

ALIMONY ROULETTE
IS IT TIME FOR ALIMONY BY FORMULA?
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Alimony Hypothetical—How Much Would You Award?

Assume John earns \$65,000 per year and Mary earns \$25,000. It is a 10-year marriage and a first marriage for both. John and Mary met in college. John is 32. Mary is 30. There are no claims that either made career sacrifices to enter into this marriage. There are no children. All marital assets have been divided equally. The only issue is alimony.

During their marriage they deposited their income into a joint account and paid all living expenses out of that account. They have not maintained any savings. They each had discretion to take care of their own needs out of the joint account without much controversy.

While each claim that the other was primarily at fault in causing the marriage to end, the allegations of fault are not so significant as to constitute the basis for awarding or denying alimony.

Looking at this as a lawyer, what is your best guess as to the amount that might be ordered, if any.

What analysis did you use?

“If it ain’t broke-don’t fix it”

Given the fact that we have a wealth of case law going back 75 years and statutory factors that are presumably equitably applied by our Judges, why would I be asked to present on this subject? My answer--I am a proponent for formulaic alimony. Here are my reasons:

1. My own lawyering experience when asked by prospective clients, “How much alimony will I have to pay/How much alimony am I entitled to”
2. My mediating experience when impasse occurs on the issue of alimony entitlement. (Someone is getting it wrong)
3. Child support guideline experience. (How many remember the times before?)
 - a. As with child support, will still have disputes about being unemployed, underemployed, self employed, 2nd jobs and what constitutes income.

b. As with child support, once incomes are determined, the amount will be more predictable.

c. The length of time will generally be shorter. (Can debate whether this is good or bad—maximums often become minimums)

4. The evolving (improving) marriage dynamics. (Women in the home/workplace)

5. Case law is still unsettling. (More on this later)

6. Anonymous judges' alimony survey. (Report by a judge who will remain anonymous about judges in an area in this state which will remain undisclosed)

7. Elimination of "reasonable needs" analysis and what constitutes "lifestyle."

"What case law would we lose?"

General Utah alimony history:

Quite miraculously, Utah case law development over the last 70 years has been less tied to fault than most other states. The basic general factors developed by case law and statute have stayed pretty consistent during this 70-year period. While there were instances in the period from 1930 to 1960 where fault played a part of the award or denial, most of the factors with which we are familiar have been dominant in the judicial construction of alimony awards.

The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and upon her husband's ability to pay. *Hendricks v. Hendricks*, 65 P 2nd 642 (Utah 1937);

There was a period of time where alimony did not automatically terminate on the spouse's remarriage. *Austad v Austad*, 269 P 2nd 284 (Utah 1954);

Although now statutorily recognized both as a factor and a general limit on length of the award, it was stated in *English v English*, 565 P 2nd 409 (Utah 1977) that neither the length of marriage or the parties relative contributions thereto, were proper criteria for determining alimony. ;

One factor in considering length of alimony is to encourage recipient to seek employment. *Carter v. Carter* 584 P 2nd 904 (Utah 1978);

If alimony is justified, it should be permanent unless sufficient facts exist to show what will occur in future. Although designated as "permanent," alimony was still subject to termination or modification upon showing of appropriate change of circumstances. *Olson v. Olson* 704 P 2nd 564 (Utah 1985);

Primary criteria, subject to other influencing factors are:

1. Needs of the recipient;
2. Ability of recipient to supply income for herself;
3. Ability of payor to pay, recognizing his own needs;
4. To the extent possible maintain (or equalize) the standard of living

enjoyed during the marriage. *Jones v Jones* 700 P 2nd 1072 (Utah 1985); *Canning v Canning* 744 P 2nd 325 (Utah App 1987); *Osguthorpe v Osguthorpe* 791 P 2nd 895 (Utah App. 1990) also dealing with underemployment; *Burt v Burt* 799 P 2nd 1166 (Utah App 1990) explaining that equalizing standard of living does not mean equalizing disparities in income;

Howell v Howell 806 P 2nd 1209 (Utah App. 1991) first real effort to define standard of living and that standard of living was not only limited to the actual expenses during the marriage but could include the expenses that might have existed if the parties had not separated; *Rudman v Rudman* 812 P 2nd 73 (Utah App 1991); *Bell v Bell* 810 P 2nd 489 (Utah App 1991); *Willey v Willey* 866 P 2nd 547 (Utah App 1993);

Fault, although recognized as a relevant factor in *Childs v Childs* 967 P 2nd 942 (Utah App 1998), cert. Denied, 982 P 2nd 88 (Utah 1999), has generally not been used in alimony considerations for the last two decades. Recently, fault was statutorily included as a possible factor and was actually invoked in *Riley v. Riley* 138 P 3rd 84 (Utah App 2006)

Excluding *Riley*, very little was added to the alimony case law since 2004 until late 2008. For some reason, starting the end of October 2008, the Court of Appeals seems to have become more active and some might say, less predictable about alimony issues.

The first: *Jensen v Jensen* 197 P 3rd 117 (Utah App 2008), imputing income on very little evidence and terminated alimony after five years in this 16-year marriage with not much more than speculation and a curious trial court comment that the appellate court felt within the proper discretionary power, "if the alimony period were longer than five years, (wife) would become older and rely only on the alimony for her support and that such reliance would be a disservice to her." Compare this with *Rasband v Rasband* 752 P 2nd 1331 (Utah App 1988) holding that automatically decreasing alimony could not be justified absent specific findings to support decrease; and *Chambers v Chambers* 840 P 2nd 841 (Utah App 1992) holding that reduction of alimony after three years and then a termination three years later not supportable unless specific and detailed findings are present justifying the both.

Then *Black v Black* 619 UAR 37 (Utah App 2009) allowing retroactive termination of alimony back to the date cohabitation began rather than the date it was judicially established or date of the filing of petition to terminate.

This was followed by *Young v Young* 620 UAR 59 (Utah App 2009) permitting an increase of alimony based on receipt of social security benefits which the court felt was not foreseeable and justified even though recipient was in prison at the time of increase

and was not legally permitted to receive social security while incarcerated.

And *Leppert v Leppert* 621 UAR 6 (Utah App 2009) which, other than saying trial court had discretion to impute income to wife since there was some credible evidence, remanded on every other alimony finding and conclusion saying that Judge Dever did not make adequate findings justifying his conclusions for reducing wife's stated needs, and automatically reducing alimony when she started getting her share of the retirement and terminating when she reached age 65.

And of course, we have the current statutory factors: UCA 30-3-5 (8)

1. The financial condition and needs of the recipient spouse.
2. The recipient spouse's earning capacity or ability to produce income.
3. The ability of the payor spouse to provide support.
4. The length of the marriage. Alimony may not be ordered for a duration longer than the number of years that the marriage existed except for extenuating circumstances.
5. Whether the recipient spouse has custody of minor children requiring support.
6. Whether the recipient spouse works in a business owned or operated by the payor spouse.
7. Whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor to attend school during the marriage.
8. The standard of living existing at the time of separation and under appropriate circumstances, an attempt to equalize the parties' respective standards of living.
9. Whether a spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage.
10. Alimony ordinarily terminates upon remarriage or cohabitation of the receiving spouse or the death of either spouse.
11. The Court may consider the fault of the parties.
12. When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and

in determining the amount of alimony.

13. The income of a subsequent spouse of the payor may not be considered except in their ability to share in living expenses or because of improper conduct.

“A look back at alimony—nationally”

The historical concept of alimony awards was generally based on (1) fault—if wife was at fault she was not entitled but was if husband was at fault which was typically the case and (2) wife needed lifelong support since she had no workforce skills and would become a public charge.

As the cultural and economic fabric of marriage changed with wives becoming increasingly at fault in the marriage breakdown and their increased use in the workforce, the prior justification for alimony eroded.

Because of the lack of a clear purpose for continuation of the earlier justifications for the award of alimony, a huge variance in state applications developed. On one extreme, alimony was virtually non-existent except in limited or temporary circumstances to the other end of the spectrum where, as in Virginia, it is permanent.

On a national level the theory of alimony is as diverse as there are number of states. And, if there is to be a justification for alimony, why should it be as arbitrary as the state in which one gets divorced.

When fault was the primary basis for a divorce, it drove the application or justification of alimony. If neither party was at fault, then there was no legitimate reason to get divorced. If both were at fault, then they deserved each other and still had to stay married.

On the other hand if the party at fault was the wife, she was forced from the marriage and left to survive on her own. She had broken the social contract and should not benefit from her breach.

If the husband was at fault and since women usually did not or could not find employment, men had to maintain the standard of living of the wife since that is what she would have enjoyed and should be entitled to the benefit of her bargain.

In essence alimony was the common law element of damages much as it would under tort or contract law.

But two basic social changes almost mandated a rethinking of the theory of alimony. Divorce lost much of its social stigma. Women moved into the labor force in increasing numbers. As these social changes became more obvious, the trend away from placing so much emphasis on fault developed and some states started permitting divorce without fault.

The creation in 1970 of the Uniform Marriage and Divorce Act (UMDA) embraced the granting of no-fault divorces thereby eliminating the traditional notions of alimony. But, since the passage of that act was eliminating alimony as a reflection of punishment for marital misconduct, the act did not specifically address the question as to what the underlying philosophy of alimony should be. If anything, what might be read into the act, was that perhaps alimony was not necessary at all.

Basically the Act created a two-prong test to determine eligibility for alimony. Alimony could be awarded only if (1) the party seeking the support “lacks sufficient property to provide for his reasonable needs” and (2) “is unable to support himself through appropriate employment.” In essence, property division became the primary method of support and “reasonable needs” was vague, leaving states with approaches that resulted in very different figures in determining a spouse’s “needs. Indeed, official comments to the Act suggested that when a spouse could secure employment appropriate to his skills, then reasonable needs would be met.

The overall underlying message in the Act was that self support was the norm; that working women should not need support and that as greater numbers of women went to work, support awards should become smaller, both in amount and duration.

While it is true that UMDA did refer to the marital standard of living as one of the factors that could influence the amount and duration of support, it was not a factor to be applied until the two prong test for eligibility was met.

States continued to have wide-ranging theories of approaches to alimony which apply, in different manners, to the relevance of marital misconduct, the reasonable needs of the requesting spouse, the impact of employability and the method by evaluating that and the importance of the length of marriage to the duration of alimony.

For instance, in Arizona, the amount is based on a duration factor; #years of marriage time 15% of difference incomes. In Kansas, alimony is limited to 121 months with the option of one extension up to 121 months. The amount is 20% of the difference in incomes if no children—25% if there are children. In Ohio, there is one year maximum alimony for every three years of marriage. In Oregon, remarriage does not automatically end alimony. And, in Texas you have to have been married for five years and it is limited to \$2,500.00 per month for up to three years.

There is a group of states, Georgia, Louisiana, Connecticut and Virginia where a spouse who is guilty of fault cannot receive alimony. Some states such as Utah, where fault can be a factor and still others where fault is entirely irrelevant.

Because of the wide disparity in the state by state approaches to alimony, the movement for alimony guidelines has started to develop increasing interest. For instance, in *Bacon v Bacon* 819 So. 2nd 950 (Fla. 4th DCA 2002), in a concurring opinion, Judge Farmer expressed his view that “broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines . . .”

In some respect, this movement gained favor because of the generally favorable experience in most states with child support guidelines. And that a standard for measuring entitlement to alimony ought to be a question of policy within the traditional notions of the legislative power rather than the judiciary. But the detractors for alimony guidelines were quick to point out that regardless of the success of child support guidelines, marriages have too many different fact situations to permit the creation of reasonable guidelines.

With that general background, The American Law Institute (ALI) in its *Principles of the Law of Family Dissolution: Analysis and Recommendations*, adopted the notion that the theory of alimony, absent extraordinary circumstances, should be based exclusively on compensation for losses that occurred as a result of the marriage.

This premise has been rejected by other family law organizations who have studied the subject. Most notably, the American Academy of Matrimonial Lawyers (AAML).

The Academy was most concerned with the problem that continued to exist with ALI's "principles," namely that the setting of alimony still lacked any consistency in states thereby resulting in a perception of unfairness and that with inconsistency flowed the inability to accurately predict an outcome in any given case, thereby providing nurture to litigation on the issue.

It was the hope of the Academy that any approach ought to include the two factors that were considerations in virtually all jurisdictions—income of the parties and length of the marriage. Therefore, the basic guideline approach recommended by the Academy is:

Amount:

Unless one of the deviation factors listed below applies, spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income.

Length:

Unless one of the deviation factors listed below applies, the duration of the award is arrived by multiplying the length of the marriage by the following factors:

0-3 years (.3);
3-10 years(.5);
10-20 years (.75)
and over 20 years, permanent.

"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 and is added to and subtracted from the parties' income for child support purposes.

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 of 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 reimbursed medical expenses);
- 4) A spouse has unusual needs;
- 5) A spouse has received a disproportionate share of the marital estate;
- 6) There are unusual tax consequences;
- 7) Other circumstances that make application of these considerations inequitable;
- 8) The parties have agreed otherwise.

Some other alimony scenarios:

To provide some general idea as to how other fact situations might look using this alimony formula and without attempting to factor in any reasons for deviation:

1. Obligor's monthly gross is \$5000.00; obligee's is \$2000.00 It is a 12 year marriage. Alimony would be \$1100.00 per month for 9 years.

2. Obligor's monthly gross is \$5000.00; obligee's is \$1000.00 It is an 8 year marriage. Alimony would be \$1300.00 per month for 4 years.

3. Obligor's monthly gross is \$9000.00; obligee's is \$5000.00 It is a 18 year marriage. Alimony would be \$1700.00 per month for 13 years, 6 months.

4. Obligor's monthly gross is \$7500.00; obligee's is \$2500.00 It is a 5 year marriage. Alimony would be \$1750.00 per month for 30 months. With these same facts and a marriage of more than 20 years, the alimony would be the same but it's length would be indefinite.

No weight has been assigned to any of the deviation factors listed. Presumably, the trial court would, within it's discretionary authority, decide what weight should be assigned. The deviation could be applied to either the amount, the duration or both.

Conclusion

There is plenty to litigate in the family law arena. For divorcing couples we (lawyers and the judiciary) ought to minimize the amount of risk/reward approach to as many of the issues as possible.