



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON REVIEW OF SPOUSAL MAINTENANCE AWARDS IN DIVORCE PROCEEDINGS

FROM: Margit Kelley, Staff Attorney, and Don Salm, Senior Staff Attorney

RE: Suggested Options, to Date, for Revising Wisconsin's Spousal Maintenance Laws

DATE: October 7, 2010

This Memo provides a summary of options that may be available for possible legislative proposals by the Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings. The options are based on suggestions at the Committee's August 24, 2010, meeting or in correspondence from members since that meeting and the research by committee staff. The options listed are not exhaustive. The major headings of Parts 1. to 5., below, are based on the five separate topic areas that are in the committee's charge.

Chair Staskunas and other members of the committee requested further information on any model laws that deal with maintenance and the committee's study charge. Pertinent model acts, if any, are set forth at the beginning of each "Options for Legislation" section in this Memo.

CHARGE 1: THE PURPOSE AND GOALS OF AWARDING MAINTENANCE

Current Wisconsin Law: Support and Fairness as Objectives

In *LaRocque v. LaRocque*, 139 Wis. 2d. 23, 406 N.W. 2d 736 (1987), the Wisconsin Supreme Court stated that maintenance awards must further two objectives: (1) to support the recipient spouse in accordance with the needs and earning capacities of the parties; and (2) to ensure a fair and equitable financial arrangement between the parties in each individual case.

Options for Legislation

- Allowing a formula that considers two universal factors in making a maintenance determination (income of the parties and the length of the marriage), and allows a number of

common considerations for deviation from the formula. [American Academy of Matrimonial Lawyers Commission (2007); the complete commission recommendations are enclosed as **Enclosure 1.**]

- Specifying that a court may award maintenance only if it finds that: (1) the recipient lacks sufficient property to provide for his or her own reasonable needs; and (2) the recipient is unable to support himself or herself through appropriate employment or is the custodian of a child whose needs make it appropriate for the custodian not to work outside the home. [The Uniform Marriage and Divorce Act, drafted by the National Conference of Commissioners on Uniform State Laws (1974).]
- Specifying that maintenance is a compensatory award allowed in the following circumstances:
 - In a marriage of significant duration, the loss in living standard experienced at divorce by the spouse who has less wealth or earning capacity.
 - In a marriage where one spouse had a disproportionate share of the care of the marital children or children of either spouse, resulting in a loss of earning capacity.
 - In a marriage where one spouse provided care to a sick, elderly, or disabled third party in fulfillment of a moral obligation of either or both spouses.
 - In a marriage that ends in divorce before a spouse realizes a fair return from the parties' investment in the other spouse's earning capacity through education or training.
 - In a marriage of short duration, where there is an unfairly disproportionate disparity between the spouses' abilities to recover their premarital standard of living. [American Law Institute, Principles of the Law of Family Dissolution (2002).]
- Clarifying, in the maintenance statute [s. 767.56, Stats.], the purpose of awarding maintenance in Wisconsin (e.g., codifying *LaRocque* into the statutes, or developing other language based on other states' laws or cases or on suggestions by committee members).
- Awarding maintenance to either party as a rehabilitative measure to enable the recipient to acquire the education or skills necessary to become self-supporting.
- Awarding maintenance only in cases in which one of the spouses has no work experience.
- Providing for four different types of maintenance, based upon different goals for each type: (1) permanent maintenance when a party lacks the financial ability to meet his or her needs and necessities of life; (2) rehabilitative maintenance when a party needs assistance in establishing his or her capacity for self-support; (3) "bridge-the-gap" maintenance when a party needs short-term support to allow him or her to make a transition from being married to being single; and (4) durational maintenance when permanent maintenance is not appropriate, used to provide economic assistance for a set period of time following a short- or moderate-duration marriage. Before making an award of any type of maintenance, the court must first make a specific factual determination as to: (1) whether there is an actual need for

maintenance by either party; and (2) whether either party has the ability to pay maintenance. [Florida Law.]

- Providing for three different types of maintenance: (1) general maintenance to provide financial assistance to a spouse with substantially less income potential than the other spouse so that both spouses can maintain a reasonable standard of living after the divorce; (2) transitional maintenance for short-term needs such as re-entry or advancement in the work force; and (3) reimbursement maintenance to achieve an equitable result in the overall disposition of the parties' financial relationship. [Maine Law.]

CHARGE 2: MAKING APPLICATION OF THE MAINTENANCE CONSIDERATIONS GIVEN IN S. 767.56, STATS., MORE UNIFORM AND PREDICTABLE

Current Wisconsin Law

Under current law, the court must consider a statutorily specified list of factors before it is allowed to order maintenance payments. [s. 767.56, Stats.]

Options for Legislation

- Specifying a **formula** to provide consistency, fairness, and predictability, which considers the income of the parties and the length of the marriage, and allows a number of common considerations for deviation from the formula. Circumstances that may require an adjustment to the formula's amount or duration include:
 - A spouse is the primary caretaker of a dependent minor or a disabled adult child.
 - A spouse has pre-existing court-ordered support obligations.
 - A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses).
 - A spouse has unusual needs.
 - A spouse's age or health.
 - A spouse has given up a career, a career opportunity, or otherwise supported the career of the other spouse.
 - A spouse has received a disproportionate share of the marital estate.
 - There are unusual tax consequences.
 - Other circumstances that make application of the guideline formula inequitable.
 - The parties have agreed otherwise.

[American Academy of Matrimonial Lawyers Commission.]

- Specifying that a spouse is presumptively entitled to an award of maintenance when the parties have been married five years or more and one spouse's income is expected to be at least 25% more than the other's at the time of divorce, and specifying a **formula** for determining the amount and duration of the award. [American Law Institute, Principles of the Law of Family Dissolution.]
- Adding **rebuttable presumptions** about what should apply in most cases. Presumptions may help to make maintenance decisions more predictable and provide more guidance, but would also allow for judicial discretion.
- Providing a rebuttable presumption that the amount of an award determined from the maintenance guideline formula is the correct amount to be awarded, and must be applied. The presumption may be rebutted after taking into consideration any special needs and obligations of the parties. [Pennsylvania Law.]

CHARGE 3: WHETHER THE STATUTES SHOULD PROVIDE GUIDANCE TO THE COURTS RELATING TO AMOUNT AND DURATION OF A MAINTENANCE AWARD

Current Wisconsin Law

Under current law, the court must consider a statutorily specified list of factors for determining the amount and duration of maintenance awards. [s. 767.56, Stats.] The factors are not weighted. Wisconsin courts have stated that equal income division is a reasonable starting point in determining maintenance.

Options for Legislation: Determining the Amount of a Maintenance Award

- Specifying a **formula** for the amount of a maintenance award as follows: unless one of the specified factors for deviating from the formula (listed above) applies, the maintenance amount must be 30% of the payer's **gross** income, minus 20% of the recipient's gross income. In no event may the total amount of the recipient's income plus maintenance exceed 40% of the parties' combined gross incomes. The maintenance amount must be calculated before child support is determined. [American Academy of Matrimonial Lawyers Commission.]
- Specifying that a maintenance order should be for the amount and length of time that the court deems just, after considering all relevant factors, including: (1) the financial resources of the parties; (2) the time necessary to acquire education or find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the payer to meet his needs while meeting those of the spouse seeking maintenance. [Uniform Marriage and Divorce Act.]
- Specifying a **formula** for a presumptive maintenance award (when the parties have been married at least five years and the payer's income is at least 25% greater than the recipient's), which is equal to the difference in the spouses' incomes at divorce, multiplied by a durational

factor (that is equal to .01 for each year of marriage, but in no case may exceed .4). If child support is ordered, the combined support amounts may not exceed 40% of the income difference. [American Law Institute, Principles of the Law of Family Dissolution.] [Note: Arizona Guidelines use the same formula structure, with a multiplier of .015, and a maximum of .5.]

- Specifying a **formula** for a presumptive maintenance award that takes the payer's net income, subtracts the recipient's net income, and multiplies that number by 40% if there is no child support obligation, or by 30% if there is a child support obligation. This alternative includes a defined calculation for net income, with a subtraction for child support before calculating maintenance. [Pennsylvania Law.]
- Specifying a **formula** for a presumptive maintenance award that takes 40% of the payer's gross income and subtracts 50% of the recipient's gross income. [Colorado Law.]
- Specifying a **formula** for a presumptive maintenance award that takes 30% of the payer's gross income and subtracts 50% of the recipient's gross income, unless one of the deviation factors applies. If there is a child support obligation, the formula takes 28% of the payer's gross income and subtracts 58% of the recipient's gross income. [New Mexico Guidelines; Fairfax County Virginia Bar Association.]
- Specifying a **formula** using weighted points. The formula would use tables that correlate factors (such as the length of the marriage, income, age, and education of the recipient, any disability, and number of children) into weighted points that are totaled and compared to a five-level scale to evaluate the maintenance claim. [Software program widely used in Michigan.]
- Maximizing the amount of maintenance at 15% of the payer's gross income, based on a 40-hour work-week (and not including any overtime or adjustments). The 15% maximum should include all payments the payer makes, including maintenance, child support, insurance, and any other applicable payments.
- Granting maintenance to either party in an amount that does not exceed a monthly amount necessary to meet the minimal, reasonable needs of the recipient, but in no case at more than 20% of the payer's monthly income, based on a 40-hour work week or the payer's base pay.
- Awarding *no* maintenance in cases in which both parties work, particularly if the spouse requesting maintenance is making a reasonable living with his or her current employment.
- Prohibiting maintenance during periods when child support is ordered, to avoid duplication of payments towards shelter, transportation, utilities, and other basic household necessities.
 - *Current Wisconsin Law:* The Wisconsin Administrative Code, s. DCF 150.03 (6), requires that if a payer will have obligations for both child support and maintenance to the same recipient, the court must first determine the payer's child support obligation, before determining any maintenance obligation.

- Specifying that a target amount of maintenance should be for **minimal living expenses**, rather than a target amount based on the marital standard of living. A comment submitted by a committee member notes that this takes into consideration that it is difficult for the average divorced couple to both live at the marital standard, supporting two separate households, on the same income.
- Specifying a **formula** that the amount of the maintenance award is presumptively 40% of the payer's **net** income minus 50% of the recipient's net income. Child support must be determined before calculating each party's net income. Deviations to achieve a fair result may be considered: (1) when the payer is making additional payments for the children's benefit (such as education); (2) when the payer is assuming a greater portion of the marital debt; or (3) when either of the parties is underemployed. [California Law and Guidelines.]
- Requiring the court to take into consideration the care of children or stepchildren, disabled adult children or stepchildren, or elderly parents or in-laws that has inhibited or continued to inhibit the recipient's earning capacity. [New York Law.]
- Including a mandatory reduction in the amount of maintenance by 10% after five years, and reducing 10% each year thereafter. The reductions will not occur if the recipient has children of the marriage who are still under age 16, or if the court finds that the recipient is incapable, both physically and mentally, of any gainful employment. [Massachusetts Law.]
- Specifying that the amount of maintenance may not be more than: (1) \$2,500 per month; or (2) 20% of the payer's average gross monthly income; whichever is less. [Texas Law.]

Options for Legislation: Determining the Duration of a Maintenance Award

- Specifying that the duration of a maintenance award must follow a prescribed **schedule**, unless one or more of the specified deviation factors applies, as follows:
 - 0-3 years of marriage: multiply the length of the marriage by .3.
 - 3-10 years of marriage: multiply the length of the marriage by .5.
 - 10-20 years of marriage: multiply the length of the marriage by .75.
 - Over 20 years of marriage: award indefinite maintenance.

[American Academy of Matrimonial Lawyers Commission.]

- Specifying that the duration of an award must generally be fixed at **one-half** the length of the marriage. If *both* the length of the marriage and the age of the recipient are greater than a specified amount (e.g., if the length of marriage is at least 20 years, *and* the recipient is at least 40 years old), the term would be indefinite. In determining the length of the marriage, the court must include any period immediately preceding the formal date of marriage during which the parties lived together as domestic partners. The presumption for the duration of a

fixed maintenance award applies unless application to a particular case would yield a substantial injustice. [American Law Institute, Principles of the Law of Family Dissolution.]

- Prohibiting maintenance until after at least 15 years of marriage, with a maximum award of **three years of maintenance**, except in cases of disability, or where a recipient contributed to the education of the payer.
- Allowing both existing and new maintenance awards to be limited to three years. All previously awarded maintenance would be adjusted to this revision by the following procedure: the payer could file a form with the clerk of circuit court upon the expiration of three years from the initial maintenance payment, pay a filing fee of not more than \$50, and provide a copy of the divorce decree that gives the length of the marriage and date of divorce; the recipient would then receive a copy of the filed form and would have 30 days to refute the filing; and then maintenance would terminate.
- Limiting an award of maintenance to three to five years, when the recipient has no work experience, to give the recipient an opportunity to go back to school to gain skills necessary to become self-supporting. The recipient is to be given a coach (paid for by the recipient) to make sure that the money is being spent to keep him or her on track in improving his or her quality of life. This could be similar to the state's current Wisconsin Works.
- Defining the length of marriage, for purposes of maintenance, as the date of marriage until divorce papers are filed. Otherwise, the length of marriage can vary depending on the amount of time it takes for the divorce to be granted. Likewise, the length of time that maintenance is paid should include payments already made during the course of the divorce, between the date of filing and the final judgment.
- Requiring any maintenance recipient to be applying for employment, or acquiring a degree that can be finished within three years, or both. When the recipient stops seeking employment, or takes a break from school, maintenance stops.
- Terminating maintenance if the recipient receives an inheritance equal to or greater than the amount the recipient would have otherwise received from maintenance.
- Requiring a recipient to provide notice to the court of remarriage, for termination of maintenance payments, rather than requiring the payer to provide such notice, as under current law.
- Requiring automatic termination of maintenance payments upon the death of the payer.
- Providing a rebuttable presumption that for marriages under 10 years, the duration of a maintenance award should be for one-half the length of the marriage. For marriages between 10 and 20 years in length, the duration of the maintenance award would gradually increase, with a maximum duration equaling the length of the marriage. The determination is subject to the court's discretion for a longer or shorter period of time based on a list of given factors and the circumstances of the parties. [California Law & Guidelines.]

- Allowing permanent maintenance to be awarded under the following standards: (1) after a long-duration marriage; (2) after a moderate-duration marriage if it is appropriate based on given statutory factors; or (3) after a short-duration marriage if the circumstances are exceptional. Long, moderate, and short duration lengths of marriages could be defined, or left to the court's discretion. [Florida Law.]
- Providing a rebuttable presumption that maintenance will not be awarded if the parties were married for less than 10 years. Also, having a rebuttable presumption that, if the parties were married between 10 and 20 years, maintenance will not be awarded for more than one-half the length of the marriage. [Maine Law.]
- Providing a rebuttable presumption limiting the duration of a maintenance award to one-third the length of the marriage. A court may consider an award of indefinite maintenance if: (1) the marriage was at least 20 years; or (2) the recipient is the caretaker of a child of the marriage who suffers from serious physical or mental disability and the recipient lacks sufficient income or property to care for the child. [Pennsylvania Law.]
- Limiting the duration of a maintenance award to one-half the length of the marriage. The total award may not exceed 12 years, unless the recipient has sole or shared physical placement of children who are still under age 16 at the 12th year, in which case maintenance continues until all children have reached age 16. [Massachusetts Law.]
- Requiring mandatory termination of maintenance upon the payer reaching the age of retirement, as defined in the federal Social Security Act. [Massachusetts Law.]
- Requiring that all maintenance awards be reviewed at least once every four years to insure that application of the formula results in the determination of appropriate amounts of support. [Pennsylvania Law.]

Enclosure 2 provides a comparison of the application of the various formula options to a simple fact pattern.

CHARGE 4: WHETHER COHABITATION SHOULD BE CONSIDERED WHEN REVISING MAINTENANCE ORDERS UNDER S. 767.59, STATS.

Current Wisconsin Law

Under current Wisconsin law, cohabitation is not a statutory factor in modifying a maintenance award. However, Wisconsin courts allow a revision of maintenance upon a recipient's cohabitation with a member of the opposite sex if there is either: (1) a showing of a change in the recipient's financial needs; or (2) a finding that the new living arrangement was fashioned for purposes of avoiding revision.

Options for Legislation

- Specifying that cohabiting with another adult does not affect the terms of maintenance. [Uniform Marriage and Divorce Act.]

- Requiring that the court terminate an award of maintenance, without regard to its duration as fixed by the judgment of divorce, if the payer shows that the recipient has established a domestic-partner relationship with a third person, unless the original judgment provides otherwise, or terminating the award would yield a substantial injustice. [American Law Institute, Principles of the Law of Family Dissolution.]
- Requiring that cohabitation of the recipient with another person, who is not a minor child, constitutes a rebuttable presumption of a substantial change in circumstances that would allow a court to revise a maintenance award.
- Requiring that cohabiting with any adult for 30 or more days is grounds for termination of maintenance.
- Providing a rebuttable presumption, unless the parties agree otherwise in writing, that there is a decreased need for maintenance if the recipient is cohabiting with a person of the opposite sex. [California & Massachusetts.] However, the income and assets of the cohabitant or new spouse may not be considered when determining or modifying maintenance. [Massachusetts.]

Comment Submitted by Committee Member

In a comment submitted, a committee member noted:

Moving towards a system which would consider an automatic end to maintenance if the person receiving maintenance is “cohabiting” with someone else would result in more litigation and less predictability. Even with a well-defined definition of cohabitation, this would result in more factual issues for the parties to litigate: Does the person they are cohabiting with financially support them? If so, should that matter for purposes of ending maintenance? If not, why should maintenance end? Are they really residing together? What if they are cohabiting in a same-sex relationship? Do you need to prove they are in a sexual relationship? And so on.

CHARGE 5: WHETHER MARITAL FAULT SHOULD BE CONSIDERED WHEN DETERMINING A MAINTENANCE AWARD

Current Wisconsin Law

Legislative Council Memo No. 5 includes a copy of the article, *Traditional Values and No-Fault Divorce*, which discusses some of the motives behind Wisconsin’s discontinued consideration of fault when granting a judgment of divorce.

Options for Legislation

- Specifying that maintenance shall be set **without regard to marital misconduct**. [Uniform Marriage and Divorce Act; American Law Institute, Principles of the Law of Family Dissolution; and American Academy of Matrimonial Lawyers Commission.]
- Using fault only when assigning any maintenance award, but keeping all other “no fault” divorce laws.
- Using as a statutory factor for awarding maintenance: whether the one seeking maintenance had ample time during the marriage to get a job, or obtain a degree, but unreasonably failed to do so. This could be grounds for not awarding, or for decreasing, maintenance.
- Specifying that marital fault is not a factor.
 - A committee member comment and a model law comment note that allowing fault as a factor in a maintenance determination would: (1) result in increased litigation for the parties; (2) not assist in making a maintenance determination more uniform and predictable; and (3) would encourage more people to charge their spouses with misconduct.
- Allowing a court to deny maintenance if the one seeking maintenance engaged in extra-marital activities during the marriage, or had not made reasonable efforts to obtain employment or develop the skills necessary to become self-supporting.
- Requiring that a criminal conviction for any abuse-related offenses be considered when terminating or reducing spousal support. [California Law.]
- Requiring the amount of maintenance to take into consideration any acts by one party against the other that has inhibited or continues to inhibit the recipient’s earning capacity or ability to obtain meaningful employment. This includes acts of domestic violence. [New York Law.]
- Specifying that evidence of marital misconduct or spousal abuse should be one of the factors in determining the duration of a definite or indefinite award of maintenance. [Pennsylvania Law.]
- Specifying that eligibility for maintenance must take into consideration any marital misconduct by the party seeking maintenance, and any acts by either spouse that resulted in excessive or abnormal expenditures, or destruction, concealment, or fraudulent disposition of property owned by the parties together. [Texas Law.]

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Enclosures