

ALIMONY GUIDELINES and COMMENTARIES (*REVISED*)



STATEWIDE ALIMONY GUIDELINE COMMITTEE

Muriel McClelland, Chair

# Alimony Guideline Worksheet

## Monthly Payment

(Use Only One Box)

**If there are no children for whom support is paid, then use lines 1 through 6.**

1. Payor's Gross Monthly Income \_\_\_\_\_
2. Multiply Line 1 by 0.3                      x 0.30 = \_\_\_\_\_
3. Recipient's Gross Monthly Income \_\_\_\_\_
4. Multiply Line 3 by 0.5                      x 0.50 = \_\_\_\_\_
5. Subtract Line 4 from Line 2                      \_\_\_\_\_
6. Check a Box:

Line 5 is positive number. Payor pays this monthly alimony amount.

Line 5 is zero or negative. No monthly alimony is paid.

**OR**

**If there are children for whom child support is paid, use Lines A through F.**

- A. Payor's Gross Monthly Income \_\_\_\_\_
- B. Multiply Line A by 0.28                      x 0.28 = \_\_\_\_\_
- C. Recipient's Gross Monthly Income \_\_\_\_\_
- D. Multiply Line C by 0.58                      x 0.58 = \_\_\_\_\_
- E. Subtract Line D from Line B                      \_\_\_\_\_
- F. Check a Box:

Line E is positive number. Payor pays this monthly alimony amount.

Line E is zero or negative. No monthly alimony is paid.

## INSTRUCTIONS FOR ALIMONY GUIDELINE WORKSHEET

Worksheet calculations:

Use the Instructions for Lines 1 through 6 if there are no children for whom support is paid.

**Line 1:** Enter the amount of Payor's Gross Monthly Income. This is the same gross monthly income as would be figured for "income" and "gross income" for child support purposes. See NMSA 1978 § 40-4-11.1(C)(1), (2) (1995).

**Line 2:** Multiply Line 1 by 0.3 or take 30% of Line 1 (Payor's Gross Monthly Income), and enter the resulting amount.

**Line 3:** Enter the amount of the Recipient's Gross Monthly Income. This is the same gross monthly income as would be figured for "income" and "gross income" for child support purposes. See *id.*

**Line 4:** Multiply Line 3 by 0.5 or take 50% of Line 3 (Recipient's Gross Monthly Income), and enter the resulting amount.

**Line 5:** Subtract Line 4 from Line 2. This is the indicated Alimony Monthly Amount.

**Line 6:** If the result in Line 5 is a positive number, then this is the indicated monthly Alimony Amount that the Payor should pay. If the result in Line 5 is zero or a negative number, then the Payor should pay no alimony. Check the appropriate box.

Use the Instructions for Lines A through F if there are children for whom support is paid.

**Line A:** Enter the amount of the Payor's Gross Monthly Income. This is the same gross monthly income as would be figured for "income" and "gross income" for child support purposes. See *id.*

**Line B:** Multiply Line A by 0.28 or take 28% of Line A (Payor's Gross Monthly Income), and enter the resulting amount.

**Line C:** Enter the amount of the Recipient's Gross Monthly Income. This is the same gross monthly income as would be figured for "income" and "gross income" for child support purposes. See *id.*

**Line D:** Multiply Line C by 0.58 or take 58% of Line C (Recipient's Gross Monthly Income), and enter the resulting amount.

**Line E:** Subtract Line D from Line B. This is the indicated Monthly Alimony Amount.

**Line F:** If the result in Line E is a positive number, then this is the indicated monthly Alimony Amount that the Payor should pay. If the result in Line E is zero or a negative number, then the Payor should pay no alimony. Check the appropriate box.

Example 1: No Children

Line 1: Husband's Income: \$6,000  
Line 2: Husband's Basis:  $\$6,000 \times 0.30 = \$1,800$   
Line 3: Wife's Income: \$1,800  
Line 4: Wife's Basis:  $\$1,800 \times 0.50 = \$900$   
Line 5: Spousal Support:  $= \$1,800 - \$900 = \$900$

Example 2: Two Children

Line A: Husband's Income: \$6,000  
Line B: Husband's Basis:  $\$6,000 \times 0.28 = \$1,680$   
Line C: Wife's Income: \$1,800  
Line D: Wife's Basis:  $\$1,800 \times 0.58 = \$1,044$   
Line E: Spousal Support:  $= \$1,680 - \$1,044 = \$636$

Adjusted Incomes for Child Support (deduct indicated alimony amount from husband's gross income and add the indicated alimony amount to wife's gross income). Use the indicated alimony amount to adjust the parties' gross monthly incomes and use the resulting adjusted incomes to calculate child support in accordance with the statutory guidelines. In this example, the following adjustments to Gross Monthly Income would be made and the resulting amounts used in the Gross Monthly Income Columns on the appropriate child support worksheet.

Husband:  $\$6,000 - \$636 = \$5,364$

Wife:  $\$1,800 + \$636 = \$2,436$

## NEW MEXICO STATUTORY FACTORS

The New Mexico factors to be considered by judges in making alimony determinations as follows:

- E. When making determinations concerning spousal support to be awarded pursuant to the provisions of Paragraph (1) or (2) of Subsection B of this section, the court shall consider:<sup>1</sup>
- (1) the age and health of and the means of support for the respective spouses;
  - (2) the current and future earnings and the earning capacity of the respective spouses;
  - (3) the good-faith efforts of the respective spouses to maintain employment or to become self-supporting;
  - (4) the reasonable needs of the respective spouses, including:
    - a) the standard of living of the respective spouses during the term of the marriage;
    - b) the maintenance of medical insurance for the respective spouses; and
    - c) the appropriateness of life insurance, including its availability and cost, insuring the life of the person who is to pay support to secure the payments, with any life insurance proceeds paid on the death of the paying spouse to be in lieu of further support;
  - (5) the duration of the marriage;
  - (6) the amount of the property awarded or confirmed to the respective spouses;
  - (7) the type and nature of the respective spouses' assets: provided that potential proceeds from the sale of property by either spouse shall not be considered by the court, unless required by exceptional circumstances and the need to be fair to the parties;
  - (8) the type and nature of the respective spouses' liabilities;
  - (9) income produced by property owned by the respective spouses; and
  - (10) agreements entered into by the spouses in contemplation of the dissolution of marriage or legal separation.

## COMMENTARIES

### NEW MEXICO ALIMONY GUIDELINES (*REVISED*)

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<sup>1</sup> NMSA 1978, § 40-4-7(E) (1997). Further information concerning spousal support (alimony), and the use of alimony and child support guidelines may be found at: [www.secondjudicialdistrict.com](http://www.secondjudicialdistrict.com) and [www.nmbar.org](http://www.nmbar.org).

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## ALIMONY GUIDELINE COMMENTARIES (REVISED)

### I. INTRODUCTION

In January, 2001, Deborah Davis Walker, then presiding judge of the Family Court, Second Judicial District, established a committee of family law practitioners to study the alimony problem (i.e., difficulty in settling cases or predicting what a court will do), research the use of guideline models in other states, and make recommendations to the family court judges as to whether alimony guidelines would be appropriate for use in Bernallilo County. The committee was comprised of sole practitioners, attorneys in small and large firms, a lawyer/mediator, and accountants who serve as experts for alimony assessments.

The first challenge in studying guidelines of other jurisdictions was to differentiate among the various legal constraints relevant to the law of alimony awards in any given forum, e.g., fault/no fault distinctions, *pendente lite* /permanent alimony formulas, gross/ net income formulas, interplay between child support and spousal support, and treatment of spousal support in community property states as distinguished from separate property/equitable distribution states.

After extensive review of guidelines in other jurisdictions (the vast majority of which were used for *pendente lite* purposes), the Fairfax County, Virginia *pendente lite* guidelines,<sup>1</sup> which combined financial resources available to both parties and calculated a percentage taking into account the payment of child support, looked promising because of the simplicity of the formulas. Simple enough, but would a simple percentage formula work for a post-divorce alimony guideline consistent with New Mexico alimony statutes and case law.

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<sup>1</sup> The Fairfax County guidelines also refer to the use of the formula in permanent alimony awards after the factors in the Virginia alimony statute are taken into consideration. Fairfax Bar Association, Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, Va. Nov. 2002), available at [http://www.fairfaxbar.org/pub\\_order\\_form.asp](http://www.fairfaxbar.org/pub_order_form.asp) (Last visited 2004). They are sometimes, but not always, used in court for permanent alimony awards. Additionally, the Fairfax formula has also been adopted for use in the Richmond area.

The committee then reviewed various theories and philosophies of spousal support, espousing different goals and purposes for the award of alimony. A percentage formula does not, in and of itself, address the complex issues of a spouse being out of (or minimally involved in) the workforce, children in the family still to be raised, or insufficient retirement resources, to give just a few examples. These considerations and others influenced the American Law Institute (ALI) proposed guidelines,<sup>2</sup> as well as several other theoretical approaches to the award of spousal support (e.g., “human capital,” “marital residuals”<sup>3</sup> theories). Based upon this examination and a study of guidelines used in other jurisdictions,<sup>4</sup> Since the committee’s first report, the following states or jurisdictions have formed working committees to develop alimony guidelines: Wichita, Kansas; Chicago, Illinois; Ohio; and New York. Michigan’s computer program is now in use in Kentucky, Washington and Florida. In January, 2005, Canada published a comprehensive Draft Proposal for the development of spousal support. The Canadian experience has been very similar to the New Mexico experience. The Canadian spousal support guidelines are advisory only, use income-sharing, and include formulae for *with* and *without* children. There are some significant differences: Canadian guidelines include a durational formula, include ceilings and floors of income for the payor, and Canadian judges are allowed to use or not use the guidelines in their own discretion. the committee initially postulated ideal guidelines using a range of percentages in a declining balance and weighing statutory factors, coupled with a durational factor determined by either length of marriage or the practicalities of the

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<sup>2</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

<sup>3</sup> <sup>4</sup> Robert K. Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN’S L.J. 23, 23-74 (2001); Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69 (2004).

<sup>4</sup> <sup>5</sup> In addition to studying guidelines in use in several California jurisdictions and in Fairfax County, Virginia, the committee reviewed guidelines in other jurisdictions (Arizona [Maricopa County], Nevada, Michigan, Oregon and Minnesota) which addressed factors, several of which also applied numerical weights to those factors. New Mexico’s alimony statute also enumerates specific factors to be considered in an award of spousal support, but can these factors be quantified, and thus weighted, in any meaningful way? The committee determined that while factor weights were useful tools, the simplicity of a single percentage would suffice to do justice to the measurable factors in the New Mexico statute and still provide a simple enough tool to be used for an alimony calculation.

rehabilitative/transitional scheme. This scheme proved to be unworkable as a guideline because of its complexity.

Also following its review of percentage formulas used around the country and the theoretical approaches to “New Wave” alimony, the committee formulated some assumptions for proposed New Mexico guidelines: some cases would always be “outliers” based upon the unique facts of the case (e.g., high income, age, disability) and would never be appropriate for a percentage guideline formula.<sup>5</sup> It was also a basic assumption of the committee that guidelines were just that – guides – and that deviations were to be expected. Finally it was thought that at the very least a percentage guideline could be an indicator of ability to pay in the absence of mitigating statutory factors.

Committee emphasis shifted to when alimony is or is not appropriate in very general terms, and then to when alimony guidelines are or are not appropriate, again in the broadest possible terms. The committee decided to delineate guideline categories based upon number of years married,<sup>6</sup> concluding that the most difficult category for which to provide a guideline is a marriage of ten to twenty years. Because the 10-20 year marriage was the most difficult case to settle with respect to alimony, the committee’s consensus was that a guideline would be most helpful in this category.

The goals of the committee were to select a percentage (or percentages) and perhaps a durational factor that was equitable given usual spousal support circumstances, have the formula be simple enough for practitioners (and pro se litigants) to calculate a bottom line, and

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<sup>5</sup> The outliers probably number fewer than ten percent of the cases most practitioners would see. The Committee’s rationale was that if guidelines could be utilized for the remaining ninety percent of the cases, the use of guidelines would be justified.

<sup>6</sup> For example, under ordinary circumstances no alimony would be contemplated in marriages that lasted fewer than five years. Alimony might be considered in marriages of five to ten years. The New Mexico spousal support statute implies that alimony is to be expected, and provides that the court shall reserve jurisdiction in marriages over twenty years. NMSA 1978, § 40-4-7(F) (1997). This statutory implication has been reinforced recently in New Mexico where the Court of Appeals held that if the final decree or marital settlement agreement is silent on the issue of alimony, then the court has continuing jurisdiction to determine alimony in a marriage lasting twenty years or more. *Rhoades v. Rhoades*, 2004-NMCA-020, ¶ 17, 135 N.M. 122, 85 P.3d 246; *See Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295 (final decree was not silent on alimony).

yet be capable of calculation on a single page worksheet. In the end, the committee decided against recommending a durational factor as too arbitrary and lacking in a consideration of discrete facts. Committee members concurred that the duration of alimony payments should be left open to negotiation.

The committee's proposed guidelines, based upon the Fairfax County percentage formulas, were submitted to Judge Walker and to New Mexico Supreme Court Justice Pamela Minzner (who had early on expressed interest in this project) on December 17, 2003. The New Mexico Supreme Court by Order entered on December 23, 2003 mandated that the committee's proposed alimony guidelines be tested during the course of settlement negotiations in Bernallilo County for a period of six months and that the alimony guideline committee report back to the Supreme Court at the conclusion of the pilot project. Based upon the very open and welcome reception of guidelines by attorneys and the favorable experience of facilitators using guidelines for purposes of settlement in the Second Judicial District, the committee's recommendations following the initial six-month pilot project period were to expand the experiment to include further pilot projects around the state and to explore the use of guidelines by judicial officers consistent with the factors enumerated in our alimony statute.<sup>7</sup>

After studying the report and recommendations of the Second Judicial District committee following its pilot program,<sup>8</sup> the New Mexico Supreme Court in an Order entered October 1, 2004 adopted the recommendations of the Second Judicial District alimony guideline committee and established pilot projects in the First, Third, and Eighth Judicial Districts, continued the pilot project in the Second Judicial District, appointed a Statewide Alimony Guideline Committee,

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<sup>7</sup> As the case law involving guidelines around the country demonstrates, any judicial determination of alimony amounts must always consider statutory factors. The formula and worksheets are to be used as a guideline, not a schedule. The amount calculated may very well not fit the circumstances of the case to which it is being applied, and yet it may still be within a reasonable range.

<sup>8</sup> SUPREME COURT OF THE STATE OF NEW MEXICO, ALIMONY GUIDELINE COMMITTEE, NO. 03-8500, IN THE MATTER OF THE ALIMONY GUIDELINES PILOT PROJECT FOR THE SECOND JUDICIAL DISTRICT COURT (2004).

ordered further data collection, and mandated the further study of the use of guidelines on a limited statewide basis.<sup>9</sup>

The initial commentaries and proposed guidelines were made available to all New Mexico attorneys by posting on the Supreme Court website.<sup>10</sup> The statewide committee in February, 2005 mailed a questionnaire to the 343 members of the Family Law Section, receiving 70 responses. A compilation of the results of this questionnaire is included in the September, 2006 report to the Supreme Court, along with compilations of a second questionnaire and actual case surveys as reported by attorneys and settlement facilitators on the use of the recommended guidelines in all four pilot project districts. Based upon this data and further study, the Statewide Alimony Guideline Committee endorses the use of these guidelines on a statewide basis for settlement purposes.

As more fully discussed in the commentaries which follow, there will always be exceptional cases or “outliers,” in which the recommended formula will produce a “wrong” result (e.g., cases with high Payor income or great disparity of income or mitigating statutory factors). Indeed, an important use of the guidelines in the outlier cases is a general showing of ability to pay and need, then the parties can hopefully negotiate the actual amount. There will also always be cases in which a settlement cannot be reached. In those instances, judges must continue to exercise the discretion entrusted to them, taking into consideration the statutory factors and case law to determine the “right” result for those cases whose fact patterns present anomalies inconsistent with the general use of a guideline.

## **II. RECOMMENDED ALIMONY GUIDELINES**

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<sup>9</sup> SUPREME COURT OF THE STATE OF NEW MEXICO, ALIMONY GUIDELINE COMMITTEE, No. 04-8110, IN THE MATTER OF THE ESTABLISHMENT OF THE ALIMONY GUIDELINE STATEWIDE PILOT PROJECT COMMITTEE (2004).

<sup>10</sup> SUPREME COURT OF THE STATE OF NEW MEXICO, ALIMONY GUIDELINE COMMITTEE, No. 03-8500, IN THE MATTER OF THE ALIMONY GUIDELINES PILOT PROJECT FOR THE SECOND JUDICIAL DISTRICT COURT (2003).

A. ALIMONY GUIDELINE AMOUNT – *In the broadest sense, the guideline amount reflects the need for alimony and the ability to pay.*

*For cases with no child support between the parties:*

**30% of Payor's Gross Income minus 50% of Recipient's Gross Income**

*For cases with child support between the parties:*

**28% of Payor's Gross Income minus 58% of Recipient's Gross Income**

1. Applicable formulas:

a. When there is no child support obligation between the parties, the formula is 30% of the proposed Payor's gross income minus 50% of the proposed Recipient's gross income.

b. When there is a child support obligation between the parties (as opposed to when there are no children of the marriage but a party may have a previous child support obligation), the formula is 28% of the proposed Payor's gross income, minus 58% of the proposed Recipient's gross income.

2. Calculate spousal support first: When both child support and spousal support are appropriate, the method for calculating child support is to first calculate the spousal support and then to adjust the parties' incomes by the spousal support amount using the resulting adjusted incomes to calculate child support pursuant to the New Mexico Child Support Guidelines.

3. Definition of gross income: Gross income is defined the same as in the New Mexico Child Support Guidelines.<sup>11</sup>

B. WHEN ALIMONY IS GENERALLY APPROPRIATE

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<sup>11</sup> NMSA 1978, § 40-4-11.1(C) (2)

1. Assuming the Recipient has inadequate income to meet his/her needs, and considering the statutory factors, indefinite, modifiable alimony is usually appropriate when:
  - a. Recipient is disabled.
  - b. Recipient is fifty-five years or older and has not been employed full-time outside the home for the previous five years or more.
  - c. The parties have a child with a significant mental or physical disability and the Recipient is the primary care provider.
2. Marriage < 5 years: Usually no alimony absent exceptional circumstances (see ¶ 3, below)
3. Marriages > 5 and < 10 Years: In this category there may be situations where alimony (assuming the Payor has the ability to pay), would be appropriate using a reimbursement theory or a rehabilitative/transitional spousal support plan:
  - a. Recipient left a promising career, or an exceptionally good-paying job, passed up a substantial job opportunity, or interrupted significant educational opportunities in favor of the marriage.
  - b. Recipient worked or used separate assets during the marriage to allow the other spouse to obtain professional job skills or advance education which is not going to be used for the benefit of the community. At the very least there should be spousal support equal to Recipient's community share of Payor's student loans.
  - c. Recipient requires a transition period to get back into the work force due to temporary health issues, a short period required to update work skills or short-term child care issues.

- d. Recipient did not work during the marriage, worked only part-time during the marriage or will require time to obtain employment, full-time employment and/or increase income to a reasonable level.
- e. There are minor children (or child) under the age of six and it is not practical for Recipient to generate income in excess of work-related childcare costs, or where during the marriage both parties committed to one parent remaining home with the child(ren).

4. Marriages >10 and <20 Years: In addition to the previously mentioned considerations for an alimony award (marriages >5 and <10 years), alimony in this category will primarily be based on roles assumed during the marriage and the resultant disparity in income or ability to earn, as well as the statutory factors enumerated in NMSA 1978, § 40-4-7 (E). Transitional or rehabilitative alimony is especially appropriate in this category of cases with duration and amount predicated upon an educational plan or a vocational rehabilitation plan or, in the case of transitional spousal support, upon the amount of support needed to transition the party back into the workforce on a full-time basis. It is not unusual for the alimony obligation to exceed guideline amounts in cases awarding rehabilitative or transitional alimony payable for a limited time period, because the goal of spousal support may shift from only meeting basic needs to meeting both basic needs and addressing the cost of education and/or training to increase the ability to become self-supporting in the future.

5. Marriages > 20 Years: The above comments also apply to marriages lasting twenty years or more. Guideline percentages can apply to long-term marriages as well as shorter term marriages, as dictated by the facts of the case. Guidelines for cases involving marriages of twenty years or longer apply when income is derived from employment of one or both parties, and may or may not be applicable when the parties reach retirement status. In some cases (usually *very* long term marriages) equalization of retirement income of both parties

(including social security payments) is appropriate. The New Mexico alimony statute provides that the court shall retain jurisdiction over periodic spousal support payments in marriages lasting twenty years or longer, unless the marital settlement agreement/final decree specifically provides that no spousal support shall be awarded.<sup>12</sup> Our alimony statute also provides for a lump-sum, nonmodifiable alimony award which may be paid in periodic payments. Parties litigating a twenty-year plus alimony case will find that the court has no alternative but to retain jurisdiction, while in a negotiated settlement the parties have the choice of settling on a nonmodifiable alimony award or reserving jurisdiction, or a combination of both.<sup>13</sup>

### C. TRANSITIONAL AND REHABILITATIVE ALIMONY

Transitional or rehabilitative alimony may be appropriate, particularly in marriages in the ten to twenty-year range, with amount and duration predicated upon a *reasonable* educational or vocational rehabilitation plan and provision for basic needs. Reasonableness of the plan is largely a function of ability to become self-supporting in a limited period of time that would justify support to meet the basic needs of the recipient and the additional expense necessary for education or training costs allowing a spouse to be out of the workforce. An example of rehabilitative alimony would be sufficient support to fund schooling to earn a degree leading to an income-producing vocation as opposed to a minimum wage job, but not to become a brain surgeon. In the case of transitional spousal support, the main consideration is the inevitable increase in living expenses resulting from the establishment of two households. However, other considerations may be temporary barriers to full-time employment or employment such as temporary health issues, short-term child care issues, the time it may take to obtain a new job, etc. One example of transitional alimony would be a marriage ending in February and a

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<sup>12</sup> NMSA 1978, § 40-4-7 (E) (1997).

<sup>13</sup> *Edens v. Edens*, 2005-NMCA-033, 137 N.M. 207, 109 P.3d 295.

teaching job beginning in September of that year, requiring sufficient funds to bridge the gap before income is actually earned.

D. WHEN **ALIMONY** IS GENERALLY **NOT** APPROPRIATE

The committee emphasizes there is no restriction against an award of alimony in any case. These alimony guidelines are not intended to, and in no way can, replace judicial discretion in awarding alimony. That said, the committee suggests alimony may **not** be appropriate in the following situations:

1. *When the Payor's income from all sources is less than \$20,000.00 annually.* Absent other considerations, Payor's ability to pay guideline spousal support is limited by low income, affecting ability to pay.

2. *In marriages of less than five years absent exceptional circumstances.*

3. *In marriages of less than ten years where both parties are self-supporting with approximately equal career opportunities.*

4. *When a proposed Recipient is cohabiting with someone other than the Payor.*

5. *When the parties' incomes consist of social security and pension income only and their incomes are approximately equal.*

6. *When an alimony award would be considered "Double-Dipping."* The concept of double-dipping arises when the same asset is considered in both the property distribution (or payments to buy out a property distribution) and support obligation. A number of states are divided in how they address this issue, but it appears to be an emerging issue with greater recognition of its impact within the professional communities. The 1994 Child Support Guidelines Review Commission partially addressed this issue in its section entitled "*Equalization of Community Property*" where it is stated: "*Exchange of monies between the divorcing parties*

*to equalize property division is generally not an income-producing event, excepting interest payments, and therefore are not included in determination of gross income.*<sup>14</sup>

The following examples represent some instances when property distributions, or payments therefor, should not be considered as income for alimony purposes:

- a. When owner compensation is in excess of reasonable compensation and that excess has been factored into the valuation of the business which the owner receives as property, that excess income should not be considered for alimony purposes.
- b. When retirement plan benefits valued at the time of divorce are distributed to one party as property to offset property distributed to the other spouse, those benefits when in pay status should not be income for alimony purposes.
- c. When stock options awarded as property are later exercised, the income that is produced as a result of the sale should not be considered income for alimony purposes.

As a general rule, when any asset distributed as property upon divorce later produces a gain, the amount of income that should be considered for alimony purposes is limited to the gain only and not the value of the property divided upon divorce, because that is “double-dipping.”

7. *When the service on the former community debt allocated to the Payor significantly affects Payor’s ability to pay spousal support.* Debt service should signal the need

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<sup>14</sup> See *Leeder v. Leeder*, 118 NM 603, 884 P. 2d 499 (Ct. App 1994); CHILD SUPPORT REVIEW COMMISSION FINAL REPORT (1994).

to reserve the court's jurisdiction regarding spousal support in the event the Payor files bankruptcy.

E. WHEN ALIMONY **GUIDELINES** ARE GENERALLY **NOT** APPROPRIATE

1. *High income cases.* Consistent with the New Mexico Child Support Guidelines, these alimony guidelines do not recommend a cap, even in high income cases.<sup>15</sup> In high income cases, guideline alimony may produce an unreasonable amount of spousal support. In these situations it is more appropriate to consider the reasonable needs of the respective spouses, including their standard of living during the marriage, in establishing a realistic amount of spousal support. All the factors set forth in NMSA 1978, § 40-4-7(1997) must be addressed by counsel and will always be considered by the court in awarding alimony.

2. *Alimony Guidelines and New Mexico Child Support Worksheet B – Equal Time-Sharing.* The child support amount resulting from equal timesharing (50/50) when combined with guideline spousal support may result in inadequate total support for a family. The chart which follows provides an illustration. *Payor's income before alimony or child support = \$3,386; Recipient's income = \$924; one child of the marriage:*

	<u>NO ALIMONY</u>		<u>WITH ALIMONY</u>			
	<u>WKSHT INCOME</u>	<u>CHILD SUPPORT</u>	<u>GUIDELINE ALIMONY</u>	<u>CHILD SUPPORT</u>	<u>TOTAL PAID</u>	<u>TOTAL FAMILY</u>
A	<35	\$452	\$412	\$400	\$812	\$1736
B	(65/35)	\$373	\$412	\$295	\$707	\$1631
B	(50/50)	\$252	\$412	\$166	\$578	\$326

<sup>15</sup> See the initial report: ALIMONY GUIDELINE COMM., ALIMONY GUIDELINES AND COMMENTARIES, app. A, pt. 3 (2004); see generally *id.* app. A.

As the table illustrates, 50/50 time-sharing can result in very little child support. Resulting inadequate family support relates more to the child support guidelines than to the alimony guidelines.

3. *Equitable factors.* There are strong equitable factors that do not lend themselves to a guideline calculation but still may be considered. Some such examples are: frequent relocation to assist Payor's career or education, Recipient's caretaker role for stepchildren or elders affecting Recipient's ability to be employed, and Recipient's work to put Payor through school.

4. *Other factors.* There will always be outliers and unusual circumstances that do not lend themselves to guidelines. The above examples are not comprehensive. The courts have always had, and will continue to have, broad discretion to determine both the proper amount and duration of alimony awarded based upon the facts of each case and consistent with the statutory factors of NMSA 1978, § 40-4-7.

#### F. ALIMONY GUIDELINE DURATION

This committee, concurring with the Second Judicial District Alimony Guideline Committee, is not recommending a specific durational guideline. Jurisdictions around the country that employ a durational factor recommend one-third to one-half the number of years of marriage, with longer awards of alimony in long-term marriages. Duration is subjective and unique to each case depending upon the purpose and goals of an alimony award. If parties cannot negotiate duration of spousal support based upon the facts of the case, they risk uncertainty in both amount and duration at a trial. Under present case law, the judge may award indefinite, modifiable spousal support, reserving jurisdiction – the ultimate “til death do you part.”

1. **0 to <5 years of marriage:** Generally no alimony.

2. **5 to <10 years of marriage**: Generally only rehabilitative or transitional alimony. A rehabilitative or transitional plan will usually establish the duration of spousal support payments.

3. **>10 to <20 years of marriage**: Some states use a durational guideline for the 10-20 year marriages in the range of 30% to 50% of the number of years of marriage.<sup>1</sup>

4. **>20 years of marriage**: The court will reserve jurisdiction in marriages lasting longer than twenty years unless the parties can agree to lump-sum, nonmodifiable spousal support for a term certain paid in periodic payments or in a single lump sum.

5. **No duration**: New Mexico statutes and case law allow a one-time “buy-out” of alimony in a lump sum, non-modifiable payment (or periodic payments of that lump sum) over time.

#### G. DEFINITION OF INCOME FOR ALIMONY PURPOSES

In an effort to define “income” consistently, the alimony guideline committee recommends that the definition of income (including considerations for the imputation of income) used for child support purposes also be used to determine gross income for the alimony guideline worksheet calculation.<sup>2</sup>

#### H. EFFECT OF REMARRIAGE ON ALIMONY PAYMENTS

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<sup>1</sup> One academic theory is the “Declining Balance Approach,” with or without a rehabilitative or plan, rather than using a strict guideline duration formula. *See infra* Part I.

<sup>2</sup> <sup>18</sup> Assigned the task of addressing the definition of income, bonuses, capital gains, nonrecurring income, self-employed income, income benefits determination, imputed income and overtime issues, the Child Support Review Commission’s Income and Tax Subcommittee developed the “Definition of Income in Commentary.” As stated in the subcommittee’s report, “the purpose of the commentary is to aid judges, lawyers, and litigants in determining gross income in these situations, thereby creating greater uniformity and predictability, which should lead to settlement of more cases.” STATE OF NEW MEXICO, CHILD SUPPORT GUIDELINES REVIEW COMMISSION FINAL REPORT (1994).

Alimony should terminate when a proposed Recipient has remarried or is cohabiting with someone other than the Payor, and the proposed Recipient has failed to present extraordinary conditions, which are rare and exceptional, to justify continuation of alimony.<sup>3</sup>

#### I. DECLINING BALANCE APPROACH TO ALIMONY

The committee considered a declining balance approach as one possible alternative to determine transitional and rehabilitative alimony amounts over time with or without the use of a standard percentage formula. It is well recognized that support needed for rehabilitation is generally greater but for a shorter duration. The committee offers this very academic approach as a settlement tool “food for thought,” but not as a “guideline” *per se*. The declining balance approach recognizes the contribution of both parties in a marriage to the total earning capacity of the community, and is compatible with New Mexico’s community property principles as well as judicial decisions holding that educational degrees and professional licenses are not community property subject to division.<sup>4</sup> Under one declining balance approach, for example, payments from the higher earning spouse are made to the lower earning spouse for up to one-half of the length of the parties’ marriage, but only in the amount necessary to bring the lower earning spouse up to 40% of the parties’ combined gross income initially, and to less than 40% in subsequent periods.<sup>5</sup>

#### III. NEW MEXICO ALIMONY DECISIONS RE: USE OF PERCENTAGES/FORMULAS

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<sup>3</sup> <sup>19</sup> *Kuert v. Kuert*, 60 N.M. 432, 292 P.2d 115 (1956); *Brister v. Brister*, 92 N.M. 711, 594 P.2d 1167 (1979); *Cherpelis v. Cherpelis*, 1996-NMCA-037, 121 N.M. 500, 914 P.2d 637.

<sup>4</sup> <sup>20</sup> *Bilbao v. Bilbao*, 102 N.M. 406, 696 P.2d.494 (Ct. App. 1985) (holding that alimony award may properly take into consideration the fact that a spouse has been economically disadvantaged by the marriage). The court in *Bilbao* recognized that in many cases the “other” spouse has contributed significantly to the earning power (capital) of the higher earning spouse. The committee believes that the declining balance formula could be properly used as a settlement device. See also *Dunning v. Dunning*, 104 N.M. 295, 720, P2d. 1236 (1986). Compare *Lovato v. Lovato*, 98 N.M. 11, 644 P2d. 525 (1982).

<sup>5</sup> See Collins, *supra* note 4, at 62 n.161.

A. The Supreme Court in *Copeland v. Copeland*,<sup>6</sup> analyzed an award of a percentage of retirement benefits and upheld the award despite the argument that it would be administratively difficult to manage, stating that percentage awards in child support and alimony cases have been adequately handled by the courts.

B. In *Henderson v. Lekvold*,<sup>7</sup> the Supreme Court dealt with child support arrearages by upholding an escalating schedule of child support, stipulated to by the parties. The stipulated support award provided that as father's income increased, child support would similarly increase based upon the Second Judicial District Court guideline then in effect.<sup>8</sup> The Court reasoned that such increases do not need prior Court approval because settlements between husband and wife are highly favored in the law, the incorporation of the guidelines into the settlement agreement was not ambiguous, and that the provision was fully enforceable.<sup>9</sup> The Supreme Court reversed the trial court's refusal to follow the settlement agreement.<sup>10</sup>

C. In *Weaver v. Weaver*,<sup>11</sup> the Supreme Court struck down a sliding scale formula utilized by a trial court in its initial decision.

D. Finally, in *Dunning v. Dunning*,<sup>12</sup> the Supreme Court reversed a decision of the Court of Appeals which upheld an alimony provision that awarded wife 25.3% of husband's gross military retired pay. The percentage award was originally ordered by the trial court and

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<sup>6</sup> 91 N.M. 409, 413, 575 P.2d 99 (1978).

<sup>7</sup> 95 N.M. 288, 621 P.2d 505 (1980).

<sup>8</sup> *Id.* at 290.

<sup>9</sup> *Id.* at 293.

<sup>10</sup> *Id.*

<sup>11</sup> 100 N.M. 165, 667 P.2d 970 (1983).

<sup>12</sup> 104 N.M. 295, 720 P.2d 1236 (1986).

was not based upon a settlement agreement.<sup>13</sup> The Supreme Court held that the expressed “public policy” of the State was that modifications in spousal support had to be based upon a substantial change of circumstances including reviewing the need and ability to pay and that a percentage award would violate such public policy.<sup>14</sup> The Supreme Court also held it was improper to provide for automatic increases in spousal support whether expressed as escalator clauses, in terms of a percentage, or based on a sliding scale.<sup>15</sup> Alimony had to be a definite amount.<sup>16</sup>

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<sup>13</sup> *Id.* at 296.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *See also* the initial report: ALIMONY GUIDELINE COMM., ALIMONY GUIDELINES AND COMMENTARIES, apps. A-C (2004) (Containing a review of alimony guidelines in other jurisdictions (Appendix A), alimony worksheets used in other jurisdictions (Appendix B), and alimony case law in other jurisdictions (Appendix C), respectively).