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## ALIMONY GUIDELINES

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### Should New Jersey Adopt a Formula Approach for Spousal Support?

The existing methodology for calculating alimony in the state of New Jersey is seriously flawed. A systematic review of cases reported after the 1988 statutory revisions demonstrates a complete lack of uniformity or predictability in decision-making.<sup>1</sup> This lack of uniformity or predictability inhibits settlement and undermines confidence in the judicial system.

This criticism is not unique. **Exhibit A** details the number of state jurisdictions – 41 in total -- presently utilizing statutory "factors" similar to the criteria contained within Title 2A:34-23. In a comprehensive review of these statutes, Professor Mary Kay Kisthardt of the University of Missouri School of Law observed the following:

The lack of a coherent rationale (underlying the concept of alimony) undermines the ability to provide consistency in awards. Alimony statutes vary significantly from state to state with some authorizing payments in a wide variety of situations and others restricting it to very narrow circumstances. But in almost all states judges are given a great deal of discretion with the result that these awards are rarely overturned. Because of an inability to come to a

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<sup>1</sup> The author prepared extensive written materials including an article entitled "Alimony; A Brief History and Analysis" as chairman of the Burlington County Bench Bar committee for presentation at the third bench bar committee conference on January 24, 2007. As part of the underlying research, over 100 reported and unreported New Jersey decisions were reviewed since 1988, the effective date of the present statutory criteria. The most striking feature of the review was a significant lack of consistency among judicial decisions in cases with identical or highly similar fact patterns. In some situations, cases with similar fact patterns contained wildly divergent results. Many possible explanations exist. Of course, reported decisions do not contain a complete record as to all pertinent factual circumstances. It is entirely possible that important facts were not reported in the written decisions that could account for the lack of consistency. It is equally plausible that the existing statutory scheme, which contains no prioritization as to the factors, no indication from the Legislature as to the interaction among the factors, as well as the enormous discretion given to trial judges also explains the lack of consistency. It may also be the case that the bench and bar are not properly versed with regard to the use of the statute, consistently misapplying the methodology, oblivious to the nuance of a well-crafted law.

consensus regarding the underlying rationale for alimony, legislatures often include a long list of factors for judges to consider. One commentator found over 60 factors mentioned in the 50 states. Unfortunately there are often internal inconsistencies in the factors and no state provides a priority ranking. Judges struggle with how to apply a myriad of factors to reach a fair result. Statutory criteria, with no rules for their application, then result in a "pathological effect on the settlement process by which most divorces are handled."<sup>2</sup>

Professor Marsha Garrison has further concluded that "like cases simply do not produce like results" pursuant to the numerous and often conflicting statutory factors a Judge may consider.<sup>3</sup>

The Reporters notes to Section 5.02 of the *Principles of the Law of Family Dissolution* as published by the American Law Institute contain detailed discussions as to inconsistencies in the definition of key traditional alimony factors common among the 41 jurisdictions that utilize similar statutory schemes.<sup>4</sup> This includes divergent interpretations of the need factor, which is recognized by the New Jersey judiciary as one of the three most important factors in calculating alimony.<sup>5</sup>

These widespread criticisms have encouraged at least two revisionist approaches to the issue of calculating alimony. The first approach has resulted in the creation of guidelines premised upon the traditional rationale of need. Guidelines have been promulgated in California, Virginia, Pennsylvania, Michigan, Arizona, Nevada, Oregon, Minnesota, New Mexico and Kansas. Some of these guidelines are in use in limited counties; others are in use by entire state jurisdictions. Some are presently pilot

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<sup>2</sup> Professor Mary Kay Kisthardt, Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, *Journal of the American Academy of Matrimonial Lawyers*, Volume 21, pp. 62 to 63, 2008.

<sup>3</sup> Professor Marsha Garrison, The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes? 8 *Duke Journal of Gender and Policy* 119, 120 (2001).

<sup>4</sup> Section 5.02 pages 793-796

<sup>5</sup> Stiffler v. Stiffler, 304 N.J. Super. 96, 99 (Ch. Div. 1997)

programs; others represent existing statutory standards. Some are easy to comprehend; others are highly complicated. Some apply only to pendente lite awards; others apply to final dispositions. Surprisingly, there tends to be little uniformity among the different state protocols.<sup>6</sup>

The second approach is based upon a fundamental rethinking of the rationale underlying the theory of alimony by eliminating the concept of need and adopting a premise based upon compensation for loss. This second approach forms the basis of the concept of compensatory spousal payments as articulated by the American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations*, and, in the opinion of the author, offers a more enlightened and predictable approach.

### **THE ALI CONCEPT OF COMPENSATORY SPOUSAL PAYMENTS**

The American Law Institute was established in 1923 to promote clarity and simplification of American common law. The ALI is presently headquartered in Philadelphia, Pennsylvania, adjacent to the University of Pennsylvania. It drafts, approves and publishes restatements of the law, uniform protocols and model codes.

Starting in 1923, the American Law Institute participated in the restatement of contracts, restitution, real property, trusts and other significant substantive areas. Second restatements began in 1952, followed by third restatements in 1987. It was the third wave that finally focused attention on family law practice.

The 1,187-page American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* was published in 2002 after eleven years of work involving four separate drafts prepared by over 160 judges, law professors and practicing attorneys. It is essentially a restatement of the law of domestic relations and the first comprehensive restatement of its kind.

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<sup>6</sup> Guidelines for Alimony: The New Mexico Experiment Twila B. Larkin, Family Law Quarterly, Volume

## **THE PURPOSE OF CSP**

Chapter 5 addresses the traditional concept of alimony. It replaces the word “alimony” with the concept of “compensatory spousal payments” (CSP) and adopts a completely different paradigm underlying the award: rather than relief of need, the traditional concept underlying virtually all state rules of alimony, compensation for loss forms the underlying rationale, a substantive concept adopted from the law of damages.

The ALI model first addresses the purpose of CSP. There are three universally acknowledged financial claims between spouses incidental to dissolution: child support, division of property and alimony. Acknowledging the uniformity as to the rationales underlying the first two categories, as well as the inconsistency as to the final category with regard to purpose and function, Section 5.02 defines the objectives of CSP as a method to “allocate financial losses upon dissolution according to equitable principles that are consistent and predictable in application.”

In the ALI model categories of financial loss are established. One category recognizes a loss of earning capacity attributable to a claimant leaving the labor market to care for children.<sup>7</sup> A second category relates to adjustments made during long-term relationships that result in a loss of earning capacity with or without children, such as serving exclusively as a homemaker.

In the first category, there is a presumption favoring CSP if children were born and a disparity in earning capacity exists at the time of dissolution. The presumption can be overcome if the claimant did not provide the majority of childcare functions during the relationship.

## **CALCULATING THE AMOUNT AND LENGTH OF CSP**

The amount of the CSP represents a percentage of the difference in the post-

dissolution income earning abilities of the parties. The percentage increases the longer a dependent spouse serves as the primary caretaker. Each state jurisdiction is free to set the percentage.

The length (“term” in our vernacular) is fixed for a period of time equal to the length of marriage, or, if children were born, fixed to a period of time equal to that period the claimant spouse served as the primary caretaker.

The length can be indefinite based upon the advanced age of the claimant or in exceedingly long periods of marriage. Indefinite terms are not favored.

Payments can be made periodically or converted to a lump sum. Additionally, CSP can be modified or terminated for the traditional reasons, such as remarriage, death, et cetera. Tax treatment of CSP does not appear to be addressed by the ALI. However, the IRS would likely treat CSP as alimony under Section 71 of the IRC.

### **ADJUSTING TO A NEW APPROACH**

The largest intellectual adjustment for New Jersey attorneys relates to recharacterization of the underlying rationale from need to compensation; from dependent spouse to claimant; from relief of need to fixing compensation. However, once the leap is made, a fair-minded, predictable and attractive standard emerges.

Upon further analysis, the methodology of calculating CSP is loosely analogous to a common "rule of thumb" utilized by many matrimonial practitioners to double check their application of the New Jersey statutory factors. Specifically, after determining ability to pay and need, many utilize a percentage of the difference in the income-earning abilities of the litigants as an additional checkpoint. The real innovation of the ALI standard relates to fixing the term, arguably the most challenging conundrum when attempting to create predictability and consistency.

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<sup>7</sup> The word “claimant” replaces “dependent spouse” as dependency suggests need.

## **CSP: A PROPOSAL**

New Jersey should consider a pilot program utilizing the ALI standard of CSP pursuant to the following terms and conditions:

1. Initially, utilization of the ALI standard should be non-binding; rather, alimony should be calculated pursuant to the existing statutory framework while a second calculation should be prepared to fix CSP. The data should be gathered by attorneys and compiled by a subcommittee of the local bar association for a period of one year and then reviewed by a subcommittee of the New Jersey State Bar Association Family Law Executive Committee. The pilot program should occur in a minimum of six counties that are geographically and economically diverse. The data will permit a comparative analysis between the existing statute standard and the ALI framework, the first study of its kind in the State of New Jersey.
  
2. To avoid redundancy with regard to fixed expenses, some analysis and coordination must occur with regard to utilization of the CSP methodology and the existing New Jersey Child Support Guidelines, which are clearly premised on need. It may not be possible to reconcile the ALI alimony protocol with our existing child support standard, in light of the differences between the underlying rationales.
  
3. It is possible that the CSP methodology should have a horizon limitation. For example, CSP protocol could apply to cases involving gross annual family income under \$150,000. The guidelines would not apply in higher income situations. This suggestion is not included in the ALI model.

## **CONCLUSION**

It is clear that problems exist with regard to the current statutory framework for calculating alimony in the State of New Jersey. The absence of predictability inhibits settlement. Injustice occurs when similar fact patterns result in disparate awards. This ultimately calls into question the integrity of the judicial process.

The fall 2008 *Family Law Quarterly*, published by the American Bar Association, commemorates the golden anniversary of the section with a special issue covering changes in family law over the past fifty years. The *Principles of the Law of Family Dissolution* is the subject of an extensive article designed to determine the impact of the

principles on both legislative enactments and court decisions. The authors conclude that while certain sections of the principles have not yet had a significant influence, the section dealing with compensatory spousal payments has in fact exerted a noticeable impact, primarily in sparking discussions among judges, attorneys, academicians and social commentators concerned with the universally recognized flaws related to factor-based, need-driven statutory schemes.

Compared to the alimony guideline protocols utilized by many state jurisdictions identified above, which continue to be premised upon relief of need, the ALI concept of compensatory spousal payments, driven by principles of compensation of loss, is attractive as it facilitates a more predictable outcome both with regard to the amount and length of the award. Accordingly, this novel approach should be carefully considered as the centerpiece of any revisions to the existing New Jersey statutory scheme.