AN
ALIMONY MANIFESTO:
HOW ALIMONY SHOULD BE CALCULATED, AND WHY

by

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I. SYNOPSIS & PURPOSE

The analysis, flowchart, and worksheets detailed below are intended to provide a mechanism by which family court judges can analyze divorce cases to determine whether an award of post-divorce alimony is appropriate, and if so, make a conscious, rational, and objective determination of both amount and duration. The intended product is one that can be used by judges in actually deciding awards, and therefore be used by practitioners in predicting those awards, to serve as a tool for advising clients, negotiating cases, and making litigation decisions.

As with other formula proposals, this analysis seeks to project alimony awards that are adequate, predictable, and consistent, between cases in a single court, between courts in a single jurisdiction, and between jurisdictions. It seeks to provide a series of analytical steps intended to provide similar results in similar fact patterns irrespective of who is doing the analysis.

This analysis does not intend, however, to create a "simplified formula" followed by a list of deviation factors that can and often do swallow the initial calculation. Instead, it is designed to provide an analytical flowchart of independently calculated steps which, in combination, are intended to serve the purposes of alimony in modern divorce cases. The analysis includes all statutory and case law factors required to be considered in Nevada, and is believed readily adaptable to the decisional or statutory requirements of most other States.

This analysis is grounded in and references Nevada law, and the alimony factors recited in that law, but it is intended for wider application, as the principles applied are not State-specific. This first iteration is intended to provide a methodological suggestion. If seen as useful, it can be refined and improved, and might be useful in the incremental move toward nationalization of family law concepts and their application. A goal is to require the fewest possible number of modifications to adapt the analysis to the "x-factor" of State-specific "consideration factors," limits, and unique purposes.

A principal difference of this effort from others is that it attempts to squarely address the two facets of time present in every alimony case. The first of these is the one that many formulations look at – the length of marriage. The second is often given little attention – the point in both life and career path of when the award is made, as part of the decision of whether and how long an award should be made, rather than as a subjective modification or deviation factor in altering a formulaic presumption.

Additionally, this analysis differentiates the ***kind*** of alimony being awarded in the initial determination of whether and how long it should be awarded, rather than as an alteration of that award, providing for automatic termination of those payments that theoretically ***should*** end at a point in time or the occurrence of an event, and for non-termination of those payments that should not end.

This analysis is primarily concerned with the making of initial awards. Modification requests – by either party and in either direction – bring to bear additional factors. A variation of the analysis will be necessary for consideration of modification requests, either periodically to confirm the continued viability of the analysis made, or upon changed circumstances.

The intent behind achieving a generally-acceptable analysis of alimony cases is to give lawyers a tool with which they can reasonably advise clients in advance of some probable range of outcomes on this subject, as they are able to do now with both property and child support issues. If such an analysis is accepted and adopted, it should decrease the total amount of litigation, by reducing the uncertainty of results that could be expected from such litigation.

The public policy objective of such an achievement would be the avoidance of a great deal of litigation now caused by uncertainty – the "roll the dice" decision being replaced with an incentive to settle based on a rational cost/benefit analysis. If successful, it will have the salutary effect of removing from litigation cases that did not in fact need to be tried, preserving judicial resources and making the process of divorce more economical for clients.

It should also make appellate review of trial court decisions more productive and useful, creating a meaningful record of what and how facts and circumstances were weighed, and allow guidance to be systematically applied in future cases.

II. BACKGROUND AND EXPLANATION

A. Context and History: Marriage, Divorce, and Alimony

In large part, the evolution of "marriage" is what has continuously disrupted the understanding and approaches to the purpose of alimony. This analysis will not delve into the history of that evolution to any significant extent except to reference a couple of reviews of that history,[1] acknowledge that the transformation of marriage is continuing, if not greatly accelerating,[2] and suggest that alimony has a place in modern American divorce practice.

The closest the Nevada Supreme Court has come to explaining its perception of the purpose of alimony is its statement in 1998 that "property and alimony awards differ in effect," with alimony constituting "an equitable award serving to meet the post-divorce needs and rights of the former spouse."[3]

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[1] *See*, *e.g.*, J. Herbie DiFonzo and Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1 (2008); Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L.Q. 333 (2008).

[2] Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 UCLA WOMEN'S L.J. 97 (2007); Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011). *See also* Appendix 1.

[3] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998), *citing Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). The *Shydler* decision is discussed in greater detail below.

The Nevada Supreme Court emphasized the point of alimony being a no-fault proposition in 2000, when it dramatically held that fault is not to be considered in the making of alimony awards at all, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue."[4]

Historically, ***most*** of the comments by the Nevada Supreme Court as to the nature and function of alimony have been in the "subtractive" – saying what alimony is ***not***, rather than what it is, and stating why its grant, denial, or amount was improper, rather than when or how much ***is*** proper.

Thus, according to the Court, in addition to alimony not being a sword or prize, courts are ***not*** required to award alimony so as to equalize future income.[5] Property equalization payments "do ***not*** serve" as a substitute for alimony (or presumably vice versa).[6] And alimony is ***not*** an assignable property right.[7]

But that begs the question of what it ***is*** – or is supposed to be. The repeated reference to negatives is reasonable, given the absence (in Nevada law or nationally) of any viable defined purpose for alimony awards.

So while it might be thought that the elimination of "fault" analyses would make it simple to know what alimony awards are intended to accomplish, such has not proven to be the case. Even with a strictly "economic" *raison d'etre*, the Nevada Supreme Court has still set out a number and variety of explanations over the past 50 years for what it was trying to accomplish and why, as it groped its way from reviewing for a facial "abuse of discretion" to deciding whether the trial court paid at least lip service to "consideration" of changing lists of "factors" – which the Nevada Legislature has now enshrined in the statute, without improving their actual usefulness in any way.

Throughout that evolution, the Court has consistently stated that the amount of alimony a district court may award "is within its sound discretion."[8] In a series of cases, the Nevada Supreme Court shaped and re-shaped how that "sound discretion" should be (or, at least, should not be) applied, without ever providing objective analytical criteria.[9]

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[4] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The Court closely examined the legislative history of the 1993 amendment to NRS 125.150, and concluded that the Legislature deleted the language about the "respective merits of the parties" in direct response to the Court's decisions in previous cases suggesting that marital fault could be considered in determining both alimony and property distribution.

[5] *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

[6] *Id.*

[7] *Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938).

[8] *See*, *e.g.*, *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992).

[9] This history is sketched in Appendix 1.

In her work for the American Academy of Matrimonial Lawyers' alimony project, Professor Mary Kay Kisthardt provided a summary description of the English common law evolution of divorce and the importation of the concept of alimony to the United States with the rest of English law. She then turned to the evolution of alimony in the United States.[10]

As imported to this country, alimony seemed to be most commonly analogized for damages for breach of the marital contract, with a strong "fault" determiner as to both eligibility and amount.[11] Tracing the history of its "modern era" to the 1970s, Professor Kisthardt noted the expansion of property allocation to wives upon divorce, and the rise of no-fault divorce (with accompanying fading of fault in alimony determinations) as giving rise to a focus on "need."[12]

The aim of newly re-titled "maintenance" of making recipients self-supporting in the shortest possible time generated enormous differences in post-divorce economic trajectories for men and women (i.e., men got much richer post-divorce, while women got much poorer). This gave rise to a "second wave" of reform in the 1990s, looking beyond "need" to provide compensation for losses in earning capacity and for homemaker services rendered in common divisions of marital duties, but some commentators deemed those reform efforts "unsuccessful."[13]

Professor Kisthardt classified various modern academic alimony proposals[14] as having been intended to shift from "need" to "compensation" for the "marriage cost" of loss of earning capacity that otherwise would have accrued, career development being subordinated to child-rearing, or an interest in the future earnings of the more highly-compensated spouse.[15]

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[10] Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61 (2008) ("*Re-thinking Alimony*"). Readers are directed to her summary, from which this pencil-sketch and several of the following cites were taken.

[11] *Id*. at 66-67. *See also* Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: the Minnesota Experience*, 28 Wm. Mitchell L. Rev. 861, 867 (2001) (describing some views of fault in making alimony awards).

[12] *Id*. at 66-68, citing UNIF. MARRIAGE AND DIVORCE ACT § 308, 9a U.L.A. 147, 347 (1987) as the legal regime removing from alimony its "punitive rationale," and subordinating the marital standard of living to one of six factors intended to create usually short-term awards making recipients "self-supporting" as quickly as possible.

[13] *Re-thinking Alimony* at 68-70, citing, *inter alia*, Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227; Brett R. Turner, *Rehabilitative Alimony Reconsidered: The Second Wave of Spousal Support Reform*, 10 DIVORCE LITIG. 185 (1998).

[14] Not to be confused with the alimony-abolishment proposals submitted to State legislatures in the guise of "reform" partially listed in Appendix 2.

[15] *Re-thinking Alimony* at 70-72, citing, *inter alia*, 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 (2001). Professor Kisthardt classified my earlier writings in this subject area into this category of alimony analyses. *See* Marshal Willick, *In Search of a Coherent Theoretical Model for Alimony*, 15 NEV. LAW. 40 (Apr. 2007).

Throughout that evolution, alimony has remained available to courts as "a remedy without a rationale."[16] As noted by pretty much every theoretical commentator on alimony, the absence of a coherent theoretical basis for such an award, and the resulting absence of consistency or predictability in such awards, impedes settlement, increases litigation costs, and undermines confidence in the fairness of the judicial system.[17]

The level of resources expended by both the parties and the courts is often disproportionate to the economic stakes actually involved in such cases. In a word, the current system of making alimony determinations is inefficient. Professor J. Thomas Oldham concisely refers to alimony as "the most controversial aspect of American divorce law."[18]

The realities of perceived arbitrariness and the absence of a ready explanation of the purpose of alimony have directly fed the efforts of those with personal or political grievances with its very existence. The last ten years or so has seen a tide of efforts in various States usually titled as alimony "reform" initiatives, but really aimed more at eliminating permanent alimony or limiting it to the greatest possible degree.[19] Given the large number of divorces leading to remarriages, some of the pressure for these efforts are coming from "second families" or so-called "second-wives clubs" that consider the financial obligations stemming from the first dissolution onerous and unfair.[20]

Defenders of leaving alimony in the judicial toolbox have been hampered by the lack of any concise explanation of why it belongs there.[21] Throughout the past several decades, the goals of those

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[16] *Re-thinking Alimony* at 64, citing Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 809 (1999).

[17] *Re-thinking Alimony* at 62-63; Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, 34 FAM. ADVOCATE 8, 10 (Winter 2012); Hon. David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L. J. 325 (2009) ("*Nevada Alimony*"); Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOCATE 14, 18 (Spring 2003).

[18] J. Thomas Oldham, *Changes in the Economic Consequences of Divorces*, 1958-2008, 21 J. AM. ACAD. MATRIM. LAW. 419 at 437 (2008).

[19] *See* discussions below and in Appendix 2, briefly recounting some of those efforts.

[20] *See*, *e.g.*, Knox, D., & Zusman, M.E., *Marrying a Man with "Baggage": Implications for Second Wives*, 35 J. DIVORCE AND REMARRIAGE 67–80 (2001); Belinda Luscombe, *The End of Alimony*, TIME, May 27, 2013, at 44. A few of these legislative initiatives and their key points are collected in Appendix 2.

[21] *See* comments of Florida Family Law Section Chair Carin Porra: "Their group is basically made up of people who pay alimony and are not happy about that and want to get rid of the obligation. We represent both sides and it's our job to make sure the laws are fair for people on both sides of that question . . . . they keep calling it permanent and it's really not. While the term may be permanent, what it really is is a long-term alimony that can always be modified if the circumstances are appropriate. . . . [e]liminating it entirely would be detrimental to the folks out there in need of that type of long-term award. Even though society has changed . . . there are still homes where there are older folks or families where they have made the decision for one person to stay home and care for the children. That affects those persons' ability at some time in the future to support themselves if those marriages terminate," *Florida Bar News*, Feb. 15, 2013,

proposing alimony guidelines have remained consistent – predictability, consistency, adequacy, and theoretical soundness. Essentially every formulaic proposal, however, has been supplemented by so many wide-ranging modification or deviation factors that the process is returned to a muddle of exceptions giving the appearance, and perhaps the substance, that the original goal has been lost.

In large part, that is why the analysis proposed in this paper has been constructed as a flow-chart. Rather than having individual considerations alter a presumption (and therefore appear to critics as rationalizations for a subjective conclusion), or be lost in the black box of "factors to be considered" by a judge before announcing a number, the components of the award, if any, to be made are part and parcel of the actual calculation of that award, providing the rationale for a particular award on its face.

B. Nevada Alimony Law (Short Course)

Each State has, of course, a unique body of statutory and case law, but on this topic, for reasons discussed below and in the articles and other works cited, those histories are more alike than different as they relate to the reason for the creation of this analysis. These materials will therefore recount the alimony law of Nevada, in terms of its categories, statutes, and case law evolution to illustrate the problem being addressed, before turning to the proposed formulaic solutions to that problem, in Nevada and elsewhere.

1. Statutory Evolution

Nevada's marriage and divorce laws trace to the territorial laws of 1861, and provisions empowering courts to make awards of "support of the wife and children" go all the way back to that time.[22] They remained in the form of husbands paying support for wives until the whole statutory scheme was reworded in 1975, during the debate regarding the proposed Equal Rights Amendment. After that time, alimony could theoretically flow in either direction.

NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case. Unless otherwise ordered by the court, alimony terminates in the event of the death of either party or the subsequent remarriage of the spouse receiving periodic payments pursuant to NRS 125.150(5). Pursuant to NRS 125.150(7), prior to the expiration of the term during which alimony is being paid, either party may file a motion for a modification of the award upon a showing of a change of circumstances.

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available at http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/SMTGT/Alimony%20bill%20expected%20to%20be%20a%20hot%20topic (last visited Sep. 29, 2013).

[22] "Support" is a word of "broad signification," permitting the separate property of the husband to be set aside for the wife and children for "everything, necessities and luxuries, which the wife in like circumstances is entitled to have and enjoy." *Lake v. Bender*, 18 Nev. 361, 403 (1884) *opn. on reh'g*.

In 1989, the legislature amended the alimony statute to require "consideration" of rehabilitative alimony, further requiring a court to consider a spouse's need for obtaining career-related training, whether the spouse who would pay such alimony obtained greater job skills during the marriage, and whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

Until 1993, some consideration of "fault" was at least impliedly in play in Nevada's alimony law. That year, the Legislature resolved the potential conflict between the concept of a no-fault divorce, on the one hand, and the consideration of marital misconduct, on the other hand, when determining an award of alimony by deleting the phrase "having regard to the respective merits of the parties" from NRS 125.150(1).

The 2007 Nevada Legislature codified 11 "guideline factors" lifted directly from Nevada Supreme Court decisions,[23] which a district court is required to "consider" in making an alimony award. The legislative history adopting those factors is devoid of any discussion or consideration of whether the factors listed make any sense individually or in combination or how they were to be prioritized, weighted, or applied in making awards.

Nevada District Court Judge David A. Hardy's detailed analysis of Nevada alimony law[24] attempted to categorize the statutory factors in accordance with the purposes they were apparently conceived to serve:

> 1. The financial condition of each spouse.[25] This guideline focuses on the recipient's need and the payor's ability to pay.
>
> 2. The nature and value of the respective property of each spouse.[26] This guideline focuses on the recipient's need and the payor's ability to pay.
>
> 3. The contribution of each spouse to any property held by the spouses pursuant to section 123.030 of the Nevada Revised Statutes.[27] This guideline focuses on the spouses' respective financial conditions and is therefore an extension of the need and ability to pay considerations.

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[23] The underlying decisional authority is discussed in Appendix 1.

[24] *Nevada Alimony*, *supra*, at 336-37.

[25] NRS 125.150(8)(a).

[26] NRS 125.150(8)(b).

[27] NRS 125.150(8)(c).

4. The duration of marriage.[28] This guideline focuses on the reliance theory of marriage continuation.

5. The income, earning capacity, age and health of each spouse.[29] This guideline focuses on the recipient's need, the payor's ability to pay, the payor's career asset, and the reliance theory of marriage continuation.

6. The standard of living during the marriage.[30] This guideline focuses on the reliance theory of marriage continuation.

7. The career before the marriage of the spouse who would receive the alimony.[31] This guideline focuses on the recipient's economic loss resulting from career subordination.

8. The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage.[32] This guideline focuses on the career asset as an adjunct to property division and economic loss resulting from career subordination.

9. The contribution of either spouse as homemaker.[33] This guideline focuses on economic loss resulting from career subordination.

10. The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony.[34] This guideline focuses on the recipient's need.

11. The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.[35] This guideline focuses on the recipient's need and the payor's ability to pay.

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[28] NRS 125.150(8)(d).

[29] NRS 125.150(8)(e).

[30] NRS 125.150(8)(f).

[31] NRS 125.150(8)(g).

[32] NRS 125.150(8)(h).

[33] NRS 125.150(8)(i).

[34] NRS 125.150(8)(j).

[35] NRS 125.150(8)(k).

It hardly need be said that the above statutory list is not particularly helpful in actually determining how much, if any, alimony should be awarded and, if so, for how long.[36]

2. Categories of Alimony Available

The basic form of Nevada law on the subject provides for five basic flavors of alimony awards:

- "Maintenance" – payments made during the pendency of an action, which terminate upon entry of a final Decree.[37]

- Temporary spousal support – a specified post-divorce award intended to terminate at a specified future date or upon a specified future event.[38]

- Permanent alimony – a specified post-divorce award intended to continue indefinitely, unless modified by later court order (usually upon "changed circumstances" of some sort).[39]

- Rehabilitative alimony – a specified post-divorce award for the purpose of obtaining training or education relating to a job, career, or profession.[40]

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[36] Sadly, the quote Judge Hardy used in the introduction of his article seems as applicable to the current statute and its list of factors as when the Nevada Supreme Court approved this excerpt from the argument of counsel before it in a divorce case 120 years ago:

> The popular ignorance, even in the legal profession, of the law of marriage and divorce, has, in times not long past, been so dense as almost to exclude from the legislation on this subject [alimony] its proper forms. Largely the statutes contain expressions and provisions of whose meanings, and especially of whose consequential effects, their makers pretty certainly had no clear idea whatever. Instead of consistency and verbal propriety, they abound in absurdities. They are often chaos.

Lake v. Bender, 7 P. 74, 75 (Nev. 1885).

[37] NRS 125.040 authorizes Nevada courts to make orders for "temporary maintenance for the other party" during the pendency of an action. No standards are provided, and such temporary orders for the purpose of keeping everyone fed, clothed, and housed during the pendency of the case are often made on a perfunctory review of "need and ability," as disclosed solely by preliminary financial disclosure forms.

[38] NRS 125.150(1) authorizes the court to award alimony at the conclusion of a divorce case "as appears just and equitable." No standards are provided there, either.

[39] *Id*.

[40] In 1989, the Nevada Legislature added NRS 125.150(8) (now 125.150(9)), requiring a court granting a divorce to "consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession." This provision did add some language indicating what such an award would encompass, and at least two factors to consider in making such an award (whether the obligor obtained job skills or education during the marriage, and whether the recipient provided financial support while the obligor did so). Such an order must contain terms for when such training or education will commence.

- Lump-sum alimony, which presumably requires a set aside of one spouse's separate property to the other.[41]

In practice, as discussed in the following sub-section, these categories are sometimes blurred and overlapping. While conceding the futility of trying to categorize cases rendered over a 120-year span which "lack analytical consistency" and contain overlapping analyses, Judge Hardy nevertheless organized the published case law into four basic kinds of decisions, and ascribed each of the major decisions as seeming to follow at least one of them:[42]

1. Traditional need-based alimony and/or the payor's ability to pay.
2. Non-specific economic loss.
3. Adjunct to property division.
4. Reliance theory of marriage continuation.

Other commentators have grouped the decisions somewhat differently. One analysis labeled the case law as awarding "transitional, rehabilitative, just and equitable, [or] permanent alimony."[43]

Another stated that alimony, as it has been developed in Nevada, could be "distilled into three different concepts": bridge the gap alimony; rehabilitative alimony; and compensatory or contract alimony.[44] That author described the 3 categories this way:

> Bridge the gap alimony is appropriate in a short-term marriage where one of the spouses needs a short period to place themselves in an economically independent position.
>
> Rehabilitative alimony permits a disadvantaged party to retrain or update a career, and move toward economic independence in a reasonable period.

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[41] NRS 125.150(1) considers on its face that alimony might be payable "in a specific principal sum" rather than in installments, and NRS 125.150(4) provides: "In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable." In the meantime, the community property statutes require a presumptive equal division of such property, absent a "compelling reason" for an unequal division and the trial court "sets forth in writing the reasons for making the unequal disposition." NRS 125.150(1). So while "lump sum alimony" could, at least theoretically, be made from community property, the required standard and legal findings are so much lighter under the alimony rubric ("abuse of discretion") than under the property division language ("compelling circumstances") that most lump sum awards seem to be of separate property.

[42] *Nevada Alimony*, *supra*, at 339-343.

[43] *See* Bruce I. Shapiro and John D. Jones, *Alimony in Nevada, Part I*, 25 NEV. FAM. L. REP. 1 (Summer 2012), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf (last visited Sept. 29, 2013).

[44] *See* Radford Smith, *Advanced Child and Spousal Support Issues*, in ADVANCED FAMILY LAW (NBI, Nov. 2012).

> Compensatory or contract alimony is designed to compensate a party for their investment in the career of the other spouse, and to ensure the party can live in a manner approaching the lifestyle he or she lived during the marriage.[45]

A casual comparison of these retrospective efforts at categorization and the cases referenced to support them shows that they are vague, overlapping, and sometimes contradictory.

Respectfully, it appears that all such efforts are an intellectual dead-end for the same reason that the "Tonopah formula" automation of the Nevada case law (discussed below) was ultimately a failure. The decisions being analyzed (or mathematically modeled) do not conform to any theoretical basis, approach, or reasoning, and it is therefore impossible that a distillation of those decisions, or a mathematical model based upon them, is going to make any theoretical sense either. Coherence cannot be divined from chaos.

3. Purposes and Categories of Alimony are Confused in Application

While the judiciary has criticized the legislature for not providing any objective criteria for alimony,[46] the Court itself has not done much better. Appendix 1 summarizes the leading alimony cases in Nevada, illustrating why judicial determination of alimony is so subjective and discretionary that it has been called "the last great crapshoot in family law."[47] Both the statutes and the case law are so vague as to be largely useless in predicting, or negotiating, the awards that will be made in actual cases.

No benchmarks have been established for how to apply the "considerations" set out in the case law (and now in the statute). For example, ***how*** should courts "consider" property divisions, given that the Court has at times focused on less than $100,000 as a major factor in denying alimony (*e.g. Fondi*), while ignoring distributions to spouses in other cases of nearly ten times that much cash (*e.g. Rutar*)? How long a marriage is required before maintenance of the marital lifestyle becomes important, and what part of the marital lifestyle should be "maintained" – the average, the peak, or whatever was true at the moment of divorce? What is the role of appellate review – to remand for consideration of factors and detailed inquiry as in *Sprenger*, or to impose specific amounts and terms of alimony as the Court did mere months later in *Gardner*? Are the Court's various factor lists stated

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[45] The author ascribed this category to Richard A. Posner, ECONOMIC ANALYSIS OF THE LAW 151 (7th Ed. 2007).

[46] "Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support." *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998). This criticism far predated the legislative adoption of the factors recited above, but adopting case law "considerations" as statutes is hardly an "objective standard" and did nothing to assist either judges in deciding cases or lawyers advising clients.

[47] Marshal S. Willick, *In Search of a Coherent Theoretical Model for Alimony*, NEV. LAWYER, April, 2007, at 40.

in *Sprenger* and *Buchanan* in the alternative, or did one supplant the other? Which, and under what circumstances?

Not much has been said as to maintenance, presumably because such orders are necessarily limited in time and therefore overall economic impact, and because such awards are non-appealable.[48]

Trying to find some meaningful distinction between facts supporting "permanent," as opposed to "temporary," awards yields no firm criteria. The Court has used the same factor lists for both, sometimes throwing in "rehabilitative" language as well, without ever giving any kind of guidance or test for distinguishing "long term" from "short term" marriages, or otherwise indicating when temporary alimony might be more appropriate than permanent alimony, or vice versa.[49]

Once that never-specified threshold is crossed, however, the Court has indicated that one objective after "long term" marriages or in "permanent alimony" cases is maintenance of the marital standard of living for the lesser-earning spouse.[50]

The same confusion exists between "rehabilitative" and "temporary" awards. The Court has at times confused "rehabilitation" as a goal with general temporary support, using the terms interchangeably, making it unclear which should be the focus of a trial court, or under what circumstances one or the other is more appropriate.

In 1989, what is now NRS 125.150(9)-(10) both codified and modified the earlier case law which recognized the need for rehabilitative alimony, adding targeted classes of intended beneficiaries, and restrictions and conditions necessary for such awards. The statute recognized the need to sustain a spouse during a period of readjustment and training for employment, and the Court has added in the goals of avoiding welfare dependence and not forcing unskilled spouses into poverty upon divorce.

But the cases contain numerous contradictions. Sometimes (*Fondi*) the Court has seemed highly focused on the wife's ability to have ***some*** job so as to stay off the welfare rolls, but at other times has ignored the long-term career of the wife (*Gardner*) in ordering additional support.

When it focused on the rehabilitative alimony statute itself, the Court was highly concerned with its statutory purpose (*Fondi*) and even its technical requirements (*Fick*). At other times however, the Court simply threw the word "rehabilitative" out in some general sense (*Shydler*, *Kerley*) seeming to make it synonymous with temporary alimony, and at least once directing entry of a temporary

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[48] NRAP 3A; *Katleman v. Katleman*, 74 Nev. 141, 325 P.2d 420 (1958).

[49] Individual district court judges in Nevada are all over the map, from saying that a five-year relationship is "significant" to downplaying a 15-year marriage as "relatively short term."

[50] *See*, *e.g.*, *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

alimony award "at least for a period of rehabilitation" where no specific job or career training was at issue.[51]

Where trial courts have apparently relied upon the existence of the rehabilitative alimony statute to make a minimal award, the Nevada Supreme Court has sometimes reversed when it considered the overall award to be less than "fair and equitable."[52] In other, analytically similar cases, the Court has not done so.[53]

In practice, courts at all levels have not applied the rehabilitative alimony statute as it is written. The statute requires both the trial and appellate courts to conduct a separate analysis as to whether rehabilitative alimony is called for "in addition to any other alimony awarded by the court." No court at any level has apparently addressed how to accomplish this purpose with a finite pool of available money.

Nevada cases have a lengthy familiarity with "lump-sum" alimony awards, but the overall law governing such awards is as confusing as all the other categories. A lump-sum award is sometimes designated as providing for temporary or permanent alimony.[54]

NRS 125.150(1)(a) permits an award of post-divorce alimony "in a specified principal sum," as distinguished from "specified periodic payments." This money could come from the obligor's separate property existing during the marriage or to be acquired later, or even from that spouse's share of community property divided upon divorce.

NRS 125.150(4) allows the set aside of separate property from a spouse for the support of the other spouse or their children as is deemed "just and equitable." Applying this statute would apparently require a finding that some separate property of the obligor spouse existed upon divorce.

The Court's discussions of lump sum alimony over the years[55] do not clearly explain whether it is applied as a remedy or some separate species of available award. In either case, the Court has expressed the sentiment that there is a need for lump sum alimony to be available to avoid a party

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[51] *See Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

[52] *See*, *e.g.*, *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994); *Johnson v. Steel, Inc.*, 94 Nev. 483, 581 P.2d 860 (1978) (same reasoning used in a case predating the rehabilitative alimony provisions).

[53] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[54] *See Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972) (explaining that the reason for the payment of alimony in lump sum was to ensure that the spouse would actually receive payments that might otherwise be made by way of periodic payments).

[55] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972); *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977); *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990); *Schwartz v. Schwartz*, 126 Nev. ___, 225 P.3d 1273 (2010).

being left without the ability of self support or to prevent efforts by the payor spouse to frustrate a divorce court's order.[56]

There is some fuzziness in what awards terminate upon remarriage. Traditionally, in the absence of the district court "otherwise ordering," all future payments cease upon remarriage, but it would appear that a periodic payment of lump sum alimony or even (after *Waltz*) a designation of "permanent alimony" is sufficient to prevent remarriage from constituting a terminating event. Since lump-sum alimony need not even be paid in "lump sum" under *Kishner*, it seems possible that this entire category is just a euphemism for "unmodifiable." Left unclear is whether there are ***any*** contingencies that could affect the recipient's entitlement to full collection of such an ordered "lump sum award."

In summary, as the above and the recitation in Appendix 1 indicate, the law of alimony as set forth to date by the Nevada Legislature and Nevada Supreme Court is muddled, vague, contradictory, and inadequate.

C. Other States Have Similar Problems

National commentary indicates that the Nevada experience described above is typical, not exceptional. One author counted over 60 "factors" like those listed above in use nationally for judges to weigh, and many other commentators have made the same criticisms toward them as the Nevada practitioners have regarding ours: that the factors are inconsistent, overlapping, and lack any prioritization among them, so that "[both] the trial and appellate courts look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion."[57]

That reality leads, apparently everywhere, to development of the same unfocused, difficult-to-analyze, and contradictory case law as seen in Nevada. A review of the literature, as to alimony generally and guideline efforts specifically, indicates that frustrations with what kind of alimony might be appropriate in any given situation, and why, appear to be universal.[58]

Such frustrations are the basis of academic proposals to focus the analysis of alimony by the development of some sort of guideline, including those described in the next two sections. As discussed below, however, the existing muddle has also provided a space within which those with an agenda of eliminating alimony have been able to pitch proposals to do so. Where they have been

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[56] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

[57] Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 28 (2001), quoting Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 276 (1987).

[58] *See* Twila Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 38-49 (2004).

successful, courts have been deprived, to larger or smaller degrees, of their primary tool for effectuating equity to the parties before them.

III. FORMULAIC PROPOSALS THAT DON'T COMPUTE: A HISTORY OF FAILURES TO REACH CONSENSUS

A. Why Propose Guidelines? A Hierarchy of Purposes

The very concept of a formulaic approach to alimony determination is controversial. Proponents assert that there is a value to establishing some level of consistency between cases and departments, and predictability in any given case, because litigation of the "What the heck, give it a try" variety could be reduced – on both sides – if there is ***some*** kind of objective methodology for establishing a presumptive spousal support award that could then be varied (up or down) in accordance with the particular facts of the case.

Critics protest that any such approach "doesn't work," whether the complaint was that the presumptive results were considered "too high" or "too low," and usually on the basis that a formula "eliminates judicial independence" or "hinders good lawyering" – the same sort of complaints that were heard when the concept of child support guidelines were first proposed.

For all the reasons set out above – basically coming down to consistency, adequacy, and predictability – the formula approach should prevail as to the preliminary question. The next question is who should propose such guidelines?

This can be looked at aphoristically[59] or sarcastically,[60] but the reality is that neither legislatures nor courts are likely to take the lead on doing anything constructive in this area. Legislatures have no institutional inclination to improve the law – they are reactive, to proposals brought by special interests or (far more rarely) commissioned experts reporting back with recommended solutions to problems that have gained public attention. Courts are in the business of resolving individual cases, not designing analyses inclusive of considerations that might not be present in a given case.

No, the reality is that it is up to academics – family law scholars – to propose, debate, and recommend a reasoned analysis of alimony, which can ***then*** be brought to the attention of courts, or legislatures, or both, as the situations present themselves, to improve the statutory criteria or judicial

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[59] "If not now, when, if not me, who?" (a modern rendition of the Talmudic: "If I am not for myself, then who will be for me? And if I am only for myself, then what am I? And if not now, when?" Rabbi Hillel, recorded in *Pirkei Avot* (Ethics of the Fathers [Mishnah 14], a tractate of the Mishnah).

[60] "Somebody has to do something, and it's just incredibly pathetic that it has to be us." Jerry Garcia, of the Grateful Dead.

analyses. As Judge Hardy observed, "Judicial discretion is best exercised when it is purpose driven."[61]

This is not an appropriate article in which to yet again recount the historical evolution from the British ecclesiastical courts through the democratization of absolute divorce to the social revolutions of the American 20th Century that make "marital fault" ever more irrelevant[62] and have led to the discarding of various rationales for alimony.

Rather, the effort is made here to try to derive an approach to the problem what would be useful for courts to attempt to apply in modern cases, using the scholarly and careful analyses of others to build the applicable list. There are some who think that it may be too ambitious to propose even that much. Lamenting, like pretty much everyone else, the "chaos" that is the American law of alimony and the lack of improvement to date from guideline proposals, Professor Oldham suggested:

> Perhaps a smaller step – an attempt to agree upon the current norms being applied – could be a useful first step out of the current U.S. morass. Also, if U.S. rules could be clarified, this could focus the debate regarding whether they are fair.[63]

The problem is that the chaos being criticized stems directly from the lack of clarity in the rules being applied. This chicken-and-egg situation is extremely unlikely to ***have*** any rational "norms being applied," which is ***why*** it is a mess.

The contribution being attempted here is the suggestion not so much of a different calculation of appropriate alimony awards, but of a different methodology for determining them, with a focus on the process more than the result. The idea is that, if the process of how results are reached is both fair and perceived as such, the resulting case law will begin to form the coherence that the commentators seek.

Answering in advance those who will assert that it is improper for courts to adopt a formula or analysis when the legislature has not spoken on the point, the below quote from the Nevada Supreme Court regarding custody and calculation of child support is at least equally applicable here:

> The issues in this case and the Family Law Section's amicus curiae brief demonstrate that there are gaps in the law. However, despite these gaps, attorneys must still advise their clients, public policy still favors settlement, and parties are still entitled to consistent and fair resolution of their disputes. To resolve the issues on appeal and ensure consistent and

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[61] *Nevada Alimony* at 326.

[62] New York, the last American State to adopt no-fault divorce, did so in 2010.

[63] J. Thomas Oldham, *Changes in the Economic Consequences of Divorces*, 1958-2008, 21 J. AM. ACAD. MATRIM. LAW. 419 at 441-42 (2008).

> fair application of the law by district courts, this court has attempted to fill some of these gaps by defining the various types of child custody.[64]

It would be inadvisable for those seeking adequate, predictable, and consistent alimony awards to wait for even-handed legislative action that might never occur, or to allow the field of alimony reform to be occupied by those whose actual intent is to abolish the judicial tool of achieving equity. Rather, a rational and fair methodology can and should be implemented by the courts, where the legislative branch fails to do so.

B. Nevada Efforts Toward a Formula Approach

1. The "Tonopah Formula"

In *Wright v. Osburn*[65] the Nevada Supreme Court decried the Legislature's failure to set forth an objective standard for determining the appropriate amount of alimony. That fact had been debated in the Family Law Section of the Nevada State Bar for some time, and the Section had appointed a working group to propose such a standard.

The intent was to establish a completely objective starting point and "reality check" for divorce courts and lawyers, by means of a formula that would reproduce the results in the existing case law by allocating weighted values to the factors set out in the prior decisions. A high priority was given to making the calculation sufficiently simple to encourage its use, by ensuring that all calculations could be completed on a single page worksheet.

The working group analyzed all of the Nevada Supreme Court's alimony decisions to the date of its creation (1996), ensuring that every factor recited by the Court in determining what sum of alimony should be awarded was reflected in a mathematical model, either as a direct part of the calculation (duration of marriage, and the parties' ages, education, difference in income, and disability, if any) or a potential modification factor.[66]

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[64] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

[65] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

[66] *See* Roger Wirth, *Alimony in Nevada*, in Eighth Annual Family Law at Tonopah (CLE materials, State Bar of Nevada 1997); Todd L. Torvinen, *The So-called "Tonopah Formula" for Alimony Explained*, 17 NEV. FAM. L. REP. 9, 11 (Sept. 2002), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf (last visited Sept. 29, 2013).

The formula was designed to address medium and longer-term marriages, and so applied to marriages of 7 years or longer. The deviation factors[67] were expressly non-exhaustive.

All information then available nationally as to proposed alimony standards and objective tests was reviewed, including law review articles on the subject and the rules of thumb or computer models followed in jurisdictions throughout the country, specifically including Oregon, California, and Minnesota.

A model that produced results essentially consistent with all then-existing Nevada case law was created and presented to the Section at its annual meeting in Tonopah in 1997. A statute (A.B. 278, introduced March 17, 1997) was drafted. After some further mathematical testing, a "gross"-based

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[67]

1. The length of the marriage;
2. The age and the life expectancy of each spouse;
3. The physical and mental health of each spouse;
4. The contribution during the marriage of one spouse to the education, training or earning capacity of the other spouse and any increase in the level of education of a spouse obtained during the marriage;
5. The extent to which the present and future earning capacity of one spouse is impaired because that spouse has not worked for an extended period;
6. The extent to which acceptable opportunities for employment are unavailable to a spouse because of his age;
7. The length of time reasonably necessary for a spouse to obtain training or to update his skills;
8. The extent to which a party has achieved a substantially advantageous economic position during the marriage through the combined effort of the spouses;
9. The standard of living established during the marriage;
10. The number of dependents of each spouse and the age, health and any other condition of such dependents;
11. The provisions of any order relating to the custody of any dependents, including, without limitation, the length of time that any obligations for the support of a child will be effective and the impact of the custody provisions of the order on the ability of a spouse to work;
12. The tax liabilities and benefits to each spouse as a result of the divorce, including, without limitation, the tax effect of alimony pursuant to sections 71 and 215 of the Internal Revenue Code (26 U.S.C. §§ 71 and 215), and future amendments to those sections and corresponding provisions of future internal revenue laws;
13. The amount of monthly income after taxes of each spouse after considering the overall financial situation of that spouse, including, without limitation, any outstanding mortgages or legal fees and costs;
14. The anticipated cost of health care for each spouse;
15. The amount and characterization of property that each spouse will receive pursuant to NRS 125.150, including, without limitation, separate property;
16. The amount of any future retirement income that each spouse will receive;
17. The length of time of physical separation of the spouses before the divorce;
18. Whether it would be more just and equitable to grant a spouse a lump-sum award of alimony; and
19. The amount and duration of any alimony awarded pursuant to section 8 of this act [the "rehabilitative alimony" provisions].

version of the formula was created, which was believed to create essentially the same results as the original "net"-based version without requiring calculation of tax effects.[68]

At the 1997 Tonopah meeting, after lengthy debate, the Section voted to ***not*** ask the Nevada Legislature to formally enact the proposed statute, on the basis of a lack of familiarity by the bench and Bar as to how well it would "work" across a multitude of real-life cases. Instead, the Section requested that district courts throughout the state try actually running calculations under the formula, in parallel with their determination of alimony in real cases, and that the resulting comparative data be assembled and reviewed a few years later to determine the utility of that formulaic approach, so it could be determined whether the statute as proposed should be abandoned, modified, or submitted for enactment as consistent with justice.

Apparently, the follow up was never done, and partisans on both sides of the debate have remained staunchly for or against a formulaic alimony analysis, focused on the Tonopah formula model. The Tonopah formula was never sanctioned by the Nevada Supreme Court, or even mentioned in any opinion.

In short, the Tonopah formula experiment proved that it was possible to create a mathematical model that accurately recreated the outcome of existing decisional law when similar facts were presented.

What did not occur to those of us that put it together, however, was the same background problem that plagues several of the other guideline efforts discussed in these materials: perhaps a mathematical modeling of an inconsistent and contradictory body of case law was doomed to be unacceptable in actually solving the problem of predictability, consistency, and adequacy. It is the same reason why computerizing a bad manual records-keeping system is not helpful – all that results is a fast and efficient bad records-keeping system.

2. Nevada Academic Analyses

As discussed above, the Tonopah formula was, essentially, a mathematical projection of the table of significant alimony cases put together to try to derive, after the fact, underlying analytical factors that subsequent examinations of the cases indicate may not have existed to find.[69]

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[68] Both the "net" and "gross" versions of the worksheet are posted at http://willicklawgroup.com/spousal-supportalimony/.

[69] The table, posted at http://willicklawgroup.com/spousal-supportalimony/ under the heading "Alimony Factors Apparently Relied Upon In Nevada Supreme Court," and updated with other cases since the Tonopah formula was created, recited as points of analysis only the facts recited by the Nevada Supreme Court in reaching the decisions set out in the cases: the age of the recipient, the property awarded to the recipient, when the obligor's career was developed, the obligor's income, the recipient's premarital job training, the recipient's employment and income potential, whether the marriage produced children, and the length of the marriage. The cases in which some or all of these factors were discussed were *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988); *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994); *Sprenger*

After assisting with the Tonopah formula effort, I participated in a CLE presented at an ABA annual meeting in 1997 that focused on alimony issues.[70] The research done for that presentation, and in follow up, gave rise to three printed discussions trying to derive unifying principles.[71] That work led to the analysis in this article.

The most thorough and scholarly examination of spousal support in Nevada law is the examination of every case decided in Nevada by District Judge David A. Hardy in 2009.[72] As discussed above, after concluding that Nevada law "provides no consistently or coherently stated rationale for alimony awards,"[73] Judge Hardy elected to "not join the surfeit of national scholarship examining the intellectual and philosophical underpinnings of alimony," but instead made a plea, stating in conclusion that his work "urges a re-examination of why and how courts should award alimony," stating that "[w]ithout policymaker assistance, trial courts will continue entering disparate alimony awards and litigants will continue to benefit or suffer from the vagaries of judicial personality."[74]

There is little doubt that Judge Hardy was correct, but as discussed below, his invitation for "policymakers" to learn, and care, enough to actually do something to bring order to the law of alimony went entirely unheeded.

In 2012, two Nevada attorneys again proposed that some kind of a formula approach to alimony was needed because "district court awards of alimony are inconsistent and often inadequate," noting correctly that in over 100 years of cases, "there has never been a Nevada Supreme Court decision that reversed a trial court for awarding too much alimony," only for awarding too little.[75]

Noting that the same problems of consistency, adequacy, and predictability had led to child support guidelines, the authors suggested a bare-bones categorization of marriages into short (2-6 year),

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v. Sprenger, 110 Nev. 855, 878 P.2d 284 (1994); *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995).

[70] *The Perils of Poverty*, ABA Annual Meeting, San Francisco, California, August 1, 1997. The presentation, Marshal Willick, *Spousal Support Modifications and Related Issues in the Post-60 Age Group*, raised some issues about the impact on pre-existing alimony awards of pension maturity and achieving retirement age.

[71] *Alimony at Twilight: Spousal Support When a Party is at or Near Retirement Age* (Legal Education Institute, Aspen, Colorado, 2006); *In Search of A Coherent Theoretical Model for Alimony* (Nevada Lawyer, April, 2007); *Inter-relation of Alimony Awards with Community Property* (19th Annual Symposium of the Family Law Council of Community Property States, May, 2007, Las Vegas, Nevada).

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

[73] *Nevada Alimony* at 343.

[74] *Id*. at 347.

[75] Bruce I. Shapiro and John D. Jones, *Alimony in Nevada, Part I*, 25 NEV. FAM. L. REP., Summer, 2012, at 5.

moderate (6-20 year) and long-term (20+) durations, forbidding any but "transitional" alimony to marriages of less than 2 years, and presuming little or no alimony for short-term marriages, rehabilitative alimony for moderate-term marriages, and either rehabilitative or equitable "if rehabilitation is not possible" alimony in long-term marriages.[76] Apparently, in all instances, the burden would be on the proposed recipient to "establish need."

For amounts, the proposed formula was pretty vague, asserting that in combination with any child support, it should never be more than half an obligor's income, and that it might be equal to 30-50% of the difference in the post-tax net incomes of the parties in moderate or long-term marriages, and a lesser percentage of the difference in shorter ones.[77]

Officially, actual practice in Nevada has never used any kind of formulas, although anecdotal reports exist that some judges, in some cases, either entertain Tonopah formula (or other) calculations supplied by lawyers, or perform such calculations themselves when deciding cases. No such formulaic calculation has been addressed by the Nevada Supreme Court.

C. Other States' Efforts Toward a Formula Approach to Alimony

Twila Larkin's expansive survey of efforts to formulate alimony guidelines[78] illustrates how the process of creating such a formula has worked in most places. Like Nevada, New Mexico wanted something simple enough to fit on a one-page worksheet, while still applying "percentage and durational factors that were equitable given usual spousal support circumstances."[79]

Ultimately abandoning creation of a durational component, the New Mexico formula splits along "with children" and "without children" lines. If there are no children, that formula subtracts 50% of the payee's gross income from 30% of the payor's gross income. With children, those number shift to 58% and 28%.

Rather than "deviation factors," the New Mexico guideline acknowledged that the formula would produce unfair results in a number of circumstances by listing circumstances where its application is presumptively inapplicable, including high income cases, and shared custody or multiple-family child support cases. "Equitable factors" to "consider" include care of family members resulting in

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[76] *Id*. at 6.

[77] *Id*. at 6-8.

[78] *See* Twila Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 38-49 (2004) ("*Guidelines for Alimony*") (describing many existing guidelines).

[79] *Id*. at 32. In retrospect, this focus on "up-front" simplicity – with its necessary "back-end" cost of deviation and modification factors, appears to have been a mistake, for all the reasons explained in these materials.

lost employment opportunities, prior relocations for the payor's career benefit, and contributions to the payor's education.[80]

A Fairfax County, Virginia guideline, in use for 30 years, similarly differentiates between cases with and without children. If there is no child support component, like New Mexico, the formula subtracts 50% of the payee's gross income from 30% of the payor's gross income.[81] With children, also like New Mexico, those numbers shift to 58% and 28%. The posted guidance cautions against use in high income cases.

Johnson County, Kansas guidelines calculate 20% of the difference between the respective gross earning capacities of the parties, include a list of "considerations" to modify that calculation, and propose payments for a maximum of 121 months, plus ("rarely") for a potential renewal period.[82] Notably, those guidelines suggest modification if the parties are at or near retirement age and explicitly include "tacking" periods of premarital cohabitation into length-of-marriage calculations.[83]

In Michigan, a complicated formula takes into consideration the length of marriage, income, age, education, disability, and the number of children, assigning points to each factor and assessing the "strength" of the claim through the output of a computer program.[84]

With few exceptions, alimony guidelines are not even presumptive as to outcome, but only "starting points for discussion."[85] Virtually all guidelines enacted until very recently appear to be applied in

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[80] *Id.* at 55-56.

[81] Fairfax Bar Association Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, Va., Nov. 2002), *available at* http://www.fairfaxbar.org/pub_order_form.asp.

[82] Kansas, Johnson Co. Bar Assoc., Fam. Law Guidelines, Maintenance, Pt. V (Rev. 2010), *available at* http://www.jocobar.org/associations/10019/files/Section%205%20-%20MAINTENANCE.pdf (last visited Sept. 29, 2013).

[83] For a discussion of tacking, *see* Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011).

[84] Apparently, Michigan has two main competing programs for applying spousal support guidelines: "Prognosticator" and "Marginsoft," and while their output has been held "non-binding," *see Anderson v. Anderson*, No. 299486 (Sept. 15, 2011, unpublished) http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20110915_C299486_33_299486.OPN.PDF, the Michigan Court of Appeals has also determined that the use of such programs by a court was not inadmissible hearsay. *Skripnik v. Skripnik*, No. 272017 (Dec. 18, 2007, unpublished), http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20071218_C272017_47_272017.OPN.PDF. However, at least one published, and therefore binding, opinion by the Court of Appeals reversed a trial court for relying on a spousal support calculator: *Myland v. Myland*, 804 N.W.2d 124 (Mich. Ct. App. 2010).

[85] *Re-thinking Alimony* at 73, noting PA. R. CIV. P. 1910.16-1. *See* discussion of Massachusetts, New York, and Florida guidelines below.

only limited counties or divisions, not State-wide,[86] and the great majority are used only for temporary, pre-divorce support orders. This last point is a bit counter-intuitive since, as a matter of course, the impact of any ***pre***-divorce orders is much smaller, as to time and money, than that of post-divorce orders that could run for decades, and as to which all concerns of consistency, predictability, and adequacy are heightened.

The bottom line of alimony guidelines around the country was that until recently, no one in a position of authority, anywhere, has perceived sufficient value to guidelines to actually implement them as a meaningful part of the litigation process. This reality means that alimony has remained inconsistent and unpredictable, leaving in place all the additional costs to both the litigants and the courts that guidelines were conceived to alleviate.

Two things are needed for any of the theoretical advantages of alimony guidelines to materialize. First, a legitimate, even-handed guideline must be conceived that is adequate to refute the criticisms attendant to each effort so far, preserving judicial discretion without losing the ability to serve the goals of consistency, predictability, and adequacy. Second, a legislative or judicial administration must have both the wisdom and the political will to obtain the advantages presented by such guidelines by implementing (and, hopefully, refining and improving) them sufficiently to make a real difference in how clients are advised, cases are negotiated, and decrees are entered.

Unfortunately, recent experience indicates that where the second objective of "will" has been met, it has been at the behest of special interests intent on eliminating or crippling alimony rather than improving the methodology of its consideration.

The archetype of this kind of "reform" movement is probably the Massachusetts law, which in 2013 replaced law from the 1970s making alimony awards based upon the needs of the recipient, the ability of the obligor, and the goal of maintaining the lifestyles of both parties enjoyed during the marriage.[87]

Under the old law, judges were prohibited from imposing any term limits on alimony awards. Under its replacement, the pendulum swung to the opposite extreme, making "permanent" alimony all but impossible in less-than-20-year marriages, and setting up "reimbursement," "transitional," and "rehabilitative" alimony for marriages based solely on their length – less than 5 years, 5 to 20 years (limited to 50-80% of the length of marriage), and greater than 20 years. Measurements of awards were phrased in terms of the differential between the incomes of the obligor and recipient, with some gamesmanship in what kind of income "counts" (dividends versus paychecks, for example), pretty obviously intended to protect wealthy potential obligors. Curiously, alimony was to be determined prior to the property division.

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[86] *Guidelines for Alimony* at 29-32.

[87] Massachusetts General Laws chapter 208 §§49-55, effective March 1, 2013.

Everything was set up to limit and restrict awards – for example, cohabitation by the recipient triggers presumptive loss of an award, but even massive income by an obligor's new spouse is to be ignored by the courts. And the statute, on its face at least, purported to be retroactive even if the decrees and agreements it would affect stated that they were unmodifiable.

In Florida, similar "reform" effectively eliminating so-called "permanent" alimony, and enormously restricting any such awards, passed both houses of the legislature, but was vetoed by the Governor; the proponents have apparently promised to continue trying until they are successful. A similar effort was attempted in New Jersey.

In New York, mandatory pre-divorce guidelines have given way to debate about making such guidelines applicable to post-divorce awards.

All of the proposals recounted above are two and three-dimensional analyses[88] focused on income difference and length of marriage, and not directly calculating all of the various reasons for (and against) making alimony awards. Almost invariably, they are of the "calculate, then decide whether to deviate" model. The proposals focus on "income caps" and "percentage maximums" that have an actual intention of gaming the result rather than having alimony awards subject to any kind of meaningful analysis of the parties and marriage at issue.

In other words, alimony "reform" in recent years at the State level has become a euphemism for alimony repeal or restriction, focused on eliminating, rather than illuminating, trial courts' examination of the equities of the parties before them.

D. National-Level Efforts at Alimony Guideline Proposals

1. The ALI-ABA *Principles*: "Loss" for "Need"

a. Introduction

In 2002, after eleven years of work and four drafts, the American Law Institute ("ALI") published its *Principles of the Law of Family Dissolution: Analysis and Recommendations* ("*Principles*"). Consisting of 1,187 pages of single-spaced exposition, explanations, theoretical bases, and citations, the *Principles* considered many of the foundational questions in family law surrounding divorce, cohabitation, same-sex relationships, and parentage.

The Director's Foreword noted that this ALI effort was different from its usual attempts to summarize the law of the various States as it actually existed – this was not a "restatement," but an exposition of principles "because much of the relevant law is statutory, and what seemed to be

[88] *See* discussion below.

needed was guidance to legislatures as well as to courts."[89] Famed law professor Geoffrey Hazard, then director of the ALI, described the project as "among the most important that the [ALI] has ever undertaken."[90]

Among the topics tackled by the *Principles* – consisting of its Chapter 5 – was alimony, a term which it recast as "Compensatory Spousal Payments." The Chief Reporter's Foreword to the *Principles* explained that the ALI approached an area of law going by 3 different names (alimony, spousal support, or maintenance) and consisting mainly of a "judge-made elaboration of relatively general statutory principles."[91]

Like most other recaps of the history leading to the current state of alimony law, the *Principles* text recounted the evolution of rationales, summarizing that the traditional explanation for alimony was "weakened" by the availability of "absolute divorce"[92] and "was undermined completely by modern reforms removing fault from divorce and rejecting gender roles."[93] Yet courts and commentators broadly saw alimony as "necessary," even with no theory to explain why it was so, given the continuing reality that "the financial dependency of wives continued in most marriages."[94]

The history set out added that in the modern no-fault era, "community property-like" concepts of distribution upon divorce of property acquired during marriage had become the norm, while the development of property concepts such as "goodwill" for business valuations made "claims on post-dissolution earnings that could traditionally have been made only under the rubric of alimony" and thus blurred the line between historical property and alimony concepts.[95]

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[89] Foreword dated Nov. 16, 2001, by Lance Liebman, Director, American Law Institute, A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AD RECOMMENDATIONS (2002) ("*Principles*"), at XIII.

[90] Prof. Geoffrey Hazard, Foreword to *Principles* at XI (Tentative Draft No.3 pt. I, 1998), quoted in Michael R. Clisham and Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 Fam. L.Q. No. 3 (Fall 2008) at 573 ("Clisham and Wilson").

[91] Foreword dated May 7, 2001, by Ira Mark Ellman, Chief Reporter, *Principles* at XVII.

[92] Absolute divorce is the (relatively) new process of returning married persons to the status of unmarried persons, replacing divorce "*mensa et thoro*" (from bed and board) – essentially, legal separation – which at some times was all the relief available. The Latin phrasing lingers on to this day in the divorce codes of some jurisdictions, especially those that have interlocutory decrees preceding the issuance of absolute divorce orders.

[93] *Principles*, Introduction at 26.

[94] *Id.*

[95] *Principles*, Introduction at 23-25. As detailed a bit later, courts tended to be receptive to claims on "earning capacity" only when those claims were "framed in familiar terms," which it posited as the reason for rejection that professional degrees or licenses are "property" to be valued and distributed, while at the same time valuing essentially the same object within professional goodwill "that effectively include the obligor's earning capacity." *Id.* at 28.

The Chief Reporter opined that national alimony law was susceptible to the *Principles*' "core recommendation" of "establishment of presumptions or guidelines to provide predictability and consistency," which is why the ALI "provided an analysis and rationale for a particular approach to the creation of such guidelines." The work explicitly desired those guidelines to be established for statewide use if any such consistency was to be possible.[96]

Bemoaning, like many other references, "the absence of any systematic theory of alimony in modern divorce law," the ALI sought to discern "lessons from this history" and stated as a central conclusion that "need" – the usually-stated basis for alimony awards – was grossly insufficient, and irreparably so.[97] Specifically, it explained that courts used the same word to mean different things, and sometimes granted alimony "where no need exists under any commonly employed standard," while also denying alimony "despite the presence of obvious need."

Trying to discern why, the ALI noted that the current law of alimony, nationally, has "no coherent rationale," and that alimony continues to be a "residual category . . . defined as those . . . awards . . . in connection with the dissolution of a marriage that are not child support or the division of property."[98] This residual category of award is used "to provide remedies in a wide variety of cases that do not share any consistent pattern that can be captured in a sensible definition of [need].[99] Concluding that a "unifying concept must be sought in other terms," it found such a concept in reframing the question of alimony as one of discerning and addressing ***need*** to discerning and addressing ***loss***.

Explaining the essence of the ALI approach, the Introduction stated:

> A spouse found in need is usually a spouse on whom the marital dissolution imposes a loss that seems unfairly disproportionate. That is, the sense that one spouse has an obligation to meet the other's post-dissolution needs arises from the recognition that the need results at least in part from the marital failure. The payment's true justification is as a remedy for an unfair loss allocation, not as relief of need, and need is not therefore an eligibility requirement for the award. It is of course true that a spouse who incurs a disproportionate financial loss from the dissolution will often seem in need but the degree of need will vary. That is why no single standard of need appropriately decides all alimony cases.

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[96] *Id*.

[97] *Id*. at 29. In later exposition, the text describes the "two principal difficulties" of failing to provide clearly why any such need is the problem of the wealthier former spouse, rather than "their parents, children, friends, or society in general," and the impossibility of choosing when and to what extent, "need" exists, noting opinions claiming that the measurement is of basic necessities, moderate middle-class existence, and "the living standard enjoyed during the marriage even if it was lavish." *Principles* at 878.

[98] *Principles* at 875 (§ 5.01).

[99] *Principles*, Introduction at 29.

The *Principles*, however, are not actually a specific formula, and may not actually be used to calculate a particular award in a particular case. Rather, it is a construction set – a framework intended to allow "rule makers" to actually make value judgments on a wide variety of specific topics, such as how long a "marriage of significant duration" might be, and lock those value judgments into a presumptive calculus designed to circumscribe the limits of judicial discretion absent findings of "substantial injustice" by their application.[100]

Rejecting the traditional norm of permitting any judicial determination bounded only by "abuse of discretion," the ALI opined:

> The fact that reasonable judges may differ on a policy choice does not make it beneficial that they should. There is no utility and considerable cost in accommodating varying judicial preferences concerning the minimum tolerable income disparity, or the minimum marital duration at which an award should normally be required. Such variation will uncover no adjudicative principle to guide later decisions, but will impose a considerable cost in inconsistency, unpredictability, and the perception of adjudicative unfairness as neighboring cases yield different results because of different judges rather than different facts.

In other words, the ALI paradigm relegates judicial discretion to far lesser importance than consistency and predictability in the interest of societal good, but passes the buck of making the "value judgments" that would actually bound judicial discretion to whomsoever the "State-wide rule makers" might be. As discussed below, to date, no such body has taken the ALI up on its invitation.

b. The Analysis Itself

In 14 sections spanning 134 pages, the *Principles* set out its alimony framework in a logical exposition, each piece of which is supported by massive citations to authorities (cases and articles) describing and illustrating the concepts involved, illustrating the lack of existing cohesive analysis, identifying any discernable patterns and trends, and reciting the goals intended to be reached by adoption of the analysis (once appropriate State-by-State "value judgments" are reached as to the particular values to be inserted).

§ 5.01, Scope, clarified that the chapter does not address property division or child support, and is not concerned with enforcement of remedies.[101]

§ 5.02, Objective, specified that all the following sections intended to allocate financial losses arising at dissolution of a marriage, without regard to marital misconduct, and taking into account loss of

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[100] The ALI found no universal underlying analysis to guide such specific value judgments, and further noted that the power to impose such presumptive rules might fall from State to State to legislatures, administrative bodies, or the highest court in a State in its rule-making capacity. *Principles*, at 95-96 (§1.1. Rules of Statewide Application).

[101] *Principles* at 874-75.

earning capacity arising from child care, losses of opportunities and expectations caused by adjustments made over the course of a long marital relationship, disparities in financial impact of the dissolution of a short marital relationship, and recognizing the "primacy" of the income earner's claim to benefit from the fruits of his or her own labor, as compared to any claims of a former spouse.[102]

One notable point of that analysis is the theoretical background of a moving measuring stick, starting with the pre-marital standard of living in short marriages, and mutating over (unspecified) time to the marital standard of living.[103]

Explicitly ***not*** a basis of "loss" is "compensation for inequities in the spousal give and take during the marriage," on the basis that "divorce law cannot provide general relief for unfair conduct in marriage" for many reasons, not least of which is that, in the modern no-fault world, at least theoretically, anyone can get out of marriage found to be intolerable.[104]

The ALI had no clear solution for the kind of devastating losses suffered by a spouse in even a short-term marriage who becomes severely disabled, noting that the case law exhibits a certain degree of judicial frustration with the inability to compel assistance from "the community at large" in such cases, and therefore sometimes makes support the responsibility of the uninjured former spouse, and sometimes not.[105] The text simply labels the question "beyond the scope of this project."

§ 5.03, Kinds of Compensatory Awards, classifies compensatory awards into two groups. The first, to be detailed in §§ 5.04, 5.05, & 5.11, involves the loss of living standard of the spouse who leaves the marriage with less wealth or earning capacity, and the earning-capacity loss suffered by reason of the care of children or others.

The second group, detailed in §§ 5.12 & 5.13, includes the loss suffered by one spouse when the marriage terminates "before that spouse realizes a fair return from his or her investment in the other

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[102] *Principles* at 876-77.

[103] *Principles* at 877.

[104] *Principles* at 880-81. The ALI acknowledged that parties might be constrained by "nonlegal ties that keep parties in unhappy relationships" but summarily proclaimed that "There is little the law can do to alter that," other than making the division of losses upon divorce as fair as possible. The Nevada Supreme Court found its way to a similar declination to visiting claims about most kinds of normal financial imbalance during marriage, albeit in the context of property distributions. It distinguished hiding or secreting assets during divorce proceedings, on the one hand, from "undercontributing to or overconsuming of community assets during the marriage" on the other, and held: "Obviously, when one party to a marriage contributes less to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or entitlement to more than an equal share of the community property. Almost all marriages involve some disproportion in contribution or consumption of community property." *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

[105] *Principles* at 883-84.

spouse's earning capacity," or an unfairly disproportionate disparity between parties to a short-term marriage in recovering their respective premarital standards of living.[106]

It is here that the ALI effort addressed the subject of ***time*** (a crucial element of the analysis made in this paper). The ALI did not look directly at ***where*** in an individual's life or career path either marriage or divorce occurred, but did focus on the length of marriage and whether it overlapped child-rearing years.

Short marriages normally gave rise to no claims under the first group of losses discussed above, but as the marriage lengthens, the claim grows until it hits a ceiling to be determined by rule-makers, but suggested here as being 40% of the income difference between spouses no matter how many losses are aggregated, so the person making the money always gets more of it than any former spouse.[107]

On the flip side, second-group losses are not limited by the 40% limit, and differentials in spousal incomes is not relevant to them because they essentially classify as species of reimbursements.

For first-group awards, the normal payment pattern would be periodic installments – unless a judge wanted to provide equivalent value by a lump-sum payment or disproportionate amount of property. For second-group awards, the presumption flips, with lump-sum award the norm, and installments only paid if necessary.[108]

§ 5.04, Compensation for Loss of Marital Living Standard, is a lengthy, substantive provision requiring a State-wide rule-maker to determine the length of marriage and spousal-income disparity that will give rise to a presumptive entitlement to compensation, which entitlement rises with length of marriage until it reaches the specified maximum.[109] Courts are to impose the presumptive award absent written findings that doing so would yield a substantial injustice.

One interesting note to counting the length of marriages includes expressly tacking onto the marriage any premarital period of cohabitation in which the parties were effectively domestic partners.[110]

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[106] *Principles* at 888-89.

[107] *Principles* at 890.

[108] *Principles* at 892.

[109] *Principles* at 895-96. The discussion of all components of § 5.04 stretches from page 895 to 928; it might rightfully be seen as a core provision to the ALI approach, and includes a review of a large number of studies and papers exploring the various theoretical bases of alimony, gender differences in marriage and divorce, feminist theory, sociological studies and theories, economic trends in careers and compensation, age selection in marriage patterns, and a host of other considerations, discussions, opinions, and speculations.

[110] *Principles* at 896. The *Principles* do not use the term "tacking," and the status it terms "domestic partners" has been labeled "a single economic unit" in other writings. *See* articles referenced in fn.2.

Rather than attempt to measure the actual income-capacity loss, if any, suffered by the dependent spouse, the ALI imputes it by referencing the gap between the parties' post-divorce earning capacities, because "It is the disparity itself, and not the reason for the disparity, that over time gradually enlarges the dependent spouse's financial stake in the marriage, and it is the passage of time that gradually increases the risk that she will be unable to replace much of this stake if the marriage fails.[111]

§ 5.05, Compensation for Primary Caretaker's Residual Loss in Earning Capacity, details the loss and presumptive award related to child care when a court determines that one spouse provided substantially more than half of the total care provided by both spouses to raising the children.[112] Again, how long a child-care period creates such a presumptive award, and its size, are left to unspecified rule-makers.

The section makes it clear that in no event, in combination with the loss set out in § 5.04, can the presumed award exceed the maximum limit set for awards under the prior section alone, and again the award would be essentially mandatory absent findings of "substantial injustice." The awards are deductible and includable in calculating income for child support purposes.[113]

§ 5.06, Duration of Award of Periodic Payments Under §§ 5.04 and 5.05, is not specific (deferring such terms to the "rule-makers"). The section includes guidance that the term be indefinite when the ages of both parties are greater than the (unspecified) minimum value to be set out in the rule, but otherwise for a fixed duration taking into account how long the children were raised. The presumptive duration is to be imposed except on written findings of substantial injustice, or that some other term is "less likely than the presumed term to require subsequent modification or extension."[114]

The text contains many studies and references discussing social policy and economic impacts and discussing the various trajectories of men and women absent permanent alimony awards after long-term marriages involving substantial income disparities upon divorce.[115]

§ 5.07, Automatic Termination of Awards Made Under §§ 5.04 and 5.05, codifies the usual cessation of general alimony awards upon the remarriage of the obligee or the death of either party, unless the original decree provided otherwise, or the court makes written findings that such termination would

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[111] *Principles* at 901-902.

[112] *Principles* at 928-930. Actually it is phrased as a double negative, the award being presumptively made "in the absence of a determination . . . that the claimant did not provide substantially more than half of the total care . . . ."

[113] *Principles* at 939.

[114] *Principles* at 946-47.

[115] *Principles* at 947-957.

"work a substantial injustice because of facts not present in most cases to which this section applies."[116]

The explanatory text distinguishes such awards from those discussed in the following sections that are based on various concepts of restitution or reimbursement.

§ 5.08, Judicial Modifications of Awards Made Under § 5.04 and § 5.05,[117] provides for alteration of orders if the obligor has an unexpected income loss, the obligee did not suffer the extent of loss anticipated upon divorce (say, by getting a better job than was expected post-divorce), or if the obligor, having suffered an income loss at the time of divorce, begins to make the greater income he had made prior to the divorce.[118] Additionally, the provision permits adjustments based on "significant changes" to the cost of living.

This subject is not much addressed in the analysis made in this paper, since matters relating to post-award modification have been deferred to a later discussion.

§ 5.09, Effect of Obligee's Cohabitation,[119] provides for procedures and evidentiary burdens relating to the obligee's post-award relationships, but is not further discussed here since it relates to post-award modification.

§ 5.10, Form of Award Under §§ 5.04 and 5.05,[120] provides the detail to the discussion referenced above as to when periodic payments, as opposed to lump-sum awards or property transfers of equivalent value, might be most appropriate, but is not addressed further as it is not central to the subject of this analysis.

§ 5.11, Compensation for the Residual Loss of Earning Capacity Arising from the Care of Third Parties,[121] is the first of the "reimbursement" sections, putting the burden on the claimant to show that such care was provided, and that an earning-capacity loss attributable to such care occurred and had not been restored at the time of divorce. In short, it is a special category to be made only on

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[116] *Principles* at 957-58.

[117] *Principles* at 963-64.

[118] Lawyers commonly refer to the income-drop suffered by the primary wage-earner at the time of divorce as SAIDS, or "Suddenly Acquired Income Deficiency Syndrome." In common (if somewhat snarky) reference, the syndrome is described as rarely fatal, and business owners contracting this malady nearly always make miraculous recoveries immediately after a decree is entered.

[119] *Principles* at 974-75.

[120] *Principles* at 983-84.

[121] *Principles* at 987-88.

proof that such special circumstances occurred and had a measurable impact on the obligee's future income.

§ 5.12, Compensation for the Contributions to the Other Spouse's Education or Training,[122] is the second "reimbursement" section, putting the burden on the claimant to show that funds were contributed to the education or training of the other spouse, and benefited the other party. The award may not be made if general alimony under §§ 5.04 and 5.05 is made, and the section includes what expenses to tabulate in computing the award.

§ 5.13, Restoration of Premarital Living Standard After a Short Marriage, ducks the meaning of those terms to the "rule -makers," but provides that if the conditions are met, a disparity between the parties as to their ability to recover their respective premarital standard of living can be compensated.[123] The section requires proof of significant expenditure for a marital purpose, that the expenditure is unrecoverable, and measures the compensation at half the sum expended, or by way of "transitional assistance" giving the obligee "a reasonable chance to recover the lost opportunity."

§ 5.14, Form of Award Under § 5.12 and § 5.13, specifies that such reimbursement awards should be made, where possible, by way of additional property or lump sum amounts, and if not possible, then by way of periodic payments.[124]

c. Discussion

Unlike the ALI's Restatements of the Law, which target judges ("decision-makers," in ALI parlance), the *Principles* were admittedly[125] directed primarily to State legislatures ("rule-makers," in ALI parlance). The apparent motivation was the reality that in most places, actual implementation of the *Principles*' analytical scheme would require legislative action.

As detailed above, the *Principles* consists of a construction set – a system of rebuttable presumptions designed as a template for adoption by a State legislature requiring "a level of detail whose precise content is left to each jurisdiction's policy-making body."[126]

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[122] *Principles* at 990-91.

[123] *Principles* at 999-1000.

[124] *Principles* at 1009.

[125] Press Release, American Law Institute, American Law Institute Publishes Principles of the Law of Family Dissolution (May 15, 2002), available at http://www.ali.org/alilpr051502. htm.

[126] *Principles* at 34.

The problem is that State legislatures do not often go looking for ways to improve the handling of family law determination mechanics. Most State legislatures consist of legislators and staff largely clueless of how courts actually work, nevertheless the content of the decisional law applied in alimony or other cases, and they tend to look at subject matters such as "alimony" or "child support" only when prodded to do so by federal legislation imperiling agency funding, events getting press attention, or proposals trumpeted by special-interest groups based on advancing their own self-interest.[127]

So it is unsurprising that in more than a decade there has been apparently only one regional family court, in Arizona, that has adopted alimony guidelines purportedly based on the *Principles*' recommendations.[128] In 2008, commentators surveying the effects of the *Principles* found it to be of primary interest to academics and theoreticians, labeling its impact in the "real world" as "anemic," "slight," "mixed" and "paltry."[129] Apparently, very few courts anywhere cite the research, reasoning, or analysis set out in the *Principles* as anything more than general support for conclusions they have reached by other methods.

Perhaps optimistically, even those who put the *Principles* together seemed to anticipate the leap of faith required for "rule-makers" to comprehend the analysis, agree with it, and elect to use the construction set to build a set of rules adopting and applying the analysis (after making all of the "value judgments" required to actually fill in the relevant time periods and other calls).[130]

On the question of loss of earning capacity (referenced in §§ 5.04 & 5.05), the ALI analysis made no effort to measure, estimate, or calculate the actual income loss suffered by a caretaker, instead choosing to latch on to a percentage of the wage-gap between obligor and recipient as the measurement for the loss. The reasons the ALI gave for its decision made a lot of sense, but not the decision itself.

The *Principles* noted economic data indicating that virtually all caretakers suffered "significant continuing impact" on their earning capacity, but that it is very difficult to "establish[] what an individual's earning capacity would have been had the individual made different life choices years earlier." Because any effort to do so would require speculation, the ALI was concerned that "requiring specific proof of loss would therefor result in the frequent rejection of claims that are in fact meritorious" and the effort of doing so "is likely to yield transactional costs disproportionate to

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[127] *See* Appendix 2.

[128] *See* Mark Hansen, *A Family Law Fight: ALI Report Stirs Hot Debate Over Rights of Unmarried Couples*. 89 A.B.A. J. 20 (2003).

[129] Clisham and Wilson at 576.

[130] Clisham and Wilson at 577, discussing and noting the comment by Professor Harry Krause that the formulation of the *Principles* "may be ahead of our time." Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends – and Vice Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1099 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

the benefit." Given the economic data showing the effect to be real, the ALI concluded that "fewer errors may be made by assuming that all primary caretakers incur an earning-capacity loss than by attempting to ascertain the loss in each case."[131]

The problem with the ALI's solution is that the wage gap between the obligor and the recipient might – indeed, probably would – have nothing whatever to do with the actual earning-capacity loss suffered by the recipient. Using game theory, the ALI hypothesized that couples would usually make the rational choice of having the earning-capacity loss suffered by the lower-earning spouse, but that fact also has nothing to do with actual compensation for the loss suffered.

Choosing to "measure" a loss by use of calculations having nothing to do with the ***actual*** loss being calculated is detrimental to the legitimacy of the entire analysis. The historical problem with alimony guidelines is their non-acceptance because of perceived arbitrariness – both in the calculations and in the unbridled "consideration" of vague "factors." The ALI proposal simply substituted one arbitrary number for another. If earning-capacity loss is to be compensable at all, some effort should be made to determine what that loss might be, as proposed below.

While it is always dangerous to arrogate knowledge of the judgment of history (a continuously-moving target that sometimes reverses course), perhaps evaluation of the approach to alimony guidelines taken in the *Principles* could be best seen by the degree to which those formulating proposed guidelines have been willing to adopt its analysis and methodology. As indicated by the next section, seen in that light, the ALI analysis has not been the solution to the problem of alimony that its creators hoped.

2. The AAML Effort at Boil-Down

a. Introduction

In March, 2007, the American Academy of Matrimonial Lawyers ("AAML") Board of Governors approved a report of a Commission assembled by the Academy to propose a resolution to the alimony problem.

The *Report of the American Academy of Matrimonial Lawyers on Considerations when Determining Alimony, Spousal Support or Maintenance*[132] was commissioned specifically to evaluate the ALI proposal – a task which took the AAML Commission two years, involving surveys of its membership, CLEs, and other proceedings. At the end of those efforts, the AAML Commission

[131] *Principles* at 932-35.

[132] Available at http://www.aaml.org/sites/default/files/AAML-ALI-REPORT-Final%205-02-07.pdf (last visited October 11, 2013).

(made up of both academics and well-experienced national matrimonial law experts) rejected the ALI analysis and proposal, without really indicating why it was doing so.[133]

The AAML Commission agreed that the lack of consistency in alimony determinations results in "a perception of unfairness." It determined that the lack of consistency leads to the lack of predictability of outcomes, and that "the lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases because without a reliable method of prediction clients are in a quandary."

However, it rejected the ALI theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the dissolution of marriage. After reviewing the history of the evolution of alimony, from its historical roots through general assumptions about "need," to a focus on rehabilitation, to the expansion beyond that to concepts of contract principles such as expectation or quasi-contract doctrines like restitution or unjust enrichment, the AAML found that all prior efforts had:

> left unanswered the critical question of the measure of the dependent spouse's basic entitlement to support. Is it at the marital standard of living (as provided in the common law) or is it at some other level based on "need"?

Finding the "current trend" as providing support based on factors that include need (and sometimes fault), the AAML declared that "need" remained an "elusive concept" because it was not clear if the reference was to "the marital standard of living," "subsistence level," for a "transfer of money to provide income sufficient to acquire skills or training to become self-supporting," or "the equitable division of the marital stream of income." The AAML analysis also noted the "alternative theory" of theoretical bases rooted in "contribution" to the economic partnership underlying modern theories of equitable distribution.

b. The Analysis Itself

Without much explanation of how it got there, the AAML Commission found, after surveying "approaches used in many jurisdictions," that the most universal components of formulas in actual use were "income of the parties" and "length of the marriage."

The AAML formula is in two parts – amount and duration.

For amount, 30% of the payor's gross income minus 20% of the payee's gross income.

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[133] Stating that the ALI *Principles* were "premised on a theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission."

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

The formula is not to be applied in any case where combined gross income of the parties exceeds $1,000,000 a year, and the calculated payment, in addition to the payee's income, may never exceed 40% of the combined gross income of the parties.

For duration, the length of the marriage is multiplied by:
0-3 years: (.3)
3-10 years: (.5)
10-20 years: (.75)
over 20 years: permanent alimony.

The formula outputs for length and duration are then subject to "deviation factors," provided with no guidance[134] or mathematical relationship to the formula outputs:

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

c. Discussion

The AAML Commission considered as confirmation of the legitimacy of its methodology that its presumptive formula "yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions." At the same time, its report recognized that the "unique circumstances of the parties" might require alteration of the amounts calculated per the suggested "deviation factors" to "address the more common situations where an adjustment would need to be made."

[134] The AAML report included an appendix of examples of the application of the recommendations to three income-variation patterns (basically, projections of the proposed formula with or without any of the factors listed for deviation), which would require reasoning by analogy to the closest model.

The simple application of the proposed formula has enticed at least one court into referencing it. In *Boemio*,[135] the Maryland Court of Appeals held that it was not an abuse of discretion by the trial court to award indefinite alimony, citing various statutory standards, and that the trial court did not improperly refer to the guidelines published by the AAML when awarding alimony because (1) the only reference to the guidelines was made when the court analyzed the statutory factors and attempted to craft an alimony award that properly incorporated both the quantitative and qualitative considerations of the statute, (2) the judge explained that the guidelines were referred to for information purposes only, and did not control the court's decision, and (3), the judge said the guidelines were not authoritative and were subject to the statutory factors, which the court considered.

E. Why These Formulas Don't Compute: Limitations of Two and Three-Dimensional Approaches to Alimony Analysis

As H.L. Mencken famously observed, "For every complex problem, there is a solution that is simple, neat, and wrong."[136]

This would appear to underlie the problem of every alimony formulation intended to be "easy enough to encourage actual use" or "simple enough to fit on a one-page worksheet." By creating calculations, and then of necessity setting out a list of reasons not to actually apply it in common situations, all such formulations sacrifice the theoretical legitimacy that is necessary for adoption of any alimony guideline.

Any analysis that attempts to boil down all the history, policies, and considerations making up the law of alimony to just a couple of factors – no matter how common or "universal" – suffers from a "blind men and the elephant" fallacy – trying to explain the whole of a complex concept consisting of several very different parts by focusing on only one of them.[137]

Simple guidelines are just too blunt an instrument. A mathematical projection of the sort set out in the Tonopah Formula, the New Mexico formula, or the AAML Commission's formula, quickly propose an amount of alimony and a duration for payment of the sum calculated, without the resulting amount or length being tied in any meaningful way to the reason for any such payment.

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[135] *Boemio v. Boemio*, 994 A.2d 911 (Md. 2010).

[136] The full quote is apparently a bit wordier: "Explanations exist: they have existed for all times, for there is always an easy solution to every problem – neat, plausible and wrong." H.L. Mencken, "The Divine Afflatus" in *New York Evening Mail* (16 November 1917); later published in *Prejudices: Second Series* (1920) and *A Mencken Chrestomathy* (1949).

[137] *See* http://en.wikipedia.org/wiki/Blind_men_and_an_elephant. The parable, originating in the Indian subcontinent, illustrates the relativism of "truth" and the behavior of experts in fields where there is a deficit or inaccessibility of information.

Both amount and duration ultimately vary wildly in accordance with the disparity in income at the moment of divorce, and the length of the marriage at issue, without taking account of any of the circumstances giving rise to those two facts, or the moment in life and career cycle at which they are being measured.

Such "two-dimensional" formulas are inadequate to encompass the policies underlying the alimony law of the many States – which policies are often implicit, occasionally contradictory, and usually unfocused. The formulas cope with that fact by leaving layering on a third dimension of analysis in the form of reviewing policies and obviously-critical facts set out in "deviation factors" to be applied after the calculation itself. This gives rise to its own set of difficulties.

Those deviation factors ask a court that has a number in front of it to then decide whether to "adjust" that number because "A spouse has unusual needs" or "Other circumstances make application of these considerations inequitable." Doing so is hardly more likely to be consistent and predictable in application than the unbridled discretion after "considering" vague factors that the formulas were intended to replace.

The ALI analysis tried to avoid the problem by creating an integrated series of analytical steps to be given the weight of presumptions, but it is still more of a construction set than an actual working guideline, so it is hard to see how, or whether, it would actually work if the hard policy choices were actually made, actual rules constructed, and then application to actual cases attempted. It is unclear exactly why other bodies such as the AAML reject its overall refocus of the question as one of loss from marriage and its breakup. Perhaps a more detailed explanation of the rejection would illustrate flaws – or promises – in the ALI paradigm, but until it is put into practice, it remains too theoretical to meaningfully evaluate.

On the other extreme from a simplified formula, some analyses have tried to capture the full range of possible elements of an alimony decision, but the resulting complexity of the calculation has required the creators of such analyses to bury their assumptions and weighting of factors, putting them "under the hood" and requiring a computer program to actually perform the calculations. This, in turn, unfortunately, tends too often to cause those using such an analysis to stop thinking about ***why*** results are produced, giving the program output a measure of *deus ex machina* presumption,[138] and creating just the image of arbitrariness that the program was intended to avoid.

That is precisely the criticism leveled at the trial court by the Michigan Court of Appeals in *Myland*[139]:

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[138] It becomes too easy to rely on such hidden calculations. California's child support formula is famously so complicated that no one can calculate support payable under it without a computer program. *See* Exhibits to 1992 Report of the Nevada Child Support Guidelines Review Committee, posted at http://willicklawgroup.com/child-support/. Anecdotal reports indicate that a large percentage of California practitioners regularly using the *Dissomaster* (tm) calculator for child support calculations do not actually know how the various inputs are calculated, or why.

[139] *Myland v. Myland*, 804 N.W.2d 124 (Mich. Ct. App. 2010).

> This limited, arbitrary, and formulaic approach is without any support in the law. It totally fails to consider the unique circumstances of the parties' respective positions and fails to reach an outcome that balances the parties' needs and incomes. In short, we cannot sanction the use of such a blunt tool in any spousal support determination, and the trial court's use of this formula here was an error of law. Given the trial court's use and application of its formula, it is not surprising that it failed to consider the factors relevant to an award of spousal support, aside from the length of the parties' marriage and their relative incomes. Indeed, this formula does not adequately account for many factors that were highly relevant to this proceeding, including the parties' ages, health, abilities to work, needs, previous standard of living, and whether one of them would be supporting a dependent. The trial court considered none of these required factors in the instant proceeding.

What follows is an attempt to respond to those common criticisms and failure to obtain consensus as to legitimacy.

IV. A PROPOSED SOLUTION: EXPLICIT REASONING IN A FOUR-DIMENSIONAL ANALYSIS

Judges' determinations on questions such as alimony are most likely to actually be – and to be perceived by others as being – "fair" when the decision is clear, and based on reasoning and calculations that can not only be understood, but can clearly be traced to factors relevant to the determination.

In an analysis of alimony, it is submitted that the only way to accomplish this result is to turn the usual formula mechanics on their head. There should ***be*** no "deviation factors." Rather, that third dimension – each of the policy and factual determinations that might alter the calculation of the amount and duration of support – should be part and parcel of making the decision whether to make such awards, and if so for how long, in the first place.

This can be accomplished by application of a series of analytical steps that logically uncovers and addresses those underlying policies and facts, ***some*** of which are readily susceptible to mathematical projection once identified and understood. The starting position is established as a base-line of whether, after distribution of property, there is any requirement for reimbursement types of awards ***first***, rather than last,[140] and what capacity for any further payments is left, both then and after any such reimbursement is made.

[140] This is a reversal of the ALI method, which tags such determinations at the end of its process in §§ 5.12 & 5.13.

Next, the court must evaluate the anticipated future income of both parties, to see if there is any income differential between them.[141] For all further possible alimony awards, the question is whether the various modern alimony rationales make it reasonable for any of the income of one party to be diverted to the other party.

For example, the concept of a "career asset" leads to a pretty straight-forward mathematical construct, once the axis of realization of career potential over time is explicitly charted, and the place of the alimony determination in both the career and life path of both parties is measured. This is the "fourth dimension" of alimony awards – keeping the notion of time involved in determining the amount, and duration, of each part of the award.

Other steps beyond career asset sharing are inherently more subjective, but if made part of an adequately structured flow-chart style analysis, one step after another, ***still*** will serve the ends of consistency, predictability, and adequacy, because different judges going through the same reasoning process can reasonably be expected to arrive at similar conclusions based on the same evidence.

In basic steps, the analysis proposed here starts with determining the economic abilities of both parties, taking into account the division of property, any separate property assets and income flows, and the projected earning capacity of the parties, noting how long that income is expected, and when if at all pension and retirement income, or loss of income from retirement, can be expected. The court should determine whether the base economic and timing facts make the case at hand "an alimony case."

From those base facts, a series of successive tests is applied, at each stage taking into account the resources of each party remaining from or enhanced by the prior step, and how long the facts underlying any payments ordered are expected to remain true, starting with whether some form of reimbursement is owed by one party to the other, and if so how much, whether it can be paid in lump sum, and if not how long would be required to pay it.

Next comes rehabilitative awards, if any, serving the societal purpose of permitting divorcing persons to become self-sufficient, if possible and appropriate under the facts of the case.

Then an analysis of the career asset, if any, developed by either party during the marriage. This alimony component should normally not be terminable upon remarriage or death of the recipient, since it is akin to reimbursement of a property investment. It should be scheduled to begin, and end, in accordance with the anticipated income stream that the spousal interest had some place in obtaining. It should not be necessary to determine an income gap between the parties to justify such

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[141] This informs the judge's discretion of whether an award at each step is reasonable. Suppose facts that would otherwise give rise to a reimbursement for an expenditure by one spouse in the education and training of the other. If the spouse who would receive such an award leaves the marriage with a vastly superior earning potential, and the spouse who would pay such an award would have little ability to pay it, the reimbursement should not be ordered irrespective of the "loss" suffered by the wealthier spouse, who on these facts would be in a superior position to bear that loss going forward.

an award, although the court should be able to find that the interest not be paid if the post-divorce economics of the parties would make such payment unreasonable.

Any offsetting career asset analysis going the other way (i.e., from the recipient spouse to pay the obligor spouse) is offset from the career asset alimony derived from this step.

Only then should the kinds of "general alimony" usually discussed be determined – taking into account any money transfers being made because of the prior steps, and for how long they are expected, and therefore the total remaining economic resources of both parties.

The analysis separately asks about compensation for loss or waste, alimony based on loss of earning capacity, and alimony based on divergence in future living standards. It is only at this stage where questions get asked such as whether the case involves a long-term marriage in which the recipient spouse should enjoy "as nearly as possible" the "station in life" she had prior to the divorce until remarried, death, or financial circumstances change.

At any step where an alimony award would be appropriate but is not feasible because of a lack of anticipated economic ability, the court should ask whether a reservation of jurisdiction to re-evaluate such an award upon changed circumstances is reasonable. Whether a foreseeable eventuality such as retirement should alter the court's orders should be considered and addressed when the initial award is made, whenever possible. And at the end of the analysis, a court may still decide, based on some singular facts or considerations outside the analysis, that alimony should, or should not, be awarded, and why.

It is believed that following this analysis as a flowchart, examining capacity and duration at each stage, will necessarily encompass all of the statutory factors that trial courts are currently given the unfocused directive to "consider." Doing so in a logical hierarchy of purposes, however, should lead to awards of alimony better suited to satisfaction of the underlying purposes of each component. In turn, this should result in alimony awards that are inherently as adequate as the financial circumstances of the parties permit, consistently across cases, and therefore predictable in advance of litigation.

This proposed analysis, like others, is:

> designed to be used in conjunction with state statutes that first determine eligibility for an award. [It is] not intended to replace existing state public policy.[142]

What remains to be seen is whether the flowchart approach suggested here, rather than simplified-guideline-with-deviation-factors approach, is any more susceptible to widespread adoption, refinement, and practical application.

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[142] This was lifted directly from the conclusion of *Re-thinking Alimony* at 79.

V. THE FLOWCHART: WORKSHEETS AND FINDINGS

What follows here is an explanation of the decision-trees set out on the worksheets. They are intended to actually be completed by the court, step by step, thus building the conclusion as to the amount, duration, and terminability of alimony from its individual components, as opposed to starting with a number and creating rationalizations for why it is appropriate.

For each choice made by the court (between contested versions of facts, or as to policy) a finding of fact or conclusion of law will be suggested by the choice made, thus creating the basis for the decision made, for the benefit of the parties and any reviewing court. Better findings should lead to better appellate reviews – which should in turn, eventually, give rise to a more coherent body of decisional law.

It is worth noting that the various components could lead to awards flowing in opposite directions. For example, suppose that the wealthier party during a short-term relationship would be entitled to reimbursement for costs in establishing that relationship, but the less-wealthy party terminated a career to enter into that marriage and now requires recertification to be self-supporting. Depending on the myriad facts that might be present, it is possible that the two awards could offset, in part or entirely. It is also possible that as a matter of general equitable considerations, the trial court will find it appropriate in the final step to nullify one of the awards otherwise called for. The point to the exercise is that the suggestion of each element, and what the court did with it, and why, would be spelled out in the resulting decision.

A. Steps

1. Property Distribution and Evaluation of Whether the Case is an Alimony Case

Once the property and debts have been ascertained and distributed, the anticipated post-divorce earnings of each party can be projected, and the separate property resources and cash-flows of both parties should be known.[143] The financial resources of each party, and the length of time going forward they can be expected to continue should be noted. This will include projections of the working life of each party, when (if at all) pension or retirement income can be expected, and the proportion of the party's working income that such retirement income is anticipated to produce.

It is here that a preliminary consideration can be made of the distribution made of the community estate. The purpose is not (as the AAML deviation factor inquires) whether "a spouse has received

[143] One reviewer of this proposal has indicated that because the financial information is so important to this analysis, cases in which there is a dispute as to the nature of property (whether valuable assets are separate property or community property, for example), it might be necessary to complete a trial on property issues before an informed trial on alimony would be possible.

a disproportionate share of the marital estate." That "factor" is a bit vague, but seems intended to determine whether a potential alimony award has already been satisfied by other means. Rather, the purpose of inquiring into the property distribution and total resources of the parties, for this analysis, is to inquire whether this is an alimony case at all.

The Nevada Legislature has provided no guidance as to the impact of the size of the marital or separate estate on alimony determinations, and the Nevada Supreme Court has been inconsistent on the point.

As a matter of ***theory***, the Court has directed that "the financial condition of the parties," and "the nature and value of their respective property" be "considered" since the 1974 decision in *Buchanan*.[144] Similar directives were included in *Sprenger*[145] and *Rodriguez*.[146] But the direction to "consider" something is not terribly helpful to a trial court actually trying to figure out an appropriate award – or to counsel trying to negotiate an alimony case.

The case law does not seem particularly helpful, including both justifying denial of alimony based on the spouse's receipt of $91,000,[147] and justifying an expansion and lengthening of alimony despite the spouse's receipt of three quarters of a million dollars.[148]

Experience and logic suggest that, in reality, there is something of an "alimony versus property" bell curve in play, whether or not consciously acknowledged or referenced by the bench and Bar. Specifically, there are relatively few cases where parties have high incomes but no assets; more frequently, there is a correspondence such that those with low incomes have relatively few assets, those with moderate incomes have more, and those with very high incomes have a significant amount of property.

In a low-income, low-asset case, there is plenty of need, but very little ability to pay support. At the other end of the spectrum, there comes a point at which any award of alimony is simply irrelevant to the standard of living of the recipient – in other words, while there is ability, there is no demonstrable need.[149] Usually, alimony comes up in "the middle" – the bulk of cases between the

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[144] *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

[145] *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[146] *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

[147] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[148] *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992).

[149] Someone with a spare million in conservative investments spinning off a 5% rate of return will have a monthly income of some $4,166 per month. While there are those that seem intent to test the limits of credulity with conspicuous consumption, there comes a point where the automatic income from assets exceeds any reasonable definition of "need."

very poor and the very rich, for whom there are some assets to divide, but post-divorce payments from one spouse to the other will have an effect on the quality of life for one party, the other, or both.

The exceptional cases are actually somewhat easier. It seems obvious that if there is high income, but no significant assets, the only way to not cause an immediate and severe disparity in living circumstances is by way of an award of significant alimony. And if there are plentiful assets but no significant income, an alimony award would be irrelevant or unenforceable (except by way of property set-aside).

In the Nevada experience, "the middle" is a large category indeed. In the ten primary Nevada alimony cases decided between 1988 and 2000,[150] the property at issue was either unspecified and presumably unremarkable,[151] to the low tens of thousands per spouse,[152] up to many hundreds of thousands of dollars per spouse.[153] There appears to be no meaningful correlation between the assets distributed, within that range, and the Court's stand on how much, or how long, alimony should be paid.

The decision tree below calls on the trial court to determine whether an action is an "alimony case," looking at present and future predictable capacities of both parties as of the time of divorce, and whether any of the triggers to the various components of alimony stepped through are present to consider in detail.

The fact that one party to a marriage has a significant separate property estate is irrelevant to Nevada community property law. It could be relevant, however, to a judge's view of the equities to be balanced in determining whether and how much of an alimony award should be made.

For example, if the facts showed that a couple consumed the entirety of their community income during a marriage of significant length, based on the belief that separate property assets owned by one of them would provide for their income into old age, a case could be made to protect the expectancy interest of the spouse not on title to those assets in the event of divorce, but that sort of "weird facts" (among many others) does not fit into the traditional categories of alimony rationales.

The law is not well developed, but it would appear that the separate property of one spouse is most readily "set apart" for the support of the other when the sort of facts set out in *Daniel v. Baker* are

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[150] *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Rutar v. Rutar*, 108 Nev. 203, 827 P.2d 829 (1992); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994); *Gardner v. Gardner*, 110 Nev. 1053, 881 P.2d 645 (1994); *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995); *Kerley v. Kerley*, 111 Nev. 462, 893 P.2d 358 (1995); *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000).

[151] *Gardner*, *Alba*, *Wright*, *Rodriguez*.

[152] *Heim*, *Kerley*; *Fondi* (actually, $91,000).

[153] *Rutar*, *Sprenger*, *Shydler*.

present: there is a great disparity in the financial condition of the two parties; the spouse in need has no or little potential for meaningful employment with a sufficient salary for the spouse to reach a decent standard of living; and there is a great age distance between husband and wife. The case becomes even stronger where, as in *Sargeant*, one spouse is likely to violate court orders of regular support, or even destroy assets just to injure the other spouse.

The cases from over a century ago (*e.g.*, *Lake v. Bender*) dealt with situations in which the then-new community property law did not affect the wealthier spouse's accumulation of all property in his name despite long years of work by the other spouse. Oddly, the more widespread modern use of prenuptial agreements and similar contracts may have brought society full circle, returning to a situation in which one of two spouses can accumulate a large separate property estate while the other does not accumulate even a small community property estate, even during a long-term marriage.

Courts are generally loathe to produce a result where one divorced spouse lives a life of relative luxury while the other is relegated to merely surviving on a meager – or non-existent – community property distribution. The existence of a substantial separate property estate on one side of a marriage of significant length is sometimes seen as a justification for an award of separate property from one spouse to the other to prevent such a situation.

It is, however, a standard-less and therefore dangerous power. Under what circumstances is it "fair" – or "unfair" – that one spouse's separate property should be reduced to provide assets to the other, just because the marriage did not create "enough" community property? What about the situation where the parties marry at or after retirement, and necessarily are living off the pre-marital savings of one or both parties?

The availability of separate property set-aside creates a situation where, in the discretion of a judge, the act of marriage could create a hotch-pot effectively making even premarital separate property available for distribution upon divorce. Absent a situation where one party has subsidized the marriage, and essentially seeks compensation, the concepts of no-fault divorce and presumptive equal distribution would seem to militate against a gratuitous transfer of wealth from one party's separate property estate to that of the other.

But the power remains available, and the existence of substantial separate property assets on one side always at least raises the question of whether "regular" or lump-sum alimony should be awarded. Such set-aside alimony fits into the final, residuary element for alimony.

The decision tree for the court at the outset would include:

> Does the court have sufficient information as to the assets, debts, and incomes of the parties to make a reasonable projection of their needs, abilities, and anticipated career paths?
>
> Is this a case in which there are no significant community property or separate property assets or income, and no reasonable likelihood of either existing in the foreseeable future?

Is this a case where the property distributed makes any potential alimony award essentially irrelevant to the future living standards of the parties?

Except in cases in which the court can definitively state that the case is ***not*** an alimony case from a review of basic case facts, the court should step through the detailed analysis for each alimony component and make individual determinations as to each of them.

2. Reimbursement Awards for Money or Property Contribution or Liquidation

It is at this stage that most short-term marriages will focus, with questions such as one party's change in position, loss of property or income to go into a marriage that did not result in a meaningful melding of incomes and interests for any significant period, or contribution of funds to the other for the separate interest of the other, or for a marital purpose for which there has been no return, and for which reimbursement is reasonable.

As a theoretical matter, there are several possible bases for "compensatory alimony." For example, there have been many short-term marriages where one spouse liquidated pre-existing property, automobiles, etc., just to find that the marriage did not work out, and the assets had to be replaced or the spouse has to relocate back to some prior residence. In such a case, a straightforward allocation of the costs incurred to achieve the premarital standard of living, dividing that cost either equally or in proportion to the means of the parties, seems the most logical solution.

For a marriage that fell apart within a year after inception, the question is whether one party can make a reasonable claim on the property or income of the other for restoration of the premarital living standard, due to where the parties will be left economically by the divorce.[154]

The question is whether this is to be paid in lump sum from resources available, or to be paid over time, in either of which cases the amount and time of those payments is brought forward to the following steps as a limitation in available resources of the potential obligor. Irrespective of the form of payment, reimbursement alimony should not normally be terminable upon the remarriage of the recipient, because no consideration of need is even an implicit basis of the right to the reimbursement.

That said, one check should be whether the economic circumstances of the parties is so extreme – say, where the would-be recipient is clearly in a superior position so that payment of such

[154] Here, the units of proof and measurement proposed by ALI § 5.13, "proof of significant expenditure for a marital purpose, that the expenditure is unrecoverable, and [measured] . . . at half the sum expended, or by way of "transitional assistance" giving the obligee "a reasonable chance to recover the lost opportunity," seems appropriate, at least as a starting point, but since both the resources of the parties leaving such a marriage and the sacrifices made by each to get into it might be greatly disproportionate, the trial judge should have discretion to alter how much of the resulting cost should be borne by each party.

reimbursement might cause the ***obligor*** to need general support – that the reimbursement should not be ordered.

The decision tree for this element should include:

> Has one party has subsidized the marriage from separate property, and is equitably entitled to compensation from the other?
>
> Was this a short-term marriage in which one of the parties suffered a disproportionate change in position, loss of property or income, or contributed funds to the separate interest of the other or for a marital purpose for which there has been no return, and for which reimbursement is reasonable?
>
> > Did one party liquidate a disproportionate sum of pre-existing property to enter into the marriage?
> >
> > Did one party suffer a disproportionate expense to enter into the marriage?
> >
> > Do the parties have any divergence in their abilities to re-achieve their pre-marital standards of living?
> >
> > If not equally, in what proportions should the parties bear the additional cost for one of them to regain the premarital standard of living?
> >
> > How should any such reimbursement be paid?

3. Rehabilitative Alimony Evaluation

Next is a forthright review of whether the arguably dependent spouse is a candidate for rehabilitative alimony – whether he or she is capable of enhancing his or her earning potential and independent earnings. Not all former spouses can, or should, attempt "rehabilitation."[155]

The questions to be resolved here are those stated in 125.150(9) or necessarily implied by that statute or any provision relating to rehabilitative alimony:

> Did the obligor obtain job skills or education during the marriage?
>
> Did the recipient provide financial support while the obligor did so?
>
> Is the recipient a candidate for rehabilitation?

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[155] *See Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988).

If so, when will such rehabilitation begin?

How much money will be required, on what schedule, to pay for that rehabilitation?[156]

How long will the rehabilitation last?

At the conclusion of the period of rehabilitation, will the recipient's property award plus post-rehabilitation earnings permit self-support?

The level of self-support that can and should be expected of the lesser-earning spouse informs the rest of the analysis.

4. Alimony Based on a "Career Asset"

The third step would be a straight-forward evaluation of the realization of the "career asset." The term is shorthand for the common scenario in which one career or other primary source of income has been developed by the efforts of both spouses during the marriage.[157] Even when the case concerns an original alimony award (rather than modification of an existing award), courts have reacted negatively to one spouse's early retirement that has the effect of decreasing the expected cash flow from the career to the detriment of the supported spouse.[158]

The tangible products of a "career asset" are spun off over time as "hard" assets – cash that can be saved, invested, or used for the purchase of tangible goods, or income deferred as divisible retirement benefits. Presumably, all of the spun off returns are distributed to the parties in accordance with their interests in it as part of the property distribution, but the remaining intangible

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[156] The statute classifies under this provision funds for testing, evaluation, guidance in establishing a job plan, employer cost of training, assisting in a job search, the cost of tuition, books, and fees for a high school diploma equivalent or college courses "directly applicable" to job goals, or courses of training in skills for employment.

[157] In *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000), the Court supported permanent alimony as a factor for the dependent spouse after a long-term marriage, noting that the husband was walking away with the "career asset" of the Ph.D. degree and high degree of employability, and that the wife was entitled after a long marriage to live as nearly as fairly as possible to the station in life that she enjoyed before the divorce. Similar language was used in *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d (1998), *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), and *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988).

[158] *See Smith v. Smith*, 737 So. 2d 641 (Fla. Dist. Ct. App. 1999) (the court pointed out that even if the parties had agreed to an early retirement, where the circumstances warranted, the court could still impute income to a retiring spouse); *Hill v. Hill*, No. ED76954, 2000 Mo. App. LEXIS 1506 (Mo. Ct. App. Oct. 10, 2000) (where husband voluntarily retired at age 56 before the separation and divorce and sought no other employment, the trial court acted properly when it imputed income to the husband since he was capable of earning a substantial income but chose, instead, to pursue nonremunerative activities, given his education, work experience, work history, and past income levels).

potential for further production is not usually quantified in any overt way, other than whether the worker's business is a "going concern," or a professional remains in practice.

Most of the alimony cases do not seem to analyze either the stage of the career path that the working spouse had achieved as of the moment of divorce, or the arguably "separate" and "community" components of the career asset.[159] Both would appear to be mistakes, and consciously focusing on both the remaining potential of a career asset, and its appropriate allocation, would lead to sharper alimony rulings as to this component.

Typical alimony analyses give no significant weight to the natural talent or primary education of the working spouse (definitionally "separate property" components to any career success), focusing instead on the education, training, and even business experience achieved during marriage to determine whether there is a legitimate spousal interest in the career asset of the employed spouse[160] – but not comparing it to anything else.

As a preliminary matter, then, the arguably "separate" and "community" components of the higher-earning spouse's career should be evaluated. The "separate" pieces are the natural talent, etc., mentioned above, plus of course the actual ***work*** to be done in the future. What remains is the ***marital*** component to the "career asset" of the working spouse in any marriage of significant length – the portion of future income to be realized by one spouse that are derived from the successes, contacts, and efforts contributed by ***either*** spouse during the marriage. That marital component could be analogized to a form of "community goodwill," and is effectively what courts seek to provide to the former spouse when they speak of a "career asset" possessed by the party paying alimony.

To analyze the career asset more formally in an alimony case, the components combining to create income, from natural ability to education to experience, are weighted and attributed as separate or marital contributions to the future income stream. The career asset worksheet contains that weighting and math, as part of the decisonal flowchart.

The second quantifiable part of an alimony award based on a career asset is the reasonable expectation of length of future receipt of funds based on that career. A "career asset" basis of alimony is dynamic, not static, in two ways.

First, it dissipates over time as ability, effort, and education/training are converted into assets, and potential income is transformed into realized income. The career asset declines in value with age

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[159] *See* collected cases in Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Prospective Retirement*, 110 A.L.R. 5th 237 (2003).

[160] In *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), for example, the Nevada Supreme Court listed "the husband's education during the marriage" as a factor to be considered and, finding that he had developed his "business acumen" during that time, directed the lower court to "increase and extend" the alimony awarded.

and reaches zero upon *bona fide* retirement. There are cases which hint at exactly such a reasoning process in the court's mind, even if not stated exactly this way.[161]

For example, a 64-year-old airline pilot has an effective work life of just one year, as a matter of federal regulation.[162] While such a person is not foreclosed from other work, even in the same industry (say, as a flight instructor), it would not be appropriate, no matter the length of the marriage, to create a permanent or long-term alimony award based on a career asset which has been almost completely converted at the time of divorce from potential income to realized income.[163]

It is most straightforward to deal with such realities with presumptions and burdens of going forward. Where the component of alimony is a spouse's interest in the "career asset" being retained by the other spouse, an order establishing alimony could reasonably be couched as terminating or reducing at the date predicted for work to cease (and alimony payable to be adjusted accordingly). The burden should be explicitly placed on one side or the other to file a motion if the career asset did not stop producing income at the time predicted.[164] This could prevent the kind of cases in which modification upon retirement was denied because retirement was "foreseen" or "foreseeable" at the time the original order was made.[165]

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[161] *See*, *e.g.*, *Kuester v. Kuester*, 554 N.W.2d 684 (Wis. Ct. App. 1996). In that case, a husband in his early fifties was involuntarily terminated, sought work for about a year, and then gave up, voluntarily retired and began to withdraw monthly amounts from his IRA. The court ordered alimony based upon his prior income, finding his decision to retire unreasonable given his age, health, work experience, and the job market, and stating that "since Frederick retained a substantial earning capacity at the time of the divorce, the trial court was entitled to impute income to him based on his unreasonable refusal to exercise that potential."

[162] See "Fair Treatment for Experienced Pilots Act" (P.L. 110-135, Dec. 13, 2007).

[163] *See Lambertz v. Lambertz*, 375 N.W.2d 645 (S.D. 1985) (obligor retired from the military shortly before his mandatory retirement date was entitled to downward modification of alimony since the retirement was not voluntary, despite his age of 55); *but see Stubblebine v. Stubblebine*, 473 S.E.2d 72 (1996) (setting alimony in accordance with husband's earning capacity despite his lack of income following retirement from both military and post-military private employment, at the age of 64, taking into account the obligee's needs and ability to provide for those needs, and balancing those against the obligor's ability to provide support, even when he has retired in good faith at a "normal" retirement age).

[164] Indeed, with the benefit of hindsight, courts have pronounced that the drafters of support agreements should provide for such "contingencies" as retirement at the time of drafting. *See Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001). Some courts and commentators have been quite harsh in such comments, stating that "no thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject a client to lengthy future proceedings." *See Deegan v. Deegan*, 603 A.2d 542 (N.J. Super Ct. App. Div. 1992), *quoted in* Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Early Retirement*, 2002 A.L.R. 5th 22, 2002 WL 31414142 at 19.

[165] *See*, *e.g.*, *In re Marriage of Jones*, 389 N.E.2d 338 (Ind. App. 1979) (husband unable to show that eventual retirement was "not reasonably foreseeable when the judgment was entered"); *Jenkins v. Jenkins*, 1993 WL 385346 (Ohio Ct. App. 1993) (same); *McManus v. McManus*, 638 So. 2d 1051 (Fla. Dist. Ct. App. 1994) (reversal of order terminating alimony because retirement was not an "unanticipated" change of circumstances). To some degree, of course, eventual retirement is "foreseeable" in ***every*** case – no one expects to be able to work forever.

Not every career has a clear "no later than" termination, but either within an industry, or for a particular individual, it is not unusual for there to be an expectation of concluding employment at some predictable point. That point could be projected, based on standards in the field, and any factors individual to the case.

The second way that the career asset component is "dynamic" rather than "static" is that in many cases, the spousal interest in future income will be an ever-declining percentage of the future income stream, as new (and separate property) successes, contacts, and efforts become increasingly responsible for future income. This point, however, should not be too heavily weighted.

A useful analogy is the pension cases. In *Fondi*,[166] the Nevada Supreme Court rejected an attack on its earlier holding in *Gemma*,[167] in which the Court had adopted the "time rule" of division of pensions through which the non-employee spouse receives a share of whatever retirement benefits are ultimately received by the worker, despite the reality that the worker's post-divorce efforts are definitionally separate property:

> In Gemma, the employee spouse pointed out an apparent flaw in this "wait and see" approach. Id. at 462, 778 P.2d at 431. Namely, appellant in Gemma complained that the pension ultimately received is often measured using the highest salary earned by the employee, and this salary, in turn, is usually the one earned just before retirement, after the divorce has occurred. Id. Therefore, Mr. Gemma argued that using the pension ultimately received, rather than the hypothetical pension were the employee to retire at the time of divorce, unfairly allowed the community to benefit from post-divorce labor. Id.
>
> We recognized that such an argument may occasionally have merit. Id. at 462-63, 778 P.2d at 431-32. We also noted, however, that in the usual case the early working periods were often "the building blocks to upward mobility and ... increased salary." Id. at 462, 778 P.2d at 431. Because the size of the full pension was therefore based on earlier community labor, we concluded that the community should receive a share of this full benefit, even though such a share may have been based in part upon post-divorce income. Id.
>
> We further recognized in Gemma, however, that occasionally a substantial increase in retirement benefits might be almost completely due to work or achievement after the marriage. Id. As we noted in Gemma, such an extraordinary increase in benefits might occur where the employee spouse attains a significantly higher-paying position while remaining within the coverage of the same pension plan, either through earning a post-divorce degree, or transfer within the company to an unrelated area of service. Id. Such a situation, we reasoned, stood in sharp contrast to the usual one, where the employee's wage increases were simply due to a rise in the cost of living, or a gradual movement up the corporate ladder. Id. at 462, 778 P.2d at 432.

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[166] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[167] *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

Similarly, any continuation of a career path post-divorce is necessarily based on "the building blocks to upward mobility and increased salary" created during marriage. Because, typically, alimony awards are based on earning levels existing at the time of divorce, rather than any expectation of increased income afterwards, it would not be reasonable in most cases to further decrease the derived sum of income payable to the non-employee spouse from the future efforts of the employee spouse.

A divorce decree calling for future reduction or termination of alimony may seem harsh to the obligee, whose needs presumably will not decrease. But property division schemes everywhere increasingly resemble the community property scheme of dividing, usually equally, that which was created during the marriage, and most States (including Nevada) have eliminated "fault" analyses in favor of (allegedly) purely economic criteria for whether and how much alimony should be awarded.

By treating the "career asset" as just one more thing to divide, alimony awarded on that basis can be analyzed almost as readily as property. For this alimony component, any alimony award outliving the income stream thrown off by the career would not be compensatory to the former spouse, but a transfer of wealth from one party's separate property to that of the other. Where the property accrued during the marriage is divided, presumably equally, alimony awards reaching beyond the exhaustion of the career asset can be seen as unfair.

For example, in a post-retirement case, the parties would have already completed the transformation of the career asset into assets and investments – large or small. If those assets and investments are equally divided, ***no*** alimony award would appear proper for the career asset, since the parties would have precisely equal resources for self-support.

On the other hand, changes in the post-divorce marital status of the recipient would ***not*** appear to be a basis for termination of this component of any alimony award.[168] As quoted by Judge Hardy, describing the theory that alimony based on an "economic entitlement theory" should "not be affected by post-marriage economic events":

> If alimony is an entitlement based on gender-neutral principles, it is difficult to explain why a wife must forfeit that entitlement simply because she has begun a new life relationship. Even if she wins the lottery, a dissociated partner need not return her buyout; a creditor need not cancel a debt; a tort victim need not give back her damage award.[169]

In the modern world, pensions are typically divided between spouses to the degree accrued during the marriage. Career-asset-based alimony might be seen, in part, truly as "maintenance" – stopgap payments by the employee spouse to the non-employee spouse to provide the ability to live long enough for the deferred compensation portion of the career asset to enter pay status. Quite neatly,

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[168] *See*, *e.g.*, Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 992 (2006).

[169] *Nevada Alimony* at 334, quoting Starnes, *supra*, at 992.

alimony awarded under this theory will stop just at the point that retirement income begins to be received.

Conceptualized this way, this component of alimony becomes merely a means of preventing too gross of a disparity in the available incomes of the parties until the career asset is completely converted from potential to realized income, and the parties are returned to parity as they each begin to receive their half of the marital portion of that asset by way of retirement benefits.

Anecdotal accounts suggest that this basic approach has been stumbled upon, if not clearly enunciated, in some case decisions; in long-term marriages, the trial court sometimes effectively pools the current income of a working spouse and the retirement income of a spouse who has retired, until both achieve retirement age, at which time each receives his or her time-share rule of all retirement benefits earned during marriage. An order providing for such payments structured that way achieves by design the same result reached in cases where the payor spouse moves for alimony termination upon retirement – without requiring the additional litigation of the modification motion.

The worksheet attempts to derive a spousal share of the career asset, both as to amount and duration.

5. Alimony Based on Compensation For Loss or Waste

In the situation where one spouse has committed waste to such an extent that the community estate is severely depleted, there might not even be sufficient remaining property to make up the loss to the other spouse. Such circumstances would seem most appropriate for an award of a lump sum alimony award that could not be discharged in bankruptcy, or left uncollectible against an estate by reason of competition with other creditors. But Nevada statutory and decisional law have created the opposite approach to such situations.

Nevada switched from an "equitable distribution" to an "equal distribution" state in 1993. Prior to that year, NRS 125.150 required the court to make such disposition of:

> (1) The community property of the parties; and
> (2) Any property placed in joint tenancy by the parties on or after July 1, 1979, as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

After 1993, NRS 125.150(1) provided that in granting a divorce, the court:

> (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court

> finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

The legislature did not define what is meant by a "compelling reason" which would permit an unequal division of community property, and no existing body of statutory or case law provided a reliable precedent. In *Lofgren*,[170] the Nevada Supreme Court identified one "compelling reason" which would justify an unequal division of community property as the financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order.[171]

The next year, in *Putterman*,[172] the Nevada Supreme Court held that both the husband's financial misconduct in the form of his having refused to account to the court concerning earnings and other financial matters, and his lying to the court about his income, provided compelling reasons for an unequal disposition of community property.[173] The Court also noted, in dicta, that other possible "compelling reasons" for an unequal division of community property could include negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup.[174]

Thus, the Nevada Legislature and Supreme Court have jointly, if inadvertently, created a situation where theoretical consistency and precedent collide.[175] Especially in view of the ALI recasting of alimony from a focus on "need" to one of "loss," it makes much more sense to provide compensation to one spouse for any financial mis-deeds of the other by way of a compensatory alimony award, made ***after*** characterization and division of the marital property.

Indeed, it is through the process of property division that any economic loss to a spouse is quantified – it shows up in the case facts as the difference between the property that ***should*** be before the court for division and what is actually presented.

At least as interpreted to date, the statutory changes authorizing disproportionate division of community property upon a finding of "compelling circumstances," while eliminating "the merits of the parties" in deciding alimony, have made the process of economic division upon divorce ***backwards***, so that compensation to a spouse who has suffered loss is an awkward part of the property division analysis – which still has to be done before alimony is awarded.

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[170] *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996).

[171] *Id.*, 112 Nev. at 1283-84.

[172] *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).

[173] *Id.* at 609.

[174] *Id.* at 608.

[175] "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, THE COMMON LAW (1881).

Where the loss of marital property is significant and reimbursement is ordered, in practice this has led to the creation of inter-spousal "debt" of property that does not even exist at the time of divorce. Such a debt for phantom "property" is effectively indistinguishable from alimony.

The Nevada Supreme Court should reconsider its interpretation of the legislative amendments. If ***anything*** should be done without consideration of the "merits" of the parties' actions, it is division of whatever property remains for division that is characterized as community in this no-fault State. ***After*** the property is divided, a trial court can properly assess the compensation one spouse might owe another for "negligent loss or destruction of community property, unauthorized gifts of community property, and even, possibly, compensation for losses occasioned by marriage and its breakup." It is at that point that a court ***should*** consider whether compensatory alimony should be awarded.

This can be done within the existing framework of Nevada law. The trial court would simply quantify the scope of damages during the property evaluation, and actually ***award*** any compensation owing as alimony.

Normally, this category of alimony should not be terminable based upon the remarriage of the recipient, for the same reasons discussed in the preceding section. The orders for compensation for such loss and waste are carried forward on the flowchart, using as resources what came from the preceding steps, and further altering what remains, and for how long, for all following steps.

6. Alimony Based on Loss of Earning Capacity

The decision tree steps through the analysis and factors discussed at great length in the ALI *Principles* and other works. Instead of imposing a conclusion and then asking the court to determine to apply it or not, however, this step causes a judge to explicitly ask the questions used in several formulas as "considerations" or "deviation factors" for ***not*** applying a formula, and asks the judge to apportion responsibility for the decision made and calculate the loss suffered, if any.

There is no limit to the size of the award that can be made under this component, other than the limits imposed by the capacity of the obligor to satisfy it, in terms of both amount and duration. Those limitations were, implicitly, accepted by the parties when they made the decision for such care to be provided, whether the marriage remained intact or not.

It is submitted that the transactional cost objection set out in the *Principles*[176] is best dealt with by construction of a presumption of damage, which the data supports, but that judges should be trusted with the task of inserting numbers into the presumption in accordance with evidence – including otherwise-unsupported testimony – submitted in the case. There is less risk of error from that process than there is danger of illegitimacy by inserting into the formula an irrelevant measurement.

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[176] *Principles* at 932-35.

This component must explicitly consider the factor of time, in several ways. First, the length of time that the care was provided informs, but does not control, the analysis of income loss.[177] It is easy to project situations where care was provided by a recipient during a critical time – personal to the recipient, or in the larger world – such that unique or valuable opportunities that would probably have led to increases in income-earning potential were irretrievably forgone.

Time also is relevant to how long such an award should run post-divorce. The career and life paths of both the recipient and the obligor do not go on forever, and the ramifications of the choice they made, presumably together, to sacrifice the recipient's income-earning potential only run from the divorce until either the obligor's ability to compensate for the loss ends, the recipient's forgone career path would have ended, or the recipient is able to recover the lost potential.

Accordingly, the decision-tree for the judge should include the following steps:

> Has the recipient provided care for the parties' children, the obligor's children, or any third party that the parties explicitly or implicitly agreed required care to the detriment of the career path that the recipient would otherwise have followed?
>
> If so:
>
> > For how long was such care provided?
> >
> > Based on the evidence presented, has it been established by clear and convincing evidence that the recipient did not suffer a loss of future earning capacity by reason of providing such care?
> >
> > Based on the evidence presented, has it been established by clear and convincing evidence that any such loss of future earning capacity is temporary, and can be recovered by the recipient?
> >
> > > If so, how long will that take?
> >
> > What is the current monthly earning-capacity of the recipient?
> >
> > What would the current monthly earning-capacity of the recipient have been in the absence of the care provided?
> >
> > For how many years is such loss of future income likely to continue?

[177] This is another divergence from the ALI formulation, which would measure compensation by the amount of time spent by the recipient in the care of others.

In the circumstances of this case, is the responsibility for making the decision to suffer the loss of future income any greater or less than 50%?

This category of alimony normally ***would*** be terminable upon the remarriage of the recipient, because it is a species of the traditional "need-based" rationale that implies that a new marital union may reduce both the need of the recipient, and the moral duty of the obligor to continue providing support, but of course a judge retains the existing discretion to alter that result if appropriate.

7. Alimony Based on Divergence in Future Living Standards

It is at this stage – taking into account what capacity exists for such an award and for how long into the future it is reasonable to consider it based on the life-cycle of the parties – that the court determines the kind of general alimony that has so completely occupied most other proposals for guideline alimony.

The decision-tree for this component calls on the court to evaluate the marital standard of living upon divorce, in relation to the length of the marriage and whether it has been increasing, decreasing, or remaining relatively constant.[178] Then, whether the evidence submitted indicates that there would be (now of in the foreseeable future) a discernable divergence in the standard of living of the parties, and if so how much and for how long.[179] Finally, whether any "disqualifying facts" prevent this calculation from being run, and if not, the calculation is performed.

The hope is that the focus on process, and placement of this component after reimbursement and rehabilitative alimony components, will make variations between courts within a jurisdiction, and even between jurisdictions, less significant, and perhaps over time lead to increasing consensus on the appropriate methodology, test, or calculation for performing it.

If the other steps in this analysis are performed, variations in how ***this*** step is conducted will be illuminated, rather than hidden in the fog of other considerations, and it should be possible to actually analyze whether the awards being made are appropriate in length and amount by comparing outcomes in similar cases. This may provide information sufficient address the kind of despair

[178] Again, this informs, but does not control, the judcial decisions to be made. Perhaps if the legislature, or appellate courts, further define the standard of living relevant to be considered – subsistence, average in this marriage, peak, or current – this step of this analysis could be modified to suit the policy choice. For now, having the judge explicitly consider the history is all that can apparently be accomplished.

[179] The impact of any rehabilitative alimony on projected future earning capacity is, of course, relevant. In some cases, a reservation of jurisdiction to determine the impact of any rehabilitative award on future earning capacity might be appropriate.

exhibited by commentators unable to focus on a data set sufficiently to hazard a guess as to whether the test should be loosened or tightened to make the resulting awards larger or smaller.[180]

Most of the various tests developed by the agencies, commissions, and committees discussed above largely fit into this component step, and would provide relatively similar outcomes – and there are several more that, in application, would provide largely the same calculation.[181]

Accordingly, the proclamation of the AAML Commission is accepted at face value: its presumptive formula "yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions."[182] So its test is inserted here, with the alteration only of where and how it is used.

First, the test is only applied at all if the capacities of the parties, rolled forward from the prior steps, show that there is an apparent "need" and "ability" (both terms being observations, rather than judgments, based on whether there is a remaining income differential between them likely to exist for at least 5 years into the future as shown on the worksheets).

Next, there are no "deviation factors." Rather, the considerations set out in the AAML list have been included in the prior steps, and in the logic tree that a judge should go through to determine whether to run the analysis ***at all***. If not, the analysis calls for the statement of a reason that should translate easily into a finding of fact permitting transparency (and easy appellate review). If so, the step is applied, giving rise to an award that would appear to satisfy Professor Oldham's request for application of "the current norms being applied." The outcomes of applying those norms can then be evaluated, as the cases appear, for the policy decision of whether those outcomes are appropriate, or not.

Accordingly, if this step is reached, the court should bring forward from the prior steps the obligor's remaining gross income, the recipient's gross income, and should note the time period that the income levels disclosed are expected to remain.

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[180] *Re-thinking Alimony* at 63, citing Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14, 18 (Spring 2003) ("recognizing" that there are "too many types of marriages with too many different possible fact situations to permit creation of reasonable guidelines"); *see gen'ly* J. Thomas Oldham, *Changes in the Economic Consequences of Divorces*, 1958-2008, 21 J. AM. ACAD. MATRIM. LAW. 419 (2008).

[181] *See*, *e.g.*, 2008 "Spousal Support Advisory Guidelines" for Canada, posted at http://www.justice.gc.ca/eng/retired pay-pr/fl-lf/spousal-epoux/spag/index.html (last visited Oct. 13, 2013); full explanatory materials, history, explanations, etc., are posted at http://library.law.utoronto.ca/spousal-support-advisory-guidelines.

[182] *See Re-thinking Alimony* at 78. Prof. Kisthardt went on to explain the testing done: "To test whether the formula would yield results similar to those applying other guidelines a common hypothetical was used and support amounts were calculated using the proposed AAML Considerations and seven other guidelines currently in use or proposed. The result was that the amounts arrived at using the AAML Considerations were well within the norm."

The decision tree asks the court to make the following decisions:

Is the marital standard of living at the time of divorce consistent with the marital standard of living prior to breakdown of the marriage?

If not, does the evidence indicate that it is appropriate to use some standard of living other than that present at the moment of divorce, and why?

On the basis of the prior findings and rulings, is there a discernable divergence in the future standard of living each of the parties might reasonably be expected to have?

If so, what is the extent of the divergence?

How long can that divergence be expected to remain so?

Has there been an award of rehabilitative alimony that is expected to impact projected future earning capacity?

If so, how much and when?

Is a reservation of jurisdiction appropriate to determine the impact of any rehabilitative award on future earning capacity?

Even if there is such a divergence, does the combined gross income of the parties exceed $1,000,000 a year?

If the calculation is performed, would the calculation result in the recipient having a total income of 40% or more of the combined gross income of the parties?

The calculation to be performed:

The payor's gross income is multiplied by .3.

The recipient's gross income is multiplied by .2.

The second number is subtracted from the first number.

To determine duration, the length of the marriage is multiplied by:

0-3 years: (.3)
3-10 years: (.5)
10-20 years: (.75)
over 20 years: permanent alimony.

Note that the AAML formula was transported in its entirety into this step, based on the assertion that the formula specifics match up closely with other guidelines; there are those with significantly different views of the brackets that should be used.[183]

8. "Just 'cuz" Alimony – or Its Denial

While the analysis set out above makes a start (hopefully) toward a reproducible series of steps that can be applied from case to case when alimony is arguably at issue, it is only a first step in trying to develop a "rational set of parameters which can be universally applied." There are an infinite variety of scenarios that could be proposed which would not yield just and equitable results based solely on the steps of that analysis. And the judiciary is never more resistant and hostile than when it perceives an effort to restrict the range of its discretion.

Accordingly, any alimony analysis probably has to leave some general power to make – or deny – a lump-sum or periodic award on the basis of equitable grounds to be specified and stated by the trier of fact. Most lists of "considerations" or "deviation factors" recognize this reservation, in meaninglessly vague terms such as "unusual needs," or "other circumstances."

Rather than label a category into which a decision could be shoe-horned, it seems the better option to simply identify the plenary power of a trial court to override the presumptive force of a guideline, with the concomitant requirement to explain why the presumptive outcome would result in substantial injustice in the circumstances of the case at hand.

It is in this residual alimony category that "weird facts" fit, such as the hypothetical situation discussed above in which a couple consumed the entirety of their community income during a marriage of significant length, based on the belief or promise that separate property assets owned by one of them would provide for their income into old age. Other "expectancy interests" could be made out by unusual fact patterns.

Any case in which the assets, income, and debts of the parties are highly unusual might give rise to such exceptional equitable over-rides. It is here, for example that the hypothetical case fits where there are large assets (either community or separate property, or both) but no significant income, such that a court considers a set-aside of property in lump sum for the support of the less-wealthy spouse.

It is hoped that having a gantlet of specific bases for alimony to be sequentially examined before reaching this point – even if each is individually rejected, or the resulting calculation is overridden

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[183] One reviewer, for example, believed the AAML formula too easily yields excessive results. The example cited was for a couple marrying at age 18. Upon divorce 10 years later, they would be 28, with an alimony obligation of 7.5 years. If this view is accepted the formula proposed could adjust the tiers to require longer marriages, say by changing "3-10" to "3-15" and increasing all successive tiers by 5 years.

in the discretion of the court – will sharpen the basis of making or denying an alimony award in a specific case in such a way as to facilitate settlement, or at least consistent appellate review. The flippant title of this subsection notwithstanding, there is reason to believe that judges going through a series of concrete steps for making alimony determinations will reach decisions ***more*** – not less – grounded in law, equity, and public policy.

9. Termination, Modification, or Review Directives

A great deal of litigation has been spawned in alimony cases on the question of whether changes in circumstances were "foreseeable" at the time of the original award, such that a court hearing a modification motion should be disposed to entertain it. As set out in some detail above, and elsewhere,[184] courts can eliminate a great deal of unnecessary litigation by focusing on the time elements of any alimony awards made, including considerations of who has the burden of moving to alter orders if the assumed facts underlying the specifics of those orders do not come to pass.

The ALI, in its § 5.07, called for "automatic termination" of certain kinds of alimony award upon the remarriage of the recipient or the death of either party. The analysis above attempts to provide more nuanced suggestions of the duration of awards in consideration of retirement eligibility, and what kinds of awards normally should, or should not, be terminable upon the remarriage of the recipient. Considerations of termination at death bring into play tax considerations, and the reasonableness of estate liability, both of which are beyond the scope of this article.

Courts making alimony awards should strive wherever possible to specify any events that would, or would not, call for those awards to be terminated, or reviewed, and if relevant which party has the burden of bringing the matter back before the court.

B. Worksheets & Instructions

The worksheets at the core of this proposal are an initial proposal, and definitionally a work in progress. If specific additional decisions are necessary to permit meaningful judicial evaluation of the alimony components they address, those decisions should be inserted into the worksheets (and reported back so the process can be improved).

Some steps are merely mechanical or arithmetic, but each decision called for is intended to provide the basis for at least part of a finding of fact or a conclusion of law on the issue of alimony, so completion of and reference to the worksheets would permit a court to essentially write a decision as to alimony simply by reciting the decisions made.

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[184] David S. Dolowitz, *Alimony Options in a Postretirement World: Is Modification Predictable?*, 34 FAM. ADVOCATE 20 (Winter 2012); Marshal S. Willick, *Alimony at Twilight: Spousal Support When a Party is at or Near Retirement Age* (Legal Education Institute, Aspen, Colorado, 2006).

VI. COMMENTARIES, CAVEATS, AND INVITATION

The struggle between theory and practice is particularly striking as to alimony guidelines, as illustrated by the two efforts most closely examined above before suggesting the flowchart approach.

The ALI grounded every aspect of its analysis in meticulous reviews of cases (yielding few useful guiding principles) and a staggering amount of commentary. Yet it produced a work product not actually usable, by anyone, as presented, and (at least to date) no one in a position to actually do anything to put the proposed system in place has shown much interest in doing so.

On the other side is the AAML effort, which on its face was more concerned with ease of understanding and use than with fulfilling any particular policy goal. Those creating it did not attempt to justify why the factors they referenced might be appropriate, they merely mirrored the existing law present in most places. But as the dozens of commentators have found and recited, the "law present in most places" does not make much sense, internally or from jurisdiction to jurisdiction. Of ***course*** an exhaustive review of state statutes and case law revealed that "the most consistent factors" were income and length of marriage, but that reality spawned the chaos that has caused scholars to suggest guidelines in the first place.

It is hoped that this analysis finds a line between endless indulgence of theoretical considerations, and not caring about them at all, by retaining a view of the goal to be accomplished while focusing on ***process***, seeking to create a bottom-up methodology rather than imposing a top-down formula.

If there is any judicial appetite to use this methodology in resolving actual cases, it is believed that it will pass muster upon appellate review; each of the statutory "considerations" are incorporated in the flowchart steps and worksheets, and the flowchart is an aid to application of judicial discretion, not a means of evading it.[185]

As illustrated by the failure of the Nevada Bar and judiciary to do any meaningful "double-blinding" of the output of the Tonopah Formula, it is extremely difficult to create a process of testing application of any formula that provides meaningful data about how it affects judicial decision-making. No superior means of testing the methodological suggestions made here seem apparent. However, since the point of the guidelines suggested here is the conscious, deliberate, and transparent application of judicial decision-making, it is hoped that if cases are decided as suggested here, the case decisions themselves will provide an opportunity for review and improvement of the process suggested.

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[185] In other words, the guideline proposed here is intended to permit an application and explanation of judicial discretion, as approved in *Boemio v. Boemio*, 994 A.2d 911 (Md. 2010), rather than an abrogation of judicial responsibility in decision-making, as criticized in *Myland v. Myland*, 804 N.W.2d 124 (Mich. Ct. App. 2010).

VII. CONCLUSIONS

The lack of a theoretical framework has plagued all efforts to achieve predictability and consistency in alimony cases since it is hard to formalize a process when it is uncertain exactly what it is intended to achieve or the meaning of the terms used in doing so.

The ALI *Principles* are an impressive work, but no State so far has seemed willing to adopt the loss-for-need swap and do the work required to make the necessary "value judgments" and implement the proposal as envisioned. Most other formulas have been focused on simplicity, but boiling them down to a simple mechanical application of a couple of case facts also cooks off the flavors of alimony that are supposed to be reflected in the end product. This gives such formulas an impression of arbitrariness, as well as requiring resort to a multitude of "considerations" or "factors" of varying degrees of objective and subjective verifiability that are not really helpful to counsel seeking to predict the outcome of litigation.

This proposal attempts to resolve those concerns by providing a flowchart process of alimony that elevates the choices of the court into reproducible steps. Once capacity and need are determined, the applicability of each type of alimony reflected in the modern decisional law is considered in sequence, as to both amount and duration.

The order of the steps is subtractive from the resources of time and money available, giving highest priority to restitutional concepts, then to rehabilitative ones, and reaching general alimony only where there is remaining capacity to provide it. If an award should go on for ten years, but the obligor only has an estimated working life of five years, that conflict should be reconciled in the original award, not left for later enforcement or modification motions. Similarly, if the various factors indicate that a larger award should be made than is possible from the funds available, the court should at the outset determine how to reconcile the competing equities.

At every stage, the element of time is explicitly considered for when any awards should start, stop, or be re-evaluated. Judicial discretion is focused on the individual bases on which awards might be made, but is preserved both within the components and in making overall awards (or refusing to do so), in such a way that findings and conclusions should be explicitly stated. This is intended to make the awards made both seem and be less arbitrary, and to assist appellate review.

The above multi-step process – or one building on and improving it – would create the "objective standard" the Nevada Supreme Court called for in *Wright*, to the advantage of litigants on both sides of possible alimony cases.

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VIII. APPENDIX 1 – NEVADA CASE LAW

This discussion is not intended to be a comprehensive analysis of every alimony case ever decided by the Nevada Supreme Court. Those seeking such a work are referred to Judge Hardy's comprehensive article.[186] Rather this overview is intended to illustrate the roots of Nevada's treatment of alimony, and the current state of the decisional law.

A line of cases starting in the Nineteenth Century (long predating the Nevada Revised Statutes) held that the power of a divorce court to award the separate property of one spouse to the other was limited to the amount "necessary and proper" for the support of the wife or children, but explicitly included whatever level of "necessities and luxuries" the court determined was proper.[187] The court's power extends to, but does not require, an actual change in title to real or personal property.[188] It includes the power to order liquidation of assets in order to provide income necessary for support,[189] or to terminate one spouse's partial ownership interest in jointly-titled property so as to set aside the entirety of the property to the other spouse as a matter of support.[190]

All of these set-aside cases, and even the early "regular" alimony cases discussed immediately below, had a rather paternalistic tone. Both that tone, and the reasoning behind it, were understandable in the era before 1975, when the husband had sole management and control of community property, and the spouses necessarily had unequal powers and bargaining positions.

In *Rosenbaum v. Rosenbaum*,[191] the Court directed that in setting an appropriate level of alimony, a trial court is allowed but not required to consider what a husband could in good faith earn if he so desired. Evidence of "earning power" is proper, and the key to the trial court's use of the information is its determination of good faith. If the payor:

> intentionally holds a job below his reasonable level of skill or purposefully earns less than his reasonable capabilities permit, the court should take that into consideration in fixing the amount of alimony or child support. On the other hand, if a husband or father, through circumstances beyond his control, cannot in good faith obtain a job commensurate with his

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

[187] *Lake v. Bender*, 18 Nev. 361, 4 P. 711, 7 P. 74 (1884).

[188] *Powell v. Campbell*, 20 Nev. 232, 20 P. 156 (1888); *Greinstein v. Greinstein*, 44 Nev. 174, 191 P. 1082 (1920).

[189] *Lewis v. Lewis*, 71 Nev. 301, 289 P.2d 414 (1955).

[190] *Jacobs v. Jacobs*, 83 Nev. 73, 422 P.2d 1005 (1967).

[191] 86 Nev. 550, 471 P.2d 254 (1970).

skills or by the exercise of ordinary industry of a person commanding those skills earn more money, the award should be in keeping with his ability to pay.[192]

In 1972, the Court returned to the subject of lump-sum alimony, affirming in *Sargeant v. Sargeant*[193] a lump sum award of over $331,000 where the husband's net worth was three million dollars, the husband was twenty years older and had a much shorter life expectancy than the wife, and a possibility existed that husband might dissolve his assets in recrimination against the wife.[194]

In *Buchanan v. Buchanan*,[195] the Court laid out a series of "factors" that courts should consider when deciding whether or not to make an alimony award, including the financial condition of the parties, the nature and value of their respective property, the contribution of each to any property held by them as tenants by the entirety, the duration of the marriage, the husband's income, earning capacity, age, health, and ability to labor, and the wife's income, age, health, station, and ability to earn a living.

The "*Buchanan* factors" thus became the first analytical test for determining the appropriateness of alimony. It gave trial courts a "check the box" list of ostensibly-objective things to explicitly discover or determine before doing what courts had always done – taking their best guess as to what alimony award was appropriate. From time to time after *Buchanan*, the Nevada Supreme Court indicated that the failure of a district court to "adequately consider" those factors would be reversible error meriting remand for reconsideration.[196]

Matters were often expressed differently when "lump-sum" alimony was at issue. In what seems like linguistic slight-of-hand, the Court held in 1977 that the "nature and purpose" of an award of lump sum alimony remains the same, whether it is payable immediately in full, or periodically in installments.[197] In other words, lump-sum alimony need not be paid in "lump sum" – whether it is ordered paid immediately in full or periodically in installments, it is not subject to automatic termination upon death or remarriage, since the purpose of such an award is to "fully and finally fix the rights and obligations of the parties with respect to future support."[198]

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[192] 86 Nev. at 554, 471 P.2d at 256-57.

[193] *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972).

[194] *Id*., 88 Nev. at 228-29, 495 P.2d at 621-22. The Court noted that it had previously approved lump sum alimony awards in *Fenkell v. Fenkell*, 86 Nev. 397, 469 P.2d 701 (1970); *Winn v. Winn*, 86 Nev. 18, 467 P.2d 601 (1970); and *Shane v. Shane*, 84 Nev. 20, 435 P.2d 753 (1968).

[195] 90 Nev. 209, 215, 523 P.2d 1, 5 (1974).

[196] *See Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983).

[197] *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977).

[198] 93 Nev. at 223.

In *Johnson v. Steel, Inc.*,[199] the Court characterized the trial court's two year alimony award as one of "rehabilitative alimony," which it then found unjust under the guidelines established in *Buchanan*, given the wife's prior education, lack of work experience, and the absence of evidence to suggest that she actually would be able to earn enough to meet her expenses after only two years of training.[200] Questioning the wisdom of awarding "rehabilitative alimony" in cases involving "lengthy marriages" and children raised by a spouse who may never be able to acquire an earning capacity commensurate with the marital standard of living, the Court found an "inherent injustice" in denying a wife "reasonable alimony" where she has been a full-time homemaker and caretaker of the children with her husband's agreement and to the parties' mutual benefit.[201] The Court reversed the alimony award and remanded for reconsideration.

In *Heim v. Heim*,[202] the Court seemed to indicate a desire to go beyond a "check-the-box" approach. It reversed an award of $500 per month to a 57-year old wife who was unemployed and who had stayed home during the 35-year marriage to raise the parties' six children, while the husband had acquired a Ph.D. and was earning $60,000 per year at the time of divorce. The Court held that in deciding matters concerning alimony, the judge must "form a judgment as to what is equitable and just, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce."[203] Further, the Court ruled that the "*Buchanan* guidelines" were "simply an inexhaustive list of . . . common sense considerations," rather than a specific analysis for lower courts to follow.[204] Finally, the Court emphasized that an award of alimony must be "fair."[205]

In *Ford v. Ford*,[206] the trial court had initially awarded the wife $2,500 per month for six years as rehabilitative alimony, but later rescinded that order when the wife sold some stock awarded to her for more than it was presumed worth at the divorce trial. The Nevada Supreme Court reversed, citing the lower court's failure to consider the tax implications of the wife's liquidation of the stock, and again relying upon the "inexhaustive list of factors" in *Buchanan*.

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[199] *Johnson v. Steel, Inc.*, 94 Nev. 483, 581 P.2d 860 (1978).

[200] 94 Nev. at 489-90, 581 P.2d at 864.

[201] 94 Nev. at 487-89, 581 P.2d at 862-64.

[202] 104 Nev. 605, 763 P.2d 678 (1988).

[203] 104 Nev. at 609, 763 P.2d at 680.

[204] The irony, of course, is that the Court's "inexhaustive list of . . . common sense considerations" now ***is*** the statutorily-mandated "analysis for lower courts to follow."

[205] 104 Nev. at 610.

[206] 105 Nev. 672, 782 P.2d 1304 (1989).

In 1990, however, in *Fondi v. Fondi*,[207] the Court affirmed a trial court order awarding ***no*** alimony at all after a 17-year marriage of a legal secretary to a judge, despite the large disparity in their incomes, finding that the wife had "marketable skills" and was working at the time of divorce, and that the wife had not been "required" to stay home from work to care for her stepson (although she had, apparently, done so at least part of the time). The Court emphasized that the wife received some $91,000 in property, plus a share of the husband's future pension.

The Court took the opportunity in *Fondi* to discuss the meaning and importance of the then-new "rehabilitative alimony" provisions, finding that they were passed as a response to the growing number of unskilled spouses who were forced into poverty as the result of a divorce. The Court found that the rehabilitative alimony provisions were "created . . . as a way of allowing these spouses to obtain some sort of job skill, especially in situations where community funds and labor have been used to educate and train the other spouse."[208] But in the case at hand, the Court saw no problem with the result reached, since the lower court "considered" the possibility of job training for the wife before rejecting it, reasoning that since the wife had some "marketable skills" as a legal secretary, she was "not within the class of unskilled workers that this statute was designed to benefit."

Also in 1990, the Court revisited the subject of lump-sum alimony. Relying on its 1972 holding in *Sargeant*, the Court clarified in *Daniel v. Baker*[209] that the general rule of abatement of alimony claims upon death of the obligor[210] does not apply where a right to lump sum alimony is in question. The trial court had denied lump-sum alimony, but on appeal, the Court noted that the husband was 20 years older than his 60-year old wife and in poor health, and the wife had few assets and no hope of employment, so that such an award of alimony ***would*** have been just and equitable. The Court found an abuse of discretion in the lower court's failure to award permanent or lump-sum alimony. It held that the claim for lump-sum alimony did not abate even upon the death of the husband, and that a "permanent alimony" award would not abate if the court had "otherwise ordered" so that the claim survived death, and remanded.

After another two years, the Court issued a decision in *Rutar v. Rutar*,[211] in which the parties had been married for 18 years. The Court reversed a 3½ year rehabilitative support award, indicating that support should continue for 8 years because the wife had not worked at all for the prior 12 years,

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[207] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[208] 106 Nev. at 863, n.5, referencing Minutes of the Assembly Committee of Judiciary, 65th Sess. at 4-5 (May 22, 1989).

[209] *Daniel v. Baker*, 106 Nev. 412, 794 P.2d 345 (1990).

[210] *See Foy v. Estate of Smith*, 58 Nev. 371, 81 P.2d 1065 (1938) (a motion to increase alimony becomes moot if the requesting spouse dies during the pendency of the motion, or an appeal related to the motion, because alimony is a personal right and not an assignable property right); *Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949).

[211] 108 Nev. 203, 827 P.2d 829 (1992).

spoke little English, and sought re-education. The Court directed the lower court to retain jurisdiction to further modify the award as circumstances changed.

Notable here was the minimal regard given to the approximate one and a half million dollars in property split by the parties, despite the statement in *Buchanan* that property allocations should be considered in alimony determinations, and the emphasis in *Fondi* of a far smaller payout to the spouse as a basis for a zero-alimony award. Inexplicably, given the posture of the case on appeal, the Court ignored the rehabilitative alimony statute it had found so important less than two years earlier, and instead referenced the list of factors in *Buchanan*.

In *Fick v. Fick*,[212] the Court was primarily concerned with the appropriate weight to give a premarital agreement. Along the way, however, the Court held that under NRS 125.150(9), the trial court erred in making an award of rehabilitative alimony but not establishing the period by which the wife was required to commence her re-training.

In 1994, the Court decided several alimony cases. In the first, *Sprenger v. Sprenger*,[213] the Court reversed the district court's two-year rehabilitative support award to a 44-year old wife after a marriage of 21 years, in which she had stayed home to raise two children, despite a prior career as a practical nurse. The husband earned about $100,000 per year, and the Court found that he had developed his "business acumen" during the marriage.

The Court, remanding, directed the lower court to "increase and extend" the alimony award so that the wife, who had not worked outside the home in decades, would enjoy, "as nearly as possible," the "station in life" she had prior to the divorce until she remarried, died, or her financial circumstances changed.[214] The Court listed seven factors that should be considered by the trial courts in deciding whether and how much alimony to award as: (1) the wife's career prior to the marriage; (2) the length of the marriage; (3) the husband's education during the marriage; (4) the wife's marketability; (5) the wife's ability to support herself; (6) whether the wife stayed home with the children; and (7) the wife's award, besides child support and alimony.

Almost immediately after *Sprenger*, however, the Court issued a decision in *Gardner v. Gardner*,[215] which did not go through that analysis at all, but also reversed a two-year award of rehabilitative alimony. The parties in that case had been married 27 years, the husband made about $75,000 per

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[212] 109 Nev. 458, 851 P.2d 445 (1993).

[213] 110 Nev. 855, 878 P.2d 284 (1994).

[214] In so holding, the Court echoed prior case law extending back more than a hundred years. On rehearing in *Lake v. Bender*, 18 Nev. 361, 4 P. 711, 7 P. 74 (1884), the Court held that the wife "is entitled, at least, to be as well supported during the remainder of her life, as she ought to have been, and was, prior to her application for divorce." 18 Nev. at 410.

[215] 110 Nev. 1053, 881 P.2d 645 (1994).

year, and had developed his career during the marriage. The wife had been a career teacher throughout the marriage, and was making about $43,000 at the time of divorce.

The Court majority extended the award made below by an additional ten years to make the award "fair and just," and remanded with directions that an amended judgment be entered. The court also directed the lower court to retain jurisdiction "to review this modified award in the event of a substantial change of circumstances that would suggest the need for additional relief to either party."

As in *Fick* – but not *Sprenger* – the Court in *Gardner* made a point of distinguishing alimony granted under the "general" statutory alimony provisions from that awarded under the "rehabilitative" provisions. Concluding that the wife would not be able to improve her position with further education, and that the proposed rehabilitative alimony award would not accomplish its goals, the Court simply dismissed the idea of "rehabilitation," and entered the award as stated above on the basis of the general alimony factors used for evaluating what would be "fair and just under the circumstances." But it did not consider why the career teacher in the case at hand should be considered so differently than had the career legal secretary in *Fondi* as to the "class of person" the statutes were designed to assist, such that one was inside of that "class," and the other was outside of it.

Also in 1994, the Court issued a decision in *Waltz v. Waltz*,[216] in which it held that NRS 125.150(5), which requires termination of alimony payments in the event of the death of either party or remarriage of the payee, did not apply to an award of "permanent alimony" as that term had been used in the parties' divorce decree, because in that case, the "alimony" award ***had*** been intended to substitute for a property award that was not made.[217]

In *Alba v. Alba*,[218] the Court affirmed a lower court award of $1,000 per month as rehabilitative alimony for three years to permit the wife to obtain education in the field of graphic arts, following a marriage of seven years, where the husband worked as a general contractor, the wife was a blackjack dealer, and they apparently had no children. The Court based its decision, in part, on the approval of the lower court's finding that the husband had a much higher earning potential than did the wife, "justifying" an award of rehabilitative alimony pursuant to NRS 125.150(8).

In *Kerley v. Kerley*,[219] the lower court had ordered $250 per month in rehabilitative alimony for two years. The parties had been married for eight years when the husband filed for divorce, and nearly

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[216] 110 Nev. 605, 877 P.2d 501 (1994).

[217] Specifically, a share of military retirement benefits, where the marriage had been just a bit short of the ten years required for direct payment by the military pay center of a portion of the military retirement benefits as the wife's sole and separate property. *See* 10 U.S.C. § 1408(d)(2).

[218] 111 Nev. 426, 892 P.2d 574 (1995).

[219] 111 Nev. 462, 893 P.2d 358 (1995).

three more years passed before the *Decree* was issued. The wife had not worked during most of the marriage, at the husband's request, but had the capability to work for her own support, and the husband in this case, too, was a contractor.

The Supreme Court affirmed, finding that the husband "failed to present sufficient evidence to demonstrate that the district court's judgment was anything other than 'equitable and just' or that it failed to consider the requirements of NRS 125.150." Oddly, the Court's affirmance did not reference the rehabilitative alimony provisions, disregarding the label assigned by the district court, and treating the "rehabilitative" award as general temporary alimony rather than under the restrictions of the rehabilitative alimony provisions, none of which were mentioned.

In 1998, the Court issued several opinions dealing with the purpose and mechanics of alimony awards. In *Shydler v. Shydler*,[220] it reversed a trial court's denial of alimony after a 17-year marriage, reiterating the seven factors set out in *Sprenger*, and reversing with instructions to the lower court to determine a "fair award" to the wife, who could never earn what her husband was making. The Court held that "two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-divorce earning capacities of the parties . . . and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life [] enjoyed before the divorce."[221]

Coming as close as ever to a definition, the Court in *Shydler* distinguished alimony from awards of community property, defining alimony as "an equitable award serving to meet the post-divorce needs and rights of the former spouse." The definition was essentially circular, however, because the Court stopped short of stating that courts actually had any duty to satisfy those "needs and rights," or precisely what facts would trigger the requirement to determine such an "equitable award." Even as to what should be ***considered***, the Court was both vague and contradictory, stating simultaneously that property equalization payments "do not serve" as a substitute for alimony, ***and*** that the amount of community property divided "may be considered" in setting alimony. Again ignoring the rehabilitative alimony statutory provisions and their requirements, the Court held that there should be an award of spousal support "at least for a period of rehabilitation."

In *Wright v. Osburn*,[222] the Court reversed as an abuse of discretion a five-year rehabilitative award to a stay-at-home mother after a 14-year marriage, during which the wife did not work outside the home. The Court remanded without specific instructions, but indicated that the award should have been higher, for a longer period, or both. Again referring the court below to the factors set out in *Sprenger*, the Court observed that "it appears very unlikely that in five years, [wife] will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of [husband]."

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[220] 114 Nev. 192, 954 P.2d 37 (1998).

[221] *Shydler v. Shydler*, *supra*.

[222] 114 Nev. 1367, 970 P.2d 1071 (1998).

Along the way, the Court criticized the Nevada Legislature for not giving better guidance for alimony cases, saying: "Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support."

In consolidated cases issued under the title *Gilman v. Gilman*,[223] the Court considered requests to modify alimony awards in light of the post-divorce cohabitation of the recipient spouses. Denying that request in one of the cases, the Court found mere cohabitation insufficient to justify terminating spousal support, because such relationships are voluntary and tenuous, that "a recipient spouse may be left largely unprotected, from an economic standpoint, if he or she breaks off a relationship with a cohabitant," and that this was important because part of the reason for spousal support is to keep spouses off the welfare rolls.

In 2000, the Court turned from its repeated references to the list of factors in *Sprenger* – not even mentioning that case in its opinion in *Rodriguez v. Rodriguez*.[224] Instead, the Court reasserted and expanded the 1974 *Buchanan* factors as a list of what was to be considered by courts setting alimony awards: (1) the financial condition of the parties; (2) the nature and value of the parties' respective property; (3) the contribution of each to any property held by them as tenants by the entirety; (4) the duration of the marriage; (5) the husband's income, earning capacity, age, health, and ability to labor; and (6) the wife's age, health, station and ability to earn a living.

Noting the "archaic tenor" of the factors, the Court nonetheless applauded them for being "common sense," and added "examples" of factors that "conceivably could from time to time be relevant as well" as including "the existence of specialized education or training or level of marketable skills attained by each spouse," and "repetitive acts of physical or mental abuse" by one spouse "causing a condition in the injured spouse which generates expense or affects that person's ability to work."

It was at that point that the Court stressed that simple marital misconduct or fault are expressly ***not*** to be alimony factors, so alimony is not "a sword to level the wrongdoer" or "a prize to reward virtue," making the alimony analysis – at least theoretically – strictly an objective, economic analysis.

The Court did not discuss whether the (previously) often-recited *Sprenger* factors should be considered outdated, or whether they continued to stand as an alternative list of factors to consider in alimony cases.

The Court has had little to say about general alimony in the years since *Rodriguez*, leaving the trial courts to resolve cases on the basis of the statutes and cases discussed above.

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[223] 114 Nev. 416, 956 P.2d 761 (1998).

[224] 116 Nev. 993, 13 P.3d 415 (2000).

In 2010 in *Schwartz*,[225] the Court turned again to the question of lump sum alimony, and determined that when a potential alimony obligor is old, rich, and sick, courts must explicitly determine whether lump sum alimony is appropriate, thus adding a step to the legal analysis in every alimony case as to reviewing the health of the obligor.

By requiring a trial court focus on the practical likelihood of payment of an alimony award, the case was a positive, if small, step in the creation of a law of alimony that serves the goals of predictability, adequacy, and consistency.

[225] *Schwartz v. Schwartz*, 126 Nev. ___, 225 P.3d 1273 (2010).

IX. APPENDIX 2 – LEGISLATIVE ALIMONY "REFORM" INITIATIVES

Massachusetts (2012): Ch. 208 General Laws of Mass. § 34 was modified by H3617. The revision eliminated permanent alimony in all marriages of less than 20 years, established alimony durational limits of "not longer" than 50-80% of the marriage, required termination on recipient cohabitation, automatic termination upon the retirement of the obligor, time limits on rehabilitative alimony, capped the amount of alimony at 30-35% of the difference in the parties' gross incomes (from which is excluded capital gains, and interest and dividend income) and established a formula for phasing out all support payments.

Florida (2013): HB 231 would have eliminated permanent alimony, permitted reconsideration of all prior permanent alimony orders, automatically reduced alimony upon retirement of the obligor, and established a schedule mandating no alimony in marriages of less than 10 years, no alimony payments of more than half the length of a marriage, and limiting how much could be awarded where it was permitted. The bill was vetoed just before effectiveness.

California: Family Code 4320 sets out the factors a California court must consider when making a "permanent" (i.e. post-judgment") spousal support order. While the length of the marriage is a factor, support orders must be based on the needs of the supported spouse with reference to maintaining the marital standard of living, balanced against the ability of the payor spouse to pay. The goal of such spousal support is to assist the supported spouse in becoming self-supporting, so no support may be ordered, even after a long term marriage, if each spouse has the present and future wherewithal for self-support. But, on the flip side, it is improper for the family court to terminate support jurisdiction after dissolution of a long term (more than 10 year) marriage based on speculation about the amount of time it will take for the supported spouse to become financially self-sufficient.

Colorado: C.R.S. 14-10-114, effective January 1, 2014, implements "guidelines" that are explicitly non-presumptive for spousal maintenance (alimony), of 40% of the higher income less 50% of the lower income, and duration depending on the length of the marriage on a sliding scale that caps duration at half the length of the marriage for marriages of less than 20 years. A finding of need is required for an order of maintenance.

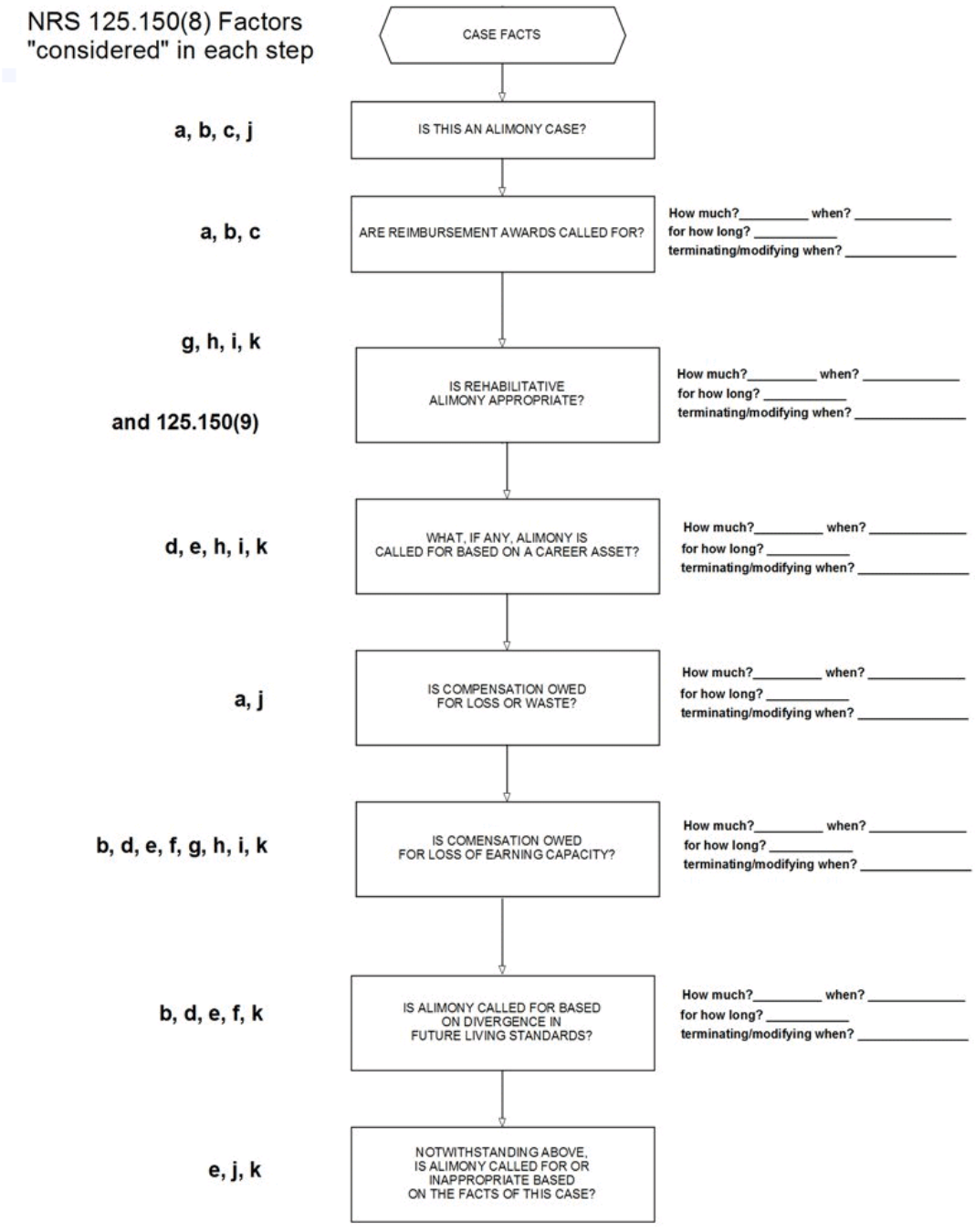
New Jersey: H-A-3909, proposing amendment to N.J.S.2A:34-23 and N/J.S.2A:34-25, permitting imputed income to an alimony recipient, defining need as a percentage of the difference between the parties' income capacities, providing for termination of awards upon cohabitation, restricting the length of rehabilitative alimony, limiting the term of payments to a percentage of the length of the marriage, providing for termination of awards upon the retirement of the obligor, etc.

Lots of bills in lots of States have been reported from 2009 to 2013, and many disappeared for whatever reason, with or without hearings, without any action being taken. Reports continue to appear that several States have groups attempting to emulate the Massachusetts statute, including some in Pennsylvania, Oklahoma, and New Jersey. *See* Jennifer Levitz, *New Art of Alimony*, WALL

ST. J., Oct. 31, 2009. Anecdotal reports include such efforts being made in Connecticut, Vermont, Maryland, Oregon, Virginia, South Carolina, Georgia, Arkansas, and Tennessee.

X. APPENDIX 3 – FLOWCHART OF STEPS WITH FACTOR REFERENCE

ALIMONY ANALYSIS FLOWCHART



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XI. APPENDIX 4 – WORKSHEETS

I. CASE FACTS

Value of non-retirement property divided upon divorce:

Plaintiff: Defendant:

Notable facts re: liquidity, timing, or division of property & debt:

Length of marriage:

Plaintiff:

Age & notable matters relating to health:

Income at Divorce:

Notable facts relating to current income relative to historical career path:

Amount and date of known/anticipated changes in income:

Notable separate property income streams:

Years until anticipated retirement/end of career path:

Value of notable separate property assets:

Estimated pension/retirement or other income expected upon retirement:

Defendant:

Age & notable matters relating to health:

Income at Divorce:

Notable facts relating to current income relative to historical career path:

Amount and date of known/anticipated changes in income:

Notable separate property income streams:

Years until anticipated retirement/end of career path:

Value of notable separate property assets:

Estimated pension/retirement or other income expected upon retirement:

II. IS THIS AN ALIMONY CASE?

Does the court have sufficient information as to the assets, debts, and incomes of the parties to make a reasonable projection of their needs, abilities, and anticipated career paths?

> If not, what steps are to be taken, by whom, to obtain, refine, or create the information necessary?

Is this a case in which there are no significant community property or separate property assets or income, and no reasonable likelihood of either existing in the foreseeable future?

> If so, irrespective of need, no further analysis is to be done.

Is this a case where the property distributed makes any potential alimony award essentially irrelevant to the future living standards of the parties?

> If so, no further analysis is to be done, except for reimbursement, loss or waste, career asset division, and final equitable review.

Does the divorce leave the parties with any significant divergence in future incomes, assets, or standards of living?

Given the ages and career paths of the parties, for how long could or should an alimony order remain in effect?

Except in cases in which the court can definitively state that the case is ***not*** an alimony case from a review of basic case facts, the court should step through the detailed analysis for each alimony component and make individual determinations as to each of them.

III. ARE REIMBURSEMENT AWARDS CALLED FOR?

Is this a marriage of sufficiently short term that the court is concerned with attempting to restore the parties to a pre-marital standard of living?

Did one party liquidate a disproportionate amount of pre-existing property to enter into the marriage?

Did one party suffer a disproportionate expense or loss to enter into the marriage, that is inequitable based on the financial circumstances of the parties?

Did one party subsidize the marriage from separate property, or contribute funds to the other for the separate interest of the other or for a marital purpose for which there has been no return?

Was there any breach of fiduciary duty in investments of separate property into community property, or of the disposition of community property created during the marriage?

Do the parties have any divergence in their abilities to re-achieve their pre-marital standards of living?

If not equally, in what proportions should the parties bear the additional cost for one of them to regain the premarital standard of living?

Is it possible to pay any such reimbursement in lump sum? By compensatory award of assets? By time payments if necessary?

Is the recipient in a sufficiently superior economic position to the obligor that reimbursement should not be ordered?

Is there any reason that this award should not be payable irrespective of the future marital status of either party (i.e., any reason that the obligation should not survive remarriage)?

IV. IS REHABILITATIVE ALIMONY APPROPRIATE?

Is there a periodic obligation remaining from the prior element?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

Does one party have a need for training or education relating to a job, career, or profession?

Did the obligor obtain job skills or education during the marriage?

Was there an offsetting investment in the job skills or education of the obligee?

Did the recipient provide financial support while the obligor did so?

Are there other factors relevant to determining whether such rehabilitative alimony is appropriate here?

If rehabilitative alimony is appropriate:

When will such rehabilitation begin?

How much money will be required, on what schedule, to pay for that rehabilitation?

How long will the rehabilitation payments last?

Are there any conditions, reporting, required achievements or timing for such rehabilitation?

At the conclusion of the period of rehabilitation, will the recipient's property award plus post-rehabilitation earnings permit self-support?

What income level is the recipient expected to achieve?

When is such self-support expected to be possible?

At that time, will the parties continue to have a divergence in income-earning potential?

Should rehabilitative alimony survive remarriage of the recipient?

V. WHAT, IF ANY, ALIMONY IS CALLED FOR BASED ON A CAREER ASSET?

Is there a periodic obligation remaining from the prior elements?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

Has one party developed or enhanced the capacity for a career, profession, or business during the term of the marriage?

For how long into the future can the career asset developed during the marriage be reasonably expected to continue producing future income?

What is the percentage of attribution to be given to the future income to be expected from the career asset developed during the marriage:

Separate Components	Marital Components
___ Natural Ability	___ Direct Assistance by Spouse
___ Premarital Education/Training	___ Marital Education/Training
___ Premarital Contacts/Reputation	___ Marital Contacts/Reputation
___ Status/Position/Seniority	___ Status/Position/Seniority
___ Efforts/Experience/Opportunities	___ Efforts/Experience/Opportunities
___ Other	___ Other

Taking into account all evidence, to what extent is the career asset with which one party leaves the marriage attributable to development during the marriage?

The spousal share of that marital interest (50%) is:

The future income stream attributable to the career asset developed during marriage: $

That figure, multiplied by the spousal share of the marital interest = $

For how long post-marriage can the career asset developed during the marriage be expected to continue producing an income stream:

How long until the career asset is expected to finish converting potential income into realized income?

Is there clear and convincing evidence that the marital contribution of the future income stream should be further devalued going forward?

By what extent, over what time period?

At what date should career-asset alimony terminate?

Which party has the burden of filing a motion to alter that termination date, and are there any limitations as to how soon or how late such a motion may be filed?

Is there any reason that this award should not be payable irrespective of the future marital status of either party (i.e., any reason that the obligation should not survive remarriage)?

VI. IS COMPENSATION OWED FOR LOSS OR WASTE?

Is there a periodic obligation remaining from the prior elements?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

Has the court found that a party has committed waste of marital property, or caused the loss of marital property in violation of a fiduciary duty, such that the other spouse should be compensated?

Was there financial misconduct of one of the parties, such as waste or secretion of community assets in violation of court order?

Has the court made a finding of a basis for an unequal division of property based on negligent loss or destruction of community property, unauthorized gifts of community property, or compensation for losses occasioned by marriage and its breakup?

Note: this question does ***not*** review alleged "undercontributing to or overconsuming of assets during the marriage," permit a "retrospective accounting of expenditures made during the marriage," or ask whether there has been any "disproportion" in contribution or consumption, which are not compensable.

Has the court otherwise made a finding of compelling reasons for an unequal disposition of community property?

If any of those findings were made, was sufficient property or funds set aside to the non-wasting spouse to fully compensate for the loss or waste?

Should compensatory alimony be awarded to accomplish such compensation?

How much, and for how long?

Is there any reason that this award should not be payable irrespective of the future marital status of either party (i.e., any reason that the obligation should not survive remarriage)?

VII. IS COMPENSATION OWED FOR LOSS OF EARNING CAPACITY?

Is there a periodic obligation remaining from the prior elements?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

Has one of the parties provided the majority of care for the parties' children, the obligor's children, or any third party that the parties explicitly or implicitly agreed required care?

Has it been established by clear and convincing evidence that the party providing care did ***not*** suffer a detriment to the career path or a loss of future earning capacity by reason of providing such care?

For how long was such care provided?

Has it been established by clear and convincing evidence that any such loss of future earning capacity is temporary, and can be recovered by the party providing care?

If so, how long will that take?

What is the estimated economic loss to the party providing care until that recovery can be accomplished?

What is the current monthly earning-capacity of the recipient?

What would the current monthly earning-capacity of the recipient have been in the absence of the care provided?

For how long is such loss of future income likely to continue?

In the circumstances of this case, is the loss-suffering party's responsibility for making the decision to suffer the loss of future income any greater or less than 50%?

What is the expected time period from the divorce until the first to occur of:
the end of the obligor's expected career path; or
the end of the career path that the recipient would otherwise have followed; or

the recipient is able to recover the lost potential?

Is there any reason that this component of alimony should not terminate upon the remarriage of the recipient?

VIII. IS ALIMONY CALLED FOR BASED ON DIVERGENCE IN FUTURE LIVING STANDARDS?

Is there a periodic obligation remaining from the prior elements?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

How long was the marriage?

During the marriage, was the marital standard of living increasing, decreasing, or remaining relatively constant?

Is the marital standard of living at the time of divorce consistent with the marital standard of living prior to breakdown of the marriage?

If not, does the evidence indicate that it is appropriate to use some standard of living other than that present at the moment of divorce, and why?

On the basis of the prior findings and rulings, and prior awards under other alimony elements, is there a discernable expected divergence in the future standard of living each of the parties might reasonably be expected to have?

If so, what is the extent of the divergence?

Has there been an award of rehabilitative alimony that is expected to impact projected future earning capacity?

If so, how much and when?

Is a reservation of jurisdiction appropriate to determine the impact of any rehabilitative award on future earning capacity?

Will retirement or another foreseeable event have the effect of largely or completely eliminating the divergence?

Will that foreseeable event happen within five years?

Even if there is such a divergence, does the combined gross income of the parties exceed $1,000,000 a year?

If the calculation is performed, would the calculation result in the recipient having a total income of 40% or more of the combined gross income of the parties?

Is this a marriage of sufficient length that the recipient spouse should enjoy as nearly as possible the "station in life" she had prior to the divorce until remarried, death, or financial circumstances change?

The calculation to be performed:

The payor's gross income is multiplied by .3.

The recipient's gross income is multiplied by .2.

The second number is subtracted from the first number.

To determine duration, the length of the marriage is multiplied by:

0-3 years: (.3)
3-10 years: (.5)
10-20 years: (.75)
over 20 years: permanent alimony.

Does the calculation performed cause a projected alimony award greater in amount or longer in time than the actual or expected resources of the obligor of income or time until retirement?

If so, should the obligation be reduced to match resources, the obligation remain irrespective of the resources, or some compromise be made between the figures?

Is this an appropriate case for a change in the order made to be scheduled at this time, based on retirement or any other anticipated change in status of either party?

Should this order be expressly modifiable or non-modifiable?

If modifiable, are there any restrictions on when a modification may be requested, or whether a request should be restricted to any kind of modification (i.e., shorter, longer, higher, lower)?

IX. NOTWITHSTANDING ABOVE STEPS, IS ALIMONY CALLED FOR OR INAPPROPRIATE BASED ON THE FACTS OF THIS CASE?

In combination, and taking into account all offsetting awards, is there a periodic obligation remaining from the prior elements?

If so, how much, for how long?

Given the orders from the prior elements, what are the gross incomes of the parties, and for how long are those income levels expected to remain so?

Is there any remaining capacity of time and money to examine an ability for a further award?

If not, should such an award be deferred to a future date, or jurisdiction reserved?

Are there considerations not adequately reflected in the components addressed above that indicate that the award of alimony, if any, derived from those components is insufficient to satisfy equity under the facts of this case?

What are those considerations?

Why would an award of alimony in accordance with the prior elements be unfair?

Are there considerations not adequately reflected in the components addressed above that indicate that the award of alimony derived from those components is excessive or improper to satisfy equity under the facts of this case?

What are those considerations?

Why would an award of alimony in accordance with the prior elements be unfair?