

## **SPOUSAL SUPPORT OVERVIEW**

By Charlotte L. Allen  
Charlotte Allen PLC  
Midland, MI

### **1. Why We Still Have Spousal Support**

Spousal support, also called alimony, has been a component of family law just about forever. Many people, including attorneys, are under the misconception that spousal support has gone the way of the dinosaur, but spousal support still arises in many divorces and actions for separate maintenance, especially following long-term marriages or where there is a large disparity in income between the parties. Other special circumstances, such as the disability of one party and domestic violence, may affect an award of spousal support notwithstanding the length of the marriage.

That said, spousal support is not your mother's alimony award. The structure, availability, duration, enforceability and modification of spousal support awards have changed, as well as the method of establishing an amount. Computer models, such as the prognosticator or the alimony guidelines, are now in common usage, despite the inability of software to assess and quantify all of the factors inherent in an award of spousal support under the case law of this state.

Federal law also affects spousal support. The Internal Revenue Code contains provisions relating to alimony, the IRC term for spousal support, and deductibility of spousal support is an important issue. Especially in income disparity cases, the deductibility of alimony from the higher earner's income and taxability to the lower earner is a method of income shifting that can be used to minimize the overall tax burden.

Spousal support is an effective way to address the problem of a spouse, most often the woman, who had been out of the work force for a long period of time and who either does not have a college degree or has no current job skills. Transitional or temporary spousal support, sometimes called rehabilitative spousal support, can give her the ability to obtain the education and job skills she needs to get back into the work force and have a decent standard of living. Commonly, three to five years of spousal support can be the basis for a reasonable and effective plan. Presenting such a well-thought out plan to the court can be persuasive and result in an appropriate award.

## **2. Spousal Support Statutes<sup>1</sup>**

Spousal support appears in a great variety of statutes. Basic authority for establishment of a spousal support order is found in the Divorce Act, MCL 552.1 *et seq.* That statute provides in pertinent part:

(1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

Spousal support is a domestic relations matter under the jurisdiction of the circuit court.

MCL 552.502.

---

<sup>1</sup> Spousal support and alimony are addressed in a number of other statutes as well, including the Identity Theft Protection Act and the Social Security Number Privacy Act. A truly exhaustive exploration of all of the statutes is beyond the scope of this presentation.

The Friend of the Court Act, MCL 552.501 *et seq.*, allows referees to establish spousal support orders. Actions for spousal support are within the category of cases qualifying for expedited relief under the Friend of the Court Act. MCL 552.508. MCL 552.508 states:

The circuit court shall utilize referees and take other appropriate action to expedite obtaining relief in the form of child or spousal support in domestic relations matters, including the entry and enforcement of child support orders and the enforcement of spousal support orders, as necessary to obtain dispositions of petitions for relief within the following time frames:

- (a) Ninety percent of dispositions within 3 months after filing a petition.
- (b) Ninety-eight percent of dispositions within 6 months after filing a petition.
- (c) One hundred percent of dispositions within 12 months after filing a petition.

However, referees cannot modify those orders. MCL 552.507 states in pertinent part:

- (2) A referee may do all of the following:
  - (a) Hear all motions in a domestic relations matter, except motions pertaining to an increase or decrease in spouse support, referred to the referee by the court.

Spousal support under the Friend of the Court Act is defined as the payment of money for a spouse ordered by the circuit court, whether the order is embodied in an interim, temporary, permanent, or modified order or judgment. Support may include payment of the expenses of medical, dental, and other health care, child care expenses, and educational expenses. MCL 552.502. A support order is an order entered by the circuit

court for the payment of support whether in the form of a lump sum or a periodic payment. MCL 552.502a.

Parties can opt out of Friend of the Court services, and if they do, the payee is responsible for enforcing the order. MCL 552.505a.

The Uniform Interstate Family Support Act, MCL 552.1101 *et seq.*, applies to spousal support. Under the UIFSA, a support order is defined as a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, spouse, or former spouse that provides for monetary support, health care, arrearages, or reimbursement and may include related costs and fees, interest, income withholding, attorney fees, and other relief. MCL 552.1104.

MCL 552.1301 states:

- (2) This act provides for the following proceedings:
  - (a) Establishment of an order for spousal support or child support under article IV.
  - (b) Enforcement of another state's support order and income withholding order without registration under article V.
  - (c) Registration of another state's order for spousal support or child support for enforcement under article VI.
  - (d) Modification of an order for child support or spousal support issued by this state's tribunal under article II, part 2.
  - (e) Registration of another state's order for child support for modification under article VI.
  - (f) Determination of parentage under article VII.
  - (g) Assertion of jurisdiction over nonresidents under article II, part 1.

However, a “tribunal of this state that lacks continuing, exclusive jurisdiction over a spousal support order shall not serve as a responding tribunal to modify another state's spousal support order.” MCL 552.1301(3). A Michigan court that issues a support order has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A Michigan court shall not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state. MCL 552.1301(6).

Domestic relations matters under the Support and Parenting Time Enforcement Act include spousal support. MCL 552.602. Spousal support orders are enforceable under the Support and Parenting Time Enforcement Act. MCL 552.611a. The remedies for enforcement of child support orders are available for spousal support as well. Income withholding, liens on real and personal property, contempt proceeding, attachment of pension proceeds and suspension of state licenses are all possibilities. MCL 552.601 *et seq.* Contempt sanctions are available under MCL 600.1701(F).

The Interstate Income Withholding Act, MCL 552.671 *et seq.*, establishes procedures for income withholding in Michigan to enforce support orders from other jurisdictions. The Uniform Enforcement of Judgments Act, MCL 691.1171 *et seq.*, also applies. A person seeking to enforce the judgment of another state in Michigan is not required to file a new action or complaint. A foreign judgment authenticated by the method established by Congress or the laws of Michigan may be filed with the court clerk and is enforceable in the same manner as a Michigan judgment. MCL 691.1173. A judgment filed in this way is subject to the same procedures, defenses and proceedings

for reopening, vacating or staying as a Michigan judgment and are enforceable in the same manner. MCL 691.1173. Once a foreign judgment has been properly filed with the clerk and notice is mailed, the foreign judgment is enforceable 21 days after the notice of filing of the foreign judgment was mailed to the payer. MCL 691.1174(4). Enforcement must be stayed if the payer can show that either 1) an appeal from the foreign judgment is pending or will be taken, or a stay has been granted and the payer has furnished security required for satisfaction of the debt under the laws of the state which rendered it or 2) any ground on which enforcement of a judgment from Michigan courts would be stayed, with the same security for satisfaction of the judgment that is required in Michigan. The stay is effective for the pendency of the appeal (MCL 691.1175(1)) or for the second reason, an appropriate period of time. MCL 691.1177. Post-judgment interest is calculated according to the laws of the issuing state. MCL 691.1176. The payee has the option of bringing an enforcement action in lieu of this procedure. MCL 691.1177.

The Uniform Foreign Money-Judgments Recognition Act, MCL 691.1151 *et seq.*, applies to spousal or child support orders issued by foreign governments and allows enforcement in Michigan. The Court of Appeals has held that foreign support orders, including lump-sum payments, are enforceable in Michigan under the UFMJRA to the extent the judgment awarded a sum certain to the wife. Additionally, the provisions of the property distribution that were not lump-sum were enforceable under principals of comity. *Dart v Dart*, 224 Mich App 146, 568 NW2d 353 (1997), *aff'd*, 460 Mich 573, 597 NW2d 82 (1999), *cert den*, 529 US 1018 (2000).

A number of statutory provisions relating to incarcerated persons address spousal support. The Inmate Reimbursement to Municipalities Act requires a court to “take into consideration any legal obligation of the defendant to support a spouse, minor children or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support BEFORE entering an order on behalf of a municipality. MCL 800.317.

The State Correctional Facility Reimbursement Act, MCL 800.404, states:

At the hearing on the complaint and order and before entering any order on behalf of the state against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

The Prisoner Reimbursement to the County Act, MCL 801.87, contains a similar provision, requiring the court, before entering an order on behalf of the county, to take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support. The Correctional Industries Act, MCL 800.321, requires that, for inmates assigned to work at a private manufacturing or service enterprise,

If the inmate has a spouse or children, 20% shall be paid to the inmate's spouse or children for the purpose of family support. If the inmate's spouse or children receive aid to families with dependent children or general assistance under the social welfare act, ...while the inmate is incarcerated, the 20% designated in this subdivision shall be deposited with the state treasurer and credited to the general fund as repayment of that aid or assistance, until that amount of aid or assistance is repaid. MCL 800.327a.

The Public Employee Retirement Benefit Protection Act limits the amount that may be paid to a spouse or former spouse unless a Domestic Relations Order has been entered. MCL 38.1685 states:

that if an “award or order requires a retirement system to withhold payment of a retirement benefit or requires the retirement system to make payment or requires the individual to request that the retirement system make payment of a retirement benefit for the purposes of meeting the member's or retirant's obligations to a spouse, former spouse, or child, the withholding or payment provisions of the award or order are effective only against amounts that become payable to the member or retirant, unless otherwise provided in an eligible domestic relations order under the eligible domestic relations order act,... The limitations contained in this section do not apply to the accumulated contributions of a person who terminates employment before acquiring a vested member status.

A number of other statutes also apply to spousal support. The Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq.*, addresses interstate enforcement of spousal support. The Estates and Protected Individuals Code states that, for purposes of a probate estate, an individual who “is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse, unless, by virtue of a subsequent marriage, her or she is married to the decedent at the time of death.” However, a decree of separation does NOT terminate the status of husband and wife and is not a divorce for purposes of the estate. MCL 700.2801. A spouse may testify against his or her spouse in an action arising out of the spouse’s failure to support him or her or their children. MCL 600.2162.

The Michigan Penal Code takes a dim view of the failure to pay spousal support. MCL 750.165 states:

If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does



not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than \$2,000.00, or both.

The Department of Treasury may also seize the state tax refund of a person who is in arrears on his or her spousal support obligation. The payment of support is a higher priority than even an Internal Revenue Service levy. MCL 205.30a.

### **3. Case Law Factors**

Eleven factors are considered in determining whether to award spousal support. The court must make findings on each factor relevant to the particular case. The factors come from case law and give substance to the statutory authority. The lead cases are *Sparks v Sparks*, 440 Mich 141; 485 NW2d 893 (1992), *Beason v Beason*, 435 Mich App 791, 460 NW2d 207 (1990), and *Parrish v Parrish* (138 Mich App 546, 361 NW2d 366 (1984)). The factors are:

1. The past relations and conduct of the parties.
2. The length of the marriage.
3. The ability of the parties to work.
4. The source of and amount of property awarded to the parties.
5. The age of the parties.
6. The ability of the parties to pay alimony.
7. The present situation of the parties.
8. The needs of the parties.
9. The health of the parties.
10. The prior standard of living of the parties and whether either is responsible for the support of others.

11. General principals of equity.

Generally, the cases list all of the factors but only discuss the ones relevant to the particular facts of the case. The factors overlap and some may be given more weight depending on the facts of a particular case. The trial court must lay out the basis for its decision. MCR 2.517(A), *Sparks, Beason, Jansen v Jansen*, 205 Mich App 169, 517 NW2d 275 (1994); *Torakis v Torakis*, 194 Mich App 201; 486 NW2d 107 (1992), *Thames v Thames*, 191 Mich App 299; 477 NW2d 496 (1991).

The award of alimony is in the trial court's discretion. *Olson v Olson*, 256 Mich App 619, 671 NW2d 64 (2003), citing *Pelton v Pelton*, 167 Mich App 22, 421 NW2d 560 (1988). The *Olson* court held:

The main objective is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case.

The court cited to *Ianitelli v Ianitelli*, 199 Mich App 641, 502 NW2d 691 (1993) and *Thames v Thames*, 191 Mich App, 299, 477 NW2d 496 (1991). A spousal support award must be just and reasonable under the circumstances of the individual case. *Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993).

Cases specific to each factor:

1. The past relations and conduct of the parties.

While divorce itself is no-fault, fault is still an issue in spousal support and property division. In *Welling v Welling*, 233 Mich App 708, 592 NW2d 822 (1999), the appellant claimed that the trial court erred in concluding that his drinking was at fault in the breakdown of the marriage in its determination of spousal support and property

division. The court of appeals affirmed. The court of appeals noted that the trial court considered not merely his status as an alcoholic but rather his conduct as a result of his drinking. Citing *Sparks*, the court of appeals concluded that his conduct was a greater factor in the marital breakdown. In addition, the trial court had looked to other factors, including the length of the marriage, the difference in earnings, and the wife's financial struggles since separation, among others.

Conduct during the marriage is a long recognized factor in the determination of spousal support. In *Feldman v Feldman*, 55 Mich App 147, 222 NW2d 2 (1974), the wife's adultery was considered. In *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956), husband's mean temper, obscene language, and accusations of infidelity led to the breakup. In *Abadi v Abadi*, 78 Mich App 73, 259 NW2d 244 (1977), the wife's fear of domestic violence was properly considered.

## 2. Length of marriage.

The longer the marriage, the stronger the claim for spousal support, especially if one party has been out of the work force and has no career or marketable skills. If his or her standard of living will be reduced as a result of the divorce, spousal support should be considered. *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956), *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992), *Zecchin v Zecchin*, 149 Mich App 723, 386 Nw2d 652 (1986), *Feldman v Feldman*, 55 Mich App 147, 222 NW2d 2 (1974), *Schaffer v Schaffer*, 37 Mich App 711, 195 NW2d 326 (1972), *Ross v Ross*, 24 Mich App 19, 179 NW2d 703 (1970).

In *Socha v Socha*, 5 Mich App 404, 146 NW2d 839 (1966), the Court of Appeals held that there is no absolute duty to provide spousal support, and both duration of the marriage and age of the parties are important factors. For a marriage of seven years duration, the trial court did not abuse its discretion in denying a spousal support claim.

Where the wife did not have enough credits to qualify for Social Security and the marriage was of 30 years duration, an award of spousal support was proper. *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996). Where the wife was a homemaker for most of the 24 year marriage and her prospects for employment were uncertain, spousal support was affirmed. *McNamara v McNamara*, 178 Mich App 382, 443 NW2d 511 (1989).

The duration of a former marriage between the same parties may not be considered. *Giesen v Giesen*, 140 Mich App 335, 364 NW2d 327 (1985). The length of time the parties resided together prior to the marriage may not be considered either. *Korth v Korth*, 256 Mich App 266, 662 NW2d 111 (2003).

### 3. The parties' ability to work.

Trial courts place a great deal of weight on the parties' ability to support themselves. For example, in *Sullivan v Sullivan*, 175 Mich App 508, 438 N W2d 309 (1989), the trial court erred in awarding temporary rather than permanent spousal support where the wife, having mental problems, was unlikely to support herself fully after the temporary support period ended. The trial court erred in *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986) because the wife would have had to dissipate her marital assets to meet her daily needs while she was learning new job skills. Spousal support

was affirmed where the wife had been put of the work force and needed further education (*Abadi v Abadi*, 78 Mich App 73, 259 NW2d 244 (1977), where the wife could not work due to lack of skills (*McLain v McLain*, 108 Mich App 166, 310 NW2d 316 (1981), where the wife's ability to earn a living was questionable (*Van Ommen v Van Ommen*, 25 Mich App 652, 181 NW2d 634 (1970), *Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995).

An award of spousal support is proper when, despite employment qualifications, a spouse has been unable to locate work. *McCarthy v McCarthy*, 192 Mich App 279, 480 NW2d 617 (1991).

#### 4. The source and amount of property awarded.

The property awarded is a part of the consideration in determining a spousal support award. A party should not have to dissipate his marital assets to support himself. *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995). The *Hanaway* court limited the use the wife's property settlement for purposes of spousal support to use of the income-producing portion, not the overall value. See also *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003). The Court of Appeals, in *Ross v Ross*, 24 Mich App 19, 179 NW2d 703 (2003), affirmed an award of substantial spousal support and property despite the receipt of a number of valuable gifts from husband's family during the marriage.

Where the trial court awarded substantial property settlement to the wife, no award of spousal support was proper despite the wife's contributions to the husband's business. *Schaffer v Schaffer*, 37 Mich App 711, 195 NW2d 326 (1972).

Remand for a determination of an increased amount of spousal support was proper where the trial court placed inordinate weight on the amount of property awarded to the wife and did not adequately consider the disparate income of the parties. *Gates v Gates*, 256 Mich App 420, 664 NW2d 231 (2003). An award of \$50,000 per month spousal support was affirmed where (1) the property awarded to the wife was primarily non-income-producing, (2) husband was capable of earning significantly more than wife, and (3) husband was in good health whereas wife had ovarian cancer. *Olson v Olson*, 256 Mich App 619, 671 NW2d 64 (2003).

In a recent child support case, the Court of Appeals held that imputation of a 4% return on a non-income-producing asset, a vacant lot, was appropriate. *Borowsky v Borowsky*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2007) (COA No. 262986, January 23, 2007). Whether the Court of Appeals will apply the same logic to spousal support cases remains to be seen.

#### 5. The age of the parties

Age is a factor, especially due to the affect of age on the parties' ability to support themselves. *Demmen v Demmen*, 195 Mich App 109, 489 NW2d 161 (1992). The Court of Appeals held that spousal support should have been awarded to a 55-year old wife, whose age was an impediment to her ability to support herself. *McLain v McLain*, 108 Mich App 166, 310 NW2d 316 (1981). The Court of Appeals reversed a two-year award of rehabilitative spousal support as inequitable following a 30-year

marriage. The court found that while the trial court intended to encourage the wife to work full-time, that is not always possible for someone in her 50s. *Wiley v Wiley*, 214 Mich App 614, 543 NW2d 64 (1995). See also *Arnholt v Arnholt*, 129 Mich App 810, 343 NW2d 214 (1983) and *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986).

#### 6. Ability to pay.

Income is not only limited to taxable income. MCL 552.602(n) defines income as earnings, pensions, unemployment compensation, tax refunds and social security benefits. Disability payments can also be used to pay spousal support. *Ackerman v Ackerman*, 197 Mich App 300, 495 NW2d 173 (1992), *Torakis v Torakis*, 194 Mich App 201, 486 NW2d 107 (1992). The ability to pay includes the unexercised ability to earn if income has been voluntarily reduced to avoid paying spousal support. *Knowles v Knowles*, 185 Mich App 497, 462 NW2d 777 (1990). A payee's voluntary reduction of income may also be considered. *Moore v Moore*, 242 Mich App 652, 619 NW2d 723 (2000).

In a recent child support case, the Court of Appeals held that imputation of a 4% return on a non-income-producing asset, a vacant lot, was appropriate. *Borowsky v Borowsky*, \_\_\_\_ Mich App \_\_\_\_, \_\_\_\_ NW2d \_\_\_\_ (2007) (COA No. 262986, January 23, 2007). In *Healy v Healy*, 175 Mich App 187, 437 NW2d 355 (1989), the court of appeals looked to a child support case, *Rohloff v Rohloff*, 161 Mich App 766, 411 NW2d 484 (1987), and applied the *Rohloff* criteria for determining ability to pay, including employment histories, reasons for termination of employment if applicable, work opportunities available, diligence in the job search and availability of employment to

spousal support. Arguable, *Borowsky* also could apply to the analysis of ability to earn in spousal support cases.

#### 7. The Present Situation of the Parties

The parties' present situation includes the combined effect of various individual factors on the ability of one spouse to pay and on the present or anticipated needs of the parties. The wife's poor employment and retirement prospects coupled with the husband's work history and minimal marital property supported an award of spousal support. *Magee v Magee*, 215 Mich App 158, 553 NW2d 363 (1996). Wife's employment history and husband's liability for marital debts supported a spousal support award. *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990). Spousal support was both appropriate and should be increased when the wife would have to dissipate assets without support since she had no career and few prospects. *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986).

#### 8. Need

Need addresses both the present and future needs of the parties. *Magee v Magee*, 218 Mich App 158, 553 NW2d 363 (1996) (the wife did not have enough social security credits to qualify for benefits). Spousal support was extended when the wife had not been able to keep up the marital home and had been forced to move into a cheaper residence. *Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990). No spousal support was awarded where the wife received substantial property. *Schaffer v Schaffer*, 37 Mich App 711, 195 NW2d 326 (1972). The wife's care of an adult child with cerebral palsy was an appropriate case for spousal support. *Parrish v Parrish*, 138 Mich App 546,



361 NW2d 366 (1984). However, the trial court erred in awarding the wife one-half of husband's pre-tax income without making a finding regarding the wife's needs. *Olson v Olson*, 256 Mich App 619, 671 NW2d 64 (2003).

Social security benefits are not subject to division as property but can be considered in the context of spousal support. The Court of Appeals in the unpublished case<sup>2</sup> of *Lowrie v Lowrie*, COA No. 256631 (2005), held that "the trial court's decision to divide plaintiff's future anticipated social security benefits in an attempt to equalize the parties' monthly social security incomes as part of the property distribution **was invalid as the doctrine of federal preemption precluded the court from ruling in a manner contrary to the Social Security Act.** *Id.*, at 2. However, the trial court could properly consider Social Security benefits in the context of spousal support. Income includes "payment due or to be due in the future to an individual from...social security." MCL 552.602(n)(ii).

## 9. The parties' health

Health is relevant to both ability to work and personal needs. Where there is no showing that the wife's claims of poor health affected her job performance, no spousal support is proper. *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990). The wife's cancer and possible future health needs is relevant. *Demman v Demman*, 195 Mich App

---

<sup>2</sup> There are no published Michigan opinions that are directly on point. Many other states and the federal courts have ruled on this issue however. See 42 USC 407(a), *Philpott v Essex Co Welfare Bd.*, 409 US 413, 93 S Ct 590, 34 L Ed 2d 608 (1973), *Hisquierdo v Hisquierdo*, 439 US 572, 99 S Ct 802, 59 L Ed 2d 1 (1979), *In re Marriage of Boyer*, 538 NW2d 293 (Iowa) (1995), *In re Marriage of Crook*, 211 Ill 2d 437, 813 NE2d 198 (Illinois)(2004), *In re Marriage of Hulstrom*, 342 Ill App 3<sup>rd</sup> 262, 794 NE2d 980 (Illinois) (2003) .

109, 489 NW2d 161 (1992). When wife took a trip to Europe rather than receive additional medical care, there was no need for increased spousal support. *Moser v Moser*, 184 Mich App 166, 310 NW2d 316 (1981). Physical abuse affecting the wife's long-term health was a reason to award spousal support. *Kiplinger v Kiplinger*, 172 Mich 552, 138 NW2d 230 (1912). Schizophrenia and resultant doubts about employability were reasons for spousal support. *McLain v McLain*, 108 Mich App 166, 310 NW2d 316 (1981). Wife's mental incapacity and husband's bone disease were both properly considered. *Esslinger v Esslinger*, 9 Mich App 11, 155 NW2d 702 (1967).

#### 10. Prior standard of living

The parties' station in life and standard of living establish a qualitative basis for determining the extent of the support duty. *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956). The *Johnson* court recognized the wife's right to live in the manner she would have enjoyed had the marriage remained intact. Proper support includes maintaining the spouse in his or her accustomed station in life, commensurate with the other spouse's ability to pay support and child support for minor children. *Tomlinson v Tomlinson*, 338 Mich 274, 61 NW2d 102 (1953). An award of spousal support was increased when the trial court did not consider the doctor's present and potential future earnings. *Vaclav v Vaclav*, 96 Mich App 584, 293 NW2d 613 (1980). Spousal support can be used to equalize the spouses' positions. *Voukatidis v Voukatidis*, 195 Mich App 338, 489 NW2d 512 (1992).

#### 11. General principals of equity

Once the trial court obtains jurisdiction of a divorce matter, it may consider general principals of equity in determining whether or not to award spousal support and the amount of that support. In *Parrish v Parrish*, 138 Mich App 546, 361 NW2d 366 (1984), the Court of Appeals upheld a spousal support award based in part on the wife's care of a disabled daughter. However, the Court of Appeals reversed an award based in part on the wife's support of adult children who were capable of earning a living. *Lesko v Lesko*, 184 Mich App 395, 457 NW2d 695 (1990).

The Court of Appeals applied a balancing test in *Zecchin v Zecchin*, 149 Mich App 723, 386 NW2d 652 (1986), holding that the trial court must consider both the amount needed by the wife and the husband's ability to pay. Since the wife would have to dissipate her assets while the husband could live off of his salary and pension without invading his resources, an award of spousal support was proper.

In *Maake v Maake*, 200 Mich App 184, 513 NW2d 664 (1993), the trial court erred in failing to award spousal support considering the length of the marriage, the earning capacity of the parties and the fact that the actual value of the assets the wife received was less than the value placed on them by the trial court.

#### **4. Alimony-in-Gross**

Alimony in gross May be either a lump-sum payment or installment payments of a definite amount of money over a specific period of time. *Firnschild v Firnschild*, 67 Mich App 327; 240 NW2d 790 (1976), citing regarding lump sum payments: *Bialy v Bialy*, 167 Mich 559; 133 NW 496 (1911); regarding installment payments: *Edgar v Edgar*, 366 Mich 580; 115 NW2d 286 (1962); *Schmidt v Schmidt*, 35 Mich App 185; 193

*NW2d 383 (1971), lv den 386 Mich App 774 (1971)*. Alimony in gross differs in a number of respects from spousal support or alimony in the nature of support, almost to the point of making the term “alimony in gross” an unfortunate choice. The term engenders much confusion.

Alimony in gross differs from spousal support in a number of very important ways. First, spousal support is modifiable unless the parties have expressly agreed otherwise. MCL 552.28; *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000). Alimony in gross is not modifiable absent a showing of fraud. *Oknaian v Oknaian*, 90 Mich App 28; 282 NW2d 230 (1979), *Schmidt v Schmidt, supra*. Second, under the Internal Revenue Code, spousal support is both includible as income to the payee and deductible to the payer. 26 USC § 71; 26 USC § 215. Third, alimony in gross is a claim against the payer’s estate for a specific amount whereas spousal support may be a claim against the estate but for an unspecified amount. *Welsh v Welsh*, 346 Mich 292; 78 NW2d 120 (1956); *LaBarge v LaBarge*, 312 Mich 157; 20 NW2d 143 (1945), *Braffett v Braffett*, 308 Mich 506; 14 NW2d 129 (1944), *Flager v Flager*, 190 Mich App 35; 475 NW2d 411 (1991). Fourth, spousal support is not dischargeable in bankruptcy. Alimony in gross may or may not be dischargeable, depending on whether the payments are in the nature of support, which is not dischargeable, or in the nature of property division, which is. 11 USC § 523. Be very careful in advising clients as to the effect of bankruptcy as the recent federal law revisions have been a profound change.

The Uniform Spousal Support Order (FOC 10b) does not distinguish between spousal support and alimony in gross. This can lead to various problems, particularly

with the tax issues, the estate issues if the payer was to die and the bankruptcy issues. For this reason, the author recommends that the term “alimony in gross” be avoided and the lump sum or installment payments that are in the nature of property division be called something distinguishable, such as periodic payments in lieu of award of property. If alimony in gross is intended to be in the nature of support, just call it spousal support and avoid questions of the parties (and drafter’s) intent down the road.

## 5. Tax Requirements

In general, spousal support is taxable to the recipient and deductible to the payer. 26 USC 215; 26 USC 71. The actual application of the provisions can be complicated, and a consultation with a tax attorney or certified public accountant is recommended for all but the most pedestrian of spousal support cases. The author includes the following language in her retainer agreement for all family law cases:

**Tax Planning.** There can be a significant element of tax implications in any divorce. Certainly, this can be a significant expense. It is important for Client to realize that Attorney is neither a tax attorney nor CPA. Therefore, it may be necessary during the process of your divorce to acquire the services of either a tax attorney or CPA. You will be advised of when to actually retain a tax professional. Attorney and Client will rely on the advice of the tax professional for tax implications and tax planning.

The Tax Reform Act of 1984 established the rules and the Tax Reform Act of 1986 modified the rules for determining which spousal support payments are deductible.

All five of the factors must be met for the payments to be deductible:

1. The payments must be in cash.
2. The payments must be made pursuant to a written judgment of divorce or separate maintenance or order.
3. The payment must terminate on the death of the payee.
4. The payer cannot make substitute payments such as child support on the death of the payee.

5. The parties cannot be members of the same tax-household or file a joint return.

If the payment is made to a third party, for example, a mortgage company, the payment must be received on behalf of the payee. This means that a mortgage payment paid on a house owned by the payee can be treated as alimony whereas a mortgage payment made for a house owned by the payer, even if occupied by the payee, cannot be so treated. Life insurance premiums can also be paid if the payee owns the policy. However, if the life insurance is in place solely to protect the payee in the event of the payer's death prior to the termination of payments, the payment will most likely not be allowed as spousal support.

Recapture provisions also apply. This means that the payer who deducted the excess payments must report them as income and the payee who paid tax on them receives a deduction. Recapture is determined when payments are actually made, not when they were due. Recapture does not apply if the payments do not exceed \$15,000 in any one of the three calendar years beginning with the first calendar year the payments are made, and only if the payments decline from year to year. If the payments remain the same or increase, recapture does not apply. Recapture also does not apply if the decline between years 1 and 2 or between years 2 and 3 does not exceed \$10,000 each.

Recapture commences with the year in which payments begin as stated in the divorce or separate maintenance judgment. The test has two steps:

1. Add the total paid in year 3 to the statutory allowance of \$15,000. Subtract this sum from the total paid in the second year. Any difference is recaptured.

2. The average of the payments made in year 2 (net of recapture, if any) and 3 is added to the \$15,000 statutory allowance. Subtract the sum from the total paid in year 1. Any difference is recaptured.

Here is an example:

1. Payer pays spousal support of \$100,000 in year 3. \$100,000 plus \$15,000 = \$115,000. Payer pays \$150,000 in year 2. \$150,000 - \$115,000 = \$35,000. \$35,000 is recaptured, and the payer pays income taxes on this amount. The payee receives a deduction for \$35,000.
2. Year 2 net payment of \$115,000 (\$150,000 - \$35,000) and year 3 payment of \$100,000 are averaged. The average is \$107,500 (\$115,000 + \$100,000 divided by 2). The average is added to the statutory allowance of \$15,000 for a total of \$122,500 (\$107,500 + \$15,000). This is subtracted from the amount paid in year 1. If the year 1 payment is \$200,000, the amount recaptured is \$77,500. (\$200,000 - \$122,500).

The total amount recaptured is reported as income by the payer in year 3 and is deducted by the payee the same year. 26 USC 71(f)(3)-(4).

Recapture does not apply if the payments are under \$15,000 per year because of the \$15,000 statutory allowance. Also, recapture only applies to declining payments over the three year period. No recapture will result if the declines do not exceed \$10,000 between years 1 and 2 or years 2 and 3. For a more thorough discussion recapture and additional examples, please see Chapter 17 of Michigan Family Law.

Section 71 payments are useful for many types of transfers between spouses outside of spousal support. Please refer to Chapter 17 of Michigan Family Law for a discussion of these other types of transfers.

Alimony in gross payments may be taxable to the payee and tax deductible to the payer if the five requirements listed above are met. If any one of the requirements is

not met or if the payments are not in the nature of support, then the payments will not be deductible to the payer or taxable to the payee.

Section 71 payments are a way to make property payments or the payment of the payee's legal fees tax deductible to the payer. Where the payer spouse has significantly higher income than the payee, this can be very advantageous. The payer can also obtain a deduction for property settlement interest payments that would ordinarily be treated as non-deductible personal or consumer interest. This makes sense since the interest income would taxable to the payee. The payments can also be used to buy out a marital interest in a business with pre-tax monies. The payments can also be used to divide non-qualified benefits that are not subject to division by Qualified Domestic Relations Order.

The downside is that these payments must terminate with the death of the payee to be deductible to the payer and taxable to the payee. If a large balance is owed at the time of the death, the payee's heirs will not receive a valuable asset, since no substitute payments can be made. 26 USC 71(b)(1)(D). Life insurance proceeds can be used to protect the heirs.

Tax-specific resources:

Tax Checklists for Divorce Settlements by Joseph W. Cunningham.

Frumkes on Divorce Taxation by Melvyn B. Frumkes.

## **6. Unallocated Support**

Ordinarily, child support payments are excluded from spousal support and are not treated in the same way. Child support is not tax deductible to the payer and is not



taxable to the payee. 26 USC 71. Even if the judgment characterizes the payment as spousal support, if the payment drops based on a contingency related to the child, such as high school graduation or attaining the age of 18, the payment is considered child support and not spousal support. If a payment is allocated between child and spousal support, any partial payment will be applied to child support first. *Id.*

Support payments can be unallocated, that is, not specifically liked to child support and spousal support. This may result in tax savings and may, therefore, be to both parties advantage. The effect is to convert the child support portion into something that is tax deductible to the payer and taxable to the payee. Here is an example:

Husband has been out of the work force for a number of years, and has only been able to find part-time work paying approximately \$10,000 per year. Wife is an executive earning \$200,000 per year. They have two minor children, who live primarily with Husband. One child is over 18 and attending college. Child care payments are \$100.00 per month. Child support under the guidelines is \$2,559 (\$30,708 annually) and spousal support, using the alimony guidelines, is \$3,422 per month (\$41,064 annually). This results in annual net income of \$76,276 for Wife and \$75,983 for Husband. Wife has agreed to pay the college tuition costs for the oldest child but is concerned that paying child support, spousal support and tuition will not leave her with sufficient resources. Using unallocated support, Wife pays to Husband \$78,969 per year. This is tax deductible to her and taxable to him. Their net annual income changes to \$81,245 for Wife and \$72,270 for Husband, giving her an extra \$4,969 per year to pay towards the tuition costs. Combined net incomes increase from \$152,259 to \$153,515, a net gain of

\$1,256. There is net loss of income to Husband, which could be offset in other ways.

*See Example 1.*

In another example, Wife has income of \$14,000 per year, and Husband earns \$54,000 per year. Wife has physical custody of their two minor children. Child support under the guidelines is payable by Husband to Wife in the amount of \$1,171 per month. Wife receives spousal support of \$328 per month. This results in net annual income to Wife of \$28,051 and to Husband of \$22,500. The available resources for the two households total \$50,551. If the payments are made as unallocated support, Wife's net income becomes \$29,663 and Husband's becomes \$24,425. This increases the combined resources to \$54,088, a gain of \$3,537. This may make summer camp for the kids a possibility. *See Example 2.*

In the third example, Wife earns \$250,000 per year. Husband earns \$30,000 per year and is the primary custodian of the children. Wife's child support obligation is \$2,891 per month. Wife would pay spousal support to Husband of \$4,041 per month. This results in net income to Wife of \$98,262 per year and to Husband of \$97,044. Their net combined resources are \$195,306. Wife is concerned that she will not be able to pay her student loans. If unallocated support is used, Wife would pay support to Husband of \$87,820 per year, resulting in net income to Wife of \$108,451 and to Husband of \$88,513, for combined net income of \$196,964. About \$1,658 more is available as a resource, and Wife's income is increased by \$10,189. Husband's net income decreases by \$8,531. *See Example 3.*

Although the net gain of available money is not huge in any of these examples, depending on the situation of the parties, even a small increase in available money can be significant. Another reason may be to maximize the income of one party due to taking on a disproportionate amount of marital debt. The net increase in income may act to balance out what would otherwise be an inequity. To see if unallocated support may be advantageous in your fact situation, Craig Ross' Support 2006 allows a quick comparison. At the bottom left hand side of the Alimony Recommendation sheet is a toggle button labeled "Use unallocated support". By clicking on the button, the screen will change to show you the effect. Please note that the "Suggested Alimony Award" does not change. You must look at the Claimant's Income and Other Party's Income boxes to determine the amount.

### **7. Spousal Support Guidelines**

Spousal support guidelines were to have been developed by the State Court Administrative Office under an older court rule. This never happened, and the court rule has now gone away. Two Michigan practitioners have developed software to compute spousal support recommendations. Craig Ross has developed the Marginsoft program Support 2006. (Support 2007 has just rolled out at the time of this writing). His website is [www.marginsoft.net](http://www.marginsoft.net). Roland Fancher's program is called the Prognosticator and his website is [www.sppub.com](http://www.sppub.com). His e-mail is: [Springfield@chartermi.net](mailto:Springfield@chartermi.net).

The spousal support component of the software addresses the case law factors that are easily quantifiable but some of the factors, such as relative health of the parties, is not truly addressed. The software therefore is a supplement to the spousal support

analysis but is not a replacement for a reasoned analysis that applies all of the *Sparks* factors.

The guidelines work from a series of facts and looks to equalization of post-divorce income. Greatest weight is put on length of the marriage, followed by income of the recipient, education or training level of the recipient, age of the recipient, and status of children, if any. Craig Ross' program can address spousal support and unallocated family support.

The guidelines are a good starting point for negotiations but are not presumptive in the way that child support guidelines are. The art of the practice of law still has a place, and using the guidelines in conjunction with an understanding of the non-quantifiable aspects of spousal support is an art. Every family situation has its own unique flavor.

## Quick Reference Guide to Cases

### Past relations and conduct:

Abadi v Abadi, 78 Mich App 73, 259 NW2d 244 (1977)  
Feldman v Feldman, 55 Mich App 147, 222 NW2d 2 (1974)  
Johnson v Johnson, 346 Mich 418, 78 NW2d 216 (1956)  
Welling v Welling, 233 Mich App 798, 592 NW2d 822 (1999)

### Length of marriage:

Demman v Demman, 195 Mich App 109, 489 NW2d 161 (1992)  
Feldman v Feldman, 55 Mich App 147, 222 NW2d 2 (1974)  
Giesen v Giesen, 140 Mich App 335, 364 NW2d 327 (1985)  
Johnson v Johnson, 346 Mich App 418, 78 NW2d 216 (1956)  
Korth v Korth, 256 Mich App 266, 662 NW2d 111 (2003)  
Ross v Ross, 24 Mich App 19, 179 NW2d 703 (1970)  
Schaffer v Schaffer, 37 Mich App 711, 195 NW2d 326 (1972)  
Zecchin v Zecchin, 149 Mich App 723, 386 NW2d 652 (1986)

### Ability to work:

Abadi v Abadi, 78 Mich App 73, 259 NW2d 244 (1977)  
McLain v McLain, 108 Mich App 166, 310 NW2d 316 (1981)  
Sullivan v Sullivan, 175 Mich App 508, 438 NW2d 309 (1989)  
Van Ommen v Van Ommen, 25 Mich App 652, 181 NW2d 634 (1970)  
Zecchin v Zecchin, 148 Mich App 723, 386 NW2d 652 (1986)

### Source and amount of property awarded:

Hanaway v Hanaway, 208 Mich App 278, 527 NW2d 792 (1995)  
Gates v Gates, 256 Mich App 420, 664 NW2d 231 (2003)  
Ross v Ross, 24 Mich App 19, 179 NW2d 703 (2003)  
Schaffer v Schaffer, 37 Mich App 711, 195 NW2d 326 (1972)  
Olson v Olson, 256 Mich App 619, 671 NW2d 64 (2003)

### Age of parties:

Arnholt v Arnholt, 129 Mich App 810, 343 NW2d 214 (1983)  
Demmen v Demmen, 195 Mich App 109, 489 NW2d 161 (1992)  
McLain v McLain, 108 Mich App 166, 310 NW2d 316 (1981)  
Wiley v Wiley, 214 Mich App 614, 543 NW2d 64 (1995)

Zecchin v Zecchin, 149 Mich App 723, 386 NW2d 652 (1986)

Ability to pay:

Ackerman v Ackerman, 197 Mich App 300, 495 NW2d 173 (1992)

Knowles v Knowles, 185 Mich App 497, 462 NW2d 777 (1990)

Moore v Moore, 242 Mich App 652, 619 NW2d 723 (2000)

Torakis v Torakis, 194 Mich App 201, 486 NW2d 107 (1992)

Present Situation of the Parties:

Lesko v Lesko, 184 Mich App 395, 457 NW2d 695 (1990)

Magee v Magee, 215 Mich App 158, 553 NW2d 363 (1996)

Zecchin v Zecchin, 149 Mich App 723, 386 NW2d 652 (1986)

Need:

Aussie v Aussie, 182 Mich App 454, 452 NW2d 859 (1990)

Lowrie v Lowrie, COA No. 256631 (2005)

Magee v Magee, 218 Mich App 158, 553 NW2d 363 (1996)

Olson v Olson, 256 Mich App 619, 671 NW2d 64 (2003)

Parrish v Parrish, 138 Mich App 546, 361 NW2d 366 (1984)

Schaffer v Schaffer, 37 Mich App 711, 195 NW2d 326 (1972)

Parties' health:

Demman v Demman, 195 Mich App 109, 489 NW2d 161 (1992)

Esslinger v Esslinger, 9 Mich App 11, 155 NW2d 702 (1967)

Kiplinger v Kiplinger, 172 Mich 552, 138 NW2d 230 (1912)

Lesko v Lesko, 184 Mich App 395, 457 NW2d 695 (1990)

McLain v McLain, 108 Mich App 166, 310 NW2d 316 (1981)

Moser v Moser, 184 Mich App 166, 310 NW2d 316 (1981)

Schaffer v Schaffer, 37 Mich App 711, 195 NW2d 326 (1972)

Prior standard of living:

Johnson v Johnson, 346 Mich 418, 78 NW2d 216 (1956)

Tomlinson v Tomlinson, 338 Mich 274, 61 NW2d 102 (1953)

Vaclav v Vaclav, 96 Mich App 584, 293 NW2d 613 (1980)

Voukatidis v Voukatidis, 195 Mich App 338, 489 NW2d 512 (1992)

General Principals of equity:

Lesko v Lesko, 184 Mich App 395, 457 NW2d 695 (1990)  
Maake v Maake, 200 Mich App 184, 513 NW2d 664 (1993)  
Parrish v Parrish, 138 Mich App 546, 361 NW2d 366 (1984)  
Zecchin v Zecchin, 149 Mich App 723, 386 NW2d 652 (1986)

Alimony-in-Gross:

Bialy v Bialy, 167 Mich 559; 133 NW 496 (1911)  
Braffett v Braffett, 308 Mich 506; 14 NW2d 129 (1944)  
Edgar v Edgar, 366 Mich 580; 115 NW2d 286 (1962)  
Firnschild v Firnschild, 67 Mich App 327; 240 NW2d 790 (1976)  
Flager v Flager, 190 Mich App 35; 475 NW2d 411 (1991)  
LaBarge v LaBarge, 312 Mich 157; 20 NW2d 143 (1945),  
Oknaian v Oknaian, 90 Mich App 28; 282 NW2d 230 (1979)  
Schmidt v Schmidt, 35 Mich App 185; 193 NW2d 383 (1971), lv den 386 Mich App 774 (1971)  
Welsh v Welsh, 346 Mich 292; 78 NW2d 120 (1956)