

Practice Tips

Tips for Handling Cases Under The New Alimony Law

By Fern L. Frolin

On March 1, 2012, An Act Reforming Alimony, M.G.L. c. 208, §§48 – 55, became law in the Commonwealth. The new law changes the structure and rules of judicially ordered support payments between former spouses. The statute establishes different types of alimony, provides criteria for courts to consider in deciding alimony cases, and encourages end dates for most alimony orders.

Alimony in Massachusetts was historically based on the recipient's need and the payor's ability to pay at the time of the order. Because most recipients' future needs and most payors' future ability to pay are speculative, nearly all orders had open-ended duration. Thus the notion evolved that alimony is usually a life-time arrangement, changeable only after circumstances requiring modification had already occurred. If a recipient increased income or conscientiously saved, he or she risked termination or reduction of alimony. If the payor suffered involuntary financial reversal, the recipient's alimony could be abruptly terminated or reduced, despite ongoing need. The scheme encouraged dependency, left recipients vulnerable to unplanned events, and left payors with no ability to foresee when alimony obligations would end.

Against this backdrop, and public pressure for change, the legislature passed the new law. The alimony law retains "need and ability to pay" concepts and permits judicial discretion in most instances, but it expands the narrow restrictions of present need and ability to pay, adding reasonable forward-looking presumptions. It also allows different forms of alimony for different circumstances. Mastery of the new law will require study, practice, and development of a lucid body of interpretive appellate law. In the meantime, the following tips may aid practitioners.



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UNDERSTAND EACH TYPE OF ALIMONY AND DETERMINE WHICH IS BEST FOR YOUR CLIENT.

General term alimony is granted to a spouse who is economically dependent. It will usually follow a mid to long term marriage. Except for judgments that the parties agreed were non-modifiable, orders entered before March 2012 are deemed general term orders. General term alimony terminates when either party dies; when the payor reaches “full retirement age” (as defined in the statute); on the recipient’s remarriage; on a date fixed by court order; or perhaps if the recipient maintains a common household with a third party. The order is modifiable unless the parties agree otherwise.

Presumptive duration depends on the length of the marriage. After a marriage of twenty years or longer, alimony presumptively ends when the payor reaches full retirement age. The new statute measures marriage length for alimony purposes from the date of marriage to the date of service of the complaint for divorce. Some practitioners question whether the date of service rule will cause payors to rush to serve a complaint in order to establish a marriage length cut-off. Lawyers should advise their clients of presumptive limits but also recognize that judicial discretion may override the statutory presumptions. For example, the court may consider a significant period of premarital cohabitation or a significant marital separation in determining the length of the marriage.

Rehabilitative alimony is granted to a spouse who is expected to be self-sufficient by a predicted time. It is available after any length marriage and is payable for up to five years. It is also available after child support ends. It terminates at a set date, recipient’s remarriage, or on death of either party. It is modifiable in amount. It may be extended for compelling reasons if unforeseen events prevent the recipient from becoming self-supporting and the payor can continue to pay without “undue burden.” Because rehabilitative alimony may last longer than the presumptive limit on general term alimony for marriages of five years or less, this may be the most advantageous form for a recipient after a short marriage.

Reimbursement alimony is compensation for the recipient’s contribution to the payor’s financial resources. It is only available if the marriage was five years or less. It is not modifiable, and it is not subject to presumptive durational limits. Reimbursement alimony ends only on the death of either party

or a date certain, so it may be a good choice for a recipient who plans to remarry or live with a new partner.

Income guidelines do not apply to reimbursement alimony. Therefore, reimbursement alimony may be optimal for a recipient who contributed substantially to the payor's future where the investment has not yet paid off – for example, when one spouse put the other spouse through graduate school.

Transitional alimony is granted to transition a recipient to a new location or an adjusted lifestyle after a marriage of five years or less. It terminates at a date certain or the death of either party, is not modifiable or extendable, and is available for up to three years. It may not be replaced with a different form of alimony.

CONSIDER DEVIATING FROM THE PRESUMPTIVE TERMINATION DATE WHEN THE ORDER IS FIRST ESTABLISHED. Under the new statute, all alimony orders presumptively terminate when the payor reaches full retirement age, if not sooner. The statute adopts the United States Social Security Act designation of full retirement age, which means that the age varies depending on the payor's birth date. Further, when the order originates, the court (or the parties by agreement) may set a different alimony termination date for good cause shown. Deviations in initial orders require only written findings of the reasons. Agreements to deviate should state the reasons. Requests for the court to deviate should include proposed findings.

Extension of an established termination date will be difficult to secure. An extension requires a material change of circumstances that occurred after the order was entered, and clear and convincing evidence of reasons for the extension. Practitioners should determine at the outset whether facts warrant an order that is longer than the presumptive duration. Advise recipient clients that they will face a heightened burden of proof if they need to extend the order.

CREATE A CHECKLIST OF REASONS TO DEVIATE FROM THE PRESUMPTIONS. The non-exhaustive statutory list includes: parties' advanced age; medical concerns; sources and amounts of income, including investment income from assets that were not allocated in the divorce; tax considerations; a party's inability to provide self-support because of the payor's abusive conduct; a party's lack of employment opportunity; and orders that one party maintain medical insurance or life insurance.

(The latter factor directly conflicts with a provision of the equitable division statute, G.L.c. 208, §34, but the legislature is expected to remedy the conflict soon.) Because the statute presumes that alimony ends at the payor's retirement age, lawyers should also consider the client's expected retirement resources, especially if the parties will not be similarly situated after a long term marriage.

Divorce lawyers may want to maintain a checklist of deviation reasons and expand the list as new appellate decisions develop.

“COMMON HOUSEHOLD” IS A QUESTION OF FACT. The new statute permits alimony modification, suspension or termination if a general term alimony recipient cohabitates with another person in a common household for at least three continuous months. A finding of “common household” requires a factual determination that the recipient and the third party reside together as a “couple.” Indicia include reputation as a couple, economic interdependence and other factors. Not expressly mentioned in the statute, but facts that practitioners may want to research, include: family memberships, joint bank accounts, and joint ownership of real estate. Look also for “couple” and “status” postings on social network media.

Conclusion: Watch for appellate interpretations of key new statutory provisions. For example, where recipients' “need” remains the basis for alimony, does the new presumptive maximum order amount now trump “need”? In the meantime, the message of the new law is that each party should plan financially. The new law requires us to think about spousal support in terms of the client's future needs, resources and lifestyle. ■

General Term Alimony	
Presumptive* Maximum Durations	
If married :	
Up to 5 years	50% of months married
Up to 10 years	60% of months married
Up to 15 years	70% of months married
Up to 20 years	80% of months married
More than 20 years	up to presumptive retirement age

*All presumptions are subject to Court's statutory exercise of discretion