

**Testimony before the House Judiciary Committee
in opposition to House Bill 2559**

Dear Members of the Committees:

My name is Gilbert B. Feibleman. I am an attorney in private practice of which 95% of my practice is limited to family law. I have been in practice since 1976. I am the former chair of the Oregon State Bar Family Law Section, the former President of the Oregon Chapter of the American Academy of Matrimonial Lawyers (AAML), a fellow of the International Academy of Matrimonial Lawyers (IAML) and a Diplomat of the American College of Family Trial Lawyers (ACFTL). In my private practice I have represented both sides to the spousal support issues and have also served as a pro-tem Circuit Court Judge on Spousal Support issues.

I have also served as the chair of a number of Family Law task forces at the request of this legislative body, such as revisions to the Family Abuse Statute and most recently, as chair of the Oregon State Bar Family Law Section Task Force to review ORS 107.136 which dealt with spousal support reinstatement.

As part of that recent task force our initial charge was to:

1. Identify areas of possible amendment to ORS 107.136 and to identify specific possible amendments.
2. Identify and articulate policy considerations underlying the law as written and possible amendments.
3. If amendments are found to be appropriate, to draft specific proposed amendments and identify applicable policy considerations that underlie the proposed amendments. This includes both social policy considerations and litigation related concerns.
4. Prepare a report regarding the above, together with such minority and concurring reports as are appropriate, and provide them to the Executive Committee of the Family Law Section for its review and discussion. The Executive Committee would then make its own independent recommendations to the Board of Bar Governors and to the Legislative Assembly as appropriate.

To fulfill our obligation to the legislature, we researched the history of spousal support in the state of Oregon.

I am here to testify in opposition to HB 2559 because the bill does not only an injustice to spouses but is contrary to the very nature and intent of Spousal support in the state of Oregon. Simply put, it is bad public policy.

What the Bill Includes

The reforms set forth in HB 2559 include the following:

- Automatic cap on duration of spousal support – one-half the duration of the parties' marriage or 10 years, whichever is less;
- Spousal support terminates at "good faith" retirement;
- Exclusion of payor's new spouse's or partner's income and assets from any initial determination or subsequent modification action;
- Termination of spousal support upon the payee's remarriage or cohabitation for three months;
- Spousal support limits equaling 30% of the difference in each party's income at the time of the order; and
- Spousal support must be reduced by the amount of retirement or pension benefits the payee receives.

Spousal Support in Oregon, generally

Spousal support has evolved in Oregon from a fault-based reflection of early English church law to an encompassing scheme for which the legislature has provided thoughtful guidelines. These guidelines have, in turn, been interpreted by enlightened courts who take seriously their broad judicial discretion to create "just and equitable" financial arrangements between spouses.

In 1971, Oregon instituted "no fault" divorce, and provided for support for either party "in gross or in installments, or both, such amount of money for such period of time as it may be just and equitable for the other party to contribute," based on a list of statutory criteria which remain at the heart of Oregon's spousal support considerations:

- (A) The duration of the marriage;
- (B) The ages of the parties;
- (C) Their health and conditions;
- (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;
- (H) Such other matters as the court shall deem relevant.¹

The most articulate statement on the purposes of spousal support in Oregon is Grove and Grove.² In preparing its opinion, the Supreme Court reviewed forty-five recent Court of Appeals decisions on spousal support in marriages of long duration.

¹ Chap. 280, Oregon Laws of 1971, amending ORS 107.105.

² 280 Or. 341, 355, 571 P.2d 477, modified 280 Or. 769 (1977).

After rejecting the notion that support is necessary only to provide food, shelter and other basic necessities, the court stated:

The expressed legislative policy is that spousal support may be awarded in an amount, and for a period of time, that is “just and equitable,” and that in making this determination the factors listed in ORS 107.105(1)(c) are relevant. It is significant that the legislature chose to express the standard in terms of what is just and equitable rather than solely in terms of need...[T]he purpose of spousal support is not solely to prevent the supported spouse from becoming a public charge. The courts must attempt to do justice between the parties as well as provide the supported spouse with a minimally adequate living...**What the courts must attempt, then, is to award spousal support, if it is appropriate, on terms that are equitable between the parties that take into account need and ability to pay and that further the goal of ending the support-dependency relationship within a reasonable time if that can be accomplished without injustice or undue hardship.**

Oregon’s spousal support statutes were substantially revised in 1999. As a result, **spousal support may now be awarded in three categories: transitional, compensatory and maintenance.** Each category has an underlying purpose.³

“Transitional” support is awarded for a limited time in order to help a former spouse gain marketable skills, education or otherwise increase his or her earning potential;⁴ in other words, transitional support is designed to “enable one party to adjust to reentry into the job market and become self-sufficient.”⁵

“Compensatory” support is a form of equitable relief where a court determines that one spouse should be compensated for contributing to the education, training, vocational skills, career or earning capacity of the other party.⁶

“Maintenance” is generally awarded in longer term marriages in order to maintain the standard of living of a spouse who has significantly less earning capacity than his or

³ This division of support into defined categories with defined purposes has been applauded by commentators. R. Collins, “The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women’s L. J. 23, * (2001).

⁴ ORS 107.105(1)(d)(A).

⁵ FAMILY LAW, Or. St Bar, Vol. 1, §9.3, p. 9-6, citing R. I Gevurtz, “The Modernization of Oregon Spousal Support Provision: HB 2555,” OSB Family Law Newsletter, Vol. 18, No. 1 (Feb. 1999), 3.

⁶ ORS 107.105(1)(d)(e). This was a rejection of the prior statutory scheme in which a contributing spouse could obtain a property judgment against the spouse whose earning capacity was enhanced. The contributions can be financial or non-financial, but must be substantial and prolonged. Denton and Denton, 326 Or. 236, 951 P.2d 693 (1998).

her spouse. All three forms of support, however, are subject to a court's broad discretion to award "an amount of money for a period as may be just and equitable."⁷

An award of spousal support imposes reciprocal obligations on the payor and payee; an award of support has never been "intended to assure a perpetual state of assured indolence."⁸ Therefore, while the higher earner must pay, the recipient must, in most cases, make an effort to become as self-supporting as possible. A court may also penalize a supported spouse by decreasing or terminating support after 10 years of payments if the supported spouse has made no effort to become self-supporting.⁹

Support contemplates a timely transition of the supported spouse into the job market,¹⁰ and the courts frequently order step-downs in support to encourage the supported spouse to achieve independence and self support.¹¹

However, **Oregon is unique in it's recognition that every case must be viewed on it's own facts.**

I could recite to you 100's of cases of mine where I believe you would agree that HB 2559 would have resulted in an injustice but instead I will give you one simple example.

Imagine the case where a woman who had been married for about 30 years to her Husband and had 6 children. The Wife was a traditional homemaker and the Husband was a practicing physician. As part of their marriage the Wife dedicated her career to raising the family and supporting Husband's career. That meant multiple moves and financial sacrifices for Husband to obtain his medical training and pursue his dream career. None of this would have been possible without Wife's support.

Then Husband decided to leave the Wife for another woman, abandoning his 30 years of marriage. The Husband, at that time, earned over \$400,000 per year and the Wife, at that stage of her career, earned \$20,000 per year and she was now 50. Husband later remarried and Husband was actually working less yet despite working less his income was now close to \$1,000,000 per year.

So what would be the impact of HB 2559?

⁷ ORS 107.105(1)(d).

⁸ J. Williams, "Is Coverture Dead? Beyond a New Theory of Alimony," 82 Geo. L. J. 2227, 2231 (1994).

⁹ ORS 107.407. See *Alley and Alley*, 98 Or. App. 450, 779 P.2d 210 (1989).

¹⁰ ORS 107.105(1)(d)(A).

¹¹ See, e.g., *Goodman and Goodman*, 131 Or. App. 149, 884 P.2d 553 (1994); *Schnebly and Schnebly*, 145 Or. App. 188, 930 P.2d 225 (1996).

A) At the divorce Wife would have been limited to 10 years of support. Is there anyone here who honestly could say that after 30 years of sacrifice, 6 children, multiple moves, a limited earning capacity and Husband earning \$380,000 per year more than Wife (his monthly income was 150% more than Wife's annual income), that at age 60 she would have to fend for herself on \$20,000 per year income and Husband would be free to live a life of luxury on \$400,000 per year income?

B) And in that case, when a later modification was sought by Husband, his income had actually increased to \$1,000,000 per year. Would it have been fair to terminate or reduce support just because time had passed?

C) And even if the Wife had remarried, should 3 months of marriage means that her 30 years of contribution and sacrifice were rendered meaningless?

The reasons why support is granted in the first place should control whether support is later terminated or reduced, not some arbitrary rule. Support is not awarded in Oregon because "a Husband has the duty to support his Wife." Support in Oregon is awarded for reasons such as the length the marriage, the disparity in the parties earning capacities, the sacrifices one party has made to support the other's career and a host of other legislative factors set forth in ORS 107.105(1)(d).

The standards are varied and are uniquely applied on a case by case basis with consideration of the following:

- (i) The duration of the marriage;
 - (ii) A party's training and employment skills;
 - (iii) A party's work experience;
 - (iv) The financial needs and resources of each party;
 - (v) The tax consequences to each party;
 - (vi) A party's custodial and child support responsibilities; and
 - (vii) Any other factors the court deems just and equitable.
- (viii) The amount, duration and nature of the contribution one spouse makes to the others career and income;
- (ix) The relative earning capacity of the parties;
 - (x) The extent to which the marital estate has already benefited from a spouses contribution to the others career or earning capacity;
 - (xi) The age of the parties;
 - (xii) The health of the parties, including their physical, mental and emotional condition;
 - (xiii) The standard of living established during the marriage;
 - (xiv) The relative income and earning capacity of the parties, recognizing that the wage earner's continuing income may be a basis for support distinct from the income that the supported spouse may receive from the distribution of marital property;

And just as those are important reasons to evaluate in determining the amount, duration and type of support to be awarded, only the changes in those reasons should control the basis for termination on remarriage and cohabitation. If a Wife remarries a

man living on social security, why would that negate the reasons why support was granted? Yet if Wife's new household has \$1,000,000 in annual income, that should be a factor in terminating support, subject to reinstatement under ORS 107.136. Every case should rise and fall on the relevant facts.

2. Remarriage or Cohabitation of a Supported Spouse as Affecting Spousal Support

Nowhere and at no time in the Oregon family law statutes or cases has there been any mention or assumption that remarriage of a supported spouse should automatically terminate spousal support. In fact, the policy of the state has been exactly the opposite.

The task force I chaired in 2005 specifically looked at this very issue and the current version of ORS 107.136 already addresses these issues in a manner consistent with public policy.

Brandt v. Brandt¹² is the first Oregon case which directly analyzed the issue of spousal support in light of the remarriage of the supported spouse. Although in that case the court terminated spousal support for a remarrying wife, the court also held that "we do not mean to be understood as holding that a subsequent marriage will ipso facto dissolve the obligation of the former husband to continue the payment of alimony, for the authorities do not seem to go so far; but we do mean to say that it affords a cogent and convincing reason for the court to modify or cut off the allowance altogether."¹³

In Grove and Grove, the court also addressed the issue of remarriage. The court found that "[t]here is no statutory provision for automatic termination of spousal support under any circumstances."¹⁴ The court noted that there is a split among states which do not have a statutory provision. Some provide an automatic termination of support on remarriage,¹⁵ and others, such as Oregon, regard remarriage as a possible change in circumstances which may justify such a termination upon proper application to the court.¹⁶ The Supreme Court discussed the underlying public policy as follows:

Although this court has expressed the opinion that it was against public policy to permit a woman to look for her support to two different men, that policy has never been held in this state to operate automatically

¹² 40 Or. 477, 67 P. 508 (1902).

¹³ Id. at 487, 67 P. 508, 510-11.

¹⁴ Grove and Grove, 280 Or. 341, 354, 571 P.2d 477, 486 (1977).

¹⁵ Id. at 354, 571 P.2d 477, 486, citing Annot., "Alimony as Affected by Wife's Remarriage," 48 ALR2d 270 (1956).

¹⁶ Id.

without regard to the particular circumstances. The cases announcing the position that it does not were decided at a time when the husband was considered to have an absolute unilateral obligation to support his wife. We would not now hold otherwise, when legal duties of spousal support are mutual. Public policy does not require that a woman whose first marriage has been dissolved be free to remarry only if her new husband is able to support her.¹⁷

In its discussion of policy, the court also recognized the continuing position of women as homemakers and child care providers in marriage, even in this age of “women’s rights.” The court found that this cultural gender-based division of labor also justifies retention of spousal support on remarriage because a lengthy first marriage where a woman is a mother and homemaker (while at the same time, her husband increases his earning capacity) places a woman at a significant long-term economic disadvantage in the marketplace.¹⁸

In Bates and Bates,¹⁹ the Supreme Court specifically approved its earlier ruling in Grove, and extended the public policy discussion by holding that **the policies underlying what is now compensatory and transitional support do not end with remarriage, and further noting that the intent to preserve the parties’ standard of living established during the marriage “remains as a gauge of the continuing fairness of the support award, even after remarriage.”**²⁰

In considering a motion to reduce or terminate support upon a recipient spouse’s remarriage, the court must review the parties’ circumstances at the time of the original award in order to maintain their relative positions in light of their changed circumstances.²¹ The court considers the parties’ shared incomes and the number of people in their households.²² The amount of support and the income ratio between the spouses awarded in the original judgment is presumed to be the most equitable distribution of income between the parties.²³ The paying spouse has the burden of proving that the remarried spouse has little or no need for continuing support.²⁴ Given these standards, in appropriate cases after the recipient spouse’s remarriage, the courts

¹⁷ Id. (citations omitted)

¹⁸ See footnote 8, supra.

¹⁹ 303 Or. 40, 733 P.2d 1363 (1987)

²⁰ Id at 44, 733 P.2d 1363, 1365.

²¹ Ho and Ho, 93 Or. App. 421, 424, 762 P.2d 344 (1988).

²² Bates and Bates, 303 Or. 40, 47, 733 P.2d 1363 (1987).

²³ Hall and Hall, 86 Or. App. 51, 54, 738 P.2d 218 (1987).

²⁴ Fouts and Fouts, 98 Or. App. 483, 486, 779 zp.2d 145 (1989).

will sometimes terminate spousal support altogether,²⁵ on other occasions the court will significantly reduce, but not eliminate support,²⁶ and in very rare instances, the court will not reduce support at all.²⁷

The courts apply the same standards to judicial orders regarding cohabitation, and also permit private agreements to terminate support on cohabitation. In such instances, however, a hearing is required to prove that cohabitation has occurred.²⁸

ORS 107.105(1)(d) provides that the court may award spousal support for an amount of money and period of time "as may be just and equitable" under the particular circumstances of the case. As Mr. Carty's testimony states:

- If a payor spouse retires early and, therefore, has a significant reduction of income, should spousal support terminate? What if the retirement is because the payor spouse has remarried an individual with significant assets who can independently support the payor spouse? What if the payor spouse retires and then later returns to work?
- If a payee spouse receives limited spousal support from a high wage earning ex-spouse, but then later remarries or cohabits with someone who has no income, should the spousal support terminate? What if the spousal support was designed to offset the payee spouse's high cost of uninsured medical expenses on account of a chronic disease or terminal illness?

There are many fact scenarios such as these, but the bottom line is that judicial discretion is a positive aspect of spousal support law. There are many reasons why spousal support might or might not be appropriate, and it is beneficial for the court to have the authority to make individual determinations in individual cases, rather than imposing a one-size-fits-all approach as set forth in HB 2559.

My involvement with Spousal Support (Alimony) Reform in Oregon

The Oregon Legislature recently took up the task of reviewing spousal support in Oregon in response to legislation proposed in the 2005 session that would have

²⁵ E.g. Bishop and Bishop, 137 Or. App. 112, 903 P.2d 383 (1995); Essig and Essig, 128 Or. App. 67, 874 P.2d 1357 (1994); Haywood and Haywood, 120 Or. App. 339, 852 P.2d 891 (1993); Rubey and Rubey, 165 Or. App. 616, 621-22, 996 P.2d 1006 (2000).

²⁶ Simmons and Simmons, 138 Or. App. 230, 907 P.2d 1134 (1995); Hoag and Hoag, 152 Or. App. 288, 954 P.2d 184 (1998); Jones and Jones, 172 Or. App. 199, 206, 17 P.3d 491 (2001).

²⁷ Thomas and Thomas, 160 Or. App. 365, 372, 981 P.2d 382 (1999).

²⁸ Edwards and Edwards, 73 Or. App. 272, 276, 698 P.2d 542 (1985).

impacted ORS 107.136 (reinstatement of terminated spousal support). The Legislature approached the Oregon State Bar Family Law Section and requested that a Task Force be assembled to review ORS 107.136, and to specifically make a recommendation on what impact, if any, remarriage of a spouse ought to have on an underlying award of spousal support.

The members of the 2005 Task Force were selected by the Executive Committee of the Oregon State Bar Family Law Section and represented a broad range of views on the existing statute, the remarriage issue, and whether changes (if any) ought to be made.²

The Task Force that I chaired dealt only with ORS 107.136, but the Appendix attached to the report provides a brief analysis of spousal support, as well as a specific look at Oregon's treatment of remarriage or cohabitation as it affects support awards. Appendix D of the report contains the Task Force's research on statutory factors in making an initial award of spousal support, basis for modification of a support award, effect of remarriage and cohabitation, and reinstatement of support after termination.

Judicial Discretion

ORS 107.136 was completely rewritten consistent with the Task Force's recommendations, which were largely based on the idea that judicial discretion is desirable. The Task Force recommended that the reinstatement statute should require courts to look at spousal support through a "totality of the circumstances" lens, and to order a reinstatement only if it would be just and equitable under all the circumstances.

Remarriage

The Supreme Court of Oregon has stated that, "Public policy does not require that a woman whose first marriage has been dissolved be free to remarry only if her new husband is able to support her."³ In other words, automatic termination of spousal support upon remarriage is against public policy because such an arbitrary rule would leave payee spouses in a position that might preclude a subsequent remarriage unless the new spouse is able to financially replace the anticipated loss of spousal support. While termination of spousal support upon remarriage might be appropriate, this is a fact-based question that requires a review of the entire case. If there is an automatic termination (penalty) for a payee spouse remarrying, would it make sense to impose a similar penalty on a payor spouse (i.e., spousal support increases because the payor spouse now has more available resources?).

² ORS 107.136 Task Force Report is attached as Exhibit 1.

³ *Grove and Grove*, 280 Or 341, 355, 571 P2d 477, 486, opinion modified on denial of reh'g sub nom. *Grove and Grove*, 280 Or 769, 572 P2d 1320 (1977).

Conclusion

Family law lawyers and The Family Law Section of the Oregon State Bar represents both husbands and wives and is neither pro-spousal support nor anti-spousal support. The section's focus is on achieving fair results in difficult cases. HB 2559 simply does not support those goals.

On behalf of the many clients I have represented over the past 37 years, I thank the members of the committees for their consideration and urge the committee to not move the bill forward

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