

Attorney and Mediator

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SPOUSAL SUPPORT (ALIMONY)

1) What is spousal support?

“Spousal support” and “alimony” are equivalent terms that describe the periodic transfer of money from one former spouse to the other to help support the payee spouse, the claimant.

In Michigan spousal support is sanctioned by statute: Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. MCL 552.23.

Michigan case law provides that relevant factors for the court to consider include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any, and all other circumstances of the case. These criteria state a policy, but do not provide a method to reach a result.

2) What are some common misconceptions about spousal support?

Fallacy: Alimony is an outmoded idea and is no longer awarded by the Courts.

Fact: Alimony is awarded in appropriate cases.

Fallacy: Spousal support is only awarded to women.

Fact: Spousal support is gender neutral and is also awarded to men. For societal reasons many fewer men than women meet the criteria.

Fallacy: Spousal support is awarded to maintain a spouse in the “style” to which he/she was accustomed during the marriage.

Fact: Rarely can either spouse maintain the former lifestyle after divorce.

Fallacy: The award of spousal support is dependant on the relative wrongdoing of the parties during the marriage.

Fact: Despite case law to the contrary, the award or denial of spousal support is usually not affected by the fault of either party.

Fallacy: Spousal support automatically terminates when the payer dies.

Fact: The right to receive spousal support does not terminate when the payer dies, but it can become problematic to collect if protections were not put in place.

Fallacy: Spousal support automatically terminates when the claimant remarries.

Fact: The obligation to pay spousal support to the former spouse does not automatically terminate when the claimant remarries, unless the order for support so provides.

3) *What are the issues that need to be decided?*

a) Is it “an alimony case”?

In general, if both parties are working and self-sufficient, spousal support will not be ordered unless there is a significant disparity in their incomes. Even if one of the parties is in a substantially better financial situation, spousal support will usually not be ordered if it is a short-term marriage. Spousal support tends to be granted in long-term marriages where one party assumed more family/home responsibilities while the other party pursued a career or livelihood and the parties end a long partnership in an unequal financial position.

b) Should spousal support be reserved for the future?

In some situations both parties are currently self-supporting but one may be at risk for losing his/her ability to continue to be self-supporting. An example of this is when one of the parties suffers an illness that is in remission, such as cancer or mental illness. A current award of spousal support may not be needed, but the right to seek spousal support in the future, usually for a specified number of years, may be reserved in the judgment of divorce.

c) How much will the periodic payment be?

This is one of the most difficult issues, since the interests of the parties are often diametrically opposed. The size of the payment relates to the transfer of funds needed to reduce (but not eliminate) the disparity in the net incomes of the two post-divorce households. The payment amount does not have to remain fixed. For example, the award may set scheduled decreases (or increases) over time, or may provide for a change upon pre-determined events, such as the sale of the family home.

d) How long will payments continue?

Spousal support is typically ordered for a specified period of time; the longer the marriage the longer the award. Spousal support that continues for the lifetime of the claimant, called permanent alimony, is unusual but is awarded in appropriate circumstances. A spousal support award can be open-ended. For example, it may continue until the further order of the court. Spousal support can terminate automatically upon one or more stated triggering events, such as the claimant's remarriage or cohabitation with a person of the opposite sex, when the claimant's income exceeds a specified dollar amount, etc. True alimony always ends on the death of the payee, though not on the death of the payer. Termination of spousal support may also be triggered by an event that involves the payer's circumstances, such as the payer's retirement or disability. Sometimes the triggering events are the subject of much negotiation.

e) Can the amount or length of payments be modified?

Although the spousal support award can provide for changes, as stated above, a significant issue is whether either party, without the consent of the other, can bring about a change that was not contemplated in the original award. For example, if the claimant is awarded \$1,000/mo. for five years, can the claimant have the award extended beyond five years? Can the payer reduce the payments to \$500/mo.? The Michigan Court of Appeals has recently ruled in an important family law decision that both parties have a statutory right to petition the court to modify the spousal support provisions of a divorce judgment. The court may modify spousal support provisions upon petition by either party unless the parties waived that statutory right and agreed that the alimony provisions in the judgment were final, binding and non-modifiable. *Staple v Staple*, 241 Mich App 562 (2000). It should be noted that if spousal support is expressly barred in the judgment of the divorce, it cannot be reopened later. If spousal support is not addressed in the judgment, it is reserved.

f) Will the claimant be protected if the payer dies?

While alimony terminates on the death of the payee, the obligation to pay does not necessarily terminate on the death of the payer. The payee may file a claim against the payer's probate estate, but as a practical matter there may

be no probate estate from which to collect. As part of the alimony negotiation, the parties may include provisions for the payer to secure the obligation with life insurance.

g) How will the payments be treated from a tax standpoint?

If certain Internal Revenue Code requirements are met, the spousal support may be deductible by the payer. Conversely it would be taxable to the payee. The parties can agree that spousal support (even if it would otherwise meet IRC rules) will not be tax deductible by the payer nor taxable to the payee. Usually the payer is in a higher income tax bracket than the payee, so that if the payments are set up to be deducted by the payer and taxable to the payee the parties' overall income taxes are reduced. In effect this creates more money to go around. Because of this potential tax advantage, in cases where child support is also involved the parties sometimes elect to treat child support like alimony so the entire transfer of money from the payer to the payee is given alimony tax treatment. This is called "unallocated family support" because the support paid to the claimant is not allocated between child support and spousal support. This payment method is sometimes used to reduce the divorced family's overall income taxes if there is a spread between the payer and the payee's marginal tax rate after the transfer of support money. Courts will not order unallocated family support over the objection of either party, although the Washtenaw County alimony guideline does provide for a calculation of unallocated family support.

4) What is the alimony guideline?

Craig Ross is a former referee with the Washtenaw County Friend of the Court who conceived the guideline in 1978 and has continued to refine it ever since. Unlike the State Child Support Guideline, which is presumptive, the alimony guideline is intended to serve as a tool to evaluate and resolve spousal support claims.

a) How did the guideline come about?

Although Michigan law sets forth standards for determining spousal support, those standards are not quantifiable. This resulted in unpredictable results from one case to the next and from one judge to the next. The lack of predictability made it difficult for attorneys to advise their clients on the spousal support issue and therefore made it difficult for parties to settle. The guideline is an attempt to quantify the factors most often relevant to alimony determinations to improve predictability and make it easier to reach settlement.

b) What information does the guideline provide?

The guideline evaluates the strength of the claimant's case for alimony by setting a numerical score from 1 to 100. It also provides a description of the kind of alimony case the claimant presents, ranging from, "This is an unlikely

alimony case barring some unusual or compelling circumstance” to “Permanent alimony is justified” and many results in between. If the guideline determines it is an appropriate case for alimony, the recommendation goes on to provide an annual payment amount and a suggested payment term, which is often stated as a range, for example “3 to 5 years.”

c) What factors does the guideline weigh?

The guideline gives the most weight to the length of the marriage. The second most important factor is each party’s gross income. The relative disparity in their incomes is also a component. In the usual case, the parties’ incomes are straightforward, but sometimes even this can be an issue. For example: (1) When the claimant is unemployed or employed less than fulltime, the issue of “imputed income” may arise; (2) Projecting the income of the payer can be tricky when the payer’s income is not regular, such as when the payer is self-employed or receives bonuses or commissions. It can be especially problematic when there has been a sudden unexplained drop in income around the time of the divorce; (3) If the payer is a business owner this presents special challenges, because the method used to value the business as an asset for property division may impact the determination of the payer’s income for support purposes. The two issues must be considered together. In addition to considering the claimant’s actual income, the guideline evaluates the claimant’s income earning potential by taking into account the claimant’s educational attainment, from “No high school diploma” to “Ph.D./Professional Degree.” Although this factor is not as critical to the output as income, it can also present issues. Should a bachelor’s degree in fine arts earned 20 years ago be given the same weight as a bachelor’s degree in information technology earned two years ago? The guideline also factors in the claimant’s age. Finally, the guideline makes an adjustment to reflect child-rearing responsibilities during the marriage, present and past. In combination these factors are designed to assess the claimant’s need for support and the payer’s ability and responsibly to pay.

5) *What is the role of the attorney?*

a) Identify priorities

Because alimony is a complex subject, one role of the attorney is to help the client understand the issues and evaluate which ones are important to him or her. The client needs to consider where he or she is likely to be 5, 10, 20 years later. For example, for some payers it is very important to negotiate a nonmodifiable alimony award to remove the cloud of uncertainty about future obligations. On the other hand, if the future appears uncertain and income is not assured, the ability to modify the award may be essential. Because alimony remains modifiable unless the parties agree otherwise, when only one party wants the award to be non-modifiable it may be necessary to give something of value to the other party in exchange for the agreement that the alimony will be non-modifiable. For a claimant with a serious health risk, a key

element of the spousal support award may be a reservation clause, which may be specifically related to the recurrence of the health problem.

b) Problem solve

Once the client's priorities are clear, the attorney helps to generate alternatives to best meet the client's needs. For a claimant who plans to go back to school to improve job skills, the attorney may try to negotiate larger payments, but over a shorter period of time. On the other hand, if the claimant does not anticipate increased earnings down the road, the claimant's needs may be better met by accepting smaller payments, but over a payment period that extends until eligible for retirement benefits, to avoid a gap in income. If the client is the payer and the payer's top priority is finality, it may be possible to "buy out" the alimony claim. In other words, the payer may offer to give the claimant a larger share of their property at the time of the divorce in exchange for the claimant waiving the alimony claim.

c) Using the guideline

In the usual case, the guideline provides a good gauge of whether alimony is appropriate. For the attorney, the payment amount and term of payment recommended by the guideline is used more as a starting point for negotiation than an endpoint. The guideline, while very useful, does not (cannot) address many of the issues discussed above. Note that some judges use the alimony guideline as an aid in determining alimony while others do not.