

VERMONT SUPERIOR COURT



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TO: Senator Richard Sears, Chair, Senate Judiciary Committee and Representative
Maxine Grad, Chair, House Judiciary Committee

FROM: Brian J. Grearson, Chief Superior Judge

RE: Alimony reform report

DATE: January 13, 2017

I. REQUEST FROM THE LEGISLATURE

Section 8a of Act 167, which was passed by the Legislature in the spring of 2016, states as follows:

Sec. 8a. SPOUSAL SUPPORT AND MAINTENANCE TASK FORCE

On or before January 15, 2017, the Family Division Oversight Committee of the Supreme Court shall report to the Senate and House Committees on Judiciary on its study of spousal support and maintenance guidelines in Vermont. The report shall include any legislative recommendations for changes to Vermont's law concerning spousal support and maintenance.

II. BACKGROUND TO THE REPORT

The Family Division Oversight Committee has been discussing the issues surrounding alimony guidelines for several years beginning in 2008. The Committee created its first draft of alimony guidelines in March of 2012, and then spent several months modifying that draft before circulating the draft guidelines to judges and family law attorneys in November of 2012. In doing so, the Family Division Oversight Committee emphasized that the guidelines were merely a “draft,” without the force and effect of law. During the ensuing four years some lawyers used the draft guidelines in negotiating divorce agreements, and some but not all judges referred to the draft guidelines to “double check” their alimony decisions. Those lawyers and judges who used the guidelines found them to be very helpful and useful in negotiating and fostering settlements that both sides felt were fair and reasonable. They also agreed that to be effective, the guidelines needed to be disseminated more broadly among the attorneys and used explicitly by the judges. It will come as no surprise that most divorce cases are resolved without a contested final hearing and that attorneys as well as judges believe guidelines will increase the likelihood of settlement. Based on informal feedback from judges and lawyers over the four years the

guidelines were available, the Oversight Committee revised the guidelines again in October 2016 (see Appendix A) and recommends their adoption by the legislature.

III. MATERIALS REVIEWED AND ACTION TAKEN

As a result of the Legislative request alimony guidelines were carefully considered at the regularly scheduled meetings of the Family Division Oversight Committee on July 8, September 23, November 4, and December 9, 2016. A subcommittee appointed by the full committee included, in addition to the undersigned, Judge Thomas Devine, a trial judge with almost 20 years' experience as a Child Support Magistrate and Superior Court Judge and Attorney Emily Davis, an experienced domestic relations attorney representing both payors and recipients of alimony, both of whom have been involved in the development of alimony guidelines for the committee since 2008¹; Judge Kevin Griffin, an experienced domestic relations attorney before being appointed to the bench, and Attorney Susan Murray, also an experienced domestic relations attorney who has represented both payors and beneficiaries of alimony. All committee members were provided with the materials that the Alimony Reform Group previously provided to the Senate Judiciary Committee. In addition, the subcommittee appeared as a panel for discussion of the proposed guidelines at the Vermont Bar Association's Annual Meeting October 14, 2016. Following the panel discussion, the subcommittee invited further comments from the Vermont Bar Association's Family Law Division (see Appendix C), and judges. Finally, in addition to the foregoing, the subcommittee reviewed guidelines from other states, Vermont case law, as well as committee members' own experience litigating these issues.

Based on the foregoing, the Family Division Oversight Committee issues the following report on the adoption of alimony guidelines pursuant to Act 167:

IV. THE JUDICIARY'S INTEREST

At the outset, the Family Division Oversight Committee wants to emphasize that the Judiciary has no interest in, and takes no position with regard to, the particular "policies" that should inform legislation regarding spousal maintenance or alimony. Any such policies or positions are within the purview of the Legislative branch, not the Judicial branch.

Having said that, the Judicial branch does have two interests with regard to alimony:

- (1) The Judiciary has an interest in having clear statutory language from the Legislature, which will enable judges to apply the alimony statute in a manner that is consistent from judge to judge and case to case; and
- (2) The Judiciary has an interest in maintaining a level of discretion in issuing alimony awards, as currently exists in the alimony statute, 15 V.S.A. §752, in order to address the unique facts and circumstances of individual families, where application of a simple formula would not produce a fair result.

V. ALIMONY GUIDELINES

A. Background

The Judiciary is aware of the concern among the public and the bar over a perceived lack of consistency, predictability, and fairness in alimony awards in Vermont. As noted above, beginning in 2008 the Family

¹ Attorney Peter Lawrence, a long-time member of the Family Division Oversight Committee, was also an initial member of the subcommittee considering alimony guidelines until his retirement.

Division Oversight Committee began to study this issue, in 2012 produced draft alimony “guidelines” in an attempt to provide a framework for consistency in alimony court orders throughout the state, and revised those guidelines in October 2016 (Appendix A).

The idea of creating guidelines for alimony grew in part from Vermont’s child support guidelines. Since the mid-1980s, federal law has required Vermont to use guidelines for establishing and modifying child support. Prior to the adoption of Vermont’s child support guidelines, child support orders often differed greatly from county to county, even when families’ financial situations were similar. Pursuant to federal law, the Vermont Office of Child Support created Vermont’s child support guidelines in order to ensure consistent child support awards throughout the state.

The child support guidelines are, in essence, a formula based on parents’ respective incomes. The child support guidelines are available online, and have, indeed, provided consistency and predictability in child support awards throughout the state. This, in turn, has enabled many child support issues to be resolved without need of a court hearing. Most child support orders issued by judges and magistrates are based on the parties’ written agreements.

B. Difference Between Alimony Guidelines and Child Support Guidelines

Although there are some parallels between child support and alimony, there are important differences that must be taken into consideration. First, child support is *required* in divorces and parentage cases whenever there is a minor child, whereas alimony is never *required* in any case.

Moreover, child support is a function of the parents’ incomes, whereas the parties’ incomes is only *one* factor that must be considered in determining an alimony award. There are several other factors which the Legislature requires the courts to consider, as listed in 15 V.S.A. §752, in deciding whether to award alimony, and if so, for how long. Those factors include the age and health of the parties; the length of the marriage; each party’s reasonable needs; the time and expense necessary to enable a party to obtain employment training; inflation; the value and kinds of assets owned by the parties; and the marital standard of living (see Appendix B).

Therefore, unlike child support, rigid alimony guidelines which are based on only two (most formulas only take into consideration the parties’ incomes and the length of the marriage) of the seven factors would be more likely to lead to unjust outcomes than no guidelines at all.²

C. ALIMONY STATUTORY FACTORS

Presently the decision whether to award alimony is based on a consideration of seven factors set forth in 15 V.S.A. §752 (see Appendix B). The committee believes it is important to preserve the court’s ability to exercise its discretion by considering the various factors in fashioning an alimony award based on the facts of the particular case before the court. Further, the adoption of the guidelines will also serve to enhance the ability of the parties to fashion their own agreements because there will be more predictability and consistency among the courts.

Alimony awards do not lend themselves to the formulaic approach required by child support guidelines because of the number of factors that must be considered and the fact that in a given case, one or more factors may substantially outweigh other factors resulting in the award of alimony. By way of example only, the following illustrate examples of circumstances supporting alimony awards where guidelines alone would not produce a fair result and would allow a spouse to:

² Even in the context of presumptive child support guidelines, the deciding judge or magistrate may take into consideration other factual circumstances besides the income of the parties, and may make a child support order that deviates from the guideline amount.

- Complete educational goals that lead to higher earning potential
- Engage in job re-training that leads to higher earning ability
- Allow the children of the parties to remain in the family home and stay in the same school and community
- Give time to grow retirement and investment assets so that alimony could be reduced or terminated, rather than deplete those assets thereby requiring the payor to provide more support for a longer period of time
- Bridge the gap where the recipient spouse had set his or her career aside to raise the parties' children, while the other spouse was able to increase his or her job training and income development
- Address physical or psychological deficits or disabilities that affected earning capacity
- A property division that awards one party substantially more property than the other to obviate the need for an alimony award

The foregoing illustrate cases of an alimony award that may reflect the unique circumstances of the particular case where there is a significant disparity in income or income earning ability between the parties, health considerations relating to the recipient, or the need for alimony due to a property division that substantially favors the payor as opposed to the recipient.

The Alimony Reform Group represents litigants who believe the alimony awards in their specific cases were unfair. That group speaks only from the payors' perspective. There has been no voice from the recipients' perspective which may include those who received alimony and believed the award was fair, or those who *received* an award they believed was unfair, or those who were ordered to pay alimony and believed it was fair. It should be apparent that for every case submitted as an example of what one party believes is an unfair award, another example of a perceived fair award could be submitted.

IV. RECOMMENDATION

As stated above, the Judiciary has two interests as it relates to the issue of alimony: *First*, the Judiciary has an interest in clear statutory guidance, to enable judges to more consistently apply the alimony statute. *Second*, the Judiciary has an interest in maintaining the discretion it currently has under the alimony statute, so it can fairly address those cases in which the use of an alimony formula would produce an unfair result.

Consistent with these two interests, the Family Division Oversight Committee recommends that 15 V.S.A. §752 be amended as follows:

The Legislature should add a new section (8) to 15 V.S.A. §752(b), to provide that alimony guidelines as established in October 2016 shall be considered, along with all the other factors in §752(b), in making alimony awards.

Respectfully submitted,



Brian J. Grearson, Chief Superior Judge

On behalf of the Family Division Oversight Committee

APPENDIX A

ALIMONY GUIDELINE SUMMARY

The Family Division Oversight Committee appointed a sub-committee to consider whether specific guidelines would be useful to provide a framework for consistency in court orders with respect to alimony (a/k/a spousal support or spousal maintenance) awards.

THESE GUIDELINES HAVE NO LEGISLATIVE OR COURT RULE APPROVAL OR AUTHORITY AND SHOULD NOT BE CITED OR RELIED UPON.

These guidelines focus on two main variables: (1) the length of the marriage and (2) the relative incomes of the parties. The guidelines are an attempt to put those variables into a grid that suggests a predictable range of outcomes. The guidelines assume that the threshold legal determination of a need for alimony has been made.

<u>Length of marriage</u>	<u>% of the difference between parties' gross incomes</u>	<u>Duration of alimony award as % of length of marriage</u>
0 to >5 year	0 -20%	Presumption of no alimony or short-term (up to one yr.)
5 to >10 years	15 - 35%	20 - 50% (1- 5 yrs.)
10 to >15 years	20 - 40%	40 - 60% (3 - 9 yrs.)
15 to >20 year	25 - 45%	40 - 70% (6 - 14 yrs.)
20+	30 - 50% (9 years - ???)	45% to "permanent"

**Revisions from 11/12/12 draft are reductions in low end of percentage differences in parties' incomes and in the low end of duration for marriages exceeding 5 years. Upper brackets not changed.*

Notes:

1. Duration would be affected by length of marriage within the designated range and the discrepancy in incomes of the parties, as well as the ages of the parties at time of divorce. On one hand, it might be reasonable to assume the younger the parties (or the recipient), the closer to the lower end of the range because of the parties' work-life expectancy. On the other hand, if the parties are older and near retirement, and if alimony is being paid out of earned income, the duration may be shorter than the length of the marriage might otherwise indicate.
2. Guidelines assume an approximately an equal division of the marital estate. An award of property in lieu of maintenance or sufficient property to generate income would lead to lower amount of alimony (or no alimony) and/or for shorter duration.

3. Child support may increase recipient's net income – these guidelines do not address child support.
4. No COLAs are addressed, nor review of each party's entitlement to social security or private retirement assets or plans.
5. The statutory factors, including threshold determination, would still apply. See 15 VSA §752:
 - (1) The financial resources of the party seeking maintenance, the property apportioned to the party, the party's ability to meet his or her needs independently, and the extent to which a provision for support of a child living with the party contains a sum for that party as custodian;
 - (2) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
 - (3) The standard of living established during the civil marriage;
 - (4) The duration of the civil marriage;
 - (5) The age and the physical and emotional condition of each spouse;
 - (6) The ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance; and
 - (7) Inflation with relation to the cost of living. (Amended 1981, No. 247 (Adj. Sess.), § 7; 2009, No. 3, § 12a, eff. Sept. 1, 2009.)

Illustrations of Guidelines:

Example 1:

Party A: \$100,000

Party B: \$25,000

Marriage: less than 5 years (0 to 20%)

Difference in income: \$75,000

Minimum alimony: zero

Maximum alimony: 20% of \$75,000 = \$15,000

A's net (earned – alimony) income: \$85,000; B's net (alimony + earned) income: \$40,000

Maximum duration: 1 year.

Example 2:

Party A: \$100,000

Party B: \$ 25,000

Marriage: 5 to less than 10 years (20 to 35%)

Difference in income: \$75,000

Minimum alimony: 15% of \$75,000 = \$11,250

A's net income: \$88,750; B's net income: \$36,250
Minimum duration: 1 year

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Maximum alimony: 35% of \$75,000 = \$26,250
A's net income: \$73,750; B's net income: \$ 51,250
Maximum duration: 5 years

Example 3:

Party A: \$100,000
Party B: \$12,000
Marriage less than 5 years (maximum alimony 20%)
Difference in income: \$88,000

Minimum alimony: zero
Maximum alimony: 20% of \$88,000 = \$17,600
A's net income: \$82,400; B's net: \$29,600
Maximum duration: 1 year.

Example 4:

Party A: \$75,000
Party B: \$35,000
Marriage 15 to less than 20 years (25 to 45%)
Difference in income: \$40,000

Minimum alimony: 25% of \$40,000 = \$10,000
A: \$65,000; B: \$45,000
Minimum duration: 6 years

Maximum alimony: 45% of \$40,000 = \$18,000
A: \$57,000; B gets \$53,000
Maximum duration: 14 years

Example 5

Party A: \$100,000
Party B: \$25,000
Marriage of 20+ years (30 to 50%)
Difference in Income: \$75,000

Minimum alimony: 30% of \$75,000 = \$22,500
A: \$77,500; B: \$47,500

Maximum alimony: 50% of \$75,000 = \$37,500
A: \$62,500; B: \$62,500 total: Incomes are equalized.
Duration: 9 years to permanent. [What is permanent?]

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APPENDIX B

15 V.S.A. § 752

§ 752. Maintenance

(a) In an action under this chapter, the court may order either spouse to make maintenance payments, either rehabilitative or permanent in nature, to the other spouse if it finds that the spouse seeking maintenance:

- (1) lacks sufficient income, property, or both, including property apportioned in accordance with section 751 of this title, to provide for his or her reasonable needs; and
- (2) is unable to support himself or herself through appropriate employment at the standard of living established during the civil marriage or is the custodian of a child of the parties.

(b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, after considering all relevant factors including, but not limited to:

- (1) the financial resources of the party seeking maintenance, the property apportioned to the party, the party's ability to meet his or her needs independently, and the extent to which a provision for support of a child living with the party contains a sum for that party as custodian;
- (2) the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living established during the civil marriage;
- (4) the duration of the civil marriage;
- (5) the age and the physical and emotional condition of each spouse;
- (6) the ability of the spouse from whom maintenance is sought to meet his or her reasonable needs while meeting those of the spouse seeking maintenance; and
- (7) inflation with relation to the cost of living.

APPENDIX C

Feedback from the Bench and the Bar

In October 2016, at the Vermont Bar Association's Annual Meeting, the Family Division Oversight Committee gave a presentation about the draft guidelines, and at that meeting received input from the attendees about whether and how the draft alimony guidelines should be used.

Following that meeting, the Family Law Section of the Vermont Bar Association surveyed its members about the alimony guidelines via its listserv.

The following is a summary of the bar's feedback:

All attorneys applauded and supported the goal of increasing consistency and predictability in alimony awards.

Virtually everyone agreed that the guidelines should be distributed formally, rather than continue to be circulated and used informally by some but not all judges and lawyers.

Some attorneys favored making the guidelines a rebuttable presumption; in other words, these attorneys favored basing alimony on just two of the factors in 15 V.S.A. §752: the parties' incomes and the length of the marriage. These attorneys believe that such a presumption would result in more predictability and therefore would encourage more cases to settle.

Most attorneys, however, opposed making the guidelines a rebuttable presumption, and instead took the position that the guidelines should remain guidelines. These attorneys pointed out that if the guidelines become a presumption, all the other statutory factors in 15 V.S.A. §752 (other than income and length of marriage) would essentially be eliminated from consideration. These attorneys believe that the other factors in §752(b), such as the age and health of the parties, the need for retraining, inflation, and the marital standard of living, are all important factors in addition to the parties' incomes and the length of the marriage, and should continue to be considered in making alimony awards. One attorney further worried that if a rebuttable presumption were created, parties would have a disincentive to become or stay employed, and courts would lose the ability to award assets in lieu of alimony.

Virtually everyone – regardless of whether they favored guidelines or a rebuttable presumption – argued for allowing judges to retain the discretion they currently have under 15 V.S.A. §752 to issue alimony awards tailored to the specific facts of the case.

Finally, as a “solution” to the problem, the majority of attorneys supported adding the guidelines to 15 V.S.A. §752(b), making them one of the factors to be considered by the court in determining alimony awards.