

Johnson County  
Family Law Bench-Bar  
Financial Considerations  
Guidelines

*October 2015*

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# I. DIVISION OF PROPERTY

## Introduction

This section of the Family Law Guidelines relates to the division of property.<sup>1</sup> The first step in making a property division is to determine all of the assets and liabilities owned by the parties. The laws of Kansas make it clear that all property belonging to *either or both* of the parties, no matter how the property was acquired or how the property is titled, is marital property at the time of the filing of a Petition for Divorce.

However, these guidelines, which are discretionary in nature, make a distinction between mutual (marital) and individual (non-marital) property. The tax effects related to the division of property in family law cases should be considered and the Committee recommends that practitioners consult the applicable sections of the Internal Revenue Code, other tax resources, or experts in the area of tax calculations and effects.

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These Guidelines:

- are a tool for litigants and their attorneys
- are not “the law”
- do not limit litigants, attorneys, or judges from creating a property division agreement that differs from these guidelines
- were developed based on current knowledge and practice
- are not helpful in all circumstances

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# I. DIVISION OF PROPERTY

## SECTION A: Division of Net Worth

A division of property “operates retrospectively to adjust the rights of the parties to property already accumulated” and accrued property not yet received, while maintenance is “prospective and deals with future support.” *Beck v. Beck*, 208 Kan. 148, 149, 490 P.2d 628 (1971). Spousal maintenance (spousal support) and division of property are separate and distinct concepts, but “neither can be fixed by itself without giving appropriate consideration to the other.” *Almquist v. Almquist*, 214 Kan. 788, 793, 522 P.2d 383 (1974).

### 1.1: Mutual Property.

#### (a) **Definition.**

The following property is considered mutual and is subject to division:

- (1) any and all property acquired during the marriage through the efforts of one or both of the parties, including retirement benefits accumulated during the marriage;
- (2) gifts from one spouse to the other before or after the marriage;
- (3) the appreciation, rents, profits, dividends, interest, and earnings of any individual property during the marriage; and
- (4) property rights accrued by either or both of the parties during the marriage and not yet received (unless received as a result of gift or inheritance).

#### (b) **Division.**

The Court exercises its discretion when dividing the net worth of the parties, and considers the following factors set forth by the legislature of the State of Kansas in K.S.A. 23-2802:

- (1) Ages of the parties;
- (2) Duration of the marriage;
- (3) Property owned by the parties;
- (4) Present and future earnings;
- (5) Time, source, and manner of acquisition of property;
- (6) Family ties and obligations;

- (7) Allowance or disallowance of maintenance;
- (8) Dissipation of assets;
- (9) Tax consequences of the division; and
- (10) Any other factors the court considers relevant and/or necessary to make an equitable division.

Although the Court is not required to equally divide the net marital estate, Courts frequently reach such a result after considering the aforementioned factors and adjusting for any disparity between the parties. In the event a party contemplates filing a Petition for Divorce and expects to gain a financial advantage by alleging that the other party failed to perform a material marital duty or obligation (i.e. fault), the following case law should be thoroughly reviewed: *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982), *In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 827 P.2d 1222 (1997) and *In re Marriage of Cohee*, 26 Kan. App. 2d 756, 994 P.2d 663 (1999).

**(c) Appreciated Value of Individual Property.**

Any appreciation in value of individual property during the marriage is considered a mutual asset and is subject to division. The amount of appreciation is the difference in the entry value on the date of marriage, or the date received if acquired after marriage, and its value on the divorce valuation date. See also *In the Matter of the Marriage of Hair*, 40 Kan. App. 2d 475, 193 P.3d 504 (2008).

**EXAMPLE:** Husband has a retirement account at the time of the marriage. It is necessary to determine the account's value on both the date of the marriage and the property division valuation date for the divorce. An increase in equity during the marriage is marital equity and is subject to equitable division.

**(d) Effect of Record Ownership.**

The actual record owner of a particular asset or liability should not affect the division of the net worth of the parties. It is the manner of the acquisition of the asset or liability, as opposed to its record ownership, which determines whether it is mutual property or individual property, and therefore should either be divided between the parties or restored to one of them.

**EXAMPLE:** Husband buys a new car with marital funds, registering it in his name alone. One of the parties then files for divorce. The car is mutual property even though Wife is not a registered owner of the vehicle.

**(e) Effect of Greater Earnings by One Party During the Marriage.**

The fact that the income earned by one spouse allowed the parties to acquire more assets is not a factor considered by the Court when dividing property.

**EXAMPLE:** Husband is employed outside the home and Wife has not had monetary earnings. At the end of a five-year marriage, the parties have a net worth of \$40,000.00, all of which is directly traceable to the earnings of Husband. The net worth would generally be mutual and divided, with each party receiving \$20,000.00.

**(f) Division of Net Worth in Cash in Lieu of in Kind.**

If it is necessary to accomplish the division of property partly or wholly in cash in order to achieve an equitable division of net worth, the cash portion should be paid straightaway. If an immediate cash payment is financially impossible and payments must be made on an installment or other deferred basis, then:

- (1) the payments should bear an equitable rate of interest (e.g., current statutory judgment interest rate) compounded to correspond to the payment periods rather than simple uncompounded interest over the entire period of the obligation (preparation of an amortization schedule is advised); and
- (2) the entire sum should be paid within a period of time as brief as practicable (perhaps with a balloon payment) due to the effect of inflation on the unpaid principal balance.

To avoid the discharge of a marital obligation resulting from a divorce in a bankruptcy proceeding, every effort should be made to characterize the obligation as a domestic support obligation. In addition, endeavor to obtain a security interest in property retained by the obligor equal to the unpaid obligation to protect against possible discharge through bankruptcy proceedings.

Installment payments should have no effect on maintenance amounts due to being categorized as division of property rather than earnings or income.

**(g) Dissipation of Assets.**

If one party dissipates mutual assets, the dissipated amount may count toward that party's share of the parties' marital net worth. In contrast, losses in business or investment ventures, however speculative, should not be regarded as "dissipation" and should be borne equally by both parties.

**EXAMPLE:** The parties would have had a mutual net worth of \$100,000.00, but instead have a net worth of \$80,000.00 due to Husband's gift to his girlfriend of \$10,000.00, and speculative stock market losses of \$10,000.00. The gift to his girlfriend should count against Husband, but the stock market losses should not. This would result in a division of the \$80,000.00 net worth of \$45,000.00 to wife and \$35,000.00 to Husband.

**CAUTION:** There is a significant difference between proving dissipation due to a one-time gift of \$10,000.00, and questionable dinners over a period of two years. Make certain to consider the financial cost of pursuing a dissipation claim versus the value of successfully proving dissipation.

**(h) Effect of Individual Debts Paid During the Marriage.**

Where mutual assets or income earned during the marriage are used to satisfy the premarital debts of a party, the amount of the debt at the time of the marriage (to the extent satisfied during the marriage) should be considered and distributed to the debtor as a part of the debtor's ultimate share of the mutual assets pursuant to the factors set forth in K.S.A. 23-2802 (2012).

**(i) Examples of How to Divide Marital and Non-Marital Assets and Liabilities.**

The following examples are offered to assist in the distinction between mutual property and individual property and the treatment of each:

**EXAMPLE 1:** A married couple has a net worth of \$53,000.00, all in mutual assets and liabilities. The net worth is as follows: a) a house with a net equity of \$15,000.00; b) a car used by wife having a value of \$5,000.00; c) furniture and other personal property in the residence having nominal value (as household goods and furnishings are valued at the price a party could receive, not the purchase price. Unless a household good or furnishing is a valuable collectible, most items are worth a garage sale price.); d) a car used by husband having a value of \$5,000.00; e) a retirement benefit of husband having a present, after-tax value of \$15,000.00; and f) stocks and bonds in the amount of \$13,000.00. If the parties receive an equal division, each party should receive \$26,500.00. In this case, the wife might receive a) and b), the husband could receive d) and e), and each spouse will receive one-half of c) and f).

**EXAMPLE 2:** A married couple has a net worth of \$63,000.00, made up of the assets described in Example 1, plus a certificate of deposit inherited by wife from her mother during the marriage. At the time of the inheritance, the certificate of deposit had a value of \$7,000.00; it has now accrued \$3,000.00 of interest and is worth \$10,000.00. The calculation is as follows: each party will get one-half of the \$53,000.00, as in Example 1. Each party will also get one-half of the increase in the value of the certificate (the \$3,000.00 interest earned after it was inherited is mutual property); Wife will receive the \$10,000.00 entry value of the certificate as individual property. Wife should receive \$38,000.00 (\$26,500 + \$10,000 + \$1,500) and Husband should receive \$28,000.00 (\$26,500 + \$1,500).

## **1.2: Individual Property.**

### **(a) Definition.**

Individual property is defined as follows:

- (1) The entry value of property owned by either party prior to the marriage, and brought into the marriage; or
- (2) The entry value of property received during the marriage by will or inheritance from the party's family member. Generally, it is the relationship of the donor(s) to the party in the marriage and not the designated donee or intent at the time of the gift that will determine the individual status of the property; or
- (3) The entry value of the property received during the marriage by gift from someone other than the spouse or children of the parties. Generally, it is the relationship of the donor(s) to the party in the marriage and not the designated donee or intent at the time of the gift that will determine the individual status of the property.

### **(b) Restoring Individual Property.**

As a general rule, individual property will not be divided, but restored at its entry value to the party for or by whom it was acquired before consideration of the division of mutual property, so long as the property still exists and can be traced. Entry value is the value of the particular individual asset at the time that the parties were married or the asset came into the marriage. The court may determine the entry value of the property at the time the parties commenced living together if the parties commingled their earnings, jointly acquired assets, and/or shared expenses prior to marriage consistent with the manner that marital expenses were shared. The length of the parties' relationship and/or marriage, as well as the other factors set forth in K.S.A. 23-2802, may determine the degree to which any individual property is restored.

**(c) Effect of Sale of Individual Assets Where Proceeds Are Used for the Purchase of Other Assets.**

When individual assets are sold and the proceeds used to purchase other assets, or when individual assets are traded for other assets, the new assets may be considered individual to the extent of the value of the original individual assets, so long as the value of the individual asset can be traced.

**EXAMPLE 1:** The parties are married for 2 years. Individual property is presently worth \$15,000.00, but had an entry value of \$12,000.00. The individual property is sold for \$15,000.00 and the proceeds, along with \$5,000.00 in additional mutual assets, are used to purchase a \$20,000.00 asset. The new asset would be treated as \$12,000.00 individual and \$8,000.00 mutual property.

**EXAMPLE 2:** Wife inherits a ranch and transfers ownership to herself in joint ownership with husband. The ranch is individual property as to its entry value and mutual property as to any increase in value after inheritance.

**CAUTION:** Every case is different. If Husband quit his job and worked on the ranch for 15 years, Wife may only be set aside a small fraction of the non-marital value of the ranch.

**(d) Effect of Sale of Individual Assets Where Proceeds are not used for the Purchase of New Assets.**

When proceeds from individual liquidated assets are used for purposes other than the purchase of new assets, such as living expenses, the awarded spousal share will, in part, depend on whether mutual assets exist that can be reasonably traced or identified as acquired from the individual assets. The overall equities of the situation are considered in determining how much, if any, of the value of liquidated individual assets will be restored to the party originally owning these assets. Some factors to be considered are:

- What was done with the liquidated individual assets?
- Who benefitted from the use of the liquidated assets?
- The degree to which both parties agreed to the use of the liquidated assets.
- The degree to which the mutual assets (or the individual assets of the other party) were preserved by the use of the liquidated assets.

### **1.3: Debts.**

#### **(a) Unsecured Debt.**

When possible, unsecured debts should be paid from the parties' assets. If there are not sufficient assets to cover the parties' unsecured debts, the debts should be divided equitably in light of the circumstances of the case.

#### **(b) Secured Debt.**

Secured debts should usually be assumed and paid by the party receiving the asset that secures the debt. The party with the responsibility for paying the secured debt should hold the other party harmless from any liability thereon. Effort should be made by the responsible party to remove the other party from ongoing legal liability by requiring the responsible party to refinance, sell the secured property within a specified period, or otherwise remove such liability.

#### **(c) Debt Incurred After Filing.**

It is presumed that after the parties have filed for divorce and have separated both physically and financially, the party incurring the debt should pay any debt incurred. The parties should generally be expected to pay normal living expenses and payments from their regular incomes and not expend marital assets for living expenses in the pre-divorce period.

### **1.4: Effects of Bankruptcy.**

The parties should keep in mind the possibility of one of the parties filing for bankruptcy. Bankruptcy can affect the division of property in three ways: the presence of the automatic stay, the discharge of debts, and the avoidance of certain liens. It is recommended to consult legal experts practicing in the area of bankruptcy law with respect to individual case analysis.

### **1.5: Presentation of Suggested Division.**

The court is required by statute to make a determination as to whether the division of property proposed by the parties in settlement or at trial is equitable. *See In re Marriage of Kirk*, 24 Kan. App. 2d 31 (1997). In order to determine this fact, the court needs information about the assets and liabilities of the parties. In addition to the Domestic Relations Affidavit required pursuant to Kansas Supreme Court Rule No. 139, each party in a contested matter, or at least one party in a settled case, should prepare a balance sheet or synopsis of the assets and liabilities of the marriage along with a proposed division. The synopsis should generally value the properties and demonstrate to the court those properties that are to be retained by each party.

## **SECTION II**

### **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

#### **Introduction**

This section of the *Family Law Guidelines* addresses spousal support maintenance.<sup>2</sup> Kansas Statutes limit the Court's ability to modify maintenance once the Court has ordered it. The Court may not increase or accelerate maintenance without the consent of the payor. Unusual financial circumstances involving one or both of the parties may justify variations from the usual analysis of need and ability to pay.

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## **SECTION II**

### **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

#### **SECTION A: Overview of Spousal Maintenance (Spousal Support)**

Maintenance (spousal support) is neither a right nor an entitlement in Kansas. Kansas courts exercise broad discretion in determining both the amount and duration of any spousal support award. Generally, the purposes of maintenance are: (1) to help mitigate an economic imbalance in present or future earning capacity and financial well-being in light of the particular facts of each case, and (2) to assist in rehabilitation of a divorcing spouse's ability to appropriately support themselves in the future. The initial factors to consider when determining whether spousal support is appropriate are: (1) the economic needs of one spouse, and (2) the ability of the other spouse to pay support. Although maintenance is inherently transitional and not intended to create a long-term lifestyle, the facts of any given case may suggest deviation from this basic principle. For example, although it may be appropriate to allow no spousal support or nominal spousal support in a short-duration marriage (generally less than 3 years in length), a long-duration marriage may justify substantial maintenance for an extended time. Unusual circumstances, such as health issues of a party, might mitigate in favor of more or less maintenance for longer or shorter periods of time.

#### **SECTION B: Factors to Consider**

While divorcing parties are free to negotiate and contractually establish or address maintenance under different terms, Kansas courts must follow Kansas statutes and case law when determining this issue. Wide latitude is given to the courts in awarding maintenance; the Court may award maintenance in an amount the Court finds to be "fair, just and equitable under all of the circumstances." K.S.A. 23-2902(a) (2012). *See also In re Marriage of Colgan*, 331 P.3d 833 (Kan. Ct. App. 2014).

Kansas courts may not order more than 121 months of initial maintenance, regardless of the length of the marriage. K.S.A. 23-2904. *See also In re Marriage of Dicus*, 328 P.3d 1127 (Kan. Ct. App. 2014). However, an extension may be ordered if the Court has reserved jurisdiction to extend maintenance if the request is properly and timely made prior to the expiration of the maintenance period. K.S.A. 23-2904 (2011). *See also Einsel v. Einsel*, 340 P.3d 1236 (Kan. Ct. App. 2015). No single extension can exceed 121 months as well. Historically, the grant of extensions has been rare.

No one should presume that spousal support should be paid or not paid; neither should there be a presumption of an absolute entitlement nor an unrealistic expectation of a particular style or standard of living similar to what the parties experienced during the marriage. However, in the context of a specific fact situation, "need" may be a relative term. When assessing "need," it may be appropriate to consider the parties' historic lifestyle as one factor. *See In re Marriage of Kunzle*, 169 P.3d 344 (Kan. Ct. App. 2007). While maintenance serves the purposes of transitioning the parties into their respective futures and of cushioning the financial impact of one household becoming two, the analysis should consider all relevant factors as set forth in this section.

In assessing whether there should be maintenance and the amount and duration of any maintenance, the initial analysis should focus on the present and future needs of one spouse and the ability of the other to pay. The first question to consider is whether one spouse “needs” financial assistance from the other, and this preliminary question requires a much broader analysis than merely a review of the parties’ Domestic Relations Affidavits or short-term prospective budgets.

If the division of the assets, the parties’ respective incomes, or other factors suggest that both parties will have the financial ability to appropriately support themselves without payment of maintenance, then a fair question is whether any maintenance at all is justified. The specific facts of each case must be carefully analyzed in making this threshold determination. Generally, justification for maintenance at a substantial level for an extended period of time is greater when the duration of the marriage is longer, the ages of the parties are more advanced, and the prospective disparity in the parties’ financial prospects and income-generating capability is greater. This general principle assumes, of course, that the payor spouse actually has the ability to pay.

In those cases where one party demonstrates the need for financial assistance, the inquiry shifts to whether the other party is reasonably able to provide such assistance. If both parties are equally or nearly-equally needy, generally neither party should have maintenance from the other. One party may have significant need; but, if the facts show that the other party cannot reasonably provide financial assistance, then there may not be any viable way to pay maintenance.

Kansas courts have listed various factors and circumstances to be considered in determining the need for and in calculating the amount and duration of maintenance. The Committee has not made any attempt to list all factors, the courts and attorneys should be mindful of recent changes in or additions to the relevant body of law. The following factors (among others) are most relevant to the analysis:

- The parties’ needs and overall financial situation.
- The present and prospective earning capacities of the parties.
- The length of the marriage.
- Property owned by the parties, regardless of source.
- The ages of the parties.
- The contributions or sacrifices by one party to aid the other’s education or career.

- Rehabilitation issues:
  - The retraining or education needs of one or both of the parties.
  - The number of years a party has been absent from the job market and the reason for the absence.
  - The parties' skills and ability to reenter the job market.
  - Unusual or unique health or medical needs.

*See, e.g., Williams v. Williams*, 219 Kan. 303, 548 P.2d 794 (1976), and *Stayton v. Stayton*, 211 Kan. 560, 506 P.2d 1172 (1973).

Marital fault is not a factor to consider when determining if maintenance is appropriate and maintenance should never be ordered for punitive purposes. See *In re Marriage of Sommers*, 246 Kan. 652, 659 (1990). Courts have, on rare occasion, allowed consideration of marital fault when a party's conduct is "so gross and extreme that failure to penalize therefor[e] would, itself, be inequitable." See *In re Marriage of Sommers*, 246 Kan. 652, 659 (1990). Marital fault is also not an appropriate consideration when determining the amount or duration of support.

## **SECTION II**

### **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

#### **SECTION C: Determination of Earning Capacities**

##### **2.1: Imputation of Income.**

Usually each party's present gross income would be the same as their earning capacity. It may also be appropriate to consider historical information, the seasonal nature of employment, and the likelihood of continued income in the future. If appropriate, income may be imputed to either party. If either party is deliberately unemployed or underemployed but reasonably capable of full-time employment, income may be imputed by considering the potential and probable earnings based on historical earnings of the parties, their educations, and any unique skills or qualifications.

##### **2.2: Amount and Duration of Maintenance.**

For typical fact situations, a reasonable basis for establishing maintenance is as follows:

- (1) Amount. 25% of the first \$300,000 difference in the parties' earnings (or imputed earning capacity), plus 15% of the excess difference (more than \$300,000 difference).
- (2) Duration. One-third of the total duration of the marriage (to a maximum of 121 months) reserving to the Court jurisdiction to extend maintenance on motion filed pursuant to the statute.

The suggested formula does not contemplate marriages of very long duration or where extreme facts or circumstances exist.

A. Generally, Spousal Maintenance should terminate on the first of the following occurrences:

- (1) The death of either party.
- (2) The remarriage of the maintenance recipient.
- (3) The expiration of the term of maintenance specified.
- (4) The maintenance recipient's cohabitation in a marriage-like relationship.

B. Length of the marriage should be calculated from the date of the marriage or from date the parties started living together.

C. Generally, the maintenance obligor should receive credit for appropriate temporary maintenance payments made during the pendency of the divorce.

D. There are many possible approaches to establishing maintenance, and the specific facts and circumstances of each case must be thoroughly analyzed in determining both the amount and duration of maintenance. The following serves as a reasonable starting point for establishing the appropriate amount and duration of maintenance in typical fact situations with no extraordinary or compelling facts or circumstances:

- (1) **Amount** – Twenty-five percent (25%) of the first \$300,000 difference plus fifteen percent (15%) of the excess difference (more than \$300,000 difference) in the parties' earnings (or imputed earning capacities).
- (2) **Duration** – One-third (1/3) of the total duration of the parties' marriage, to a maximum of 121 months, in appropriate cases reserving to the Court jurisdiction to extend maintenance on motion timely filed pursuant to the statute.

These Guidelines recognize and acknowledge the wide diversity of factual situations that present themselves for analysis in marital dissolution matters, and the Guidelines intend to foster careful analysis of the facts, rather than routine adherence to a rote formula or rule. The facts of any given case may suggest a smaller amount or shorter duration of spousal support, while some cases may call for more maintenance for a longer period. The suggested formula does not apply to marriages of very long duration, or where extreme facts or extraordinary circumstances exist. Thoughtful analysis of the facts and circumstances must be applied in each case.

The parties should specify the period of time in months that maintenance will be paid, as well as events that would cause the maintenance to be modified or terminated earlier. Unless negotiated otherwise, maintenance should terminate on the first of the following events:

- (A) the death of either party;
- (B) the maintenance recipient's re-marriage;
- (C) the expiration of the specified term of maintenance (presuming all maintenance payments were paid when due.

Some parties will negotiate additional “cohabitation” termination contingencies, such as:

**Example A:** the cohabitation (as defined by the then-current Kansas law) of the maintenance recipient with a non-relative adult (regardless of gender) in a marriage-like relationship; or

**Example B:** the maintenance recipient's living in a marriage-like relationship with an adult non-relative (regardless of gender) whether homosexual or heterosexual.

In determining the length of the marriage, the period should be calculated from the date of the marriage (or the date the parties commenced cohabitating as a financially-unified household

prior to marriage) until the date of the parties' separation or the filing date of the Petition for Divorce or other agreed-upon date. Credit should also be considered for the payor spouse for the period of time he or she pays any temporary maintenance, whether court ordered or paid by informal agreement, after the separation of the parties until the time of the divorce.

**Example:** if the calculation of time for maintenance results in a term of five years, and the parties has been separated for six months, during which time appropriate support has been paid by the maintenance payor, the remaining term of maintenance should be 4.5 years.

In some instances, where one party continues to pay all of the family household expenses but no actual temporary maintenance is paid by that party, the parties should consider whether a credit should be provided for each month the household expense payments were made by a party in lieu of temporary maintenance.

### **2.3: Calculation Examples.**

Hypothetical 1. The parties have been married 6 years (72 months). Spouse A earns \$80,000 annual salary, and Spouse B earns \$20,000 annual salary. Both parties' incomes are relatively stable and predictable. In this fact situation, the Guidelines formula suggests that, in the absence of other extraordinary or compelling circumstances, Spouse A pay maintenance (spousal support) to Spouse B as follows:

Amount:           \$80,000 - \$20,000 = \$60,000 (income differential)  
  
                          \$60,000 x .25 = \$15,000 (annually)  
                          \$15,000 ÷ 12 = \$1,250 (suggested monthly maintenance)  
  
Duration: 72 months ÷ 3 = 24 months.

Hypothetical 2. The parties have been married 18 years (216 months). Spouse A earns \$450,000 annual salary, and Spouse B earns \$50,000 annual salary. Both parties' incomes are relatively stable and predictable. In this fact situation, the Guidelines formula suggests that, in the absence of other extraordinary or compelling circumstances, Spouse A pay maintenance (spousal support) to Spouse B as follows:

Amount:           \$450,000 - \$50,000 = \$400,000 (income differential)  
  
                          \$300,000 x .25 = \$75,000  
plus           \$100,000 x .15 = \$15,000  
  \$90,000 (annually)  
  
                          \$90,000 ÷ 12 = \$7,500 (suggested monthly maintenance)  
  
Duration: 216 months ÷ 3 = 72 months.

## **SECTION II**

### **SPOUSAL MAINTENANCE (SPOUSAL SUPPORT)**

#### **SECTION D: Special Considerations**

##### **2.4: Parties Nearing Retirement.**

Unique challenges are confronted in cases involving divorcing parties who are nearing retirement, especially where such cases involve long-term marriages. Special care should be given in analyzing the circumstances of such cases, and creative thinking will often be required in order to craft reasonable and realistic support plans.

For example, where a couple have reached social security age and are ready and preparing for retirement after a long-term marriage, it may be neither reasonable nor realistic to expect one party to pay the other long-term support as suggested by these Guidelines. The same applies to one party who has been a high-earning executive for many years, but now is approaching retirement with an income expected to be a fraction of what they have been earning.

In such circumstances, consideration should be given to establishing future spousal support as a percentage of future income. In this way, both the payor and payee share the upside and downside of future uncertainty of income. In such instances, income should generally not be income imputed or assumed to the payor, unless it can be shown that the payor is intentionally unemployed or underemployed for the sole purpose of depriving the payee of spousal support.

##### **2.5: Parties with Variable Incomes.**

In some cases the parties' present gross income will be highly variable or difficult to ascertain. The general maintenance principles may not be appropriate for fact situations involving one or more parties with substantially fluctuating incomes. Such situations allow for creative maintenance agreements, such as providing for lower monthly maintenance with lump-sum maintenance payments based on excess income periodically received. Those whose incomes are primarily from big-ticket commission sales or transactions (e.g. commercial real estate agents or individuals whose incomes are largely derived from variable bonuses) are good examples.

Consideration should be given to establishing maintenance payments based on reasonably predictable gross income ("base income") augmented by additional lump-sum maintenance payments if the payor receives gross income in excess of the base gross income via bonuses, commissions, etc. One option to consider is to take an average of the historic variable gross annual income of a party for the preceding reasonable time frame (e.g. 3 years or 5 years) to determine an average "base" gross income for a party.

No single approach or rule would apply to every case and the Committee endorses creative resolutions of such cases through allocating each party a portion of both the upside and downside risks.

## **2.6: Parties With Minor Children.**

The Kansas Child Support Guidelines established by the Kansas Supreme Court factor in monthly maintenance payments when calculating child support, and child support may be ordered in addition to maintenance. Where there are no minor children or no payments being made by one or both parties for an adult child of the parties (i.e., college tuition or similar expenses, or an adult child with a disability), and in a case where maintenance is otherwise appropriate, the parties may consider utilizing higher percentages than the suggested formula found in Section 5.4.

## **2.7: Duty to Disclose.**

In all cases where maintenance is modifiable or terminable, the parties have a duty to timely disclose material changes of circumstances that might constitute grounds for modification or termination of maintenance.

## **2.8: Method of Payment.**

Maintenance may be paid in a lump sum, in periodic payments, or based on a percentage of future earnings. Other approaches may also be appropriate, depending on the circumstances. When considering alternative methods of payment, the tax consequences of the selected method of payment should be carefully considered.

## **2.9: Modification of Maintenance.**

If the parties agree in writing to the amount or duration of maintenance, the Court cannot modify these terms at a later time unless the ability to modify these terms in the future was included in the agreement. The parties should include detailed terms and any specific conditions for future modification of maintenance in any written agreement if they desire the ability to modify maintenance in the future under those agreed terms and conditions. If the Court determines spousal maintenance at a trial or other hearing, the Court may modify the amounts or other conditions for the payment of maintenance at any time in the future with reasonable notice to the party affected. However, the Court can only modify the amounts originally awarded that have not already become due.

The Court may not modify the original or subsequently modified award without consent of the party liable for maintenance, if the modification has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was stated in the original decree. Thus, Court-ordered maintenance may be reduced but not increased beyond the original amount or term ordered. Past due installments may never be modified, except by agreement.

Generally, in fact situations where the length of the marriage or other unique circumstances justify maintenance of 121 months or more, the parties should reserve to the Court continuing jurisdiction to reinstate or extend the duration of maintenance in accordance with Kansas statutory and case law.

Johnson County Bar Association  
Family Law Bench-Bar Committee  
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