



Kristin A. Gustafson, Esq.

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To: The Honorable Senator Carney  
The Honorable Representative Kuhn  
Members of the Committee On Judiciary

My name is Kristin A. Gustafson. I live in Windsor, Maine and have practiced law based in Kennebec County since 1987. Since 1992, my practice has focused exclusively on Family Law, primarily in the area of Divorce.

I am speaking today to express my strong opposition to LD 2142, An Act to Establish Guidance for Awarding General Spousal Support. This Act fundamentally alters how spousal support awards will be determined in divorce matters in a manner that is likely to yield inequitable results and result in increased litigation.

The existing spousal support statute, 19-A § 951-A, has existed since revised in the year 2000. There are five different types of spousal support: general, transitional, reimbursement, nominal and interim. The proposed legislation make significant changes to how general support is determined as follows:

- The legislation contains a definition of "spousal support income." Sec. 1. 19-A MRSA § 951-A sub-§1-A.
- The legislation redefines the purpose of general spousal support. Sec. 2. 19-A MRSA § 951-A sub-§2-A-1.
- The legislation creates a rebuttable presumption that general spousal support will be awarded in marriages over 10 years if one spouse's "spousal support income" is an amount equal to 75% or less than the other spouse's "spousal support income." Sec. 3. 19-A MRSA § 951-A sub-§2-A.
- The legislation creates a rebuttable presumption that general spousal support will be awarded in accordance with a formula. The calculation is the difference between the parties' "spousal support income" multiplied by a "durational factor." The "durational factor" is the number of years the parties were married multiplied by 0.015, to the extent the "durational factor" does not exceed 0.3. Sec. 4. 19-A MRSA § 951-A sub-§2-B.
- The legislation requires a court awarding spousal support to consider the presumptions for general support under subsection 2-A and the eighteen (18) factors set forth in subsection 5. Sec. 2. 19-A MRSA § 951-A sub-§2.
- The legislation provides the presumptions in subsections 2-A, 2-B and 2-C can be overcome by a finding the result would be inequitable or unjust. Sec. 6 19-A MRSA § 951-A sub-§2D.

P.O. Box 31, Windsor, ME 04363  
Phone: (207) 621-0693  
Email: [Kristin@GustafsonFamilyLaw.com](mailto:Kristin@GustafsonFamilyLaw.com)  
[www.GustafsonFamilyLaw.com](http://www.GustafsonFamilyLaw.com)

- The legislation permits a court to include a 2<sup>nd</sup> spousal support award if a final judgment includes both a spousal support and child support award, and the child support obligation will terminate within 3 years of the date of judgment. Sec. 7. 19-A MRSA § 951-A sub-§2E.

The definition of "spousal support income."

The definition of "spousal support income" requires the court to do the following calculation:

- Determine each spouse's gross income as defined in the child support statute.
- Subtract any amount of child support one spouse must pay in accordance with the child support guidelines from the obligor's gross income. This is the obligor's "spousal support income."
- Subtract the amount of child support the other spouse is presumed to directly pay in accordance with the child support guidelines from the obligee's gross income. This is the obligee's "spousal support income."

Preliminarily, the amount paid in child support subtracted from an obligor's gross income is paid in cash with after tax dollars and is tax free to the obligee. The obligor must also pay all taxes due on any spousal support paid to the obligee. (The long-standing tax deduction from income paid for spousal support was discontinued in 2017). Further, the amount subtracted from the obligee's gross income is what the obligee is presumed to spend directly for the benefit of the children. There is no requirement that this amount be actually spent on the children and no factual support for this deduction from the obligee's gross income. The calculation also fails to consider any money the obligor spends directly for the benefit of the children while in his or her care.

Additionally, gross income does not accurately reflect each's spouses available disposable income. Available income greatly varies depending how gross income is taxed.

- A W-2 employee pays ordinary income tax to the federal government depending on that person's tax bracket and that employee also pays payroll taxes for social security at the rate of 6.2% for wages up to \$176,100 and Medicare taxes of 1.45% (plus and additional .09% for wages over \$200,000).
- A self-employed person must pay both the employee share of social security and Medicare taxes and the employer's share of those taxes.
- State income tax varies according to what state the income is earned in. (Or in the case of NH, there is no income tax for wage earners).
- Long term Capital Gains are taxed at 0%, 15% or 20% depending on income; and short-term Capital Gains are taxed as ordinary income.
- Rental income is not subject to payroll taxes.
- Interest and dividends are not subject to payroll taxes.
- Income from partnerships and S-Corps that are not wages are not subject to payroll taxes.
- Social security benefits are taxed at different rates depending on total income.

This list only includes the most common taxes and is not a comprehensive list of all possible taxes that must be paid. There are people who pay taxes on money we don't even realize. And there are others make a whole lot of money, and pay little or no taxes.

## The Purpose of Spousal Support

The existing statute provides general spousal support "may be awarded to provide financial assistance to a spouse with substantially less income potential than the other spouse so that both spouses can maintain a reasonable standard of living after the divorce."

The proposed legislation references the "loss of living standard" by a spouse with less income or earning capacity, but further asserts spousal support "may be awarded to allocate equitably between spouses certain *financial losses* that either or both may incur at dissolution." (emphasis added). The use of this language may lead to litigation over financial losses that are unrelated to income or earning capacity.

Rebuttable presumption that general spousal support will be awarded in marriages over 10 years if one spouse's "spousal support income" is an amount equal to 75% or less of the other spouse's "spousal support income."

This provision will greatly increase the number of spousal support awards in a typical Maine divorce. If adopted, it will be presumed that spousal support paid if the following differences in "spousal support income" exist:

<u>Spouse 1</u>	<u>Spouse 2</u>
\$ 30,000	\$ 22,500
\$ 40,000	\$ 30,000
\$ 50,000	\$ 37,500
\$ 60,000	\$ 45,000
\$ 75,000	\$ 56,250
\$100,000	\$ 75,000
\$150,000	\$ 112,500
\$200,000	\$ 150,000

In my experience, these differences, which under the proposed legislation do not take into consideration the varying tax obligations of the obligor, coupled with the fact that both child support and spousal are tax free to the obligee, would very rarely generate a spousal support award under current law.

The rebuttable presumption that general spousal support will be calculated in accordance with a formula.

The legislation's proposed formula multiplies the difference in "spousal support income" by a durational factor. The durational factor is calculated by multiplying the years of marriage by .015, but only to the extent it does not exceed 0.3. Thus, the durational factor for a 10 year marriage is .15; for a 15 year marriage is .225 and for a 20 year marriage at .3 For all marriages over 20 years, the durational factor is capped at .3

The adoption of a formula for spousal support in general, and more specifically, a rebuttable presumption formula, is an aberration in divorce law in the United States. The use of a length of the marriage durational factor prioritizes marriage length over the 17 other factors a court currently must consider in awarding spousal support.

Further, in high income cases where a spouse has been a homemaker during a long marriage and has minimal earning capacity, this could result in a significantly lower spousal support award than is typical under the current statute. A spouse who has been out of the workforce during a long marriage is often imputed minimum wage. In Maine, minimum wage is \$15.10 an hour, which for a 40 hour week is \$31,408 a year. The longer the marriage, the less likely there are minor children. There is no rationale basis to cap the spousal support award at 30% of the difference in "spousal support income."

Finally, the inclusion of a length of the marriage durational factor creates a difficult choice for those in abusive marriages, since the longer the marriage, the greater the spousal support award.

The requirement that the court consider the presumed 75% difference in "spousal support income" and also consider the 18 spousal support factors.

This requirement is illogical. A presumption is defined as "something that is thought to be true because it is highly probable." "Presumption", *Black's Law Dictionary* 1435 (11th ed. 2019). "Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence." *Id.*

#### Overcoming presumptions

The presumption that general spousal support will be awarded in marriages over 10 years if one spouse's "spousal support income" is an amount equal to 75% or less of the other spouse's "spousal support income", and the presumption that any spousal award will be calculated in accordance with the formula set forth in the legislation are rebuttable, and can be overcome. This is akin to a deviation in child support. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." "Presumption", *Black's Law Dictionary* 1435 (11th ed. 2019). The standard for rebutting the presumption set forth in the legislation is if the presumption's application would be inequitable or unjust. This is a difficult standard to meet.

The proposed legislation retains the rebuttable presumption that general support may not be awarded if the marriage was less than 10 years. It also retains the presumption that if spousal support is awarded in a marriage of at least 10 years, but not more than 20 years, the term of support is one-half the length of the marriage. In my experience, it has been exceedingly difficult to overcome these presumptions, and few attorneys attempt it. In contrast, many clients who are dissatisfied with a spousal support award calculated as required by the proposed legislation have a significant incentive to litigate and attempt to rebut the presumed award.

#### Second spousal support award

The legislation permits a court to include a 2<sup>nd</sup> spousal support award if a final judgment includes both a spousal support and child support award, if the child support obligation will terminate within 3 years of the date of judgment. This provision is inconsistent with the policy that child support is intended to provide for children, and spousal support is intended to provide for the spouse alone.

Conclusion

Proponents of this legislation assert that a presumed calculation of spousal support is a more predictable and efficient way to award spousal support. This legislation is not going to accomplish this goal. Thank you for your time and consideration of my thoughts on this legislation.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kristin A. Gustafson". The signature is written in black ink and is positioned above the typed name.

Kristin A. Gustafson, Esq. Bar #3691