

***KOGOD* CONTRADICTIONS, PRACTICAL PROBLEMS, AND REQUIRED STATUTORY FIXES (Part One)**

I. BACKGROUND AND SUMMARY

Kogod v. Cioffi-Kogod, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019) raised several issues that deserve discussion.

While the opinion made some advances in alimony theory in Nevada, some unfortunate phrasing might cause practitioners to stop short of presenting everything they should when facing alimony issues.

The Court was apparently not informed that its holding as to the termination of the community contradicted several of its own prior pronouncements, nor was it informed of the resulting problems for district court judges; if this cannot be rectified by case law, a statutory correction is warranted.

Similarly, the opinion made conflicting analyses on the issue of waste that are likely to lead to divergent results in future cases.

This is the first of a multi-part series of articles on the *Kogod* holding; this article addresses the alimony portion of the opinion. The series will explore what the case means, and how the relevant law touched by the opinion might and should develop going forward.

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II. AVAILABLE ALIMONY THEORIES IN, AND BEYOND, *KOGOD*

The *Kogod* divorce divided an estate valued at some \$47 million; most of the opinion dealt with the degree, and rationale, for how or why that estate might be unequally divided. Most of those holdings, and theories, are explored in the other sections of this multi-part article.

Relevant here is that the former spouse would leave the marriage with assets, primarily in cash, worth no less than \$24 million or so, and the impact that fact had on the alimony analysis.

A. *Kogod*, Need, and Loss

The *Kogod* opinion expounded on alimony at some length, ultimately deciding that even though alimony may be awarded on a basis other than need, no alimony was warranted here, where income-producing assets would produce passive income sufficient to maintain the marital standard of living.

The Court produced a binary analysis for alimony. The first is “when necessary to support the economic needs of a spouse” and the second is “to compensate for a spouse’s economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living.”¹

Along the way, the Court stated that where alimony is intended to achieve parity in income, it *also* must “further some underlying rationale,” suggesting three such: economic need, the recipient’s inability to maintain the marital standard of living, or the recipient’s decreased income-earning potential as a result of the marriage. The Court stated that without finding such an “underlying rationale,” there is no discretion to award alimony “solely” to achieve income parity.

After reciting the historical underpinnings of alimony, world-wide and in Nevada, the Court listed the current statutory alimony factors, noting the subjectivity of what “need” might be, and for the first time citing the seminal analysis by the American Law Institute (“ALI”) into alimony theory.²

Without much explanation, the *Kogod* opinion noted the ALI's significant reframing of the alimony analysis from one of "need" to one of "loss." But the *Kogod* Court's embrace of the ALI analysis was a half-measure. The ALI framework *requires* an entire rejection of any kind of "need" analysis, substituting in its place analysis solely framed in terms of "loss" and compensation for that loss.

Kogod, however, added a "loss" analysis to its perception of potential alimony bases, and then ascribed the Nevada statutory factors to either a "need" or "loss" analysis.

Certainly, the Court should be applauded for taking the time to delve into alimony theory in the context of resolving a case, as opposed to the "result-driven" opinions of prior years that are difficult to apply prospectively. Arguably, however, the combination of need and loss analyses more confused than clarified the law; treating "need" and "loss" analyses as *alternative* lenses invites some duplication, contradiction, and confusion.³

For all the reasons detailed in the Universal Approach article, the ALI reframing was great as a matter of theory, but has proven to be a dead end in application. In nearly two decades there has been apparently only one other court that has adopted alimony guidelines purportedly based on the *Principles'* recommendations – a regional family court in Arizona.⁴

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."⁵ 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. The *Kogod* opinion could be read as another such instance.

Actually, the Nevada statutory factors are so broad that they embrace not *two* analyses, as stated in the *Kogod* opinion, but touch on each potential theoretical basis for an alimony award: Reimbursement Award; Rehabilitative Award; Career Asset Compensation; Loss or Waste Compensation⁶; Loss of Earning Capacity Compensation; Divergence in Future Living Standards; and Residual Equity.⁷ One or more of each Nevada statutory factor fits within each of those potential bases. As explained in the Universal Approach article:

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.⁸

In short, practitioners can and should use *Kogod* in arguing future cases, but it is problematic as a template for presentation of those cases because its binary analysis muddles two very different theoretical constructs. An alimony argument, or ruling, should be internally consistent.

B. The Alimony Bell Curve

The actual basis of the *Kogod* court’s reversal of alimony to the wife was the simple conclusion that “the nature and value of the community property [the wife] received in the divorce obviated any basis for awarding alimony.”

The Court did not expressly label this conclusion, but recited cases from inside and outside Nevada in reaching it, including a South Dakota case speaking to the “symbiotic relationship” between property and alimony awards and finding that when the property award is so large that the receiving spouse is capable of self-support, able to maintain the marital standard of living without assistance, and “not economically disadvantaged” in earning power as a result of the marriage, no alimony is warranted.

The Universal Approach article calls this reasoning the “alimony bell curve,” explaining that at each end of the curve (lots of need and no ability to pay on one end, and no need and lots of ability to pay on the other) alimony is not really at issue,⁹ and noting:

Usually, alimony comes up in “the middle” – the bulk of cases between the 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.

Cases clearly outside the bell curve are relatively rare. Unless the underlying facts support the argument, it is not worth arguing, so no further time is spent on it here.

C. A Proposed Presentation Outline for Alimony Claims

Practitioners should not read the *Kogod* opinion as limiting the arguments they can and should make; as noted, the Nevada statutory factors actually encompass a wider variety of theoretical bases for alimony awards than are discussed in the opinion.

What follows is a more comprehensive presentation outline, correlating to the implicated factors from the Nevada statutory factors list, which should suffice to capture relevant facts in virtually every case. The details on how to calculate awards under each theory are detailed in the worksheets posted with the flowchart.

1. Is this an alimony case? (a, b, c, j)

This question should always be asked. The worksheet gives questions to ask to answer the threshold issue.

2. Are reimbursement awards called for? (a, b, c)

This category generally only applies to very short-term marriages after which the court's focus is attempting to restore the parties to their pre-marital standards of living.

3. Is rehabilitative alimony appropriate? (g, h, i, k)

This category follows the statute and case law to determine whether it applies to the facts of a particular case.

4. What, if any, alimony is called for based on a career asset? (d, e, h, i, k)

The "career asset" theory is present in several Nevada cases and often provides the primary rationale for an alimony award, as detailed in the worksheets.

5. Is compensation owed for loss or waste? (a, j)

This category is touched upon by two factors in the Nevada statutory list, but under current law may be separately dealt with in Nevada under a property analysis, as detailed in the Universal Approach article.

6. Is compensation owed for loss of earning capacity? (b, d, e, f, g, h, i, k)

This category applies if one of the parties was involuntarily removed from the work-force and a career path in order to provide the majority of the care for the parties' child or another person.

7. Is alimony called for based on divergence in future living standards? (b, d e, f, k)

This factor is designed for the situation where the parties' respective future living standards are expected to diverge because of a disparate ability to provide for themselves in the future. It is sometimes called "general alimony."

The Universal Approach includes the AAML "shorthand" calculation used to produce an actual proposed number and duration for this factor, which was part of the work of Prof. Kristhardt that was positively cited in *Kogod*.¹⁰

8. Notwithstanding the above, is alimony called for or inappropriate based on the facts of this case? (e, j, k)

This is sometimes called "just 'cuz alimony" – alimony allocated when a judge has exhausted the categories of alimony but is still convinced that despite the failure to analytically fit within one of those categories, the totality of the circumstances require one party to pay, and the other to receive, an alimony award.

And, in reliance on Nevada case law, every alimony analysis should at least stop to consider whether lump-sum alimony is a more appropriate order than periodic payments would be.¹¹

The more comprehensive lawyers' filings are as to the bases for requested awards, the more orders should be in keeping with the law as applied to the facts.

III. CONCLUSIONS

Courts can only be expected to issue orders, and opinions, consistent with community property and alimony theory if the appropriate legal theories are cogently presented by counsel in their filings and argument.

Kogod was an outlier of a case on its facts, and while it was a useful advance in expanding the published Nevada authority on family law issues, and may have well reached proper conclusions on the facts of the case at hand, it fell unfortunately short in several areas of logic, theory, and public policy that will require either further cases or legislation to make right.

As to alimony, the suggestion of alternate need and loss analyses in a single case is likely to engender more confusion than coherence in the development of the law. Practitioners should probably look beyond the text of the decision in making requests for awards that are theoretically coherent and sound.

Kogod provides some useful holdings, but it has created some procedural problems, inserted doubt into some legal doctrines, and altered others without providing a comprehensive framework for analysis, as discussed above and in the later sections of this article.

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1. The Court emphasized its approach in footnote 2, where it said “These were the only two possible bases for alimony” The phrasing is unfortunate. Lawyers should probably read into the text an implied “under the circumstances of this case.”

2. *Principles of the Law of Family Dissolution: Analysis and Recommendations* (“*Principles*”) (Am. Law Inst. 2002) (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).

3. For a detailed explanation of the ALI analysis, its reasoning, and its limitations, see Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015) (“Universal Approach”), posted at <https://www.willicklawgroup.com/spousal-support-alimony/>.

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

5. Michael R. Clisham & 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. 573 (2008) at 576.

6. As explained in Universal Approach, waste analyses are far better dealt with in an alimony analysis than in a property analysis, and the Nevada case law on the subject has essentially painted itself into a theoretical corner on this topic; this issue requires a lot more explanation, and will have to wait for a separate article.

7. See the Flowchart and Worksheets posted in, and separately from the Universal Approach article, providing a full explanation, at <https://www.willicklawgroup.com/spousal-support-alimony/>.

8. 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.

9. “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.”

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). 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. “Gross Income” is defined by a state’s definition of gross income under its child support guidelines, including actual and imputed income, and is calculated *before* child support is determined.

For duration, the length of the marriage is multiplied by:

0-3 years: (.3)

3-10 years: (.5)

10-20 years: (.75)

more than 20 years: permanent alimony.

The formula outputs for length and duration are then subject to “deviation factors” as detailed in the Universal Approach article.

11. *See Schwartz v. Schwartz*, 126 Nev. 87, 225 P.3d 1273 (2010) (when a potential alimony obligor is old, rich, and sick, courts must explicitly determine whether lump sum alimony is appropriate).