



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 1

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

FROM: Don Salm, Senior Staff Attorney and Chadwick Brown, Staff Attorney

RE: Current Wisconsin Law Relating to Spousal Maintenance

DATE: August 17, 2010

This Memo analyzes the current Wisconsin law relating to the awarding of spousal maintenance in divorce proceedings, including current statutory provisions and significant court cases interpreting those provisions or the concept of maintenance awards in general. Maintenance awards were formerly known as “alimony” (also known as “spousal support” in some states).

BACKGROUND

On May 7, 2010, the Joint Legislative Council created the Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings. The committee is directed to study: (1) the purpose and goals of awarding maintenance; (2) making application of the maintenance considerations given in s. 767.56, Stats., more uniform and predictable; (3) whether the statutes should provide guidance to the courts relating to amount and duration of a maintenance award; (4) whether cohabitation should be considered when revising maintenance orders under s. 767.59, Stats.; and (5) whether marital fault should be considered when determining a maintenance award.

Legislation to effect change in the spousal maintenance statutes has been proposed in each of the past four legislative sessions. The first of these attempts, 2001 Assembly Bill 75, requested the Joint Legislative Council to conduct a study of maintenance in divorces. This legislation was referred to the committee on Rules, where it failed to pass pursuant to Senate Joint Resolution 1.

The remaining legislative efforts, 2003 Assembly Bill 823, 2005 Assembly Bill 529, and 2007 Assembly Bill 9, were introductions of substantially similar bills that each failed to pass pursuant to Senate Joint Resolution 1. A copy of 2007 Assembly Bill 9 is enclosed.

MAINTENANCE: RELEVANT STATUTES

The granting of an order for maintenance is addressed in s. 767.56, Stats. Revision or modification of a maintenance order is addressed in s. 767.59, Stats. Family support, which is a combined obligation of maintenance and child support, is addressed in s. 767.531, Stats.

PURPOSE OF MAINTENANCE PAYMENTS

As part of a divorce, annulment, or legal separation proceeding, a court may obligate one party to pay maintenance to the other party for either a limited or indefinite period of time. Maintenance furthers two objectives: (1) to support the recipient spouse in accordance with the needs and earning capacities of the parties (***support objective***); and (2) to ensure a fair and equitable financial agreement between the parties (***fairness objective***). [*LaRocque v. LaRocque*, 139 Wis. 2d 23 (1987).]

- In the interest of fairness, maintenance may exceed the recipient's budget. [*Hefty v. Hefty*, 172 Wis. 2d 124, 493 N.W.2d 33 (1992).]
- "Fairness" has a special meaning under the law of maintenance. A reasonable maintenance award is not measured by the average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married. When a recipient spouse can reasonably reach that lifestyle level by his or her own efforts following the expiration of limited-term maintenance, putting a time cap on the payment of maintenance may be appropriate. The payment of maintenance is not to be viewed as a permanent annuity. [*Heppner v. Heppner*, 319 Wis. 2d 237, 768 N.W.2d 261 (Ct. App. 2009).]

FACTORS FOR DETERMINING WHETHER TO AWARD MAINTENANCE

Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001 (1) (g) or (j), Stats., the court may grant an order requiring maintenance payments to either party ***for a limited or indefinite length of time*** after considering the following 10 factors (presented with relevant Wisconsin cases):

1. The length of the marriage.
 - An otherwise short-term marriage should not be considered a long-term marriage because there are children. [*Luciani v. Montemurro-Luciani*, 191 Wis. 2d 67, 528 N.W.2d 477 (Ct. App. 1995).]
 - In the case of a long-term marriage, the court may use 50% of total earnings as a starting point. [*Bahr v. Bahr*, 107 Wis. 2d 72, 318 N.W.2d 391 (1982).] [**Note:** The statutes do not specify or provide guidance as to what is a "short-term" or a "long-term" marriage, and there is no definitive appellate court case on this matter.]
 - When parties have been married to each other more than once, a trial court can look at the total years of marriage when determining maintenance. The trial court is not bound by the terms of maintenance in the first divorce and may look to current conditions in

setting maintenance. [*Wolski v. Wolski*, 210 Wis. 2d 183, 565 N.W.2d 196 (Ct. App. 1997).]

2. The age and physical and emotional health of the parties.

- Leaving maintenance open due to potential future health problems of one spouse without expert testimony has been found to be proper, but failure to limit the order accordingly was improper. [*Grace v. Grace*, 195 Wis. 2d 153, 536 N.W.2d 109 (Ct. App. 1995).]

3. The division of property made under s. 767.61, Stats.

- The trial court's exclusion of pension payments when considering income available to a maintenance recipient was correct when the pension had been awarded to the recipient as part of the property division and had no value outside of the payments made from it. [*Seidlitz v. Seidlitz*, 217 Wis. 2d 82, 578 N.W.2d 638 (Ct. App. 1998).]

4. The educational level of each party at the time of marriage and at the time the action is commenced.

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

- A maintenance award must account for the recipient's earning capacity and ability to be self-supporting at a level comparable to that during marriage. It is unfair to require one spouse to continue income production levels to maintain the standard of living of the other who chooses a decrease in production. [*Forester v. Forester*, 174 Wis. 2d 78, 497 N.W.2d 78 (Ct. App. 1993).]
- A court may consider earning capacity rather than actual earnings in determining child support and maintenance if it finds a spouse's job choice voluntary and unreasonable. [*Sellers v. Sellers*, 201 Wis. 2d 578, 549 N.W.2d 481 (Ct. App. 1996).]

6. 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, if so, the length of time necessary to achieve this goal.

- Section 767.56 (6), Stats., contemplates maintenance being awarded to help a former spouse maintain an opulent standard of living reasonably comparable to that enjoyed during the marriage. There is nothing requiring that such spouses first have contributed to the household or child rearing to a certain degree. Nor does the statute condition a court's order maintaining that standard of living upon it being the result of both incomes when one party received personal benefits from the use of corporate property. [*Steinmann v. Steinmann*, 309 Wis. 2d 29, 749 N.W.2d 145 (2008).]

7. The tax consequences to each party.

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

- A couple's marital property agreement had no effect on the maintenance award granted to the husband where the agreement did not include a maintenance exemption provision. [*Steinman*, 309 Wis. 2d, at 31.]
- Trial court properly exercised its discretion in striking a marital property agreement under former s. 767.255 (3) (L), Stats. [now s. 767.61, Stats.], because the challenging spouse was not represented by counsel and waived maintenance under s. 767.56, Stats. [*Metcalf v. Metcalf*, 309 Wis. 2d 235, 747 N.W.2d 528 (2008).]

9. The contribution by one party to the education, training or increased earning power of the other.

- Compensation for a person who supports a spouse while the spouse is in school can be achieved through both property division [now set forth in subch. VII of ch. 767, Stats.], and maintenance payments. [*Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).]
- Under this provision, the contribution by one party to the other's education is not limited to contributions that arose only during the marital period. The court may freely consider the total contributions of that party. [*Meyer v. Meyer*, 239 Wis. 2d 731, 620 N.W.2d 382 (2000).]

10. Such other factors as the court may in each individual case determine to be relevant.

a. Marital Fault:

- The trial court **may not consider marital misconduct** as a relevant factor in granting maintenance payments. [*Dixon v. Dixon*, 107 Wis. 2d 492, 319 N.W.2d 846 (1982).]
- Consideration of one spouse's solicitation to have the other murdered in denying maintenance did not violate the statutory scheme and was not an improper consideration of "marital misconduct." [*Brabec v. Brabec*, 181 Wis. 2d 270, 510 N.W.2d 762 (1993).]

b. Cohabitation:

- The general rule is that maintenance decisions are based on the parties' financial circumstances at the time the determination is made. A financial benefit flowing from one spouse's cohabitation with a third party at the time of divorce is an

appropriate consideration in setting maintenance. [*Woodard v. Woodard*, 281 Wis. 2d 217, 696 N.W.2d 221 (2005).]

- It was improper to discontinue maintenance payments to a former wife solely upon the ground of her cohabitation with another man. [*Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 327 N.W.2d 674 (1983).]

c. Effect of Retirement:

- Despite the trial court's recognition of the stay-at-home wife's expectations of what her lifestyle would have been after her husband retired, the trial court obliterated those expectations because it seemed to assume that it should cut off maintenance once the husband retired, as retirement would cut off his sources of income. By ending maintenance, the trial court ignored the applicable principles of fairness and erroneously exercised its discretion. If the former wife was to be able to enjoy the life she would have enjoyed if the parties had not divorced, she was entitled to maintenance even though her former husband retired. [*Heppner*, 319 Wis. 2d 237, at 241.]

AMOUNT OF MAINTENANCE

Based on the relevant factors set forth above, in determining the amount of a maintenance award, the court must consider the financial resources available to the parties and the need of the recipient spouse. Maintenance is measured by the parties' lifestyle immediately before the divorce and the lifestyle that they could anticipate enjoying if they were to stay married. The award may take into account income increases the parties could reasonably anticipate. [*Hefty*, 172 Wis. 2d 124, at 134.]

- Equal income division is a reasonable starting point in determining maintenance, but the goal is the standard of living enjoyed during the marriage, not 50% of the total predivorce earnings. Maintenance may surpass 50% of the couple's predivorce income, but the payee is not entitled to live a richer lifestyle than that enjoyed during the marriage. [*Johnson v. Johnson*, 225 Wis. 2d 513, 593 N.W.2d 827 (Ct. App. 1999).]
- Financial resources available include all income (not just salary), and may allow for a likelihood of a post-divorce change in that income. Income may include cash equivalents and benefits (e.g., expense accounts), interest on investments, income from exercise of stock options, and personal injury awards. Post-divorce increases in a pension fund valued in a divorce should be treated as an income stream available for maintenance. [*Olski v. Olski*, 197 Wis. 2d 237, 540 N.W.2d 412 (1995).]
- An award may be based on a percentage of the payer's income in "unusual circumstances." [*Olski*, 197 Wis. 2d 237, at 240.]

DURATION OF MAINTENANCE

Current s. 767.56 (intro.), Stats., specifies that the court, after considering the factors, above, may award maintenance for a limited or indefinite length of time. If limited, the duration must be based

upon the time needed by the recipient to become self-sufficient. Prior to the receipt of the last payment, a petition may be filed for modification or extension. The purpose of maintenance is, at least in part, to put the recipient in a solid financial position that allows the recipient to become self-supporting by the end of the maintenance period.

- When a recipient becomes employed and makes productive investments of property division proceeds and maintenance payments, it is not a substantial change in circumstances but an expected result of receiving maintenance. [*Rosplock v. Rosplock*, 217 Wis. 2d 22, 577 N.W.2d 32 (Ct. App. 1998).]

A court may also hold a judgment for maintenance open, which allows the court to retain jurisdiction over maintenance without making a maintenance award. If a court limits the term of maintenance or holds it open, it must give findings supporting this decision. [*Preiss v. Preiss*, 238 Wis. 2d 368, 378 (2000).]

- The purpose for holding maintenance open was to assess an ex-husband's ability to maintain his income level because if he could, he did not require spousal maintenance. Because at the end of trial, the ex-husband did not have complete information regarding a severance package, how long before he would get a job, or what kind of retraining he might choose, the circuit court did not abuse its discretion in deciding to hold open the issue of maintenance. [*Van Ryen v. Van Ryen*, 2008 WI App 51, 309 Wis. 2d 236 (2008).]
- A court may award maintenance to a party while an offer is pending. [*Grace*, 195 Wis. 2d at 156.]

TERMINATION OF MAINTENANCE

Absent an agreement otherwise, spousal support ends upon the remarriage of the obligee spouse and a petition by the obligor. [s. 767.59 (3), Stats.; *Rintelman v. Rintelman*, 118 Wis. 2d 587, 598; 348 N.W.2d 498, 503 (1984).]

STIPULATION

Parties may stipulate [make an agreement in writing, filed with the court] as to the payment of maintenance, its amount, and its duration. Stipulations are not binding on the court, and may be modified or repudiated and set for trial. A stipulation incorporated into a divorce judgment is in the nature of a contract.

- That a stipulation appears imprudent is not grounds for construction of an unambiguous agreement. [*Rosplock*, 217 Wis. 2d 22, at 30.]

REVISION OF MAINTENANCE ORDERS

On a petition, motion, or order to show cause, a court may revise and alter a support or maintenance order as to the amount and payment of maintenance. A court may not revise or modify a judgment or order that waives maintenance payments for either party.

The court has the authority to: (1) revise the amount of maintenance; (2) increase, reduce, or terminate maintenance; and (3) extend limited maintenance; and (4) limit indefinite maintenance.

The criteria for a revision is whether there has been a substantial change of circumstance warranting the revision, giving consideration to both the support and fairness objectives of a maintenance award. [s. 767.59 (1) (c), Stats.]

- ***Cohabitation*** with a member of the opposite sex does not automatically require revision of maintenance. There must be either: (a) a showing of a change in the payee spouse's financial needs; or (2) that the new living arrangement was fashioned for purposes of avoiding revision. [*Van Gorder*, 110 Wis. 2d 188, at 197.]

FAMILY SUPPORT

Family support [s. 767.531, Stats.] may be granted in lieu of child support and maintenance. This combined obligation is frequently used to gain favorable tax treatment in cases where the obligor is in a higher tax bracket than the obligee. Maintenance payments are generally treated for tax purposes as deductible for the obligor and reportable income for the obligee. Child support payments are neither, so by combining the two into a deductible and reportable payment parties can frequently gain some tax advantage.

In order to receive favorable tax treatment, the award cannot contain a provision that it be reduced based upon any child-related contingency. If the award is later modified to include such a contingency, the obligor could be subject the risk of tax recapture.

In cases where a family support award is considered, the court is still required to calculate a separate child support obligation using the statutory guidelines. The after tax amount of family support awarded cannot be less than the amount that would be received for child support.

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Enclosure