

SECTION V

MAINTENANCE

This fifth section of the *Family Law Guidelines* relates to the issue of spousal support (maintenance).¹ The *Family Law Guidelines* is the work of the Family Law Bench-Bar Committee of the Johnson County Bar Association. The Committee comprises lawyers, judges, and mental health professionals who share a strong interest in family law.

5.1 Purpose. Maintenance is neither a right nor an entitlement in Kansas. The Court exercises broad discretion in determining both the amount and duration of spousal maintenance. Generally, the purposes of maintenance are two-fold: (1) to help mitigate an economic imbalance in future earning power in light of the particular facts of each case, and (2) to assist in rehabilitation of one spouse's ability to support himself/herself in the future. The primary factors to be considered in this analysis are the needs of one spouse and the ability of the other spouse to pay. The underlying principle of maintenance is that it is transitional in nature and is not intended to constitute a permanent lifestyle.

5.2 Factors to Consider. The Kansas Statutes [K.S.A. 60-1610(b)(2)] allow courts great latitude with respect to the award of maintenance, providing that the Court "may" award maintenance in an amount that the Court finds to be "fair, just and equitable under all of the circumstances." Kansas courts may not order more than 121 months of maintenance, regardless of the length of the marriage, although the Court may reserve jurisdiction to extend maintenance for an additional period. Such extensions are rare.

In determining whether there should be maintenance, and if so, the amount and duration, the most important considerations should be the needs of one spouse and the ability of the other to pay. The initial inquiry is whether one spouse "needs" financial assistance from the other. There should be no presumption that spousal support should

¹ Although helpful in reaching resolution by settlement or decree, the *Family Law Guidelines* are not binding and have not been adopted by the Court. The *Family Law Guidelines* are designed to provide a framework for negotiation and a suggested manner of resolving the difficult issues that arise in family law cases. The *Guidelines* represent a consensus of the Committee. Individual judges and lawyers may have differing opinions regarding various provisions of the *Guidelines*. The *Guidelines* should not be a substitute for critical analysis of each individual case. Nevertheless, the *Guidelines* have proven to be a valuable resource in helping resolve divorce, child custody, paternity, and other family law cases.

be paid or not paid, nor should there be an entitlement or expectation of a particular style or standard of living similar to what the parties experienced during the marriage. Maintenance serves the purposes of transitioning the parties into their respective futures and of cushioning the financial impact of one household becoming two.

If the asset division, the parties' respective incomes, or other factors suggest that both parties will have the financial wherewithal to support themselves without payment of maintenance, then the Court will likely consider whether any maintenance is justified. The specific facts of each case must be carefully analyzed in making this threshold determination, and generally speaking, the longer the duration of the marriage, the greater is the justification for maintenance.

In those cases where one party does need transitional financial assistance, the inquiry shifts to whether the other is able to provide such assistance. If both parties are equally or nearly-equally needy, then it may be that no maintenance should be paid. One party may have significant need, but if the other party cannot reasonably be expected to assist, the unfortunate conclusion may be that there is no solution via maintenance.

Kansas courts have enumerated various factors and circumstances that may be taken into account in determining the need for and the amount and duration of maintenance. No attempt is made herein to list all such factors, and the Courts and attorneys should be mindful of recent changes in or additions to the relevant body of law. The following factors (among others) are relevant to the analysis:

- (1) The parties' needs and overall financial situations;
- (2) The present and prospective earning capacities of the parties;
- (3) The length of marriage;
- (4) Property owned by the parties, regardless of source;
- (5) The ages of the parties;
- (6) The contributions or sacrifices by one party to aid the other party's education or career;
- (7) Rehabilitation issues:
 - (a) The retraining or educational needs of one or both of the

parties,

- (b) The number of years a party has been absent from the job market and the reason(s) for the absence,
- (c) The parties' skills and ability to re-enter the job market, and
- (d) Unusual or unique health or medical needs.

Fault of either party is not a factor for consideration in determining whether maintenance is justified or the amount or duration thereof, and maintenance should never be ordered for punitive purposes.

5.3 Determination of Earning Capacities. Usually each party's present gross income would be the same as his/her earning capacity. It may also be appropriate to consider historical information, the seasonal nature of employment, and the likelihood or not of continued income in the future. If appropriate, income may be imputed to either party. If either party is deliberately unemployed or underemployed, although capable of full-time employment, income may be imputed by considering the potential and probable earnings based on historical earnings of the parties, their educations, and unique skills or qualifications.

5.4 Amount and Duration of Maintenance. The following serves as a reasonable basis for determining the amount and duration of maintenance for either temporary (interim) or final orders:

- (1) Amount: Twenty percent (20%) of the difference between the respective gross earning capacities of the parties.
- (2) Duration: One-third of the total length of the marriage, to a maximum of one hundred twenty-one (121) months.

The parties should specify the period of time for which maintenance is to be paid, as well as events which would cause the maintenance to be terminated earlier. Maintenance should generally terminate on the first occurrence of any of the following:

- (A) the death of either party;
- (B) the remarriage of the maintenance recipient;
- (C) the cohabitation (as defined by the then-current Kansas law) of the maintenance recipient with a non-relative adult (regardless of gender) in a marriage-like relationship;
- (D) the maintenance recipient's living in a marriage-like relationship with an adult non-relative (regardless of gender) whether homosexual or heterosexual (for purposes of this provision a civil union or same-sex marriage obtained in a jurisdiction providing for such an arrangement shall be considered evidence of living together);
- (E) the expiration of the term of maintenance specified, so long as maintenance payments due therein have been paid.

In determining the length of the marriage, the period is calculated from the date of the marriage (or, if applicable, the date the parties commenced living together as a financially-unified household prior to marriage) until the date of the parties' separation. Credit should also be considered for the payor spouse for the period of time he or she pays any temporary maintenance after the separation of the parties until the time of the divorce. For example, if the calculation of time for maintenance results in a term of five years, and the parties have been separated for six months during which support has been paid by the maintenance payor, the remaining term of maintenance would be 4.5 years.

5.5 Parties Nearing Retirement. Unique challenges are confronted in cases involving divorcing parties who are nearing retirement, especially where such cases involve long-

term marriages. Special care should be given in analyzing the circumstances of such cases, and creative thinking will often be required in order to craft reasonable and realistic support plans. For example, consider the couple who have reached social security age and are ready and preparing for retirement after thirty-five years of marriage. It is generally neither reasonable nor realistic to expect one party to pay the other 120 months of support as suggested by these Guidelines. The same applies to the divorcing individual who has been a high-earning executive for many years but who is approaching retirement and whose income going forward will be a fraction of what he/she has been earning. In one sense, this analysis is merely a version of the “need and ability to pay” analysis, but such cases will inevitably result in difficult decisions and trade-offs.

In such circumstances, consideration should be given to establishing future spousal support as a percentage of future income. In this way, both the payor and payee share the upside and downside of future uncertainty of income. In such instances, income should generally not be imputed or assumed to the payor, unless it can be shown that the payor is intentionally unemployed or underemployed for the sole purpose of depriving the payee of spousal support.

5.6 Parties with Variable Incomes. In many cases the parties’ incomes will be difficult to ascertain or will be highly variable. Those whose incomes are primarily from big-ticket commission sales or transactions (e.g., commercial real estate agents) are good examples. Careful analysis should be given to the facts in such cases, and consideration should be given to establishing maintenance payments based on reasonably-predictable income (“base income”), augmented by additional lump-sum maintenance payments if and when the payor receives income in excess of the base income via bonuses, commissions, etc. Such potential scenarios are sufficiently variable that no single approach or rule would apply to every case, but the Committee endorses the idea of creative resolution of such cases based on a sharing of both the upside and downside risks.

5.7 Parties With Minor Children. With respect to maintenance, these Guidelines make no distinction between cases involving minor children and those that do not, and the maintenance calculation itself is the same whether or not there are minor children.

5.8 Duty to Disclose. If when the maintenance was calculated child related expenses were considered in reducing the paying parties income and/or support, the paying party should be obligated to advise the other party of any changes in the child related expenses within five days of the change so that a modification of the support may be requested, if appropriate. It may be necessary to reserve the right to increase support in the Marital Settlement Agreement or Decree of Divorce to give effect to this provision.

5.9 Method of Payment. Maintenance may be in a lump-sum, in periodic payments, or based on a percentage of future earnings. Other approaches may also be appropriate, depending on the circumstances. When considering alternative methods of payment, the tax consequences of the selected method of payment should be carefully considered.

5.10 Modification of Maintenance. If the parties agree in writing to the amount and/or duration of maintenance, such agreement cannot be modified by the Court unless jurisdiction is specifically reserved to the Court or both parties agree to such modification. If maintenance is determined by the Court upon hearing, at any time and upon reasonable notice to the party affected, the Court may modify the amounts or other conditions for the payment of maintenance originally awarded that has not already become due. The Court may not modify the original or subsequently modified award without consent of the party liable for maintenance if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Thus, maintenance may be reduced but not increased beyond the original amount or term ordered. Past due installments may not be modified.

Especially with maintenance of longer-term duration, maintenance generally should be made modifiable in accordance with the statute in the event of significant changes in circumstance in the future.