

# AN OVERVIEW OF THE RULES IN THE USA REGARDING THE AWARD OF POST- DIVORCE SPOUSAL SUPPORT IN 2019

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## I. INTRODUCTION

It is difficult for a few reasons to attempt to describe the “rules in the U. S. regarding the award of post-divorce spousal support.” First, the award of spousal support is governed by state law. So, while the applicable state statutes have some similarities, each statute is somewhat different. (In a recent study I conducted, I concluded that different states are implementing very different policies regarding the award of spousal support.)<sup>1</sup> Second, as will be discussed below, in many states a judge has a great deal of discretion regarding the award of spousal support, so as a result, the standards for the award of support are not consistent even in the same state. Any attempt to summarize the rules in the U. S. that currently apply to the award of spousal support, therefore, will inevitably be somewhat imprecise.

In any event, I will try to summarize below what I believe to be the current “majority view” in the U. S. regarding the award of spousal support. When there are obviously contrasting minority approaches, I will mention them.

In the U.S., there are a number of different types of spousal support. “Reimbursement” spousal support is awarded to compensate a spouse for supporting the other while he or she obtained an education.<sup>2</sup> “Rehabilitative” support is awarded in order for the claimant spouse to obtain education or training after divorce.<sup>3</sup> “Durational” or “indefinite-duration” support is awarded to a spouse who needs support after divorce.<sup>4</sup> This article will not discuss reimbursement support or rehabilitative support.

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1. See Oldham, *infra* note 5.

2. Mahoney v. Mahoney, 91 N.J. 488, 501 (1982); In re Williams, 825 N.W.2d 327 (Iowa Ct. App. 2012); Holt v. Watson, 868 A.2d 891 (Me. 2005).

3. Pearson v. Pearson, 771 N.W.2d 288, 292 (N.D. 2009); Zaleski v. Zaleski, 13 N.E.3d 967, 973 (Mass. 2014).

4. Cousin v. Cousin, 631 A.2d 119, 126 (Md. App. 1993); In re Marriage of Ranes & Ranes, 846 P.2d 1195, 1196 (Or. Ct. App. 1993).

## II. RULES FOR THE AWARD OF SPOUSAL SUPPORT IN THE USA

### A. Entitlement

#### 1. Majority Rule

In most states divorce courts are instructed, when making a determination whether to award spousal support, to consider numerous factors.<sup>5</sup> Common factors include, for example, the duration of the marriage, the parties' health, ages, needs, debts, and earning capacities.<sup>6</sup> Some factors allow the court to consider the parties' relative fault in ending the marriage.<sup>7</sup> In a few states, the claimant spouse is barred from receiving spousal support if the claimant spouse is found to be at fault.<sup>8</sup> After considering these enumerated factors, the court is directed to award spousal support if the court concludes that such an award would be appropriate.

When determining whether the award would be appropriate, in many states the court is instructed to consider whether, among other factors, after considering the claimant spouse's earning capacity and all property awarded to the spouse in the divorce, the claimant spouse will not be able to satisfy his or her "reasonable needs."<sup>9</sup> Under the majority view, the spouse's "reasonable needs" are determined based upon the standard of living of the couple during the marriage.<sup>10</sup> (While Ira Ellman

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5. J. Thomas Oldham, *A Survey of Lawyers' Observations About the Principles Governing the Award of Spousal Support throughout the United States*, 51 FAM. L. Q. 1, 4 n.16 (2017). For example, the West Virginia spousal support statute directs a family court to consider 20 different factors. See W.Va. Code § 48-6-301 (b).

6. See 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, 33 (2001).

7. See Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L. J. 773 (1996). For example, in *Riley v. Riley*, 138 P.3d 84 (Utah App. 2006), the claimant spouse was awarded more support than she needed, due to the obligor's fault.

8. GA. CODE ANN. § 19-16-1 (2018); LA. CIV. CODE ANN. art. 112 (2018); N. C. GEN. STAT. § 50-16.3A (2018); VA. CODE ANN. § 20-107.1 (2018).

9. *Courtney v. Courtney*, 550 S.W.3d 522, 530 (Mo. App. 2017).

10. See, e.g., *Wold v. Wold*, 744 N.W.2d 541, 548 (N. D. 2008); *Rainwater v. Rainwater*, 869 P.2d 176 (Ariz. App. 1993); *Gust v. Gust*, 858 N.W.2d 402, 411 (Iowa 2015); *Wolfe v. Wolfe*, 273 P.3d 915, 924 (Or. App. 2012); *Young v. Young*, 81 N.E.3d 1165, 1170 (Mass. 2017); *L.R.S. v. C.A.S.*, 525 S.W.3d 172, 188 (Mo. App. 2017); *Marriage of Iqbal and*

valiantly devoted much of his career attempting to convince judges that a decision regarding entitlement to support should focus on the claimant's losses and not need,<sup>11</sup> U.S. judges still seem to focus on the "need" of the claimant spouse.) So, under the majority view, a claimant can qualify for support even if he or she has a significant income.<sup>12</sup> Spousal support awards could be quite large under this approach if the standard of living during the marriage was high.<sup>13</sup> An award is possible only to the extent that the obligor spouse can afford to pay.<sup>14</sup>

Under the majority approach, a claimant does not always receive substantial spousal support, even if it is proved that, after divorce, he or she cannot otherwise maintain the standard of living during the marriage. For example, in a California case, a young female dental hygienist married an older wealthy man.<sup>15</sup> When they divorced four years later, the female made a claim for substantial spousal support, based on the argument that she could not otherwise maintain the standard of living during the marriage.<sup>16</sup> The appellate court affirmed a minimal award of support by the trial court (\$5000 per month for six months), emphasizing that the "standard of living during marriage" factor was more important in divorces involving long-duration marriages.<sup>17</sup>

Similarly, a Utah state law provides that, in a marriage of

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Khan, 11 N.E.3d 1, 5 (Ill. App. 2014); TENN. CODE ANN. § 36-5-121(c)(2) (2018).

11. Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 879, n. 54 (1999).

12. See *Courtney*, 550 S.W.3d at 530 (\$95,000 in annual income did not bar a claim); *In re Marriage of Ciprari*, 2019 WL 458948 (Cal. App) (wife's monthly investment income of \$20,790 did not bar a claim).

13. See *Stratienko v. Stratienko*, 529 S.W.3d 389, 410 (Tenn. App. 2017) (wife's reasonable needs were \$15,000 per month); *S.W. v. G.W.*, 2018 WL 944074 at \*30-\*35 (N. J. App. Div.) (the trial court awarded annual support of \$450,000); *Dan v. Dan*, 315 Conn. 1, 105 A.3d 118 (2014) (monthly award of \$15,000); *L.R.S.*, 525 S.W.3d at 192 (claimant spouse's monthly reasonable needs were \$16,784). John Cleese was ordered to pay \$1,000,000 annually for six years after his California divorce in 2009. See Andrew Pierce, *John Cleese in 12 Million [Pounds] Divorce Settlement*, THE TELEGRAPH, Aug. 18, 2009.

14. *Williams v. Williams*, 541 S.W.3d 477, 485 (Ark. App. 2018).

15. *In re Marriage of Huntington*, 10 Cal. App.4th 1513, 1516 (1992).

16. *Id.*

17. *Huntington*, 10 Cal. App.4th at 1521-2; see also *Llana v. Llana*, 121 S.W.3d 286, 292 (Mo. App. 2003).

“short duration” with no minor children, when considering an alimony award the court should attempt to restore the parties to their economic circumstances when they married.<sup>18</sup> A Maine statute provides that there is a rebuttable presumption that spousal support should not be awarded if the parties were not married for at least ten years.<sup>19</sup> So, in many states, the issue of entitlement to spousal support is significantly impacted by the duration of the marriage.

It appears that spousal support is awarded in 10-20% of all divorces in the U.S.<sup>20</sup> Half of all divorcing couples in the U.S. have been married for seven years or less.<sup>21</sup> As described above, spousal support presumably is awarded rarely in such divorces.

Of those divorcing couples who were married for longer than seven years, a significant percentage both have relatively low incomes, and neither can afford to pay support.<sup>22</sup> Professor Garrison found that the award of spousal support was most likely when the marriage duration was “long” and the claimant did not work outside the home during the marriage.<sup>23</sup> Professor McMullen has argued that a significant number of women who might be eligible for support do not make a claim for support, due to feelings of guilt or shame.<sup>24</sup>

## 2. Minority Rule

It was mentioned above that, in many states dealing with marriages of significant duration, one important consideration is whether, after divorce, the claimant spouse will be able to maintain the standard of living enjoyed during the marriage. In Texas, the claimant spouse needs to establish, among other

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18. UTAH CODE ANN. § 30-3-5 (2018).

19. ME. STAT. tit. 19, § 951-A (2017).

20. See generally Marsha Garrison, *Good Intentions Gone Awry: the Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 52 BROOKLYN L. REV. 621, 629 n. 27 (1991); J. McMullen & D. Oswald, *Why Do We Need a Lawyer? An Empirical Study of Divorce Cases*, 12 J. L. & FAM. STUDIES 57, 75 (2010).

21. ANDREW CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 24 (rev. ed. 1992).

22. See Garrison, *supra* note 20, at 707.

23. Garrison, *supra* note 20, at 711.

24. See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y. 41, 58 (2011).

things, that he or she will not be able to satisfy his or her “minimum reasonable needs.” This phrase generally has been construed to mean basic living expenses, not necessarily the expenses need to maintain the standard of living during the marriage. So, to receive spousal support, the claimant spouse in Texas must show a more pressing need for support than in many other states. In addition, spousal support cannot be awarded in Texas if the marriage did not last ten years, unless (i) the obligor spouse was guilty of family violence or (ii) the claimant is disabled or caring for a disabled child.<sup>25</sup>

### *B. The Amount of Spousal Support*

#### *1. The Majority View*

In many states, in marriages other than those of short duration, an important issue is whether the claimant spouse will be able to meet his or her reasonable needs (in Texas, his or her “minimum reasonable needs”) without support. The claimant spouse frequently is asked to submit to the court a budget of what the claimant believes to be reasonable expenses, which the obligor spouse frequently challenges as inflated.<sup>26</sup> The court will then determine what expenses are reasonable—as well as the amount, if any, that the obligor spouse must contribute toward the claimant’s expenses after divorce.

Under the majority approach, the claimant does not have a right to a certain portion of the obligor’s post-divorce income. The spousal support claim is based on whether the claimant spouse “needs” the support.

In a recent Iowa case, the parties divorced after 28 years of marriage, when two of the parties’ children were younger than 18. The wife had not worked outside the home since the spouses began to have children. The husband’s annual income exceeded \$1,000,000 (more than \$80,000 per month). The court found that the wife could earn \$25,000 annually working outside the home. The Iowa Supreme Court concluded that the wife should receive

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25. TEX. FAM. CODE ANN. § 8.051 (2017).

26. See, e.g., *Stratienko*, 529 S.W.3d at 397–98; *In re Marriage of Mauer*, 874 N.W.2d 103, 111 (Iowa 2016); *Smith v. Smith*, 503 S.W.3d 178, 185 (Ky. App. 2016); *Herschend v. Herschend*, 486 S.W.3d 346, 352 (Mo. App. 2015).

monthly spousal support of \$12,600 because that was the amount needed to maintain the marital standard of living.<sup>27</sup>

As this case shows, spousal support awards can be large under the majority approach if the marital standard of living was high and the obligor spouse can afford to pay. For example, in a New Jersey case, a couple who had been married ten years was divorcing with small children. The court awarded monthly spousal support exceeding \$23,000.<sup>28</sup> It does not mean, of course, that under the majority view there is equal income sharing after divorce.<sup>29</sup>

Under the majority approach, once the marital duration is long enough to justify an award of spousal support, the amount of spousal support does not appear to be impacted by the marital duration.

## 2. The Minority View

In Texas, there is a maximum amount of spousal support. Spousal support awards in Texas cannot exceed the lesser of (i) \$5000 monthly or (ii) 20% of the obligor's gross income.<sup>30</sup> So, spousal support awards are much lower in Texas than in many other states when wealthy spouses divorce after marriages of long duration.

### C. *The Duration of the Spousal Support Award*

#### 1. Majority View

In most states, courts have substantial discretion regarding the duration of a spousal support award. Except for marriages of "long" duration, it is common for spousal support awards to last for some fraction of the duration of the marriage. For example, in a New Jersey case, the couple had been married ten years and were divorcing, with small children. The appellate court affirmed an award of support for ten years (which was the time the

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27. Mauer, 874 N.W.2d at 111.

28. J.E.V. v. K.V., 45 A.3d 1001, 1006 (N. J. App. Div. 2012).

29. See, e.g., Stone v. Stone, 488 S.E.2d 15, 19 (1997); Mauer, 874 N.W.2d at 111; Young v. Young, 81 N.E. 3d 1165, 1170 (Mass.2017).

30. TEX. FAM. CODE § 8.055.

youngest child would turn 18).<sup>31</sup>

When the parties had been married 12 years and had three minor children, an Arkansas court awarded support for ten years that gradually decreased in amount over time.<sup>32</sup> A South Dakota court affirmed a support award for eight years when the parties had been married for seven years.<sup>33</sup>

In marriages that did not last for a “long” period, indefinite-duration awards are rare. In fact, under the majority rule, a grant of indefinite-term support could be considered an abuse of discretion.<sup>34</sup>

When equitable distribution was adopted in many states during the 1970s and 1980s, courts and legislatures seemed to hope that a spouse’s post-divorce financial needs could be satisfied via a property award. Indefinite-duration alimony was less frequently awarded.<sup>35</sup> Toward the end of the 20<sup>th</sup> century, it became apparent that more spousal support was needed by dependent spouses, particularly when parties were divorcing after a long marriage.<sup>36</sup> This change in attitude has been referred to as the “second wave” of alimony legislation.<sup>37</sup>

In a number of states today, if spouses divorce after a “long” marriage, spousal support of indefinite duration—support awarded that continues until (i) the obligor dies (or perhaps retires) or (ii) the recipient dies or remarries (or perhaps establishes a new committed relationship)—is not uncommon, if the payor spouse can “afford” it and the claimant “needs” it.

For example, a Maryland case notes that there is an “implied statutory directive that a [divorce after a] long marriage is more

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31. J.E.V., 45 A.3d at 1004.

32. *Foster v. Foster*, 506 S.W.3d 808, 811 (Ark. 2016).

33. *Urbaniak v. Urbaniak*, 807 N.W.2d 621, 627 (S. D. 2011).

34. *Dubois v. Brodeur*, No. A-1665-05 at \*4 (N. J. App. Div. 2007) (cited in *Dubois v. Brodeur*, 2009 WL 701998 (N.J. App. Div.)).

35. See Garrison, *supra* note 20, at 630.

36. Compare *Otis v. Otis*, 299 N.W.2d 114, 119 (Minn. 1980) with *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 415 (Minn. App. 2000).

37. See Brett R. Turner, *Rehabilitative Alimony Reconsidered: The “Second Wave” of Alimony Reform*, 10 DIV. LITIG. 185 (1998); Brett R. Turner, *Spousal Support in Chaos*, FAMILY ADVOCATE (Spring 2003) at 14, 16–18.

likely to result in indefinite alimony.”<sup>38</sup> A New Jersey opinion contains a statement that the length of marriage is the primary factor determining whether indefinite support should be awarded.<sup>39</sup> There is a rebuttable presumption in Florida that indefinite-term alimony is appropriate when parties divorce after a long marriage.<sup>40</sup>

Of course, indefinite-term alimony is not always awarded when parties divorce after a long marriage. For example, in a recent Kentucky case, the parties had been married 24 years and were both age 44. The wife had not worked outside the home for 20 years. An award of spousal support for seven years was affirmed.<sup>41</sup>

In addition, if the court determines that the claimant will be able to rehabilitate a career within a certain time, indefinite-term support will not be awarded, even if the marriage duration was long.<sup>42</sup>

## 2. Minority Rule

A few states have established relatively short maximum duration limits for spousal support. In Indiana, spousal support cannot exceed three years in duration, unless the claimant is disabled or is caring for a disabled child. Similarly, in Texas, a spousal support award cannot be awarded for longer than seven years, unless (i) the marriage lasted longer than 30 years or (ii) the claimant is disabled or is caring for a disabled child.<sup>43</sup>

A few other states have established a statutory maximum support duration for other than “long” marriages. In Delaware and Maine, the support duration cannot exceed 50% of the marital duration.<sup>44</sup> In Utah, absent extenuating circumstances,

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38. *Boemio v. Boemio*, 994 A.2d 911, 925 (Md. 2010).

39. *J.E.V.*, 45 A.3d at 488.

40. *Fichtel v. Fichtel*, 141 So.3d 593, 595 (Fla. App. 2014); *see also* FLA. STAT. ANN. § 61.08(4) (defining a long marriage as one lasting longer than 17 years).

41. *Smith v. Smith*, 503 S.W.3d 178 (Ky. App. 2016).

42. *In re Jones*, 2016 IL App (5th) 150212-U at \*9-\*10; *Zaleski*, 13 N.E.3d at 977.

43. TEX. FAM. CODE ANN. §§ 8.051, 8.054 (2017); *see also* Ind. Code § 31-15-17-2.

44. DEL. CODE ANN. tit. 13, § 1512 (d) (2018); ME STAT. tit. 19A, § 951-A (in Maine, this is a rebuttable presumption).

support cannot continue longer than the marriage duration.<sup>45</sup>

There is another different minority view in Missouri that indefinite-term support is possible in marriages of relatively short duration.<sup>46</sup> Some Missouri courts have stated that “there is a judicial preference for awards of maintenance of unlimited duration.”<sup>47</sup>

### 3. The Effect of the Retirement of the Obligor

There has been substantial disagreement recently in the U.S. regarding whether a spousal support award should terminate when the obligor retires or reaches the “normal” retirement age. Massachusetts recently adopted a rule that spousal support generally should terminate when the obligor retires or reaches the “normal” retirement age.<sup>48</sup>

This approach has not been universally accepted. For example, in an Oregon case, the parties were divorcing after an 18-year marriage when the husband (an oral surgeon) was age 64, and the wife was age 50. The appellate court affirmed an award of spousal support for 15 years.<sup>49</sup>

When John Cleese divorced in California in 2009, he and his wife had been married 15 years. They did not have any children. Mr. Cleese was 70 years old, and his wife was 64. Although the wife received a substantial property award, Mr. Cleese was also ordered to pay annual support amounting to \$1,000,000 for six years.<sup>50</sup>

If an alimony obligation is of an indefinite duration, when the obligor retires he or she could then petition the court for modification. The court would then decide what would be fair

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45. UTAH CODE ANN. § 30-3-5(8) (j).

46. See *Roche v. Roche*, 289 S.W.3d 747, 756–8 (Mo App. 2009) (indefinite-term support award affirmed after a marriage of 4 ½ years); *Fox v. Fox*, 552 S.W.3d 777, 787 (Mo. App. 2018) (indefinite-term support award affirmed after a marriage of 7 years).

47. See, e.g., *Parciak v. Parciak*, 553 S.W.3d 446, 453 (Mo. App. 2018).

48. MASS. GEN. LAWS ch. 208, § 49 (f) (2018).

49. *Marriage of Logan*, 347 P3d 337, 337–8 (Ore. App. 2015).

50. See *Pierce, Andrew Pierce, John Cleese in 12 Million [Pounds] Divorce Settlement*, THE TELEGRAPH, Aug. 18, 2009. Mr. Cleese married again in 2012. See *Anita Singh, John Cleese Marries for the Fourth Time*, THE TELEGRAPH, Aug. 13, 2012.

under the circumstances.<sup>51</sup> If one views spousal support as a mechanism for post-divorce income sharing due to one spouse having an interest in the other's career, income sharing should stop upon retirement. In contrast, if one views spousal support as a means of providing support for a needy former spouse after divorce for the remainder of his or her life, the retirement of the obligor may seem less relevant.

*D. The Ambiguous Standards Being Utilized to Award Spousal Support in the U.S. Today*

While I have attempted above to describe the current majority approach toward the award of spousal support today, it appears that, in a number of states, the standards being applied are quite inconsistent, even within one city or state. For example, when I sent out questionnaires to 5000 lawyers around the country and asked them to describe the standards being applied for the award of spousal support where they practice, a number of respondents described their local standards as unpredictable and arbitrary.<sup>52</sup> Similarly, a committee formed by the Supreme Court of Iowa to investigate standards for the award of spousal support in Iowa received many responses from Iowa lawyers that the standards for the award of spousal support were quite unclear.<sup>53</sup> Robert Kirkman Collins concluded that, when making spousal support determinations, "both trial and appellate judges look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion, rendering it impossible for couples or their counsel to predict with any degree of certainty what the actual alimony award might or should be."<sup>54</sup> A Nevada trial judge summarized Nevada law in this manner: "Nevada decisional and statutory law provide support for almost any conceivable alimony

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51. See, e.g., Gust, 858 N.W.2d at 412–14; In re Marriage of Swing, 194 P.3d 498, 499–502 (Colo. App. 2008).

52. Oldham, *supra* note 5.

53. See IOWA SUPREME COURT FAMILY LAW CASE PROCESSING REFORM TASK FORCE, SPOUSAL SUPPORT WORK GROUP REPORT, APPENDIX D 20 (March 22, 2016) (79% of the respondents stated that alimony awards tend to be inconsistent where they practice).

54. Robert Kirkman Collins, *The Theory of Marital Residues: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 31–32 (2001).

decision.”<sup>55</sup> Finally, a Nevada family law lawyer has characterized the standards being applied in Nevada for spousal support as “muddled, vague, contradictory and inadequate.”<sup>56</sup>

*E. Spousal Support Guidelines in the U.S.*

Under the majority approach described above, judges have great discretion regarding the amount and duration of any support award. Some have questioned the wisdom of such an approach because it is quite difficult for lawyers to predict the amount and duration of any award in a particular case. In addition, awards sometimes seem arbitrary.

As a result of these criticisms, some have advocated for more definite rules. A few New Jersey courts recently attempted to create a “rule of thumb” for when indefinite-duration support should be awarded. In this particular case, the parties had been married 15 years at divorce. The trial court did not grant indefinite-duration support and stated that such support should be award only if the marriage lasted 25 years. The appellate court reversed, arguing that indefinite-duration support should be awarded if the marriage lasted 15 years. The New Jersey Supreme Court rejected this attempt to provide a rule of thumb for when indefinite-term support should be awarded.<sup>57</sup>

One way to have more definite rules would be to promulgate guidelines for the award of spousal support. Support guidelines first occurred at local levels in the U. S. For example, Maricopa County, Arizona is one county that has adopted spousal support guidelines.<sup>58</sup> More recently, guidelines have been adopted in Colorado, Illinois, New York, Massachusetts, and Vermont.<sup>59</sup> The

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55. David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325, 343 (2009).

56. Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MAT. L. 153, 171 (2014).

57. See *Gnall v. Gnall*, 119 A.3d 891, 901–02 (N.J. 2015) (holding that a determination of an indefinite-support award is based on all of the facts and circumstances, not just the length of the marriage.).

58. See Superior Court of Arizona, Maricopa County, Family Court Department, *Spousal Maintenance Guidelines* (Oct. 2002); *Cullum v. Cullum*, 160 P.3d 231, 234–35 (Ariz. Ct. App. 2007).

59. COLO. REV. STAT. § 14-10-114 (2018); 750 ILL. COMP. STAT. ANN. 5/505 (2018);

American Association of Matrimonial Lawyers has also proposed support guidelines.<sup>60</sup>

As the term “guidelines” suggests, the recently adopted guidelines do not eliminate all judicial discretion regarding the amount and duration of an award of spousal support. The Massachusetts guidelines appear to be presumptively applicable, but the court may deviate from them if the court makes written findings why the deviation is necessary.<sup>61</sup> The Colorado guidelines expressly state that the guidelines do not create a presumptive amount or duration.<sup>62</sup>

Similarly, the Vermont Supreme Court has held that the Vermont guidelines do not create a presumptive amount or duration. The guidelines merely are a factor that the court must consider. It was therefore not error for the court to have awarded support in an amount that was not within the amount range suggested by the guidelines.<sup>63</sup>

In sum, even if states adopt guidelines, judges retain substantial discretion regarding the amount and duration of awards. To exercise that discretion, each judge must come to some conclusions about the purposes and rationales for spousal support.

#### 1. Determining the Amount of the Award Under Guidelines

Under the majority approach mentioned above, the amount of a spousal support award is not expressly affected by marital duration. In contrast, the drafters of some guidelines have proposed that the level of post-divorce income sharing should be affected by marital duration. For example, in Maricopa County, the court first determines the difference in the parties’ net

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N.Y. DOM. REL. L. § 412 (2018); MASS. ANN. LAWS ch. 209C, § 9 (2018); VT. STAT. ANN. tit. 15, § 654 (2018). Guidelines generally are adopted in an attempt to make spousal support awards more consistent. When the author contacted the office of Representative Beth McCann, one of the Colorado legislators who introduced the Colorado guidelines legislation, Ms. McCann stated that this was the reason she endorsed spousal support guidelines. Email from the office of Representative McCann to the author, dated Oct. 22, 2015.

60. See Mary Kay Kisthardt, *Rethinking Alimony: The AAML’s Considerations for Calculating Alimony, Spousal Support, or Maintenance*, 21 AM. ACAD. MAT. L. 61 (2008).

61. See MASS. GEN. LAWS ch. 208, § 53(e) (2018).

62. COLO. REV. STAT. § 14-10-114 (3) (e).

63. See *Jaro v Jaro*, 198 A.3d 1270, 1275 (Vt. 2018).

incomes at divorce (the “net income difference”).<sup>64</sup> The court then multiplies that net income difference by a percentage.<sup>65</sup> The percentage is determined by multiplying 1.5% times the number of years the parties were married.<sup>66</sup> So, if parties were married for ten years, the award would be 15% of the net income difference, while the award would be 30% of that difference if the marriage lasted 20 years.<sup>67</sup>

As Professor Thompson has explained, Canada has accepted a similar approach for spousal support awards when the parties do not have minor children.<sup>68</sup> Similarly, the Vermont guidelines provide for post-divorce income sharing that increases as marital duration increases.<sup>69</sup> The Vermont guidelines suggest a range of post-divorce income sharing that gradually increases with marital duration.<sup>70</sup>

Under the guidelines adopted in Colorado, Illinois and New York, spousal support amounts are not affected by marital duration. In Colorado, for example, the amount of support is determined by adding both spouses’ adjusted gross incomes and multiplying that total by 40%. The payee spouse’s adjusted gross income is subtracted from that amount to determine the support amount.<sup>71</sup> In Illinois, the amount of support is determined by multiplying the higher-earning spouse’s net income by 33 1/3% and subtracting from that amount 25% of the recipient’s net income.<sup>72</sup>

In the U.S., alimony has traditionally been considered deductible by the obligor for federal income tax purposes and

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64. See Superior Court of Arizona, *supra* note 58.

65. *Id.*

66. *Id.*

67. See Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L. Q. 801, 811–13 (1999).

68. See Rollie Thompson, *Spousal Support Eh? Sorry, Not Your American Alimony*, HOUS. J. OF INT’L L. 1–34 (2019).

69. See VT. STAT. ANN. tit. 15, § 752 (b) (8).

70. *Id.* The amount of sharing is 15-35% of the difference in the parties’ gross incomes if the marriage lasted 5-10 years, and gradually increase to 30-50% for marriages that lasted more than 20 years.

71. See COLO. REV. STAT. ANN. § 14-10-114 (3) (b) (I) (A).

72. See 750 ILL. COMP. STAT. ANN. 5/504 (b-1) (A).

taxable income to the recipient.<sup>73</sup> As of 2019, this rule has been changed; alimony no longer is deductible by the obligor or income to the recipient.<sup>74</sup> This tax rule change presumably means that, due to this change in tax law, alimony award amounts in the U. S. will be significantly reduced. For example, under the Colorado guidelines, the award is to be reduced by 20% if the obligor cannot deduct the payment for tax purposes.<sup>75</sup>

## 2. Determining the Award Duration Under Guidelines

All current guidelines now agree that spousal support award duration should be a function of marital duration. For example, under the New York guidelines, the award duration should be 15-30% of the marital duration for marriages that lasted 15 years or less. For marriages that lasted longer than 20 years, the duration should be 35-50% of the marital duration.<sup>76</sup> In Vermont, for marriages that lasted 10-15 years, the duration should be 40-60% of the marital duration, and 50-70% of the marital duration for marriages that lasted 15-20 years.<sup>77</sup>

Similarly, under the guidelines that have been adopted in Colorado, Illinois, and Massachusetts, except for marriages that lasted longer than 20 years, support award duration is a function of the length of the marriage.<sup>78</sup>

In Colorado, for marriages that did not last 20 years, the suggested maximum duration is 50% of the marital duration.<sup>79</sup> This duration is identical to rules discussed above enacted in Delaware and Maine regarding support duration.<sup>80</sup> In Colorado, Illinois, and Massachusetts, indefinite-duration alimony may be

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73. See KRAUSE, ELROD & OLDHAM, *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 1132 (West Academic ed., 2018).

74. See Robert Channick, *Get Divorced before New Year or Lose the Alimony Deduction*, CHICAGO TRIBUNE, Dec. 4, 2018, Business Section, p. 1.

75. See COLO. REV. STAT. ANN. § 14-10-114 (3) (b) (I) (B).

76. N.Y. DOM. REL. L. § 236; see also Elena Karabatos and Eric A. Tepper, *New York's Spousal Maintenance Guidelines*, 51 FAM. L. Q. 51 (2017).

77. See VT. STAT. ANN. tit. 15, § 752 (b) (8).

78. See COLO. REV. STAT. ANN. § 14-10-114; 750 ILL. COMP. STAT. 5/504 (b-1) (1) (B); MASS. GEN. LAWS ANN. ch. 208, § 49.

79. COLO. REV. STAT. ANN. § 14-10-114 (3) (b) (II) (B).

80. See *supra* note 44 and accompanying text.

awarded if the marriage lasted at least 20 years.<sup>81</sup>

### 3. Determining Entitlement to Support Under the Guidelines

Guidelines currently in use in the U.S. are intended to provide some guidance to a court once the judge has determined that support is warranted. So, while guidelines now provide a mechanism for more predictability of awards once the judge determines that an award is justified, they do not provide any guidance regarding the entitlement determination itself. In addition, while the guidelines may provide some guidance regarding award amount and duration, judges retain substantial discretion to deviate from the guidelines.

It would be helpful if states could provide more guidance regarding the purposes and rationales for spousal support. Spouses can have different earnings at divorce for at least three reasons. First, the spouses may have chosen careers with different earnings prospects. Second, one spouse might have become ill or disabled and may no longer be able to work.<sup>82</sup> Finally, a spouse might have stopped working outside the home during the marriage to care for the parties' children and disrupted his or her career. Should all these different situations be treated identically for purposes of making a spousal support award? For purposes of determining whether a spousal support award is appropriate, are the only relevant factors marriage duration and the differences in the parties' incomes at divorce? Or is the reason for the difference in income also important? Does it matter, for example, if the higher-earning spouse's income is derived from gifts or inheritances, not a career?<sup>83</sup>

For example, should spousal support be awarded in all divorces when the parties have been married for a certain minimum period and have different incomes at divorce? Or should the claimant spouse have to establish something more,

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81. See COLO. REV. STAT. ANN. § 14-10-114 (3) (b) (II) (A); 750 ILL. COMP. STAT. ANN. § 5/504 (b-1) (1) (B); MASS. GEN LAWS ANN. ch. 208, § 49 (c).

82. See *Marriage of Wilson*, 247 Cal. Rptr. 522 (Cal. App. 1988) (during a marriage lasting 6 years, the wife became disabled as a result of an accident).

83. See *Mani v. Mani*, 869 A.2d 904 (N.J. 2005) (wife had substantial income during marriage in the form of gifts from her father).

such as that he or she suffered career damage as a result of a role assumed during the marriage?<sup>84</sup>

In addition, once a judge determines that an award is appropriate, what factors should affect the amount and the duration of the award? Are the only relevant factors marriage duration and the difference in incomes, or should other factors also be significant?

### III. CONCLUSION

Under the majority approach described above, judges in the U. S. currently have substantial discretion regarding the issues of entitlement, amount and duration of support awards. The adoption of spousal support guidelines could provide more certainty and uniformity, at least regarding the amount and duration of awards. However, many judges currently seem to support the current majority approach.

It is unclear whether the current majority approach toward spousal support can long endure. In American divorce law, a spouse's post-divorce earnings are generally considered not divisible at divorce. When an award of post-divorce spousal support is made, this essentially is an exception to the general rule regarding post-divorce earnings. Many states need to provide greater guidance regarding when post-divorce income sharing is appropriate and justified.

These words of family law scholar Homer Clark, although written more than 50 years ago, still seem surprisingly relevant: "If we do not know what we are trying to accomplish by [awarding

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84. For example, section 15 of the New Zealand Property (Relationships) Act of 1976 sets forth the general rule that, at divorce, "relationship property" is to be divided equally. An exception is created, however, if the claimant spouse can establish that he or she will have a lower post-divorce income than the other spouse, and that the claimant's post-divorce earning capacity was reduced as a result of a role assumed by the claimant during marriage. If the claimant can establish such career damage as a result of caregiving during marriage, the court can award the claimant more than 50% of the relationship property. (This statute was construed by the court in *Scott v. Williams* [2017] NZSC 185, [2018] 1 NZLR 507.) A spousal support statute could be drafted in a similar way. A general rule could be set forth that spousal support should not be awarded unless a claimant spouse could show that he or she suffered career damage as a result of a role assumed during marriage.

alimony], we will not easily be able to decide whether it should be granted in a particular case, or, if so, in what amount.”<sup>85</sup>

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85. HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 441 (West Academic ed., 1968).