

- 1 **AN ACT** *to amend* 767.75 (1f); *to repeal and recreate* 767.56; and *to create* 102.27
2 (2) (c) of the statutes; **relating to:** amount and duration of maintenance awards.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill draft, relating to the amount and the duration of maintenance awards, was prepared for the Joint Legislative Council's Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings.

At various points in the draft, alternative provisions or language for committee consideration are presented in brackets. In most cases, the source of the bracketed alternative language is highlighted in bold print at the beginning of the alternative.

Background

Seeking to make maintenance awards more uniform and predictable, and to provide guidance that would be available to all parties regardless of legal representation, the committee utilized the two universal factors that are considerations in all annulment, divorce, or legal separation cases: the income of the parties and the length of the marriage.

However, the committee recognized that there are many variations in circumstances, and that the amount and duration of a maintenance award arrived at using simply the income of the parties and the length of the marriage may not always reflect the unique circumstances of the parties. Therefore, deviation factors are included to address the more common situations where an adjustment to the formula standards may be necessary.

This bill draft largely adopts the recommendations of the [American Academy of Matrimonial Lawyers' Commission (AAML Commission), reported in 2007; New Mexico Supreme Court's Statewide Alimony Guideline Committee, reported in 2006; Texas Law; or committee member's suggestion], for formulating the amount and duration of maintenance awards. The deviation factors incorporate the current maintenance factors set forth in s. 767.56, stats.

Current Law

Under current law [s. 767.56, stats.], maintenance may be awarded to a party for a limited or indefinite length of time, for an amount not defined by statute, after considering a list of statutory factors that includes the length of the marriage, the age and physical and emotional health of the parties, the educational levels of the parties, the earning capacity of the party seeking maintenance, the feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the contribution by one party to the education, training, or increased earning power of the other party.

Bill Draft

This bill draft repeals and recreates the maintenance statute. It provides that the formula standards, specified in the new statute, should be used to determine the amount and duration of a maintenance award, unless a party shows that use of the formula standards would be unfair to either of the parties based on a list of common circumstances for deviating from the standards.

1. Amount of Maintenance Award

AAML commission option: This bill draft provides that the amount of a maintenance award is determined as 30% of the payer's gross income minus 20% of the payee's gross income, except that the total amount of the payee's income cannot result in the payee receiving more than 40% of the parties' combined gross income. Maintenance is to be determined before determining child support. Child support is then determined from each party's after-maintenance income.

[OR]

New Mexico guideline option: This bill draft provides that the amount of a maintenance award is determined as 30% of the payer's gross income minus 50% of the payee's gross income, except if the payer has a child support obligation to the same payee, the amount is determined as 28% of the payer's gross income minus 58% of the payee's gross income.

[OR]

Texas law option: This bill draft provides that the amount of a maintenance award may provide for the payee's minimum reasonable needs, and is limited to \$1,000 per month or 10% of the payer's gross income per month, whichever is less.

[OR]

Committee member's suggestion: This bill draft provides that the amount of a maintenance award is determined as 1% of the payer's gross income per year of marriage.

2. Duration of Maintenance Award

AAML commission option: This bill draft provides that the duration of a maintenance award is graduated based on the length of the parties' marriage. The duration of the award is determined as follows:

- (a) If 0–3 years of marriage, [multiply the length of the marriage by 0.3 *or* no maintenance is to be awarded].
- (b) If 4–10 years of marriage, multiply the length of the marriage by [0.5 *or* 0.3].
- (c) If [11–20 *or* 11–25] years of marriage, multiply the length of the marriage by [0.75 *or* 0.5].
- (d) If [21 *or* 26] or more years of marriage, indefinite maintenance is to be awarded.

[OR]

New Mexico guideline option: This bill draft provides that the duration of a maintenance award is graduated based on the length of the parties' marriage. The duration of the award is determined as follows:

- (a) If 0–9 years of marriage, award no maintenance.
- (b) If 10–25 years of marriage, maintenance may be awarded for a duration that is one–third the length of the marriage.
- (c) If 26 or more years of marriage, indefinite maintenance is to be awarded, reserving jurisdiction with the court.

[OR]

Texas law option: This bill draft provides that the duration of a maintenance award [if the length of the marriage is at least 15 years] is limited to 3 years or the shortest reasonable period to allow the payee to obtain employment or develop skills to become self–supporting, whichever is less.

[OR]

Committee member's suggestion: This bill draft provides that the duration of a maintenance award is determined as 1.5 years for every 10 years of marriage.

3. Applicability

The provisions of this bill draft would first be applicable to actions filed on or after the date the statute takes effect.

SECTION 1. 102.27 (2) (c) of the statutes is created to read:

102.27 (2) (c) The definition of gross income in s. 767.56 (1) (a) may not be used to limit the assignment of benefits under this section.

NOTE: Clarifies that although the portion of worker's compensation awards not intended to replace income is excluded from gross income in establishing a maintenance award, the full worker's compensation benefit is assignable for the collection of maintenance.

SECTION 2. 767.56 of the statutes is repealed and recreated to read:

767.56 (1) DEFINITIONS. In this section:

(a) "Gross income" means all of the following:

1. Salary and wages.
2. Income imputed based on earning capacity.
3. Interest and investment income.
4. Social Security disability and old-age insurance benefits under 42 USC 401 to 433.
5. Net proceeds resulting from worker's compensation or other personal injury awards intended to replace income.
6. Unemployment insurance.
7. Income continuation benefits.
8. Voluntary deferred compensation, employee contributions to any employee benefit plan or profit-sharing, and voluntary employee contributions to any pension or retirement account whether or not the account provides for tax deferral or avoidance.
9. Military allowances and veterans benefits.

1 10. Undistributed income of a corporation, including a closely-held corporation, or any
2 partnership, including a limited or limited liability partnership, in which the party has an
3 ownership interest sufficient to individually exercise control or to access the earnings of the
4 business.

5 11. All other income, whether taxable or not, except that gross income does not include
6 any of the following:

- 7 a. Child support.
- 8 b. Foster care payments under s. 48.62.
- 9 c. Kinship care payments under s. 48.57 (3m) or (3n).
- 10 d. Public assistance benefits under ch. 49, except that child care subsidy payments under
11 s. 49.155, shall be considered income to a child care provider.
- 12 e. Food stamps under 7 USC 2011 to 2036.
- 13 f. Cash benefits paid by counties under s. 59.53 (21).
- 14 g. Supplemental Security Income under 42 USC 1381 to 1383f and state supplemental
15 payments under s. 49.77.

16 h. Payments made for social services or any other public assistance benefits.

17 (b) "Income imputed based on earning capacity" means the amount of income that
18 exceeds the party's actual income and represents the party's ability to earn, based on the party's
19 education, training and recent work experience, earnings during previous periods, current
20 physical and mental health, history of child care responsibilities as the party with primary
21 physical placement, and the availability of work in or near the party's community.

NOTE: The definitions given in new s. 767.56 (1) (a) and (b) are also specified in s. DCF 150.02, Wis. Adm. Code, for purposes of determining child support.

1 (2) WHEN ORDERED. Upon a judgment of annulment, divorce, or legal separation, or in
2 rendering a judgment in an action under s. 767.001 (1) (g) or (j), the court may grant an order
3 requiring maintenance payments to either party subject to the provisions of this section.
4 **[Committee members' suggested option:** if the length of the marriage is at least 15 years.]

NOTE: Revises current s. 767.56, stats., to reflect the new maintenance provisions in this bill draft. Current law provides that the court may award maintenance for a limited or indefinite period of time and specifies factors the court must consider in determining the amount and the duration of any maintenance payments.

5 (3) AMOUNT. Except as provided in sub. (5), the court shall determine the amount of
6 a maintenance award **[AAML Commission option:** as 30% of the payer's gross income
7 minus 20% of the payee's gross income, except that the maintenance amount, when added to
8 the gross income of the payee, may not result in the payee receiving in excess of 40% of the
9 combined gross income of the parties.]

10 **[New Mexico guideline option:** as 30% of the payer's gross income minus 50% of the
11 payee's gross income, except if the payer has a child support obligation to the same payee, the
12 amount is determined as 28% of the payer's gross income minus 58% of the payee's gross
13 income.]

14 **[Texas law option:** to provide for the minimum reasonable needs of the payee, and shall
15 not exceed the lesser of:

16 (a) \$1,000 per month.

17 (b) 10% of the payer's monthly gross income.]

18 **[Committee member's suggested option:** as 1 percent of the payer's gross income for
19 each year of the parties' marriage.]

COMMENT: For example, if the parties were married 20 years, the amount of the maintenance award is 20 percent of the payer's gross income.

1 (4) LENGTH. Except as provided in sub. (5), the court shall determine the duration of
2 a maintenance award as follows:

3 [AAML commission option: (a) If 0–3 years of marriage, [multiply the length of the
4 marriage by 0.3] [award no maintenance].

5 (b) If 4–10 years of marriage, multiply the length of the marriage by [0.5] [0.3].

6 (c) If [11–20] [11–25] years of marriage, multiply the length of the marriage by [0.75]
7 [0.5].

8 (d) If [21] [26] or more years of marriage, award indefinite maintenance.]

9 [New Mexico guideline option: (a) If 0–9 years of marriage, award no maintenance.

10 (b) If 10–25 years of marriage, maintenance may be awarded for a duration equal to
11 one–third the length of the marriage.

12 (c) If 26 or more years of marriage, the court may award indefinite maintenance, and
13 shall reserve jurisdiction unless the parties agree to a lump–sum, non–modifiable payment for
14 a specified term of periodic payments or a single lump sum payment.]

15 [Texas law option: for whichever is less:

16 (a) For no more than 3 years.

17 (b) For the shortest reasonable period to allow the payee to obtain employment or
18 develop skills to become self–supporting.]

19 [Committee member’s suggested option: as 1.5 years for every 10 years of marriage.]

COMMENT: For example, if the parties were married 20 years, the
duration of the maintenance award is for 3 years.

20 (5) FACTORS FOR DEVIATION FROM STANDARDS. Upon request by a party, the court may
21 modify the amount or duration of a maintenance award determined under sub. (3) or (4) if,

1 after considering the following factors, the court finds by the greater weight of the credible
2 evidence that use of either applicable standard is unfair to either of the parties:

3 **[AAML commission option:**

4 (a) The length of the marriage.

5 (b) The age and physical and emotional health of the parties.

6 (c) The division of property made under s. 767.61.

7 (d) The educational level of each party at the time of marriage and at the time the action
8 is commenced.

9 (e) The earning capacity of the party seeking maintenance, including educational
10 background, training, employment skills, work experience, length of absence from the job
11 market, custodial responsibilities for children, and the time and expense necessary to acquire
12 sufficient education or training to enable the party to find appropriate employment.

13 (f) The feasibility that the party seeking maintenance can become self-supporting at a
14 standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the
15 length of time necessary to achieve this goal.

16 (g) The tax consequences to each party.

17 (h) Any mutual agreement made by the parties before or during the marriage, according
18 to the terms of which one party has made financial or service contributions to the other with
19 the expectation of reciprocation or other compensation in the future, if the repayment has not
20 been made, or any mutual agreement made by the parties before or during the marriage
21 concerning any arrangement for the financial support of the parties.

22 (i) The contribution by one party to the education, training, or increased earning power
23 of the other.

1 (j) The responsibilities of a party as the primary caretaker of a dependent minor or a
2 disabled adult child. **[New, not found in current statute]**

3 (k) Whether a party has pre-existing court-ordered support obligations. **[New]**

4 (L) Whether a party has court-ordered payment of debts or other obligations from the
5 action between the parties. **[New]**

6 (m) Whether a party has unusual needs. **[New]**

7 (n) Such other factors as the court may in each individual case determine to be relevant.]

NOTE: Subsection (5) (a) to (i) and (n), stats., are the same as the factors provided in current s. 767.56, stats. Of these, some overlap in subject matter with the deviation factors provided in the AAML commission recommendations. Paragraphs (j) to (L) are drawn from the AAML commission recommendations that do not overlap with the factors from current s. 767.56, stats.

The new factors are: (1) the responsibilities of a party as a primary caretaker of a dependent minor (any minor, not just a child of the marriage); (2) whether a party has pre-existing court-ordered support obligations; (3) whether a party has court-ordered payment of debts or other obligations from the action between the parties; and (4) whether a party has unusual needs.

8 **[New Mexico guideline option:**

9 (a) The length of the marriage.

10 (b) The age and physical and emotional health of the parties.

11 (c) The division of property made under s. 767.61.

12 (d) The educational level of each party at the time of marriage and at the time the action
13 is commenced.

14 (e) The earning capacity of the party seeking maintenance, including educational
15 background, training, employment skills, work experience, length of absence from the job
16 market, custodial responsibilities for children, and the time and expense necessary to acquire
17 sufficient education or training to enable the party to find appropriate employment.

1 (f) The feasibility that the party seeking maintenance can become self-supporting at a
2 standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the
3 length of time necessary to achieve this goal.

4 (g) The tax consequences to each party.

5 (h) Any mutual agreement made by the parties before or during the marriage, according
6 to the terms of which one party has made financial or service contributions to the other with
7 the expectation of reciprocation or other compensation in the future, if the repayment has not
8 been made, or any mutual agreement made by the parties before or during the marriage
9 concerning any arrangement for the financial support of the parties.

10 (i) The contribution by one party to the education, training, or increased earning power
11 of the other.

12 (j) The responsibilities of a party as the primary caretaker of a dependent minor or a
13 disabled adult child. **[New, not found in the current maintenance statute.]**

14 (k) The good faith efforts of each party to maintain employment or to become
15 self-supporting. **[New]**

16 (L) The type and nature of each party's liabilities. **[New]**

17 (m) The reasonable needs of each party. **[New]**

18 (n) Whether a payer's gross income is less than \$20,000 per year. **[New]**

19 (o) Such other factors as the court may in each individual case determine to be relevant.]

NOTE: Subsection (5) (a) to (i) and (o), stats., are based on the factors provided in current s. 767.56, stats. Of these, some overlap in subject matter with the deviation factors provided in the New Mexico guidelines. Paragraphs (j) to (n) are drawn from the New Mexico guidelines that do not overlap with the factors from current s. 767.56, stats.

The new factors are: (1) the responsibilities of a party as the primary caretaker of a dependent minor (any minor, not just a child of the

marriage); (2) the good faith efforts of each party to maintain employment or to become self-supporting; (3) the type and nature of each parties liabilities; (4) the reasonable needs of each party; and (5) whether a taxpayer's gross income is less than \$20,000 per year.

1 **[Texas law option:** (a) A party has an incapacitating physical or mental disability.

2 (b) A party is the custodian of a minor child or disabled adult child.

3 (c) Such other impediment to becoming self-supporting as the court determines to be
4 relevant.]

5 (6) DETERMINE MAINTENANCE BEFORE CHILD SUPPORT. If a payer will have obligations
6 for both child support and maintenance to the same payee, the court shall determine the payer's
7 maintenance obligation under this section before determining the payer's child support
8 obligation under s. 767.511. Gross income for determining child support shall include any
9 maintenance amount received and shall subtract any maintenance amount paid under this
10 section.

NOTE: Provides that if a party is required to pay both child support and maintenance to the same party in a specified action affecting the family, the court must determine the payer's maintenance obligation first before determining the payer's child support obligation.

11 (7) DEVIATION FROM STANDARD; RECORD. If the court finds under sub. (5) that use of the
12 standards under sub. (3) or (4) is unfair to either party, the court shall state in writing or on the
13 record the amount or duration of a maintenance award that would be required under sub. (3)
14 or (4), the amount by which the court's order deviates from either standard, its reasons for
15 finding that use of either standard is unfair to either party, its reasons for the amount of the
16 deviation, and the basis for the deviation.

NOTE: Requires that if the court finds that the use of the standards for determining the amount [sub. (3)] or duration [sub. (4)] of a maintenance award is unfair to either party, the court must state, in writing or on the record: (1) the amount or duration of a maintenance award that would be required using the applicable standard; (2) the amount by which the

court's order deviates from the applicable standard; (3) its reasons for finding the use of the standard unfair; and (4) its reasons for the amount of the deviation and the basis for the deviation.

SECTION 3. 767.75 (1f) of the statutes is amended to read:

767.75 (1f) PAYMENT ORDER AS ASSIGNMENT OF INCOME. A payment order constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, benefits under ch. 102 or 108, lottery prizes that are payable in installments, and other money due or to be due in the future to the department or its designee. The assignment shall be for an amount sufficient to ensure payment under the order, obligation, or stipulation and to pay any arrearages due at a periodic rate not to exceed 50% of the amount of support due under the order, obligation, or stipulation so long as the addition of the amount toward arrearages does not leave the party at an income below the poverty line established under 42 USC 9902 (2). The definition of gross income given in s. 767.56 (1) (a), may not be used to limit income withholding under this section.

NOTE: Clarifies that the definition of gross income that is used for establishing a maintenance award does not limit the sources of income that are assignable under this section for the collection of maintenance.

SECTION 4. Initial applicability. The treatment of section 767.56 of the statutes first applies to parties filing a petition in an action for annulment, divorce, or legal separation, or in actions under s. 767.001 (1) (g) or (j), on the effective date of this section.

(END)