JUST AND EQUITABLE, BUT NOT PRACTICABLE: THE PROBLEMS OF A LOOSELY FACTORED SPOUSAL SUPPORT FRAMEWORK IN OREGON AND POTENTIAL SOLUTIONS

by
*Aime Lee Ohlmann**

Spousal support in Oregon, as in many states, is based upon a loosely factored framework that allows wide judicial discretion and limited predictability for practitioners. This makes routine settlement of the issue of spousal support challenging and increases litigation. Many states and organizations have developed frameworks for spousal support "calculators" or "formulas" that provide more predictable and consistent results for families and practitioners and better meets the established goals of spousal support. This Note explores the problems of a loosely factored framework, what solutions exist in other states, and what solutions may be implemented in Oregon.

* Aime Lee Ohlmann is a recent graduate of Lewis & Clark Law School currently practicing at Easley Family Law. Aime Lee Ohlmann worked as a paralegal in family law in both litigation and mediation-focused firms and has volunteered for the Association of Family and Conciliation Courts. Extensive gratitude is owed to Saville Easley and Jack Lundeen for their feedback and advocacy of this issue.

INTRODUCTION

Spousal support, or alimony, has a strong historical and social foundation and is awarded in some form or another in every state of the union, but frameworks vary dramatically from state to state.[1] In Oregon, spousal support awards can be either transitional, maintenance, or compensatory, each of which is awarded based on a number of statutory factors, including "any other factors the court deems just and equitable."[2] Unfortunately, this wide discretion can allow spousal support awards to vary dramatically from county to county and judge to judge, which leads to a great deal of unpredictability in awards. Unpredictability, in turn, makes settlement of cases more difficult and leads to unnecessary litigation and conflict in family law cases, harming families and creating long-ranging impacts to access to justice for families who cannot afford to litigate. Further, this unpredictability may favor the "have" spouse more than the "have-not" spouse, as a "have-not" spouse is disproportionately affected by the high cost of litigation, should the parties be unable to agree to spousal support.[3]

In response to the call from practitioners and workgroups over the last 20 years, several frameworks have emerged to try to address the troublesome inconsistency that plagues spousal support across the country. In 2001, the American Law Institute (ALI) produced its *Principles of the Law of Family Dissolution: Analysis and Recommendations*, which included a guide that would allow states to, in accordance with their own priorities, craft and adopt rules that set forth circumstances under

[1] *See* J. Thomas Oldham, *A Survey of Lawyers' Observations About the Principles Governing the Award of Spousal Support Throughout the United States*, 51 FAM. L.Q. 1, 3–5 (2017) (discussing generally the various approaches currently in use in the United States).

[2] OR. REV. STAT. § 107.105 (2021).

[3] For example, in a case where one party makes $125,000 per year, and the other makes $25,000, each party may need to pay $15,000 in attorney fees in the course of a complex hearing involving spousal support. Should the "have-not" party gamble a trial for higher spousal support and lose, they face needing to pay their attorney 60% of a year's wages. This may be an untenable risk. Alternatively, if the "have" party loses, they are losing 12% of their yearly wage, which may be an acceptable risk in pursuit of a favorable award which may recoup their costs.

which a presumption arises that a spouse is entitled to a particular award.[4] From 2005 to 2007, the American Academy of Matrimonial Lawyers (AAML) reviewed the ALI principles and declined to recommend them, instead producing their own recommendation of alimony guidelines resembling a more straightforward calculator.[5] In the years that followed, several states have either adopted or proposed a more formulaic approach to spousal support in order to reduce unpredictability.[6] For example, statewide formulas have been enacted in Massachusetts, Illinois, and Pennsylvania.[7] Beyond these, several additional jurisdictions use guidelines on either a *pendente lite* basis or in isolated counties.[8]

To date, Oregon has adopted no formula, although practitioners follow a number of "rules of thumb" during settlement negotiations and when creating expectations for clients.[9] More robust solutions should be developed and worked into legislation, or at least worked into accepted practice, to foster consensus on awards. The most historically consistent approaches are likely to be based on statistical analyses of existing Oregon case law, which could allow a working tool to be developed with the aim of standardization. If widely adopted by practitioners, such a tool could improve the current, unpredictable nature of spousal support without legislative intervention and without overly impairing the discretion of judges. In particular, a new approach being taught by Judge Todd Van Rysselberghe of Clackamas County shows promise as a framework for tool development that could provide some consistency, or at least provide a clear "range of reasonableness," should it gain wide adoption.[10] However, to truly allow practitioners a firm foundation from which to negotiate and settle cases, a statutory formula creating an entitlement to support under defined circumstances in which support is warranted and a path to calculate a presumptive amount should be developed and implemented by the legislature.

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[4] PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS XVIII, § 5.04(2) (AM. L. INST. 2002).

[5] L.J. Jackson, *Alimony Arithmetic: More States Are Looking at Formulas to Regulate Spousal Support*, 98 A.B.A. J. 15, 16 (2012).

[6] Denise K. Mills & Gina B. Weitzenkorn, *Emerging Spousal Support and Parenting Issues*, 41 COLO. LAW. 45, 46 (2012).

[7] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, §§ 48–53 (2022); 750 ILL. COMP. STAT. § 5/504 (2021); 23 PA. CONS. STAT. § 4322(a) (2022); 231 PA. CODE § 1910.16-4 (2022).

[8] Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 30 (2004).

[9] The tricky thing about unwritten "rules of thumb" is that they're unwritten. While this Author has encountered several consistently and widely discussed rules from numerous practitioners in their time in the industry, no academic articles or cases highlight them, which make them a very poor subject for an academic piece on the topic. For this reason, they are only briefly addressed in this Note.

[10] *See* Multnomah Bar Ass'n, *Spousal Support Awards: Post-TCJA and Other Thorny Issues*, VIMEO, at 49:20 (Sept. 14, 2021), https://vimeo.com/606001928/ad23684aa0.

Parts I discusses the repercussions of a lack of predictability in spousal support and its impact on litigation in family law. Part II discusses the current Oregon framework of loose factors and wide discretion. Part III discusses approaches other states have taken and frameworks proposed by other institutions in the family law sphere. Part IV evaluates paths that could be taken now in Oregon to mitigate or improve the status quo.

I. PREDICTABILITY MEANS LESS CONFLICT; LESS CONFLICT MEANS LESS HARM TO FAMILIES

A framework that leads to inconsistent and unpredictable results hampers settlement, thereby increasing litigation and both the conflict and expenses that come with it.[11] Contentious litigation in family law causes more social harm than litigation in other areas. For example, many civil litigants could go to their day in court to receive an answer from a judge on their claim and then never see their opposing party again. In family law, however, practitioners are all too familiar with cases and clients who are put in a position of attending a fiercely contested hearing on parenting time or financial matters on any given Thursday and then need to cooperate with their opposing party hours or days later to exchange the children for parenting time. Many practitioners, therefore, are constantly weighing the cost of litigation not in terms of attorney fees but also in terms of the cost of the conflict itself to the families who will need to continue to co-parent.[12] An ideal framework would foster consistency, which can facilitate settlement, which can reduce harm to families.

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[11] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 958 (1979) ("A child's future relationship with each of his parents is better ensured and his existing relationship less damaged by a negotiated settlement than by one imposed by a court after an adversary proceeding.").

[12] The Association of Family and Conciliation Courts (AFCC) is an organization that has been fostering a harm-reduction approach abroad for more than 50 years:

> AFCC is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. AFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research, and innovation and identifying best practices.

About the AFCC Oregon Chapter, ASS'N FAM. CONCILIATION CTS. OR. CHAPTER, http://afccoregon.com/about/from-the-president (last visited Dec. 31, 2022). An Oregon Chapter was founded in 2012. The Oregon AFCC board is made up of judges, lawyers, psychologists, and social workers throughout Oregon dedicated to reducing conflict for the sake of improving family outcomes. *Id.*

A. Formulas Can Reduce Conflict and the Need for Litigation

In spousal support, where the result is uncertain and discretion remains very high, parties are left to negotiate with few entitlements or expectations with which to form a starting point (much less a well-informed ending point) for negotiation. Even skilled attorneys, who have years of litigation experience before various judges and can artfully draw out a "general idea of what spousal support used to be,"[13] may learn at trial assignment the day before or a few days before trial that they have a judge who tends to favor a particular analysis, or worse, a judge who is not an experienced family law bench member and may be unfamiliar with the "feel" of spousal support.[14] Thus, even attorneys who advise their clients well may be taken unaware by a judge who is not familiar with the law, leaving the attorneys with few options before them.

As Robert H. Mnookin and Lewis Kornhauser note, "[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law."[15] By engaging in a surface-level analysis of the bargaining theory at play in dissolution cases, Mnookin and his co-authors explore how the outcome that the law would impose if no agreement is reached gives each parent certain bargaining chips and impacts the rate and terms of settlements.[16] In particular, he notes five factors that seem to be important influences or determinants of the outcomes of the bargaining process, including:

> (1) the preferences of the divorcing parties; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behavior.[17]

At play most significantly in the issue of spousal support are factors two, three, and four.

Most significantly, the current framing in Oregon does not create a *presumption* of an entitlement to spousal support.[18] In fact, there are a number of remarkable

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[13] To use Judge Raines' words. Multnomah Bar Ass'n, *Spousal Support Awards: Post-TCJA and Other Thorny Issues*, VIMEO, at 01:35:24 (May 26, 2020), https://vimeo.com/582594900/de87261ce3.

[14] Few counties in Oregon have a dedicated family court bench. Absolute uncertainty may be mitigated by motioning the court to be specially set in counties that have such procedure, but that is not available across the board in Oregon. *See infra* Part II and text accompanying notes 64–66 for further discussion on judge assignment.

[15] Mnookin & Kornhauser, *supra* note 11, at 968.

[16] *Id.* at 968.

[17] *Id.* at 966.

[18] OR. REV. STAT. § 107.105(1)(d) (2021) (stating that a court "may" award support).

cases in Oregon where spousal support was *not* ordered, despite the traditional tell-tale signs that it might be warranted (such as long duration, great income disparity between the parties, and one party's role as a caregiver to the children).[19] This means that for practical purposes, negotiations between counsel are presumed to begin at zero and end at the high end of the payor's ability to pay. Any given attorney advising the high-earning spouse of their risk of support or the low-earning spouse on their likelihood of receipt would base their legal advice primarily on that attorney's own experience and, sometimes, confidence. Within this wide range of outcomes, in cases with high-earning spouses, either party may find the risk or reward high enough to incentivize even the high transaction costs of a trial, since a monthly payout or receipt of funds of several thousand dollars per month quickly saves itself or pays itself off, respectively. Alternatively, formulas which create a *presumption* set a much more workable negotiating table where the range of outcomes are smaller compared to the transaction costs, thus disincentivizing litigation.[20] This would theoretically serve several positive objectives, including lightening court dockets and minimizing litigation and conflict between parties.[21]

Further, it has been argued, and stands to reason, that the lack of certainty benefits the high-earning spouse rather than the low-earning spouse, because they are more able to bear the transaction costs of the risk of litigation. Glendon notes:

> The greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial. These have been estimated to comprise ninety percent of all divorce cases. To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue—and a large measure of discretion

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[19] *See, e.g.*, *In re* Marriage of Brastad, 590 P.2d 794, 795 (Or. Ct. App. 1979) (after a 15-year marriage where Husband earned twice what Wife did, court declined to award spousal support noting that Wife was only 35 and had "some college"); *In re* Marriage of Jacobs, 39 P.3d 251, 253, 256–57 (Or. Ct. App. 2002) (after a 22-year marriage where Husband, age 61, was unemployed and Wife earned $99,000 per year, Husband was not entitled to support); *In re* Marriage of Talik, 202 P.3d 267, 270, 272–73 (Or. Ct. App. 2009) (in a 14-year marriage where Husband moved to follow Wife's career and stayed at home to raise the children with a potential income of $55,000, and Wife earned from $149,000 to $272,000 over the last few years, no support was ordered for Husband).

[20] *See* Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 234 (1991). Murphy notes that this was the effect of presumptive calculators in child support: "Although each state's guidelines vary, all share the common benefit of predictability. . . . Even with a reserve of discretion, the formulae permit a starting point for negotiation or litigation that the prior system of near-absolute discretion lacked completely." *Id.*

[21] *Id.* at 235 (quoting Carol Schrier-Polak, *Child and Spousal Support Guidelines: A Current Update*, VA. LAW., Jan. 1990, at 42, 44 ("Settlements reflecting the support guidelines have replaced unnecessary court hearings, and costs have been reduced because all concerned can predict in advance what the support award is most likely to be.")).

> means exactly that—the economically stronger party gains negotiating leverage from the superior ability to prolong negotiation, to engage in extensive pretrial discovery, and to use preliminary court appearances for harrassment [sic]. It is important that legal reform in the area of divorce should take place with a view toward the needs of divorcing couples of modest means for whom the law is the background of the process of negotiation and settlement. Here, and not in the courtroom, is where divorce law has its main impact.[22]

From an access to justice perspective, the greatest amount of good can come from providing a framework upon which parties who cannot afford representation or are assisted by neutral mediators—or even, as Oregon may provide, by paralegals certified to practice family law[23]—can receive an equitable answer to the spousal support question without the need of a litigation attorney to advise and guide. To this end, a calculator or formula would provide the most predictability and, therefore, foster settlement in the vast majority of cases.

B. Family Law Should Maintain a "Do No Harm" Approach

The harms that come from the adversarial legal process in family conflict have been condemned since the 1980s and are the basis of wide and thorough research by groups intent on reducing conflict, such as the Association of Family and Conciliation Courts (AFCC).[24] For example, the term *therapeutic jurisprudence* was established in the late 1980s as a way to analyze "the role of law as a . . . social force that, like it or not, may produce therapeutic [helpful] or anti-therapeutic [harmful] consequences."[25] It was first applied scholastically to family law by Barbara Babb,

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[22] Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986) (citing Mnookin & Kornhauser, *supra* note 11, at 951 n.3).

[23] Elizabeth Castillo, *Oregon Proposal Considers Licensing Paralegals to Provide Some Legal Services*, OPB: THINK OUT LOUD (Jan. 4, 2022, 3:29 PM), https://www.opb.org/article/2022/01/04/oregon-proposal-considers-licensing-paralegals-to-provide-some-legal-services/.

[24] In 1985, Julien Payne noted that:

> The past twenty years have witnessed ever-increasing attacks on the impact of the adversarial legal process on family conflict resolution. The criticism has been widespread. Experts in the behavioural and social sciences, and particularly psychiatrists and psychologists, have condemned the adversarial legal process as an ineffective means of promoting the constructive resolution of family disputes.

Julien D. Payne, *Future Prospects for Family Conflict Resolution in Canada*, 24 CONCILIATION CTS. REV. 51 (1986).

[25] Barbara A. Babb, *Family Law and Therapeutic Jurisprudence: A Caring Combination—Introduction to the July 2021 Special Issue of Family Court Review*, 59 FAM. CT. REV. 3, 409 (2021) (alteration in original) (quoting David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991)).

who notes that she "began many years ago to assert that [therapeutic jurisprudence] is the tool needed to assist family law professionals to identify beneficial outcomes for parties and to enable the law to be a caring, helpful profession."[26] From this philosophy, a good family law attorney can be defined by not only what financial outcomes they are able to achieve for their clients, but also how they can minimize the emotional harm that their clients experience, and maximize healthy and stable relationships that their clients leave with—including with their former spouse, to the extent that those healthy relationships are necessary to co-parent effectively for the good of children involved in these cases.

Several variables have been identified as important to children's mental health in divorce: "(1) an authoritative relationship with at least one parent, (2) mild parental conflict or conflict that does not involve the children, (3) economic stability, and (4) a good relationship with the other parent."[27] Researchers have found that mediation and avoiding adversarial processes can improve several of these variables, and can decrease time and cost associated with litigation, increase compliance with resulting orders, and lead to parties more satisfied with the outcomes, both immediately after the ordeal and several years later.[28] Oregon continues to take positive steps towards encouraging out-of-court settlement by requiring mediation and alternative dispute resolution in family and civil matters, including recent expansion of ADR requirements in civil cases, including family law cases.[29]

Unfortunately, wide judicial discretion and unpredictable results work directly contrary to these objectives.[30] While satisfaction with outcomes relating to spousal support may always tend a bit low, Justice Richard Neely of the West Virginia Supreme Court stated:

> Litigant satisfaction in divorce matters is far lower than in any other type of case. Most judges who are murdered by dissatisfied customers are killed by

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[26] *Id.* at 410.

[27] Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 24 (2005).

[28] *Id.* at 27–30.

[29] *See, e.g.*, Washington County Circuit Court Supplemental Local Rule 6.201(1)(a) (2021) (requiring ADR to be attempted prior to any civil trial); Washington County Circuit Court Supplemental Local Rules 8.081(2), 12.011(1) (2021) (requiring mandatory mediation in all cases involving controversy over custody and parenting time).

[30] Murphy, *supra* note 20, at 217–19. Murphy assesses the strong role of discretion in family law as stemming from a historical context when issues of the family belonged in a court of equity, but also recites other theories on why this strong preference of discretion may persist, including the general argument that individualized decisions are necessary given the complexity and diversity of families appearing before the court and the distinctly local nature of family law jurisprudence with respect to a judge's perception of family needs, community interest, and national common law priorities.

> irate domestic litigants, not by criminals. The reason is simple: in other litigation, fewer emotional issues are involved; more important, the judge has less discretion.[31]

In order to minimize adversarial dynamics between parties, Oregon policy should be reformed to improve chances at settlement and minimize the wide scale of possible spousal support outcomes. Presumably, very few parties would volunteer to continue to support a spouse that is either leaving them or that they have chosen to leave if the law did not to require it. But frameworks that have poor predictability, poor consistency, and are the result of a high degree of discretion prevent attorneys from creating realistic expectations and working to *personalize* each award. Tom's neighbor, who just went through a divorce, may not have been ordered to pay spousal support; but Tom finds himself somehow punished, while his former spouse is somehow rewarded, by a large support award that he did not expect to pay. With no understanding of the reasons behind such an award, and no perception of fairness in the system, Tom is likely to hold a very large degree of resentment towards the judge and his ex-wife.[32] Even if spousal support is the only issue that is litigated, neither a win nor a loss after a battle about the issue is likely to foster a co-parenting relationship.

C. Guideline Child Support Has Successfully Reduced Conflict Associated with Child Support Determination

Prior to the congressional enactment of the Child Support Enforcement Amendments of 1984, and then the Family Support Act of 1988, child support faced the same crisis of unpredictability and inconsistency that spousal support continues to face today.[33] However, these acts, by conditioning Aid to Families with Dependent Children funding to states on their adoption of presumptive guidelines that were "based on specific descriptive and numeric criteria and result in a computation of the support obligation," successfully encouraged states to widely adopt models that standardized child support.[34] Child support in Oregon, as prescribed under section 25.275 of the Oregon Revised Statutes, utilizes just such a calculator to determine the presumptive child support award.[35]

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[31] RICHARD NEELY, THE DIVORCE DECISION 32 (1984).

[32] Tom is fictional, but representative of a very typical client perspective that this Author has observed in her limited practice.

[33] *See* Murphy, *supra* note 20, at 226–28; Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, §§ 1–2, 98 Stat. 1305 (1984) (codified as amended at 42 U.S.C. § 651); Family Support Act of 1988, Pub. L. No. 100-485, § 1, 102 Stat. 2343 (1988) (codified as amended at 42 U.S.C. § 1305).

[34] Murphy, *supra* note 20, at 228 (quoting 45 C.F.R. § 302.56(c) (1990)).

[35] OR. REV. STAT. § 25.275(1) (2021).

Following the implementation of these calculators nationwide, empirical analysis showed that over 70% of surveyed attorneys litigating child support under the income sharing models, similar to that implemented in Oregon, believed that the guidelines had reduced inconsistency in the awards, with the greatest reduction in variability in the awards to low-income families.[36] Judges and attorneys also generally agreed that guidelines led to more settlements on child support, with evidence tending to confirm that the predictability resulting from the fixed rule had increased the number of settled child support cases.[37]

When assessing why a formula is appropriate for child support but not spousal support, Judge Van Rysselberghe distinguishes the two frameworks by highlighting the quantitative, versus qualitative, nature of the child support factors, compared to spousal support factors.[38] All of the factors in the Child Support Calculator are numerical values that can be determined. While sources of disagreement and conflict can still exist—such as what income is assigned or imputed to either party—these issues still more closely resemble questions of fact that an attorney can develop an opinion on after diligent discovery and investigation rather than unpredictable questions of law.

II. THE OREGON STATUS QUO

In a world where consistency and predictability would foster settlement, Oregon's current spousal support laws do neither. Very few tools are available to practitioners currently to establish support objectively, and the range of approaches and awards is wide and highly discretionary.

In Oregon, spousal support is set by a permissive statute using multiple factors and wide discretion. Section 107.105(1)(d) of the Oregon Revised Statutes allows that a court, in entering a domestic relations judgment, "*may* provide . . . for spousal support, an amount of money for a period of time as may be *just and equitable* for one party to contribute to the other, in gross or in installments or both."[39] The original statute, enacted as section 107.105(1)(c) of the Oregon Revised Statutes in 1971,[40] instructed Oregon courts to consider the following:

(A) The duration of the marriage;

(B) The ages of the parties;

(C) Their health and conditions;

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[36] Murphy, *supra* note 20, at 232.

[37] *Id.* at 234.

[38] Multnomah Bar Ass'n, *supra* note 10, at 23:27–26:14.

[39] OR. REV. STAT. § 107.105(1)(d) (2021) (emphasis added). The statute is recited here as it existed in 1971 for the purpose of maintaining fidelity to *Grove*'s discussion.

[40] OR. REV. STAT. § 107.105(1)(c) (1971) (amended 1973).

(D) Their work experience and earning capacities;

(E) Their financial conditions, resources and property rights;

(F) The provisions of the decree relating to custody of the minor children of the parties;

(G) The ages, health and dependency conditions of the children of the parties, or either of them; and

(H) Such other matters as the court shall deem relevant.[41]

Statements from the Oregon Court of Appeals applying this original statute provided insight into the court's view of the *goals* of spousal support, but they did little to elaborate on how trial or appellate courts should actually apply the various factors to achieve those lofty goals. In 1977, in *In re Marriage of Grove*, the Oregon Supreme Court gave its interpretation of the legislative intent behind the factored statute in an attempt to provide clarity to lower courts and practitioners on how to apply the factors.[42] The court noted that the legislature had *not* indicated how the various factors were to be weighed nor given any specific directions for determining what kind of spousal support is "just and equitable."[43] Nonetheless, the court noted that it could draw a number of conclusions about the purpose and permissible functions of spousal support. For instance, by including language requiring the support to be "just and equitable," the legislature chose not to frame support purely in terms of need, and nothing in the statutory structure requires that the court limit its analysis "to the minimum amount necessary to provide food, shelter, and other basic necessities."[44] The court also noted that the eventual goal of support, as evidenced by related statutes, is to end the support-dependency relationship within a reasonable time if a partner's self-support at a reasonable level is possible without causing undue hardship;[45] and that it is overall proper for the courts to develop general principles in addition to and consistent with those provided by the legislature, to the end that similar cases would be treated similarly.[46]

The modern statutory scheme has increased in complexity as the legislature has divided spousal support into three primary categories, each of which has its own slightly modified factors and purposes but still applies its overarching goals as

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[41] *Id.* at 481–84.

[42] *In re* Marriage of Grove, 571 P.2d 477, 480–81 (Or. 1977).

[43] *Id.* at 481.

[44] *Id.* at 485.

[45] *Id.* at 481, 485. *Grove* found that section 107.407 of the Oregon Revised Statutes, which allows review and termination of support after 10 years if it can be demonstrated that the former spouse has not made a reasonable effort during that period of time to become self-supporting, supported this proposition.

[46] *Id.* at 485.

enunciated by *Grove*.[47] Under the new framework, the statute provides for: transitional spousal support, which focuses on temporary support of a party who would need to attain the education and training necessary to prepare for reentry into the job market or advance therein;[48] compensatory support, which focuses on a significant financial or noneconomic contribution by one party to the vocational skills or earning capacity of the other party;[49] and maintenance spousal support, which focuses on supporting a spouse in the short or long term in a more general sense, including, in a long-term marriage, the goal of providing a standard of living not disproportionate to that enjoyed during the marriage.[50] However, this increase in complexity has not provided firmer footing because many of the factors are redundant, and they remain permissive and loose in their application with no weighting or priority.[51]

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[47] *See generally In re* Marriage of Austin, 82 P.3d 170 (Or. Ct. App. 2003) (including an extensive discussion of the change in the law to add compensatory support). For other notable cases that apply *Grove* standards after the change in the law, see *In re* Marriage of Carlson, 236 P.3d 810, 822–23 (Or. Ct. App. 2010); *In re* Marriage of Potts, 176 P.3d 1282, 1284–87 (Or. Ct. App. 2008); *In re* Marriage of Timm, 117 P.3d 301, 307–08 (Or. Ct. App. 2005).

[48] OR. REV. STAT. § 107.105(1)(d)(A) (2021). As an example, spousal support might be ordered for a period of two to five years in order to allow the lower-earning spouse to complete a degree.

[49] *Id.* § 107.105(1)(d)(B). As an example, a Wife who supported her Husband through his medical or dental degree and practice, either by working to pay bills through his training or by managing domestic and child-rearing so that he could focus on his career, might be entitled to compensatory support. *See, e.g.*, *In re* Marriage of Hook, 242 P.3d 697, 700, 703 (Or. Ct. App. 2010).

[50] § 107.105(1)(d)(C). This is the "classic" type of alimony and acts to provide general financial support to a spouse that is economically dependent for any number of reasons. *See also In re* Marriage of Abrams, 259 P.3d 92, 94 (Or. Ct. App. 2011) (citations omitted) ("In a long-term marriage . . . the primary goal of spousal support is to provide a standard of living to both spouses that is roughly comparable to the one enjoyed during the marriage, while at the same time keeping in mind the objective of ending the support/dependency relationship within a reasonable time, if that is possible without injustice or undue hardship." (first citing *In re* Mallorie, 113 P.3d 924 (Or. Ct. App. 2005); and then citing *In re* Taylor, 902 P.2d 120 (Or. Ct. App. 1995))); *In re* Marriage of Colton, 443 P.3d 1160, 1166–67 (Or. Ct. App. 2019); *In re* Marriage of Card, 652 P.2d 866, 867 (Or. Ct. App. 1982); *In re* Marriage of Powell, 934 P.2d 612, 616 (Or. Ct. App. 1997); *In re* Marriage of Morrison, 910 P.2d 1176, 1179 (Or. Ct. App. 1996); *In re* Potts, 176 P.3d at 1287; *In re* Mallorie, 113 P.3d at 933; *In re* Marriage of Boatfield, 447 P.3d 35, 39–40 (Or. Ct. App. 2019); *In re* Marriage of Skinner, 398 P.3d 419, 422–23 (Or. Ct. App. 2017).

[51] *See* § 107.105(1)(d)(A)(i)–(ii), (B)(ii)–(iii), (C)(i), (C)(v), (C)(vii) (including "duration of the marriage" under all three types of spousal support; "a party's work experience" as a factor in both transitional and maintenance support; and "the relative earning capacity of the parties" in compensatory and maintenance support, even though the purpose of compensatory support presumably has a basis in restitution instead of need-based support).

There is no formula for calculating spousal support in Oregon;[52] instead, practitioners have available to them this loose framework that is open to judicial discretion, wherein a judge "may" award support that is "just and equitable."[53] The Oregon Appellate Court will only disturb awards that are "outside the 'range of reasonableness by a significant enough margin so as not to be just and equitable in the totality of pertinent circumstances.'"[54] In order to make this practicable, many practitioners have turned to informal rules of thumb that might generate a number or duration as a starting point, even if that number is utterly unpersuasive in court. For example, the following propositions have been frequently repeated by practitioners: (a) that "half the length of the marriage" is an appropriate starting point for the duration of support;[55] (b) that (outside of extenuating circumstances) indefinite support is only appropriate in marriages longer than 20 years;[56] and (c) most famously, many practitioners use or have encountered some approximation of the "Lewis Rule," which is a methodology that Judge John B. Lewis is rumored to have followed in Washington County, whereby the lower-income spouse's income was subtracted from the higher income spouse's income, and the result was multiplied by 25%.[57]

However, even these rules of thumb have been expressly disavowed by the courts and judges. In a continuing legal education course offered by the Multnomah Bar Association in 2020 titled *Spousal Support Awards: Post-Tax Cuts and Jobs Act and Other Thorny Issues*, a panel of five well-respected judges presented on the issue of spousal support generally.[58] During that presentation, the judges reiterated multiple times that formulas and rules of thumb are *not* sanctioned by the Oregon

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[52] It appears that at least one attempt has been made at development of a formula, sometime in or prior to 1997, by Judge Deanne Darling and John W. ("Jack") Lundeen. Their proposed calculator used points based on factors to assign an amount and duration. Their proposal was not adopted in Oregon. *See* Larkin, *supra* note 8, at 39 n.70.

[53] *See In re* Marriage of Reaves, 236 P.3d 803, 808 (Or. Ct. App. 2010) (quoting *In re* Marriage of Hoag, 954 P.2d 184, 187 (Or. Ct. App. 1998)) ("[T]he determination of an appropriate level of support 'is not a matter of applying a mathematical formula.'"). *But see In re* Marriage of Bach, 834 P.2d 1041, 1042 (Or. Ct. App. 1992) ("Nevertheless, some consistency is possible and is called for, especially when there are recent opinions of this court dealing with almost identical facts. Presumably, when we write on these cases, our purpose is to provide the trial bench and bar with guidance.").

[54] *In re* Marriage of Cullen, 194 P.3d 866, 873 (Or. Ct. App. 2008) (quoting *In re Potts*, 176 P.3d at 1285).

[55] Based on the Author's own knowledge and interactions with local practitioners in Oregon.

[56] Multnomah Bar Ass'n, *supra* note 10, at 37:50–40:00.

[57] Judge Keith Raines of Washington County says, "Judge Lewis always denied that, of course." Multnomah Bar Ass'n, *supra* note 13, at 01:27:25–01:30:39.

[58] *See generally id.*

Appellate Court.[59] Following the discussion on rules of thumb (and the lack thereof), the moderator asked bluntly, with almost a sense of exasperation:

> I'll ask maybe in a way that probably everyone is thinking—what do we do from here? As far as, if we shouldn't be using some sort of a rule of thumb or it's not helpful for the reasons that the panel has already illuminated, what do we as practitioners *do* in advising our clients?[60]

The first response, given by respected retired Clackamas County Judge Eve Miller, was that:

> It should be based on need. I think 'need' drives it, regardless of how much income is available. And then you start paring down the needs if there is not enough money to go around . . . and when I say 'need,' I don't mean just the most basic of needs, I mean in a lifestyle that is not overly disproportionate. For some people that works, and other people it's just barely keeping the lights on and keeping a roof over their head. But need is the first inquiry, and trying to meet those needs, and it seems that is consistent with the caselaw.[61]

The second response, given by Washington County Judge Keith Raines, was, "I think a lot of folks have a general idea of what spousal support used to be, and what it used to be should probably be reduced by somewhere around 21%."[62] The third and final response, given by Clackamas County Judge Van Rysselberghe, was that he agreed with Judge Raines but added that in high-income cases, the tax rate may be higher than 21%. Thus, the extent of practical advice given to practitioners: Do what you have been doing, which remains vaguely based on need and available

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[59] *Id.*

[60] *Id.* at 01:34:03 (emphasis added).

[61] *Id.* at 01:34:05. However, other authors have highlighted various problems with the heavy reliance on "need." *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 25 (2001) ("Even if future expenses and incomes could be determined within a tolerable margin of error, the figures presented for purposes of support negotiations or litigation often are the result of strategic posturing rather than accurate projections, and provide an inherently unreliable basis for decision making [sic]."); *see also id.* at 25 n.6 ("[E]ven though New York law requires budgetary data in affidavit form . . . my experience has been that matrimonial practitioners tend to treat these figures as much as they would treat outlandish opening bids offered in competitive negotiations—as a socially acceptable form of disinformation.").

[62] Multnomah Bar Ass'n, *supra* note 13, at 01:35:25. To put words into his mouth, Judge Raines appears to be referring here to "what spousal support would have been ordered prior to the Tax Cuts and Jobs Act." That Act eliminated the deductibility of spousal support by the payor and its taxability to payee, leaving support ordered after 2018 to be included in the taxable income of the payor spouse. *See Clarification: Changes to Deduction for Certain Alimony Payments Effective in 2019*, INTERNAL REVENUE SERV., https://www.irs.gov/forms-pubs/clarification-changes-to-deduction-for-certain-alimony-payments-effective-in-2019 (Feb. 8, 2022). However, as it has spurred this entire Note, this Author does not believe that "what spousal support used to be" is entirely clear.

income, and adjust expectations created by pre-2018 awards by 21% to 33% to account for changes in deductibility post-Tax Cuts and Jobs Act.[63]

The combination of a loose framework that allows wide judicial discretion and a diverse bench of judges hampers predictability for practitioners advising their clients. For example, approaches vary from judge to judge; as noted above, Judge Eve Miller may evaluate *need* first and then move on to available income, or Judge Van Rysselberghe may first establish a *range of reasonableness* by assessing incomes at hand and comparative cases.[64] These starting points may lead to very different outcomes, particularly in high-income cases. Further, most practitioners in most cases are not given advanced notice on *which* judge will be hearing their case. Trial setting and assignment are handled differently in each county. In Multnomah County, attorneys appear at trial assignment the day before the trial to learn whether their matter will be heard and before which judge (unless the case is specially set);[65] in Clackamas County, you are given a court date and report to the court in the days leading up to trial how much time will be needed, and it is then determined whether a judge is available.[66] Thus, even an advanced practitioner who has sussed out any given judge's approach is not likely to be able to give their client meaningfully accurate expectations far in advance of trial.

Oregon is not alone with its unpredictable and varied-factor framework, and the problems with such a framework have been extensively observed and acknowledged elsewhere as well.[67] Many scholars see problems in this broad exercise

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[63] Multnomah Bar Ass'n, *supra* note 13, at 01:35:25.

[64] *See* Multnomah Bar Ass'n, *supra* note 10, at 33:43, 49:21, 01:50:00.

[65] *See* Multnomah Circuit Court Supplementary Local Rule 8.014(2) (2021) (requiring an attorney to file a motion more than fourteen days in advance of trial assignment if they believe that the matter will more than six hours of court time, so that the case may be assigned to an individual judge).

[66] *See Going to Court: Information About Going to Court in Clackamas County Circuit Court*, OR. JUD. DEP'T, https://www.courts.oregon.gov/courts/clackamas/go/Pages/calendars.aspx (last visited Dec. 31, 2022).

[67] *See* Collins, *supra* note 61, at 32–34 (footnotes omitted). As of his writing in 2001:

> One factor—the length of the marriage—does enjoy virtually unanimous endorsement. Thirty-nine of the forty states that list criteria (97.5%) cite the duration of the marriage as a factor to be considered in awarding alimony. Eleven other criteria are endorsed by a majority of the states. Thirty-eight states (95%) assess the parties' physical health or disabilities; twenty-eight of the listing states (70%) also consider the mental or emotional state of the recipient or of both parties. Thirty-seven states (92.5%) look to the age of either the party receiving support or both persons. Over four-fifths of the states (87.5%) make reference to the standard of living established during the marriage or the parties' economic status. Twenty-nine states (72.5%) cite the needs of the recipient with the needs or ability to pay of the party providing support examined by thirty-two states (80%). The property distributed as a result of the divorce is considered in a majority of states (70%), as is the earning (or income) potential of the parties (65%). Their financial resources and means are recited by nearly three-quarters of the states (72.5%). A high proportion of states (62.5%)

of discretion and its practical impacts on cases. In his 2001 nationwide review of factors being applied in states, Robert Collins notes that more than 60 factors were being applied across the nation and in various levels of ubiquity.[68] In her nationwide review of then-existing spousal support frameworks in 2004, Twila Larkin notes:

> While statutes enumerate specific factors for consideration in determining alimony, the statutes are uniformly silent as to the manner in which these factors should be utilized in calculating an award. Not a single jurisdiction ranks the relative significance or weight of any statutory factor. No statute explains how a judge should apply the listed criteria.[69]

Marshal Willick, who authored an extensive piece on existing frameworks and formulas in addition to proposing his own methodology in 2014, notes:

> [M]any other commentators have made the same criticisms toward [the factors] as the Nevada practitioners have regarding ours: that the factors are inconsistent, overlapping, and lack any prioritization among them, so that "[both] the trial and appellate courts look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion."[70]

III. THE FORMULA MOVEMENT AND SUCCESSFUL IMPLEMENTATION

While formulas have not been adopted nationwide, guidelines governing final alimony or spousal support awards have been implemented successfully statewide in at least three states.[71] However, "success" in this context is obviously in the eyes of the beholder; as Willick discusses extensively, the goals for practitioners and academics in their pursuit of formulas or guidelines are typically consistency, predictability, and adequacy, but practitioners and academics are not the only boots on the ground pushing for reform.[72] The space is shared by men's rights groups and

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> consider the time needed for rehabilitative education, and many (72.5%) take into account the presence of a child in the home whose care precludes or limits employment as a significant factor.

Id. at 33–34.

[68] *Id.* at 33.

[69] Larkin, *supra* note 8, at 38 (citing Collins, *supra* note 61, at 32).

[70] Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MATRIM. LAWS. 153, 171 (2014) (alteration in original) (quoting Collins, *supra* note 61, at 32–33).

[71] *Id.* at 160, 193. More formulas exist on a county-by-county basis or for application only on only a *pendente lite* basis. *See* Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAWS. 61, 73–77 (2008); Larkin, *supra* note 8, at 39–40.

[72] *See* Willick, *supra* note 70, at 177, 203.

others seeking to eliminate or cripple alimony, rather than improve its consistency or illuminate trial courts' examination of the equities of the parties before them.[73]

Willick has divided proposed frameworks for alimony reform into what he calls "two-dimensional" formulas, which are simple calculations that lead to a presumptive spousal support award or a limitation on support.[74] This contrasts with the "three-dimensional" framework that is provided by the ALI *Principles of the Law of Family Dissolution*, which is not a calculator itself but rather an "integrated series of analytical steps to be given the weight of presumptions."[75] This allows a more customizable application than a strict formula. Willick further proposes his own "four-dimensional" methodology, which he proposes as a series of questions that guide the decision as to whether and in what amount spousal support would be appropriate, in the hopes that a consistent methodology at least leads to consistent results.[76]

A. The AAML Formula

The American Academy of Matrimonial Lawyers (AAML) exists to "provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law."[77] In 2007, after a review of ALI's *Principles of the Law of*

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[73] *Id.* at 160, 193.

[74] *Id.* at 199–200. Willick does not hold back in his criticism of such simple calculators, asserting:

> Simple guidelines are just too blunt an instrument. A mathematical projection of the sort set out in the Tonopah Formula, the New Mexico formula, or the AAML Commission's formula, quickly propose an amount of alimony and a duration for payment of the sum calculated, without the resulting amount or length being tied in any meaningful way to the reason for any such amount.

Id. This Author respectfully disagrees, to the extent that any two-dimensional formula allowing for support to be determined based proportion of income within the historic "range of reasonableness" could be determined, that guideline would be better than nothing. We should not let the perfect be the enemy of the attainable good.

[75] *Id.* at 200; *see also* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.04(2) (AM. L. INST. 2002) ("Entitlement to an award under this section should be determined by a rule of statewide application under which a presumption of entitlement arises in marriages of specified duration and spousal-income disparity.").

[76] Willick, *supra* note 70, at 201–28.

[77] *Mission*, AM. ACAD. MATRIM. LAWS., https://aaml.org/mission/ (last visited Dec. 31, 2022). The AAML holds strict admissions criteria, including bar admission for at least ten years and a focus of practice (at least 75%) for at least the five years immediately preceding application. *Qualifications to Become an AAML Fellow*, AM. ACAD. MATRIM. LAWS., https://aaml.org/page/membership_criteria (last visited Dec. 31, 2022). It also requires that its applicants "demonstrate substantial involvement in the area of matrimonial and family law and have endeavored to encourage the study, improve the practice and elevate the standards of matrimonial and family law . . . ." *Id.* At the time of this writing, only 18 practitioners in Oregon are members. *See Find*

Family Dissolution, the AAML declined to recommend the ALI's proposed compensatory payment structure, noting that the ALI's premise that spousal support should be based exclusively on compensation for losses that occurred as a result to the marriage and rejecting that premise.[78] The Commission chose instead to develop its own formula. Noting that their purpose was to provide a simplified formula that could be used as a starting point in negotiations, the Commission observed that "[t]he common denominators in all the guidelines reviewed were income of the spouses and duration of the marriage. These two factors, therefore, became the focus of the AAML Considerations."[79]

So long as the payee's gross income does not exceed 40% of the combined gross income of the parties, the amount of support under the AAML Considerations is the result of "30% of the payor's gross income minus 20% of the payee's gross income."[80]

Spousal Support Award = [30% of Payor's Gross Income] – [20% of Payee's Gross Income]

The duration of support under the AAML Recommendation is calculated by multiplying the length of the marriage by the following factors:[81]

Length of Marriage	Award Duration Factor
0–3 years	0.3
3–10 years	0.5
10–20 years	0.75
>20 years	Permanent

Duration of Spousal Support Award = [Length of Marriage] x *[Award Duration Factor]*

These recommendations are intended to provide a default number to use if a number of deviation factors are not present, including but not limited to the same vague factors that create uncertainty and unpredictability under current frameworks: "A spouse is the primary caretaker of a dependent minor or a disabled adult child; . . . [a] spouse's age or health; . . . [a] spouse has given up a career, a career opportunity[,] or otherwise supported the career of the other spouse;

a Lawyer, AM. ACAD. MATRIM. LAWS., https://aaml.org/page/findalawyer (last visited Dec. 31, 2022).

[78] Kisthardt, *supra* note 71, at 61–62.

[79] *Id.* at 78 (footnote omitted).

[80] *Id.* at 80.

[81] *Id.*

[and] . . . [o]ther circumstances that make application of these considerations inequitable . . . ."[82]

While the AAML notes that their formula was "tested" by using a common hypothetical to compare the results of the AAML formula to seven other guidelines currently in use or proposed, the author of the AAML report its success by indicating that the results were "well within the norm."[83] While this may be true, the report provides no process rationale as to how the numbers were generated, giving the overall impression from reading the report that the values were plucked from the air.

B. The Massachusetts Guidelines: An Alimony Limitation

Under their Alimony Reform Act in 2011, the state of Massachusetts enacted comprehensive guidelines meant to standardize spousal support awards away from the loose framework that that state had exercised under previously.[84] Under its 1974 statute, Massachusetts law provided that "[u]pon a divorce or upon petition at any time after a divorce, the court may order either of the parties to pay alimony to the other."[85] This was tied together with a list of factors that the court must consider,[86] with no further standards to guide application, not unlike Oregon's original spousal support statutes. This vagueness, while allowing broad judicial discretion, led to various interpretations and applications across the board, which generated motivation on the part of practitioner bar groups and other interested parties in reform.[87] In 2011, the Alimony Reform Act created four types of support, which bears a structural resemblance to Oregon's three categories today: "general term alimony" which is intended to support a recipient spouse who is economically dependent, resembling Oregon's maintenance support;[88] "rehabilitative alimony" which is support paid to a spouse who is expected to become economically self-sufficient by a predicted time, akin to Oregon's transitional support;[89]

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[82] *Id.* at 81. The "caretaker" deviation factor alone greatly reduces the utility of the recommendation, given the large proportion of cases that include minor children in the family court system.

[83] *Id.* at 78.

[84] *See* An Act Reforming Alimony in the Commonwealth, ch. 124, 2011 Mass. Acts 574 (codified as amended at MASS. GEN. LAWS ch. 208, §§ 34, 48–55 (2011)).

[85] An Act Further Regulating the Payment of Alimony and the Assignment of Property in Libels for Divorce, ch. 565, § 34, 1974 Mass. Acts 544; *see also* Charles P. Kindregan Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK UNIV. L. REV. 13, 22 (2013).

[86] § 34, 1974 Mass. Acts 544.

[87] *Id.*; *see also* Kindregan Jr., *supra* note 85, at 24.

[88] *Compare* MASS. GEN. LAWS ANN. ch. 208, §§ 48, 49 (2022), *with* OR. REV. STAT. § 107.105(1)(d)(C) (2021).

[89] *Compare* ch. 208, §§ 48, 50 (Mass.), *with* § 107.105(1)(d)(A) (Or.).

"reimbursement alimony" which is payment to a spouse to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, not unlike Oregon's compensatory support;[90] and "transitional alimony" which is intended to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce (which Oregon does not have a direct corollary for, although support for this purpose could be awarded as maintenance support in Oregon).[91]

The Massachusetts Alimony Reform Act (2011) does not strictly produce a single result; instead, it provides an upper limit on not only the duration of support, but also the amount of support to be awarded.[92] For example, chapter 208, section 53(b) of the Massachusetts Code reads that, except for reimbursement alimony, "the amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued."[93]

With regards to duration, the code requires that, unless the interests of justice require that the court deviate otherwise, general term alimony shall not continue for a period of more than:[94]

Length of Marriage	Duration of General Term Alimony
0–5 years	50% x number of months in marriage
5–10 years	60% x number of months in marriage
10–15 years	70% x number of months in marriage
15–20 years	80% x number of months in marriage
>20 years	Court may order indefinite alimony

The court has the ability to deviate from the duration and amount limits for the general term amount and duration limits in cases that include a number of qualitative factors, including advanced age or chronic illness of either party; significant premarital cohabitation or marital separation of significant duration, which might be considered in determining the length of the marriage; a party's overall deficiency of property or employment opportunity; and "upon written findings, any other factor that the court deems relevant and material."[95] Thus, the court continues to have the ability to exercise discretion in cases that deviate or include unique issues, while practitioners are given a framework that can guide their advice to their clients in fostering expectations.

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[90] *Compare* ch. 208, §§ 48, 51 (Mass.), *with* § 107.105(1)(d)(B) (Or.).

[91] *Compare* ch. 208, §§ 48, 52 (Mass.), *with* § 107.105(1)(d)(C) (Or.).

[92] Ch. 208, §§ 48, 49(b), 53 (Mass.).

[93] *Id.* § 53(b).

[94] *Id.* § 49(b)–(c).

[95] *Id.* § 53(e).

Overall, while the formula provides an upper limit for beginning negotiations, it is not so much a *calculator* as a *cap.* It does not establish a presumed minimum entitlement, which could serve the purpose of creating settlement expectations.

C. The Illinois Guidelines

In Illinois, the court first finds, as a matter of threshold, whether maintenance support is appropriate by considering a list of factors that closely resembles factors seen in Oregon and in other territories.[96] If a court finds that maintenance *is* appropriate, then the court is given guidelines by which to calculate support.[97] In cases where the combined gross annual income of the parties is less than $500,000, and the payor has no child support obligation from a prior relationship, then the support amount is calculated as follows, so long as the calculated amount does not exceed 40% of the combined net income of the parties: [98]

> *Guideline Support = [33.3% of Payor's Net Income] – [25% of Payee's Net Income]*

The duration of the support in Illinois is calculated based on the length of the marriage:[99]

Length of Marriage	Duration of Support
0–5 years	0.20 x the duration of the marriage
5–6 years	0.24 x the duration of the marriage
6–7 years	0.28 x the duration of the marriage
7–8 years	0.32 x the duration of the marriage
8–9 years	0.36 x the duration of the marriage
9–10 years	0.40 x the duration of the marriage
10–11 years	0.44 x the duration of the marriage
11–12 years	0.48 x the duration of the marriage
The durational factor increases for each year of marriage until . . .	
>20 years	Court may award support equal to the duration of the marriage or indefinite

[96] 750 ILL. COMP. STAT. 5/504(a) (2021); *cf.* OR. REV. STAT. § 107.105(1)(d)(C) (listing factors for Oregon courts to consider in awarding spousal maintenance).

[97] 750 ILL. COMP. STAT. 5/504(b–1).

[98] *Id.* 5/504(b–1)(1)(A).

[99] *Id.* 5/504(b–1)(1)(B).

This formula closely resembles the AAML formula, although its gradation on duration is more specific to each year of marriage obtained. As with other statutes, triers-of-fact can choose not to award maintenance in accordance with the guidelines, instead awarding a deviated amount with specific findings of fact relating to its reasoning for the deviation.[100]

D. The Pennsylvania Guideline

Title 23, Chapter 41, Section 4322 of the Pennsylvania Consolidated Statutes establishes that "[c]hild and spousal support shall be awarded pursuant to a [s]tatewide guideline as established by general rule by the [Pennsylvania] Supreme Court."[101] The statute further requires that "the guideline shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors . . . ."[102] The statute also requires the court to review the guideline at least every four years, and its most recent revisions came into effect on January 1, 2022.[103]

At its base, the Pennsylvania guideline (as in effect in 2022) uses two slightly modified formulas, depending on whether children are present or not.[104] A payor's base income obligation is calculated by subtracting from the payor's net income, the payee's net income, and child support obligations, if applicable.

Payor's Base Obligation With Children	Payor's Base Obligation Without Children
Payor's Net Income	
Payee's Net Income	Payor's Net Income
– Payor's Child Support Obligation	– Payee's Net Income
Payor's Base Obligation	Payor's Base Obligation

The monthly spousal support obligation is then calculated by multiplying the payor's base obligation by a statutory deviation factor, and adjusting for additional

[100] *Id.* 5/504(b–2)(2).

[101] 23 PA. CONS. STAT. § 4322(a) (2022). For a discussion on the 2022 changes to Pennsylvania's support guidelines, see Michael E. Bertin, *New 2022 Pennsylvania Child and Spousal Support Guidelines*, LEGAL INTELLIGENCER (Feb. 7, 2022, 11:20 AM), https://www.law.com/thelegalintelligencer/2022/02/07/new-2022-pennsylvania-child-and-spousal-support-guidelines/.

[102] *See* § 4322(a).

[103] *Id.*

[104] 231 PA. CODE § 1910.16-4 (2022).

expenses, if applicable. An overly simplified view of the formula can be understood as follows:[105]

Monthly Spousal Support With Children	Monthly Spousal Support Without Children
30% Payor's Base Obligation	40% Payor's Base Obligation, adjusted for additional expenses

The rules include a structure and parameters by which to calculate each party's net income, which takes all income from an inclusive list of sources and then deducts a defined list of deductions, which include income taxes, FICA payments, and nonvoluntary retirement payments, mandatory union dues, and alimony paid to the other party or third parties.[106]

The formula creates a rebuttable presumption that the guideline-calculated support obligation is the correct support obligation while allowing deviation so long as the reason for the deviation, and findings in support of it, are specified on the record or in writing.[107] A list of factors that can be considered in determining whether to deviate from the child or spousal support guidelines is included in the rule.[108] In fact, the statute seems to *require* considering deviation if factors apply. Specifically, the Pennsylvania Divorce Code reads that the "trier-of-fact *shall* consider the child's and parties' special needs and obligations, and apply the . . . deviation factors, as appropriate."[109]

Generally, the rules seem robust and well-structured to meet several of the goals associated with the calculation of spousal support. First, it creates a *de facto* fixed starting point for negotiation, which narrows the range of "dispute" and thus reduces the perceived and actual risks and/or rewards of litigation compared to the transaction costs of litigation; secondly, it creates an inherent priority that does not otherwise "loose factor" frameworks. Here, the amount is *first* calculated using the disparity in the parties' income, and *then* other factors are applied or considered. This framework seems well-tailored to reducing litigation and increasing consistency.

[105] *Id.*; *see also id.* § 1910.16-6 for the Pennsylvania rule regarding basic adjustments and additional expenses allocation.

[106] *Id.* § 1910.16-2(c).

[107] *Id.* § 1910.16-5(a).

[108] *Id.* § 1910.16-5(b).

[109] *Id.* § 1910.16-1(d)(2) (emphasis added).

E. The Tonopah Formula in Nevada

In one of the most ambitious state-level attempts to create a calculator to date, the Family Law Section of the Nevada State Bar put together a working group with the goal of establishing a completely objective formula as a starting point and "reality check" for Nevada divorce courts and lawyers.[110] This was done by analyzing all of the decisions—working every factor recited by the court in determining a sum of alimony into a mathematical model that produced results essentially consistent with all then-existing Nevada case law.[111] The formula was designed to address marriages of seven years or longer, considered medium and longer-term marriages.[112]

The model was presented at the Family Law Section annual meeting in Tonopah, Nevada, in 1997.[113] However, the Section elected *not* to recommend the adoption of the so-called Tonopah formula to the Nevada Legislature at that time.[114] Willick, who was involved in the effort, cites that the concerns were due to the lack of familiarity with the Tonopah formula by the bar and bench and apprehension as to how it would work across a multitude of real-life cases.[115] Instead, it was decided that the Section would request that district courts try to implement the formula alongside their own determinations so that comparative data could be compiled about the results. According to Willick, in 2014, the follow-up was never done, so the formula was never formally adopted.[116]

IV. POSSIBLE PATHS FORWARD FOR OREGON

The solutions available in Oregon exist on a continuum from a retrospective analysis of existing caselaw to develop a tool that generates historically consistent results, all the way to a major shift in Oregon law with the legislative implementation of a rebuttable formula (akin to current child support calculators).

A. The "Van Rysselberghe" Method: Comparative Combined Income

In the very well-attended and successful continuing legal education course offered by the Multnomah Bar Association in 2020 and re-offered subsequently in 2021 titled *Spousal Support Awards: Post-Tax Cuts and Jobs Act and Other Thorny Issues*, Judge Todd Van Rysselberghe, as part of a multi-judge panel presenting in the training, presented a framework that he found helpful in determining a "range-

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110 Willick, *supra* note 70, at 174.

111 *Id.*

112 *Id.* at 175.

113 *Id.* at 176.

114 *Id.*

115 *Id.*

116 *Id.*

of-reasonableness" based on past similar appellate cases.[117] His approach, which he originally developed as a practice tool, utilizes an extensive database to compare the most relevant factors of any present case to 286 compiled cases from the Oregon Court of Appeals and Oregon Supreme Court.[118] Most typically, he utilizes the combined income of both parties in an instant or hypothetical case and compares that combined income with historic cases that dealt with similar combined incomes, and then analyzes the proportionate share of income given in those cases compared to the instant case to generate a range of expected support outcomes. While Judge Van Rysselberghe himself extensively highlights that no formula is approved in Oregon and that rules of thumb are "handy but not helpful" in that they are not admissible and do not provide reliable answers in a qualitative, multi-factor framework, his proposed framework offers at least one tool for practitioners' toolboxes.

Judge Van Rysselberghe likens his method to treating spousal support cases like homes on a real property appraisal report. An appraiser using a sales comparison approach might look to primary factors of a "subject" property, such as location, detached/attached, or zoning. An appraiser will then identify comparable properties ("comps") that have sold recently in close geographic proximity that ideally have similar features, such as age, condition, or number of bedrooms. Finally, an appraiser will make adjustments to the value of the comps based on the appraiser's assessment of the value of the differing features.[119] For example, when comparing a subject property that does not have a garage to a property that is similar in many key ways but *does* have a garage, the appraiser may draw the conclusion that the subject property is worth: [the sold price of the comp] *minus* [the perceived value of a garage] *equals* [the market value of the subject property]. An appraiser may evaluate, adjust, and average a number of comps to develop a well-rounded opinion of value.

In Judge Van Rysselberghe's method, he first combines the party's income to determine the overall "size of the pie" that the parties are working with. Then, using this as the primary factor to find "comps," he identifies cases (drawing on his database of 286 appellate cases that evaluated an award of spousal support) that have ranges of similar combined incomes. For example, if the subject case included a spouse making $6,000 per month, and a spouse making $2,000 per month, then

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[117] Multnomah Bar Ass'n, *supra* note 10, at 49:20; *see* Multnomah Bar Ass'n, *supra* note 13.

[118] Based on an interview that Judge Van Rysselberghe generously granted this Author, he reports that he developed his database himself, by pulling a few cases at a time and compiling them into a spreadsheet that he developed for that purpose. The tool is quite impressive, and nothing like it is available to the public. Interview with Hon. Van Rysselberghe, Judge, Clackamas Cnty. (2022), in Oregon City, Or.

[119] *See* A GUIDE TO UNDERSTANDING A RESIDENTIAL APPRAISAL, APPRAISAL FOUND. 4 (2013), https://cdn.nar.realtor/sites/default/files/migration_files/A-Guide-to-Understanding-Residential-Appraisal-03-28-13.pdf.

the parties' combined income would be $8,000 per month. In his framework, he would identify other cases that had a combined income of around $8,000 per month and then compare what the final result was in those cases after spousal support was awarded. For example, if the payee in a comparable case ended up with a total income of $3,000 (out of the parties' combined income of $8,000), which was made up of $1,500 of their own income and $1,500 spousal support, then that could be compared to the subject case where the presumed payee made $2,000 a month and might be awarded $1,000 to result in the same $3,000.

A notable benefit of Judge Van Rysselberghe's method is that it resembles the approach lawyers are trained to do already: find relevant caselaw, compare similar fact sets, and analogize and distinguish as appropriate. However, by including *all* cases since the beginning of the 1971 statute establishing support, the court is reviewing 50 years of "noise" that itself reflects substantial internal inconsistency. Further, while identifying comparable cases should help an attorney develop a range of reasonableness or inform the judge they stand before, it will not overcome a particular judge's inclinations or prejudices relating to spousal support, and any given judge is free to ignore comparable cases so long as they make findings to support "reasonableness." Thus, inconsistency remains rampant.

B. A Retrospective Tool: Generation of a Formula or Tool Based on Existing Case Law

Perhaps the most comprehensive approach would be to create a tool that mathematically analyzes the relevant appellate and Oregon Supreme Court cases (akin to the 286 spousal support cases identified by Van Rysselberghe) as a slightly more formalized version of the Van Rysselberghe's method.[120] This approach would be in line with what was attempted in Tonopah, the most historically consistent solution.[121] It could be accomplished by using Oregon spousal support cases to identify statistical standard distributions for support based on identified factors. First, cases should be sorted by purpose (transitional, maintenance, and compensatory; for cases prior to the delineation of types of support, this may be an

[120] Practitioner Julie Gentilli Armburst created just such a "proprietary formula" by creating a database of *all* spousal support cases in a given county during a given period and generating an algorithm to advise practitioners on appropriate support amounts. However, because she utilized *all* cases, and not just those produced by the Court of Appeals or the Oregon Supreme Court, she would have captured primarily cases that would have no precedential value and had not been reviewed by a higher court. Further, her system was subscription based, and intended only to help practitioners who paid a fee to access her data and formula. *See* Suzanne Stevens, *An Oregon Data Solution for Less Painful Divorces*, PORTLAND BUS. J., https://www.bizjournals.com/portland/news/2017/07/26/an-oregon-data-solution-for-less-painful-divorces.html (July 31, 2017, 4:10 PM). Eventually, the project proved unsustainable. *See* Bob Ambrogi, *Another Legal Tech Startup Is Shutting Down,* LAWSITES (May 17, 2019), https://www.lawnext.com/2019/05/another-legal-tech-startup-is-shutting-down.html.

[121] *See supra* Part III.E.

art and not a science; it may also be a matter of judgment to include or exclude cases that do not involve enough findings to be useful) and then differentiating factors that fall outside of qualitative norms. For example, a norm may be that "the parties are in good health"; therefore, cases in which one party has poor health should be identified and keyed as such. This analysis would require both a legal judgment and likely a development of software or advanced excel to perform the analysis. However, the result may be something akin to Tonopah, which could be proposed to practitioners and legislators and/or used by practitioners as an informal tool (albeit one that hopefully generates persuasive statistical ranges that could be utilized in court and therefore be a reliable negotiation tool).[122]

C. Legislative-Lite: Improvements to the Existing Framework Without Formulas

Several steps could be taken to provide clarity and structural improvement in the existing framework by evaluating existing theories and models, and guiding their application in a more uniform way. For example, section 107.105 of the Oregon Revised Statutes is currently silent on the priority of awarding each type of support.[123] In order to improve clarity, the priorities should be enunciated, allowing spousal support to be awarded according to clearer policy purposes. In evaluating policy drivers behind spousal support, Robert Collins notes that while no clear statutory priority can be extracted from the wide number and prevalence of factors at play nationally, two general approaches can be delineated:

> Under the first approach, there is an attempt to gauge a recipient's financial needs, now and in the future, regardless of what direct or indirect contributions (or lack thereof) the recipient may have made to the marital enterprise. Under the second approach, there is an attempt to reward the recipient's past economic and personal contributions to the marriage—the investments of time, money, or effort in the relationship itself, or in its financial health.
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> . . . .
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> Unfortunately, the legislative solution to the shortcomings of both the needs and investment models appears to be simply to employ both simultaneously. Of the forty states that list criteria, all but three jurisdictions cite factors that are relevant to *both* approaches. Such an all-inclusive approach destroys the chances for the predictability that fosters settlement in non-exceptional cases,

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[122] Although this proposed tool is the preferred solution to the issue presented in this Note, a thorough discussion and explanation of the data science required to create the tool in the context proposed here is beyond the scope of this analysis.

[123] *See generally* OR. REV. STAT. § 107.105 (2021).

> and leaves jurists, attorneys, and litigants without guidance as to the proper standard to apply.[124]

These models—the *needs* model and the *investment* model—can both be seen at play in the existing Oregon framework. As noted by Judge Miller, *need* is where many judges begin their analysis of what is appropriate, at least as it relates to transitional and maintenance support.[125] Compensatory support, on the other hand, can be reflective of an *investment* model, which seeks to reward a party for their contributions to the marriage, whether that be the sacrifice of their career in order to provide noneconomic contributions to the family or direct support of a spouse's career in a way that contributed to that party's increased income that they expect to earn after the marriage.[126]

By reframing spousal support on these basic models and by moving away from general factors and towards frameworks more narrowly tailored to those specific purposes of spousal support, Oregon's spousal support framework could become more consistent and less unpredictable, to the benefit of families and the court system at large. For example, the existing statute could be reformed to highlight the following priorities.

Courts should first evaluate transitional support and prioritize it above other awards. If a spouse who earns less than 65% of the high-earning spouse's income has the opportunity to improve their earning capacity by completing training or education, the statute should create a presumption that the court *shall* award support to allow that party to obtain the training or education, as determined by the party's need and the available income. This serves the purpose of incentivizing self-support, as enunciated as a primary goal of spousal support in *Grove*, and as a form of social insurance, whereby a dependency relationship between spouses is mitigated by support of training.[127]

The court should then, before evaluating need, assess whether compensatory support is appropriate. Scenarios entitling a partner to compensatory support should be more clearly framed to include a wider range of common situations where a

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[124] Collins, *supra* note 61, at 36, 38–39 (footnote omitted).

[125] Multnomah Bar Ass'n, *supra* note 13, at 38:18.

[126] *See, e.g.*, *In re* Marriage of Austin, 82 P.3d 170, 176 (Or. App. 2003) ("The focus of [section] 107.105(2)(d)(B) [of the Oregon Revised Statutes] is more broadly directed toward assessing whether one spouse is entitled to compensation for certain contributions made to the other, a focus that is indicated by the legislature's choice of name for this type of support: compensatory.") (citing *Compensate*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "compensate" as "[t]o pay (another) for services rendered [or] make amendatory payment to; to recompense . . . .")).

[127] *See In re* Marriage of Grove, 571 P.2d 477, 485 (Or. 1977) (discussing eventual goal of support, as evidenced by related statutes, is to end the support-dependency relationship within a reasonable time if a partner's self-support at a reasonable level is possible without causing undue hardship).

spouse has made a financial or other contribution to the earning capacity of the other, for example, not only by way of enabling education, training, or vocational skills of the other party;[128] but also by contributing: labor, paid or unpaid, to a joint business, which the other will continue to benefit from following the dissolution; by generating or creating opportunity which the other will continue to benefit from following the dissolution; or by forgoing their own opportunities or career in order to benefit the marital estate, including in order to contribute noneconomic benefits such as childrearing. This serves the purpose of more clearly identifying cases where a lower-earning spouse may have an equitable interest in the future earnings of a spouse akin to an unjust enrichment claim.[129] Compensatory support should continue to be nonmodifiable except on "a showing of an involuntary, extraordinary and unanticipated change in circumstances that reduces the earning capacity of the paying spouse."[130] Compensatory support should be awarded in amounts up to 40% of the difference between the parties' income, for a presumptive duration of half of the marriage, in cases where a party's contribution was substantial or essential;[131] in cases where a contribution was perhaps smaller but tangible, the amount should be more closely tailored to the size of the contribution.

The court should then, lastly, once those claims are exhausted or awarded, consider whether a party has a further need for maintenance support beyond those awards. This award is considered a type of social insurance to prevent a party from being unable to meet their needs or, in cases of higher income, unable to continue

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[128] This is largely in line with the current compensatory support, although "significant" has been removed, as it seems to create an assumption on practitioners' parts that it is only appropriate in extreme cases.

[129] Willick, *supra* note 70, at 201–04, includes a very interesting discussion of assessing a party's future income in terms more akin to property interests. Oregon has historically held that income received by a spouse post-dissolution is subject to no entitlement on the part of the payee. *See* Feves v. Feves, 254 P.2d 694, 700 (Or. 1953) ("It is manifest that this statutory obligation for support and maintenance should not be so interpreted as to continue the rights of the former wife just as though no divorce had been granted. The statute does not contemplate a continuing right in her to share in future accumulations of wealth by her divorced husband, to which she contributes nothing."). However, compensatory support arguably exists in cases where the payee spouse *has indeed contributed something*, and it is only the nature and quantity of the contribution that requires analysis; yet, the holding in *Feves* has not been formally abrogated by the court. Willick proposes a framework for an analysis that distinguishes between which parts of a party's increased earning capacity are their own personal "natural talents" and which are the fruit of the marriage, and proposes a way to calculate future expected earnings.

[130] This is current law. *See* OR. REV. STAT. § 107.135(3)(a) (2021).

[131] Forty percent is the presumptive amount in Pennsylvania for cases with no children, and also the upper limit of the Illinois guideline. 231 PA. CODE § 1910.16-4 (2022); *see supra* Part III.C–D.

the standard of living that they enjoyed during the marriage.[132] A presumptive guideline for this amount should be 25% of the difference between the parties' incomes, *less* any compensatory support awarded.[133]

These modifications to the Oregon framework would provide clarity on purpose and allow practitioners to make a more straightforward analysis.

CONCLUSION

We are now more than ten years past the initial wave of "proposals" relating to spousal support, which has allowed a number of formulas to be implemented in other states. However, Oregon still utilizes a vague standard of "just and equitable" with a list of nonexclusive, unprioritized factors to determine spousal support, which carries with it unpredictability and inconsistency. Most states that had success in generating a formula did so via work groups of several practitioners.[134] In particular, this seems like a task ripe for advisory from the State Family Law Advisory Committee (SFLAC),[135] should the will in that organization exist. This Author would gladly volunteer. Many paths for reform exist in Oregon, should the will exist in the family law community to achieve those goals.

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[132] *See* Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 3–5, 11–15, 17 (2010) (discussing alimony as a type of social insurance). This is in line with current goals of maintenance support, as evidenced by factors including those set forth in section 107.105(1)(d)(C) of the Oregon Revised Statutes. *See* § 107.105(1)(d)(C)(iv), (viii) (citing "the standard of living established during the marriage" and "the financial needs and resources of each party").

[133] This mirrors the Lewis Rule. While some may argue that the Lewis Rule should be *less* than it used to be, since we live in a post-Tax Cuts and Jobs Act world, 25% is lower than all other state guidelines assessed here. *See supra* Part II. It is proposed here as social insurance in cases where *no demonstrable contribution to the marriage was made*.

[134] *See, e.g.*, Willick, *supra* note 70, at 174; Kisthardt, *supra* note 71, at 73–77; Larkin, *supra* note 8, at 29, 39–51.

[135] The SFLAC is a panel of 16 members appointed by the Chief Justice of the Oregon Supreme Court. It advises the State Court Administrator on family law issues in the courts and meets with committees and subcommittees to address and improve the family law court standard in Oregon. *State Family Law Advisory Committee (SFLAC)*, OR. JUD. DEP'T, https://www.courts.oregon.gov/programs/family/sflac (last visited Dec. 31, 2022).