American Bar Association
Section of Family Law

2014 Fall Meeting

Trends in Alimony Modifications

Speakers:
Amy J. Amundsen, Esq., Memphis, TN
Hon. Mike Kelly, Charleston, WV

October 15 - 18, 2014
Stowe, Vermont
Speaker Bios

Amy J. Amundsen – partner with Rice, Amundsen & Caperton, PLLC. A graduate of the Cecil C. Humphreys School of Law in Memphis, TN, a Fellow in the International Academy of Matrimonial Lawyers and the American Academy of Matrimonial Lawyers, Ms. Amundsen has served as President of Tennessee Bar Association Family Law Section, President of the Memphis Bar Association, and President of the Memphis Chapter of the American Inns of Court. For the past 12 years she has chaired the Alimony Bench Book Committee that produces a bench book for judges and lawyers across the State. She regularly speaks at continuing education seminars for many legal organizations and has written several articles for state and local bar journals.

Honorable Mike Kelly, Eleventh Family Court Circuit, has served as a Kanawha County Family Court Judge since 2001. Originally appointed by Governor Bob Wise, he was elected to a six year term in 2002 and an eight year term in 2008. During the past twelve years, Judge Kelly has presided over more than 25,000 divorce, alimony, custody, child support, paternity, domestic violence and guardianship cases. He has been Chief Judge for the Eleventh Family Court Circuit and President of the West Virginia Family Court Association. He is currently the presiding judicial officer for the Kanawha County Domestic Violence Pilot Court, and is the only family court judge in West Virginia hearing both civil and criminal domestic violence cases.

Judge Kelly was named a recipient of the Governor’s Civil Rights Day Award for 2007, and in 2006 he was recognized by the YWCA Resolve Family Abuse Program for his “pursuit of justice of behalf of victims of domestic violence and their children.”
Removing the Parachute: Recent Trends in Alimony Modification

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October 17, 2014
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Traditional Wife

SO THE HARDER A WIFE WORKS, THE CUTER SHE LOOKS!

Vitamins for pep! PEP for vitamins!
Divorce looked like--
First Wife’s Club

CHANGES OVER TIME

- 1967-14.8% W in workforce.
- 2010-47% W in workforce.
- 1967-61% make less than spouse.
- 2010-33% of women make more than their spouse.

US Census Bureau
Recession HITS 2008

• Loss of 25% of assets;
• Unemployment rate reaches 10% in October 2009.
LAWS HAVE CHANGED

- No-Fault Divorces;
- Joint/Shared custody;
- Rehabilitate Spouse;
- Civil Unions and Same-Sex Marriages.

Alimony MOVEMENT.

Interest Groups

- Massachusetts Alimony Reform (3/1/2012); (started Steve Hitner)

- The 2nd Wives & Partners Club; (group run by Jeanie Hitner)

- Alliance for Freedom from Alimony/Alimony Reform.
Second Wives Club

CHANGES TO ALIMONY LAW

1. COHABITATION

2. RETIREMENT

3. ENDING DATES FOR ALIMONY

4. RETROACTIVE MODIFICATION

5. INCREASE WHEN CHILD SUPPORT ENDS
COHABITATION

DEFINITION OF Cohabitation
Varies from state to state:

a. Man and woman in romantic relationship…amended to “TP”;

b. Holds themselves out as married;

c. Lives with TP & financial benefits;

d. Different time requirements.
Some Factors Court Considers

- A. Living together;
- B. Mixing finances;
- C. Sharing living expenses;
- D. Recognizing relationship in social and family circle; and
- E. Sharing household chores.

Consequences are different:

**Automatic modification**
- 1. Alabama;
- 2. Arkansas;
- 3. Illinois;
- 4. Utah;
- 5. North Carolina;
- 6. South Carolina;
- 7. Louisana.

**Judge’s Discretion**
- 1. Georgia;
- 2. New York;
- 3. Maine;
- 4. Oklahoma;
- 5. Missouri;
- 6. South Carolina (as to rehabilitative alimony);
Examples of statutes on Cohabitation-(discretion with the court)

• “...shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household . . . With another person for a continuous period of at least 3 months”…

• MASS. GEN. LAWS ch. 208 sec. 49(d)(1)-(2).

Rebuttable Presumption

1. “3rd person contributes to the support of the alimony recipient and all or part of the alimony obligation should be suspended;
2. 3rd person receives support from the alimony recipient and all or part of the alimony obligation should be suspended.”

TENN. CODE ANN. 36-5-121.
JUDGES’ DISCRETION

How much to modify-proof?

Reinstate when live-in leaves?

Apply retroactively to date filing?
TIP: seek injunctive relief to pay into court.

CONSIDER--Obligor’s Remarriage or Cohabitation

Obligor’s-
  a. Decrease of Living Expenses; and

b. Higher standard of living.
TIP-subpoena new spouse income/expenses, if representing obligee.

• CA & MASS specifically prohibit examining income/assets of obligor’s partner/spouse. NH & Utah prohibit obligor’s income, unless obligor is underemployed or unemployed.
Cohabitation statutes across the USA

RETIREMENT
When do we get to retire—MODIFY ALIMONY?

APPROACHES SINCE 2011:

a. Age of social security eligibility;
b. 67 years of age;
c. Eligible for a severance package;
d. Eligible to apply for retirement under the Plan;
e. All of the above.

Statutes across the USA on Modification of Alimony upon Retirement
What are the issues regarding Retirement

- **Automatic termination** upon normal retirement?
  - Carve out exceptions:
    - Continues to work?

- **Automatic modification** upon normal retirement?

<table>
<thead>
<tr>
<th>Burden on obligor to show “reasonable and in good faith”?</th>
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<td>Rebuttable presumption-retires @ normal age is material change-Burden obligee.</td>
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**Fuller v. Fuller, 723 S.E.2d 235 (S.C. Ct. App. 2012).**

Now statutory....

- 1. retirement contemplated when alimony awarded;
- 2. age of obligee;
- 3. health of obligee;
- 4. retirement mandatory/voluntary;
- 5. decrease obligee’s income;
- 6. other factors court deems fit.
ENDING DATES FOR ALIMONY PAYMENTS

LIMITS ON DURATION

Examples of some states imposing limits:
- Utah: Length of Marriage
- Oregon Bills: ½ duration
- Missouri Bill: No more than 10 years;
- New Hampshire Bill: limit renewal request;
- Mass: % of years of marriage;
- Del: less than 20 yrs- ½ marriage. Over 20 yrs.- unlimited.
Retroactive Modification

Some courts allow retroactive modification prior to date of filing and notice to party- back to modifying event;

Courts enforce parties agreement on retroactivity;

Courts modify when statute provides for automatic termination.
Enforcing the Agreement

“In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith.”

Conn. Gen. Stat. § 46b-86(b):

Theories for retroactive modification

- 1. Restitution — person conferred a benefit/inequitable to keep benefit.

- 2. Fraud — attempt to hide remarriage;

- 3. Agreement provided conditions when alimony would be modified — contractual.
INCREASE ALIMONY WHEN CHILD SUPPORT ENDS

CA

- Material change of circumstances:
  - Child Support Terminates.
  - Brought within 6 months from date Order.
  - Parties’ agreement did not preclude modification/did not provide what happens after CS terminates.
- Change of custody?
- Will this be the NEXT TREND???
Practical Tips for Drafting Settlement Agreements

IF representing the economically disadvantaged spouse

1. Interrelate property/child support and spousal support;

2. List the factors;

3. Secure the alimony from bankruptcy;

4. Prohibit modification of alimony, if the alimony award is a modifiable type of alimony.
**IF representing the economically disadvantaged spouse**

5. Provide future events triggers increase;

6. Reserve alimony award if facts warrant it;

7. Life Insurance – obligee is the owner;

8. Disability insurance-obligee beneficiary;

9. Equalize the social security payments;

10. Arrearages exist-payment even if it ends.

**IF representing the payor spouse**

1. Outline the Rehabilitative Plan;

2. Tax Deductible;

3. Modifiable;

4. Define remarriage and/or living together;

5. Provide for an award of attorney fees and suit expenses if a party seeks to modify alimony.
**IF representing the payor spouse**

6. Provide ending date for alimony;

7. Ensure that the obligee understood and was competent to enter into the agreement;

8. Deduct mortgage payments and/or insurance payments from alimony, if obligee fails to pay these expenses.

9. Seek injunctive relief to pay alimony into courts until court hears modification petition.

Questions???

THANK YOU!!
Removing the Parachute:  
Recent Trends in Alimony Modification*  

Amy J. Amundsen  

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Introduction  

II.  

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Termination of Alimony upon the occurrence of an event  

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C.  

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Use of formula in some jurisdictions based on the length of marriage and income of the spouse  

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Legislatures addressing retroactively applying modification to a date prior to filing of petition for modification  

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Upward modification of alimony upon termination of child support  

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Practical Tips in Drafting the Settlement Agreements  

A.  

Practical Tips in Drafting the Settlement Agreement IF representing the economically disadvantaged spouse (Wife)  

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Practical Tips in Drafting the Settlement Agreement IF representing the payor spouse (Husband)  

I.  

Introduction  

“A pendulum dropped from the high point never stops at the middle; it swings the other way. That’s where we are now.”

In 2011, Massachusetts overhauled their alimony laws and enacted a new statute. Some people believe the Massachusetts law will have a domino effect across the country as interest groups lead the charge to revamp alimony laws in other states. To a certain extent this has been true. Interest groups, many of which have spawned from groups in Massachusetts, have led movements in Colorado, New Jersey, Florida, Oregon and other states; however, many of these groups attempts to overhaul the alimony laws in these states have fell short due to concern from critics that the changes go too far. Other states, which have not seen a movement for a total

* The author would like to acknowledge the assistance of Nick Margello, Editor-in-Chief of the University of Memphis Law Review.

1 This is how Fern Folin, one of the attorneys who assisted in writing the Massachusetts’s Alimony Reform Act of 2012, describes the current environment of alimony law in Massachusetts.
overhaul, have seen several changes to their alimony laws, which align with the interests of overhaul movement. All of these changes will have a large effect on alimony modification in the future.

Many of these changes affecting alimony modification stem from a belief by some that the current system is outdated and in need of reform to keep up with changing times. During the 1960’s and 1970’s alimony laws were passed in response to rising divorce rates. Permanent alimony was considered a standard award for many marriages, because it was seen as necessary for survival in a society where most women worked in the home and raised children. However, things have changed over the last several decades. Divorce law has seen changes as a result of the rise of no fault divorce and more short term marriages. Divorce law in many states has been changed to allow for civil unions and same-sex marriage. Child support guidelines and joint/shared custody has transformed the way courts deal with children during divorce. Society has changed as well. Nearly half the workforce has become women and almost a third of women make more than their spouse. Also, the baby boomer generation has reached the age of retirement and would like to trade in their briefcases for golf bags. Unfortunately, the economic recession of 2008 wiped out jobs and nest eggs and slowed job growth. All of these changes have contributed to a rise in requests for modification of alimony awards.

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4 Pearson, supra note 2.
This Article examines the recent trend of legislatures to amend alimony laws and the
effect these changes will have on alimony modification. Part II of this Article examines what the
trends have been across legislatures and how some of the courts have interpreted these statutes.
Finally, Part III discusses practical tips in drafting the settlement agreement based on the party
that the attorney is representing.

II. Legislative Changes in Alimony Modification and Courts’ interpretation

Most of the legislative changes affecting alimony awards and modification are enacted in
an effort to make alimony awards and modification more predictable. Some proponents of these
changes feel more structure is needed in order to reach balanced outcomes for both parties in
alimony disputes. Those in favor of legislative guidance believe that such guidance leads to
more uniformity in the way that courts award alimony, resulting in more equitable outcomes and
decreasing the cost, effort and time associated with divorce. Critics of these changes feel that

6 See Boemio v. Boemio, 994 A.2d 911, 919 (Md. 2012) (“Of the three financial issues
raised by divorce—asset division, child support and spousal maintenance—the question of
alimony is typically the least predictable and the most contentious.” (quoting Robert K. Collins,
The Theory of Marital Residuals: Applying an Income Adjustment Analysis to the Enigma of
Alimony, 24 Harv. Women’s L.J. 23, 23 (2001)).

7 See Jackson, Alimony Arithmetic: More States are Looking at Formulas to Regulate
Spousal Support, A.B.A. J. / (Feb. 1, 2012 4:30 AM)
http://www.abajournal.com/magazine/article/alimony_arithmetic_more_states_are_looking_at_f
ormulas_to_regulate_spousal; Victoria M. Ho & Stephanie A. Sussman, Appellate Court Trends
(“Absent alimony guidelines, this area will continue to be difficult to predict as equity is often—
like beauty—in the eye of the beholder”).

8 See Bacon v. Bacon, 819 So.2d 950, 955–956 (Fla. Dist. Ct. App. 2002) (noting the
benefits that would occur with a statute setting guidelines for alimony); Jackson, supra note 7;
Andrew Zashin, What Will Happen to my Income after Divorce?, CLEVELAND JEWISH NEWS
unlike other areas of law, which may benefit from uniformity, alimony awards by their nature must be based on discretion due to the varying facts involved in alimony disputes. These critics feel that the current structure of awarding alimony is sufficient to ensure fairness. While the debate regarding whether legislative changes are needed will likely continue, there have already been several trends across state legislatures in an effort to make alimony awards and modification more predictable.

A. Termination of alimony upon the occurrence of an event.

Legislatures in several states have recently added provisions to their alimony modification statutes that allow for termination of alimony on the occurrence of a specific event. The most frequently added events that trigger alimony modification are cohabitation and retirement. The following subsections address the trends and issues that arise when cohabitation and retirement trigger alimony modification

i. Cohabitation

Legislatures in various states have addressed the effect, if any, that cohabitation of a spouse might have on an award of alimony. Courts have been approving stipulations between parties that terminate alimony upon cohabitation with a member of the opposite sex for decades. While stipulations may state that alimony “automatically” terminates upon cohabitation, a spouse usually must move the court to modify a decree based upon the other

9 See Jackson, supra note 7 (quoting Karen Pinkert-Lieb, partner with Schiller DuCanto & Fleck in Chicago); see also Gonsewski v. Gonsewski, 350 S.W.3d 99, 105 (Tenn. 2011) (Noting that spousal support is factually driven and Tennessee law has recognized that trial courts are accorded wide discretion).

spouse’s cohabitation. Some states have gone further by statutorily requiring termination upon cohabitation. Other states have statutes which allow courts to modify alimony based upon cohabitation, but give the court discretion regarding the extent of modification. A few states have implemented statutes providing that upon a finding that a recipient party is cohabitating with another person, there is a rebuttable presumption that less alimony is needed to support this spouse.

Several states have recently amended their alimony statutes to join the growing number of states that provide either automatic termination upon cohabitation or termination upon cohabitation at the discretion of the court. For example, recent changes in Massachusetts’s law provide that courts “shall suspend, reduce or terminate” an alimony award when a recipient spouse continuously maintains a “common household” with another person for a period greater than three months. These changes also provide that any modification based upon the recipient spouse’s common household arrangement may be reinstated upon termination of the common household.

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11 See, e.g., Edwards, 698 P.2d at 544.
14 See Cal. Family Code § 4323; Del. Code Ann. tit. 13 § 1512(g); Va. Code. Ann. § 20-109(A) (requiring termination upon cohabitation unless there is a stipulation or contract to the contrary or the spouse proves by a preponderance of evidence that termination would be unconscionable); see also Tenn. Code Ann. § 36-5-121(f)(2)(B), g(2)(B) (providing a rebuttable presumption when a recipient of alimony in future i.e. periodic alimony and/or transitional alimony lives with another person).
household, but the reinstatement period cannot exceed the date of the original order awarding alimony.\textsuperscript{18} The law has led to some disagreement between attorneys and judges as to whether it was meant to apply retroactively to recipient spouses maintaining common households prior to the enactment of the law, and whether the law automatically requires a modification of the alimony award.\textsuperscript{19} The new law has led to some disputes regarding how these provisions should be applied. Other states have proposed bills to add similar provisions which have not yet been enacted into law.\textsuperscript{20} For example, Missouri judges have discretion to modify alimony upon a finding of cohabitation, but a 2014 bill would make such modification automatic any time that a recipient spouse cohabitates with another for 90 consecutive days.\textsuperscript{21}

Some state lawmakers have attempted to make sure that cohabitation by an obligor spouse does not increase alimony payments.\textsuperscript{22} Some courts may consider the decreased living expenses of the obligor when they cohabitate with another person in order to show a greater ability to pay alimony.\textsuperscript{23} For example, a court might consider a new spouse’s income under

\begin{flushright}
\textsuperscript{18} Id.
\textsuperscript{22} S.B. No. 718, 115th Leg., Regular Session (Fla. 2013); H.B. 2559, 77th Legis. Assemb. (Or. 2013); see also LA. REV. STAT. ANN. Art. 114 (“The subsequent remarriage of the obligor spouse shall not constitute a change of circumstance.”).
\textsuperscript{23} See MO. ANN. STAT. § 452.370 (urging the court to consider the extent to which reasonable expenses of either party should be shared with a cohabitant); UTAH CODE ANN. § 30-3-5(8)(i)(i)(iii)(B)(allowing consideration of subsequent spouse’s income if the court finds improper conduct justifies that consideration); Moore v. Moore, 763 N.W.2d 536, 546–547 (S.D. 2009).
\end{flushright}
circumstances where the obligor has argued an inability to pay, but claimed joint expenses.\textsuperscript{24} Courts have also allowed for discoverability of the finances of an obligor’s new spouse under certain circumstances that make them relevant.\textsuperscript{25} A 2013 Florida Bill would have likely prohibited the use of the obligor’s decreased living expenses upon cohabitation as a means for increasing alimony. The governor vetoed the bill, which provided that an obligor’s remarriage or cohabitation with another person and that other person’s income could not be a basis for modification of alimony.\textsuperscript{26}

As a result of these statutes, courts often need to interpret what constitutes “cohabitation.” Not all courts agree regarding what circumstances qualify as “cohabitation.”\textsuperscript{27} Recently, some legislatures have attempted to define cohabitation.\textsuperscript{28} For example, New Jersey Senator Anthony Bucco proposed a bill last spring that listed factors that should be considered by the court when determining whether a recipient spouse is cohabiting. These factors included,

\begin{itemize}
  \item For example, Courts might allow an alimony recipient to discover the new spouses income when there when an obligor reduces his income to allow for modification and continues to live off his new spouses income, or when the obligor transfers assets to a new spouse in order to disinvest income while failing to fulfill the alimony obligation. \textit{See, e.g.}, Hayden v. Hayden, 662 So.2d 713, 716 (Fla. Dist. Ct. 1995) (allowing new spouse’s income to be discoverable by former spouse when obligor reduces his income to allow for modification and is supported by new spouse’s income or transfers assets to new spouse to disinvest income); Walles v. Walles, 685 A.2d 508, 520–21 (N.J. 1996) (allowing information related to new spouse’s income to be turned over directly to former spouse when the new spouse is employed by obligor’s professional association).
  \item S.B. No. 718, 115th Leg., Reg. Sess. (Fla. 2013).
  \item See MASS. GEN. LAWS ch. 208 § 49(d)(1); ME. REV. STAT. tit. 19, § 951-A(12); N.C. GEN. STAT. § 50-16.9; S.B. 552, 97th Gen. Assemb., 2d Sess. (Mo. 2014); OKLA. STAT. tit. 43, § 134(C); S.B. 1808, 216th Leg., 1st Sess. (N.J. 2014); H.B. 4180, 120th Gen. Assemb., 1st Sess. (S.C. 2013); W. VA. CODE § 48-5-707(a)(2).
\end{itemize}
“intertwined finances such as joint bank accounts and other joint holdings or liabilities, sharing or joint legal responsibility for living expenses, recognition of the relationship in the couple’s social and family circle, living together, [and] sharing household chores.”²⁹

Another trend among legislatures has been to amend statutes to account for cohabitation between individuals of the same sex.³⁰ Courts often avoid addressing issues of public policy that relate to same-sex relationships when determining alimony modification.³¹ In states where statutes are already gender neutral, courts have interpreted same-sex relationships as warranting cohabitation if all of the elements of cohabitation are met.³² Courts have also interpreted gender neutral divorce agreements with similar language as including same-sex cohabitation.³³ Courts interpret statutes specifying that cohabitation must be between individuals of the opposite sex literally.³⁴ As a result, some legislatures have amended statutes to account for cohabitation between individuals of the same sex. For example, California law provides a presumption that less alimony is needed when an ex-spouse is cohabiting with a partner of the opposite sex.³⁵

³⁰ See H.B. 3531, 77th Legis. Assemb. (Or. 2013) (modifying alimony when parties live as “husband and wife or as domestic partners”); see also LA. REV. STAT. ANN. Art. 115; N.C. GEN. STAT. § 50-16.9(b); WASH. REV. CODE ANN. § 26.09.090(2).
³² See Garcia v. Garcia, 60 P.3d 1174, 1175 (Utah 2002).
³³ See, e.g., Stroud, 641 S.E.2d at 151 (holding that trial court erred by refusing to interpret contract based on the conclusion that same sex individuals cannot cohabit as a matter of law in Virginia).
³⁵ CAL. FAMILY CODE § 4323.
California bill would substitute the term “spouse” for the terms husband and wife and trigger the rebuttable presumption upon cohabitation with a “non-marital partner.”

\[\text{ii. Retirement}\]

Several state legislatures have recently attempted to address what should happen to alimony support when the obligor reaches retirement age. Prior to 2011, no states had statutes stating that alimony could be modified when the obligor reaches the age of retirement. Since 2011, at least eleven bills have been proposed in eight states allowing for an opportunity to modify alimony as the result of an obligor’s reaching retirement age. Only South Carolina, Massachusetts and Colorado have passed legislation which may lead to modification of alimony when the obligor reaches the age of retirement. Florida, the state with the largest portion of its population over the age of 65, was four hours away from changing its laws to allow for modification of alimony when an obligor retires at a reasonable age. Florida Governor Rick Scott vetoed the proposed bill at the last minute, because the bill’s retrospective application would tamper with many settled economic expectations of divorced Floridians. The failure to get these bills passed does not mean that the issue is not still ongoing. Attorney Thomas J.

\[\text{36 S.B. No. 1306, Regular Session (Cal. 2014).}\]
\[\text{38 COLO. REV. STAT. 14-10-122; MASS. GEN. LAWS ch. 208, § 49(f); S.C. CODE ANN. § 20-3-170.}\]
\[\text{40 Ray Rayes, Gov. Scott Vetoes Alimony Bill, but Debate Not Over, TAMPA TRIB. (May 2, 2013, 6:01 AM), http://tbo.com/gov-scott-mulls-alimony--other-bills-on-deadline-b82486384z1.}\]
\[\text{41 Id.}\]
Sasser, who is leading a special legislative subcommittee dealing with alimony for the Family Law Section of the Florida Bar, stated that he is in the process of drafting a new statute with a “fresh take on alimony.” Additionally, Florida news reports indicate that the vetoed bills will likely return to the legislature in the near future.\textsuperscript{42} Florida is not the only state where this issue is ongoing. New Jersey recently passed a bill that is awaiting approval by Governor Chris Christie, which will allow modification or termination upon prospective or actual retirement.\textsuperscript{43}

There are various approaches to what should occur when the obligor reaches retirement age. In Massachusetts, an alimony obligation automatically terminates when the obligor reaches the full age of retirement, but the law provides two exceptions.\textsuperscript{44} One exception allows the court to set a different alimony termination date for good cause shown.\textsuperscript{45} A bill which is currently before the legislature would add a provision that states that good cause may be shown when a divorce occurs within 10 years of the obligor’s full retirement age and the marriage was longer than 20 years.\textsuperscript{46} The proposed amendment would allow the court to order continued alimony if the obligor continues to work under these circumstances.\textsuperscript{47} Massachusetts’s second exception provides courts with discretion to grant an extension of existing alimony for good cause shown, so long as when granting an extension, the court enters written findings of a material change in circumstances and reasons for the extension that are supported by clear and convincing

\begin{thebibliography}{10}
\bibitem{44}MASS. GEN. LAWS ch. 208 § 49(f).
\bibitem{45}\textit{Id.} at § 49(f)(1).
\bibitem{46}S.B.701, 188th General Court (Mass. 2013).
\bibitem{47}\textit{Id.}
\end{thebibliography}
evidence. Four other states have also seen bills that allow automatic termination of alimony, with potential exceptions, when the obligor reaches retirement age or retires in good faith.

Colorado’s statute allows a rebuttable presumption that retirement was made in good faith when the obligor reaches the age of retirement. The Colorado statue, which allows parties to avoid this presumption by agreement in writing or a contrary expression in the divorce decree, has been in effect since last year. The North Carolina legislature did not pass a bill, which was recommended by the North Carolina Bar Association, that would have also provided a rebuttable presumption at retirement age. While an early version of a New Jersey bill put the burden upon the obligor to prove that retirement is reasonable and in good faith, the bill which is currently before the governor provides that there will be a rebuttable presumption that alimony shall terminate upon the obligor reaching normal retirement age.

South Carolina was the first state to enact a statute addressing what occurs when the alimony obligor reaches retirement age. Their approach does not result in a presumption or automatic termination, but instead allows for a hearing to determine whether there has been a change in circumstances for alimony.

Bills proposing modification when the obligor reaches the age of retirement have been split regarding whether to use a set retirement age or evaluate each individual obligor on a case-by-case basis. For example, the statutes in Colorado and Massachusetts and an early version of a

48 MASS. GEN. LAWS ch. 208 § 49(f)(2).
50 COLO. REV. STAT. 14-10-122.
51 Id.
54 S.C. CODE ANN. § 20-3-170.
55 Id.
2013 Maine Bill, provided that the statute would take effect when the obligor is eligible for full United States Social Security.\textsuperscript{56} A 2011 North Carolina bill, which failed to get passed, allowed for a rebuttable presumption at the age of 67.\textsuperscript{57} A 2013 Oregon bill provides that good faith retirement occurs when the obligor first becomes eligible to apply for retirement under his/her retirement plan, regardless of his/her ability to continue to work after that age.\textsuperscript{58}

Another approach to assessing the appropriate retirement age is to consider factors as opposed to a set date or age. This allows for a subjective determination of whether the retirement is reasonable, which requires evidence and testimony for the court to make the decision based upon the judge’s discretion.\textsuperscript{59} South Carolina’s statute does not provide a set date for retirement, but instead looks at the circumstances of the individual obligor’s retirement.\textsuperscript{60} South Carolina courts look at six factors:

(1) whether retirement was contemplated when alimony was awarded;

(2) the age of the supporting spouse;

(3) the health of the supporting spouse;

(4) whether the retirement is mandatory or voluntary;

(5) whether retirement would result in a decrease in the supporting spouse’s income; and

\textsuperscript{56} COLO. REV. STAT. 14-10-122; MASS. GEN. LAWS ch. 208 § 48(f); H. Paper 367, 126th 1st Reg. Sess. (Me. 2013); see also Social Security Act, 42 U.S.C. § 416(I) (defining retirement age based upon date of birth between 65-67 years old). New Jersey has a currently pending bill which provides for automatic termination upon reaching retirement age under the Social Security Act, but has a separate bill which would analyze each obligor’s retirement on a case-by-case basis using factors. See S.B. 488, 2016th Leg. (N.J. 2014); S.B. 1808, 216th Leg. (N.J. 2014).


\textsuperscript{58} H.B. 3531, 77th Leg. Assemb. (Or. 2013).

\textsuperscript{59} Fuller v. Fuller, 723 S.E.2d 235, 240 (S.C. Ct. App. 2012) (requiring the trial court to consider all relevant evidence).

\textsuperscript{60} S.C. CODE ANN. § 20-3-170(B).
(6) any other factors the court sees fit.\textsuperscript{61}

Florida’s failed bill looked at similar factors in determining the reasonable age of retirement, and also evaluated the obligor’s type of work and the normal age of retirement for that type of work.\textsuperscript{62} The bill which is currently before Governor Christie considers similar factors including the degree and duration of economic dependency of the recipient during the marriage or civil union, whether the recipient sacrificed claims and property in exchange for a more substantial and longer alimony award, sources of income of the parties and the ability of the recipient to have saved for retirement.\textsuperscript{63}

In addition to these statutes, case law exists in many states that provide guidance to judges regarding whether to modify an award of alimony based upon the obligor reaching the age of retirement. Courts have found that alimony cannot be modified when retirement is done with the primary purpose of avoiding or reducing alimony payments.\textsuperscript{64} Courts often make a subjective determination based upon a variety of factors regarding the reasonableness of retirement.\textsuperscript{65}

\textbf{B. Enforcing Parties’ Agreement}

\textsuperscript{61} \textit{Id.; Fuller}, 723 S.E.2d at 240 (“We decline to adopt a bright-line rule that, where the supporting spouse reaches a particular age, that age alone is sufficient to justify a reduction or termination of alimony.”).
\textsuperscript{62} SB 718, 115th Reg. Sess. (Fla. 2013).
\textsuperscript{63} Assemb. Comm. Substitute Assemb. 845, 971, & 1649, 216th Leg. (N.J. 2014). A separate New Jersey Bill which did not pass the legislature allowed automatic termination at the age in which an individual is eligible for retirement under the Social Security Act, regardless of the whether the obligor decides to continue working past this age. S.B. 488, 2016th Leg. (N.J. 2014).
\textsuperscript{64} Smith v. Smith, 419 A.2d 1035, 1038 (Me. 1980); Commonwealth ex rel. Burns v. Burns, 331 A.2d 768, 770 (Penn. 1974).
\textsuperscript{65} For an overview of the factors considered by courts, see Jane Massey Draper, \textit{Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree—Conventional Retirement at 65 Years of Age or Older}, 11 A.L.R.6 th125 (2006).
Some legislatures appear to be trying to make alimony modifications more predictable by requiring courts to strictly enforce the language of divorce agreements and awards when the language provides for no modification or modification under the occurrence of specific circumstances. For example, in 2013 Connecticut amended its statute to provide that when a final judgment incorporates a provision of an agreement between the parties that sets forth circumstances under which alimony will be modified, the court must enforce the provision of the agreement. The Connecticut statute already included a provision providing that a decree may preclude or limit modification. Similarly, Arkansas has a provision in its statute allowing for automatic termination of alimony upon contingencies set forth in the order awarding alimony and the legislature added a provision allowing a party to petition for modification if the recipient fails to meet the circumstances set forth in a rehabilitative plan. Ohio also recently amended its

66 There are a few states that have statutes requiring enforcement of certain terms of a divorce agreement or order. See, e.g., ARK. CODE ANN. § 9-12-312(a)(2)(F), (b)(3) (enforcing the conditions for termination in the alimony award and allowing to petition for modification for failure to meet requirements of rehabilitative plan); CONN. GEN. STAT. § 46b-86 (enforcing agreement as to circumstances for modification and allowing specification of circumstances not to be changed); COLO. REV. STAT. §14-10-122 (enforcing parties’ agreement for modification); KAN. STAT. ANN. 29-2903(b) (allowing decrees to be modifiable under prescribed circumstances); MINN. STAT. § 518.552 (allowing parties to expressly preclude or limit modification); MO. ANN. STAT. § 452.335- 1 (requiring maintenance order to state if it is modifiable); N.M. STAT. ANN. 40-4-7(B)(1)(a) (allowing parties to condition continuation of support on compliance with rehabilitative plan); OHIO REV. CODE ANN. § 3105.18 (requiring courts to enforce voluntary agreements of the parties); 23 PA. CONST. STAT. § 3105(c) (providing certain provisions not subject to modification); S.C. CODE ANN. § 20-3-130(b)(3) (terminating rehabilitative alimony on occurrence of specific event in the future); TENN. CODE ANN. § 36-5-121 (allowing parties to contract for modification).

67 See CONN. GEN. STAT. § 46b-86(b); H.B. 6688, General Assemb., Jan. Sess. (Conn. 2013). A recent Mississippi bill would

68 CONN. GEN. STAT. § 46b-86(a).
69 ARK. CODE ANN. § 9-12-312(a)(2)(F).
statute to require courts to “consider any purpose expressed in the initial order or award and enforce any voluntary agreement of the parties.”

Not all legislatures are moving towards restricting modification to the terms of the agreement. Kansas currently requires the consent of the party liable for maintenance when a modification increases or accelerates the maintenance to be paid. A recent Kansas bill would add a provision to this statute allowing the court discretion to modify the statute based upon evidence of need for the increase or acceleration. Maine recently amended its statute, which used to prohibit modification of alimony when an order expressly provided that the award could not be modified. Alimony may now be awarded “if justice so requires” on all orders awarding alimony after October 1, 2013.

C. Permanent alimony still exists, but only in extenuating circumstances

Legislatures have recently enacted laws that attempt to provide more predictable end dates for alimony obligors. Permanent alimony continues indefinitely until death, remarriage or a substantial change circumstances. Permanent alimony is awarded under special circumstances, i.e. “to allow the requesting spouse, consistent with his needs, to maintain the standard of living established by the parties during the marriage, and to ensure that . . . one

70 ARK. CODE ANN. § 9-12-312(b)(3); H.B. 1962, 89th General Assemb. (Ark. 2013).
71 OHIO REV. CODE ANN. § 3105.18 (2011);
72 KAN. STAT. ANN. 29-2903.
75 See ME. REV. STAT. tit. 19, § 951-A.
spouse is not ‘shortchanged.’”77 For several decades it was standard for judges to provide permanent alimony to a spouse who was divorced from a long-term relationship.78 Judges have continued to use their discretion in awarding permanent alimony. For example, Judges have used their discretion to award permanent alimony with rehabilitative alimony when a spouse’s ability to earn is less than the needs that will be necessary to maintain the same standard of living.79 Judges also retained jurisdiction to modify rehabilitative alimony when a substantial change in circumstances occurs under which the rehabilitative alimony was awarded.80

Legislatures have trended towards limiting awards of permanent alimony in an effort to make the economically disadvantaged spouse self-reliant by enacting statutes that give a presumption in some cases of rehabilitative alimony to allow a spouse time to find a job or for schooling or job training.81 This trend has led some commentators to prematurely ring the death knell for permanent alimony.82 Several attempts at eliminating permanent alimony have failed.83 This may indicate that even permanent alimony opponents feel that permanent alimony is necessary under some circumstances, such as when a spouse is disabled, too old to enter the

81 See, e.g., FLA. STAT. ANN. 61.08.
workforce, or unable to earn the amount required to obtain the standard of living of the marriage. 84

Legislatures have tried to restrict permanent alimony by imposing time limits on the duration for which alimony may be awarded. 85 These time limitations are usually based upon the length of the marriage. For example, Utah law provides that absent extenuating circumstances, the duration of an alimony award should not last longer than the duration of the marriage. 86 In *Kelley v. Kelley*, the Utah Court of Appeals interpreted extenuating circumstances to include when the parties are in a continuous marital relationship in common law form for a period greater than the length of the marriage. 87 The dissenting judge in that case described the typical extenuating circumstances as being one which implicates the physical health, mental health or well-being of a spouse. 88 Recent Oregon bills are more restrictive with one bill limiting alimony length to half the duration of the marriage 89 and another providing the same limitation with a maximum ten year duration. 90 Not all proposed legislation is based upon the length of the marriage. A bill currently before the Missouri Legislature would limit alimony to ten years and...
apply retrospectively to modify alimony awards currently in effect.\textsuperscript{91} If enacted, the bill would end previously awarded alimony within ten years from the date of the order or two years from a motion for modification, whichever date is later.\textsuperscript{92} In New Hampshire, a bill has been proposed that would put a limit, not on the duration of the alimony award, but instead on the time in which a spouse may request to renew permanent alimony that was awarded for a definite term.\textsuperscript{93} Instead of placing a time limit on a motion to renew from the termination date of the alimony, the proposed amendment would limit requests to renew to five years from the date of the decree of nullity or divorce.\textsuperscript{94}

Other states have moved away from permanent alimony by providing guidance for the expected duration of alimony. For example, Rhode Island’s law explains that alimony should only be provided for a “reasonable length of time to enable the recipient to become financially independent and self-sufficient.”\textsuperscript{95} Some of these guidelines function in a similar manner as the time limits of other states, but provide judges with more discretion. For example, the Massachusetts’s 2012 alimony overhaul led to specific guidelines for duration based on the length of the marriage, but allows judges to deviate from the guidelines so long as they provide written findings that deviation is necessary.\textsuperscript{96} The new law provides alimony for 50\% of the duration of the marriage if the marriage was less than 5 years, 60\% of the duration if the marriage lasted 5-10 years, 70\% of the duration of the marriage if the marriage lasted 10-15

\textsuperscript{92} Id.
\textsuperscript{94} Id.; see also N.H. REV. STAT. ANN. 458:19.
\textsuperscript{95} R.I. GEN. LAWS § 15-5-16(b)(2).
\textsuperscript{96} MASS. GEN. LAWS ch. 208 § 53(e); MASS. GEN. LAWS ch. 208 § 49(b).
years, 80% of the length of the marriage if the marriage last 15-20 years and allows alimony for an indefinite amount of time for marriages over 20 years.\textsuperscript{97}

Several states have seen movements to eliminate permanent alimony from their statutes, but many of these movements have not been successful. In Washington D.C. the statute allowing for permanent alimony has been repealed.\textsuperscript{98} A New Jersey bill substituting “permanent alimony” for “open duration alimony” is currently awaiting approval by Governor Chris Christie,\textsuperscript{99} but this change may not have any real impact on New Jersey’s approach to duration of alimony awards. Attorney Amanda S. Trigg, an officer with the New Jersey Bar Association’s Family Law Executive Committee, explains that “‘permanent alimony’ . . . was always a misnomer under [New Jersey] law, so although that looks like a significant change, it really is not.” While proponents of alimony reform in Florida have been unsuccessful in their recent attempts to eliminate permanent alimony,\textsuperscript{100} in 2010 a bill was enacted that made duration alimony applicable to long term marriages, required a higher standard of proof for spouses seeking permanent alimony and required courts to provide a finding that no other form of

\textsuperscript{97} MASS. GEN. LAWS ch. 208 § 49(b).
\textsuperscript{98} D.C. CODE § 16-912.
\textsuperscript{100} Governor Rick Scott recently vetoed a bill that would have eliminated permanent alimony. \textit{Florida Gov. Scott Vetoes Bill That Would End Permanent Alimony in State}, FOXNEWS.COM (May 2, 2013), http://www.foxnews.com/politics/2013/05/02/florida-gov-scott-vetoes-bill-that-would-end-permanent-alimony-in-state/. In 2004, a Florida lobbying group attempted to amend the state constitution to abolish alimony completely by claiming that it was involuntary servitude. Jackson, \textit{supra} note 7.
alimony is appropriate when permanent alimony is awarded. Portions of a 2013 Maine Bill, which were not enacted, sought to eliminate “general support” and only allow for “transitional support.”

D. Use of formula in some jurisdictions based on the length of marriage and income of the spouse

In recent years legislatures have proposed the use of guidelines, similar to child support guidelines, to calculate alimony awards. These guidelines primarily take into account the duration of the marriage and the income of the spouses, but do not account for intangible benefits that were received by a spouse during the marriage. Formulas were first used at a local level, confined to temporary or pendente lite alimony, and meant to serve only as a starting point for discretionary awards. In 1977, Santa Clara County in California adopted guidelines for calculating temporary alimony pending a final judgment. The Santa Clara Formula calculates alimony by subtracting 50% of the net income of the payee from 40% of the net income of the payor, not including child support payments by the payor and adjusts the outcome for tax consequences i.e. (40% of Payor income – child support) – 50% payee income. Since its adoption, the Santa Clara formula has been applied in several other counties throughout

101 H.B. 1111, 113th Reg. Sess. (Fla. 2011); Fla. Stat. Ann. 61.08(8) (requiring clear and convincing evidence that permanent alimony is appropriate for moderate duration marriages and written findings of exceptional circumstances following marriages of short duration).


103 Zashin, supra note 8.

104 Id. at 77.

105 Id. at 63.


California and local rules in other states have experimented with their own formulas for calculating alimony. Several local bar associations and family law groups, such as the Boston Bar Association and Fairfax County Bar Association, have come up with their own formulas which primarily take into account the duration of the marriage and the income of the spouses.

Other local bar associations and groups, such as the New Jersey State Bar and the Nassau County Bar Association, have opposed the implementation of formulas.

Until recently, formulas were used mostly in scattered jurisdictions on the local level to serve as a starting point for temporary/pendente lite alimony. For years, Pennsylvania was the only state which provided a statewide statute using a formula. The statute instructed courts to

109 Kisthardt, supra note 8 at 74–77 (discussing alimony support formulas that are used in certain counties in Arizona, Nevada, Oregon Kansas and Kentucky).
111 While the New Jersey State Bar opposed bills with alimony formulas for duration and amount, it recently supported the bill that was recently sent to the Governor, which includes duration limits, but enumerates factors for determining alimony. See Legislative Alert: Alimony Legislation, N.J. ST. BAR ASS’N, http://www.njsba.com/resources/gov-affairs/legislative-alert-alimony-legislation.html (last visited July 29, 2014).
113 Texas caps the amount of maintenance that court will may award in alimony at $5,00 per month or 20% of the spouse’s average monthly gross income. TEX. FAMILY CODE ANN. § 8.051.
use the formula in high income cases as preliminary analysis for calculation of pendente lite obligations.\textsuperscript{114} Quantitative guidelines for temporary alimony while divorce is pending are starting to be implicated.\textsuperscript{115} In 2010, New York adopted its own formula for temporary alimony.\textsuperscript{116} The formula is used to calculate alimony owed by a payor who has an annual income up to and including $500,000.\textsuperscript{117} When a payor has an annual income of more than $500,000, then the formula is used to calculate portion of the payor’s income up to and including $500,000, and factors are used to calculate the alimony for the portion in excess of $500,000.\textsuperscript{118}

Over the last three years, proponents of alimony reform have been pushing the adoption of alimony formulas to calculate all alimony payments, not just temporary alimony, in an effort to standardize alimony awards.\textsuperscript{119} Much of the support for these reforms has come from grassroots organizations formed by spouses who have received what they consider unfair alimony judgments.\textsuperscript{120} For example, when Massachusetts became the first state to adopt a

\begin{footnotes}
\item[114] Oklahoma provides an equation for computing the division of an active duty and reservists military members’ retirement or retainer. \textit{OKLA. STAT. tit. 43, § 134.}
\item[115] \textit{PA. R. CIV. P. 1910.16-4(a).}
\item[116] Jackson, \textit{supra} note 7.
\item[117] \textit{Id.}
\item[118] \textit{N.Y. DOM. REL. LAW § 236 (5-a).}
\item[119] O’Connor, \textit{supra} note 112.
\item[120] See, e.g., Jess Bidgood, \textit{Alimony in Massachusetts Gets Overhaul, with Limits}, \textit{N.Y. TIMES}, Sept. 27, 2011, at A11 (discussing how Steve Hitner, president of Massachusetts Alimony Reform, had to declare bankruptcy after being unable to modify his alimony payments); O’Connor, \textit{supra} note 112 (discussing how Mercedes Aponte joined the Women’s Lobby of Colorado, which helped push the alimony formula through Colorado’s legislature, when she fell into poverty after receiving an award of 18 months of spousal support following a 12 year marriage and lost her job). \end{footnotes}
formula\textsuperscript{121} for calculating the amount and duration of alimony awards outside of temporary alimony in 2012,\textsuperscript{122} many credited Steve Hitner with getting the sweeping reform legislation passed.\textsuperscript{123} Hitner’s struggled to get his alimony modified following the collapse of his business in 2001.\textsuperscript{124} This led him to become an advocate for the group Massachusetts Alimony Reform.\textsuperscript{125} Shortly thereafter, his second wife formed the 2nd Wives Club in an effort to campaign to change Massachusetts’s alimony laws,\textsuperscript{126} which had not been updated since 1975.\textsuperscript{127} Hitner ended up helping to rewrite the law as a member of the Judiciary Committee Task Force, and his organization called Massachusetts Alimony Reform spawned similar organizations across the country including Florida, New Jersey, Connecticut, and Oregon.\textsuperscript{128} Since Massachusetts’s formula was enacted, Illinois, New Jersey, and New York have seen bills proposing statutes which would award alimony based on a formula for amount and duration.\textsuperscript{129}

\textsuperscript{121} \textsc{Mass. Gen. Laws} ch. 208 § 53.
\textsuperscript{122} \textit{Id}.
\textsuperscript{123} Elizabeth Benedict, \textit{The New Alimony Laws in MA—And Maybe In FL, NJ, CT, And OR?}, Huffington Post (Mar. 7, 2012, 12:50 pm), http://www.huffingtonpost.com/elizabeth-benedict/the-new-alimony-laws-in-m_b_1313015.html. (“It is widely understood among lawmakers and lawyers that without Steve Hitner’s tenacity and the political clout of Mass Alimony Reform, reform would not have happened.”).
\textsuperscript{124} \textit{Id}.
\textsuperscript{125} \textit{Id}.
\textsuperscript{126} Levitz, \textit{supra} note 5.
\textsuperscript{127} Benedict, \textit{supra} note 123.
\textsuperscript{128} \textit{Id}.
\textsuperscript{129} While there has not been much media coverage surrounding Illinois Bill, according to WESTLAW, Illinois’s Bill had passed both Houses and was awaiting approval by the Governor at the time this Article was written. S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013). New Jersey’s Bill has gone to Governor Christie for signature, but a compromise resulted in excluding a formula for determining the amount and duration of alimony. \textit{See} S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014); David Perry Davis, \textit{N.J. Alimony Bill Falls Far Short of Needed Reforms}, \textsc{Press Atlantic City} (July 11, 2014, 12:01 AM), http://www.pressofatlanticcity.com/opinion/commentary/david-perry-davis-n-j-alimony-bill-falls-far-short/article_932478cc-5744-5d4f-a88f-e99e3f4cd475.html; Andrew Seidman, \textit{N.J. Lawmakers Pass Bill to Limit Alimony Payments}, \textsc{Philly.com} (July 2, 2014, http://articles.philly.com/2014-07-02/news/51005775_1_alimony-payments-alimony-reform-
Just this year, Colorado overhauled its calculation of alimony awards to implement its own formula.\(^{130}\)

There are some similarities between the enacted statutes and the proposed bills. All base the amount of alimony on the party’s income and the duration on the length of the marriage. With the exception of New York, all of the enacted and proposed statewide formulas, provide Judges with discretion to deviate from the guidelines upon specific findings for deviation such as advanced age, illness, or unusual health circumstances, tax considerations, whether the payor is providing health insurance or life insurance, sources and amounts of unearned income, significant premarital cohabitation that included economic partnership or marital separation, physical or mental abuse by payor, deficiency of party’s property, maintenance or employment opportunity.\(^{131}\)

The formulas all provide Judges with discretion to deviate from the guidelines for reasons not listed within the statute, providing judges with discretion to take into account special circumstances which have traditionally been large non-economic factors in alimony awards such as significant contribution to the marriage.\(^{132}\)

New York’s proposed bill requires judges to

\(^{130}\) COLO. REV. STAT. 14-10-114.


\(^{132}\) COLO. REV. STAT. 14-10-114(3)(b)(II)(A); MASS. GEN. LAWS ch. 208 § 53(e)(9).
explain their reasoning when awarding alimony for the portion of income of a payor above $500,000.\textsuperscript{133}

The Massachusetts statute and New Jersey’s proposed bill use the same formula for determining duration and amount of alimony.\textsuperscript{134} Both limit the amount of alimony to the need of the recipient or 30-35\% of the difference between the parties’ gross incomes.\textsuperscript{135} Similarly, a recent bill in Oregon proposed limiting the amount that could be awarded for alimony to 25\% of the difference between the gross incomes of the spouses.\textsuperscript{136} They also shared the same sliding scale for duration of the alimony.\textsuperscript{137}

Colorado’s statute and Illinois’s proposed statute both determine the amount of alimony by subtracting a percentage of the recipient’s gross income from a percentage of the payor’s gross income, but the percentages vary.\textsuperscript{138} Colorado’s statute is more favorable than Illinois’s statute towards low income recipients when the payor has a high income because it awards a greater percentage of the payor’s income. For example, under Colorado’s statute, when an unemployed recipient who is seeking alimony from a payor that makes $100,000, that recipient

\textsuperscript{134} MASS. GEN. LAWS ch. 208 § 53; S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).
\textsuperscript{136} H.B. 2559, 77th Leg. Assemb., (Or. 2013).
\textsuperscript{137} Both MASS. GEN. LAWS ch. 208 § 53 and New Jersey’s failed bill allowed recipient spouses to receive alimony for 50\% of the duration of the marriage if the marriage lasted from 0–5 years, 60\% if the marriage lasted more than 5 years, but less than 10 years, 70\% if the marriage lasted more than 10 years, but less than 15 years, 80\% if the marriage lasted more than 15 years, but less than 20 years and an indefinite duration if the marriage lasted more than 20 years. MASS. GEN. LAWS ch. 208 § 53; S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).
\textsuperscript{138} COLO. REV. STAT. 14-10-114 (Awarding 40\% of the higher earner’s income minus 50\% of the lower earner’s income); S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013) (Awarding 40\% of the payor’s gross income minus 50\% of the payee’s gross income). Illinois proposed statute also includes a provision that the amount of alimony combined with the recipients gross income may not result in an amount greater than 40\% of the combined gross income of both parties. S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013).
would receive $40,000 assuming that the judge does not deviate from the formulas. Under Illinois’s proposed statute, a payee in the same situation as the Colorado recipient would receive $30,000. This hypothetical does not consider how the income is computed under each statute or the judges ability to exercise discretion in special circumstances. Colorado’s statute becomes less favorable for recipients when the recipient has a high gross income. For example, under Colorado’s statute when a recipient who makes $80,000 is seeking alimony from a payor that makes $100,000, that recipient would receive nothing in alimony if the judge did not use discretion to deviate from the statute. Under Illinois’s proposed statute, a payee in the same situation as the Colorado recipient would receive $14,000 if the judge did not deviate from the statute. Additionally, Colorado’s statute does not apply to parties with a combined annual gross income over $240,000.139 The statute provides that a fair and equitable alimony award should be given for parties with income over $240,000 based upon factors including the financial resources of each party, lifestyle during the marriage, the distribution of marital property, whether one party has historically earned higher or lower income, the duration of the marriage, age and health of the parties, significant economic or noneconomic contribution to the marriage or to educational or occupational advancement of the party and any other factor.140 Similarly, Illinois’s statute is applicable to parties with annual gross income less than $250,000.141 For parties with income over $250,000, the proposed statute provides that alimony should be awarded after consideration of all factors including, party income, the needs of each party, present and future earning capacity and any impairment due to devoting time to domestic duties or delayed education, training employment or career opportunities, standard of living established during the

139 COLO. REV. STAT. §14-10-114(3)(b).
140 Id.
marriage, duration of the marriage, age and physical and emotional condition of the parties, contributions and services to the career or career potential of the other spouse, and agreements by the parties.

There have been mixed reactions to the new and proposed statutes that have come out of this trend. Proponents of the formulas feel that without the formulas being imposed as a requirement, judges will ignore the guidelines and award alimony based upon their own discretion. 142 Others are concerned that judges will have the opposite reaction. These individuals worry that the guidelines will become the default for both judges and attorneys, and all divorces, regardless of the circumstances, will be treated the same. 143 Opponents of the formulas argue that unlike child support, which hinges solely on the income of parents, alimony awards need to be more discretionary to take into account the non-economic factors as well. 144 For example, unless judges act within their discretion to deviate from the formulas, a formula might not properly place a dollar amount on a homemaker who stayed at home giving up her dream of becoming an engineer. Many family law and mediation attorneys in the states which have enacted formulas have embraced the opportunity to improve their websites by implementing “alimony calculators.” Some believe that people will not be able to determine the value or effectiveness of these new formulas until judges have time to interpret and apply the laws.

The biggest question regarding these new guidelines the amount of discretion judges will exercise in applying these formulas. Fern Folin, a Massachusetts attorney who served on the

142 English, supra note 19.
143 See Jackson, supra note 7.
144 Brenda L. Storey, Surveying the Alimony Landscape: Origin, Evolution and Extinction, 25 FAM. ADVOC. 10, 12 (2003). For example, some have critiqued the formulas for treating spouses who stayed at home with children and spouses who never had children the same way. Gialanella, supra note 112.
2012 Alimony Reform Task Force which wrote the Massachusetts Alimony Reform Act, shares the belief of many others that the only way that the new statute will work fairly is if judges exercise the discretion given to them to deviate from the presumptions in appropriate cases. The first state Supreme Court to analyze judge discretion under one of the new alimony guidelines recently held that “judges have broad discretion when awarding alimony under the [new] statute.”\textsuperscript{145} In Zaleski v. Zaleski, the Supreme Judicial Court of Massachusetts noted that the legislative history of the Alimony Reform Act “clearly show[ed] that the broad discretion that judges historically have had in making awards of alimony was not affected by the Alimony Reform Act of 2011.”\textsuperscript{146}

\textit{E. Legislatures addressing retroactively applying modification to a date prior to filing of petition for modification}

Several legislatures have recently addressed the issue of retroactive modification of alimony awards. Under the Uniform Marriage and Divorce Act, alimony and child support decrees may be modified only prospectively from the time a motion to modify is filed.\textsuperscript{147} Federal regulations also provide that child support orders should be modified only from the date that notice of a petition for modification is given.\textsuperscript{148} Generally, Courts do not modify child support awards retrospectively to a date prior to the filing of an application for modification.\textsuperscript{149} Similarly, Courts have often made alimony modifications allowable from the time a motion for alimony modification is filed, so that the party who will be affected by the modification has

\begin{footnotes}
\footnote{146}{Id. at *3 n. 13.}
\footnote{147}{\textsc{Unif. Marriage & Divorce Act} § 316(a).}
\footnote{148}{45 C.F.R. § 303.106.}
\footnote{149}{\textit{See}, \textit{e.g.}, Theisen v. Theisen, 708 N.W.2d 847, 855 (Neb. Ct. App. 2006).}
\end{footnotes}
notice of the potential modification.\textsuperscript{150} Some courts have held that past-due alimony payments under the divorce decree constitute vested property rights, which are not subject to modification.\textsuperscript{151}

Under certain circumstances, courts may allow for retroactive modification of alimony awards, often under theories of restitution,\textsuperscript{152} to a date prior to the motion for modification. A court may allow an alimony award to be modified retroactively when there appears to be a fraud committed such as when a spouse attempts to hide her remarriage to avoid modification.\textsuperscript{153} Some courts have allowed retroactive modification when a divorce agreement includes a provision allowing for retroactive modification or automatic modification upon the occurrence of some event, because the party has no reason to expect the agreement not to be modified when that event occurs.\textsuperscript{154} However, a court may decide not to retroactively modify an alimony award if the divorce decree provides a provision requiring the court to modify alimony, such as a provision stating that “the party will receive alimony until further order of the court.”\textsuperscript{155} Some courts allow retroactive modification when a statute provides for automatic modification.\textsuperscript{156}

\textsuperscript{150} See, e.g., Blaufuss v. Ball, 305 P.3d 281, n. 8 (Alaska 2013) (“retroactive modification is not allowed in the majority of states.”)(citing Wirtz v. Wirtz, 2010 Alas. Lexis 32, at 14 n. 48 (Alaska, Mar. 24, 2010)).


\textsuperscript{152} See RESTATE. RESTITUTION § 74 (“[A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution of the judgment to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final”)

\textsuperscript{153} See, e.g., Jacobson v. Jacobson, 502 N.W.2d 869, 874 (Wis. 1993).

\textsuperscript{154} See, e.g., MICH. COMP. LAWS § 552.603(5); Dodd v. Dodd, 499 P.2d 518, 523 (Kan. 1972); see also Langson v. Langson, 764 A.2d 378, 388 (Md. Ct. Spec. App.) (noting that parties could have included provisions in the separation agreement, but failed to do so).


\textsuperscript{156} See, e.g., Steffens v. Peterson, 503 N.W.2d 254, 259 (S.D. 1993) (“Alimony payments which fell due prior to modification were vested, since South Dakota has not held that remarriage automatically terminates alimony”).
Legislatures have increasingly been enacting legislature likely to have an effect on retroactive modification. The bill that was recently passed by the New Jersey Legislature provides that when a party files for a modification of their alimony award based upon changed circumstances due to unemployment, “[t]he court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction in income.”\textsuperscript{157} If the Governor signs this bill, there will be a different standard for when an alimony modification can be effected and when child support modification can be effected, because New Jersey law provides that “[a] change in circumstances, such as a job loss, could . . . not be used as a basis to modify retroactively arrearages which accrued under a child support order.”\textsuperscript{158} Courts are also effecting retroactive modification by enacting statutes allowing for automatic modification.\textsuperscript{159} Allowing automatic modification in these circumstances would often lead to different standards being applied when assessing the time for modification of alimony awards and child support. Several states have laws, including the new Colorado law, that resolved these differences by stating that alimony may not be modified prior to the date of filing or service of a party.\textsuperscript{160} The Colorado legislature has also enacted legislation to ensure that a recipient of alimony for a set duration may not retroactively reinstate alimony following the time when the alimony has ceased.\textsuperscript{161}

\textsuperscript{157} See Assemb. Comm. Substitute Assemb. 845, 971 & 1649, 216th Leg. (N.J. 2014). Rhode Island also provides courts with discretion to apply an alimony modification retroactively to the date of a substantial change in circumstances. R.I. GEN. LAWS § 15-5-16(b).


\textsuperscript{159} See ARK. CODE ANN. § 9-12-312(2)(d); MASS. GEN. LAWS ch. 208, § 49(a).

\textsuperscript{160} See, COLO. REV. STAT. 14-10-122(2) (Providing that neither a child support order nor maintenance order may be modified prior to the date of filing); CONN. GEN. STAT. § 46b-86(a); D.C. CODE § 16-913(c); MICH. COMP. LAWS § 552.603(2); MINN. STAT. § 518.518A.39; VA. CODE. ANN. § 20-112; W. VA. CODE § 48-5-707.

\textsuperscript{161} COLO. REV. STAT. 14-10-122(2)(a)(II); see also UTAH CODE ANN. § 30-3-5(j).
Similarly, a recent New Hampshire bill proposed changing the time from when a motion for renewal of alimony could be filed to five years from the date of the divorce decree.\textsuperscript{162}

\textbf{F. Upward modification of alimony upon termination of child support}

While it is difficult to predict with certainty the next emerging trend in legislatures, often trends appear to get started when a state legislature steals a new idea that has seen success in a neighboring state. Peter M. Walzer, who is a past president of the Southern California Chapter of the American Academy of Matrimonial Lawyers and former chair of the executive committee of the State Bar Family Law Section, explained that a recent change in California law has led to increased support for the recipient spouse when the recipient spouse seeks an upward modification of alimony when child support terminates. In 2011, California changed its spousal support law to provide that “termination of child support . . . constitutes a change of circumstances that may be the basis for a request by either party for modification of spousal support.”\textsuperscript{163} A party may not seek modification if the jurisdiction of the court to modify spousal support has been terminated or the judgment/parties’ agreement provides that the order is nonmodifiable or specifically addresses termination of child support.\textsuperscript{164} The statute requires a party seeking modification to file a motion to modify alimony within six months from the date

\textsuperscript{162} See H.B. 604, 163d Sess. Gen. Court, 1st year (N.H. 2013). The current New Hampshire Law provides that the Court may consider a petition to extend permanent alimony the petition is made within five years of the termination date of the permanent alimony order. \textsc{N.H. Rev. Stat. Ann.} 458:19(VII).

\textsuperscript{163} \textsc{Cal. Family Code} § 4326. The language of the statute initially provided that it would only be in effect temporarily, however, the legislature passed a bill in June of this year making the statute permanent. \textit{See Assemb. B. No. 414, Reg. Sess.} (Cal. 2013).

\textsuperscript{164} \textsc{Cal. Family Code} § 4326(d).
the child support order terminates.\textsuperscript{165} This new approach is unique, because courts in other jurisdictions would likely consider the termination of child support to be a foreseeable event, which is not sufficient to constitute modification.\textsuperscript{166} As previously noted, if this new idea catches on, it would not be the first time that other jurisdictions duplicate an innovative change in California alimony law.\textsuperscript{167}

\textbf{III. Practical Tips in Drafting the Settlement Agreement.}

\textbf{A. IF representing the economically disadvantaged spouse (Wife), consider incorporating this language in the Agreement-}

1. \textbf{Make property distribution, child support and spousal support interrelated.}

The parties understand and agree that the provisions of this Agreement relating to the equitable distribution of the marital estate are accepted by each party as a final settlement of the division of the assets and liabilities. Both parties represent that the assets set forth in this Agreement are all of the assets subject to the equitable distribution and that there are no such other assets in the name of either party or held by any other person for the benefit of either party.

As also set forth in the child support and alimony provisions above, the parties acknowledge that the equitable distribution, and the amount of child support and alimony provisions of this Agreement are directly related to each other and that Wife only agreed to the limited duration alimony payments herein provided in connection with and in reliance upon the equitable distribution provisions herein provided and child support provided. Wife has relied upon the equitable distribution portion of this Agreement in entering into the limited duration

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\textsuperscript{165} \textit{CAL. FAMILY CODE § 4326(b).} \\
\textsuperscript{166} \textit{See Streit v. Streit, 237 A.2d 662, 663 (N.Y. App. Div. 1997) (refusing to modify alimony because it was foreseeable that parties’ children would become emancipated). But See N.Y. DOM. REL. LAW § 248(b)(1).} \\
\textsuperscript{167} \textit{See supra note 106.}
\end{flushleft}
portion of this Agreement. Husband has relied upon Wife’s waiver of permanent alimony in entering into the equitable distribution portion of this Agreement. Should the child support be reduced or terminated, then Wife may petition the court to increase the amount of alimony to enable the Wife to enjoy the standard of living as contemplated by statute and case law.

2. **List the factors for the award of alimony and provide the court, as a baseline, the facts that would have been proven, if a modification of alimony petition is filed in the future.**

Husband shall pay to Wife as alimony *in futuro* the sum of $____________________ to be paid upon the entry of the Final Decree of Divorce. Husband shall pay the first check to Wife and continue thereafter until the Wage Assignment is implemented.

The alimony shall terminate upon the earlier of Wife’s death or remarriage, but not upon Husband’s death or remarriage. Therefore, Husband shall insure on his life with Wife as owner and irrevocable beneficiary, life insurance policies in the amount of at least $____ million dollars.

The parties agree that Husband will pay his first alimony payment no later than ________________, and will pay the monthly alimony amount as follows: ½ of the monthly amount on the first (1st) day of each month and ½ of the monthly amount on the fifteenth (15th) day of each month, until Wife’s death or remarriage, whichever occurs first.

The parties agree that Wife is not a candidate for rehabilitation and that it is unlikely that she would be able to achieve a standard of living by her own efforts reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the Husband. Said alimony payments are necessary for wife’s
support and maintenance and based upon the factors of T.C.A. § 36-5-121(i)(1-12). Had this case gone to court, the husband agrees that the proof would be

1. Husband has a high earning capacity, rising to the ranks of Commander in the __________ and now as Test Captain Pilot for _________________ earning in excess of $______________ per year, and having benefits of retirement plans, profit sharing, stocks, health savings accounts, life insurance policies, wellness programs, and other personal benefits at his employer. Wife is without employment as she has been a homemaker throughout their lives, raising their two children and providing a nurturing environment for husband and children;

2. While both parties have a college degree, Wife has not worked in the workforce for over ___ years. Even with educational training, Wife will not achieve an earning capacity that would match or be that of her husband’s after the divorce. Husband has ____ years of a military career and continues to be employed at ________________, having the ability to earn in excess of $______________ per year.

3. The duration of the marriage is ___ years;

4. Wife is ____ years of age and has seen psychologists to assist her with the breakup of the long term marriage. Husband is ____ years of age and is in excellent condition.

5. Wife has medical issues and is taking medication for high blood pressure and high cholesterol and is being monitored. Husband’s physical condition is excellent.
(6) Due to the lack of liquid assets, Wife is in need of spousal support just to pay her living expenses.

(7) The parties have had a high standard of living established during the marriage, and Husband continues to have a high standard of living going to trips, staying at nice hotels, eating at high end restaurants;

(8) Wife has made both tangible and intangible contributions to the marriage as initially a wage earner and then when the children were born, as mother and homemaker, which increased Husband’s earning power;

(9) Husband is at fault for the demise of the marriage and has excessively dissipated the marital estate for the last two years;

(10) This alimony \textit{in futuro} would be taxable to Wife and deductible by Husband.

3. \textbf{Secure the alimony and any other debts the Husband is responsible for paying, so that they are not discharged in bankruptcy.}

The parties agree that the alimony \textit{in futuro} is non-dischargeable in bankruptcy as it is a domestic support obligation and the alimony is necessary for the support and maintenance of Wife. In the event the Bankruptcy Court discharges the alimony obligation from Husband to Wife, the parties agree that such a decision by the Bankruptcy Court adversely affects the Wife and as such, Wife shall be entitled to apply to any court of competent jurisdiction for a modification of the support provisions of this Agreement, regardless of the waivers and/or limitations stated in this Agreement. Thus, this Court shall reserve jurisdiction to award alimony in the future to the Wife, as needed.
With respect to each party's responsibility for payment of certain debts and liabilities, and Husband shall hold Wife harmless for the payment thereof, and Husband understands and agrees that his obligation is a nondischargeable support and/or domestic support obligation pursuant to 11 USC 523 (a) (5) and (15) under the Bankruptcy Code, this obligation being part of the final financial agreement. These provisions for alimony and support necessarily include the receipt of those assets and payments of debts. Failure to receive said assets and benefit from said debt payments will gravely impact upon wife’s standard of living and the alimony and support provisions would have been significantly higher but for wife’s reliance on said provisions. Husband stipulates for any subsequent proceeding that said provisions are nondeductible, nondischargeable, nonmodifiable alimony and support necessary for the maintenance of wife.

4. **Make exceptions to prohibit under certain circumstances to modify alimony, if the alimony awarded is a modifiable type.**

   Alimony *in futuro* is modifiable upon request of either party pursuant to Tenn. Code Ann. 36-5-121 (f)(2). However, the parties agree that these facts will not justify a material and substantial change in circumstances to support a petition to modify the amount of alimony: 1) sale of the home, 2) a part time job of wife, 3) the remarriage of husband, or 4) wife’s mother or adult children residing with wife.

5. **Provide Stipulations of Future events that will justify an increase in alimony.**

   The parties agree that said alimony shall be increased in the future, when 1) Husband’s income reaches $____________ per year, 2) child support is reduced or eliminated due to the child reaching majority, etc. (these are not limiting facts).

6. **Reserve alimony award if facts warrant it.**
In light of CITE CASE and STATUTE, an award of alimony *in futuro* is warranted and because of these reasons ___CITE REASONS____, alimony *in futuro* can not be awarded at this time.

The parties agree that Husband lost his job through no fault of his own, and is without employment. Wife has needs and is a candidate for alimony *in futuro*. The parties agree that Wife should be awarded alimony *in futuro* of $100.00 per month until Husband obtains employment and then the alimony *in futuro* will be increased to the level of Husband’s ability to pay.

7. **Secure alimony with life insurance and make the recipient of alimony, the owner of the policy.**

   Alimony *in futuro* shall terminate upon Husband’s death and Wife shall receive all of the proceeds from the life insurance policy. Husband shall obtain a life insurance on himself, naming Wife as owner and irrevocable sole and primary beneficiary of said policy in the amount of no less than _____ Million Dollars to provide to Wife. Husband shall immediately transfer ownership of said policy to Wife and shall furnish her proof of compliance of this section within thirty (30) days from the date of the request. Should Husband fail to make payments on said life insurance, Wife shall have an option to continue making payments and to assess the cost of said premium against Husband. Husband shall not have the right to borrow against the life insurance without written permission of Wife.

   Upon Husband’s death, the life insurance proceeds from Husband’s policy, shall not be taxable to Wife, as the parties agree that these proceeds are to cover Wife’s support and maintenance until her death and the parties agreed that the alimony would not be taxable to her nor deductible by him.
Should there be any obligation, alimony, child support, life insurance or other outstanding debt upon the death of Husband, which obligation is not satisfied by the life insurance policy or by Will or Trust, then it will be a claim against the estate of Husband for monies or things due or to become due in the future under this Agreement by the persons entitled to receive those monies or things.

8. **Ensure that Husband has disability insurance policy to cover the monthly alimony in case he becomes disabled.**

Husband shall cause to be maintained and shall obtain additional disability insurance on himself in the amount of $____________ Dollars per month as nondeductible, nondischargeable alimony necessary for the support and maintenance of Wife. Wife shall have a lien on said proceeds and be named as a beneficiary outlined herein and Husband agrees that said proceeds will not be less than Husband’s monthly obligations to Wife. Husband agrees that said proceeds shall be applied first to the obligation to pay alimony and paid to Wife directly by the insurer in the amount of alimony obligations due to Wife.

Upon written request of said Wife or her agent, Husband shall furnish, without charge, proof of compliance with this paragraph within thirty (30) days from the date of such request. In addition, said Wife or her agent is hereby authorized to obtain said documentation of compliance with this paragraph directly from employer or any insurance carrier insuring Husband.

Should Husband fail to make payments on said insurance, Wife has the option to continue making payments on said insurance and to assess the cost of said premiums against Husband. Husband agrees that a judgment shall be awarded against him for the cost of said premiums paid by Wife. Wife shall be the owner of said policy.
A copy of the policies covered or involved in these provisions will be delivered to Wife within thirty (30) days of the signing of this Agreement. Any failure to provide insurance as outlined above shall also be a claim against the estate of Husband.

9. **Equalize the social security payments:**

   Beginning when Husband elects to receive Social Security payments, Husband agrees and shall pay to Wife as alimony *in solido* the sum of $____ per month on the first day of each month and continuing thereafter on the first day of each month, until his death. Said money represents an equalization of the parties expected Social Security Benefits so that they each receive the same amount of money from the Social Security Administration at their expected retirement age of Sixty-six (66) years and six (6) months.

   Husband agrees that the sum of $ ______________ per month paid to Wife is alimony *in solido* and necessary for the support and maintenance of Wife and is a domestic support obligation. The parties agree, understand, and intend this alimony *in solido* is **nonmodifiable** and is **nondeductible** by the payor and excludable from income of the payee.

10. **Provide protection for recipient if arrearages exist and Wife lives with a third party.**

   In the event that Wife lives with a third party, the parties agree that the alimony will be suspended until that third party vacates the home. Upon that person’s departure, the alimony award will be reinstated at the same level and duration of the initial award.

   In the event that Husband is in arrears at the time that Wife remarries, then alimony shall continue at the same level until the arrearages are paid in full before the alimony is terminated.

**B. Practical Tips in Drafting the Settlement Agreement IF representing the payor spouse (Husband)**

1. **Outline the Rehabilitative Plan in the settlement agreement.**
The parties acknowledge that Wife has a college degree in ______________ and is rehabilitated, however Husband agrees to pay for Wife to further her education and attend and complete law school within the next five (5) years. Wife agrees that she shall only receive the law school tuition costs at the University of ______________ beginning Fall of _____ and continuing thereafter until she graduates but no longer than four and one-half years from August, ___. Husband agrees to pay this alimony and pay up to ____________________ per year for books until she graduates or December, ____, whichever occurs first. Said payments shall be deductible by Husband and includible as income to Wife. Said payments shall terminate upon Wife’s death. Said payments shall not be modified nor extended if Wife has any illness or for any other reason.

Wife shall provide to Husband her grades and the invoice from the school before Husband is obligated to pay Wife for the tuition costs. Should Wife not receive a B or better grade point average, then Husband does not have any financial responsibility to pay for Wife’s law school tuition or books.

2. **Provide for the tax deduction for the payor.**

The parties agree that said alimony *in futuro* shall be deductible from income for the payor and the alimony shall be includible as income for Wife pursuant to IRS Code 71 (b). If the IRS or any other taxing authority finds that the alimony payments are not deductible by the payor, then the parties agree to modify the alimony amount so that the net economic effect to the payor will be as though the alimony payments were fully deductible to the payor.

3. **Provide for modifiability of alimony awards.**

The monthly payment of $________________________ shall begin on ___________ and continue thereafter on the first day of each month through
___________, when Husband turns 65 years of age. The parties agree that upon a court order, the alimony may be reduced to an alimony in futuro amount that is equivalent to ¼ of Huband’s gross income from all sources not to exceed Two Hundred Dollars ($200,000.00) per year, until Wife’s death or remarriage or Husband turning the age of 65 years. Gross income is defined as income, earned or unearned from all sources as defined by the Tennessee Child support Guidelines.

The parties agree that one of these conditions would be a material and substantial change of circumstances that may cause a reduction in alimony in futuro is:

a. Husband begin receiving social security income or turns 65 years of age and retiring from the practice of medicine, whichever occurs first;

b. Husband suffering from a massive heart attack and his income being significantly impacted, though Husband agrees to carry disability insurance as outlined above;

c. Husband changing employment that results in a sale of his practice and working for a professional group outside of ____________.

In such an event as outlined above, the parties agree that Husband may file a Petition to modify alimony and show that one of these conditions exist and the court would then consider all of the factors of TCA 36-5-121 to determine whether to modify the amount of alimony. If the court deems it appropriate to modify the alimony, the parties have already agreed that the amount Wife would receive is 25% of Husband’s gross income from all sources but no less than $_______________ per month or $_______________ per year in alimony in futuro. Gross income would be defined as income is defined under the Tennessee Child Support Guidelines.

4. Define when alimony payments terminate-what “remarriage” or “living together” means.
Said alimony payments shall terminate upon the remarriage of wife. Wife shall immediately upon remarriage notify Husband. Failure of Wife to timely give notice of remarriage shall allow the Husband (obligor) to recover all amounts paid as alimony to Wife after the date of marriage. Remarriage includes both the ceremonial marriage and cohabitation with an unrelated person for a period of more than thirty (30) days. Subsequent divorce, annulment, or separation shall be immaterial in this determination, as once the court terminates alimony, the parties agree the court shall lose subject matter jurisdiction to award any further alimony payments to Wife.

Wife shall immediately notify Husband if she is cohabitating with a third party for a period of more than thirty (30) days. Failure of Wife to timely give notice of cohabitation shall allow the Husband (obligor) to recover all amounts paid as alimony to Wife after the date of cohabitation and all of his reasonable and necessary litigation costs and attorney fees in having to prove that Wife is cohabitating with a third person. Subsequent removal of the third party from the home of the recipient or separation of the parties shall be immaterial in this determination that alimony terminates.

5. **Provide for an award of attorney fees and suit expenses if a party seeks to modify alimony which is deemed not to be modified, or seeks to obtain alimony when the party waived it in an agreement.**

The parties waive alimony, including but not limited to alimony *in futuro*, alimony *in solido*, rehabilitative alimony and transitional alimony. If either party files a petition for alimony, then the other party shall be awarded all of their reasonable and necessary attorney fees and suit expenses for having to defend the lawsuit.

OR
The parties agree that the alimony is not modifiable. If either party files a petition to modify alimony, then the other party shall be awarded all of their reasonable and necessary attorney fees and suit expenses for having to defend the lawsuit.

6. **Provide for an ending date of alimony or at least a review date by the courts.**

The parties agree that the alimony shall terminate upon the Husband’s reaching the age of full retirement as defined by his then current employer. If Husband receives a severance package, said money is not to be used for alimony purposes, but will be Husband’s income to live on in the future.

7. **Ensure that the recipient knew and was competent to enter into the Agreement.**

Neither party at the time of this Agreement is under the influence of any intoxicant or drug, legal or illegal, nor are either party experiencing any mental problems or conditions that would affect his/her judgment other than the stress normally to be expected in a divorce. Wife has supplied to Husband a letter from her psychologist that stated that Wife is mentally competent to enter into this Agreement. Both parties warrant and acknowledge that they are competent to enter into a legally binding contract, and they know the nature, extent, and character of their estate and know the consequences of their actions.

8. **Deduct mortgage payments and/or insurance from alimony payments, if not paid by recipient.**

Wife shall pay the mortgage payments and the home owners’ insurance premiums as they become due until the home sells or is refinanced removing Husband’s name from the mortgage. In the event that Wife fails to timely pay the mortgage and insurance premiums, Husband may pay the creditors and then deduct that amount from the monthly alimony payments he pays to Wife.
9. **Seek an injunction from the court, if statute does not allow retroactive modification from date of the event.**

The parties agree that if any of these future events would occur, the parties agree that the court may retroactively award alimony to the date of the occurrence of the event rather than the date of its ruling on modification. The parties further agree that the payor may seek injunctive relief from the court and pay the alimony obligations into the court clerk’s office, pending the court’s determination on the petition to modify alimony.
ALIMONY MODIFICATION: A JUDGE’S PERSPECTIVE

“The falsest presumption in the law is that a judge is supposed to know it.”

Hon. Robert J. Staker
U.S. District Court, S.D.W.V.

The Honorable Mike Kelly, Judge
Eleventh Family Court Circuit
Charleston, West Virginia
I. ALIMONY MODIFICATION CHECKLIST

A. THRESHOLD ISSUE

_____ Is alimony modifiable?

• Final Divorce Order

• Separation Agreement

• In West Virginia, an Order can be modified to add an alimony award even if previously denied or not addressed by the parties or the Court.

• Was the order or agreement fair and reasonable and not obtained by fraud, duress or other unconscionable conduct?

• Is the waiver of modification in the separation agreement “explicit, well expressed, clear, plain and unambiguous”?

• Has there been a catastrophe that would allow modification “as the circumstances of the parties may require” regardless of the agreement?

B. SUBSTANTIAL CHANGE OF CIRCUMSTANCES

Has there been a substantial change of circumstances that was not reasonably expected at the time of the decree?

_____ Loss of Job

_____ Retirement
C. OTHER FACTORS EFFECTING MODIFICATION

____ Prospective Only
____ Contempt

II. DE FACTO MARRIAGE: WEST VIRGINIA’S APPROACH

1. W.Va. Code §48-5-707 allows for a reduction or termination of spousal support because of a “de facto” marriage.

2. The statute directs the trial court to “give consideration, without limitation, to circumstances such as the following in determining the relationship of an ex-spouse to another person”:

   (a) The extent to which the ex-spouse and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as “my husband” or “my wife”, or otherwise conducting themselves in a manner that evidences a stable marriage-like relationship;

   (b) The period of time that the ex-spouse has resided with another person not related by consanguinity or affinity in a permanent place of abode;
(c) The duration and circumstances under which the ex-spouse has maintained a continuing conjugal relationship with the other person;

(d) The extent to which the ex-spouse and the other person have pooled their assets or income or otherwise exhibited financial interdependence;

(e) The extent to which the ex-spouse and the other person has supported the other, in whole or in part;

(f) The extent to which the ex-spouse or the other person has performed valuable services for the other;

(g) The extent to which the ex-spouse or the other person has performed valuable services for the other’s company or employer;

(h) Whether the ex-spouse and the other person have worked together to create or enhance anything of value;

(i) Whether the ex-spouse an the other person have jointly contributed to the purchase of any real or personal property;

(j) Evidence in support of a claim that the ex-spouse and the other person have an express agreement regarding property sharing or support; or

(k) Evidence in support of a claim that the ex-spouse and the other person have an implied agreement regarding property sharing or support.

3. The burden is on the payor to prove by a preponderance of the evidence that a de facto marriage exists.

4. If the payor has failed to meet to meet the burden of proof, the court may award reasonable attorney’s fees to the prevailing payee. There is no provision allowing for an award of fees to the payor.

5. If the payor prevails, the reduction or termination is retroactive to the date of service unless it would cause an undue hardship on the payee.

6. The statute does not apply to rehabilitative alimony or “spousal support in gross” (either a lump sum or periodic payments of a definite amount over a specific period of time).
7. In Lucas v. Lucas, 215 W.Va. 1, 592 S.E. 2d 646 (2003), the West Virginia Supreme Court held that W.Va. Code §48-5-707 provides courts with the “specific discretion to reduce or terminate spousal support where certain conditions indicating a de facto marriage are found to exist.” 592 S.E. 2d at 652. (Emphasis added).

8. Neither reduction nor termination of spousal support is mandatory if a de facto marriage is shown. Rather §48-5-707 “is essentially a unique and particularized form of a modification statute, generally premised upon the change in circumstances occasioned by the de facto marriage.” Id.

9. Where modification of spousal support is requested under §48-5-707, in addition to those factors set forth in that statute, the Courts must also be guided by the twenty factors to be used in determining spousal support in the original instance as set forth in §48-6-301.

10. The payor must show the existence of a de facto marriage and then prove that, comparing the parties’ former and current financial status and needs and the effects of any assistance provided as a consequence of the de facto marriage, a reduction or termination is of spousal support is warranted. It is possible that cohabitation may not alter the financial needs of the recipient.

11. Given the “unstable nature of a de facto marriage,” it would “rarely be an abuse of discretion for a court to preserve its future options by granting a nominal alimony award.” 592 S.E. 2d at 654.

12. In Wachter v. Wachter, 216 W.Va. 489, 607 S.E. 2d 818 (2004) the Court tightened up whatever loose ends were left by Lucas. In deciding whether there is a de facto marriage, the trial court must look to the eleven factors enumerated in W.Va. Code §48-5-707 (which the Court finds to be “merely intended as a guide”), plus “any other evidence presented by the parties that is relevant to establishing the existence or non-existence of a de facto marriage”. The courts “must look at each case individually to determine whether the evidence preponderates toward a finding of a de facto marriage.” (Emphasis added).

13. The duration of a relationship is not, in and of itself, proof of a de facto marriage. The court must also look at the “character” of the relationship.
14. Though Ms. Wachter and her lover had maintained a conjugal relationship for eight years, cohabited in the former marital home and jointly made small improvements to the home, this was not sufficient to show a de facto marriage when they did not hold themselves out as a married couple, did not use the same last name, she was sole owner of the home, the lover had a home in Florida where he stayed 2-4 months of the year, they owned no real estate or personal property together, they had no joint bank accounts or credit cards, neither was the beneficiary in the other’s will or life insurance and they were “financially independent of one another”.

III. ALIMONY GUIDELINES AS A SETTLEMENT TOOL

1. While West Virginia has yet to adopt an alimony formula or guidelines, the process of considering such adoption was extremely enlightening.

2. A statewide survey of family law practitioners (316 responded) were decisively in favor of guidelines:

   (a) By a distinct majority of 63% to 20%, the attorneys reported inconsistent results among the various family courts on similar sets of spousal award fact. Attorneys who regularly appear in five or more family court circuits reported the highest degree of inconsistency.

   (b) By an overwhelming majority of 81.9% to 9.6%, the attorneys believed that guidelines would help bring consistency in awards in cases with similar facts.

   (c) By an even greater majority, 83.5% to 8.38%, the attorneys thought that guidelines would assist them in predicting to their client whether he or she or the opposing party is an alimony candidate and, if so, the range of duration and amount that might be awarded.

   (d) Finally, by another prodigious majority of 79.6% to 11.2%, the practitioners affirmed that having alimony guidelines would make it easier for cases to settle, since predictability is key component for settling a case prior to trial.

3. A survey of family court judges (35 out of 45 responding) revealed solid, if not strong, support:
(a) By 51.4% to 17.1%, a majority of the judges were in favor of non-binding spousal support guidelines (the rest choosing “don’t know” or “maybe”). Considering the “maybe” vote, the majority leaning in favor of guidelines was 77%.

(b) By 45.7% to 34.2% (again, the rest choosing “don’t know” or “maybe”), a plurality of the judges believed that there is “a problem with inconsistency” among the judges in the award or denial of alimony claims that could be addressed by guidelines.

(c) By 48.5% to 37.1%, a plurality of the judges believed that guidelines would be helpful as a presumption for the granting or denial of an alimony award at a temporary hearing.

(d) By 40% to 31.4%, a plurality of the judges believed that guidelines would save the parties from expending unnecessary attorney fees and costs. Considering the “maybe” vote, the number believing that guidelines might save fees and costs jumps to 63%.

(e) By 68.5% to 22.8% a clear majority of the judges opposed mandatory guidelines, similar to the child support formula, which restricts their discretion and takes the ultimate issue out of their hands.

4. We found the formulas currently in use in Kentucky and Michigan to be particularly helpful and relevant. Both use computer software developed by Marginsoft, Inc. and both are consistent with the interests and concerns of our judges and attorneys.

5. In a report generated by the Standing Committee on Justice Initiatives of the State Bar of Michigan, the completely voluntary availability of the Marginsoft program in that state has resulted in approximately 68% of family law judges using it. Of those using it, 88% utilized it “as one factor in their determination or as a tool for settlement.” While a few judges gave the guidelines presumptive weight, the vast majority used the guidelines as a starting point and then modified the recommendation to fit the case before them. These judges considered the program to be “a useful tool to analyze and settle cases.”

6. Both the Kentucky and Michigan guidelines use objective criteria (e.g. ages of the parties, duration of the marriage, current incomes, educational level obtained, etc.) to arrive at a rating of the claim (from “0 – This is an unlikely case for alimony” to “100 – An excellent case for permanent alimony”) and range for both duration (a number of months to permanent) and amount.
7. The Kentucky formula, in particular, continues to be used by a number of West Virginia judges for purposes of settlement despite our inability to persuade our colleagues to adopt guidelines particular to our state.
INTRODUCTION

When I attended the Judicial Academy in 1994, one of the most useful documents I received was a memorandum prepared by Judge Bill Swann which helped me make findings of facts and conclusions of law in regard to divorce cases. Over the years I have modified it somewhat, specifically in regard to alimony. With the help of Professor Janet Richards and Attorney Amy Amundsen, I have made some other additions.

Judge Don R. Ash
VI. CHECKLIST FOR FINDINGS OF FACTS AND CONCLUSION OF LAW IN
REGARDS TO ALIMONY

A. FACTORS FOR CONSIDERATION REGARDING SPOUSAL SUPPORT

The legislature has directed Tennessee courts to consider twelve factors in awarding spousal support [§ 36-5-121(i)]. Of the twelve factors, the Court in this case wishes particularly to emphasize the following factors:

YES  NO

___  ___  (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

___  ___  (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training to improve such party's earning capacity to a reasonable level;

___  ___  (3) The duration of the marriage;

___  ___  (4) The age and mental condition of each party;

___  ___  (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

___  ___  (6) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be the primary residential parent of a minor child of the marriage;

___  ___  (7) The separate assets of each party, real and personal, tangible and intangible;

___  ___  (8) The provisions made with regard to the marital property as defined in § 36-4-121;

___  ___  (9) The standard of living of the parties established during the marriage;

___  ___  (10) The extent to which each party has made tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

___  ___  (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The court may consider four types of alimony scenarios when awarding spousal support: transitional alimony, rehabilitative alimony, alimony in solido and alimony in futuro. Transitional alimony is intended to be used to “close in the gap” or “adjust to the realities of the divorce”, but where rehabilitative alimony would not be appropriate. The concept of rehabilitation is intended to allow a spouse to achieve, with reasonable effort, an earning capacity to have a standard of living comparable to that of the marriage or that of the other spouse after the divorce. Alimony in futuro and alimony in solido are two forms of a long-term or more open-ended support. Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001). Whether the spousal support is to be alimony in futuro or alimony in solido is determined by either the definiteness (in solido) or indefiniteness (in futuro) of the sum of alimony ordered to be paid at the time of the award. Burlew v. Burlew, 40 S.W.3d 465 (Tenn. 2001), (citing Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn.1999). McKee v. McKee, 655 S.W.2d 164, 165 (Tenn.Ct.App. 1983)).

The Tennessee legislature has demonstrated a preference for an award of rehabilitative alimony to rehabilitate an economically disadvantaged spouse. The legislative purpose behind the preference for rehabilitative alimony is to rehabilitate a spouse to achieve, with reasonable effort, an earning capacity that achieves a standard of living comparable to that during the marriage or the standard of living expected of the other spouse after the divorce.

There is no absolute formula that must be followed, however, the Supreme Court in Aaron v. Aaron, 909 S.W.2d 408 (Tenn. 1995), set out several guiding principles:

(1) The real need of the spouse seeking the support is the single most important factor; (Citing Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989)).
(2) In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support; (Citing Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989)).
(3) Further, the amount of alimony should be determined so that the party obtaining the divorce is not left in a worse financial situation then he or she had before the opposite party's misconduct brought about the divorce (Burlew v. Burlew, 40 S.W.3d 465, 469 (Tenn. 2001) citing Aaron v. Aaron, supra); and
(4) While alimony is not intended to provide a former spouse with relative financial ease, we stress that alimony should be awarded in such a way that the spouses approach equity.

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Section VI-3
(Revised 12/31/11)
Thus, need, ability to pay, status, and fault are the primary considerations. *Aaron v. Aaron*, supra.

The cost of health care is a proper expense item to consider when awarding alimony. The court may order one party to obtain or maintain health insurance on the other spouse and may order payment of the premiums and health costs not covered. T.C.A. § 36-5-121 (j). *Storey v. Storey*, 835 S.W. 2d 593 (Tenn. App. W.S. 1992).

One way to guarantee alimony payments is with life insurance on the life of the obligor. The court may order one party to designate the other party as beneficiary under existing policies. T.C.A. § 36-5-121 (k). The Court can also order the acquisition and maintenance of such policies.

**B. THIS IS A CASE FOR TRANSITIONAL ALIMONY**

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This type of alimony was created by T.C.A. 36-5-121(g)(1). It is to be used when rehabilitation is not necessary but one party needs assistance due to the economic consequence of a divorce.

1. Payable for a determinate period of time.
2. Terminates upon the death of the recipient.
3. Terminates on the death of payor (unless specifically stated) or upon some occurrence of other specifically stated conditions such as but not limited to cohabitation or remarriage of the party.
4. Unmodifiable except by agreement of the parties in an initial order or by the court in an initial order.
5. Can be awarded with other types of alimony, except rehabilitative alimony.

**Elements**

a) One spouse is temporarily economically disadvantaged relative to the other spouse (T.C.A. 36-5-121(g)(1)).

b) One spouse needs funds to help “bridge the gap” from the time of the divorce to a certain time in the future.
c) Used to soften the “economic blow” of divorce.

Checklist for Transitional Alimony

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<tr>
<td>(1) The amount pre month $____________;</td>
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<tr>
<td>___</td>
<td>___</td>
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<tr>
<td>(2) The rationale for the amount (must be read into the record)</td>
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<td>___</td>
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<tr>
<td>(3) The duration of the amount and rationale for duration</td>
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<td>___</td>
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<tr>
<td>(4) The transitional alimony shall terminate upon the death of the recipient;</td>
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<tr>
<td>___</td>
<td>___</td>
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<tr>
<td>(5) This transitional alimony shall terminate upon the death of the payor</td>
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<tr>
<td>___</td>
<td>___</td>
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<tr>
<td>cohabitation of the payee</td>
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<tr>
<td>___</td>
<td>___</td>
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<tr>
<td>remarriage of payee</td>
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<tr>
<td>___</td>
<td>___</td>
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<tr>
<td>(6) This transitional alimony shall _____ or shall not _____ be modified.</td>
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C. THIS IS A CASE FOR REHABILITATIVE ALIMONY

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The question is whether, in light of all the circumstances, can the spouse rehabilitate themselves to achieve, with a reasonable effort, an earning capacity that will permit the economically disadvantaged spouse’s standard of living after the divorce to be reasonably comparable to the standard of living during the marriage or to the post divorce standard of living expected to be available to the other spouse. T.C.A. 36-5-121(c)(2). If the answer to the
foregoing question is negative, the court should award alimony in futuro or alimony in solido, as it deems appropriate.

(1) Rehabilitative alimony is designed to temporarily support the disadvantaged spouse for the amount of time it will take to rehabilitate the recipient to such an extent that he or she can achieve, with a reasonable effort, an earning capacity that will permit that spouses standard of living after the divorce to be reasonably comparable to the standard of living or to the post divorce standard of living expected to be available to the other spouse.

(2) Rehabilitative alimony terminates upon the death of the recipient. Rehabilitative alimony shall also terminate upon the death of the payor unless otherwise specifically stated. T.C.A. § 36-5-121(e)(3).

(3) Rehabilitative alimony is subject to modification for the duration of the award upon a showing of substantial and material change in circumstances. T.C.A. § 36-5-121(e)(2).

(4) Rehabilitative alimony can be awarded with other types of alimony with the exception of Transitional alimony.

**Elements**

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(e)(1).

(b) After a limited amount of time through additional training or education, the disadvantaged spouse is likely to increase appreciably his or her earning power or ability to accumulate capital assets so as to remedy the existing economic disadvantage, relative to the other spouse. Smith v. Smith, 912 S.W.2d 155 (Tenn. App. 1995), appeal denied.

(c) If rehabilitation of the disadvantaged spouse is feasible, then temporary, rehabilitative alimony should be awarded. T.C.A. § 36-5-121(d)(2).

(d) The factors used to determine if rehabilitation is feasible are those set out in 36-5-121(d)(3).

1. Education
2. Employment history, and

**Check List for Rehabilitative Alimony**

(1) The amount per month $________________________

(2) The rationale for amount *(read into the record)*
(Describe the standard of living the parties enjoyed during the marriage or the post divorce standard of living expected to be available to the spouse.)

(3) The duration ____________________________.

(4) The rationale for duration (read into the record)

__________________________________________________________________________

__________________________________________________________________________.

(5) The rehabilitative alimony shall _____ or shall not _____ terminate upon the death of the obligor _______________________. (check one)

D. THIS IS A CASE FOR ALIMONY IN SOLIDO (LUMP-SUM ALIMONY)

YES   NO

____  ____

(1) Alimony in solido is designed to accomplish a stated result within a limited time and not be modifiable.

(2) It is a definite, fixed amount, payable in either lump sum or periodic payments.

(3) Can be awarded with other types of alimony, when there is property of which to award this alimony.

ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(d)(3).

   (1) After a limited amount of time the disadvantaged spouse will no longer be in need of support from the former spouse.


CHECKLIST

(1) The amount awarded______________________.

(2) The payment schedule ____________________________.

(3) The property awarded ____________________________

__________________________________________________.
E. **THIS IS A CASE FOR SUPPORT ON A LONG-TERM BASIS**

*(*IN FUTURO OR PERIODIC ALIMONY*)

**YES** **NO**

The purpose of alimony *in futuro* is to provide financial support to a spouse who cannot be rehabilitated. Anderson v. Anderson, 2007 WL 957186 (Tenn. Ct. App. 2007), *(Citing Burlew v. Burlew, 40 S.W.3d 465, 468 (Tenn. 2001)).*

(1) Alimony *in futuro* is designed to continue the support that was incident to the marriage relationship, and is appropriate when the spouse cannot be rehabilitated. Rehabilitated means to achieve, with a reasonable effort a comparable standard of living to that during the marriage or which the other spouse will enjoy after the divorce.

(2) It is for an indefinite amount, payable in future periodic installments, and contingent upon the death or remarriage of the recipient and possibly on the death of the obligor or other contingencies as imposed by the court or statute.

(3) The recipient shall notify the obligor of the remarriage timely upon the remarriage. Failure to give notice will allow the obligor to recover all payments made after the date of the remarriage.

(4) Although the total amount is indefinite, the periodic payments should be of a definite amount and are subject to modification (both as to arrearages and future payments), based on a showing of a substantial and material change of circumstances arising after the divorce and not foreseen at the time of the divorce. T.C.A. § 36-5-121(f)(2)(a); Proctor v. Proctor, 2007 WL 2471504 (Tenn. Ct. App. 2007).

(5) If the recipient lives with a third person, a rebuttable presumption arises that the third person is contributing to the support of, or receiving support from, the recipient and, therefore, the court should suspend all alimony obligation.

(6) Alimony in futuro can be awarded with other types of alimony, even Rehabilitative or Transitional. T.C.A. 36-5-121(d)(1).
ELEMENTS

(a) One spouse is economically disadvantaged relative to the other spouse. T.C.A. § 36-5-121(f)(1).

(b) Rehabilitation of the disadvantaged spouse is not feasible. T.C.A. § 36-5-121(f)(1).

CHECKLIST FOR ALIMONY IN FUTURO:

(1) The amount of the award $______________ per month;

(2) This award does ____ or does not ____ terminate upon the death of the obligor; (check one)

(3) Alimony shall terminate upon death or remarriage of the recipient [additional contingencies] (or __________, whichever occurs first);

(4) The court foresees the following at the time of this award, which facts will not justify a sufficient change of circumstances to support a petition to modify the current alimony award (i.e., retirement of obligor, earnings or increased earnings of recipient, adult child living in recipient’s home, etc.)__________________________________________

F. ISSUES OF TAX DEDUCTION AND BANKRUPTCY

YES  NO

____  ____

The court should make specific findings of fact indicating: (1) whether the alimony payments will be includible as income to the recipient and deductible as alimony to the payor pursuant to IRS § 71(b); (2) that the alimony is necessary for the support and maintenance of the spouse, and thus, not dischargeable in bankruptcy court; and (3) whether the award of attorney fees as alimony in solido is includible as income to the recipient and deductible as alimony to the payor pursuant to IRS § 71(b).

Alimony is considered taxable income to the recipient under the provisions of the Internal Revenue Code. Conversely, the payor of alimony is permitted to claim a tax deduction under I.R.C. § 215 in an amount equal to the alimony or separate maintenance payments paid during the taxable year. However, in order for alimony payments to be deductible, the eight requirements of I.R.C. § 71 must be satisfied:
YES   NO

___   ___  (1) Payments must be made in cash;
___   ___  (2) Payments must be to a spouse or on behalf of a spouse;
___   ___  (3) Payments must be made pursuant to a divorce or separation instrument;
___   ___  (4) Payments may not be designated as non-qualifying alimony;
___   ___  (5) Spouses may not be members of the same household;
___   ___  (6) The payments must terminate upon the recipient's death; (typically alimony *in
solido* does not terminate on death and is not subject to be includible as income to
the recipient and deductible by the payor);
___   ___  (7) Spouses may not file a joint return; and,
___   ___  (8) Payments must not constitute child support.

G.  ADDITIONAL ORDERS

(1) A lien is imposed upon the following items of marital real property of the _________
as security for the payment of the spousal support ________________________________
__________________________________________________________________________
__________________________________________________________________________

(2) As additional alimony necessary for the support and maintenance of spouse, the
______________ shall pay the health insurance premiums for the ____________ for a
period of ________ months.

(3) As additional alimony necessary for the support and maintenance of spouse, the
______________ shall pay the attorney fees of $________________ in the amount of
$______________ as the court finds that the amount of attorneys fees are both reasonable
and necessary. The amount of alimony is not dischargeable in bankruptcy.

(4) The obligor shall obtain and maintenance life insurance in the amount of
$______________, naming the other spouse as beneficiary until the alimony is paid in full.

(5) The life insurance policy insuring the obligor’s life shall be owned by the payee so
that the premiums paid by the obligor is deductible as income for the payor.

(6) The alimony payment shall be made by wage assignment. T.C.A. 36-5-501.