

## **SPOUSAL SUPPORT: PAST, PRESENT AND FUTURE**

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Spousal support is a controversial subject in the area of family law. Despite the existence of specific laws on the subject, results in spousal support cases are extremely varied and completely unpredictable. This lack of consistency in spousal support cases has resulted in frustration with the system and a perception of unfairness. Society's understanding of the purposes behind spousal support have changed with time, and continues today. It is unclear what changes may come in the near future. To understand where spousal support may go, it would be helpful to start by understanding its past, and by following its development and evolution through to the present.

### **THE EVOLUTION OF SPOUSAL SUPPORT**

The original concept of "spousal support" dates back to the English common law system. In the original English divorce system, separation of the spouses or an absolute divorce could only be obtained where one of the spouses was "at fault" for the end of the marital relationship. If it was determined that the wife was "at fault," the husband could obtain a separation or divorce and he had no continuing duty to support the wife. If it was determined that the husband was "at fault," even though the wife obtained a separation or divorce, the husband retained control of his wife's property. In exchange for this, the husband had the continuing duty to support his wife. This initial form of "spousal support" was later adopted by the American colonies.

With the passage of time, the American divorce system evolved separately from the original English system. While the American system retained the English fault-based

system described above, the American system took the fault-based system one step further by punishing the “guilty” spouse for causing the end of the marriage. When the husband was the “guilty” spouse, the courts imposed a legal duty upon him to continue supporting his wife so that she could maintain their standard of living during the marriage. This was because, for the most part, at that time women did not work outside the home and, even if it were socially acceptable to do so, no job would pay enough to take care of their basic needs, let alone maintain a standard of living similar to the one enjoyed during the marriage. Judges believed that this form of spousal support was necessary because it was a way to punish the husband for his breach of the marital contract, while at the same time providing the innocent wife with a means to continue enjoying the marital standard of living. On the other hand, where the wife was the “guilty” spouse, the judges did not impose a duty of support, reasoning that because the wife was responsible for the end of the marriage, she brought the problem upon herself and had no right to receive support.

Although this policy for awarding spousal support continued well into the twentieth century, as our country evolved and significant social and economic changes took place, this rationale no longer made sense. The social stigma attached to divorce lessened in the 1960's. Some states, including California, adopted the “no-fault” divorce system in which it was no longer required to prove that either spouse was responsible for the breakdown of the marriage. After 1970, in order to receive a divorce in California, either spouse was obligated only to show that there was a permanent breakdown of the marital relationship. Not only was spousal support as punishment longer viable, but, as

more and more women entered the workforce, suitable employment became available to them, thus reducing the need for support as maintenance.

### **THE PRESENT STATE OF PERMANENT SPOUSAL SUPPORT IN CALIFORNIA**

Almost all of the states, including California, have now adopted the policy that the purpose of spousal support is to help a spouse to provide for his or her own reasonable needs while providing an opportunity to retrain and/or reeducate himself or herself, if he or she is unable to support himself or herself sufficiently through appropriate employment following the breakdown of the marital relationship. The exact standards for awarding spousal support vary from state to state. California law determines the issue of whether to award permanent spousal support as well as the issue of how much to award based upon the consideration of fourteen statutory factors. Those factors include the length of the marriage, the age and health of the parties, the employability of the supported spouse, the ability of the supporting spouse to pay support, the relative needs of each spouse and the goal that the supported spouse become self-supporting within a reasonable amount of time. These standards, which are set forth in the *Family Code* under section 4320 reflect the rejection of fault-based divorce and clarify that the purpose of spousal support is to ensure that the reasonable needs of both parties are met.

Temporary spousal support is based upon a different set of criteria not codified by state law and much more discretion is given to the judge. The amount of temporary spousal support is often dependent upon what the financial situation was at the time of separation of the parties. In some courtrooms in California, lawyers are hard pressed to

evaluate in advance how much temporary spousal support a judge might award for a client, as many facts have to come into play.

### **THE FUTURE OF SPOUSAL SUPPORT**

In California, judges are beginning to award spousal support even if the equal division of the community property will enable a spouse to be self-supporting. Because the supported spouse helped the other spouse get to a certain level of financial security, some judges believe that the supported spouse should be entitled to a portion of that increased income in the form of spousal support. According to this philosophy, a spouse's future income is viewed in part as a marital asset and spousal support becomes a way of dividing that marital asset fairly. In addition, in certain limited instances the judges have found ways to bring fault in "through the backdoor" in order to avoid the unpalatable result of rewarding a spouse for egregious conduct such as domestic violence or murder. These are just two examples of how the philosophy behind awarding spousal support is changing.

In an attempt to reduce litigation by bringing consistency to the method of determining spousal support awards, some states, including California, have adopted specific formulas. In some states, computer software programs have been developed to determine the appropriate amount of spousal support to award, based upon that state's particular guidelines. For example, in California, most family lawyers and judges use a program called "Dissomaster" which calculates the "guideline" amount of child support and spousal support awardable in any given matter, based upon information your lawyer

provides. California has adopted legislation requiring everyone to use federal “guidelines” for calculating child support, with certain limited exceptions. No similar statute has been passed with regard to spousal support. Judges are not supposed to use the spousal support figures generated by the program. Those figures are only persuasive and give the judges and attorneys a starting point in determining the appropriate spousal support award to make, especially on a temporary basis, in which the courts are more inclined to look at the “status quo” of the financial condition of the marital relationship at the time of separation.

Now that same-sex marriages are legal in California, domestic partners who marry will be able to receive spousal support based upon the same criteria as heterosexual spouses. Of course, couples of the same or different gender may contract away the right to receive spousal support by a properly drafted premarital agreement. Whether such an agreement will be upheld in a court of law some time in the future is another area which characteristically may have indeterminate and conflicting results. Visiting your family law attorney early and often is the best protection against an unwanted outcome.

### **CONCLUSION**

Many changes in family law have been the predictable result of an evolved society encompassing the way we look at marriage, the role of women in the home and in the workplace and the attempt to achieve gender neutrality. It is not clear how spousal support law may be viewed in the future. However, whatever changes the future may bring, Cooper-Gordon LLP is more than ready to assist you in identifying and resolving the issues.