

# Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance

by  
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## I. Introduction

The mission of the American Academy of Matrimonial Lawyers is “to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected.”<sup>1</sup> In 2003 President Sandra Joan Morris appointed a Commission (AAML Commission) to critically review the American Law Institute’s *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002) (*PRINCIPLES*), to analyze the *PRINCIPLES* and to make recommendations consistent with the mission of the Academy. The Commission’s first project was the Academy’s *Model for a Parenting Plan* which was adopted in November 2004 and published in 2005.<sup>2</sup>

After concluding the Parenting Plan, the Commission focused on spousal support (also referred to as alimony or maintenance), which remains a difficult issue for practitioners, judges, legislatures and litigants.<sup>3</sup> The ALI Commission conducted a review of Chapter 5 of the *PRINCIPLES* on Compensatory Payments. The *PRINCIPLES* are premised on the theory that, absent extraordi-

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<sup>1</sup> The American Academy of Matrimonial Lawyers, [www.aaml.org](http://www.aaml.org) (last visited Apr. 12, 2008).

<sup>2</sup> See Mary Kay Kisthardt, *The AAML Model for a Parenting Plan*, 19 J AM. ACAD. MATRIM. LAW. 223 (2005).

<sup>3</sup> See Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 741 (1993) (“One recurring difficulty in contemporary divorce law has been the problem of grounding alimony and maintenance awards in a coherent theory.”).

nary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission.<sup>4</sup> The AAML Commission also considered extensive feedback from members of the Academy which was gathered through a national survey, a general meeting of the membership and a discussion session that followed an AAML Commission CLE presentation on the issue.

After considering all these sources of information the Commission concluded that there are two significant and related problems associated with the setting of spousal support. The first is a lack of consistency resulting in a perception of unfairness.<sup>5</sup> From this flows the second problem, which is an inability to accurately predict an outcome in any given case.<sup>6</sup> This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases, because without a reliable method of prediction clients are in a quandary and lawyers can only offer forecasts based on experiential, rather than empirical, backing.<sup>7</sup>

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<sup>4</sup> The approach has been criticized by others. See Penelope Eileen Bryant, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L & POL'Y 167 (2001). For an argument that adoption of the Principles may help some women, see, Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers*, 8 DUKE J. GENDER L & POL'Y 151 (2001).

<sup>5</sup> See Lara Lenzotti Kapalla, Comment, *Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form*, 2004 MICH. ST. L. REV. 207.

<sup>6</sup> Marti E. Thurman, *Maintenance: A Recognition of the Need for Guidelines*, 33 U. LOUISVILLE J. FAM. L. 971 1995 (arguing that the lack of adequate guidance by maintenance statutes damages settling parties even more so than those parties who go to trial).

<sup>7</sup> See Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER & POL'Y 119, 120 (2001) (suggesting that because of the myriad of conflicting considerations the judge may consider "like cases simply do not produce like results").

In response to these concerns, many jurisdictions have adopted a formula approach to setting spousal support.<sup>8</sup> This approach is similar to that used to set child support, although the standards for setting spousal support are not the same as those for setting child support.<sup>9</sup> The AAML Commission recognized these differences and its approach for recommending both the amount and length of a spousal support award reflects and responds to the challenges of arriving at a fair result in these cases.

This article will highlight some of the problems inherent in setting alimony awards, review the traditional rationales for alimony, the evolution of the remedy and discuss approaches to addressing the concerns, including the use of guidelines and the AAML Considerations.

## II. Current Problems

There are three economic issues involved in most divorce actions: property division, spousal support and child support. Property division is generally based on a partnership model of marriage which suggests that at the dissolution of the partnership, the spouses should share the assets that have been acquired during the marriage.<sup>10</sup> While not all jurisdictions require an even split of the assets, most jurisdictions will generally begin with this as-

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<sup>8</sup> See Twila Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 38-49 (2004) (describing many of the existing guidelines). See also *infra* notes 63-92 and accompanying text.

<sup>9</sup> See Brenda L. Storey, *Surveying the Alimony Landscape: Origin, Evolution and Extinction*, 25 FAM. ADVOC. 10, 12 (Spring 2003) (noting that unlike child support, which hinges solely on the incomes of the parents, alimony is required to take into account a significantly greater array of economic and noneconomic factors). See also Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14, 18 (Spring 2003) (noting that efforts to adopt statewide guidelines often have foundered on an assertion that the law of spousal support is "not as uniform" as the law of child support; recognizing that there are too many types of marriages with too many different possible fact situations to permit creation of reasonable guidelines).

<sup>10</sup> See, e.g., Developments in the Law, *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075 (2003); Calvin G.C. Pang, *Slow Baked, Flash-Fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawaii and Beyond*, 20 U. HAW. L. REV. 311 (1998).

sumption.<sup>11</sup> The theory behind child support is obvious: parents have a duty to support their children regardless of marital status and the amounts are set by mandatory guidelines.<sup>12</sup> Spousal support, however, remains the most difficult of the economic issues to resolve because it lacks both the underlying rationale of the other issues as well as any standards by which to predict the amount of the award.<sup>13</sup>

The lack of a coherent rationale undermines the ability to provide consistency in awards. Alimony statutes vary significantly from state to state with some authorizing payments in a wide variety of situations and others restricting it to very narrow circumstances.<sup>14</sup> But in almost all states judges are given a great deal of discretion with the result that these awards are rarely overturned.<sup>15</sup> Because of an inability to come to a consensus regarding the underlying rationale for alimony, legislatures often include a long list of factors for judges to consider. One commentator found over sixty factors mentioned in the fifty states.<sup>16</sup> Unfortunately there are often internal inconsistencies in the factors and no state provides a priority ranking.<sup>17</sup> Judges struggle with

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<sup>11</sup> See Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 173 (2004).

<sup>12</sup> Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 137 (2008).

<sup>13</sup> Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 809 (1999) (calling alimony "a remedy without a rationale").

<sup>14</sup> See, e.g., Mary Frances Levy & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?*, 38 FAM. L.Q. 3, 13 (2004).

<sup>15</sup> 2 HOMER HARRISON CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 257-58 (1987).

<sup>16</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 32-33 (2001).

<sup>17</sup> *Id.* at 28, quoting Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 276 (1987). ("[b]oth the trial and appellate courts look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion.").

how to apply a myriad of factors to reach a fair result.<sup>18</sup> Statutory criteria, with no rules for their application, then result in a “pathological effect on the settlement process by which most divorces are handled.”<sup>19</sup>

Without a reliable method of prediction, clients are often uncertain about whether to assume the risk of trial. This situation may present the greatest challenge for women who often do not have the financial resources to fund protracted litigation with an uncertain outcome.<sup>20</sup> A study in Maryland found that courts made very few alimony awards even though a majority of the marriages studied had lasted more than ten years and at the time of the divorce the average income of the husbands was almost double that of the wives.<sup>21</sup> What was striking was the number of cases in which the economically dependent spouse did not seek an award. The authors concluded that this was due in large part to the reluctance to expend money on litigation costs without the likelihood of any beneficial result.<sup>22</sup>

### III. In Search of a Rationale

#### A. *The Traditional Theory of Alimony*

The initial rationale for alimony or support had its origins in the English common law system. Historically there were two remedies from the bonds of marriage. Although an absolute divorce was theoretically possible, it required an act of Parliament and

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<sup>18</sup> Collins, *supra* note 16, at 32 n.39, quoting Margaret F. Brinig & June R. Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 893 n.151 (1988) (citations omitted):

The most common statutory prescription for spousal support is to list a set of appropriate considerations . . . without any guidance as to the relative importance of the factors or their purpose in being considered. In determining spousal support, the courts then recite the appropriate list of considerations and announce a result, again without reference to any rational ordering of the factors or explaining their importance. Almost totally absent from these decisions is an explanation of the role spousal support is intended to play.

<sup>19</sup> A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.02 (2002) [hereinafter PRINCIPLES].

<sup>20</sup> Susan Elgin, *Alimony Guidelines Is It Time?*, 38 MD. B.J. 46 (2005).

<sup>21</sup> *Id.* at 48.

<sup>22</sup> *Id.* at 51.

was therefore hardly ever used.<sup>23</sup> More commonly a plea was made for a separation from bed and board (*mensa et thoro*). This action available from the ecclesiastical courts constituted a legal separation as absolute divorce was prohibited under canon law.<sup>24</sup> A husband who secured such a divorce retained the right to control his wife's property and the corresponding duty to support his wife.<sup>25</sup> Even after Parliament authorized the courts to grant absolute divorces, the concept of alimony remained.<sup>26</sup> The initial rationale appeared to be premised on the fact that women gave up their property rights at marriage and after the marriage ended they were without the means to support themselves.<sup>27</sup> The original award of alimony was similar to the wife's claim of dower, and courts used the traditional one-third of the property standard so instead of one-third of the estate at the husband's death she would receive one-third of the income of her husband at the time of the divorce.<sup>28</sup> The concept of alimony came across the Atlantic with the founding of the colonies but seemingly without a corresponding rationale.<sup>29</sup>

The introduction of the Married Women's Property Acts changed the ability of women to retain property, but alimony remained.<sup>30</sup> It appears that at least one rationale was based on con-

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<sup>23</sup> "Parliament granted this permission only 317 times in the century and a half prior to the passage of the Matrimonial Causes Act in 1857." Collins, *supra* note 16, at 29 (citing 13 HALSBURY'S LAWS OF ENGLAND 245 (1975)).

<sup>24</sup> See Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 51 (2006).

<sup>25</sup> Jennifer L. McCoy, Comment, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U.L. REV. 501, 504 (2005).

<sup>26</sup> *Id.* at 505.

<sup>27</sup> *Id.* at 506.

<sup>28</sup> June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 46-47 (2002).

<sup>29</sup> CLARK, *supra* note 15, at 257-58:

When the English institution of alimony, which served the plain and intelligible purpose of providing support for wives living apart from their husbands, was utilized in America in suits for absolute divorce, however, its purpose became less clear. . . . Notwithstanding [this] logical objection to alimony as an incident to absolute divorce, it has been granted in the United States from the earliest colonial times to the present.

<sup>30</sup> Carbone, *supra* note 28, at 49; McCoy, *supra* note 25, at 506.

tract theories because, for many courts, the role of fault played a significant role.<sup>31</sup> Alimony then became damages for breach of the marital contract reflected in the fact that in most states it was only available to the innocent and injured spouse.<sup>32</sup> The measure of damages often approximated the standard of living the wife would have enjoyed but for her husband's breach.<sup>33</sup> Alternatively it represented compensatory damages for tortious conduct.<sup>34</sup>

### B. *The Beginning of the "Modern Era"*

In the 1970's the economic picture of spouses at divorce began to change. Many states adopted principles of equitable distribution allowing for property acquired during the marriage to be divided between the spouses regardless of how it was titled. This allowed economically dependent spouses to retain assets that were previously unavailable to them. Property division was used to address the inequities. These statutes resulted in decreasing spousal support awards.<sup>35</sup>

In addition, women, who were historically the economically dependent spouses, joined the workforce in increasing numbers.<sup>36</sup>

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<sup>31</sup> Carbone, *supra* note 28, at 49-51.

<sup>32</sup> Barbara Bennett Woodhouse, *Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2536 (1994) (citations omitted) (noting that "some jurisdictions make a dependent spouse's fault dispositive. In such jurisdictions, a dependent spouse would be barred from receiving alimony if found at fault. Some states also require a showing of the supporting spouses fault before awarding alimony.").

<sup>33</sup> Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience*, 28 WM. MITCHELL L. REV. 861, 867 (2001) (describing the various states' approaches to describing the role of fault).

<sup>34</sup> Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2424 (1994); see also Carbone, *supra* note 28, at 49-51.

<sup>35</sup> Marsha Garrison, *Good Intentions Gone Awry: the Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 701 (1991). In marriages of twenty years or longer, "Seventy-one percent of these wives were awarded alimony in 1978, as compared to 59% in 1984. Unemployed wives married ten or more years also suffered a loss in the likelihood of an alimony award greater than that of their employed counterparts and employed wives married less than ten years." *Id.*

<sup>36</sup> Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 549 (1990) (noting that "the number of families in

The previous assumption that women would be unable to support themselves through employment gave way to the idea that dependence could no longer be used as a rationale for alimony. However, the practical reality of women's financial dependency remained in many marriages.<sup>37</sup>

With the advent of no-fault divorce, alimony also lost its punitive rationale. The Uniform Marriage and Divorce Act (UMDA) changed the character of these awards to one that was almost exclusively needs based and at the same time gave spousal support a new name: maintenance.<sup>38</sup> Maintenance was only available to the spouse who had an inability to meet his or her reasonable needs through appropriate employment. The marital standard of living was only one of six factors relied upon in making awards under the UMDA, where the focus was now on "self-support" even if it was at a substantially lower level than existed during the marriage. In addition, when awards were made they were generally only for a short term, sufficient to allow the dependent spouse to become "self-supporting."<sup>39</sup> This spousal support reform often left wives, who were frequently the financially dependent spouses in long term marriages, without permanent support.<sup>40</sup>

Maintenance was sometimes awarded for "rehabilitative" purposes such as providing income for the time it takes the recipient to acquire skills or education necessary to become self-support-

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which both spouses were earners increased from 12,990,000 in 1980 to 14,955,000 in 1987" (citing United States Dep't of Commerce, Bureau of the Census, National Data Book and Guide to Sources, Statistical Abstract of the United States 407 (1989) [Statistical Abstract]).

<sup>37</sup> *Id.* at note 147 ("Women over age 25 still only earn 67 percent of what men do. Thus, in 1987, female workers, age 25 and older, earned \$321 per week, while male workers in the same age bracket earned \$477 per week." (citing Statistical Abstract at 406)).

<sup>38</sup> UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347 (1987).

<sup>39</sup> Singer, *supra* note 34, at 2425.

<sup>40</sup> Studies showed that women suffered substantial economic losses, "particularly when they had foregone wage-earning work in order to care for children and the household during marriage." Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1239 (citing studies); see also Garrison, *supra* note 35.

ing.<sup>41</sup> Short term transitional awards were used to make a spouse economically self sufficient as soon as possible.<sup>42</sup>

### C. 1990's Reforms

In response to the denial of long term awards for those most in need of them, the “second wave” of reform took place in the 1990's and expanded the factors justifying an award beyond “need.”<sup>43</sup> This new legislation encouraged courts to base awards more on the unique facts of a case and less on broad assumptions about need and the obligation to become self-supporting in spite of the loss of earning capacity that often occurs in long term marriages. The use of vocational experts to measure earning capacity became more widespread and there were attempts to quantify the value of various aspects of homemaker services as part of a support award.<sup>44</sup>

As a result of the frustration in developing a cohesive theory of alimony that would in turn lead to more consistent awards, many commentators turned to an analysis premised on compensation for loss of human capital by virtue of non-market work engaged in by the claimant during the marriage.<sup>45</sup> In the human capital view, a claim for post-divorce support is based on an economic analysis that assumes that during a marriage the parties are en-

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<sup>41</sup> Brett R. Turner, *Rehabilitative Alimony Reconsidered: The Second Wave of Spousal Support Reform*, 10 *DIVORCE LITIG.* 185 (1998); see also McCoy, *supra* note 25, at 511-12.

<sup>42</sup> O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712 (N.Y.1985) (Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow “the recipient spouse an opportunity to achieve [economic] independence.” See David S. Rosettenstein, *Alimony and Alimony Surrogates and the Imputation of Income in American Family Law*, 25 *Q.L.R.* 1, 5 (2006).

<sup>43</sup> Turner, *supra* note 9, at 18.

<sup>44</sup> Unfortunately these reforms were deemed to be unsuccessful. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227, 2250 (1994) (awards of both child support and alimony thus reflect the underlying property law assumption that “he who earns it, owns it.” This assumption is so strong that typically it is not overcome even by explicit statutory language allowing courts to give wives entitlements that reflect their domestic contributions).

<sup>45</sup> Rosettenstein, *supra* note 42, at 5.

gaged in a search for economic efficiency. These models assume that in addition to income generation, the parties also value child-rearing, and the development of income producing skills and abilities.<sup>46</sup> Rational economic decisionmaking guides the parties in choices that will maximize the ability of the partnership to realize the largest gains. In most instances since women are less likely to command as high a wage in the job market, the efficiency model would lead to a decision that the non-market tasks be assumed by her.<sup>47</sup> While this results in an economically satisfactory arrangement during the marriage, it often means that at divorce the non-market spouse will be disadvantaged if there is insufficient compensation for the efforts that were devoted to the partnership.<sup>48</sup>

Several commentators have chosen to use this analysis as the basis for arriving at “compensation.” For instance, Prof. Ira Mark Ellman would allow compensation for loss of earning capacity as a result of decisions made during the marriage.<sup>49</sup> The measure of the award is based on the claimant’s earning capacity at the end of the marriage compared to what it would have been had the

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<sup>46</sup> *Id.* at 13.

<sup>47</sup> This discussion focuses on the compensation for losses occurred during the marriage. The human capital theorists also include those whose focus on gains, such as those who benefit from a spouse’s contribution to their education. See, e.g., Joan M. Krauskopf, *Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

<sup>48</sup> Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005):

Many mothers have been stunned to learn that after years of viewing themselves as proud and valuable contributors to marriage, to family, to a new generation, the law of divorce views them as suckers. Surely this is a mistake, a mother might insist, a confusion of identities, a dialectical lapse that will be corrected as soon as it is discovered. Sadly, there is no mistake. The dispiriting message is that primary caretakers, the vast majority of whom are mothers, have been duped into providing free family caretaking at great personal economic cost; a price they must pay for their imprudent ways.

*Id.* (citation omitted).

<sup>49</sup> Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 42-49 (1989).

claimant remained single, thus the “marriage cost” that should be compensated. This compensation is only available if the claimants’ “sacrifice” of development of human capital assets is economically rational, with the exception of child care because it is based on traditional values. There need not be a corresponding gain to the non-sacrificing spouse.<sup>50</sup>

Another theory based on compensation for efforts during the marriage that seeks not to focus on losses but on unrealized gain is Prof. Robert Kirkman Collins’ theory of “marital residuals.”<sup>51</sup> It is based on the premise that during the marriage efforts were made by both spouses to maximize gains for the partnership and that at divorce there are residual economic benefits that flow from those efforts. He analogizes this to a partner in a law firm receiving compensation for “works in progress” for the efforts that were already expended but for which the benefits have not yet been fully realized.<sup>52</sup> The compensation for the marriage partners should be a sharing of the post-dissolution income that was due in part to the efforts expended during the marriage. The length of income sharing is dependent on the duration of the marriage when joint efforts were expended and reduces over time, becoming an increasingly smaller percentage of the parties’ post-divorce differences in income.<sup>53</sup> In this way it captures both the needs rationale by focusing on the differences in income and the value of prior contributions as a function of the number of years of joint contribution.<sup>54</sup>

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<sup>50</sup> *Id.* at 67-73.

<sup>51</sup> Collins, *supra* note 16, at 49-50.

<sup>52</sup> *Id.* at 49.

<sup>53</sup> *Id.* at 55.

<sup>54</sup> The formula provides that disposal incomes (net) would initially be shared equally with transfers reduced by 10 percent during each four successive periods of equal length. There would then be 5 separate periods of maintenance at 50 percent, 40 percent, 30 percent, 20 percent and 10 percent. The length of the periods is determined by the length of the marriage. For marriages up to ten years the period is one month for each year of marriage (four year marriage would mean a decrease every four months) For marriages between ten and thirty years the period would be initially 1.00 for each year of marriage increasing by .05 for each year over ten that the marriage lasted up to a maximum of 2.0 (at thirteen years the period would be 1.15 for each year of marriage (15 months), at fifteen it would be 1.25 months per year of marriage (19 months)

Another theory for deciding an alimony award based on contribution for acquisition of career assets has been proposed by Marshall Willick. He suggests that there are generally both separate contributions (natural ability) and marital contributions to the career asset that “could be weighted and attributed as separate or marital contributions to the future income stream.”<sup>55</sup> At that point the duration of the income could be calculated using market data and factors relevant to the present case. The income from the career asset is then divided as each partner shares in its value. When it no longer has a value (for instance at retirement), the alimony would cease.<sup>56</sup>

#### D. *The ALI Principles*

In response to the problems highlighted above, the ALI in its Principles recommends the setting of presumptions or guidelines.<sup>57</sup> The ALI focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage. The ALI guidelines are premised on the assumption that when a marriage is dissolved there are usually losses associated with it such as lost employment opportunities or opportunities to acquire education or training that lead to disparities in post-divorce earning capacities.<sup>58</sup> The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners.<sup>59</sup> The Principles assume a loss of earning capacity when one parent has been the primary caregiver of the children.<sup>60</sup> They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage. Finally, under the Principles, compensation could be awarded based on a loss of a return on an investment in

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and at twenty-five it would be 1.75 for each year of marriage (44 months) For marriages over thirty years it would be 2 months for each year of the marriage. *Id.* at 53.

<sup>55</sup> Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, 15 NEV. LAW. 40, 42 (Apr. 2007).

<sup>56</sup> *Id.*

<sup>57</sup> PRINCIPLES, *supra* note 19, at § 5.

<sup>58</sup> *Id.* at § 5.02.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at § 5.05.

human capital (where one spouse has supported the other through school).<sup>61</sup> This would be most important in the vast majority of states that do not recognize enhanced earning capacity or a degree or license as a divisible marital partnership asset. In setting the amount and duration, the ALI recommends a formula that is based on a specified percentage of the difference in the spouses' post-divorce income for a period of time that is dependent on the length of the marriage.<sup>62</sup>

#### E. Guidelines

While the ALI chose to focus on both the substantive rationale for alimony as well as a guideline approach to ensuring some predictability, increasing numbers of jurisdictions have chosen to focus primarily on the prediction problem by turning to mathematical formulas or guidelines. In almost all instances<sup>63</sup> these guidelines are intended to be used as a starting point for discussion and do not constitute a presumption.<sup>64</sup> Most guidelines are confined to temporary or pendente lite awards<sup>65</sup> and are the result of local, not state-wide adoption.

In California, the Santa Clara guidelines were initially adopted in 1977.<sup>66</sup> They were eventually adopted by many counties in the state.<sup>67</sup> The Santa Clara formula is used to calculate both the amount and the duration of an award. In a simplified form the amount of temporary support is computed by taking 40 percent of the net income<sup>68</sup> of the payor, minus 50 percent of the net income of the payee, adjusted for tax consequences. If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related

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<sup>61</sup> *Id.* at § 5.12.

<sup>62</sup> *Id.* at § 5.04.

<sup>63</sup> Pennsylvania is the exception as its guideline approach is mandatory for pendente lite orders. *See infra* notes 76-77.

<sup>64</sup> Larkin, *supra* note 8, at 32.

<sup>65</sup> *Id.* at 29.

<sup>66</sup> Victoria M. Ho & Jennifer Cohen, *An Update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part II*, 77 FLA. B.J. 85 (2003).

<sup>67</sup> *Id.* at 18 (citing Robert E. Gaston, *Alimony: You are the Weakest Link!*, 10 NEV. LAW. 36, 38 (Nov. 2002)).

<sup>68</sup> Which is gross income less taxes and social security payments.

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expenses.<sup>69</sup> The temporary spousal support calculations apply these assumptions. The duration factor is based on the length of the marriage. For marriages under ten years, the award should be one half of the months the parties were married. Between ten and twenty years the award gradually increase until it hits a maximum of the number of months married.<sup>70</sup>

As is the case with most mathematical formulas, the resulting amount must be adjusted by incorporating deviations necessary to achieve a fair result. In California these include additional payments that the payor is making for the children's benefit, such as education, whether the payor is assuming a greater portion of the marital debt and whether either of the parties is underemployed.<sup>71</sup>

In Arizona, the Maricopa County Family Court published guidelines that are based on the ALI recommendations. They are designed to apply to marriages that lasted over five years and in which the payee's income is no more than 75 percent of the payor's.<sup>72</sup> The guideline amount is determined by multiplying the difference between the parties' post-dissolution income by a marital duration factor. The duration factor equals the number of years of marriage times .015 with a maximum of .50.<sup>73</sup> Initially the committee chose a duration factor of .6 times the number of years married.<sup>74</sup> However after an empirical study revealed a correlation of only .21 between those cases under the guidelines and 160 actual cases, the committee revised its recommendation with respect to duration. The guideline duration now reflects not

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<sup>69</sup> Superior Court of California, County of Santa Clara, Family Court Rule 3B, available at <http://www.sccsuperiorcourt.org/family/rule3.3.htm#B>

<sup>70</sup> Ho *supra* note 66 at 86 "If the marriage lasts less than 10 years, the alimony should be one-half the length of the months the parties were married. If the parties were married 10 to 20 years, the duration of alimony should be not less than the number of months in the following formula: (months married/240) x (months married)."

<sup>71</sup> *Id.*

<sup>72</sup> Ellman, *supra* note 13 at 811-12. They do not distinguish between childless and other marriages.

<sup>73</sup> *Id.* at 812.

<sup>74</sup> *Id.* at 813.

a single number but a range of years. It is calculated as between .3 and .5 of the number of years married.<sup>75</sup>

Pennsylvania has gone a step further by taking alimony factors and incorporating them into actual monetary guidelines that are statutorily mandated in temporary alimony situations.<sup>76</sup> First a determination must be made that alimony is necessary based on the statutory factors. Once this is established, a temporary award is made pursuant to statewide guidelines. The guideline is based on the reasonable needs of the spouse seeking support and the ability to pay of the supporting spouse. Net income is used and the earning capacities of the spouses are considered. The guidelines are income driven and do not contemplate consideration of individual “reasonable needs.” Deviations are permitted for special circumstances, but the court is required to specify in writing the reasons for a deviation.<sup>77</sup>

In Michigan, some practitioners use a complicated formula that takes into consideration the length of marriage, the income and age of the payee and his or her education and training of the spouse claiming alimony, disability and number of children.<sup>78</sup> The formula uses tables that correlate the factors into gross and weighted points which are totaled and compared to a five level scale that an attorney uses to evaluate the strength of the ali-

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<sup>75</sup> Larkin, *supra* note 8, at 48.

<sup>76</sup> The purpose of the Uniform Support Guidelines, which is explained in the comments of the rule, is to “promote (1) similar treatment of persons similarly situated, (2) a more equitable distribution of the financial responsibility for raising children, (3) settlement of support matters without court involvement, and (4) more efficient hearings where they are necessary.” P.A. R. Civ. P. 1910.16-1, explanatory comment.

<sup>77</sup> In *Mascaro v. Mascaro*, 803 A.2d 1186, 1191 (Pa. 2002), the Pennsylvania Supreme Court noted that determining spousal support based upon the parties’ net incomes and obligor’s other support obligations “treats similarly situated persons similarly, which is the goal expressed in § 4322 of the Divorce Code.” The court also noted that allowing for deviations prevents the “goal of uniformity from leading to an unnecessarily harsh result where findings of fact justify the amount of the deviation.” *Id.* at 1193.

<sup>78</sup> Larkin, *supra* note 8, at 42.

mony claim. This is done using a computer software program.<sup>79</sup> The program has been endorsed by the Family Law Council of the Michigan Bar Association.<sup>80</sup>

In New Mexico the presiding judge of the Family Court in Albuquerque appointed a commission to study the “alimony problem” and make recommendations on whether guidelines would be appropriate for use in Bernalillo (encompassing Albuquerque) County.<sup>81</sup> After consideration of several different approaches, the committee concluded that a formula based on a simple percentage coupled with a durational factor would be most appropriate.<sup>82</sup> Specifically the goals of the committee were: “(1) the selection of percentage and durational factors that were equitable given usual spousal support circumstances, (2) have the formula be simple enough for practitioners (and pro se litigants) to calculate a bottom line, and (3) yet be capable of calculation on a single page worksheet.”<sup>83</sup> Ultimately the committee chose not to include a durational factor. Like the ALI formula, New Mexico uses a different calculation when child support is also ordered. If there are no children, the amount is calculated by taking 30 percent of the payor’s gross income and subtracting 50 percent of the payee’s gross income. If there are children for whom support is being paid, the percentages change to 28 percent and 58 percent, respectively.<sup>84</sup> The New Mexico Guidelines also include a list of circumstances where the guidelines are generally not appropriate. These include high income cases, cases involving special child support consideration such as shared custody or multiple family support cases. In addition some equitable factors similar to those articulated by the ALI are mentioned. These include care of family members that result in lost employment opportunities, relocation for the payor’s benefit and contributions to the payor’s education.<sup>85</sup>

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<sup>79</sup> Thurman, *supra* note 6, at 981. The software was developed by Craig Ross *see* Craig Ross, *Support 2004: Software Solutions for the Active Family Law Attorney*, (Ann Arbor, Michigan, 2004), <http://www.marginsoft.net>.

<sup>80</sup> Larkin, *supra* note 8, at 42.

<sup>81</sup> *Id.* at 29.

<sup>82</sup> *Id.* at 38.

<sup>83</sup> *Id.* at 32.

<sup>84</sup> Larkin, *supra* note 8, at 56.

<sup>85</sup> Larkin *supra* note 8, at 55-56.

The Fairfax County Virginia Bar Association has used support guidelines since 1981.<sup>86</sup> The guidelines are used primarily in pendente lite cases but when applied to post divorce alimony they must include reliance on the statutory factors. Like some of the other guidelines that make a distinction between cases involving child support. Where there is no child support being paid, the spousal support is calculated by taking 30 percent of the payor's income minus 50 percent of the payee's income. For cases with child support, the formula is 28 percent of the payor's income minus 58 percent of the payee's income.<sup>87</sup> The commentary suggests that they may not be appropriate in high income cases.<sup>88</sup>

Various forms of guidelines are also used in jurisdictions in Nevada,<sup>89</sup> Oregon<sup>90</sup> and Kansas.<sup>91</sup> The Kentucky Court of Appeals has also proposed guidelines.<sup>92</sup>

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<sup>86</sup> *Id.* at 44. The guidelines are now available on the internet at Fairfax Bar Association, Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, Va., Nov. 2002), available at [http://www.fairfaxbar.org/pub\\_order\\_form.asp](http://www.fairfaxbar.org/pub_order_form.asp).

<sup>87</sup> Larkin, *supra* note 8, at 46.

<sup>88</sup> Fairfax Bar Association, *supra* note 86.

<sup>89</sup> Todd L. Torvinen, *The So-called "Tonopah Formula for Alimony Explained*, 17 NEV. FAM. L. REP. 9, 11 (Sept. 2002), available at <http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf>. (last visited Apr. 12, 2008).

<sup>90</sup> Larkin, *supra* note 8, at 50-51.

<sup>91</sup> Kansas, Johnson Co. Bar Assoc., Fam. Law Guidelines, Maintenance, Pt. V (Rev. Feb. 2001), available at [http://www.jocobar.org/pdf/2001\\_family\\_law\\_guidelines.pdf](http://www.jocobar.org/pdf/2001_family_law_guidelines.pdf). (last visited Apr. 12, 2008). Guidelines in Kansas are used in several counties, based on gross income. For parties without children, the award is determined by calculating 25 percent of the difference between the incomes of the parties up to a difference of \$50,000 per year. For a difference in excess of \$50,000 per year, 22 percent of the excess is added. The Kansas guidelines also include a durational factor. For marriages of five years or less the number of years divided by 2.5, for more than five years 2 plus 1/3 of the number of years in excess of five years. It should be noted that Kansas has a ten year cap on court-ordered maintenance, with a renewal for the same period at the court's discretion. *Id.* at 55-56.

<sup>92</sup> *Atwood v. Atwood*, 643 S.W.2d 263, 266 (Ky. Ct. App. 1982).

#### **IV. The American Academy of Matrimonial Lawyers' Considerations**

The AAML ALI Commission worked for over two years gathering data and soliciting input from Academy members prior to making its final report. After reviewing the ALI position the Commission rejected the substantive changes in the law that the ALI proposed—i.e., moving to a compensatory rationale for spousal support. The Commission sought not to make recommendations for changes in the substantive law but rather to come up with a tool that its members could use in any jurisdiction.

With this in mind, the Commission conducted an extensive review of the guidelines being used in jurisdictions throughout the country. Like the New Mexico committee, the Commission wished to provide a simplified formula that could be used as a starting point in negotiations. The common denominators in all the guidelines reviewed were income of the spouses and duration of the marriage.<sup>93</sup> These two factors therefore became the focus of the AAML Considerations. The amount is to be calculated by taking 30 percent of the payor's gross income minus 20 percent of the payee's gross income. The additional limitation is that the alimony amount, so calculated, when added to the gross income of the payee, shall not result in the recipient receiving in excess of 40 percent of the combined gross income of the parties. To test whether the formula would yield results similar to those applying other guidelines a common hypothetical was used and support amounts were calculated using the proposed AAML Considerations and seven other guidelines currently in use or proposed. The result was that the amounts arrived at using the AAML Considerations were well within the norm.

Recognizing that certain circumstance would render an award based solely on the Considerations unfair, the Commission also included factors that would suggest a deviation. Deviations may be justified when a spouse is the primary caretaker of a depen-

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<sup>93</sup> See PRINCIPLES, *supra* note 19, at § 5.02 (“The factors of marital duration and relative spousal income have long been recognized in alimony cases.”); see also Garrison, *supra* note 35, at 706 (pointing to relative spousal income as the most important factor and marital duration as an important factor in a study of litigated, settled, and defaulted divorces in New York).

dent minor or a disabled adult child; when a spouse has pre-existing court-ordered support obligations; when a spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses); when a spouse has unusual needs, or has received a disproportionate share of the marital estate or where there are unusual tax consequences. An additional deviation factor allows consideration of those instances where the application of the formula would result in an award that is inequitable. Finally, a respect for private ordering is honored by the inclusion of an exception for the parties' agreement to an alternative amount.

The proposed Considerations were presented to the Board of Governors of the Academy at its March 2007 meeting. A lengthy discussion ensued, with individual Academy fellows raising important issues. One result of the discussion was the addition of two deviation factors: one considers the age and health of the spouses; the other focuses on those situations where a spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse. The Board of Governors then approved the Report.

## **V. Conclusion**

The proposed Considerations are designed to be used in conjunction with state statutes that first determine eligibility for an award. They are not intended to replace existing state public policy regarding eligibility for an award. In addition, the factors that are listed as deviations are intended to address the considerations for setting an amount and duration of an award found in most states' statutes. These recommendations are ones that the Commission hopes Academy members can utilize in advocating for a fair result for their clients.

## **Appendix A**

### The AAML Commission Recommendations

Adopted by Board of Governors  
March 9, 2007

The AAML Commission studied approaches used in many jurisdictions. While there are certainly many variations, there are two factors that are considerations in virtually all jurisdictions - income of the parties and the length of the marriage. Seeking to provide a formula that Academy members could use regardless of where they practice, the Commission chose to utilize these two universal factors. It should be noted that the application of the proposed AAML considerations yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions.

The AAML Commission recognizes that the amount arrived at may not always reflect the unique circumstances of the parties. Therefore, deviation factors are used to address the more common situations where an adjustment would need to be made.

The recommendations are:

#### **Amount:**

Unless one of the deviation factors listed below applies, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income the alimony amount, so calculated, however, when added to the gross income of the payee shall not result in the recipient receiving in excess of 40 % of the combined gross income of the parties.

#### **Length:**

Unless one of the deviation factors listed below applies, the duration of the award is arrived at by multiplying the length of the marriage by the following factors: 0-3 years (.3); 3-10 (.5); 10-20 years (.75), over 20 years, permanent alimony.

"Gross Income" is defined by a state's definition of gross income under the child support guidelines, including actual and imputed income.

The spousal support payment is calculated before child support is determined.

This method of spousal support calculation does not apply to cases in which the combined gross income of the parties exceeds \$1,000,000 a year.

**Deviation factors:**

The following circumstances may require an adjustment to the recommended amount or duration:

- 1) A spouse is the primary caretaker of a dependent minor or a disabled adult child;
- 2) A spouse has pre-existing court-ordered support obligations;
- 3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);
- 4) A spouse has unusual needs;
- 5) A spouse's age or health;
- 6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;
- 7) A spouse has received a disproportionate share of the marital estate;
- 8) There are unusual tax consequences;
- 9) Other circumstances that make application of these considerations inequitable;
- 10) The parties have agreed otherwise.

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The Appendix to this report contains examples of the application of the recommendations to several fact patterns.

Respectfully Submitted,

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Mary Kay Kisthardt, Reporter

November 2006

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Marlene Eskind Moses, Co-Chair

Barbara Ellen Handschu, Co-Chair

Michael Albano

Arthur E. Balbirer

Gaetano Ferro

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**Table I**  
**Spouse #1's Income: \$100,000/year (\$8,333/month)**  
**Spouse #2's Income: \$20,000/year (\$1,666/month)**

Type of Support Awarded	Amount of Support Awarded	Resulting Gross Incomes After Support, Pre-tax		Resulting Net Spendable Incomes After Support & After Tax		Duration of Spousal Support			
		Spouse #1	Spouse #2	Spouse #1	Spouse #2	0-3 Yrs (0.3)	4-10 Yrs (0.5)	11-20-Yrs (0.75)	20 Yrs + (1.0)
No Spousal Support	\$-	\$8,333	\$1,666	\$5,578	\$1,387	N/A	N/A	N/A	N/A
No Child Support	\$-	\$6,166	\$3,833	\$4,127	\$3,022	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$2,167	\$5,514	\$4,485	\$3,475	\$3,952	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
No Child Support	\$-	\$5,514	\$4,485	\$3,475	\$3,952	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$2,167	\$5,291	\$4,708	\$3,252	\$4,299	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (1 Child)	\$652	\$5,291	\$4,708	\$3,252	\$4,299	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$2,167	\$5,291	\$4,708	\$3,252	\$4,299	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (2 Children)	\$875	\$5,291	\$4,708	\$3,252	\$4,299	0 to 18 months	18 to 60 months	60 to 180 months	180+ months

**Table II**  
**Spouse #1's Income: \$240,000/year (\$20,000/month)**  
**Spouse #2's Income: \$0/year (\$0/month)**

Type of Support Awarded	Amount of Support Awarded	Resulting Gross Incomes After Support, Pre-tax		Resulting Net Spendable Incomes After Support & After Tax		Duration of Spousal Support			
		Spouse #1	Spouse #2	Spouse #1	Spouse #2	0-3 Yrs (0.3)	4-10 Yrs (0.5)	11-20-Yrs (0.75)	20 Yrs + (1.0)
No Spousal Support	\$-	\$20,000	\$-	\$12,823	\$-	N/A	N/A	N/A	N/A
No Child Support	\$-	\$14,000	\$6,000	\$9,183	\$4,623	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$6,000	\$12,925	\$7,075	\$8,108	\$6,033	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
No Child Support	\$-	\$12,925	\$7,075	\$8,108	\$6,033	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$6,000	\$12,925	\$7,075	\$8,108	\$6,033	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (1 Child)	\$1,075	\$12,925	\$7,075	\$8,108	\$6,033	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Spousal Support	\$6,000	\$12,578	\$7,422	\$7,731	\$6,551	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (2 Children)	\$1,422	\$12,578	\$7,422	\$7,731	\$6,551	0 to 18 months	18 to 60 months	60 to 180 months	180+ months



