

# Reference Points for Decision-Making

## **Brief overview:**

The role of the law is only one of many reference points for making decisions; there are many other reference points that might be more important to you:

1. Sense of Fairness – this can be independent of other decision points, and can differ from person to person
2. Interests, needs of parties and others
  - a. Developing goals and interests
  - b. Developing reasonable needs
3. Relationship (this can mean something to the parties even if not going well at the moment)
4. Practical and economic reality – with every agreement, no matter whether derived from “the law” or fairness or another standard, we need to ask: is it going to work; can it be implemented?
5. Prior agreements:
  - a. Formal, explicit
  - b. Informal, implicit
6. Other: customs, religious groups, community standards
7. Law and Underlying Principles

## **Conceptual Overview: Role of the law**

The law does matter. Informed decision-making protects you; those decisions are more likely to be honored/agreements kept.

The law as protection: A basic foundation in the law keeps the process from being a vehicle where one party can take advantage of the other.

The law as a reality check: A clear understanding of basic legal concepts and boundaries helps the parties to make more reasonable proposals. The law gives clients information about their rights and responsibilities that may help shift their understanding of what is expected or acceptable.

The law as safety: we do not abandon legal requirements. Certain requirements are adhered to in every case, such as disclosure requirements, reminding us that the process must be conducted with transparency and honesty, which encourages an open exchange of information. brainstorming of ideas and the generation of options.

The law as clarity: Certain legal standards are clear, such as child support.

The law as confusion: Other legal standards are more discretionary, and there are unsettled grey areas which can either lead to adversarial positions, or give us room to explore possibilities.

The law as a restrictive “box”. If we ignore all of the other reference points for decision making and strictly rely on the law:

- We become positional
- We become inflexible, hamstrung by “what is the least I’m obligated to do” and “what is the most that I am entitled to”
- The positions may or may not be actually supported by a clear rule of law; there are grey areas and areas of disagreement
- Our creativity is stifled
- We lose control of the process of self-determination
- Our respect for one another’s concerns is boxed in by legal concepts that are created by lawmakers who have no sense of you, your family, your finances, your agreements, what would work best for you. These sets of “rules” are simply “default”, which should only be resorted to if you simply cannot agree. Even then, the “rule” might not be clear.

## **Cash Flow Concepts**

Cash flow is what is really happening when child support and spousal support are paid and received. Because these are harsh legal terms, they can be scary concepts, so we do try to talk about support in terms of cash flow.

Child support and spousal support, in legal terms, are different concepts controlled by different areas of the law; whatever you call them, we feel that it is important that you have a sense of how each is determined, and where computer software comes in, if at all, so that you will have a foundation and reality check when discussing your options for final cash flow arrangements.

### Child support

Child support is calculated by an extremely complex formula that no one can figure out for himself or herself. A computer program that is often used is called “Dissomaster”, and it will do the calculation for you. The Dissomaster takes into account:

- Number of children
- The time each parent spends with the children
- Filing status (single, head of household, joint)
- Each parent’s income

- Health insurance payments
- Voluntary habitual contributions to retirement plans (considers the tax benefit only)
- Mandatory habitual contributions to retirement plans (considers the entire monthly payment)
- “Add-ons” like costs of child care, tuition
- Tax benefits from:
  - Mortgage interest
  - Property tax
  - Voluntary contributions to retirement plans

If you were to go to court, a judge would simply run these numbers and order whatever the Dissomaster spits out.

You, however, are free to base the component of your cash flow that is child support on any of the other decision-making reference points – in other words, what makes sense for you.

*Things to know about child support:*

- It is not taxable to the receiver and it isn't deductible for the payor.
- It doesn't mean that all kids' expenses are coming from the support payment; it assumes a contribution to expenses while in his/her home from the receiving spouse's income, and children's expenses in his/her own home paid by the payor as well. In other words, the payor should not assume that the other spouse should be paying for everything for the kids just because he is paying child support.
- College is not covered, as it ends when a child is 18 (or 19 if still in high school, etc.)
- It doesn't end if either of you remarry; it might be modified, though, based on your new spouse's assistance with your expenses and the tax benefits to you of his or her income.
- It cannot be made non-modifiable

## Spousal support

### ***Short term v. long term marriage***

The length of marriage is measured from the date of marriage through the date of separation, not the date of divorce.

- Short term:
  - A marriage of fewer than ten years is called a “short term marriage”.
  - There is a presumption that it takes half the length of the marriage for the receiving spouse to become self-supporting, but there is no help for us in the law about what “self-supporting” actually means.
  - This is NOT a rule, although practitioners do cling to it and rely on it.
- Long-term
  - A marriage of more than ten years is called a “long term marriage”, and the half the length of the marriage presumption is, we think, missing on purpose.
  - Some practitioners think this means that the receiving spouse is entitled to lifetime support. Most practitioners and judges, though do not share this view. All it really means is that the FIRST time you were to go to court to get a spousal support order, a judge cannot put an end-date to it, and even if the order is \$0, must retain “jurisdiction”, or the ability, to modify or order spousal support. However, as time goes on, a judge could eventually terminate it.
  - We like to divide the length of the marriage issue into three parts: the short term, the long term, and the “tween”, or between 10 and 20 years, where the most judicial discretion occurs.
  - A marriage of more than 20 years, though, surely means continuing support.

### ***Temporary support v. post-judgment support***

- Temporary support
  - Is any support that is requested between the date of the separation and the first to occur of your final agreement or a trial on the issue of *post-divorce* support.
  - If you were to be in court requesting temporary support, the judge would do the same thing as for child support – consult the computer and order whatever it spits out. This does not take into account your special situation, your needs or your ability to pay.
- Post-Judgment support
  - Is any support that you agree to in your Marital Settlement Agreement that will be in place after your divorce, or
  - What the court orders at trial for support that will take place after your divorce.
    - The court is expressly *forbidden to use the computer* to do this. Instead, a court is supposed to take into account the factors listed at the handout

(Exhibit A)

- Spousal support extremely expensive to try: Law school maxim: the more factors, the longer the trial – all have to be briefed and findings made about each one.
- The work we are doing tracks those factors, and we are free to craft a cashflow arrangement that takes all of this into account, and one that is appropriate to your situation.

## ***Different spousal support structures***

- Fixed, with review
  - *Example: \$2,000 per month until May 1, 2022, at which time the parties will review*
- Fixed, with reservation
  - *Example: \$2,000 per month until May 1, 2022, at which time support goes to \$0, but the court reserves jurisdiction to continue the support if through no fault of their own, the supported spouse is still unable to support themselves.*
- Fixed, with built-in reductions based on milestones
  - *Example: \$2,000 per month until May 1, 2022 (perhaps when receiver has finished post graduate work plus six months to find a job), at which time support goes to \$0.*
- Stepdown to encourage receiver to become self-supporting
  - *Example: for every two dollars earned by the receiving spouse, spousal support is reduced by one dollar)*
- Fixed (non-modifiable), with termination
  - *Example: \$2,000 per month until May 1, 2022, at which time support terminates forever.*
- Modifiable
  - *All of the above, but with the ability to modify along the way*
- Lump sum
  - *Example: x will pay y the sum of \$100,000, after which spousal support is terminated forever.*

## ***To Consider***

- *Should spousal support be taxable to the supported spouse? As of January 1, 2019, spousal support is no longer tax deductible to the payor unless a spousal support order has been ordered by a court prior to December 31, 2018. Whether a modification of this order, and under what circumstances this will apply (i.e. does the order have to be part of a divorce decree or simply a spousal support order standing alone, etc.) are unclear.*
- *Should support be modifiable as to either the amount or the duration or both* The advantages to having support nonmodifiable as to amount and duration are that no circumstances can change the payment or the time period, and there can be no litigation and no doubt in anyone's mind as to how much support is to be paid and for how long. Therefore, even if the supporting spouse should get a huge raise or the supported spouse becomes disabled, this would not affect the payment either way. The disadvantages for the supported spouse are obvious: should the supporting spouse become unemployed, he or she has no "out". The disadvantage for the supporting spouse is that the support keeps on accruing as an "arrearage" if he or she can't pay it. Should the supported spouse inherit a million dollars or get a great job, this would not affect the payment, or the arrearage.

- *If support is to be modifiable, then what are the circumstances for modification?*

*Downward:*

Supported spouse remarries - support terminates  
Supported spouse cohabitates with a person of the opposite sex  
Supported spouse becomes employed  
Supported spouse makes no efforts to become employed  
Supported spouse inherits money or receives a gift of money  
Supported spouse receives interest from the funds received in the property division  
Supporting spouse becomes unemployed  
Supporting spouse remarries - has child  
Supporting spouse retires

*Upward:*

Supported spouse becomes unemployable (accident, illness, etc.)  
Supporting spouse declares bankruptcy  
Supporting spouse receives anticipated raise, inheritance, bonus, etc.

- *Watch Out for Recapture.* If the supported spouse pays support of over \$1,250 per month, he/she must pay it for a continuous period such that period overlaps three calendar years or he runs the risk of the IRS "recapturing" the support and disallowing the excess. IRC §71(f). This period is tolled while support is simply by temporary court *order*, and by other extenuating circumstances which can be found in that statute. When we come up with our final agreement, you will need to check with your accountant or tax attorney to be sure we have not run afoul of this provision.

**EXHIBIT A**  
**Family Code section 4320**

In ordering spousal support under this part, the court shall consider all of the following circumstances:

(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

(d) The needs of each party based on the standard of living established during the marriage.

(e) The obligations and assets, including the separate property, of each party.

(f) The duration of the marriage.

(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

(h) The age and health of the parties.

(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.



(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

(n) Any other factors the court determines are just and equitable. (Am Stats 2001, C293)