

# **A Guide to the Award of Spousal Maintenance in Washington State**

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## **I. Introduction**

The legal issues surrounding the award of Spousal Maintenance are confusing, numerous and can be challenging to predict in their outcome. Largely, these differences occur because there is so little written guidance and secondarily because of the great amount of discretion allowed to the court and the parties of divorce proceedings in fashioning individualized outcomes for their own unique family circumstances. This article addresses the ‘state of the art’ such as it is at this time, regarding these issues and questions in an attempt to clarify and reconcile a number of them.

## **II. Spousal Maintenance Defined**

‘Spousal Maintenance’ (or simply, ‘Maintenance’) is the name for the legal award by which one party to a divorce or separation agrees to or is ordered by the court to provide economically for the other over a period of time after their separation. It is often referred to as the successor to the doctrine of divorce ‘alimony.’ However, it differs from alimony (and its cousin, ‘palimony’) in several regards: (1) it is not entitlement based; (2) it is adaptable to and complementary to property award concepts, rather than solely for the provision of economic subsistence for a spouse after their relationship; (3) and its duration and terminating events may differ from those of classic alimony.

In the literature, Spousal Maintenance is defined as ‘the financial support provided by one spouse to the other during or after a divorce, separation, or invalidity proceeding.’ *Washington Courts Family Law Handbook*, December, 2012, p. 9. This definition, one will find, is dated and no longer completely accurate, as the concept has evolved into a greater tool for the settlement or resolution of divorce cases.

The purpose and function of an award of Spousal Maintenance:

- IS to provide for the economic well-being of a spouse, post-separation, whether or not a divorce has been entered by the court at the time;
- IS to provide the opportunity for a spouse to gain education, skills and experience, so as to become economically self-sufficient and independent;
- IS to provide a flexible means of property allocation and/or asset transfer using future earnings as a resource, thus augmenting or protecting the equities in the present assets of the parties;
- IS NOT generally favored in Washington law, historically, and is not seen as a legal entitlement;
- IS NOT intended to provide a pension or government-like entitlement, such as unemployment compensation, industrial insurance, or Social Security, for which no

present labor is required for its receipt. It is the allocation of present and future *earned income*; hence it may be varied or modified as the earned income stream changes over time or because of events occurring in the lives of the payer or the recipient.

### **III. Spousal Maintenance – the Statute**

Section 26.09.090 of the Revised Code of Washington provides:

***“Maintenance orders for either spouse or either domestic partner — Factors***

*In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:*

*(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;*

*(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;*

*(c) The standard of living established during the marriage or domestic partnership;*

*(d) The duration of the marriage or domestic partnership;*

*(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and*

*(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.”*

### **IV. Types of Spousal Maintenance**

There are several of types of Spousal Maintenance that may be identified and distinguished by their function. The over-arching notion is that while each type may provide in some measure for a party to a divorce or separation, they may do so for different purposes and based upon different criteria. Each has its own characteristics and each is applicable in differing circumstances, although sometimes they may work in combination with each other, either serially or in combination. In analyzing, estimating and evaluating an offer or a claim of spousal maintenance, one must bear in mind these differences, as they account, in large part, for the varying maintenance awards granted by trial courts and those affirmed by appellate courts. The types most commonly found and recognized, their purposes, criteria and characteristics, may be summarized in a chart.

<b><i>Types of Maintenance</i></b>	<b><i>Purpose or Use</i></b>	<b><i>Criteria in Awarding</i></b>	<b><i>Characteristics</i></b>	<b><i>Duration</i></b>
<b><i>1. Temporary</i></b>	Maintains family lifestyle to maximum extent possible while permanent arrangements are made	Family economic lifestyle; Needs of family members; Ability to pay of primary earner; Debt allocation	As close to pre-separation lifestyle as possible, with income now spread over (1) support of <i>two</i> homes, (2) child support, and (3) debt payments	Occurs during the pendency of pre-divorce separation, and during divorce negotiations or legal proceedings
<b><i>2. Disability</i></b>	Provides assistance for a spouse who is unable to fully provide for oneself	Nature, extent that disability affects one's earning capacity or economic standing	Sufficient to provide for basic (often subsistence) needs, in context of (1) age, (2) available funds, (3) relationship duration	Anticipated length of disability May be measured in proportion to length of marriage
<b><i>3. Rehabilitative</i></b>	Provides a means for a spouse to gain skills or education to provide for oneself	Amount required for living expenses during and skill-building costs	Rarely 100% of costs or budget, as there will be no return to obligor or community for income stream to be received in future	Time required to gain skills, education and/or employment May vary according to length of marriage
<b><i>4. Compensatory</i></b>	Provides a means of justly allocating a fair return for spousal/community efforts in the other's acquisition of skill, education or income	Property concept that identifies, allocates & transfers part of a future income stream attributable to past community labor/investment	Is based upon assumed additional, incremental income to be received Is related to global property award, the needs of each party for income, and tax planning	Often based in proportion to years of marriage Significant differences among the counties and discretion of judges in its award
<b><i>5. Restorative</i></b>	Provides a means of repairing harm done by or assuaging guilt of one party Provides a more prompt exit from the relationship or legal proceeding	Extent of willingness of a party to sacrifice money for time, expediency or perceived damage to other	May be a greater amount of \$\$\$ paid over a shorter length of time or may step down in amount Consideration given to total amount paid	As negotiated Is determined in the context of a disparate property award May be lump sum or stepped down
<b><i>6. Medium of Property Settlement</i></b>	Provides alternative vehicle for transmission of wealth Utilizes tax saving opportunities Need for security to insure payments	Need for transfer to create balanced equitable property award Does not impair present equities or mandate a forced sale or liquidation	Creates an annuity for recipient that may be of greater value than present estate would support May/must be non-modifiable	Generally must be 3 or more years of non-declining amounts for tax qualification Otherwise, no limitations

## **V. Sample Questions to Ask When Spousal Maintenance is Sought**

### ***A. Questions Appropriate Ask in All Cases for Which Spousal Maintenance is Sought***

1. What is the income of each of the parties?
2. What are the (reasonable) expenses of each of the parties?
3. What would be the (presumptive) property allocation be absent an award of maintenance?
4. What are the global property percentages sought by each of the parties?
5. What was the length of the marital relationship (date of marriage to date of separation)?
6. Was there a 'committed intimate relationship' prior to marriage, and if so, for how long?
7. What is the education, employment and earnings history of each of the parties?
8. What is the health condition of each of the parties?
9. How many of the various theories or types of spousal maintenance may be applicable to the family? How do they inter-relate, cumulatively and/or longitudinally? Ought they be combined or applied in series?
10. Is either of the parties contemplating the filing a bankruptcy proceeding?

### ***B. Questions to Ask When Temporary Maintenance Is Sought***

1. Have the parties separated as yet? If yes, how long have they been separated and what have been the financial arrangements? If not, when do they plan to do separate, if there is a plan? What are or would be the financial arrangements for each of the parties?
2. Are the parties still operating out of one financial account or checkbook, or do they plan to do so? If so, will the income continue to be deposited in the family (bill-paying) account?
3. Is there a significant disparity in the incomes of the parties? Is either of the parties unemployed, unskilled or disabled, or are there young children at home?
4. What has been the standard of living (income *and* expenses) in the near-term past?
5. Has the family budget been subsidized by non-earned income or family gifts?
6. Have the parties been living at a deficit, such as off loans, debt or credit cards?
7. How long of a period might temporary maintenance be necessary, considering the process to be followed for a permanent resolution of financial affairs (such as during a trial separation, Collaborative or Cooperative Law process, and/or litigation with a court case schedule)?
8. Are there special circumstances that will affect the finances of either party in the near future, such as receipt of a bonus, obligation to pay income or property taxes or tuition for a child or parent?
9. How long have the parties been married or living together?
10. Has there been a recent serious illness or death in the family of either spouse? Will this affect the ability of either party financially, or lead to an inheritance in the future?

***C. Questions to Ask When Disability Maintenance Is Sought***

1. What is the nature of the disability and the limitations on earning capacity?
2. What is the prognosis and treatment plan for the illness or disability?
3. What are the estimated treatment time and the cost of treatment over that period?
4. What will be the limitations, if any, at the conclusion of treatment?
5. Are there any entitlements to disability income, such as from insurance or Social Security?

***D. Questions to Ask When Rehabilitative Maintenance Is Sought***

1. What is the age and what are the present skills, education, experience and past employment of the person seeking maintenance?
2. When was the person last employed? What was their compensation rate or income?
3. If previously employed, what were the reasons for termination from each employment?
4. If the person is presently employed, why is that employment not satisfactory or sufficient?
5. Has there been a past agreement or understanding concerning the person's employment?
6. Is the person seeking maintenance disabled or are there young children at home?
7. Has the person been vocationally tested or received vocational counseling?
8. What is the proposed term and estimated cost of the education or experience required for certification and/or proficiency?
9. What will be the projected working schedule and income once the person is qualified?
10. Will the person need to be self-employed? What will be the start-up expenses? Over how long of a period?
11. Is all income in the new occupation customarily reported to the IRS? Will any of it inure to the benefit of the other party?
12. What will be the disparity in income of the parties, once the person is employed in the chosen occupation or profession?

***E. Questions to Ask When Compensatory Maintenance Is Sought***

1. ***Identification of Income-Producing Component.*** What is the nature of the business or profession and the income that has been attained by the primary wage/income earner in the course of the relationship?
2. ***Identification of Baseline Value that Was Augmented.*** What experience, skill, education, qualifications or employment did the income earner have at the initiation of the relationship and at the date of marriage?
3. ***Augmentation of Income-Earner's Economic Value.*** What experience, skill, education, qualifications or employment did the income earner gain in the course of the relationship?

4. **Contribution of Spouse.** What contribution did the other party make or contribute to enable the primary income earner to attain the present skill, education, qualifications or employment?

5. **Determination of Community Interest or Investment.** What share or percentage of the business, profession or skill-level income may be attributable to the combined family contributions to the attainment of that income level?

6. **Basis of Possible Phase-Down or Phase-Out of Interest.** Might the proportion of family contribution to the income level diminish over time, as the person gains more skill, experience, education or security (as in a salaried occupation or profession); or might the family contribution continue unabated (as in the creation of a business or investment) that may even grow over time? In either case, what is the risk of future growth in income, business or investment and what is risk of future lay-off or downturn in the value of the business or investment?

7. **Retirement of Ownership Interests.** Are there any substantial assets or income-producing components being awarded to one spouse, to which the other spouse ought be awarded a share thereof in recognition of the community industry and/or investment in the creation, accumulation or build-up of the source of the income stream? This can refer to a company, investment account or holdings, or a professional degree, practice or experience.

#### **F. Questions to Ask When Restorative Maintenance Is Sought**

1. **Extra-marital Affairs.** Has either of the parties had a relationship or affair outside of marriage?
2. **Committed Intimate Relationships.** Is either party in a ‘committed intimate relationship’ or living with another adult at this time?
3. **Expenditure of Community Wealth or Credit.** Has a party expended community funds or assets in the course of an extra-marital or new relationship?
4. **Affect on Present Budget.** Is the relationship affecting the budget of the party at this time; and if so, how?
5. **Children.** Are the (marital) children aware of the relationship? Are there children of the new relationship?
6. **Counseling.** Has either party needed, sought, or received counseling in response to the situation?
7. **Dissipation of Estate.** Has either party sold, mortgaged, wasted or dissipated community assets without the knowledge, acquiescence or approval of the other? If so, how much, when or for how long, why?
8. **Knowledge or Acquiescence of ‘Innocent Spouse.’** What actions could be shown or seen as showing a knowledge, acquiescence or approval of the actions of the other?

9. **Addictions.** Is a party addicted to drugs/alcohol or a dangerous or harmful course of conduct (such as gambling, excessive spending, sexual relationships outside of marriage) that has affected the marriage or marital finances? If so, what is it, for how long has it occurred, and what have been the costs and consequences?
10. **Currency of Conduct.** Is the condition or conduct ongoing? What are the treatment options, consequences and costs?
11. **Abuse or Exercise of Excessive Control.** Has a party abused or been accused of abusing the other, such as physical, mental or sexual abuse, stalking or surveillance, controlling or isolating the other? If so, in what way?
12. **Symptoms and Effects of Abuse and Excessive Control.** What is the nature, duration, consequences, treatment and costs the conduct has occasioned to the victim (and children), as well as to the offender?

**G. Questions to Ask When a Maintenance As a Medium of Property Settlement Is Sought**

1. **Equity of Property Division.** What is the intended global property settlement -- what proportion will be awarded to each of the parties?
2. **Liquidity.** How liquid are the assets of the parties? How much debt is to be allocated to each of the parties and what are the terms of it? How much of the estate is locked up in real estate, closely held businesses or tax sheltered accounts?
3. **Income Streams.** What is the income stream of each of the parties without consideration of a maintenance award? What are the immediate and long term financial needs of each of the parties on a monthly basis?
4. **Tax Consequences.** What are the comparative benefits and costs of various maintenance scenarios?
5. **Retirement of Ownership Interests.** Are there any substantial assets or income-producing components being awarded to one spouse, to which the other spouse ought be awarded a share thereof in recognition of the community industry and/or investment in the creation, accumulation or build-up of the source of the income stream? This can refer to a company, investment account or holdings, or a professional degree, practice or experience.

## **VI. Elements of the Spousal Maintenance Award**

- a. **Amount of Monthly or Periodic Award.** The maintenance obligation is most often stated as a set amount payable per time period, usually a month. It can be a set amount for an indefinite period of time, or an indefinite amount for a set period of time. It may be variable in amount, such as a percentage of earnings or a bonus, although caution should be used when providing for the award of a percentage amount for maintenance, as to do so may

invariably lead to the need for future communications, discovery, negotiations and even litigation for each period of time.

- b. ***Duration of Award.*** What will be the terminating events? By law and unless otherwise stated, maintenance will terminate upon the death of the payer or the death or remarriage of the recipient. Inferentially, the remarriage of the recipient may include the formation of a domestic partnership. Most often and especially when non-modifiable maintenance is agreed upon, the parties agree to waive the death of the payer as a terminating event, as the maintenance may necessary for the recipient irrespective of the death, or it may be in reality a transfer of property. In either case, the obligation may be secured by payment from life insurance or an obligation upon the payer's estate. The length or duration of the award is most frequently described by a number of months, subject to the identified terminating events. If any of the statutory terminating events is waived, this should be done expressly in writing.
- c. ***Payment Due Date(s).*** Each agreement or order should state a payment due date, to establish the obligation for that period. Some contempt courts have held the payment due date during the period is advisory, with the payer not being in violation of the maintenance order until non-payment has occurred by the last day of the period. Many persons receive one or more paychecks per month, so often the parties agree that the maintenance may be made, for example, in two installments per month such as on the 15<sup>th</sup> and the 30<sup>th</sup>. This works well for the payer who may have a large mortgage, rent or child support amount due in the first part of the month as well.
- d. ***Means of Payment.*** Of course, payment could be made by cash, money order or check. However, the most favored means of payment, whether or not there is a current child support obligation, is through the use of an electronic funds transfer (ACH). This avoids the uncertainty of knowing whether a check or cash has been deposited in an account and reduces the likelihood of a check being written with insufficient funds.

If there is a current child support obligation being collected through the state, the state will also collect the spousal maintenance obligation in a similar manner. Non-payment can result in a wage assignment or garnishment of earnings. However, payment through the state may lead to administrative costs and confusion when calculating the amount due from a beginning date, an end date, or any interim change in amount due. It provides no credit for direct payments. Theoretically, it would provide a clear record of the obligation and payment, but in practice it has failed in that regard in a number of cases.

- e. ***Terminating Events.*** Harkening back to the olden days of alimony, the statutory terminating events for Spousal Maintenance remain as the death of the payer, or the death or remarriage



of the recipient. One can posit that the remarriage definition has been expanded to include domestic partnerships, as well. However, consistent with the modern notions of Spousal Maintenance, each of these automatic terminating events is suspect, especially when the maintenance has been used for compensatory or property settlement purposes. Why should a party be deprived of their rightful claim to an estate merely because of the death of the payer-‘custodian?’ Thus, it is common practice in settlements to provide for the obligation to survive one or all of these events, or to provide for the liquidation of the unpaid amounts through the use of life insurance or an estate obligation of the payer. This also occurs in litigated cases, though perhaps less frequently.

***Practice Tips:***

a. ***Refuting the Statutory Terminating Events.*** When negating a statutory terminating event, it must be drafted explicitly, such that one must state and restate the notion for clarity. Example: “the obligation shall terminate upon the death or remarriage of the wife. The obligation shall survive the death of the husband” or “the obligation shall terminate upon the death or remarriage of the wife, but shall not terminate upon the death of the husband.”

b. ***Obligation on Death of Payer.*** If the obligation is to survive the death of the payer, it is helpful to clarify whether the amount then payable shall be a continuation of the annuity previously provided for, the present value of the annuity for the payments yet to be paid, or a lump sum payment from life insurance or the estate, reflecting the total value of the amount(s) remaining to be paid.

c. ***Cohabitation.*** It is best to avoid attempting to use cohabitation, common law marriage, or the formation of an ‘intimate committed relationship’ as a terminating event. This is because none of these is clearly or statutorily defined in Washington and each is subject to judicial interpretation and discretion both in the finding of facts and the application of the law. For example, the notion of cohabitation could (but may not be) be refuted by the co-habitee paying rent for use of the premises, the use of the home fewer than all nights, the vacation of the home in the early hours of the morning, or the lack of use of the residence as a mailing address or parking location for a car.

f. ***Modifiability of Award.*** The Spousal Maintenance obligation, if imposed by the court either in a temporary order or a decree, by its nature will be modifiable. Modification is based upon evidence of a substantial and material change in the economic circumstances of either of the parties. In a modification action, the obligation may be increased or decreased; and it may be extended, shortened or terminated. The tests and criteria applied in a modification proceeding are addressed in greater detail below.

***Non-Modifiability.*** The court has held that, on a contract basis, a maintenance obligation may be made non-modifiable by agreement of the parties, if so stated in a written separation contract or agreement. Presumptively this could be written in the form of an agreed

temporary order, as well. The ability to agree on non-modifiable maintenance is a powerful incentive in voluntary divorce settlements as a party may more be far more willing to agree to the payment or use of spousal maintenance if the obligation is capped as far as future exposure. It also opens the door for the increased use of maintenance as a property settlement tool, for which it would not otherwise be effective or usable.

***Partial Modifiability.*** Since the court has provided that the maintenance obligation may be non-modifiable in full, then by corollary it may be modified by agreement on a more limited basis. Examples may include a provision that maintenance may be modified, re-determined, or changed proportionately upon the payer's promotion, loss of employment or disability; the end of the child support obligation; or other agreed upon conditions.

- g. ***Security for the Award.*** The award of maintenance can be secured in the event of the death of the payer, if expressly provided for in the agreement or decree, by the use of an existing or new policy of life insurance (query: which party would pay the cost of the new premium?) or by making the obligation be a lien against the estate of the payer.

Security for payment for events less than death, such as disability, loss of job, or bankruptcy could be provided by disability insurance, a trust, or a deposit in a dedicated bank account. However, these tools are seldom used and may impair the favorable income tax treatment of the award.

- h. ***Income Tax Consequences for the Award.*** The federal Internal Revenue Service Code provides for the deductibility for income tax purposes of the payer, of spousal maintenance agreed to or ordered of a determined amount for an uncertain period of time, or an indeterminate amount for a certain period of time. These conditions are easily met when the death or remarriage of either party is a terminating or modifying event of the obligation. The Spousal Maintenance payment will then be includable as taxable income for the recipient.

***Reduction of Total Tax Liability.*** As maintenance is usually an obligation of the party with the greatest income, transferring the tax burden to the party with the lesser income will almost always reduce the total tax burden of the parties, leaving more money 'at home' for both. Each of the parties can share in the benefit, with the payer not being taxed on that portion of gross income and the recipient having the tax obligation, but at a lesser rate and hence amount due. The tax obligation can be adjusted so that the amount of the maintenance is increased to cover the anticipated tax burden of the recipient.

***Practice Tip.*** The minefield to watch out for here is that if the obligation is too heavily front-loaded or is prepaid (especially in the first three years of the obligation) the maintenance amounts may be re-categorized as non-deductible property settlement transfers by the IRS. A tax professional needs to be consulted if either of these possibilities is being considered.

***State Income Tax Treatment.*** Washington does not have an income tax, but most of states that have income taxes key their tax treatment of spousal maintenance to the federal IRS code or the federal income tax returns being filed. One will need to check the law of the local states involved.

***Undifferentiated Spousal Maintenance and Child Support.*** The IRS Code provides for spousal maintenance treatment to be available and applied to undifferentiated spousal maintenance and child support awards. They must meet the same tests as other maintenance awards. The caveat, however, is that to the extent that the obligation changes upon termination of a child support obligation for one or more of the children, the entire obligation may be recalculated retroactively, treating the amount by which the undifferentiated amount was reduced to have been child support, rather than maintenance. Thus, these provisions, while they can prove extremely favorable to the family, must be drawn exceptionally carefully and with the concurrence of a certified public accountant well knowledgeable with matrimonial law. Their use, in practice, has been largely limited to temporary orders, which readily lend themselves to this treatment in higher economic case families, in which there is a large disparity in income between the parties.

## **VII. Modification or Redetermination of a Spousal Maintenance Award**

***Setting or Re-Determination of the Initial Spousal Maintenance Award.*** Spousal Maintenance may be set or re-determined when there has been no temporary maintenance award or there has been one and a significant financial event warranting review has occurred, such as a loss of employment, new disability, or receipt of a bonus. It may also occur if there has been a prior maintenance award that may be expiring, such as if the case is now being finally and completely resolved. Temporary maintenance awards are seldom changed during the pendency of a legal proceeding, as the parties usually require some degree of certainty in which to make future plans and time in which to settle or resolve the pending action.

***When Spousal Maintenance Awards May Be Modified.*** While an award of Spousal Maintenance may be modified in cases resolved by contested litigation (contested court proceedings) or certain cases where permitted by agreement in cases settled out of court, there are few written parameters to be followed in the modification proceeding. However, in all such cases, two levels of analysis ought to be applied. First, the ‘gate-keeper’ function: has a threshold been met as would qualify the award to be modified? Secondly, granted that the threshold has been met, what criteria ought to be applied in determining the new, modified level or amount of Spousal Maintenance?

***Cases in Which Limited Modifiability Is Permitted.*** In cases wherein the parties have agreed to limited conditions of modifiability, those conditions will define whether the threshold has been

met. These usually relate to payer's reduced ability or inability to pay at the level agreed upon. Examples:

- "In the event of the payer's earned income being involuntarily reduced by more than 10% from the amount or rate on the last year's federal income tax return, the award of spousal maintenance shall (may) be modified..."
- "the award of spousal maintenance may be modified in the event of the payer's becoming disabled as determined by the certification of two or more physicians, or by the payer qualifying for receipt of disability pay, disability insurance or a state or federal disability award..."

In many cases, the conditions providing for modification of the maintenance amount also define the outcome or the extent of modification, such as:

- "...in such circumstances, the amount of maintenance shall be reduced by the same percentage by which the payer's income was reduced."
- "...in such event, the spousal maintenance award shall then be terminated as of the end of the month of the occurrence."

***Modification or Re-Determination Anew.*** When modification or redetermination *is* permitted, either because the amount was set by the court or it was set by agreement of the parties (without a remedial formula), then the most often outcome is for the maintenance to be determined *de novo*, anew, based upon then existing factors.

***'Credit for Time Served.'*** When a modification or redetermination occurs, often there is a claim made by the payer for 'credit for time served,' that is, credit for the time period during which maintenance has already been paid. This is a consideration for re-determination of permanent maintenance awards, but is given less weight when converting temporary maintenance to other forms of maintenance. This is because during a temporary maintenance period, the recipient may have little choice or ability to move forward with their life or commit to and act upon any permanent plans, not knowing what they will have or where they will be left after the divorce; and also because the permanent award of maintenance may be based upon entirely different considerations than the temporary award, such as based on compensatory or property transfer concerns.

## **VIII. Art in the Use and Application of Spousal Maintenance**

There are several screens or filters that should be considered or applied when negotiating or setting an amount of Spousal Maintenance. The first must always be the respective needs of each of the parties for cash flow. In most cases this is voiced as the financial need of the recipient and the financial ability to pay of the payer.

Next, one may give consideration to the income tax consequences of the award and the tax effect of the payment on the cash flow of each of the parties. Calculations often include a tax-adjusted calculation of income and expenses in maintenance determinations.

Additionally, since maintenance may be a veiled transfer of property interests or a means of recognition of community investment in the property or earnings of a party, then consideration is given to the gross estate each of the parties will end up with. In this circumstance, payments may be from principal rather than income.

## **IX. Conclusion -- The Future of Spousal Maintenance in Washington**

The Spousal Maintenance concept is flexible and affords continued lifestyle, property transmission and tax planning opportunities, such that its use is likely to be grow even greater in the future. As we move away from its application of it from a slavish consideration of month-to-month earnings and expenses, we see it as providing the means for enabling future capital and family planning, such as buying a home, remarrying without financial penalty, or even providing for property transfers that can occur after death!

## **X. About the Authors**

*Stephen M. Gaddis* is a retired superior court judge and commissioner, having served as a judicial officer over the course of more than 27 years. While on the bench, he specialized in Family Law matters, having brought mediation to the court's process of custody and visitation determination, written the grant for the first Volunteer Guardian ad Litem Program (CASA) in the United States, presided over the first court to utilize Parenting Plans, served on the Parenting Plan Act drafting committee, chaired the Washington State Child Support Schedule Commission, and served as the first Unified Family Court commissioner in Washington State, among his activities. He taught on the faculty of the Washington State Judicial College and Seattle University, School of Law; has lectured frequently to bar, bench and public groups; and has written a number of articles on family law, alternative dispute resolution (ADR) and the nature of the judicial system, which have been published locally and nationally.

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## **XI. Important End Note**

This article is offered and intended for use solely as a guide to the definition, use and application of Spousal Maintenance concepts. It is not intended to be relied upon or used as a substitute for a lawyer's practice in counseling, researching or drafting of legal documents.

## **XII. Cases Which Discuss or Define the Application of Spousal Maintenance – This one section is still under construction!!!**

While there are a plethora of unpublished opinions having a great variety of fact patterns and seemingly a varying application of the law to facts, the basic principles gleaned from them are:

*A trial court has broad discretion in awarding maintenance and the court will not reverse an award of maintenance unless the trial court abused that discretion. In re: Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). The only limitation on the amount and duration of maintenance is that the award be just. RCW 26.09.090(1); *Bulicek*, 59 Wn.App. at 633. The relevant statutory factors a court must consider include (1) the financial resources of the party seeking maintenance; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance. RCW 26.09.090.

*No uniform standard exists for determining the proper duration of a maintenance award.* Generally, the longer the marriage, the more likely a court will grant maintenance for a longer period. *See, e.g., In re: Marriage of Sheffer*, 60 Wn. App. 51, 56-58, 802 P.2d 817 (1990) (holding three-year maintenance award insufficient in case involving a 30-year marriage where recipient spouse sacrificed employment to raise family). The purpose of spousal maintenance is to support a spouse until he or she has become self-supporting. *In re Marriage of Irwin*, 64 Wn.App. 38, 55, 822 P.2d 797 (1992). Accordingly, a permanent award of maintenance is neither required nor favored. One spouse "should not be given a perpetual lien on the other spouse's future income." *Sheffer*, 60 Wn. App at 54.

### ***Published Cases:***

**Child Support Calculation v. Maintenance Calculations.** *Wilson v. Wilson*, 267 P.3d 485, 165 Wn.App. 333 (2011). Husband contends that maintenance amounts must be added to child support payments to determine the maintenance award. Court found that RCW 26.09.090(1)(a) thus directs a trial court to calculate the need for spousal maintenance only after it has determined the parties' child support obligations. This statutory directive requires the trial court to consider the impact of child support on the ability of the payer to pay maintenance, before ordering maintenance. It does **not** require that the trial court, after already taking child support into consideration, recalculate child support after a maintenance amount is determined.

The court noted that: "the legislature articulates its intent to ensure that child support orders " provide additional child support *commensurate with the parents' income.* " RCW 26.19.001 (emphasis added). And the legislature also included the language "[m]aintenance actually received" and "maintenance to the extent actually paid" in the calculation of the parents' income

for purposes of child support. Former RCW 26.19.071(3) (q), (5) (f). The conflict between RCW 26.09.090(1) (a)'s direction and RCW 26.19.001, the purpose statement of the child support statute, creates an ambiguity that confronts the trial court in complying with worksheet directions when setting child support. In this instance, we resolve the ambiguity to hold that the trial court did not abuse its discretion in not including the maintenance in the child support worksheets. (Although we hold that here the trial court did not abuse its discretion in light of the ambiguity created by the conflicting provisions of RCW 26.19.001 and RCW 26.09.090(1)(a), we note that, given RCW 26.09.090(1)(a)'s explicit requirement that a trial court consider child support obligations when determining the need for spousal maintenance, accepting Walter's contention could lead to the possible result of a cycle of calculating and recalculating obligations under the child support and spousal maintenance statutes).”

**Attorney's Fees.** In re Marriage of Brown, 247 P.3d 466, 159 Wn.App. 931 (Wash.App. Div. 1 2011). Wife appealed an arbitration award and had a trial de novo. Wife failed to improve her position in trial from the arbitration. Husband is entitled to attorney fees based on the failure to improve.

**Enforceability of CR2A.** In re Marriage of Grimsley-LaVergne, 236 P.3d 208, 156 Wn.App. 735 (Wash.App. Div. 2 2010). The Court found that a the trial court should have required the parties to comply with former RCW 26.09.070 (1989) rather than accepting the CR 2A agreement. However, because each party moved to enforce the CR 2A agreement at different times during the proceedings, both parties have waived their right to appeal the enforceability of the CR 2A agreement.

**Life Insurance.** Estep v. Hamilton, 201 P.3d 331, 148 Wn.App. 246 (Wash.App. Div. 3 2008). Life insurance policies may be required to cover future maintenance payments. A party may litigate to establish insurance beneficiary status. See, e.g., In re Marriage of Morrow, 53 Wash.App. 579, 583, 589-90, 770 P.2d 197 (1989) (husband ordered to obtain life insurance to secure lifetime maintenance award).

**Arbitrability of Conflict.** In re Marriage of Pascale, 295 P.3d 805 (Wash.App. Div. 1 2013) Husband and wife entered into a CR2A that stipulated any controversy was to be arbitrated by the mediator, Harry Slusher. At trial there was controversy over what maintenance schedule to follow. The trial court denied husband's motion to compel arbitration, finding that the wife's maintenance schedule was adequate. Appellate court found that the trial court erred by denying his motion to compel arbitration based upon its determination that the spousal maintenance provision was clear on its face.

Normal contract principles apply to the interpretation of a CR 2A agreement. Morris v. Maks, 69 Wash.App. 865, 868, 850 P.2d 1357 (1993).

The arbitrability of a dispute is determined by examining the arbitration agreement between the parties. Heights, 148 Wash.App. at 403, 200 P.3d 254. If the reviewing court "can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration." Davis v. Gen. Dynamics Land Sys., 152 Wash.App. 715, 718, 217 P.3d 1191 (2009); Mendez v. Palm Harbor Homes, Inc., 111 Wash.App. 446, 454, 45 P.3d 594 (2002). Any doubts regarding the applicability of an arbitration agreement "should be resolved in favor of coverage." Heights, 148 Wash.App. at 405, 200 P.3d 254 (citing Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula, 130 Wash.2d 401, 413-14, 924 P.2d 13 (1996))

Furthermore, as the UAA makes clear, a court "may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." RCW 7.04A.070(3). " 'Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract.' " Peninsula, 130 Wash.2d at 413, 924 P.2d 13 (alteration in original) (quoting Council of County & City Emps. v. Spokane County, 32 Wash.App. 422, 424-25, 647 P.2d 1058 (1982))

### **XIII. Spousal Maintenance Research Study**

Stephen Gaddis and Virginia Leen, Esq., have initiated a research study regarding the amount and duration of Spousal Maintenance awards in Washington. The outcomes of the research study will be shared in a follow-up article, and/or will be presented at continuing education programs. Counsel are requested to complete and return the form provided, so that there will be enough data to reach statistically-supported conclusions.

Thank you for your participation in this study.



## **XIV. Study Guide for the Understanding and Use of Spousal Maintenance**

*(from “A Guide to the Award of Spousal Maintenance in Washington State,”  
by Comm. Stephen M. Gaddis, Ret. and Caroline Suissa Edmiston, 2013)*

1. Define ‘Spousal Maintenance’
2. How does Spousal Maintenance differ, if at all, from the historical notion or doctrine of ‘Alimony?’
3. What are the principal criteria applied in the decision to agree to or grant an award of Spousal Maintenance?
4. What are the specific types of Spousal Maintenance that may be identified or applied in legal cases? Generally, how do they each differ from each other in description and function?
5. What are the base considerations and characteristics of each type of Spousal Maintenance? How much and for how long might each lead to Maintenance being agreed upon or granted?
6. What are the elements or components of the Spousal Maintenance grant to be addressed in the Separation Contract, Civil Rule 2A Agreement and/or the Decree of Dissolution?
7. What questions or considerations might be applicable in determining the application of each of the various types Spousal Maintenance, and specifically the effect on the amount, duration and characteristics of the award?
8. In which circumstances would a practitioner be most likely to encourage the application of Spousal Maintenance?
9. In which circumstances would a practitioner be most likely to discourage the application of Spousal Maintenance?
10. What remaining questions do you have regarding the nature, characteristics, and application of the doctrine of Spousal Maintenance in Washington?

## Spousal Maintenance Research Study – Report Form for Study

### INSTRUCTIONS / DISCLOSURE:

1. This information will be **confidential**; however, research study outcomes and conclusions will be shared with the informants and will be presented in an article or continuing education program.
2. Fill out information to the best of your knowledge.
3. When completed, please return the form by mail, e-mail or FAX to **Virginia Leen, J.D.** at  
Virginia A. Leen, P.S. Telephone: 425-576-4071  
Bldg. 5000, 4th Floor FAX: 425-650-7075  
5400 Carillon Point E-mail: virginialeen@gmail.com  
Kirkland, WA 98033
4. **Thank you for contributing**

### INFORMATION ON CASE SETTLEMENT OR RESOLUTION:

1. **Attorney Names** (if you are willing to share): Husband: \_\_\_\_\_ Wife: \_\_\_\_\_
2. **Lived Together:** Years Prior to Marriage: \_\_\_\_\_ /OR Months Prior to Marriage: \_\_\_\_\_
3. **Total Years of Marriage:** \_\_\_\_\_, including # of Years Separation \_\_\_\_ /OR # Months Separation: \_\_\_\_\_
4. **Ages of Children of the Marriage:** \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.
5. **Gross Monthly Income**, Including Bonuses: **Husband** \$ \_\_\_\_\_ **Wife** \$ \_\_\_\_\_
6. **Resolution Process Used** (Mediation, Med-Arb, Arb, Court): \_\_\_\_\_
7. **County** Case Filed In: \_\_\_\_\_ **Name** of Mediator/Arbitrator/Judge: \_\_\_\_\_
8. **Comparative Global Property Division:** **Wife:** \_\_\_\_\_% **Husband:** \_\_\_\_\_%
9. **Maintenance Amount:** \$ \_\_\_\_\_ **Number** of Months: \_\_\_\_\_ **Modifiable?** \_\_\_\_\_
10. **Comments** (anything that may have affected the amount or duration of maintenance (such as: "short-term marriage," "Husband eager to settle," "wife wants to avoid trial," "parties can't afford trial," "both parties are retired," or "wife is disabled"): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_