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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 2

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

FROM: Don Salm, Senior Staff Attorney

RE: Background on Law Relating to Maintenance Payments (Alimony; Spousal Support) in the United States; Overview of Maintenance Payment Laws and Proposals in the 50 States

DATE: August 17, 2010

This Memo, prepared for members of the Special Committee on Review of Spousal Maintenance Awards in Divorce Proceedings, provides a summary of specific laws and proposals (e.g., bills; recommendations of task forces) in selected states that may provide committee members with a framework or individual ideas for revising the current Wisconsin law relating to maintenance payments in actions affecting the family (i.e., divorce and other actions under ch. 767, Stats.), in accordance with the committee's study charge.

### **OVERVIEW OF MAINTENANCE PAYMENT LAWS AND PROPOSALS IN THE 50 STATES; ANALYSIS OF SELECTED LAWS OR PROPOSALS IN CERTAIN STATES**

#### **Florida: New Law Relating to Alimony**

2010 Florida Laws, ch. 199 [effective January 1, 2011] makes various changes to the Florida Statutes relating to alimony, including providing statutory guidelines for when and what type of alimony may be used in dissolution of marriage cases. Specifically, the new law:

1. *Court to Make Factual Determination of Actual Need for Alimony.* Provides that before a court may make an award of any type of alimony, the court must first make a ***specific factual determination as to: (a) whether there is an actual need for alimony by either party; and (b) whether either party has the ability to pay.*** If the court finds that a party has a need and the other party has the ability to pay alimony the court must consider all relevant factors, including those listed in s. 61.08 (2), Florida Statutes F.S. The Act broadens the list of factors to consider from the prior laws "***relevant economic***" factors to "***all relevant***" factors.

2. *Factors That Must Be Considered.* Provides that the court must consider the following additional factors in determining an award for alimony:

- The earning capacities, education levels, vocational skills, and employability of the parties.
- The responsibilities each party will have with regard to any minor children they have in common.
- The tax treatment and consequences to both parties of an alimony award, including designation of all or a portion of the payment as nontaxable, nondeductible income.
- Any income available to either party through investments of any asset held by that party.

3. *Permanent Alimony.* Provides that permanent alimony may be awarded for the need and necessities of life as established during the marriage when a party lacks the financial ability to meet his or her needs and necessities of life. Permanent alimony may be awarded following a “**long-duration marriage**,” which is not defined within the statute but (according to various articles discussing the new law) has typically been held by Florida courts as **17 years or more**; following a marriage of **moderate duration** (undefined), if it is appropriate based on statutory factors in s. 61.08 (2), F.S.; or following a **short-duration** (undefined) marriage if the circumstances are “exceptional” (undefined).

An award of permanent alimony terminates upon the death of either party or the remarriage of the party receiving the award. An award may also be modified or terminated if there is a substantial change in circumstances “**or upon the existence of a supportive relationship as provided in s. 61.14, F.S.**”

4. *Rehabilitative Alimony; Rehabilitative Plan.* Provides that rehabilitative alimony may be awarded to assist a party in “establishing the capacity for self-support” by either redeveloping previous skills or credentials or acquiring additional education, training, or work experience. The new law requires that there must be a specific and defined **rehabilitative plan** which must be included as part of the order for rehabilitative alimony. This provision is consistent with existing Florida case law. Rehabilitative alimony may be modified or terminated in accordance with s. 61.14, F.S., if there is a substantial change in circumstances or (new) **if the party does not comply with the plan, or when the plan is completed.**

5. *Bridge-the-Gap Alimony.* Adds “bridge-the-gap” alimony as a type of alimony a court may award to a party. “Bridge-the-gap” alimony is intended to provide support to allow the party to make a transition from being married to being single (i.e., assist a party with their short-term needs.) The new law does not specify the duration for an award for bridge-the-gap alimony, but provides that it terminates upon death or remarriage of the party receiving alimony. An award of bridge-the-gap alimony is **not modifiable** in amount or duration.

6. *Durational Alimony.* Creates durational alimony as a type of alimony that a court may order when permanent periodic alimony is not appropriate. The purpose of durational alimony is to provide economic assistance for a set period of time following a short-duration or moderate-duration marriage. The award terminates upon the death of either party or the remarriage of the party receiving

alimony. The length of durational alimony may not be modified under the new law, except under “*exceptional circumstances*.” The new law does *not provide a specific length of time* for durational alimony, leaving that up to the discretion of the court.

### **Massachusetts: Legislation**

Under 2009 House Bill 1785 (which has been referred for further “study” and is unlikely to receive any further action this 2009-10 Session):

***Factors Court Must Consider.*** A court in a divorce or similar action is required to consider all of the following circumstances in determining an award of alimony:

- *Standard of Living.* The extent to which the earning capacity of each party is sufficient, together with the unearned income described below, to “maintain the preponderance of the standard of living established during the marriage and upon the date of separation,” taking into account: (1) the marketable skills of whichever party may not then exhibit such sufficient earning capacity; and (2) the time and expense of employment *counseling* and training required to further develop such skills or to acquire other, more marketable skills or employment.
- *Willingness to Seek, and Diligence in Seeking Employment and Training.* The willingness and *diligence* of the party not then exhibiting such earning capacity to seek the employment, *counseling*, and training described above.
- *Self-Supporting within a Reasonable Period of Time.* The goal that any party needing alimony shall be self-supporting *within a reasonable period of time*. Such reasonable period of time is to be *one-half of the length of the marriage*. The length of the marriage is the period commencing upon the date of the marriage and ending upon the date of separation, deducting therefrom any period of physical separation during the marriage. The reasonable period of time, or duration of alimony, *may not exceed 12 years except* when the supported party has custody [sole physical or joint (or “shared”) physical] of one or more children of the marriage not then having attained the age of 16 years as of such 12th year, in which case alimony must continue until such one or more children have attained such age.
- *Reduction in Amount of Alimony Due After First Five-Year Period; 10% Reduction Per Year.* All alimony due for more than five years shall, beginning with the commencement of the second half of such period of time of alimony and continuing each 12-month period during such second half, decline by 10%. There are specified *exceptions* when either: (1) the supported party then has custody [sole physical or joint (or “shared”) physical] of one or more children of the marriage who has not attained the age of 16 years; or (2) the court finds the supported party to be incapable, both physically and mentally, of any gainful employment.
- *Ability of Supporting Party to Pay Alimony.* The ability of the supporting party to pay alimony, taking into account: (1) such party’s actual earned income during the prior calendar year; (2) the average of the actual earned income during the three prior calendar years; (3) the cost to maintain the preponderance of the standard of living, as discussed

above; (4) the supporting party's obligation to pay child support; and (5) the impact on such earned income should the supporting party have custody (sole physical or joint (or "shared") physical) of one or more children of the marriage.

- *Unearned Income.* The unearned income generated by the marital assets owned by the supported party following the divorce.
- *Duration.* The duration of the marriage.
- *Age; Health.* The age and health of the parties.
- *Contribution to Education, Training or License of Supporting Party.* The extent, if any, to which the supported party contributed to the attainment by the supporting party of an education, training or license.
- *Cohabitation; Rebuttable Presumption.*
  - *Rebuttable Presumption.* There shall be a rebuttable presumption of ***substantially decreased need for alimony*** if the supported party is cohabiting with another adult.
  - *Cohabiting Adult's Income and Assets Not to be Considered.* The income and assets of any adult cohabiting with the supporting party, whether or not the supporting party is married to such adult, may not be considered when determining or modifying alimony.

***Sole Reason for Increase in Amount of Alimony.*** The bill specifies that the only reason or cause warranting an increase in the amount of alimony is the percentage rise, if any, during the prior calendar year, in the Consumer Product Index (CPI), as published by the United States Department of Labor. The increase is to commence at the beginning of the calendar year and must equal such rise in the CPI if the earned income of the supporting party has increased during the prior calendar year ***by more than three times*** the percentage increase in the CPI.

***Obligation Terminates Upon Reaching Retirement Age; No Exceptions.*** The obligation of the supporting party to pay alimony ***terminates***, without exception, upon such party attaining retirement age, as defined in of the federal Social Security Act.

### **Pennsylvania: Proposed Task Force Changes**

In 2007, a State of Pennsylvania Task Force on domestic relations laws made recommendations, for changes in the state's alimony statutes. [Title 23, Pa. Stats.] The recommendations set forth in the Task Force's Final Report (December 2007), included the following key changes, in current Pennsylvania law. [Note: The draft legislation, which was attached to the Pennsylvania Report is included as ***Enclosure 1*** to this Memo.]

- Define the terms "***cohabitation***," "compensatory alimony," "excess income," "***reasonable needs***," "reimbursement alimony" and "unfunded needs." [Note: See ***Enclosure 1*** for definitions.]

- Provide that the court must consider an award of alimony at the request of a party and upon a determination that the petitioner has unfunded needs and the respondent has excess income.
- Establish factors in determining the amount of a party's respective unfunded needs and excess income (e.g., based on, "the standard of living of the parties established during marriage").
- Provide that the amount of an alimony award is to be equal *to the least of the following three*: (1) the amount of the petitioner's unfunded needs; (2) the amount of the respondent's excess income; or (3) an amount equal to the spousal support determined under the Pennsylvania Support Guidelines.
- Allow the court to consider awarding *one year of alimony for every three years of marriage* prior to final separation.
- Establish 10 factors in determining the duration of an alimony award, *including, marital misconduct evidence of spousal abuse* (see factors in *Enclosure 1*).
- Direct the court to consider an *indefinite award of alimony* if either of the following applies:
  - The marriage was of a duration of *20 or more years* prior to final separation; or
  - The support recipient: (1) is the primary custodian or caretaker of obligee and is providing care for an unemancipated child of the parties (where the child suffers from a serious physical or mental disability); *and* (2) lacks sufficient income or earning capacity and separate and marital property to pay reasonable living expenses, including the cost of medical treatment for the child.
- Allow the court to modify or terminate an award of alimony with an indefinite term, upon a material change in circumstances of either party of a substantial and continuing nature.
- Direct the *court to set forth the reasons for its denial or award of alimony* and the amount and duration of the award, with specific reference to the relevant factors and circumstances.
- Provide that unless otherwise indicated in an agreement between the parties, an award of alimony *terminates* when the obligee remarries, *the obligee enters into cohabitation*, the obligee dies or the obligor dies (unless upon death, as otherwise indicated in a prior order of court). [Note: See definition of "cohabitation" in *Enclosure 1*.]

### **MISCELLANEOUS PROVISIONS OF INTEREST FROM VARIOUS OTHER STATES**

#### **California: Current Law**

1. *Factors*. Among other factors, the court must consider the following in ordering spousal support:

- The job market for the skills of the supported party; and the extent to which that party's present or future earning capacity is impaired by periods of unemployment during the marriage to "permit the supported party to devote time to *domestic duties*."
- The "needs of each party based on the *standard of living* established during the marriage" and the ability of the *supporting party* to pay spousal support taking into account his or her standard of living.
- The ability of the supported party to "engage in gainful employment without *unduly interfering with the interest of dependent children* in the custody of the party."
- The goal that the supported party shall be *self-supporting* "*within a reasonable period of time*" (defined, in general, as "*one-half of the length of the marriage*," but subject to judicial discretion for a longer or shorter period of time based on other listed factors and the circumstances of the parties).
- The *criminal* conviction of an *abusive spouse* must be considered in making a *reduction or elimination* of a spousal support award.

2. *Cohabitation; Rebuttable Presumption.* Includes a rebuttable presumption that, *except as otherwise agreed to by the parties in writing*, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support *if the supported party is cohabiting with a person of the opposite sex*. Upon a determination that circumstances have so changed, the court may *modify or terminate* spousal support. The income of the supporting spouse's subsequent spouse or nonmarital partner may not be considered in determining or modifying spousal support.

[Source: California Family Code, Sections 4320 and 4323.]

### **Maine: Current Law**

Specifies, in the statutes, the following types of spousal support:

- "General support" (GS): GS is awarded 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. There are *rebuttable presumptions* that GS may not be awarded if: (1) the parties were *married for less than 10 years*; or (2) for a term exceeding one-half the length of marriage if married for *at least 10 years but not more than 20 years*. A presumption is rebutted if the court finds the result inequitable or unjust.
- "Transitional support" is awarded to provide for a spouse's transitional needs including short-term needs due to financial dislocations due to divorce or re-entry or advancement in work force (includes physical or *emotional* rehabilitation).
- "Reimbursement support" is awarded to achieve an equitable result in the overall disposition of the parties' financial relationship "in response to exceptional circumstances" (including *economic misconduct* by a spouse; and substantial contributions of spouse towards the educational or occupational advancement of the other spouse during marriage).

[Source: Title 19-A, Part 2, ch. 29, subch. 2, s. 951-A, Maine Revised Stats.]

### **New Jersey: Current Law**

In 2009, the State of New Jersey enacted a law *prohibiting a person convicted of murder* (in specified degrees), manslaughter, or aggravated assault, or a substantially similar offense under the laws of another jurisdiction, *from receiving alimony* if: (a) the crime results in death or serious bodily injury, as statutorily defined, to a family member of a divorcing party; and (b) the crime was committed after the marriage or civil union. A person convicted of an attempt or conspiracy to commit murder may not receive alimony from the person who was the intended victim of the attempt or conspiracy. The new law defines “family member” and specifies that “nothing in the new law is to be construed to limit the authority of the court to deny alimony for other bad acts.”

[Source: New Jersey Statutes Annotated 2A:34-23.]

### **New York: Legislation**

Includes [in a bill 2009 NY A.B. 10984, awaiting the Governor’s signature,] among its statutorily specified other factors, the following *factors the court must consider* in determining eligibility for maintenance:

- The existence and duration of a *pre-marital joint household or a pre-divorce separate household*.
- *Acts by one party against another* that have inhibited or continue to inhibit a party’s earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of *domestic violence* as provided in New York social services statutes.
- The care of the children or stepchildren, *disabled adult children or stepchildren, elderly parents or in-laws* that has inhibited or continues to inhibit a party’s earning capacity.
- The inability of one party to obtain meaningful employment *due to age* or absence from the workforce.
- The need to pay for *exceptional additional expenses* for any children, including but not limited to, schooling, day care, and medical treatment.
- The *availability and cost of medical insurance* for the parties.

[Source: New York Senate, <http://open.nysenate.gov/legislation/bill/A10984B>.]

### **Texas: Current Law**

1. *Factors*. Includes among its other factors, the following factors the court must consider in determining eligibility for maintenance:

- The age and physical and *emotional* condition of the spouse seeking maintenance.

- Acts by *either spouse* resulting in *excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition* of community property, joint tenancy, or other property held in common.
- The *comparative financial resources of the spouses*, including medical, retirement, insurance, or other benefits; and the separate property of each spouse.
- *Marital misconduct of the spouse seeking maintenance.*

2. *Presumption Relating to Diligence.* Includes a presumption that maintenance is not warranted unless the spouse seeking maintenance *has exercised diligence in*: (a) seeking suitable employment; or (b) developing the necessary skills to become self-supporting during a period of separation and during the time the suit for dissolution of the marriage is pending. The presumption does not apply if the spouse has a physical or mental disability, or is custodian of a child of the marriage who requires “substantial care and personal supervision.”

3. *Duration of Maintenance Order; Limited Term.* With an exception for physical or mental disability or custodial duties, provides that the court: (a) may not order maintenance that remains in effect *for more than three years*; and (b) must limit the duration of the order to the “shortest reasonable period that allows the spouse seeking maintenance to meet the spouse’s minimum reasonable needs by obtaining appropriate employment or developing an appropriate skill, unless the ability of the spouse to provide for the spouse’s minimum reasonable needs through employment is substantially or totally diminished because of...physical or mental disability [or] duties as a custodian of an infant or young child [or] another compelling impediment to gainful employment.”

4. *Amount of Maintenance.* Specifies that a court may not order maintenance that requires an obligor [payor] to pay monthly *more than the lesser of* (a) \$2500; or (b) 20% of the spouse’s average monthly gross income. The court must set the amount that an obligor is required to pay “to provide for the minimum reasonable needs of the obligee [payee],” considering property received in the dissolution of the marriage [divorce] or otherwise owned by the obligee that contributes to the minimum reasonable needs of the obligee. The Department of Veterans Affairs service-connected disability compensation, social security benefits and disability benefits, and workers’ compensation benefits are excluded from maintenance.

### **ADDITIONAL ENCLOSURES**

The following articles, discussing laws and proposals in other states and recent trends in maintenance and cohabitations as it relates to maintenance, are additional enclosures to this Memo:

1. *Enclosure 2*, Article, *The New Art of Alimony*, Wall Street Journal, October 1, 2009.

2. *Enclosure 3*, Excerpt, from *Report to the Florida State Senate, Interim Project Report 2005-146, Review of Alimony Payments: Anti-Cohabitation Statutes in Other States*, pp. 5 to 8, November 2004.

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Enclosures