Spousal Maintenance Practice Tips For Arizona Attorneys

I. Introduction

Our clients invariably ask how much spousal maintenance will I receive, and for how long? After a lengthy discussion of the factors set forth by A.R.S. §25-319, the final answer is of course: "It will be up to the Judge". Because the Court's discretion is so broad in spousal maintenance cases, it is important to present your spousal maintenance case or defense in an organized, prepared and cohesive manner.

The subject "practice tips" is just that. The purpose of this article is not to address the many published spousal maintenance cases or to provide an analysis of the statutory factors set forth by A.R.S. § 25-319. This will be left up to the co-presenters. Rather, the purpose is to set forth a few recommendations for the practitioner to consider when preparing and presenting the case and during the course of the negotiations.

II. General Practice Tips:

A. Have A Blueprint Of Your Case In Advance.

Whether representing the spouse requesting maintenance or the spouse defending a request for maintenance, it is important to establish a 'blueprint' of your case in advance. Many practitioners use the word "theme", however, a theme alone falls short of the goal. The practitioner must determine his or her method of presenting the case in advance, calculate what evidence must be presented in support of the claim or defense, and how such evidence can be most effectively presented. Although the Arizona Rules Of Family Law Procedure have relaxed the evidentiary rules in family law cases, opposing counsel may file a notice which requires the application of the Arizona Rules Of Evidence, or you may have a judge who continues to apply hearsay and other basic evidentiary rules.

Equally important is the fact that a practitioner's failure to establish a blueprint in advance may lead to last minute attempts to fill the gaps and the possible exclusion of witnesses and/or evidence under the disclosure rules. It is not rare that a party attempts to list a financial expert or requests a vocational evaluation just weeks before trial. Such last minute request generally identifies a practitioner who has not established a blueprint of his or her case in advance. Not only will the Court be unhappy, but you will send a clear picture to your client and the other side that you are behind the eight ball.

B. Determine Whether Experts May Assist Your Case.

As attorneys, very few of us are as qualified as Certified Public Accountants or Divorce Planners to submit financial conclusions to the Court. In the same regard, I

am not aware of any family law practitioners in Arizona that qualify as vocational experts.

Although experts cost money, it is often less expensive to retain an expert to submit essential information to the Court than the attorneys fees it will cost your client for you to analyze reams of financial documents and to draft charts, summaries and other documents. Moreover, it is much more likely that an expert's report will be admitted into evidence than an attorney's self-drafted summaries.

Many spousal maintenance cases are tried before the Court through testimony of the client, the parties' financial affidavits, and a few tax returns and pay stubs. Although such limited presentation may suffice in smaller cases, practitioners should determine early on whether expert testimony may assist the presentation of their case.

When representing the spouse seeking maintenance in longer term marriages it can be argued that the use of expert witnesses should be the rule rather than the exception. Although it may not be difficult to present the Court with the parties' existing financial circumstances, it is generally necessary to submit expert testimony if one is to present a forecast of the parties' future financial prognosis.

1. **Vocational Evaluations.**
   Before retaining an expert to conduct a vocational evaluation, the practitioner should consider what he or she anticipates the evaluation may accomplish. A practitioner who is defending a spousal maintenance claim is generally more likely to request a vocational evaluation than the practitioner who represents the client seeking an award. In cases where it is believed that a party is underemployed, a vocational evaluation is an excellent method to introduce evidence of what the party can and should be earning. The other option is to have your own client (whose self interests are obvious) attempt to testify regarding what he or she thinks the other party can do and what income he or she should be making. Even if such testimony is admitted, it is unlikely that your client's testimony will be provided much weight. If you are asking the Court to attribute income to the other party without a vocational evaluation expert or other alternative to provide objective evidence, you are asking that the Court speculate with regard to what the spouse seeking maintenance is able to earn.

   A party requesting an award of spousal maintenance may in certain circumstances desire to enlist a vocational evaluation expert. Such circumstances include situations where it is claimed that the spouse seeking maintenance can make substantially more income than what they are presently earning because he or she in fact made more income at some point in the past. The spouse may no longer be able to earn what he or she once earned as a result of changes in technology, market conditions, or just the fact that the

spouse was essentially very lucky when he or she earned such income and was in the right place at the right time. Although the spouse may testify on his or her own behalf regarding such changes in economic conditions or his or her industry, it is generally much more persuasive for an expert witness to present such facts to the Court.

2. Financial Experts.

In light of the factors set forth by A.R.S. § 25-319, it can be helpful and sometimes crucial for a financial expert to be involved. Certified Public Accountants and Divorce Planners can provide future financial forecasts regarding the parties' comparative financial resources which you will likely not be able to have your client testify to. Such experts can provide objective predictions of the expected returns on investments, the possibility of converting non-income producing property to income producing property, as well as parties' financial prognosis as they enter their retirement years. Such experts can also provide evidence of the parties' standard of living, and the amount and duration of spousal maintenance necessary for a party to meet his or her reasonable needs within a reasonable approximation of the standard of living enjoyed by the parties during marriage. Many elements are included in such analysis, including the cost of replacing benefits that a spouse may lose upon dissolution of marriage, (i.e. health care insurance, long term disability insurance, vision insurance, mental health care insurance, etc.).

In the same regard, the practitioner who is defending against an award of spousal maintenance may utilize an expert to assist the Court in determining whether the spouse requesting maintenance can already meet his or her existing reasonable needs, and thus whether a spouse is even eligible for spousal maintenance under the threshold factors set forth by A.R.S. § 25-319(A). A practitioner may successfully utilize an expert to persuade the Court that the factors of A.R.S. § 25-319(B) should not even be considered if eligibility cannot be established.

Another area which generally requires expert testimony regards claims for "reimbursement spousal maintenance". This may arise from a claim that a spouse sacrificed his or her own career opportunities, and involves an analysis of what the spouse could be earning had he/she continued with their career opportunities.

There are numerous areas that an expert can provide more convincing testimony than your own client, as well as areas that your client may not be qualified to testify, i.e. the tax implications of the spousal maintenance award, rates of return on investments, conversion of property to income producing property, etc.

The best advice is that the practitioner and his or her client at least consult with an experienced financial expert early in the case. Such expert should of course be a person who has previously submitted reports and testimony regarding spousal maintenance cases (as opposed to the client's CPA who prepares the client's tax returns but has little experience outside of his or her tax practice).

C. Lists Of Expenditures/ Budgets.

As the practitioner defending a spousal maintenance claim, one should seriously consider deposing the party seeking maintenance. Through such deposition process, you will want to not only identify the party's ongoing expenses, but clarify the expenses that are ordinary and reasonable. In appropriate cases, you will also want to inquire what efforts that the party is taking to maximize his or her income potential if any. Because of the limited time provided by the Courts for trials in family law cases, you will be much better prepared to present your defenses than you would be if you inquired as to such issues for the first time at trial.

As the practitioner presenting the spousal maintenance claim, you will want to emphasize the parties' standard of living, and focus upon the comparison of the parties' respective financial resources. As such, you will want to present the Court with not only your own client's expenses, but the other party's expenses and discretionary income.

Do not overlook replacement expenses. A substantial replacement costs may be health care insurance. Such is even more significant with older clients. While one party may be able to maintain health insurance through employment or retirement benefits, the other party may lose such benefits upon the dissolution of marriage. Admissible evidence must be submitted as to the replacement costs of such benefits. Such may include COBRA costs or a portability policy. A standard health insurance policy may not be adequate if a party has pre-existing conditions. Portability policies are generally very expensive (i.e. over $1,000.00 per month).

In long term marriages, it is certainly appropriate to argue that one should receive comparable coverage to that secured during the marriage by the employee spouse. The question that every practitioner should ask is how can this information be presented to the judge? You may receive a sustained hearsay objection if your client testifies that an insurance agent informed him or her what the cost will be, or attempts to submit a print-out obtained from an insurance agent. Again, it may be wise to retain a financial expert who can testify to such matters.

Additionally, do not overlook other benefits one spouse may receive after the dissolution proceedings that the other spouse is not entitled to, i.e. superior social security benefits, vision coverage, dental coverage, long term disability benefits,

vacation benefits, sick leave benefits and the like.

Finally, do not overlook the impact of community debts. Although the Court is generally required to divide the community debts equally, one of the parties may be in a superior position to absorb his or her share of the debts than the other. It is easy to limit ones focus in presenting a spousal maintenance case to income and general living expenses without calculating how long it will take the parties to each respectively satisfy their portions of the community debts.

D. Findings Of Fact And Conclusions Of Law.

In larger and more significant spousal maintenance cases, it is generally a good idea to request findings of fact and conclusions of law. Not only does such request require the Court to specify its findings as applied to A.R.S. § 25-319, the Court may be more reflective when rendering its decisions when subject to such requirements.

E. Presenting Your Case.

Although easier said than done, a good practitioner will make sure that the Court knows why the client is testifying to any specific matters at all times. Effective use of transitions during trial will assist in accomplishing this. It is often difficult to keep this in perspective when racing to make sure that all of the facts are submitted. The facts alone do not make a persuasive case. You have to make sure that the Court follows your blueprint.

F. Temporary Orders.

It is imperative that you discuss with your client early in the case whether to proceed with a request for temporary orders. A party defending against a spousal maintenance request may attempt to establish that the other party can meet his or her reasonable needs based upon the mere fact that they have in fact been able to pay their expenses during the pendency of the action. A request for temporary orders for spousal maintenance may set the stage for earlier and more serious settlement negotiations.

G. Alternate Dispute Resolution.

Unless the parties can settle the spousal maintenance claim early in the proceedings, Alternate Dispute Resolution should be requested. Not only does it provide an opportunity to settle the case before incurring further fees and costs, but such can present an excellent opportunity to obtain further information regarding the other party's claims or defenses. It is often during settlement conferences or Alternate Dispute Resolution that an attorney learns facts from the other party that his or her client did not provide. It is better to learn such facts early on than at or on the eve of trial.

A judge pro-tem has the status of an "authority figure" despite the fact that he or she

does not have power to issue decisions on the merits. It often takes a neutral person with such standing to convince the parties to compromise, or that the other party has a stronger position than previously given credit for.

H. Negotiations.

Do not make the spousal maintenance claim an all or nothing proposition. Often a party is unwilling or reluctant to provide a more generous offer of spousal maintenance based upon his or her own fear of unknown contingencies, i.e. What if I become disabled? What if I lose my job? Look to possible compromises that expressly address such contingencies.

Of course, do not overlook the significance a party places upon a non-modifiable award. If such term is important to the other party (regardless of what party you represent), such should be included as part of the overall negotiations.

The principles set forth herein for trial also apply to preparation for settlement negotiations. There are many occasions when cases settle only after you present the facts and grounds supporting your claims.

I. Settlement Agreements.

If you represent the payor spouse, you may consider placing the specific reasons for a spousal maintenance award in the settlement agreement if the award remains modifiable. Thus, you have established a base point to refer to in the event that the payee spouse requests a modification or extension of maintenance pursuant to allegations of substantial and continuing changed circumstances.

If an award is to be non-modifiable, you may also want to specifically refer to the recent decision in ***Waldren v. Waldren***, 476 Ariz.Adv.Rep. 7, 131 P.3d 1067 (App.Div.1 filed 4/24/06), and expressly state that the spousal maintenance award shall not only be non-modifiable as to amount and duration pursuant to A.R.S. §§ 25--317(G) and 25-319(C), but that such shall be non-modifiable regardless of any extraordinary circumstances, and that neither party shall be entitled to relief pursuant to Rule 60(c)(5), Arizona Rules Of Civil Procedure, or any other basis for relief from the non-modifiable nature of such award.

J. Pre-Trial Memoranda.

Advise the Court of the authorities that support your client's claims or defenses in advance.

As in many areas of the law, Arizona spousal maintenance cases vary widely. For every principle, there is a counter-principle. It is not the purpose of these "practice tips" to summarize the many Arizona cases. However, a good practice tip is that the practitioner should review the Arizona cases that support his or her client's position

and provide such citations to the Court in advance of trial. This will better allow the Court to understand your blueprint - especially when you are forced to race through the last half hour of your client's testimony because the time clock is winding down.

K. Spousal Maintenance And Attorneys Fees - The Triple Edged Sword.

In every case that a practitioner defends a spousal maintenance claim, he or she must remind the client of the "triple edged sword" - i.e. you may end up paying my fees, the other party's fees, as well as more spousal maintenance than you desire. The deeper into the case, the more significant the risk. Comparative financial resources is an independent factor to award fees under A.R.S. § 25-324 - even if your client took reasonable positions.

Learn More About Spousal Maintenance