

Alimony Drafting Tips

By Linda Ravdin

Parties may enter into the drafting and negotiation of an alimony agreement prior to marriage (a premarital agreement) or incident to a separation. Many considerations are the same for both, but with some important differences.

Enforceability

As recently as 1970, premarital agreements that waived spousal support at divorce or that limited the dependent spouse's support rights were unenforceable. At present, in most states parties may enter into a premarital agreement that fixes or waives spousal support in the event the marriage ends in divorce. In a few states, a premarital agreement may not divest a court of jurisdiction to award postdivorce spousal support. As a result of the wide acceptance of premarital agreements to define rights and obligations at divorce, many more people are seeking premarital agreements and often precisely to avoid or limit a future alimony obligation. Indeed, some courts have acknowledged openly that a person with assets and income-earning potential may opt not to marry at all rather than expose his or her wealth to spousal claims.

A premarital agreement

Negotiating and drafting premarital agreement provisions regarding alimony can be quite a challenge because many relevant factors—such as the ages, health, and income-earning ability of the parties at divorce—may be unknown when the agreement is executed. When the marriage turns out to be a short one, an agreement providing for rehabilitative alimony for a dependent spouse may be quite reasonable. Limited alimony for the same dependent spouse at age 60 after a 30-year marriage may turn out to be extremely unfair. On the other hand, when a financially well-off payor agrees to pay alimony, the court will hold him or her to that promise even if circumstances have changed to the payor's detriment.

In some circumstances, the best course of action is for the agreement to remain silent regarding alimony. Thus, the scope of the agreement may be limited to protecting each party's separate property and, if appropriate, disposing of property acquired during the marriage. The decision about what is appropriate should take into account a number of factors.

- Ages of the parties at the time of marriage. The older the parties, the more likely it is that their ability to provide for their own support in the future will be known. An agreement that waives alimony when both parties are known to have the ability for self-support or which fixes the dependent spouse's rights at a predetermined amount and duration may be reasonable. On the other hand, the younger the parties at marriage, the more likely that unknown future events will affect the needs of the dependent spouse and the financial ability of the economically dominant spouse.

- The likelihood of children and one party's leaving the work force to stay home with them. A party who will forgo the opportunity for career advancement for the sake of children may want to insist on provisions to compensate for lost opportunity.
- Education, employment history and skills of the parties, and the ability of the economically weaker party to be self-supporting through employment. When both parties are capable of self-support, even if their standards of living will be disparate in the event of divorce, a waiver of alimony or a provision for a limited amount may be viable.
- Assets and sources of income. When both parties come to the marriage with substantial assets, such as retirement benefits, real estate and other investments, an interest in a trust, or a reasonable expectation of an inheritance, it may be reasonable to assume that neither will need alimony. In that case, complete waivers of all alimony claims or provision for limited alimony is a viable option.
- Disposition of property. When the agreement provides for the parties to share property acquired during the marriage, the need for alimony may be reduced because the dependent spouse will acquire other resources. On the other hand, if the agreement provides for a completely separate property regime and the party with fewer assets will not have a fair opportunity to build his or her estate during the marriage, that party will need a more generous alimony provision.
- Wishes of the parties. As discussed above, some people will choose not to marry unless they can obtain an alimony waiver. A party who will need alimony if the marriage breaks up must think hard about whether to go through with a marriage that may leave him or her without adequate support. Counsel for the needy party must ensure that the client understands clearly that in most states an alimony waiver will hold up unless the party would otherwise end up on public assistance. Even a foolish bargain, once negotiated and accepted, cannot be undone.

Courts routinely enforce marital settlement agreements in which parties either waive the right to alimony or provide for fixed support payments for a dependent spouse. In most states, courts will enforce an agreement that makes contractual alimony nonmodifiable.

Contractual alimony

Judges deciding alimony cases are limited by authority granted under state law. By contrast, negotiating parties may fashion terms to meet the particular needs of their situation. Award amounts are not bound by statutory limits. For example, many state laws do not permit a court to order a spouse to maintain life insurance or to make a lump-sum support award. Most states do not permit a court order to provide for periodic self-executing modifications of support. Freed from statutory restrictions, parties may negotiate with a larger arsenal of options and thus find acceptable solutions that otherwise might have eluded them.

In determining alimony, courts consider the dependent spouse's existing employment and sources of income as well as his or her ability to become wholly or partially self-supporting. At the end of a long marriage, a dependent spouse is likely to have a good case for alimony. A working spouse with a good education, good health, and no children at the end of a short marriage has a weak case, even with a significant disparity in the parties' incomes. Many divorcing parties fall somewhere in the middle. The case for

alimony may be strong, but the likely amount and duration may not be enough to warrant contested litigation. In all circumstances, settlement is usually the best course of action.

One common question in cases where alimony may be a factor is whether the dependent spouse should make immediate plans to return to work, assuming that is an option, or alternatively remain unemployed to enhance an alimony claim. For most dependent spouses becoming as self-supporting as possible is the better option. A dependent spouse will likely get more long-term benefit from reentering the job market and using support money for retraining or an advanced degree, if necessary. Enhanced earning potential survives the payee's remarriage and the payor's change of heart, change of circumstances, or death. Moreover, a spouse who has a viable plan for rehabilitation and has taken steps to carry out that plan is likely to appear more credible to a court and thus can make a more compelling case for fill-the-gap support.

A potential alimony payor may wonder aloud whether to buy or finance an expensive new purchase, take early retirement, or make a risky investment to reduce cash flow. Such schemes are too transparent to be seriously considered.

Before negotiating an alimony agreement, both sides need to do some preparation. The most important step is developing a realistic budget that takes into account existing and projected income from all sources and resources, such as proceeds from the sale of a family home that may be used to buy another home and a reasonable projection of living expenses. The budget should take into account child support obligations, major anticipated expenses, such as college expenses provided for in the divorce settlement, and other factors, such as plans for retirement and the availability of retirement benefits for support. The dependent spouse must take into account new expense items, such as health insurance and life insurance on the former spouse. He or she also should consider where savings may be achieved, such as by downsizing living quarters. The payee should consider opportunities to generate additional income, not dependent on the spouse, such as a return to employment or by turning nonincome-producing assets into income-producing assets. When the payee has not been in charge of family finances or has a history of being unable to live within a reasonable budget, the assistance of a financial planner may be useful to create a realistic budget as a starting point for negotiations. Additionally, the payee may need an investment advisor to assist with postdivorce financial planning and income production.

Issues and tradeoffs

A number of interrelated issues should be considered in negotiating a contract for alimony. The ultimate question is how much money will change hands. Parties may negotiate the amount, duration, automatic adjustments, division of property in lieu of support, provision of life insurance or other benefits, direct payment of expenses, or the right to use a marital asset, such as the family home, for a period of time. A concession in one area generally will trigger some offsetting concession by the other party.

- Amount of payment. The appropriate alimony amount will be a function of many factors, including needs of the payee evaluated in light of the standard of living during the marriage and the ability of the payor to meet those needs. Courts generally do not like

alimony awards that give payees a disincentive to become self-supporting or that appear to penalize the wage earner. A negotiated settlement must take this reality into account. The alimony payment may be expressed as a fixed amount or as a percentage of income. A percentage approach has the benefit of providing the payee with some protection as living expenses go up, but is subject to manipulation by the payor.

- Duration of payments. Support will either be indefinite or end at a fixed point. The payor may be willing to make somewhat higher payments if there is a definite termination date so that he or she can see a light at the end of the tunnel. The payee might be willing to accept a defined termination point in return for higher payments that provide needed support during retraining or until retirement benefits are available.

- Termination events. Most alimony contracts provide for termination on the death of the payor, the death of the payee, or the remarriage of the payee. (Termination at the death of the payee is mandatory if the parties want alimony to be deductible to the payor and taxable to the payee.) However, in some circumstances, such as when the payee makes concessions regarding division of property or when spousal support is intended in part to provide resources for children, parties may agree that alimony will not terminate upon remarriage. Some payors may wish to insist that alimony terminate if the payee enters into a cohabitation arrangement that looks like a marriage. For older parties with retirement in sight, especially if they will be sharing substantial retirement benefits, an automatic termination at the payor's normal retirement age may be appropriate.

- Modifiability. Parties have the option in most states to provide that alimony terms may never be modified, except by agreement of the parties, that they are open for future modification by the court in accordance with the standards that would apply in the absence of an agreement, or that they are modifiable in accordance with rules determined by the parties. For example, the parties may agree to limit modification to certain changed circumstances, such as a party becoming disabled. Open-ended modifiability means the payor may have substantial exposure to future claims, particularly when his or her income is expected to increase significantly due to employment or an inheritance. On the other hand, a completely modifiable alimony obligation means the payee is vulnerable to repeated attempts on the part of the payor to reduce his or her obligation.

When agreeing that the divorce court will retain jurisdiction to modify in the event of changed circumstances in the future, the parties also must take into account the potential for incurring future attorney's fees to litigate or negotiate modifications. These unknown future costs present a risk for both parties. In some cases, the payor will be better off paying a somewhat larger fixed amount to avoid future exposure to attorney's fees.

- Self-executing adjustments. Even when an agreement is not modifiable by the court, the parties may wish to agree to specific adjustments based on defined circumstances. For example, they may agree that alimony will reduce in a graduated fashion over a specified number of years. Or the parties may agree that alimony will be adjusted automatically based on a formula that incorporates their salary enhancements, the consumer price index, or a specified annual percentage increase. When adjustments are based on income from employment, attorneys should consider the possibility that a party may manipulate his or her income by, e.g., quitting work, taking a lower-paying job, or negotiating for employee benefits in lieu of cash compensation.

- Changes in circumstances. When the amount of support is substantial and is premised on the payor's continued ability to earn a high income, the payor may want to include a provision permitting termination or suspension of payments if he or she becomes disabled or involuntarily unemployed. The payee may want to preclude modification if the job loss or disability resulted from the payor's misconduct.
- Property in lieu of alimony. In structuring an alimony settlement, some thought should be given to the allocation of property. Both parties may be better off if the payor makes concessions in the property division to get a lower alimony payment or an earlier termination than would otherwise be the case. Property allocations are not dependent on remarriage and are not subject to modification based on changed circumstances. The security of additional property may make the payee more willing to accept lower payments. A payor who has a sizable income often can afford to relinquish property and rebuild after the divorce.

When the payor has substantial private-sector retirement benefits and the parties are close to retirement age, additional opportunities may be available to structure a deal. The Retirement Equity Act permits the nonparticipant spouse to start taking benefits from the plan when the participant reaches his or her earliest retirement age, even if the participant is still working. Thus, it may be in the parties' interests for the dependent spouse to receive, in lieu of some or all alimony, a disproportionate share of the payor's retirement benefits, which he or she may begin to take while the participant continues to work to accrue additional benefits.

- Alternative dispute resolution. When an agreement provides for any change in the terms of payment, it may provide that a modification dispute be resolved through alternative dispute resolution. Binding arbitration of alimony claims is on the rise and can be an effective means of resolving differences.
- Life insurance. Unless the agreement provides for alimony payments after the death of the payor, alimony will terminate when the payor dies. The agreement may provide for life insurance on the payor's life to provide security in the event of an untimely death. The payor may agree to maintain an existing policy or to purchase a new policy. The agreement may provide that the payor will own the policy and pay the premiums or it may provide that the payee owns the policy and is responsible for premiums. If the latter is the case, the amount of support should take into account this additional budget item. However, life insurance may not be necessary if the agreement provides for the spouse to receive an adequate survivor annuity.
- Enforcement. Incorporating but not merging a marital settlement agreement into a judgment of divorce, so that the full array of enforcement remedies are available, may be the best protection for the payee in states where such a mechanism is available. In addition, the parties may agree to automatic wage withholding so that payments go directly from the payor's employer to the payee. When the agreement is to be incorporated in a court order, unless parties have expressly agreed to future modifiability, structure the agreement to preclude the court from modifying it.

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SIDE BAR

Sample Clauses

1. Basic support. Upon execution of this Agreement, the Husband shall pay the Wife the sum of \$ _____ per month for her support. Such payment shall be made on the first day of each month after execution of this Agreement until his obligation for payment terminates as provided hereafter.

2. Termination of support. The Husband's spousal support payments to the Wife shall terminate upon the first of the following events: (i) death of the Wife; (ii) death of the Husband; (iii) remarriage of the Wife; (iv) the Wife's cohabitation in a marriage-like relationship for a period of 90 consecutive days; (v) entry of a court order terminating alimony upon application made pursuant to Paragraph three herein.

3. Modification of support. Upon or at any time after his retirement from the United States Government, at which time the parties will be entitled to go into pay status with respect to their shares of the Husband's Civil Service Retirement System (CSRS) benefits, the Husband may apply to the court for a downward modification of his spousal support obligation as stated in Paragraph one. Until such time as the parties go into pay status with respect to the Husband's CSRS benefits, spousal support shall not be modifiable at the request of either party, except by agreement of the parties, and no court shall have jurisdiction to modify spousal support.

4. Tax treatment of spousal support. To the extent permitted by I.R.C. § 215 in any year, the Husband shall be entitled to deduct from his gross income his spousal support payments made pursuant to Paragraph one of this Agreement. The Wife shall include such payments in her gross income pursuant to I.R.C. § 71. The parties agree that the Husband has no obligation to make any such payment (in cash or in property) after the Wife's death or any payment in substitution for any such payment after her death.

5. Life insurance. Upon execution of this Agreement, Husband shall transfer to Wife ownership of the insurance policy on his life with the _____ Life Insurance Company and with a death benefit of \$ _____. Thereafter, the Wife shall be solely liable for payment of premiums on the policy and shall have the sole right to determine the beneficiary.

—L. J. R.