Counterpoint:
To Guideline, or Not to Guideline: That is Not the Correct Question

by Christopher Rade Musulin

Defenders of the existing New Jersey methodology for calculating alimony have systematically utilized the specter of guidelines to successfully preserve the antiquated, intellectually indefensible *status quo* that is N.J.S.A. 2A:34-23 for decades. The current statute and related case law authority are fundamentally perfidious, as they remain premised upon maintenance of the marital standard of living, a historic purpose absolutely unjustifiable in 21st century America. To make matters worse, the complete absence of definitive statutory or decisional authority to precisely determine the length or characterization of the award renders the aggregate calculus incomprehensible. This combination of fatal flaws eliminates consistency of decision making in similarly situated cases, promotes litigation, discourages settlement, and erodes public confidence in our system of justice.

The visceral bloviations of those supporting the existing regime become even more apparent when we acknowledge that alimony guidelines are but one of several different existing models used to calculate spousal support. The debate is not as simplistic as one or the other— alimony guidelines or N.J.S.A. 2A:34-23. Rather, there are legitimate concerns existing on both sides of the debate that merit scrutiny and deliberative consideration.

What we need to do is open our minds; accept some constructive criticism without acrimonious posturing; collectively debate and analyze the strengths and weaknesses of the existing system; and review and consider alternative methods to calculate spousal support, including alimony guidelines. There *is* a middle ground that will satisfy all parties to the discussion, short of maintaining the existing system or adopting a simplistic guideline approach.

The results of inaction will be swift and irrevocable. As was the case with palimony and the statute of frauds, if we remain on the sidelines, decisions may be made that may adversely impact every litigant and matrimonial attorney in the state of New Jersey. We need to have a say in the process or our voices and concerns will go unheeded,with no one to blame but ourselves.

The Utility of Debate

We do not have to look further than our Founding Fathers to acknowledge a fundamental truth: It is always healthy to question authority and challenge the *status quo.* And perhaps no other expression of human existence requires constant debate than the institution of law, the method that defines the contours of societal behavior and establishes boundaries of acceptable human engagement. We are a nation of laws, not of women and men, and respect for rules, norms and procedures prevents society from devolving into chaos and anarchy.

Historically speaking, law remains dynamic, a work in progress, reflecting and reacting to changes in society. The best example of the utility of debate and modification of law can be found in legislation across America acknowledging the legitimacy of same-sex relationships and in an era before, it was civil rights. Imagine if legislators, attorneys, and public officials dogmatically adhered to existing legal standards and norms in the face of overwhelming social science data and public support acknowledging racial equality or the acceptance of same-sex relationships. The law would remain static and out of step with the realities of the world. Frustration and civil unrest would occur, with injustice resulting.

Concerning the issue of alimony, let us accept the fact that the world is a very different place than it was 25 years ago. We should not have a problem with objectively reviewing and debating an alimony statute last modified in accordance with the realities, concerns, and public policies of the Ronald Reagan era rather than the 21st century. Accordingly, let us first focus with precision on the fundamental problem with the existing methodology, the lack of consensus regarding the *purpose* of alimony.

The Purpose of Alimony

The brightest and the best legal minds in the state of New Jersey and across the country remain equally perplexed by the purpose of alimony. This includes Justice Virginia Long, writing for the majority of the Supreme Court in *Mani v. Mani*, 183 N.J. 70 (2005):

> Divorce based on the English practice was available in the American colonies from the earliest times. *Maynard v. Hill*, 125 U.S. 190, 206, 8 S. Ct. 723, 727, 31 L.Ed. 654, 657 (1888). The concept of alimony also carried over. Again, as had been the case in England, the reason for alimony, outside the legal separation scenario, remained an enigma. 2 Homer Harrison Clark, *The Law of Domestic Relations in the United States*, 257-58 (2d ed.1988). That lack of clarity regarding the theoretical underpinning of post-divorce alimony explains why, although alimony is now awarded in every jurisdiction, Collins, *supra*, 24 *Harv. Women's L.J.* at 31, there is no consensus regarding its purpose. Indeed, many distinct explanations have been advanced for alimony. *Id.* at 23. They include its characterization as damages for breach of the marriage contract, Margaret F. Brinig & June R. Carbon, *The Reliance Interest in Marriage and Divorce*, 62 *Tul. L.Rev.* 855, 882 (1988); as a share of the benefits of the marriage partnership, *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974); as damages for economic dislocation (based on past contributions), Elisabeth M. Lands, *Economics of Alimony*, 7 *J. Legal. Stud.* 35 (1978); as damages for personal dislocation (foregoing the chance to marry another), Lloyd Cohen, *Marriage, Divorce, Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 *J. Legal Stud.* 267, 276 (1987); as compensation for certain specific losses at the time of the dissolution, A.L.I., *Principles of Law of Family Dissolution: Analysis and Recommendations*, 8 *Duke J. Gender L. & Pol'y* 1, 28 (2001); as deterrence or punishment for marital indiscretion, Brinig & Carbone, *supra*, 62 *Tul. L.Rev.* at 860-61; and as avoidance of a drain on the public fisc, *Miles v. Miles*, 76 Pa. 357, 358 (1874).[1]

This criticism is not unique to the state of New Jersey. Presently, 41 American jurisdictions utilize statutory "factors" similar to the criteria contained within N.J.S.A. 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 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."[2]

Brooklyn Law School 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 jmay consider.[3]

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 regarding inconsistencies in the definition of key traditional alimony factors common among the 41 jurisdictions that utilize similar statutory schemes.[4] This includes divergent interpretations of maintenance of the marital standard of living, which is recognized by the New Jersey Supreme Court as the most important factor in calculating alimony.[5]

Searching for an Answer: The Historic Justification for Alimony

The purpose underlying an award of child support is clearly to support children born of the relationship.

This seems obvious. The purpose underlying equitable distribution is also clearly to divide the spoils of the marriage. This is equally obvious. However, consistent with the observations of Justice Long and dozens of other equally learned commentators discussed above, there is absolutely no consensus regarding the modern purpose of alimony.

Before we search for an updated justification for an award of alimony, it is appropriate to review the historic purpose of alimony. This was articulated by a different panel of the New Jersey Supreme Court approximately five years before the *Mani* decision, in *Crews v. Crews*:

> An alimony award that lacks consideration of the factors set forth in N.J.S.A. 2A:34-23(b) is inadequate, and one finding that must be made is the standard of living established in the marriage. N.J.S.A. 2A:34-23(b)(4). The court should state whether the support authorized will enable each party to live a lifestyle "reasonably comparable" to the marital standard of living.[6]

Where does this standard come from? Prior to the 1988 amendments to N.J.S.A. 2:A34-23, the 1971 statute contained only three factors: ability, need and duration of the marriage.

Senator Wynona Lipman sponsored the legislation that eventually resulted in the 1988 amendments, creating most of the factors we are familiar with today, including the fourth factor, maintenance of the marital standard of living. Before it was embedded in the statute, it was available through case law authority.

How did the standard become embedded in case law authority? Historically, there was no equitable distribution of property acquired during the marriage, since ownership turned upon title, and title was restricted to the name of the husband. Most women did not work outside of the home, marriages tended to last a lifetime, and divorces were adjudicated upon fault. It was in this environment that maintenance of the marital standard of living emerged.

When a marriage came to an end because of a husband's fault, a wife needed money to survive or she would become a public charge. She was disenfranchised from wealth since men controlled all property, and she was unable to enter the male-dominated, nondomestic workforce, having served exclusively as a homemaker and primary caretaker of the children. The guilty husband was then responsible to pay the innocent wife-victim sufficient money to sustain her in the lifestyle to which she had become accustomed. This is the historic rationale justifying the obligation to maintain the marital standard of living.[7] Accordingly, virtually every jurisdiction in America adopted maintenance of the marital standard of living as the historic core purpose of alimony awards.

Changes in the World

The rather obvious problem with the historic purpose of alimony is that American society, culture, and laws have changed; thus, the circumstantial underpinnings of the traditional purpose of alimony are simply no longer viable in the 21st century.

First, in virtually every jurisdiction in America, whether pursuant to equitable distribution or community property standards, marital assets are subject to division. The laws of colonial America with regard to exclusive male ownership no longer exist. Furthermore, ownership does not turn upon title in a matrimonial case. In the vast majority of cases, non-business-related assets acquired during the marriage, such as the home, retirement accounts, bank accounts, personal property, and other significant assets, are very often divided equally between the parties. The wife is no longer subject to economic disenfranchisement.

Second, with rare exception, fault is no longer relevant in modern divorce practice. This philosophy has been in place in New Jersey since 1971, when New Jersey adopted the core philosophy of the Uniform Divorce and Marriage Act with regard to the elimination of fault. Ironically, for purposes of the present discussion, fault was further excised from the alimony calculus by Justice Long in her opinion in the *Mani* decision, except in the most extreme situations, and only then limited to economic malfeasance as opposed to aberrational behavior causing the failure of the bond of matrimony.

Third, women are now regular members of the nondomestic workforce. In fact, it is not unusual for a wife to earn more money than her husband.

Finally, marriages are rarely long-term, a fact statistically demonstrable. Marriages are so short in length, the Appellate Division in the decision of *Hughes v. Hughes* commented that a 10-year marriage is, for all intents and purposes, a long-term relationship under modern standards.[8]

Accordingly, the above-referenced changes in the world render the historic purpose of alimony, the main-

tenance of the marital standard of living, intellectually indefensible. This observation cannot be the subject of rational debate.

Follow Your Intuition

On a more pragmatic level, our training and experience have told us for years that maintenance of the standard of living is just plain counterintuitive. By way of a simplistic example, assume a husband earns $100,000 a year and a wife earns $50,000 per year. Further assume there is no other source of earned/unearned income, no inheritance/gifting, no asset invasion, and no significant debt creation. Further, assume a combined average tax rate of 30 percent. It therefore follows that the net income of $105,000 per year defines the marital standard of living. We can't spend what we don't have.

Fast forward to divorce. In the above fact pattern, neither party will be able to enjoy a $105,000 lifestyle. Even if we divide the income in half, each will only enjoy a $52,500 per year lifestyle. It's just that simple.

If there is equitable distribution, women work and no longer serve exclusively as homemakers and/or primary caretakers, marriages tend to be short and fault is irrelevant, why is the spouse with the lower income exclusively entitled to enjoy maintenance of the marital standard of living? It just does not make sense in the year 2012.

Chaos begets chaos. Armed with the *Crews* decision, your adversary pounds away at you, relentlessly arguing that his or her client, as the prospective recipient of alimony, is exclusively entitled to ownership of the marital standard of living. Under N.J.S.A. 2A:34-23 and *Crews*, your adversary is correct. However, operating within the realities of 2012 (and basic common sense and fairness), your adversary is absolutely wrong.

The Problem With Guidelines

What about guidelines; don't they address and resolve this issue? The answer is, no. The problem with guidelines is that most models perpetuate the marital standard of living fallacy by blindly fixing a percentage of the difference in the income models existing at the time of divorce as the appropriate amount of an alimony award. It is a shortcut method that further institutionalizes and reinforces the historic purpose of alimony into what appears to be a revised, enlightened protocol.

A guideline is enticing, even subconsciously, as it is easy and can free us from the absurd constraints of the steroidal adversary who insists on permanent alimony after a three-month marriage.

A guideline is also seductive, as it mimics the proverbial rule of thumb utilized in virtually every New Jersey vicinage, and even acknowledged as a perfectly viable methodology by at least one panel of the New Jersey Appellate Division.[9] This involves fixing alimony based upon 25 or 30 percent of the difference in the income models.

There are literally dozens of guideline models across America, including California, Virginia, Michigan, Arizona, Nevada, Oregon, Minnesota, New Mexico, Kansas and Pennsylvania. Some of these guidelines are limited to specific counties; others are in use by entire state jurisdictions. Some are presently pilot programs; others represent existing statutory standards. Some are easy to comprehend, others highly complicated. Some are limited to *pendente lite* awards; others apply to final dispositions. (See The Massachusetts Alimony Reform Act of 2011, which is a sweeping alimony reform bill that was signed into law this past year on Sept. 19, 2011. The new law is effective for alimony judgments entered on or after March 1, 2012.[10]) There is no uniformity among the different guideline protocols.[11]

Critics of alimony guidelines argue that guidelines will destroy judicial discretion, eliminate advocacy, and overly simplify incredibly complicated, unique factual situations that mandate individualized attention. Supporters of alimony guidelines argue that the absence of uniformity in decision making, especially in similarly situated fact patterns, results in the promotion of litigation and obstacles to settlement, and believe that confidence in the system of justice is undermined by the absence of predictability in awards. Both sides of the debate make extremely valid points.

Is there a place for a guideline award in a matrimonial case? Perhaps. Many guidelines resolve the second major structural problem with the existing New Jersey protocol—the characterization of the award—by limiting alimony awards to a period of time not to exceed the length of marriage, and, further, by terminating alimony upon the natural time of retirement, typically age 65. But guidelines are of limited utility with regard to the amount of alimony since they continue to rely upon marital standard of living as their core rationale.

Salvaging the Existing Regime

Accepting the fact that maintenance of the marital standard of living was a viable purpose for a previous generation, is it possible to remove this factor from our existing statute, reorganize the remaining factors into a

more logical presentation, and consider the use of rebuttable presumptions with regard to characterizing the award?

It makes great sense to utilize the ability factor from the statute. We all understand this factor to generally mean the ability of either party to earn income. Implicit in the ability to earn income is the age, physical and emotional health of the parties; his or her earning capacity, educational level, vocational skills and employability; the length of absence from the job market of the party seeking maintenance; the parental responsibilities for the children; the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the availability of training and employment; and the amount of income available through investment of assets.

All of these considerations, now found in separate paragraphs of the statute, relate to the ability of either party to earn income. Logically speaking, they all belong together, as each impacts the ability to earn.

The need factor should be broken into a separate paragraph and, with the elimination of maintaining the marital standard of living, can become a more realistic expression of basic monthly budgetary needs.

Reorganizing the statutory considerations into the above-described paradigm with the unambiguous elimination of maintaining the marital standard of living is a more appropriate standard to utilize in the 21st century.

The Other Half of the Battle

When fixing initial awards of alimony, determining the appropriate amount of the award is only half the battle. Equally problematic is the issue of characterization—permanent, limited duration, or rehabilitative.

With regard to the characterization of alimony, legislative history underlying N.J.S.A. 2A:34-23 indicates a complete lack of direction in this regard.[12] The resulting case law authority is confounding. The characterization of an award under the current legal standard may present a greater intellectual conundrum than the elimination of marital standard of living with regard to fixing the specific amount of the award.

Characterizing the award is also challenging because it is premised upon the realities of a different era, with the exception of the 1999 amendment creating statutory acknowledgment of limited duration alimony awards. Once again, we should follow intuition. Although the second factor of the existing statute, duration of the marriage, suggests to us that there should be a relationship between the length of the marriage and the length of the award, we have case law specifically telling us there is no such precise correlation.[13]

To make matters worse, we have the occasional aberrational decision that further confounds the analysis, such as *Hughes v. Hughes*, which empowers the irrational adversary to argue for permanent alimony with a 10-year marriage.

Rebuttable Presumptions to the Rescue

To assist the Judiciary, attorneys, and litigants in resolving the problem of characterization, perhaps we should consider the use of rebuttable presumptions. Specifically, where the marriage is five years or less, a rebuttable presumption should exist that no alimony award is appropriate. With a marriage between five years and 15 years, the rebuttable presumption should favor limited duration alimony. Finally, with a marriage in excess of 15 years, the rebuttable presumption should support an indefinite award.

Brilliant in its simplicity, and refreshing in its recognition of reality, the utilization of rebuttable presumptions can solve the second malingering conundrum that makes settling matrimonial cases far too challenging. If we could all agree that in general, a marriage of two years does not merit alimony, but a marriage of 17 years generally requires payment until retirement of the obligor, the world would truly be a better place. The use of rebuttable presumptions as suggested above is generally consistent with our professional experience, and would go a long way toward addressing the concerns of the proponents of alimony guidelines.

Perhaps we can even go a step further, and create an additional rebuttable presumption that attainment of the age of 65, or qualification for Social Security, whichever is later, represents a *prima facie* change of circumstances entitling an obligor to a review of the support obligation.

Is There a More Enlightened Approach?

In 2002, after 11 years of work involving four separate drafts prepared by over 160 judges, law professors and practicing attorneys, the American Law Institute issued *Principles of the Law of Family Dissolution*, the restatement of family law comprised of 1,187 pages.

Chapter 5 addresses the traditional concept of alimony. It replaces the word "alimony" with the concept of compensatory spousal payments, and adopts a completely different paradigm underlying the award: Rather than relief of need or maintenance of the

marital lifestyle, compensation for loss becomes the core rationale, adopted from the substantive law of damages. Financial loss attributed to the marital relationship falls into two primary categories: first, loss of earning capacity attributable to leaving the workforce to care for children; second, loss of earning capacity attributable to serving as a homemaker, without children.

This interesting approach then determines an award of compensatory spousal payments premised upon a fixed percentage of the difference between the income models of the parties. The length—characterization—of the award is largely equal to the length of the marriage.

An analogous approach is presently utilized in England that really gets to the heart of the alimony debate. Spousal compensation is awarded in the event the party seeking the award can demonstrate "relationship generated career loss," the essence of sacrifice. If the spouse can demonstrate a career loss/income loss directly attributable to the assumption of primary caretaking or homemaking responsibilities during the course of a matrimonial relationship, they are entitled to compensatory spousal payments. Relationship-generated career loss replaces maintenance of the standard of living as the core purpose of post-marital spousal compensation.[14]

To provide a simple example, if a couple is married for 10 years, no children are born and each works on a full-time basis throughout the course of the marital relationship, vigorously pursuing their careers, there would be no compensatory spousal payments since neither spouse would be able to demonstrate career interruption or income loss directly attributable to the assumption of primary caretaking or homemaking responsibilities.

To provide an alternative example, if a couple is married for 10 years, and one spouse gives up his or her career to become a full-time caretaker of the children and homemaker of the domestic regime, this spouse would be entitled to compensatory spousal payments, as he or she can clearly demonstrate career interruption or income loss.

Eliminated from the above-mentioned modern paradigm is entitlement to marital lifestyle absent a demonstration of relationship generated career loss. Accordingly, the mere fact that you are married to someone for 10 years and enjoy a heightened standard of living does not, by itself, entitle you to continue to enjoy this standard at the conclusion of the marital relationship. This represents a fundamental departure from current New Jersey law, and effectively abolishes the *Crews* standard.

The justification for the compensation is the belief that the loss experienced by one spouse should be shared between the parties in a fair and equitable fashion. Furthermore, the loss may extend into the future if continuing parental obligations exist, such as caring for a child or if a medical condition renders a spouse unable to work.

Conclusion

There has been more legislative, learned treatise, and press attention to the issue of alimony in the previous two years than has occurred in the previous two decades.[15] This is an incredibly hot topic that requires our immediate attention and involvement.

Inaction may result in the wholesale adoption of revised statutes from sister jurisdictions, such as legislation tentatively proposed by members of the New Jersey Assembly who are enamored with the recently enacted Massachusetts model. We should not blindly adopt alimony guidelines. In the same respect, we cannot blindly accept the existing statutory regime premised upon maintenance of the marital standard of living with the additional absence of precision concerning characterization/length of the award. Rather, we should essentially prune and revise our existing statute by reorganizing the factors into a more logical presentation, and consider adopting relationship generated career loss as the modern core purpose of alimony awards. We may also wish to embed rebuttable presumptions with regard to the characterization of the award, as well as creating a *prima facie* change of circumstance upon the natural date of retirement, presumptively age 65.

This above-mentioned approach will satisfy both sides of the debate. The opponents of alimony guidelines will avoid the adoption of a simplistic model, guarantee the retention of judicial discretion, and remain involved in a system permitting diligent advocacy. The supporters of alimony guidelines will have a more enlightened core purpose related to relationship-generated career loss, eliminate the archaic warhorse that is maintenance of the marital standard of living, and enjoy fair-minded, logical rebuttable presumptions that will create greater predictability in the system.

There is room to compromise and a comfort zone in the middle that all parties should consider. Remember, with the exception of adopting limited duration alimony, there have been no significant or comprehensive revisions to the statute in almost 25 years, with case law

authority landing all over the place, struggling to make sense out of a senseless situation. The winds of change are howling, and we must rise to the occasion and do what is best for litigants, attorneys, and the Judiciary.

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Endnotes

1. *Mani*, *supra* at 79.
2. Mary Hay Kisthardt, Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, *Journal of the American Academy of Matrimonial Lawyers* (2008), 62-63.
3. Marsha Garrison, The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?, *Duke Journal of Gender Law and Policy* 8 (2001), 119-20.
4. Section 5.02 pages 793-796.
5. *Crews v. Crews*, 164 N.J. 11 (2000).
6. *Crews v. Crews*, 164 N.J. 11, 26 (2000).
7. Laura W. Morgan, Current Trends in Alimony Law—Where are We Now?, *Family Advocate* 34 (Winter 2012), 8-11.
8. *Hughes v. Hughes*, 311 N.J. Super. 15, 31 (App. Div. 1998).
9. *Smith v. Grayson*, 2011 WL 6304145 (N.J. Super. App. Div. Dec. 19, 2011).
10. Massachusetts Law Updates, http://masslawlib.blogspot.com/2011/09/alimony-reform-law-signed.html (last visited Feb. 29, 2012).
11. Twila B. Larkin, Guidelines for Alimony: The New Mexico Experiment, *Family Law Quarterly* 38 (2004).
12. The limited exception to this proposition can be found in the report of the Commission to Study the Law of Divorce, wherein our section was capably represented by Frank Louis, and significant discussion occurred with regard to the adoption of limited duration alimony into the statutory scheme.
13. *Lynn v. Lynn*, 91 N.J. 517 (1982).
14. James Copson, Financial Provision in England After an Overseas Divorce, *Family Law Quarterly* 45 (Fall 2011), 361-67.
15. L.J. Jackson, Alimony Arithmetic, *ABA Journal* 98 (Feb. 2012), 15-16. Lisette Alvarez, In Age of Dual Incomes, Alimony Payers Prod States to Update Laws, *NY Times*, March 4, 2012. Yamiche Alcindor, Should Alimony Laws be Changed?, *USA Today*, Feb. 9, 2012.