boemio v. Boemio*, \_\_\_ A.2d \_\_\_, 2010 WL 1850236 (Md. 2010). See also *Atwood v. Atwood*, 643 S.W.2d 263, 266 (Ky App.1982), in which the Kentucky Court of Appeals suggested that on remand of a divorce proceeding in which maintenance had not been awarded the trial court use a formula developed by a law professor. *Id.* (citing R. Petrilli, Kentucky Family Law § 25.10 (1981 Cum.Supp.)).

considerations expressed in the statute.<sup>99</sup>

The source of the available formulas varies. Maricopa County in Arizona has adopted the ALI guidelines; some formulas are original.<sup>100</sup> In Massachusetts, several formulas are available for voluntary use, including formulas favored by local judges.<sup>101</sup> Some formulas are based on the results of key cases; others assign different weights to the various statutory factors; and still others use only the parties' incomes and the length of the marriage.

Some formulas have a long history; for example, California's formula has been in place since 1977 and Pennsylvania's since 1989;<sup>102</sup> others, such as those in New Mexico and Maryland, are relatively new.<sup>103</sup>

All of the formulas have been subjected to rigorous scrutiny before they were promulgated. The ALI spent over ten years studying child custody, child support, equitable distribution, and alimony before adopting its "Principles of the Law of Family Dissolution" in

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<sup>99</sup> Boemio v. Boemio, --- A.2d ---, 2010 WL 1850236 (Md. 2010). It also noted that a formula promulgated by the Women's Law Center of Maryland would be an equally suitable reference. Boemio v. Boemio, --- A.2d ---, 2010 WL 1850236, n. 11 (Md. 2010).

<sup>100</sup> A formula designed by an attorney in New York provides that in lieu of "alimony," "spousal support," or "maintenance," a series of postmarital income adjustments be made between the parties. Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L. J. 23, 51 (2001). Initially, the parties would share equally in all disposable income, as presumably they had been during the marriage. Thereafter, through the application of a mathematical formula, they would share a decreasing percentage of the difference between their disposable incomes so that at the end of the period (a function of the length of the marriage), each party would be financially independent. While the decreasing percentages have appeal in that they reflect a gradual weaning of the parties from their joint financial relationship, thus cushioning the financial "shock" of a divorce, they have proved too complex and unwieldy for providing a practical solution, and, as far as we know, have not gained widespread acceptance in New York or elsewhere.

<sup>101</sup> The Divorce Spousal Support Calculator: An Alimony Formula Resource, available at <http://familylaw.kelseytrask.com/Docs/SpousalSupport.pdf>.

<sup>102</sup> See Appendix A.

<sup>103</sup> See Appendix A.

2000.

The AAML guidelines were produced after two years of information gathering, extensive review of guidelines in use across the country and the testing of its proposed formula against seven other guidelines to see if the results of the application of its formula fell within the norm.<sup>104</sup>

The formula in Michigan was based on a family law attorney's review of child support and alimony cases over a 30 year period.<sup>105</sup> New Mexico's formula was first tested in a pilot project in a single county for six months, the pilot project was expanded into other counties in 2004, and after two more years of analysis, the formulas were finally adopted as a court rule in 2006.<sup>106</sup> The formula in Nevada is still under study.<sup>107</sup> Pennsylvania's formula must be reviewed every four years.<sup>108</sup>

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Adoption of a formula should be approached with caution. Formulas proposed or adopted in other jurisdictions have been subjected to detailed scrutiny before they were promulgated, and in some cases, such as Pennsylvania, are subject to continued scrutiny. If a formula is going to play a role in New York's maintenance awards, it should be one that has been

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<sup>104</sup> Mary Kay Kisthardt, Re-thinking Alimony: the AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 J. Am. Acad. Matrim. Law. 61, 65-66 (2008).

<sup>105</sup> Michigan Divorce Law, available at <http://www.a2lawyer.com/articles/family/divorce.html#6>; see also Michigan Alimony Guidelines Survey Report (Alimony Guidelines Project of the Equal Access Initiative 2005).

<sup>106</sup> The use of a pilot project to test a formula for maintenance has been proposed in New Jersey. Christopher R. Musulin, Alimony Guidelines: Should New Jersey Adopt a Formula Approach for Spousal Support 1, n. 1 (March 18, 2009), available at <http://www.sjerseylawyer.com/CM/Custom/Article%20on%20Alimony%20for%20NJ.pdf>.

<sup>107</sup> Marshal Willick, In Search of a Coherent Theoretical Model for Alimony, Nevada Lawyer (April 2007).

<sup>108</sup> 23 Pa. C. S. §4322(a).

fully vetted to assure that its assumptions are based on the considerations required by the Domestic Relations Law.

#### **IV. Legislative Initiatives<sup>109</sup>**

New York, Florida, Massachusetts, and Pennsylvania are actively considering legislative and other proposals to address concerns about maintenance awards. Only one of the proposals, New York A. 10984-A/S. 7740-A, adopts the use of a formula in determining an award for general maintenance.

##### **A. New York**

Two bills are presently pending before the New York State Legislature: A. 2580-C/S. 5667-B and A. 10984-A/S. 7740-A.

##### **a. A. 2580-C/S. 5667-B**

This bill amends section 236B of the Domestic Relations Law to create a new category of maintenance: permanent maintenance. A party is eligible for this type of maintenance when he or she is unable to maintain the parties' standard of living established during the marriage due to certain factors: "the duration of the marriage, age, health, or reduced or lost lifetime earning capacity, or loss of health insurance benefits, or the needs of minor or dependent children . . . ." These factors have been added to the existing criteria for eligibility, namely, the parties' standard of living established during the marriage, the reasonable needs of the party lacking sufficient property and income, and the financial ability of the other party to meet those needs.<sup>110</sup>

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<sup>109</sup> The scope of this memorandum is limited to an examination of legislative initiatives in Florida, Massachusetts, Pennsylvania, and New York.

<sup>110</sup> Dom. Rel. Law §236B(6)(a).

The factors added for eligibility are among the 12 factors currently considered for duration and amount of an award.<sup>111</sup> The bill makes no change in current statute's criteria for otherwise determining the amount and duration of maintenance. The amount of the award must be "sufficient to eliminate the disparity in the post-divorce standard of living of the parties."

The breadth of amended language regarding "permanent" maintenance may be problematic because it is unlikely that anyone can continue a standard of living maintained during a marriage.

b. A. 10984-A/S. 7740-A

This bill provides general guidelines for interim maintenance and formulas to determine both a presumptive maintenance amount based on the first \$500,000 of the payor's income and the presumptive duration of the award. It also provides a set of factors to determine any additional maintenance based on income in excess of the \$500,000 "cap" and a set of deviation factors for the court to apply if the presumptive awards are unjust or inappropriate.

The bill applies the current law's standards for entitlement or eligibility<sup>112</sup> to what it terms

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<sup>111</sup> The others are:

- (1) the income and property of the respective parties . . .
- (3) the present and future earning capacity of both parties;
- (4) the ability of the party seeking maintenance to become self-supporting . . .
- (7) the tax consequences to each party;
- (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (9) the wasteful dissipation of marital property by either spouse;
- (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
- (12) any other factor which the court shall expressly find to be just and proper.

<sup>112</sup> The court may award interim spousal support when the parties have not entered into an agreement, considering the parties' standard of living during the marriage, when one party lacks sufficient property and income to provide for reasonable needs, and the other has sufficient property or income to provide for the reasonable needs of the other. N.Y. Dom. Rel. L. § 236B(6)(a).

“interim spousal support.”<sup>113</sup>

Under the bill, “maintenance” is recast at “post-marital income.” Eligibility for court-ordered post-marital income arises when there is a significant disparity between the incomes of the parties. The court determines the “guideline amount” for the presumptive award by applying a percentage formula to the difference between the first \$500,000 of the payor’s income and all of the payee’s income. An example of how the formula would work is provided in Appendix A to this Report.

When the payor spouse’s income exceeds the \$500,000 cap, any post-marital income obligation over and above the formula-derived amount is determined through consideration of a set of factors.<sup>114</sup>

If the guideline amount would reduce the payor spouse’s annual income below the self-support reserve for a single person (currently \$14,620), the presumptive guideline amount is the difference between the payor’s income and the self-support reserve. If the payor’s income is below the self-support reserve, there is a rebuttable presumption that no post-marital income be awarded.

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<sup>113</sup> The current terminology under the domestic relations law is “temporary maintenance.”

<sup>114</sup> These largely track the ones in section 236B(6)(a) of the domestic relations law, including one taken from the current language governing eligibility (“The standard of living of the parties established during the marriage.”) The bill also expands the class of persons whose care has inhibited the party’s earning capacity to include stepchildren, disabled adult children or stepchildren, and elderly parents and in-laws. The following factors are added:

- (B) the substantial differences in the incomes of the parties
- (F) the need of one party to incur education or training expenses
- (I) the existence and duration of a pre-marital joint household or a pre-divorce separate household
- (J) acts by one party against the other that constitute egregious fault likely to shock the conscience
- (K) the availability and cost of medical insurance for the parties
- (M) the inability of one party to obtain meaningful employment due to age or absence from the workforce
- (N) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment.

The second part of the presumptive award is the “guideline duration,” a separate formula for determining the length of the award, wherein the court applies a percentage to the length of the marriage, beginning at 30% for a marriage of 5 years or less, up to 100% for a marriage of 20 to 25 years. If the marriage was more than 25 years, the award is permanent. The death of either party ends the income obligation. Remarriage of the payee spouse does not. An example of how the formula would work is provided in Appendix A to this Report.

If the court finds that the presumptive award is unjust or inappropriate, it applies a set of 17 factors, similar to those used for determining the guideline amount on income over \$500,000.

Modifications of the award are permissible, as under current law.<sup>115</sup>

The formula is similar to the recommendations of the American Academy of Matrimonial Lawyers. Examples of how the formula would work for three marriages are contained in Appendix A to this Report.

An earlier version of the bill has been criticized by the Committee on Matrimonial Law of the New York City Bar Association.<sup>116</sup> One of the most significant criticisms is that the recipient’s remarriage does not trigger review of the award.<sup>117</sup> In addition, the durational formula has been criticized as raising significant tax problems that need to be addressed in the

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<sup>115</sup> N.Y. Dom. Rel. L. § 236B(9)(b).

<sup>116</sup> See Memorandum of the Committee on Matrimonial Law of the New York City Bar Association. See also Alton A. Abramowitz, New York’s Post-marital Compensation Guidelines, 10 No. 2 N.Y. Fam. L. Monthly 1 (October 2008).

<sup>117</sup> Memorandum of the Committee on Matrimonial Law of the New York City Bar Association. Under current law, the death of either party or remarriage of the recipient terminates the award. N.Y. Dom. Rel. L. § 236B(6)(c).



bill.<sup>118</sup> As we have noted earlier, any formula that is adopted requires a full vetting to ensure that it is consistent with the underlying premise of the domestic relations law.

## **B. Florida**

Currently, Florida's statute provides for the award of rehabilitative or permanent alimony.<sup>119</sup> 2010 Florida House Bill No. 907 amends the statute to add bridge-the-gap and durational alimony to the current statutory alternatives of rehabilitative and permanent alimony, and provides explanations of each of the forms of alimony.

Bridge-the-gap alimony allows the party to make a transition from being married to being single by assisting with legitimate identifiable short-term needs. An award may not exceed two years.<sup>120</sup> Rehabilitative alimony assists a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.<sup>121</sup>

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<sup>118</sup> “‘Recapture’ is the method by which the IRS safeguards against payments intended as property distributions but characterized as support receiving preferential tax treatment. The Internal Revenue Code provides that if support ceases or stops within the first three payment years (other than due to death, remarriage, or formulas tied to variable wages), then the amount of support above the specified limits (essentially \$15,000 per year) is ‘recaptured’ as income to the payor.” Alton A. Abramowitz, New York's Post-marital Compensation Guidelines, 10 No. 3 N.Y. Fam. L. Monthly 1 (November 2008).

<sup>119</sup> Fla. Rules of Civ. Pro. §61.08 (“[T]he court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.”).

<sup>120</sup> 2010 Florida House Bill No. 907, adding section 611.08(5). An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony shall not be modifiable in amount or duration. *Id.*

<sup>121</sup> 2010 Florida House Bill No. 907, adding section 611.08(6). The award may be modified or terminated based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan. *Id.*

Permanent alimony meets the needs of a party who lacks the financial ability to meet his or her needs following a marriage of long duration, a marriage of moderate duration if such an award is appropriate upon consideration of certain factors, or a marriage of short duration if there are exceptional circumstances.<sup>122</sup> Durational alimony is economic assistance for a set period of time following a marriage of short or moderate duration.<sup>123</sup>

The bill establishes presumptions for a short term, moderate term, and long term marriage which are then used in determining when durational and permanent alimony can be awarded.<sup>124</sup>

### **C. Massachusetts**

Massachusetts's current law provides that in awarding alimony the court must consider a

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<sup>122</sup> 2010 Florida House Bill No. 907, adding section 611.08(8). An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship. *Id.*

<sup>123</sup> 2010 Florida House Bill No. 907, adding section 611.08(7). The award terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances . . . . However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage. *Id.*

<sup>124</sup> A short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage. 2010 Florida House Bill No. 907, adding section 611.08(4).

number of factors.<sup>125</sup> An award of alimony is permanent.<sup>126</sup>

Two legislative proposals, Massachusetts House Bill No. 1785 and Massachusetts Senate Bill No. 1616 are under consideration to change the statute. In addition, recommendations for change have been made by the Massachusetts Bar Association and Boston Bar Association Joint Alimony Task Force (Massachusetts Bar Task Force).

Massachusetts House Bill No. 1785 provides that the court consider a number of factors, including whether the earning capacity of the party seeking alimony “is sufficient to maintain the preponderance of the standard of living established during the marriage,” the willingness of the party to seek employment, and the goal that the party become self-supporting.<sup>127</sup>

The duration of the award would be one half of the length of the marriage, capped at 12 years or until any child under the payee spouse’s custody reaches the age of 16, whichever is later.<sup>128</sup> If the duration of the award is longer than 5 years, the amount declines by 10% a year

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<sup>125</sup> Mass. Ann. Laws ch. 208, § 34 (“[T]he court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, the nature and value of the property to be so assigned, the present and future needs of any dependent children of the marriage. . . . The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.”).

<sup>126</sup> See Barbara von Hauzen, *Should Permanent Alimony be Eliminated?: an Examination of an Unresolved Conundrum*, mslaw.edu/News/Reformer/winter09.pdf (advocating for judgments tailored for special circumstances, such as no alimony awarded for short term marriages, and rehabilitative alimony for midrange marriages) Charla Bizlos Stevens and Erin Harris, *Alimony Reform: Pending Legislation Suggest that Changes may be Ahead*, Boston Herald, 3/1/10.

<sup>127</sup> Massachusetts House Bill No. 1785, available at <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01785.pdf>.

<sup>128</sup> Massachusetts House Bill No. 1785, available at <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01785.pdf>.

beginning with the commencement of the second half of the alimony period.<sup>129</sup> The award would terminate when the payor attains retirement age as defined in the Social Security Act.<sup>130</sup> There would be a rebuttable presumption that there is a “substantially decreased need for alimony if the supported party is cohabiting with another adult.”<sup>131</sup>

Massachusetts Senate Bill No. 1616 addresses the issue of permanent alimony by amending the law to allow for durational alimony – alimony for a period of time.

A more detailed proposal has been offered by the Massachusetts Bar Task Force which was created in 2007 to recommend standards for reasonableness of amount and duration of awards in light of problems of predictability and inconsistency.<sup>132</sup> The Massachusetts Bar Task Force has recommended four different categories of alimony with differing eligibility requirements, lengths of duration, and termination events.<sup>133</sup>

Transitional alimony, or short term support, may be awarded where circumstances justify,

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<sup>129</sup> Massachusetts House Bill No. 1785, available at <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01785.pdf>.

<sup>130</sup> Massachusetts House Bill No. 1785, available at <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01785.pdf>.

<sup>131</sup> Massachusetts House Bill No. 1785, available at <http://www.mass.gov/legis/bills/house/186/ht01pdf/ht01785.pdf>.

<sup>132</sup> Report of the Joint MBA/BBA Alimony Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children 2 (preliminary and draft recommendations as of September 24, 2008).

<sup>133</sup> Report of the Joint MBA/BBA Alimony Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children 1 (preliminary and draft recommendations as of September 24, 2008)(The recommendations do not apply when there are dependent children of the marriage, when the recipient would fall below the poverty level without alimony, when the recipient has a mental or physical disability, is of advanced age, or lacks the ability to exercise marketable skills, including reasons related to abuse by the payor spouse.).

and where rehabilitative support does not apply.<sup>134</sup>

Rehabilitative alimony, to encourage the rehabilitation of the supported spouse to enter into or return to the workplace, may be awarded when there is a demonstrated plan and time frame for rehabilitation and a specific plan for obtaining employment or training.<sup>135</sup>

Reimbursement alimony, available only for a short term marriage, reimburses the supported spouse from the future earnings of the payor, in recognition of the contributions to the payor spouse's employment training, education, or career development.<sup>136</sup>

General term alimony compensates a spouse for economic dependence created during the

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<sup>134</sup> The amount is not to exceed 33% of the difference between the gross incomes of the parties. An award may not exceed three years, or otherwise terminates at the death of either spouse or remarriage of the supported spouse. The award is not modifiable. Report of the Joint MBA/BBA Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children (preliminary and draft recommendations as of September 24, 2008).

<sup>135</sup> The amount is not to exceed 33% of the difference between the gross ordinary incomes of the parties, and is to be paid in one or more payments. The duration of the award is up to five years, with end dates as determined by events such as completion of job training or education. The award otherwise terminates upon the remarriage of the supported spouse. Report of the Joint MBA/BBA Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children (preliminary and draft recommendations as of September 24, 2008).

<sup>136</sup> A short term marriage is a marriage having a duration of up to 5 years. Eligibility for an award arises if reimbursement cannot be adequately compensated through property division or another classification of alimony. The amount is a finite sum set by the court, and the duration is set by the court. Report of the Joint MBA/BBA Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children (preliminary and draft recommendations as of September 24, 2008). Right now New York courts cannot award reimbursement alimony. *F.M.C. v. F.A.C.* 12 Misc.3d 1169(A), 820 N.Y.S.2d 842 (N.Y. Sup. 2006) (citing *O'Brien v. O'Brien*, 66 N.Y. 2d 576 (1985)). This Preliminary Report does not explore the nuances of *O'Brien v. O'Brien*, 66 N.Y. 2d 576 (1985) and its progeny except to note that one commentator has criticized the *O'Brien* decision in that it was based on mistaken facts, and an erroneous interpretation of New York law and the intent of the equitable distribution law. Ira Mark Ellman, *O'Brien v. O'Brien: A Failed Reform*, *Unlikely Reformers*, 27 *Pace L. Rev.* 949, 960 (2007). We also note that the recommendation of the 2006 Report of Chief Judge Kaye's Matrimonial Commission that enhanced earning capacity be eliminated as a divisible asset in equitable distribution, coupled with the elimination of remarriage as a bar to continued spousal maintenance and that at least one commentator has suggested reimbursement maintenance as an alternative to enhanced earning capacity. See 2006 Report of Chief Judge Kaye's Matrimonial Commission 66 (2006) <http://www.courts.state.ny.us/reports/matrimonialcommission>; Marsha Garrison, *Reforming Divorce: What is Needed and What is Not*, 27 *Pace L. Rev.* 921 (2007).

marriage.<sup>137</sup>

The court may consider factors that would allow deviation from the statutory norms.<sup>138</sup>

#### **D. Pennsylvania**

Pennsylvania's current statute provides:

[T]he court may allow alimony, as it deems reasonable, to either party only if it finds that alimony is necessary.

In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors.<sup>139</sup>

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<sup>137</sup> Report of the Joint MBA/BBA Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children (preliminary and draft recommendations as of September 24, 2008).

<sup>138</sup> Report of the Joint MBA/BBA Alimony Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children 1 (preliminary and draft recommendations as of September 24, 2008). Deviation factors to be considered by the court include: advanced age or chronic illness or unusual health circumstance of either party, tax circumstances, including lack of recognition of same sex marriage under federal law, whether the payor spouse is paying health insurance for the supported spouse, whether the supported spouse would be dependent on public assistance, but for deviation any significant premarital cohabitation (which may be considered in determining the length of the marriage), whether either party has income from capital gains, dividends, or other non ordinary income source, and other factors deemed relevant by the court. The court may secure the payment of the award on the event of the payor's death through an obligation on the payor's estate or by maintenance of life insurance coverage. The court must consider the amount and term of alimony, cost of premiums carried during the marriage, cost of plans available to the payor spouse, age of the parties, insurability of the payor spouse, and the probable economic condition of the payee spouse on the death of the payor spouse. *Id.*

<sup>139</sup> Pa. C. S. §3701. The statute lists 17 factors: (1) The relative earnings and earning capacities of the parties. (2) The ages and the physical, mental and emotional conditions of the parties. (3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits. (4) The expectancies and inheritances of the parties. (5) The duration of the marriage. (6) The contribution by one party to the education, training or increased earning power of the other party. (7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child. (8) The standard of living of the parties established during the marriage. (9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment. (10) The relative assets and liabilities of the parties. (11) The property brought to the marriage by either party. (12) The contribution of a spouse as homemaker. (13) The relative needs of the parties. (14) The marital misconduct of either of the parties during the marriage. The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions). (15) The Federal, State and local tax ramifications of the alimony award. (16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs. (17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

Under the Pennsylvania proposal, the determinations of eligibility, amount and duration are each governed by separate factors.

First, the court determines eligibility on the basis of whether the petitioner has unfunded needs, and the respondent's excess income,<sup>140</sup> in light of ten factors.<sup>141</sup>

This list of factors consolidates a number of the ones that appear in current law and deletes marital fault in the consideration of eligibility. However, misconduct and abuse can be considered in determining duration.<sup>142</sup>

The next consideration is the amount of alimony. If an award is appropriate:

the amount of the award shall be equal to the least of: (1) the amount of the petitioner's unfunded needs; (2) the amount of the respondent's excess income; or (3) an amount equal to the spousal support determined under the Pennsylvania Support Guidelines.<sup>143</sup>

This provision clarifies that the amount of the interim award is not necessarily determinative of the final award.

Finally, the court considers duration, which shall have a definite term or an indefinite

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<sup>140</sup> 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02.

<sup>141</sup> 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02(b) (“(1) The income and earning capacity of each party, including the income that is or could be reasonably derived from all the assets of each party. (2) The age and physical, mental and emotional condition of each party. (3) The benefits received by or available to each party, including, but not limited to, medical, retirement, insurance or other benefits. (4) The extent to which a party's earning capacity, expenses or financial obligations were or will be affected because the party served or will serve as the custodian of a minor child. (5) The standard of living of the parties established during marriage. (6) The relative education of the parties and the reasonable anticipated expenses to acquire sufficient education or training to enable the petitioner to enhance the petitioner's earning capacity. (7) The reasonable liabilities of each party, including debt service on those liabilities. (8) The obligations of each party for child support. (9) The Federal, State and local tax ramifications of the alimony award. (10) The extent to which income and assets have already been taken into account in determining an award of equitable distribution, child support, counsel fees or otherwise.”).

<sup>142</sup> See 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02(d).

<sup>143</sup> 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02(c). The generosity of interim awards has been criticized as leading to delays in concluding pending divorces. Lynne Gold-Bikin and Andrew Taylor, *How Much Is Too Much?*, 26 NO. 4 *Matrim. Strategist* 1 (April 2010).

term. In making that determination, the court is to consider all relevant factors, including ten factors spelled out in the bill.<sup>144</sup>

An indefinite term of alimony may be awarded when the obligee: (i) is the primary custodian or caretaker of and is providing care for an unemancipated child of the parties, if the child suffers from a serious physical or mental disability; and (ii) lacks sufficient income or earning capacity and separate and marital property to pay reasonable living expenses, including the cost of medical treatment for the child.<sup>145</sup>

#### **IV. Conclusion**

From our preliminary review, we have determined that the problems regarding predictability and inconsistency regarding maintenance awards in New York and their appropriate resolution require detailed study, particularly with respect to the impact of present law on lower and middle income marriages.

While there is anecdotal evidence that raises serious questions about the predictability and concerns about consistency of maintenance awards, there is insufficient data from which to

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<sup>144</sup> 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02(d)“(1) The age and physical, mental and emotional condition of each party. (2) The benefits received by or available to each party, including, but not limited to, medical, retirement, insurance or other benefits. (3) The contribution by one party to the education, training or increased earning capacity of the other party. (4) The extent to which a party's earning capacity, expenses or financial obligations were or will be affected because the party served or will serve as the custodian of a minor child. (5) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the petitioner to enhance the petitioner's earning capacity. (6) The reasonable liabilities of each party, including the duration of any debt service on those liabilities. (7) The marital misconduct of either of the parties during the marriage and prior to the date of final separation, but the court shall consider the abuse of one party by the other party even after the date of final separation. (8) The extent to which income and assets have already been taken into account in determining an award of equitable distribution, child support, counsel fees or otherwise. (9) Where appropriate, the date when either of the parties might reasonably retire from employment. (10) The amount and duration of spousal support or alimony pendente lite paid by the obligor, including payments unallocated between spouse and child, whether voluntary or pursuant to a court order.”).

<sup>145</sup> 2009 Pennsylvania Senate Bill No. 943, adding section 3701.02(f).



draw conclusions that could lead to meaningful legislative change. The necessary data about current awards should be collected and an empirical analysis should be conducted as part of a study of whether to change New York law.

Trends across the country involve efforts to identify an underlying rationale for maintenance, and to develop formulas for predicting awards and ensuring consistency. Identifying rationales for maintenance awards and developing a method for determining an award consistent with the underlying rationale are tasks that require detailed study before any change is introduced in New York. Such a study involves evaluating New York's current "need" and "standard of living rationale," making difficult policy choices that makes sense to divorcing spouses whose main concern is their own financial wherewithal, and assessing to what extent revision will address the concerns regarding predictability and consistency in maintenance awards.

Adopting any formula should be approached with caution, especially one used in another jurisdiction. Prior to their promulgation, formulas adopted in other states have been subjected to rigorous scrutiny based on the law and practices of the particular jurisdiction. In some instances, such as Pennsylvania, the formulas are subject to continued scrutiny. If a formula is going to play a role in maintenance awards, it should be one that has been fully vetted to assure that its assumptions are based on the considerations required by the Domestic Relations Law.

## **APPENDIX A**

### **TABLE OF FORMULAS**

**This table includes:**

- 1) a list of the mathematical formulas used in various jurisdictions;**
- 2) a description of all the formulas identified in this Preliminary Report; and**
- 3) examples of the application of the formulas identified in this Preliminary Report.**

## Mathematical Formulas

### Statewide Statute

Pennsylvania	Statute <sup>1</sup>	Unknown source	Interim Alimony	Net Income
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### Statewide Court Rule

CA (All cos) <sup>2</sup>	Ct. Rule <sup>3</sup>	Unknown source	Interim Alimony <sup>4</sup>	Net Income <sup>5</sup>
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New Mexico <sup>6</sup>	Ct. Rule <sup>7</sup>			
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### Statewide Voluntary Formula (not endorsed by statute or court rule)

MD	Voluntary <sup>8</sup>	Proprietary	Final Alimony	Gross Income
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Michigan <sup>9</sup>	Voluntary	Proprietary	Unknown	Unknown
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### County-Specific Formula

AZ (Maricopa Co.) <sup>10</sup>	Ct. Rule <sup>11</sup>	ALI <sup>12</sup>	Final Alimony <sup>13</sup>	Gross Income <sup>14</sup>
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KA (Johnson Co.)	CT <sup>15</sup>	Unknown	Interim & Final <sup>16</sup>	Gross Income
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Virginia (Fairfax and Richmond) <sup>17</sup>			Interim <sup>18</sup>	
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### Other Formulas

KY <sup>19</sup>	CT	CT	Final	Net
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MA <sup>20</sup>	Ind'l Judges	Multi <sup>21</sup>	Final	Gross
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Nevada <sup>22</sup>	Informal <sup>23</sup>	State Bar Ass'n <sup>24</sup>	Final	Gross/Net <sup>25</sup>
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1. 23 Pa. C. S. §4322(a). That statute further provides that the guideline shall be “established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly.” The Supreme Court of Pennsylvania ordered the adoption of the particular mathematical formula in 1989. PA. Rule of Civil Procedure 1910.16-4(a).
2. In Santa Clara, California, a guideline for determining alimony was implemented in 1977. Even though it is not statutorily mandated, much of the state of California has adopted the use of the Santa Clara formula as a guideline for establishing alimony awards. The California court system has approved the use of proprietary computer programs to assist in calculations. Family Code section 3830(“(a) On and after January 1, 1994, no court shall use any computer software to assist in determining the appropriate amount of child support or spousal support obligations, unless the software conforms to rules of court adopted by the Judicial Council prescribing standards for the software, which shall ensure that it performs in a manner consistent with the applicable statutes and rules of court for determination of child support or spousal support. (b) The Judicial Council may contract with an outside agency or organization to analyze software to ensure that it conforms to the standards established by the Judicial Council. The cost of this analysis shall be paid by the applicant software producers and fees therefor shall be established by the Judicial Council in an amount that in the aggregate will defray its costs of administering this section.”). Other counties have standard formulas that basically tweak the percentages of income. May 17, 2010 email from Bonnie Rose Hough, Managing Attorney, Center for Families, Children and the Courts, Judicial Council of California to Rose Mary Bailly.
3. May 17, 2010 email from Bonnie Rose Hough, Managing Attorney, Center for Families, Children and the Courts, Judicial Council of California to Rose Mary Bailly.
4. Family rule 3, available at <http://www.sccsuperiorcourt.org/family/rule3.3.htm#B>.
5. Family rule 3, available at <http://www.sccsuperiorcourt.org/family/rule3.3.htm#B>.
6. Guidelines were tested in a pilot project “in Bernallillo County for a period of six months . . .” New Mexico Alimony Guidelines and Commentaries (Revised 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf). In 2004, by order of the Supreme Court pilot projects were expanded into other counties. *Id.* at 4 (citing Supreme Court of the State of New Mexico, Alimony Guideline Committee, No. 03-8500, in the Matter of the Alimony Guidelines Pilot Project for the Second Judicial District Court (2004). The court also created a Statewide Alimony Committee and ordered further collection of data and further study on a limited statewide basis.
7. New Mexico Alimony Guidelines and Commentaries (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).
8. Recently the Court of Appeals approved the use of the ALI Principles and referred to the guidelines developed by the Women’s Law Center of Maryland, Inc. *See Boemio v Boemio*,--- A.2d ----, 2010 WL 1850236, n. 11 (Md. 2010).
9. Michigan Divorce Law, available at <http://www.a2lawyer.com/articles/family/divorce.html#6>; see also Michigan Alimony Guidelines Survey Report (Alimony Guidelines Project of the Equal Access Initiative 2005)(Survey results showed that 89% of the respondent judges were aware of existing alimony guidelines and a majority of the respondents used them to analyze cases but very few use them as a presumptive determination; many of the respondents indicated that they would use nonmandatory guidelines created by a task force of family law judges and family law attorneys.).
10. Superior Court of Arizona, Maricopa County, Family Court Department, Spousal Maintenance Guidelines (Originally Approved April 19, 2000; Reviewed and Reapproved October 16, 2002), available at <http://www.myazbar.org/SecComm/Sections/FA/links.cfm#supportissuesSMGuidelines>. A study by the committee

“reflects a very high correspondence between the award amounts called for by the guidelines and the amounts that family court judges, and attorneys settling actual cases, believed appropriate. It appears that the formula contained in these guidelines reflects current practice in Maricopa County, as to award amount, as well as could be achieved by any plausible formula that might be adopted.”

11. Cullum v. Cullum, 160 P.3d 231 (2007)(holding that the trial court did not abuse its discretion in applying the guidelines even though they have not been formally adopted.).

12. Superior Court of Arizona, Maricopa County, Family Court Department, Spousal Maintenance Guidelines (Originally Approved April 19, 2000; Reviewed and Reapproved October 16, 2002), available at <http://www.myazbar.org/SecComm/Sections/FA/links.cfm#supportissuesSMGuidelines>.

13. Superior Court of Arizona, Maricopa County, Family Court Department, Spousal Maintenance Guidelines (Originally Approved April 19, 2000; Reviewed and Reapproved October 16, 2002), available at <http://www.myazbar.org/SecComm/Sections/FA/links.cfm#supportissuesSMGuidelines>. See also Cullum v. Cullum, 160 P.3d 231 (2007).

14. For purposes of these guidelines, “income” means gross income from all sources that are treated as income under the Arizona Child Support guidelines, and includes income from a spouse’s separate property and from community property apportioned to that spouse.” Superior Court of Arizona, Maricopa County, Family Court Department, Spousal Maintenance Guidelines (Originally Approved April 19, 2000; Reviewed and Reapproved October 16, 2002), available at <http://www.myazbar.org/SecComm/Sections/FA/links.cfm#supportissuesSMGuidelines>

15. Johnson County Family Law Guidelines (2001), available at <http://www.jocobar.org/associations/10019/files/Section%205%20-%20MAINTENANCE.pdf>. By statute, maintenance is limited to 121 months. Ka. Stat. Ann. §60-1610(b)(2).

16. Johnson County Family Law Guidelines 3 (2001).

17. Fairfax Bar Association, Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, Va., Nov. 2002), available at [http://www.fairfaxbar.org/pub\\_order\\_form.asp](http://www.fairfaxbar.org/pub_order_form.asp).

18. Mary Kay Kisthardt, Re-thinking Alimony: the AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 J. Am. Acad. Matrim. Law. 61 (2008).

19. The formula was articulated in the Atwood decision “only for purposes of the trial court's consideration.” Atwood v. Atwood, 643 S.W.2d 263, 266 (Ky App.1982). From a brief review of Kentucky case law and practice manuals, it is not clear whether the formula is widely used.

20. Massachusetts does not have a statutorily mandated formula but some judges and attorneys have developed various formulas. See the Divorce Spousal Support Calculator: an Alimony Formula Resource, available at <http://familylaw.kelseytrask.com/Docs/SpousalSupport.pdf>. (We have noted errors in this document to the extent that it purports to describe formulas used in other states.)

21. See the Divorce Spousal Support Calculator: an Alimony Formula Resource, available at <http://familylaw.kelseytrask.com/Docs/SpousalSupport.pdf>.

22. Todd L. Torvinen, The So-called “Tonopah Formula” for Alimony, 17 Nevada Family Law Report 9 (2002).

23. The status of the Tonopah Formula is not clear. Marshal Willick, In Search of a Coherent Theoretical Model for Alimony, Nevada Lawyer (April 2007)(“The Family Law Section voted to ask district courts throughout the state to try actually running calculations under the formula, in parallel with their subjective determinations of alimony in real cases, so that the data could be reviewed a few years later to determine the utility of that formulaic approach. Apparently, the follow-up was never done, and partisans on both sides of the debate have remained staunchly for or against a formulaic alimony analysis focused on the Tonopah formula model.”).

24. Several formulas were considered. Todd L. Torvinen, The So-called “Tonopah Formula” for Alimony, 17 Nevada Family Law Report 9 (2002). The formula measures the difference in incomes (adjusted for child support, years of marriage, and age, educational level and disability of the payee. The formula adopted the “Minnesota Spousal Calculator.” *Id.* The intention was that the formula match closely 5 Nevada Supreme Court cases. *Id.* at 10.-11.

25. Worksheets, available at [http://www.familylawnevada.com/uploads/file/Tonopah\\_Gross\(1\).pdf](http://www.familylawnevada.com/uploads/file/Tonopah_Gross(1).pdf).

## Maintenance Formulas

### **1. Maricopa County, Arizona<sup>1</sup>**

Maricopa County, Arizona, has developed guidelines based on the American Law Institute's recommendations.<sup>2</sup> This guideline formula does not differentiate between marriages with children and without children.

#### *Entitlement*

Length of marriage exceeds 5 years

Payee spouse's earning capacity is equal to or less than 75% of payor spouse

#### *Amount*

	Payor's income
—	Payee' income
x	years of marriage
x	.015

### **2. Santa Clara County, California**

In Santa Clara, California, a guideline for determining alimony was implemented in 1977. Even though it is not statutorily mandated, much of the state of California has adopted the use of the Santa Clara formula as a guideline for establishing alimony awards.<sup>3</sup>

Under the Santa Clara formula, temporary spousal or partner support is generally computed thus:

#### *Amount*

	Payor's net income
—	child support
x	40%

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<sup>1</sup> Arizona is a community property state. Ariz. Rev. Stat. Ann. §25-211 (All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is acquired by gift, devise or descent, or acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.).

<sup>2</sup> The formula is not statutorily mandated but its use has been approved by the Arizona Court of Appeals. *Cullum v. Cullum*, 160 P.3d 231 (2007)(holding that the trial court did not abuse its discretion in applying the guidelines even though they have not been formally adopted.).

<sup>3</sup> Other counties have standard formulas that basically tweak the percentages of income a bit. See email from Bonnie Rose Hough, Managing Attorney Center for Families, Children and the Courts, Judicial Council of California - Administrative Office of the Courts.

— Payee's net income  
 x 50%

If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related expenses.

#### *Duration*

Pendente lite

### **3. Johnson County, Kansas**

Johnson County,<sup>4</sup> Kansas has developed its own guidelines regarding maintenance based on the number of years of marriage and the difference in earning capacity of the spouses. They are not binding on the court nor have they been adopted by the court system.<sup>5</sup> Duration and amount are not affected by the presence of minor children of the marriage.

#### *Amount*

— Payor's gross income  
 — Payee's gross income  
 x 20%

#### *Duration*

1/3 of the total length of the marriage, to maximum of 121 months.<sup>6</sup>

### **4. Kentucky**

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<sup>4</sup> According to Wikipedia, Johnson County is located in northeast Kansas, in the central United States. The county's population—the fastest growing in the state of Kansas—was 451,086 at the 2000 census, and it was estimated to be 534,093 in the year 2008, making it the largest in the state. Its county seat is Olathe, and its most populous city is Overland Park. Johnson County has the highest median household income in the state and 19th in the nation (as of 2000) and the nation's 46th highest per-capita income (as of 2005). In a study released in 2005, Johnson County had the third highest EBI (Estimated Buying Income) in the nation, meaning that Johnson Countians had the third highest amount of disposable income on average. Most of the county is suburban, being a part of the Kansas City Metropolitan Area.

[http://en.wikipedia.org/wiki/Johnson\\_County,\\_Kansas](http://en.wikipedia.org/wiki/Johnson_County,_Kansas).

<sup>5</sup> Johnson County Family Law Guidelines 49 (2001), available at [http://www.whrlawfirm.com/JoCO\\_FamilyLawGuidelines.pdf](http://www.whrlawfirm.com/JoCO_FamilyLawGuidelines.pdf). In fact, the guidelines note that some judges disagree with them. *Id.*

<sup>6</sup> Johnson County Family Law Guidelines 3-4 (2001), available at <http://www.jocobar.org/associations/10019/files/Section%205%20-%20MAINTENANCE.pdf>. By statute, maintenance is limited to 121 months. Ka. Stat. Ann. §60-1610(b)(2).



*Amount*

Payor's net salary  
+ Payee's net salary  
  
÷ 2  
  
— Payee's net income  
— Child support payor was ordered to pay

**5. Massachusetts<sup>7</sup>**

- a. Pending legislation, House Bill No. 1785

*Entitlement*

Maintaining the preponderance of the standard of living established during the marriage

*Amount*

If due for more than 5 years, beginning with the commencement of the second half of the alimony period, the amount declines by 10% a year

*Duration*

Length of marriage ÷ 2  
Capped at 12 years or until child under payee spouse's custody reaches the age of 16

*Termination events*

Payor attains retirement age as defined in Social Security Act

- b. Report of MBA-BBA Alimony Task Force

**General term alimony**, periodic payments to compensate a spouse for economic dependence created during the marriage.

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<sup>7</sup> See Barbara von Hauzen, Should Permanent Alimony be eliminated?: an Examination of an Unresolved Conundrum, [mslaw.edu/News/Reformer/winter09.pdf](http://mslaw.edu/News/Reformer/winter09.pdf) (advocating for judgments tailored for special circumstances, such as no alimony awarded for short term marriages, and rehabilitative alimony for midrange marriages) Charla Bizlos Stevens and Erin Harris, Alimony Reform: Pending Legislation Suggest that Changes may be Ahead, Boston Herald, 3/1/10.

### *Entitlement*

where the court finds it appropriate to order the payment where there is a need for the ongoing support of a spouse, to be reviewed and modified as appropriate.

### *Amount*

not to exceed 33% of the difference between the gross ordinary incomes of the parties

### *Duration*

marriage up to 5 years	maximum of 50% of length of marriage
5 - 10 years	maximum of 60%
10 - 15 years	maximum of 70%
15 - 20 years	maximum of 80%
over 20 years	indefinite

### *Termination events*

Retirement of payor at an age normal for that person's career<sup>8</sup>

## **Transitional alimony, short term support**

### *Entitlement*

where circumstances justify, and where rehabilitative support does not apply

### *Amount*

not to exceed 33% of the difference between the gross ordinary incomes of the parties  
not modifiable

### *Duration*

maximum of three years

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<sup>8</sup> See *Pierce v. Pierce*, 455 Mass. 286 (2009)(declining to create a rebuttable presumption that retirement of payor spouse terminates alimony, but upholding trial court's reduction of payor spouse's annual payments of \$110,000 to \$42,000, upon a finding that payor spouse's post-retirement income of \$34,000 could be augmented by withdrawals of \$40,000 annually from his retirement account, and that payor spouse's second spouse had sufficient income to support the payor spouse's household).

not modifiable

*Termination events*

death of either spouse, or remarriage of payee spouse

**6. Michigan**

Michigan has several sets of unofficial support guidelines.<sup>9</sup> Marginsoft Alimony Guidelines was created by MarginSoft. The company was founded by Craig Ross, a family law attorney from Ann Arbor, Michigan, who has reviewed a myriad of child support and alimony cases over a 30 year period.<sup>10</sup> Also available are the Washtenaw County Guideline, and the Alimony Prognosticator, both of which are earlier versions of the Marginsoft Alimony Guidelines.<sup>11</sup>

*Entitlement*

If the income differential between the parties reaches a minimum threshold, formula applies

*Amount*

Income differential between the parties (net of social security tax)

A "percentage is defined (depending upon the existence/placement of children) that 'labels' the parties at the same standard of living"

The case score divided by 100 is multiplied times the above income differential, after adjusting for child support, divided by two, then "fitted to the standard of living balance spot"

Adjustment for large income differential cases

*Duration*

Based on strength of the case and adjusted by length of marriage

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<sup>9</sup> Michigan Divorce Law, available at <http://www.a2lawyer.com/articles/family/divorce.html#6>; see also Michigan Alimony Guidelines Survey Report (Alimony Guidelines Project of the Equal Access Initiative 2005)(Survey results showed that 89% of the respondent judges were aware of existing alimony guidelines and a majority of the respondents used them to analyze cases but very few used them as a presumptive determination; many of the respondents indicated that they would use nonmandatory guidelines created by a task force of family law judges and family law attorneys.).

<sup>10</sup> <http://marginsoft.net/>.

<sup>11</sup> Craig Ross, Alimony Guidelines: a History, Some Detours and Explanations (1998), available at <http://marginsoft.net/Writings2.htm>.

## 7. New Mexico

New Mexico has adopted statewide alimony guidelines that focus on entitlement and amount.<sup>12</sup> They were first implemented in a pilot project in one county for a period of six months.<sup>13</sup>

### *Entitlement*

no alimony generally:

0 to < 5 years of marriage

income less than \$20,000

marriage < 10 years and both parties are self-supporting with approximately equal career opportunities<sup>14</sup>

proposed payee is cohabiting with someone other than payor

parties' income is based on social security and pensions that are approximately equal

where there is double dipping<sup>15</sup>

where debt service allocated to payor significantly affects ability to pay alimony.<sup>16</sup>

rehabilitative or transitional alimony

5 to <10 years of marriage<sup>17</sup>

other

10 to <20 years of marriage, based primarily on the role assumed in the

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<sup>12</sup> New Mexico Alimony Guidelines (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

<sup>13</sup> New Mexico Alimony Guidelines (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

<sup>14</sup> New Mexico Alimony Guidelines (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

<sup>15</sup> New Mexico Alimony Guidelines 10 (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf) (the same asset is considered in both the property distribution (or payments to buy out a property distribution) and support obligation).

<sup>16</sup> New Mexico Alimony Guidelines 11 (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

<sup>17</sup> New Mexico Alimony Guidelines (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf).

marriage, as well as the statutory factors<sup>18</sup>

*Amount*

for a couple without children for whom support is paid:

- Payor's gross monthly income x 30%
- Payee's gross monthly income x 50%

for a couple with children entitled to child support:

- Payor's gross monthly income x 28%
- Recipient's gross monthly income x 58%

In either case, if the resulting number is positive, that number is the indicated monthly alimony amount.

Spousal support is calculated first, and gross income is the same definition as contained in the child support guidelines.

No formula

high income cases  
inadequate total support because of equal time sharing of children  
Equitable factors such care giving role for stepchildren or elders, or  
frequent relocation.

*Termination events*

Remarriage or cohabitation

## **8. Pennsylvania**

Pursuant to section 4322(a) of the Pennsylvania Consolidated Statutes, Rule of Civil

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<sup>18</sup> New Mexico Alimony Guidelines (Revised September 6, 2006), available at [http://www.collinsattorneys.com/docs/revised\\_alimony\\_guidelines.pdf](http://www.collinsattorneys.com/docs/revised_alimony_guidelines.pdf) (the statutory factors include: (1) the age and health of and the means of support for the respective spouses; (2) the current and future earnings and the earning capacity of the respective spouses; (3) the good-faith efforts of the respective spouses to maintain employment or to become self-supporting; (4) the reasonable needs of the respective spouses, including: a) the standard of living of the respective spouses during the term of the marriage; b) the maintenance of medical insurance for the respective spouses; and c) the appropriateness of life insurance, including its availability and cost, insuring the life of the person who is to pay support to secure the payments, with any life insurance proceeds paid on the death of the paying spouse to be in lieu of further support; (5) the duration of the marriage; (6) the amount of the property awarded or confirmed to the respective spouses; (7) the type and nature of the respective spouses' assets: provided that potential proceeds from the sale of property by either spouse shall not be considered by the court, unless required by exceptional circumstances and the need to be fair to the parties; (8) the type and nature of the respective spouses' liabilities; (9) income produced by property owned by the respective spouses; and (10) agreements entered into by the spouses in contemplation of the dissolution of marriage or legal separation.").

Procedure 1910.16-4(a) Part IV of the Support Guidelines was promulgated by the Pennsylvania Supreme Court on September 6, 1989 and became effective September 30, 1989.<sup>19</sup>

*Amount*

Without dependent children:

— Payor's monthly net income less support to children or former spouses  
— Payee's monthly net income

x 40%

— adjustments for other expenses

With dependent children:

— Payor's monthly net income less support to children or former spouses  
— Payee's monthly net income  
— Payor's monthly child support

x 30%

*Duration*

pendente lite

**9. Fairfax County, Virginia<sup>20</sup>**

*Amount*

Without dependent children:

— Payor's income x 30%  
— Payee's income x 50%

With dependent children:

— Payor's income x 28%  
— Payee's income x 58%

*Duration*

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<sup>19</sup> 23 Pa. C. S. §4322(a). The statute further provides that the guideline shall be "established by general rule by the Supreme Court, so that persons similarly situated shall be treated similarly."

<sup>20</sup> Jeff Krause, Virginia Spousal Support Issues,  
<http://www.divorcesource.com/VA/ARTICLES/krause11.html>.

Pendente lite

**10. Texas**

*Entitlement*

duration of the marriage exceeds 10 years, and the spouse seeking maintenance lacks sufficient property.

*Duration*

Maximum of 3 years.

*Amount*

Capped at the lesser of:

\$ 2,500; or

20% of the spouse's average monthly gross income.<sup>21</sup>

**11. American Academy of Matrimonial Lawyers**

*Amount*

If combined gross income is \$1,000,000 per year or less:

— Payor's gross income x 30%  
payee's gross income x 20%  
(Not to exceed 40% of the parties' combined gross incomes)

*Duration*

Multiply the length of the marriage by one of the following factors:

0-3 years	.3
3-10	.5
10-20	.75
Over 20	permanent

**12. A. 10984-A/S. 7740-A (2010)**

*Amount*

If payor's income is \$500,000 or less (otherwise first \$500,000 of payor's income), post marital income is the lesser of the two amounts below

$$\begin{array}{rcl} & \text{Payor's income} \times 30\% \\ - & \text{Payee's income} \times 20\% \end{array}$$

Or

$$\begin{array}{rcl} & \text{Payor's income up to \$500,000} \\ + & \text{Payee's income} \\ \times & 40\% \\ - & \text{payee's income} \end{array}$$

Apply factors to income over \$500,000

*Duration*

0 to 5 years	30%
5 to 7.5 years	40%
7.5 to 10 years	50%
10 to 12.5 years	60%
12.5 to 15 years	70%
15 to 17.5 years	80%
17.5 to 20 years	90%
20 to 25 years	100%
more than 25 years	permanent

**13. Collins marital residuals formula<sup>22</sup>**

*Entitlement*

differential between incomes

*Amount*

$$\begin{array}{rcl} & \text{Payor's income net of taxes and social security} \\ - & \text{Payee's income net of taxes and social security} \\ \times & \% \text{ for each of 5 "periods:" } 50\%, 40\%, 30\%, 20\%, 10\% \end{array}$$

*Duration*

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<sup>22</sup> Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L. J. 23 (2001).



Up to 10 years	1 month per year (thus, 3 year marriage has 5 periods of 3 months)
10-30 years	1 month + .05 months for each year over 10 (15 year marriage has 5 periods of 1.25 months)
30+ years	2 months per year (35 years has 5 periods of 70 months)

#### 14. Canada

##### *Amount*

Without minor children:

— Payor's gross income  
— Payee's gross income

x applicable %  
Lower end of range: 1.5 x 2% per year of marriage  
Upper end of range: 2 x 2% per year of marriage  
Maximum range is 37.5% to 50% for marriages of 25 years or longer

With minor children:

+ Payor's net income after child support, taxes and deductions  
+ Payee's net income after child support, taxes and deductions, plus  
government benefits and credits

x 40% (lower end of range)  
46% (upper end of range)

##### *Duration*

Without minor children:

Lower end of range: .5 x years of marriage  
Upper end of range: 1 x years of marriage  
Indefinite after 20 years of marriage or  
For marriages of over 5 years, when the years of marriage and age  
of payee at separation added together total 65 or more

### Examples of Formulas

		5 yr. marriage H \$70,000 W \$20,000 No Children	10 yr. marriage H \$150,000 W \$0 No Children	25 yr. marriage H \$150,000 W \$0 No Children
Maricopa County, AZ	Amount/yr. Duration	\$3,750 Not Specified	\$22,500	\$56,250
California	Amount/yr. Duration	\$18,000 Pendente Lite	\$60,000 Pendente Lite	\$60,000 Pendente Lite
Kansas	Amount/yr. Duration	\$10,000 20 months	\$30,000 40 months	\$30,000 100 months
Kentucky	Amount/yr. Duration	\$25,000 No Specified	\$75,000	\$75,000
Massachusetts	Amount/yr. Duration	\$16,667 30 months	\$50,000 72 months	\$50,000 Indefinite
Michigan	Amount/yr. Duration	Adjusted Per Case based on Income Differential Adjusted Per Case based on Length of Marriage		
New Mexico	Amount/yr. Duration	\$11,004 Not Set by Guidelines	\$45,000	\$45,000
Pennsylvania	Amount/yr. Duration	\$19,997 Pendente Lite	\$60,000 Pendente Lite	\$60,000 Pendente Lite
Fairfax County, VA	Amount/yr. Duration	\$11,000 Pendente Lite	\$45,000 Pendente Lite	\$45,000 Pendente Lite
Texas	Amount/yr. Duration	\$18,000 Max. 3 yrs.	\$30,000 Max 3. yrs.	\$30,000 Max 3 yrs.
Am. Acad. Of Mat. Law.	Amount/yr. Duration	\$17,000 2.5 yrs	\$45,000 7.5 yrs	\$45,000 Permanent
A 10984-A/S 7740-A	Amount/yr. Duration	\$16,000 1.5 yrs	\$45,000 5 yrs	\$45,000 25 yrs
Collins formula (Amt/yr. averaged over all periods)	Amount/yr. High Period Low Period Duration	\$15,000 \$2083/mo. \$417/mo. 5 mo. periods 25 mos. total	\$45,000 \$6250/mo. \$1250/mo. 10 mo. periods 50 mos. total	\$45,000 \$6250/mo. \$1250/mo. 43.75 mo. periods 218.75 mos. Total
Canada	Amount/yr. Duration	\$7,500-\$10,000 2.5-5 yrs	\$45,000-\$60,000 5-10 yrs.	\$56,250-\$75,000 Indefinite

\*\*All calculations are based on gross income, although some require net income.