

Factors vs. Formulas

BY JOHN D. ZOLLER

Many lawyers and courts use computer software to determine what amount of spousal support, tax deductible for the payer and reported as income to the payee, would result in the same amount of after tax spendable cash for each party. We call this after tax income equalization. The trend toward using this formula is so common that it not only eclipses a deliberate step-by-step statutory analysis, it becomes the beginning and end of the question in many cases. Indeed, many lawyers advocate absolute parity of income in perpetuity as though such outcomes are supported by law. They are not. This article explores some of the attributes of each approach and how they intersect.

A trial court has broad discretion when making a spousal support determination and will not be overturned on appeal absent abuse of that discretion. Our spousal support statute, O.R.C. 3015.18 (C), calls for consideration of 14 specific factors by the court when exercising that broad discretion. The statutory factors are both simple and straightforward in some instances, and quite complex in others. The age and health of the parties, their education and historical contributions as earners and/or caregivers as well as the duration of the marriage are typically self-evident. But, when the court must consider “The retirement benefits of the parties” and the “income derived from property divided” in the divorce case itself, factoring in the ramifications of those facts to a spousal support formula can become difficult or impossible. Evidence of return on investments, cost of living adjustments and Social Security benefits may best come from qualified financial experts.

Since spousal support is presumptively deductible to the payer and income to the payee, computer software, such as Family Law Software, is used to quickly and accurately determine what amount of spousal support, after calculation of the tax ramifications, would result in each party having the same amount of after tax spendable cash. We call this income equalization. This method is relatively simple to determine with few data points. You enter incomes and solve for 50%. The software contains the relevant elements of the Internal Revenue Code. The program essentially prepares a tax return for each party and calculates many variables such as Child Support, dependency exemptions and filing status. Software must also calculate Child Support pursuant to O.R.C. § 3119 in addition to spousal support, because Child Support is tax-free to the recipient and paid out of the after-tax income of the payer. Child Support is directly affected by the amount of spousal support paid. Performing these calcu-

lations without a computer would be very dangerous and incredibly time consuming.

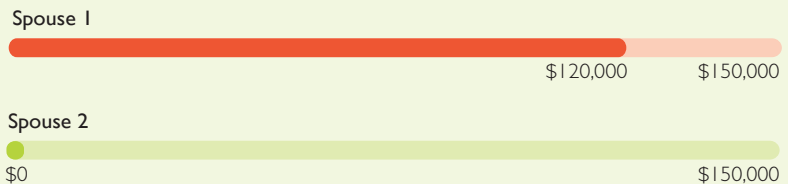
Some equalization calculations are as simple as typing in the party’s W-2 incomes, the number of children and then entering the desired net after tax percentage. Software determines the amount of spousal support that would, with or without child support, result in each spouse having the same amount of money after taxes.

This formulaic method is simple, it produces predictable results and it takes into account the incomes of the parties, the tax consequences of the spousal support award and any applicable child support. The method considers three and in some instances four (unearned income from property divided) of the 14 statutory factors. It saves a lot of money for litigants, and in cases where all other factors are equal, the income equalization method may be sufficient. In cases where neither party is going to be able to sustain the standard of living to which the parties had become accustomed during the marriage, or even a reasonable standard of living, equally allocating the pain of insolvency is probably reasonable and equitable.

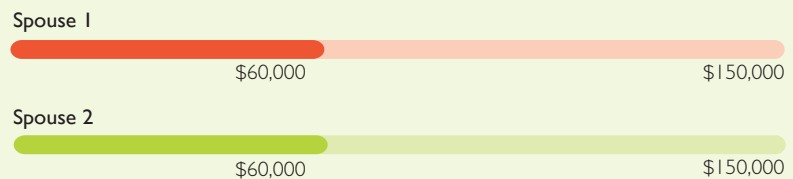
The income equalization formula, and most formulas, do not factor in the remaining statutory factors. Some couples have lived long, productive and financially conservative lives and find themselves, on the eve of retirement, facing divorce. In many of these cases one or both of the parties is producing income at the highest level ever. Using a formula to determine spousal support when the available income exceeds the cost of maintaining the marital

Gross Incomes and Income After Child Support, Spousal Support, and Taxes

Income Before Taxes



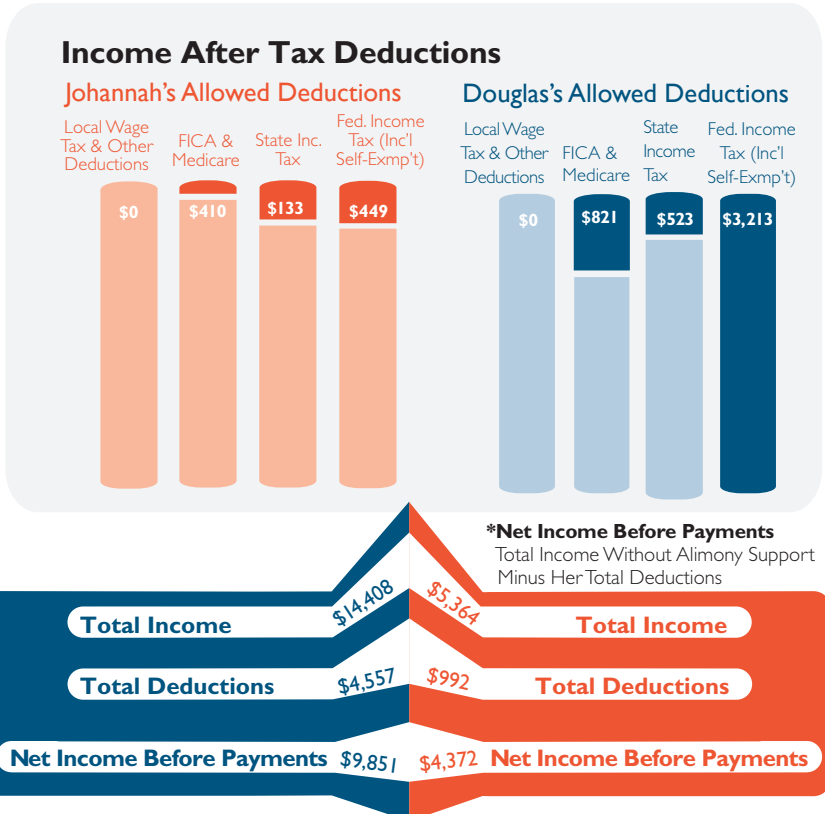
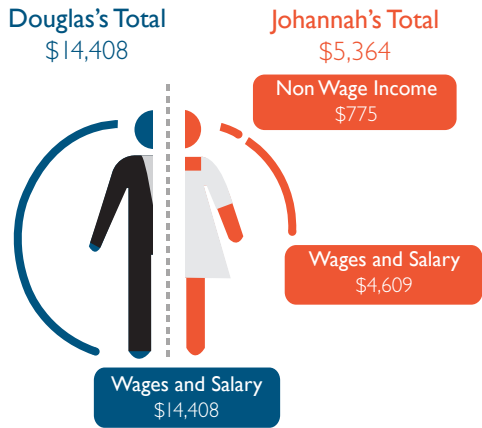
Income After Child Support, Spousal Support, Tax Deductions



Cross vs Cross

Depicting How Douglas and Johannah's Taxes Broke Down in the Court Trial

Overall Income (Without Alimony/Support)



59% to share cash to meet living expenses

41% to share cash to meet living expenses

standard of living can result in excessive and sometimes punitive outcomes. Clients often feel like the goal posts have been moved during the final quarter of the contest. They may have very different goals and objectives. Many government and union workers have interests in non-divisible employer sponsored retirement health benefits. The differences in cost of health insurance, long term care and gap insurance can, in and of themselves, make an equal division of spendable cash very inequitable. A party with substantial separate property that generates income and is a resource for retirement might receive a windfall if marital retirement assets are divided equally and then spousal support is awarded to equalize income. The spouse paying spousal support to the party with the separate property would probably face a choice between an inadequate retirement and no retirement at all.

While there is no reference to the "needs" of the parties in the statutory factors, there is no reference to excessive surpluses either. The "standard of living" measurement is as close to a "needs" based consideration as the statutory factors come. Formulas may factor in the standard of living by comparing the alleged monthly budget ("need" disguised) to the available after tax spendable cash.

The recent case of *Cross v Cross*, 8th District No. 102627 (Dec. 17, 2015) affirmed the trial court's

decision to award \$1,250/mo. in spousal support and 593/mo. in child support to Johannah Cross. The result was a 41% to 59% allocation of after tax spendable cash which Johannah appealed.

The *Cross* decision held "There is no 'mathematical formula' for determining what amount of spousal support should be ordered." An award of spousal support should be "appropriate and reasonable." The statute "does not require a spousal support award to provide the parties with an equal standard of living" *Saks v. Riga*, 8th Dist, Cuyahoga No 101091, 2014-Ohio-4930. "Rather, an award of spousal support must be designed to allow a party to maintain 'a reasonable standard of living in light of the standard maintained during the marriage.'" *Howell v. Howell*, 2d Dist. Clark No 2002 CA 60, 2003-Ohio-4842."

In the *Cross* case the Husband's historical bonuses were not averaged or included in his income for spousal support purposes. His bonuses were determined by his company's performance, not by Husband's performance. However, Wife's extra income was included because she was entirely in control of that income. These assignments of error were overruled. Another common "formula" for determining the duration of spousal support was raised in the *Cross* case. It is common for practitioners to assume the

duration of spousal support is determined by a 1:3 ratio; one year of support for each three years of marriage. However, the 27 year *Cross* marriage did not yield a 9 year support award. Douglas, the 55 year old payer, was ordered to pay support for 8 years. He will be 63 and eligible to receive Social Security when his spousal support obligation expires. This duration and rationale was also affirmed by the court in *Cross*.

Using formulas as a rule of thumb or as a yard stick to measure the result of the full array of statutory factors is not only wise, it is essential to a full understanding of "the tax consequences for each party." However, using nothing more than a formula to determine support, such as strict income equalization, is not the law. It is sometimes a useful short cut and a barometer of a fully considered award. But, "there is no formula."



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