

Understanding Spousal Support

What you need to know right now about spousal support -- in the United States and Canada.

By Nancy Kurn, CPA, CDFATM, JD, MBA



In North America, it's the judge's place to decide how the marital assets should be divided. By closely examining the assets of each spouse, the judge can determine if spousal support should be paid - and by whom. In some cases, the assets may generate sufficient income that either no spousal support is necessary or it can be reduced.

Each state has guidelines to calculate spousal support. However, they are generally just that - guidelines. Whether or not spousal support should be awarded is up to the discretion of the judge. The judge can also decide the amount of spousal support and the period of time that it should be paid. In Canada, there are no such guidelines: a judge decides whether or not spousal support should be paid, as well as the amount and duration.

An important point to note about judgments and settlement agreements: unless they specifically state that the spousal support is non-modifiable, they can be modified due to material changes in either spouse's circumstances. In Canada, the exception is that a separation agreement may be non-modifiable in spite of a material change in circumstances depending on the negotiations and what led up to the agreement - particularly if there's a waiver of spousal support in the agreement.

What factors does the judge consider?

Judges consider many different aspects to determine first whether spousal support should be awarded, and if so, the amount of support and how long it should be paid. They may look at the amount calculated under the state's guidelines. They will also look at need, ability to pay, length of marriage, standard of living, ages and health of both parties, number of minor children, educational level, and child support.

Let's take a look at some of these factors.

Need

The first question the judge will consider is, “Does the recipient have enough money to live on?” In both countries, the spouse who asks for support is required to seek economic self-sufficiency. The judge will look at the individual’s ability to earn income and the marital and separate assets of the spouse seeking support to determine if he or she can use these assets as a source of support.

For example: Bob earns \$200,000 per year. His wife Mary agreed not to work after college to stay at home and take care of their family. Mary has inherited \$2 million from her parents. It is unlikely that she will be awarded spousal support, because she has \$2 million and her share of the marital assets to use for her support.

In Canada, a lump sum can be awarded to compensate the spouse that sacrificed his or her career for the benefit of the family. Often, this lump sum will depend on the length of the marriage and other circumstances. “Courts tend to award periodic support over lump sums,” says Toronto-based family lawyer Judith Holzman. “The rule of thumb tends to be that there will not be a lump sum award in a longer marriage unless it would prove difficult to collect the support or for other special circumstances.”

The best approach to prove need is to prepare a detailed budget to establish the amount needed for spousal support.

Ability to pay

The judge will decide how much the payor can afford to pay and still have enough to live in his or her accustomed standard of living. To determine one spouse’s ability to pay, the judge will add back discretionary savings (such as contributions to retirement plans and automatic withholding to savings accounts, bonds, and employer stock purchase programs).

For example: Bob earns \$200,000 and invests \$50,400 in discretionary savings. He invests \$16,000 in his retirement plan, \$20,000 in his employer’s stock purchase program, \$2,400 in bonds, and \$12,000 in a money-market account. When the judge calculates Bob’s ability to pay spousal support, he/she will include the \$50,400, which Bob has withheld from his paycheck for discretionary savings, as income available to pay spousal support.

The payor spouse must act in good faith. If Bob were to quit his job, for example, so he would not have to pay spousal support, then the judge would generally consider the payor’s income-producing capacity. There is a Colorado case on record where the husband had a very high income and quit his job to grow mushrooms. The judge ruled that he could grow mushrooms, but that he would have to figure out a way to pay the spousal support that was awarded to his ex-wife.

“In Canada, if someone has a high-paying job,” says Holzman, “the court will consider ability to earn and order spousal support based on the high-paying job, unless the person could show that he had to quit his job for health or other good reasons.” In this case, the court would disregard any

discretionary savings, RRSP contributions, employer's stock purchase program, bonds, or money market account.

Length of marriage

The length of the marriage is also a consideration when the judge awards spousal support. If the marriage only lasted for two years, it is unlikely that the judge would award permanent spousal support to one spouse. The judge may not award spousal support at all, unless there are children or there is some other circumstance that would prevent the recipient from working. A judge considers all of the facts and circumstances.

For example: If a couple is married for 20 years, and the wife was 18 when they married and is now 38, then the judge will probably not award permanent spousal support. However, if the wife was 40 when they married and she is now 60, the judge may award permanent spousal support.

Standard of living

The judge will also consider the couple's standard of living during the marriage.

For example: If a couple is married for 25 years, and the husband earns an annual salary of \$600,000, it would be unreasonable for him to argue that his wife could live on \$40,000. However, if he earns \$50,000, it would be unreasonable for his wife to argue that she should get \$40,000 to cover her expenses.

Age and health of both spouses

Another consideration is the age and health of both spouses. Is either disabled or retired? If so, are they receiving a permanent income stream? If one spouse is 50 or older, and has never worked, he or she will have a difficult time finding employment. Spousal support will have to be awarded.

Duration of spousal support

Spousal support may be awarded for a specified time period, or it may continue until it is modified or terminated. Some judges have a rule of thumb that they will award spousal support for half the number of years of the marriage.

Spousal support generally ends upon the death of either spouse, or upon the remarriage of the recipient. Spousal support will continue until it is modified, unless the decree states that it is non-modifiable.

During the separation period, any payments to the other spouse are generally not considered spousal-support. However, if a temporary order was issued for spousal support, and the order does not state that payments will not be taxed as spousal support, then the spousal support payments are deductible by the payor and included in the income of the recipient. In Canada, temporary support is deductible by the payor and included in the recipient's income only if it's part of a court order or if a temporary agreement is in place.

“There is no rule of thumb in Canada that the award of spousal support is for only half the number of years of marriage,” explains Holzman. “While spousal support will end upon the death of either spouse if the surviving spouse was dependent on the other on the date of death, the survivor can claim dependency in Ontario and therefore claim against the estate as a dependent of the deceased, for whom the deceased ought to have made a provision in the will.”

In addition, Holzman says, “Spousal support does not end on marriage or cohabitation in Canada, but it is one circumstance that would be looked at on any application to vary support as a possible material change in circumstances. For instance, the obligation of a spouse after a 20-year marriage is very different from a new cohabitee who will not owe an obligation of support until the parties have lived together for three years or have had a child. Even a remarriage does not necessarily upset the obligation of support from the first spouse. All the circumstances of earning abilities of the new spouse, and the situation of the spouse being supported, will be taken into consideration.”

What is “No-Fault Divorce?” Can it affect spousal support?

“No-fault divorce” means that either party can file for divorce without the other spouse’s consent - and without establishing that the other spouse was at fault. Canada, as well as every state in the U.S., recognizes no-fault divorces. There are, however, some differences regarding the treatment of spousal support. In Canada, neither party can be denied spousal support because of his or her conduct. In the U.S., the conduct of either spouse can be considered when spousal support is awarded.

However, keep in mind that judges have a lot of discretion in awarding spousal support. They may or may not consider the fault or conduct of one spouse when they decide if spousal support should be awarded.

What about taxation?

As a general rule, spousal support is tax-deductible by the payor and taxable to the recipient. However, in Canada, if one spouse receives compensatory support or a lump sum for support, then it is neither deductible nor taxable. In the U.S., a lump sum may not be deductible or taxable if it is really a disguised property settlement. In addition, the recipient may be required to reduce their income and the payor may be required to report additional income if the spousal support is reduced by more than \$15,000 per year or eliminated within the first three years. (This does not apply to Canada, however.) You may also have to reclassify spousal support as child support if spousal support is reduced because of something relating to your children.

For example: Bob is ordered to pay Mary spousal support of \$5,000 per month and child support for Bob, Jr. of \$1,000 per month. If the spousal support drops to \$2,000 per month when Bob, Jr.

turns 18, then only \$2,000 per month would be considered spousal support. The rest would be deemed child support, which would not be tax deductible.

Summary: United States

- First division of assets, then judge decides spousal support;
- The amount and duration of spousal support is up to judge's discretion;
- Spousal support is generally modifiable;
- The judge looks at:
 - Need
 - Ability to pay
 - Length of marriage
 - Standard of living
 - Age and health of both spouses;
- No-fault divorce - fault can be considered for spousal support;
- Spousal support is taxable to recipient, deductible by the payor;
- Only state law governs spousal support;
- Same-sex partners have no right to spousal support;
- Common-law marriage is only recognized in nine states plus D.C. In those states, individuals are treated in the same manner as their "legally-married" counterparts.