AN UPDATE ON FLORIDA ALIMONY CASELAW; ARE ALIMONY GUIDELINES A PART OF OUR FUTURE?

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This is part one of a two part article on the use of alimony guidelines. The first part examines the current status of alimony in Florida. The second part reviews the steps other states are taking to deal with the issue of alimony in family law and discusses how Florida might improve its treatment of alimony in the future.

1. Introduction

The suggestion to use guidelines for the determination of an alimony award is new in Florida. Judge Farmer of the Fourth District Court of Appeal was the first appellate judge to approach the subject in a written opinion in June, 2002. [1]

In a concurring opinion, Judge Farmer expressed his view that "broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule." [2] Judge Farmer recognized that under *Canakaris*[3] there has been a policy of discretion with respect to alimony, however, he notes that policy is under challenge in the literature. He believed alimony entitlements should be standardized because the outcomes

[1] *Bacon v. Bacon*, 819 So. 2d 950 (Fla. 4th DCA 2002).

[2] Id. at 954.

[3] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

would be more predictable, thus encouraging settlement and decreasing litigation.[4]

[4] *Bacon*, 819 So. 2d at 956.

Two months later, Judge Polen, also of the Fourth District Court of Appeal, referred to Judge Farmer's concurrence when Judge Polen stated that broad discretion may not be the best policy and statutory guidelines should be established.[5]

These scant references in Florida case law indicate that there is some judicial support for the legislature to consider alimony guidelines, similar to the child support guidelines which are now federally mandated in all states.[6] The concept of child support guidelines met with resistance when they were first mentioned, as there was concern that guidelines would replace judicial discretion. Although there continues to be disputes over child support guidelines, few judges and attorneys would support a movement to return to the discretionary system.[7]

Obviously, alimony is very different than child support in that every marriage does not mandate alimony, where as every child requires parental financial support. However, alimony guidelines may provide a more specific and uniform way to establish support than the current system. When there is no clear way to predict what an alimony award will be, parties are less likely to settle this issue as attorneys cannot advise their clients with any certainty.

The current Florida standard is based on the need of the requesting spouse and the ability to meet that need by the paying spouse. The problem with the "need" standard is that it is

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[5] *Landow v. Landow*, 824 So. 2d 278 (Fla. 4th DCA 2002).

[6] Ira Mark Ellman, The Maturing Law of Divorce Finances: Toward Rules and Guidelines, 33 Fam. L. Q. 801, 807 (1999).

[7] Id. at 813.

difficult to define the standard of living upon which such need is based. At what length of marriage should standard of living be applied? Should generous payor spouses be penalized in a divorce with a high alimony payment to meet the standard of living, when parsimonious spouses are rewarded? Should public policy define a "middle class" standard when the payor spouse is able? On a necessities standard? At what point do divorce laws cause people not to marry - is this good public policy? All these questions are raised under the current Florida alimony rationale. It causes us to look at alimony guidelines as perhaps a possible improvement to the current general statutory factors application to alimony decisions.

If alimony is to be judicially determined in "just proportions where appropriate"[8] then this judicial discretion can understandably lead to widely disparate results. An overview of Florida alimony awards, based on the seven statutory factors delineated in Florida Statutes 61.08[9], are attached as Exhibits A and B. Exhibit A lists cases dealing with permanent alimony.

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[8] Marti E. Thurman, Maintenance: A Recognition of the Need for Guidelines, 33 U. Louisville J. Fam. L. 971, 972 (1995).

[9] In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.

Exhibit B lists cases dealing with rehabilitative alimony. There is little pattern or predictability of alimony awards, even though each case is based on the same statutorily mandated analysis.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) All sources of income available to either party.

The court may consider any other factor necessary to do equity and justice between the parties. Fla. Stat. Ch. 61.08 (2002).

A review of the attached caselaw summaries shows that, in permanent alimony cases, approximately 1/3 of the cases were remanded to the trial court for lack of findings, 1/3 were remanded to alter amount or duration, and 1/3 were remanded for other reasons. Of those remanded for amount or duration, seven of the cases were remanded because the amount of alimony was too much, approaching or over 50% of the husband's income.[10] Two cases were remanded for an award of alimony which was too low[11] (*Lowman* - 20% is too little; *Bacon* - 13.5% is not enough).

"Bridge the Gap" alimony does not lend itself to alimony guidelines. This sub-type of lump sum alimony[12] is meant to meet a specific, short-term need. Rehabilitative alimony is sometimes referred to as "Bridge the Gap" alimony, even though the two types of alimony are

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[10] *O'Connor v. O'Conner*, 782 So. 2d 502 (Fla. 2nd DCA 2001); *Tarkow v. Tarkow*, 805 So. 2d 854 (Fla. 2nd DCA 2001); *Austin v. Austin*, 785 So. 2d 528 (Fla. 3rd DCA 2001); *Rashotsky v. Rashotsky*, 782 So. 2d 542 (Fla. 3rd DCA 2001); *Gallinar v. Gallinar*, 763 So. 2d 447 (Fla. 3rd DCA 2000); *Ballesteros v. Ballesteros*, 819 So. 2d 902 (Fla. 4th DCA 2002) and *Vorcheimer v. Vorcheimer*, 780 So. 2d 1018 (Fla. 4th DCA 2001).

[11] *Lowman v. Lowman*, 724 So. 2d 648 (Fla. 2nd DCA 1999); and *Bacon v. Bacon*, 819 So. 2d 950 (Fla. 4th DCA 2002).

[12] *Borchard v. Borchard*, 730 So. 2d 748 (Fla. 2nd DCA 1999); *Athey v. Athey*, 28 Fla. L. Weekly D788 (Fla. 2nd DCA 2003).

very different; most notably, rehabilitative alimony requires a valid rehabilitative plan, and can be of longer duration.[13] As Bridge the Gap alimony is meant for a very specific, short-term need, it does not seem appropriate for an alimony guideline approach.

[13] *Gandul v. Gandul*, 696 So. 2d 466 (Fla. 3rd DCA 1997); *Green v. Green*, 672 So. 2d 49 (Fla. 4th DCA 1996); *Zelahi v. Zelahi*, 646 So. 2d 278 (Fla. 2nd DCA 1994); *Shea v. Shea*, 572 So. 2d 558 (Fla. 1st DCA 1990); *Vena v. Vena*, 556 So. 2d 436 (Fla. 5th DCA 1990); *Kanouse v. Kanouse,* 549 So. 2d 1035 (Fla. 4th DCA 1989); *Whitley v. Whitley*, 535 So.2d 623 (Fla. 1st DCA 1988); *Murray v. Murray*, 374 So. 2d 622 (Fla. 4th DCA 1979).

The American Law Institute suggests a different policy, that is for compensatory payments. This is a payment to compensate the receiving spouse for loss of earning ability cause by the marriage.[14] The American Law Institute proposes five bases for compensatory payments, including the loss in living standard experienced at dissolution by the spouse who has less wealth, an earning-capacity loss incurred during the marriage from one spouse's disproportionate share of the care of children or from the care provided to a sick, elderly, or disabled third party, the loss incurred when the marriage is dissolved before a spouse realizes a fair return from his or her investment in the other spouse's earning capacity, and an unfairly disproportionate disparity between the spouses in their abilities to recover their premarital standard of living after the dissolution of a short marriage.[15]

Note that these factors are not as income driven as guidelines, rather they are factors which must be judicially determined. The Model Provisions Adopting Chapter 5 of the American Law Institute's Principles of the Law of Family Dissolution provides suggested language that could be adopted by state legislatures.[16] The suggested formulas for some factors are income based. However, the suggested formulas for other factors add other variables such as

[14] American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002), § 5.02, comment a.

[15] Id. at §5.03.

[16] American Law Institute, Principles of the Law of Family Dissolution, supra 12, Appendix II.

the family's living expenses during the period of education or training and the amount of debt that remains from the period of education or training for factor and the amount necessary for the spouses to recover the premarital standard of living for factor .[17] The question is, are they more fair than the current Florida factors, and would they provide more predictable results

[17] Id.

A turn to income based guidelines for alimony would be a sharp departure from the currently existing philosophy with respect to alimony by Florida courts, which currently emphasizes the standard of living in fashioning alimony awards. For example, the Fifth District Court of Appeal in *Vick v. Vick* discusses percentage of income rather than standard of living, noting that the appellate court cannot determine whether the trial court's imposition of monthly support obligations constitutes abuse of discretion merely by referring to the percentage of the husband's net monthly income. Rather, the appellate court must review the trial court's overall division of assets and award of support to determine the appropriateness of the award.[18]

Conversely, the court in *Laz v. Laz* considered the percentage of income when it reversed the alimony awarded by the trial court.[19] In *Laz*, Judge Quince opined that it was an abuse of discretion for the court to award the wife of a 35 year marriage less than one-third of the income available to the parties.[20]

In *Mallard v. Mallard*, the Florida Supreme Court struggled with this issue, when the husband's net income was high (over $428,750 per year) but the parties had a parsimonious standard of living. The Second District Court of Appeal tried to accommodate this disparity by developing the concept of a "savings alimony" award to the wife. The Florida Supreme Court reversed, reaffirming the concept that alimony was to provide support only for the needs of the requesting party.[21]

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[18] *Vick v. Vick*, 675 So. 2d 714 (Fla. 5th DCA 1996).

[19] *Laz v. Laz*, 727 So. 2d 966, 967 (Fla. 2nd DCA 1998).

[20] Id.

[21] *Mallard v. Mallard*, 771 So. 2d 1138 (Fla. 2000).

Next month, in the second part of this article, there will be an examination of the steps which some of the other states are taking to deal with the alimony issue and a discussion as to how Florida might be able to address the problems associated with awarding alimony.