

## **Maintenance**

Determination of maintenance has significant impact on the future finances of either party in a dissolution. The statutory law dealing with maintenance is fairly straightforward, but the case law has some nuances. But hiring an attorney to handle this is likely worth the cost.

[Divorce attorneys](#) in Kitsap, Pierce, Mason and other counties sometimes must explain to soon-to-be ex-spouses that under our state's law, maintenance is not meant to be a permanent lien on the assets of the ex-spouses who will be paying it. Instead it's usually a flexible tool to help the payee survive until she or he acquires sufficient education or training to get on her own feet.

I had a client who came to me *after* he did his divorce himself. He agreed to a dissolution settlement under which he was to pay maintenance to his ex-wife for the rest of her life! Had he been represented, the settlement likely would have provided for maintenance of five years. And this was an intelligent, well-educated client. But he was in over his head.

Historically, maintenance has been based on the need of the recipient and the ability of the other person to pay. Under the state's statute, the determination is just a little more subtle than that:

### **Relevant factors**

For more detail, RCW [26.09.090](#)(1) provides Washington courts the relevant factors for awarding maintenance, including, but not limited to:

- a. the financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his 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 for 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;
- d. the duration of the marriage;
- e. the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- f. the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

Courts must use the statutory guidelines above in conjunction with RCW [26.09.080](#) (disposition of property and liabilities) and RCW [26.09.100](#) (child support).

### **Applying those statutory factors, and what else will be factored in**

When you get a divorce attorney in Kitsap, Pierce, or Mason Counties -- or, really, anywhere else -- he or she should warn you that judges are given very broad discretion in making an award

of maintenance, in the interest of a fair result. Any award of spousal maintenance will be viewed in the overall context of the property and child support awards.

There is no requirement in the statutes or case law that the trial court isolate the determination of maintenance from the property division. *Wilder v. Wilder*, 85 Wn.2d 364, 534 P.2d 1355 (1975). Actually, the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so. In *re Marriage of Rink*, 18 Wn. App. 549 552-3, 571 P.2d 210 (1977). The list of factors set out in the statute is no exclusive. Essentially, anything (other than fault) which affects the fairness of the outcome can and should be considered. Numerous other considerations will affect the maintenance determination: abuse of the wife prior to and during the marriage, *In re Marriage of Foran*, 67 Wn.App. 242, 834 P.2d 1081 (1992); the availability of pension and retirement benefits; receipt of disability pay; the timing of the dissolution in connection with the careers of the parties; and the availability of Social Security benefits.

For decades now, since a Washington Supreme Court ruling in 1964 [*Hogberg*, 64 Wn. 2d 617, 619, 393 P.2d 291] it has been accepted law in Washington that one spouse is not entitled to a "perpetual lien" on the earnings of another:

"It is not the policy of the law to place a permanent responsibility upon a divorced spouse to support a former wife; she is under an obligation to prepare herself so that she might become self-supporting. *Berg v. Berg*, 72 Wn.2d 532, 434 P.2d 1 (1967). Nor is the wife entitled to maintain her former standard of living as a matter of right. [Citations omitted.] 'It is the policy of this state to place a duty upon the wife to gain employment.'"

*Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

Despite this general principle, the *Hogberg* case did have some nuances allowing for an occasional award of what has been, in effect, permanent maintenance, or at least maintenance that continues "until further notice of the court".

The ability of an ex-spouse/payee to support herself is only one of the relevant factors set forth in the statute.

"...The duration of the marriage and the standard of living established during the marriage must also be considered, making it clear that maintenance is not just a means of providing necessities, *but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time...* The only limitation placed upon the trial court's ability to award maintenance is that the amount and duration, considering all significant factors, be just." [italics mine].

*In re Marriage of Washburn*, 101 Wn.2d 168, 178-79, 677 P.2d 152 (1984).

The final report of the Washington State Task Force on Gender and Justice in the Courts (1989) stated that according to the lawyers surveyed, the typical duration of maintenance was as follows:

1. Marriages less than ten years, 0-3 years of maintenance;
2. Marriages 10-20 years, 1-3 years of maintenance;
3. Marriages 21-30 years; 1-5 years of maintenance; and
4. Marriages greater than 30 years, maintenance likely to be limited to 1-10 years and most probably 5 years or less.

The judges surveyed had the following comments relating to length of marriage and maintenance:

1. Marriages 10 years or less, 2 years or less of maintenance;
2. Marriages 10-20 years, 3 years or less of maintenance;
3. Marriages 21-30 years, 5 years or less of maintenance; and
4. Marriages greater than 30 years, permanent maintenance.

## **Modification of the original decree**

The general standard for modification of decrees of maintenance and child support is set out in RCW [26.09.170](#):

The provision of any decree respecting maintenance of support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a *substantial change in circumstances*... [italics mine]

Normally, in the absence of anything in the separation agreement to the contrary, maintenance may be modified by a court only upon the showing of a *substantial change in circumstances* that was not within the contemplation of the parties at the time the decree was entered. *Lambert v. Lambert*, 66 Wn.2d 366, 397 P.2d 418 (1964). [italics added]

If you are the ex-spouse who is petitioning for a modification -- for example, you're the one paying maintenance, and you want the amount lowered -- the burden is upon you to demonstrate the required change of circumstances. The basic test, absent the most exceptional circumstances, is: could and should the facts now relied upon as establishing a change in circumstances have been presented to the court in the previous hearing?