COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2013-P-0332

Essex County

Elaine M. Holmes
Appellee

vs.

Kenneth E. Holmes
Appellant

ON APPEAL FROM A DECISION
OF THE PROBATE AND FAMILY COURT

Brief of the Appellant

W. Sanford Durland III
BBO #550087
Schmidt & Federico
Seventeenth Floor
Two Hundred Berkeley Street
Boston, Massachusetts 02116
617-695-0021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

Statement of Issues Presented For Review.

Whether the trial judgment erred in determining the term of alimony (i.e., the length of time) the Husband would be obligated to pay such spousal support to the Wife in consideration of the Alimony Reform Act of 2011 (the "Reform Act"). [1]

Statement of the Case.

Introduction.

This appeal by the Appellant, Kenneth E. Holmes, arises from a judgment of modification, entered on November 14, 2012 by the Essex Probate and Family Court (Amy Lyn Blake, J.) ("modification judgment" and "trial judge") (A.69-74).

Procedural Background.

The Defendant/Appellant, Kenneth E. Holmes ("Husband"), and the Plaintiff/Appellee, Elaine M. Holmes ("Wife"), were married on May 25, 1991 (A.12;66). After the marriage broke down, the Wife filed a complaint for divorce and served the complaint and summons on the Husband on June 1, 2006 (A.12-14;66).

---

[1] The Alimony Reform Act of 2011, H.R. 3617, 187th Gen. Ct. Section 4(b) (Mass. 2011), approved on September 26, 2011.

Thus, as defined by M.G.L. ch. 208 §48, the length of the marriage is therefore 15 years, seven (7) days (or a period equal to 180 months, seven (7) days). Furthermore, as set forth in M.G.L. ch. 208 §49(b)(4), the resulting duration - or the term - of any alimony obligation is not to exceed 80% of the length of the marriage.

Prior to the entry of the judgment of divorce, the Husband paid the Wife temporary alimony. Specifically, beginning on June 12, 2006 (A.15-16) and then again on November 3, 2006 (A.17-26), the trial court entered temporary orders under which the Husband paid support to the Wife (A.16A;26A). Specifically, those court orders required that the Husband pay temporary alimony of $368/week, plus child support of $600/week, a total obligation of $968/ week or $4,195/month (A.15;23-24).

Thus, between June 12, 2006, the date of the initial temporary order, through October 7, 2008, the date the judgment of divorce entered (A.27), a period of two (2) years, three (3) months and 25 days transpired (or a period of approximately 28 months). During that period, the Husband paid temporary alimony of $44,528 (or $368/week x 121 weeks = a total of

$44,528), while he also paid child support of $72,600 (or $600/week x 121 weeks = a total of $72,600).

As referenced, on October 7, 2008, the judgment of divorce entered ("divorce judgment") (A.27). It incorporated a separation agreement, which the parties executed the same day (A.28-44). The Husband's alimony and child support obligations continued under the judgment, albeit at the higher rate of $700/week in alimony and $600/week in child support, a total obligation of $1,300/week (or $5,633.33/month) (A.36;66-67).

Thereafter, in the period leading between the date of the divorce judgment of October 7, 2008, the commencement of the underlying modification proceedings on July 15, 2011 and through the date of the modification judgment on November 14, 2012 (A.45;69), the Husband complied and fully met his support obligations for a period equivalent to 214 weeks. During that time he paid the Wife a total of $278,200, of which $149,800 was characterized as alimony and $128,400 as child support.

On July 15, 2011, the Wife filed a complaint for modification in which she alleged a material change in circumstances (namely the Husband's substantial

increase in income and her decrease in income) and for which she sought an increase in alimony (A.45). On August 5, 2011, the Husband filed an answer and counterclaim and, as in the latter, he sought a downward adjustment to his support obligation and cited, as a change of circumstances, his son's move from the Wife's home to his home (A.46-48).

The case came for trial on November 13, 2012 on the above referenced complaints. The parties were the only witnesses and 12 exhibits were admitted into evidence (including a stipulation of uncontested facts) (A.66-68).

On November 14, 2012, the trial judge issued the modification judgment (A.69); the judgment was docketed on November 19, 2012 (A.11). In it, the judge ordered that, in lieu of a continued child support payment, the Husband would pay all of the college expenses (including books, fees, etc.) for Zachary and Rebecca until they became emancipated. He was also ordered to pay $1,300/week in deductible/includable alimony to the Wife, until one of the following events occurred: (a) either party's death; (b) the Wife's remarriage; (c) the Husband reaching his normal retirement age; (d) June 8 2020 (e) any other

applicable provision of the Reform Act. Except as modified, the divorce judgment was to remain in effect (A.69). No attorney's fees were awarded to either party (A.69).

On December 6, 2012, the Husband filed a notice of appeal from the modification judgment (A.75); that notice was docketed on December 7, 2012 (A.11).

That same day, the Husband filed a motion for relief from judgment pursuant to Mass.R.Dom.Rel.P. 60(a) & (b) (A.77-81); that motion was docketed on December 10, 2012 (A.11). In his motion, the Husband asked that the termination date of the alimony obligation be moved from the date of October 7, 2020 to an earlier date (A.78;80). In support of this, the Husband argued that it was more appropriate to apply a pro-rata percentage formula for determining the length of the marriage (A.78-80) and, pertinent to this appeal, he also requested that the alimony term specifically include the period of temporary alimony that he paid to the Wife pursuant to temporary orders issued prior to the divorce judgment (A.77-78). As for the latter, the Husband argued the date should be June 1, 2018, so that it recognized the period of temporary alimony he paid to the Wife prior to entry

of the judgment (A.78).

On December 20, 2012, the trial judge denied the motion "after review of both parties' submissions and the applicable statute" (A.77). The denial was docketed on December 26, 2012 (A.11). Out of an abundance of caution, the Husband then filed another (i.e., a second) notice of appeal on January 18, 2013 (which was docketed on January 22, 2013)(A.11;84).

On March 4, 2013, the Wife filed a motion for relief from judgment pursuant to Rule 60(b), in which she sought to correct an inadvertent mistake by the trial judge in the modification judgment (A.85-97). Specifically, in the original judgment, the judge listed the alimony termination date as June 8, 2020, but, based on the calculations described in the rationale, it was apparent the trial judge intended the termination date to actually be October 7, 2020 (A.85). The Wife's motion, to which the Husband assented, sought to correct that mistake. The trial judge allowed the motion "by agreement" on March 5, 2013 (A.85) and an amended (or corrected) judgment

issued the same day (A.98).[2]

Formal briefing followed.

Statement of the Facts.

The parties are the parents of three children (A.66). Under the terms of the divorce judgment, the children lived with the Wife (A.28:35). At the time of the modification trial, their oldest child, Kyle was emancipated and was residing with the Husband (A.70). Their middle child, Zachary, was a freshman at North Shore Community College and, since the summer of 2011, lived with the Husband (A.67;70). Their youngest child, Rebecca, was also a freshman at North Shore Community College and lived with the Wife (A.67;70).

Since 2003, the Husband had been employed as the chief financial officer for a physician's group of the Massachusetts Eye & Ear Hospital in Boston (A.67;70). Between the time of the divorce judgment and the modification trial, his earnings increased by approximately $60,000, from a level of approximately $181,000/year to a level in excess of $240,000/year (A.70).

---

[2] Note, the new termination date (of October 7, 2020) as set forth in the amended judgment does not impact the Husband's appeal, as it still does not credit the period of time he paid alimony to the Wife pursuant to the temporary orders.

At the time of the divorce, the Wife had been employed by the Peabody Public Schools, where she worked both as a substitute teacher and a paraprofessional until her voluntary resignation in May 2011 (A.67;70). The Wife resigned in the wake of a series of disciplinary measures taken by her employer (A.71). Her highest level of earnings from that employment was $19,000/year (A.67;71). Since her resignation, the Wife had not sought employment and, as of time of the modification trial, she was unemployed (A.67;71). Her only source of income was the support she received from the Husband (A.71).

After her voluntary resignation from employment, the Wife was diagnosed with thyroid cancer, for which she underwent a thyroidectomy and radiation treatment (A.71). She also recently learned the cancer spread to her lungs and her prognosis was unknown (A.71).

Since the entry of the divorce judgment, the Wife did not act in a prudent financial manner. The trial judge found that, while she sold the former marital home and received approximately $55,000 in net proceeds, she retained none of those monies at the time of the modification trial (A.71). The judge found the Wife continued to spend and incur significant

credit card debt (A.71).

At the time of the modification trial, the Husband had been paying (and was willing to continue paying) for all of the uncovered expenses associated with Zachary and Rebecca's college education (A.71). He estimated that the cost for both children to attend college was approximately $5,600 per semester (A.71). For her part, the Wife purchased laptop computers for the children and paid for other miscellaneous expenses for them (A.71).

While the Wife voluntarily left her employment at the Peabody Public Schools as a result of her poor behavior, the trial judge noted how the stress resulting from Rebecca's mental health issues had been a contributing factor (A.71). She also credited the Wife for attending a certification program to become a medical biller and coder and declined to attribute income to the Wife, noting how she never earned in excess of $19,000/year and the lack of any trial evidence pertaining to salary levels for those employed in medical billing and coding (A.71). In the end, the trial judge concluded the Wife demonstrated a continuing need for support (A.71).

Although the Husband's income increased by approximately $59,000 since the divorce judgment (A.72), the trial judge found that other facts vitiated against an increase in his support obligations, including the fact Zachary was living with him full time, the fact the Wife was not contributing to Zachary's support and the fact he was paying for Zachary and Rebecca's college education without ongoing contribution from the Wife (A.72).

While two of their children were unemancipated, they were not minors and, thus, the trial judge exercised her discretion and declined to apply the Massachusetts Child Support Guidelines to her modification support analysis (A.72-74). Instead, she concluded that an amount of support, reconfigured as an "all alimony" order, was appropriate, would provide the Husband with an increased tax advantage and would also allow the Wife to meet her reasonable needs (A.72).

Relevant to this appeal, at the conclusion of the trial, both parties requested that the trial judge set an end date for the Husband's alimony obligation under the Reform Act, based on its definition of the "length of the marriage" (namely, the period of time from the

date of marriage ceremony to the date of the service of the complaint for divorce) (A.72).

As a result, based on the fact that the parties were married on May 25, 1991 and that the original complaint for divorce was served on June 1, 2006 (A.66), for purposes of calculating an alimony termination date, the trial judge found the length of the marriage was 15 years and seven (7) days (or a period equal to 180 months, seven (7) days) (A.72). She also found that the term of alimony should not exceed 80% of the number of months of the marriage and that resulting durational limit was 144 months (or 12 years) (A.72). Finally, and starting with the October 7, 2008 divorce judgment, she concluded the Husband's alimony obligation, subject to other provisions of the Reform Act, would terminate on October 7, 2020 - a date precisely 144 months from the date of the divorce

judgment (A.72).[3]

However, in determining that term of alimony, the trial judge specifically failed to acknowledge and, more importantly, failed to credit the Husband for the payments of alimony, totaling $72,600, which he made to the Wife during the pendency of the divorce, a period which, again, was equal to 28 months (A.15-26A). In fact, that period of temporary alimony represents nearly 20% of the maximum durational term of alimony ordered by the trial judge in the modification judgment (i.e., 28 months/144 months = 0.19).

The trial judge's failure to credit and include these payments in the calculation means that, at the current level of alimony called for under the modification judgment, he will pay a significant amount of additional alimony. Specifically, instead of

---

[3] Here, the length of the marriage was 15 years, seven (7) days, or just over 180 months. Since the marriage was greater than 15 years, but not more than 20 years, under the Reform Act the duration of alimony was not to exceed 144 months (or 180 months x .80 = 144 months).

The Husband initially and unsuccessfully challenged this part of the calculation in his Rule 60 motion (A.78-80) but he is not pressing this issue on appeal.

a termination date of June 5, 2018 (or the date 144 months from the date of the initial temporary order of alimony), he must pay additional alimony until October 7, 2020, a period equal to an additional 28 months (or 121 weeks), which equates to an additional $157,300 in alimony (i.e., an amount equal to $1,300/week x 121 weeks = $157,300).

Summary of the Argument.

The trial judge erred by excluding the period of time that the Husband made temporary alimony payments to the Wife in calculating the overall length (or term) of his alimony obligation (as defined by the Reform (*see infra* p.14-27).

Argument.

I. Legal Standard.

Normally, unless the trial judge enters a judgment which is "plainly wrong," it will not be overturned. *Pare vs. Pare*, 409 Mass. 292, 296-297 (1991). On this appeal, this Court must determine whether there has been an abuse of discretion in calculating the alimony term and in denying the Husband's Rule 60 motion. *Kalendarian vs. Marden*, 46 Mass.App.Ct. 930, 931 (1999); *Department of Revenue*

vs. G.W.A, 412 Mass. 435, 441 (1992).

Since this appeal also involves a question of statutory interpretation, this Court may conduct its review *de novo*. *Freddo vs. Freddo*, 83 Mass.App.Ct. 353, 354 (2013) *citing Rosnov vs. Molloy*, 460 Mass. 474, 476 (2011). *See also Commonwealth vs. Cintolo*, 415 Mass. 358, 359 (1993) (statutory interpretation is a question of law).

II. Error by the Trial Judge.

A. Introduction.

This is an appeal from a determination of the term of alimony the Husband would be obligated to pay in consideration of the Reform Act.

Because the trial judge's analysis, and her determination of the length of the term of alimony, ignored the support payments which the Husband made pursuant to temporary orders prior to the entry of the divorce judgment, that part of the modification judgment must be vacated, corrected and/or the case must be remanded for further proceedings.

B. Background.

For years, many argued and complained over the fact that Section 34 of Chapter 208 (i.e.,. the

historically applicable alimony statute), as well as similar statutes in other states, was fraught with inconsistencies; promoted conflict (and, thus, litigation); impeded settlement; provided for too much judicial discretion; and was otherwise generally unfair and unpredictable. *See e.g.*, Drefchinski, Comment, "*Out with the Old and In with the New: An Analysis of Illinois Maintenance Law under the Uniform Marriage and Divorce Act and a Proposal for Its Replacement*," 23 N.Ill.U.L.Rev. 581, 613 (2003); Kirkman Collins, "*The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*," 24 Harv.Women's L.J. 23 (2001); Garrison, "*The Economic Consequences of Divorce*," 32 Fam. & Conciliation Cts. Rev., 10, 22 (1994).

In response, many sought and urged that a formulaic approach to alimony calculations be employed so as to address and eliminate these sorts of problems. *See* Kisthardt, "*Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*," 21 J. Am. Acad. Matrim. Law 61, 64 (2008); Brown, "*Alimony: A Survey of Formulas*," Utah Journal of Family Law (Fall/Winter 2010). Many also thought that a formula-based approach would lower

the costs of divorce, would permit an accurate assessment of the likely outcome and would facilitate a perception of fairness among alimony cases as a whole. *See* Kisthardt, *supra* at 63.

Then, in March 2012, a few years after the decision in *Pierce vs. Pierce*, 455 Mass. 286 (2009), where the S.J.C. refused to impose a presumption that alimony would automatically terminate upon the date a paying spouse's retirement, the Reform Act became law.

The Reform Act made significant changes to the law pertaining to alimony and established, among other things, specific categories (or types) of alimony, guidelines for the percentage of the amount of the alimony award, along with durational limits (or terms) for the payment of alimony (including a presumption that alimony will end at the time the paying spouse reaches retirement age). *See* M.G.L. ch. 208, §§ 48-55. Again, and pertinent to this appeal, the Reform Act sought to provide some consistency and predictability by adding durational limits to alimony payments, which were based on the length of the marriage, which the statute defined as the period of time from the date of the marriage ceremony to the date upon which the summons for the complaint for divorce was served.

Then, based on that calculation, certain durational guidelines would also then determine the length of time that alimony should be paid. *See* M.G.L. ch. 208, §§ 48(2)(b)(1-4); 48(2)(c); and 48(2)(f).

C. The Trial Judge Erred by Ruling That the Duration of Alimony Was to Be Calculated Starting From the Date of the Divorce Judgment and Not From the Date of a Temporary Order of Alimony.

1) Temporary Alimony Paid Under a Court "Order" Should Be Considered When Determining the Length of the Alimony Obligation.

As noted in the trial judge's rationale for the modification judgment (A.72), both parties requested that an end date for the Husband's alimony obligation be set in view of the enactment of the Reform Act. The judge agreed and, in doing so, concluded the following:

> The parties were married on May 25, 1991. The Complaint for Divorce was served on June 1, 2006. The length of this marriage, for purposes of calculating an alimony termination date, is fifteen years and seven days (or 180 months and 7 days). Accordingly, pursuant to G.L. Chapter 208, section 49, the term of alimony shall not exceed eighty percent of the number of months of the marriage. Here, the duration limit is 144 months or 12 years. The Judgment of Divorce Nisi entered on October 7, 2008. Defendant's alimony obligation,

subject to other provisions of the statute, shall terminate on October 7, 2020 (A.72).

Given the relatively recent passage of the Reform Act, the Husband is aware of no appellate decisions which address the issue of whether the trial judge correctly interpreted the statute insofar as the determination of the alimony term is concerned.[4] Therefore, this Court must interpret the statute by analogy and by applying principles of common sense. *See e.g.*, *Bianco vs. Bianco*, 371 Mass. 420, 423 (1976) (in a case of first impression, the S.J.C. interpreted Section 34 to define the scope of the trial judge's discretion).

Such analysis begins with the question, whether the financial support provided by the Husband here, in accordance with a temporary orders entered during the pendency of a divorce proceeding, should be included in and deemed alimony as that term is defined as "the

---

[4] Counsel for the Husband can also represent that, based on informal conversations with fellow members of the bar, it appears trial judges are interpreting and applying the statute differently.

Measuring support awards is a fundamental question of law and, under the Reform Act, one should be able to achieve a uniform result in cases with uniform facts. However, unbounded discretion and/or inconsistent discretion guarantees that results of cases will not be consistent, will discourage settlement and encourage litigation.

payment of support from a spouse ... to a spouse ... under a *court order*" (emphasis supplied). M.G.L. ch. 208 § 48.

Here, the trial judge either misinterpreted the plain and clear language of the statute or mistakenly attempted to correct it. *See* *Commissioner of Revenue vs. Cargill, Inc.*, 429 Mass. 79, 82 (1999) ("Where, as here, the language of the statute is clear, it is the function of the judiciary to apply it, not amend it"). *See also* *Tilton vs. City of Haverhill*, 311 Mass. 572, 578 (1942) (trial judge cannot read a statutory intent not specifically expressed in the statute's plain language and words).

The Reform Act does not provide a definition which specifically limits alimony to only those payments of support which occur pursuant to a judgment.[5] But, since word "order" is not specifically

---

[5] Here, the trial judge appears to have interpreted the word "order" as if the Legislature meant it to mean a final "judgment." Yet, judgment is a word that is commonly used to express a final decision or action or determination of rights from which an appeal may be taken. *See* *e.g.*, *Karellas vs. Karellas*, 54 Mass.App.Ct. 469, 470 (2002); *Morse vs. O'Hara*, 247 Mass. 183, 186 (1924) (and cases cited). Nothing in the statute suggests or implies such finality with respect to an alimony obligation, particularly when reference is made to how the statute defines the "length of the marriage." *See* *infra* p.22.

defined within the statute, the trial judge was bound to give it its usual and accepted meaning, so as to remain consistent with and promote the statutory purpose of the Act. *See Commonwealth vs. Gore*, 366 Mass. 351, 354 (1974). In short, when interpreting the meaning of the word "order," the trial judge should have looked to usual, plain and accepted meaning of the word "order." *See Cote-Whitacre vs. Department of Public Health*, 446 Mass. 350, 358 (2006). *See also Victor V. vs. Commonwealth*, 423 Mass. 793, 794 (1996) (analysis must "start with the proposition that where the statutory language is clear, the courts must give effect to the plain and ordinary meaning of the language"). The trial judge should also have referred to linguistic sources available to the Legislature, such as its use of the word in other legal contexts and dictionary definitions. *See Commonwealth vs. Zone Book*, 372 Mass. 366, 369 (1977).

When the Legislature enacted the Reform Act, and chose to use the word "order" to define an alimony payment,[6] it employed a term whose meaning was "plain

[6] The Reform Act itself does not specifically define "order" and, again, the Husband has not found case law in the Commonwealth that defines the word as it appears in this statute.

and ordinary" and non-ambiguous.[7] It is apparent from the context of the statute, that the Legislature intended for alimony to be considered broadly and intended it to be considered *any* payment, from one spouse to another, under *any* court order, regardless of when it occurs or when it is issued. Nothing in Section 48 limits an alimony payment to one occurring *only* after the entry of a judgment nor does it specifically exclude any payments occurring *prior* to the entry of the judgment.[8] "Order" has a far broader

---

[7] The word has a common definition among secondary sources. For example, Webster's Dictionary defines order as any "direction or command of a court, judge, public body, etc." Webster's New World Dictionary, 1000 (2nd College Edition, 1970).

The American Heritage Dictionary defines it as a "directive or command of a court." American Heritage Dictionary (2012) <http://www.ahdictionary.com> (accessed on March 26, 2013).

The Concise Oxford American Dictionary, 623 (2006) defines it as "a written direction of a court or judge."

Black's defines an order as a "written direction or command delivered by a court or judge." Black's Law Dictionary, 1123 (7th Edition 1999).

[8] One commentator, a member of the Alimony Reform Task Force, has been quoted as indicating that the durational limits should start tolling with the payment of the temporary support, not from the date of the final alimony judgment. *See* discussion in Deeley, *Splitting the Difference: The Historical Context and*

meaning and such a conclusion is consistent with the common understanding of the word, as well as dictionary definitions. [9]

Moreover, the trial judge properly noted that the length of the marriage is defined by the Reform Act as the period of time between the date of the marriage ceremony and the date the divorce summons is served (A.72). *See* M.G.L. ch. 208 § 48. Since the Legislature determined that a marriage was to be deemed "over" at the time of service of the summons and complaint, it would stand to reason that the inclusion of the term of any alimony payment after that point in time (i.e., the period of time the Husband paid alimony pursuant to the temporary orders) should be included in the overall calculation of the term of alimony.

Practical Ramification of the 2012 Massachusetts Alimony Reform, 30 Mass. Family L.J. 22 (April 2012).

[9] By comparison, under I.R.C. § 71(b)(2) (2006), an alimony payment is defined as one which occurs pursuant to a decree which is not necessarily a divorce judgment, but is one which simply requires a spouse to make payments for the support or maintenance of other spouse.

Again, by comparison, the Parental Kidnapping Prevention Act uses a board definition for a custodial "determination" which it defines as a "judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." 28 U.S.C.A. §1738A(b)(3).

Therefore, the trial judge's failure to include the period of time the Husband paid alimony pursuant to temporary order in the overall calculation of the term of the alimony payment was an error and requires correction by this Court and/or a remand to permit the proper and logical calculation of the alimony term as required by the Reform Act. *See e.g., Morales vs. Morales*, 464 Mass. 507 (2013) (remand necessary to apply proper legal standard to child support modifications); *Smith vs. McDonald*, 458 Mass. 540, 550 (2010) (remand necessary for custody and visitation issues).

2) **Including Alimony Paid Pursuant to a Temporary Order, in the Term of the Payment, is Consistent with the Purpose of the Reform Act.**

The Legislature anticipated that spouses who divorced prior to the effective date of the Reform Act would seek to modify the durational component of his/her alimony obligations and, in contemplation of the litigation which would likely ensue, devised a scheme which required such modification proceedings to

be brought incrementally.[10]

The Reform Act also mandates that the type of alimony also be determined by the length of the marriage. Prior to enactment of the Act, divorcing spouses could agree that one would provide financial support to the other for a specified period of time, but trial judges lacked the ability to establish an alimony obligation with an arbitrary durational limit, beyond the requirements imposed by the Internal Revenue Code to allow for the deductibility of the payment (i.e., that payments must continue until the death or either party or the remarriage of the recipient spouse). *See* I.R.C. §§ 71(b)(1) & 215 (2006). Such so-called "lifetime" alimony obligations

---

[10] Specifically, the Reform Act provides that for marriages of less than five (5) years, a complaint for modification may be filed one (1) year after the statute went into effect; for marriages between five (5) and ten (10) years, a complaint could be filed two years after the statute went into effect; for marriages between ten (10) and fifteen (15) years, a complaint could be filed three years after the statute went into effect; and for marriages between fifteen (15) and twenty (20) years, a complaint could be filed three and a half years after the statute went into effect. For any spouse paying alimony who reached full retirement age within three (3) years of the effective date, a complaint could be filed one (1) year after the statute went into effect. *See* the historical and statutory notes to M.G.L. ch. 208 § 49 (set forth in the Addendum).

were addressed by the enactment of the Reform Act and authorize a trial judge to utilize certain devices and mechanisms which were previously and commonly employed by counsel and parties.[11]

The Reform Act became effective on March 1, 2012. Yet, even in the nascent stages of familiarity, it is abundantly clear the Legislature intended to provide a tool by which the obligation to pay alimony would have a beginning and an end. Again, the Act's "terms must be read harmoniously to effectuate the intent of the Legislature ...," *Commonwealth vs. Raposo*, 453 Mass. 739, 745 (2009) (citations omitted); *see also Commonwealth vs. Gore*, 366 Mass. at 354, and, since one of the primary purposes was to place durational limits on alimony payments, it is essential that litigants and attorneys and trial judges know the durational limits of an alimony obligation (i.e., know when the obligation has been imposed and when it has been satisfied).

---

[11] In addition to open-ended "general term alimony," the Reform Act authorizes a trial judge to establish "rehabilitative alimony," "reimbursement alimony" or "transitional alimony," each of which has a durational limit, including a specific (or certain) termination date. For example, rehabilitative alimony may be paid for up to five (5) years and transitional alimony may be paid for up to three (3) years). *See* M.G.L. ch. 208 §§ 48-52.

The first temporary order under which the Husband was obligated to pay alimony to the Wife was entered on June 12, 2006. Absent any intervening event which triggers suspension or termination of alimony (e.g., the cohabitation of the recipient, the remarriage of the recipient, the death of the recipient or the death of the payor, *see* M.G.L. ch. 208 § 49(a) & (d), the end date of the alimony obligation must occur on a date certain, as determined by calculating the length of the marriage, for which payments are then to be according to a set percentage thereof. *See* M.G.L. ch. 208 §§ 49(b) & 53(a).

Here, the length of the marriage is 180 months, seven days, for which the corresponding 80% of which is 144 months. *See* M.G.L. ch. 208 §§ 49(b)(4).

Therefore, proper application of the Reform Act to the facts of this case requires a finding that the term of the obligation imposed upon the Husband to pay alimony began in June 2006, and barring the occurrence of any intervening event, would end 144 months later, or in June 2018.

Otherwise, and as is the case here, the Husband will be penalized for the payments he made via temporary order and he will be forced to pay an excess

amount of alimony (in his case the sum of $157,300), all in a manner contrary to the language and intent of the Reform Act.[12]

Conclusion & Request for Relief.

This Court should vacate that part of the modification judgment and issue an order correcting the calculations relating to the Husband's term of alimony, such that it includes the period of time he paid alimony pursuant to temporary orders. In the alternative, the case should be remanded, with an order requiring the trial judge to correct the judgment so as to assign a alimony termination which, again, includes "credit"

---

[12] In determining alimony, the approach used in Kansas is similar.

While the applicable statutes allow judges to have latitude with respect to alimony decisions, no order may exceed 121 months, regardless of the length of the marriage. *See* K.S.A. 60-1610(b)(2).

In addition, the Johnson County (Kansas) Bar Association has created a formula which is used for both temporary and permanent alimony orders. Similar to the Reform Act, the formula defines the length of the marriage as the period from the ceremony date to the date of the separation, provides for the aforementioned durational limit of alimony and, most importantly, provides that a "[c]redit should also be considered for the payor spouse for the period of time he or she pays any temporary maintenance after the separation of the parties until the time of the divorce." *See* Johnson County Bar Association, Family Law Guidelines 2010, Section V, Maintenance §§ 5.2 & 5.4. [12]

for any temporary alimony payments made.

KENNETH E. HOLMES

By his attorneys,
Schmidt & Federico, P.C.

April 18, 2013

W. Sanford Durland III
BBO #550087
200 Berkeley Street
Boston, Massachusetts 02116
(617) 695 0021

Certificate of Service

I certify that on April 18, 2013, I served two copies of the within Brief (as well as two copies of the Record Appendix) on the Appellee, by mailing two copies thereof, via first class mail, postage prepaid, to her counsel, namely James M. Walsh, Walsh & Associates, 222-224 Essex Street, Salem, Massachusetts 01970. Signed under the pains and penalties of perjury.

W. Sanford Durland III

Certificate of Compliance

I, W. Sanford Durland III, Esquire, hereby certify that the Appellant's Brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. A. P. 16(a)(6); 16(e); 16(f); 16(h); 18; and 20. Signed under the pains and penalties of perjury this 18th day of April 2013.

W. Sanford Durland III

Addendum

Pertinent Court Orders

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT
PROBATE & FAMILY COURT

ESSEX, ss. DOCKET NO. ES06D1013DV1

ELAINE M. HOLMES,
Plaintiff/Defendant in Counterclaim

v.

KENNETH E. HOLMES,
Defendant/Plaintiff in Counterclaim

JUDGMENT

(On Plaintiff's Complaint for Modification filed July 15, 2011, pleading #193 and Defendant's Counter Claim for Modification filed August 8, 2011, pleading #195)

After trial, it is hereby ORDERED and ADJUDGED as follows:

1. In lieu of child support, Defendant shall pay the tuition, books, fees and other costs appearing on the invoices for Zachary and Rebecca at North Shore Community College until they are emancipated as defined by G.L. Chapter 208, section 28.

2. Defendant shall pay Plaintiff alimony of $1,300 per week until the first to occur of the following:

   a. either party's death,
   b. Plaintiff's remarriage,
   c. Defendant's attainment of full social security retirement age,
   d. June 8, 2020;
   e. or any other applicable provision of the Act Reforming Alimony of 2012.

3. Alimony shall be includable by Plaintiff and deductible by Defendant for state and federal income tax purposes.

4. All other requested relief is denied.

5. Each party shall be responsible for their own counsel fees and costs incurred in these matters.

Dated: November 14, 2012

Amy Lyn Blake, Justice

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT
PROBATE & FAMILY COURT

ESSEX, ss. DOCKET NO. ES06D1013DV1

ELAINE M. HOLMES,
Plaintiff/Defendant in Counterclaim

v.

KENNETH E. HOLMES,
Defendant/Plaintiff in Counterclaim

RATIONALE

(On Plaintiff's Complaint for Modification filed July 15, 2011, pleading #193 and Defendant's Counter Claim for Modification filed August 8, 2011, pleading #195)

The parties were before the Court (Blake, J) for trial on the above referenced complaints on November 13, 2012. Plaintiff ("Mother") was present and represented by Attorney James Walsh. Defendant ("Father") was present and represented by Attorney Karl Spitzer. Both parties testified and were cross examined. Twelve exhibits were admitted into evidence.

The parties are the divorced parents of three children. They divorced in 2008 at which time a support order was established, wherein Defendant was obligated to pay Plaintiff $1,300 per week. The parties agreed to allocate this order, to allow Defendant to have a tax advantage, in the following manner: $700 per week in alimony and $600 per week in child support. Defendant is current in his support obligations. At that time of trial, Kyle, the parties eldest child, although residing with Defendant, was emancipated. Zachary, age 19, is a freshman at North Shore Community College ("NSCC") and has resided with Father since the summer of 2011. Rebecca, age 18, is also a freshman at NSCC. She resides with Mother. Rebecca has struggled emotionally and has been hospitalized for mental health issues. The night before the trial, Mother called 911 and Rebecca was taken to a local hospital while she awaits a bed in an appropriate facility.

Father is the Chief Financial Officer for a physician's group of the Massachusetts Eye & Ear. He has been so employed since 2003. At the time of the divorce, Father's earnings exceeded $181,000 per year. As of the time of trial, Father was on track to earn in excess of $240,000 per year.

Mother had been employed by the Peabody Public Schools as a substitute teacher and para professional from 2004 to May 1, 2011 when she voluntarily resigned from her position.

Mother's resignation followed a series of disciplinary measures taken by her employer ranging from letters of reprimand to multi-day suspensions, without pay. Mother cited as reasons for her resignation both personal and medical issues. Mother never earned in excess of $19,000 per year. Since the divorce, Mother completed and became certified as a medical biller and coder, at a cost of $16,000. She has not yet sought employment in this field. Mother is unemployed. Her only source of income is the support paid by Father.

Mother seeks an increase in alimony citing as a change of circumstance her decrease in income and Father's alleged substantial increase in income. In his counterclaim, Father seeks a downward adjustment to his support obligation and cites as a change of circumstance, Zachary's move from his mother's home to that of his father.

Since the Complaints in this matter were filed and after her voluntarily resignation, Mother was diagnosed with papillary thyroid cancer, tall cell variant. She underwent a thyroidectomy and radiation. She recently learned cancer has spread to her lungs and it is at stage four. She is exploring her medical treatment options at this time. Her prognosis is unknown.

Subsequent to the divorce, Mother sold the former marital home, netting approximately $55,000. None of those proceeds remain today. Despite downsizing, Mother continues to have significant credit card debt.

Currently, Father pays all the uncovered expenses associated with Zachary and Rebecca's education at NSCC. Mother has purchased lap top computers and miscellaneous related expenses. Father estimates the cost for both children to attend NSCC to be approximately $5,600 per semester and is amenable to continuing to pay same.

While many things have changed since the support entered pursuant to the Judgment of Divorce Nisi, whether the support should be increased, decreased or reconfigured is the central issue in this case. Father argues and the Court finds that Mother voluntarily left her employment as a result of her poor actions in the workplace. This is mitigated, in part, by the stress that Rebecca's mental health had and continues to have on Mother. Notwithstanding, Mother is responsible for her departure from the Peabody Public Schools. To her credit, Mother paid for and attended a training program to become a medical biller and coder. She passed the certification for such a position, but is not employed at this time. Mother was suddenly faced with a cancer diagnosis and an uncertain future. Assuming *arguendo* that the Court were to impute income to Mother, she has never earned in excess of $19,000 per annum and no evidence was offered as to an anticipated salary in the position for which Mother retrained. The Court declines to impute income to Mother. Although she voluntarily resigned her position, the subsequent health crisis for Mother and Rebecca's ongoing emotional issues render Mother's ability to self support untenable and unlikely. Mother has demonstrated a need for continued support. Father, as will be further detailed below, has an ability to pay support.

Father's income has increased by approximately $59,000 since entry of the Judgment of Divorce Nisi. While on its face this may appear to be a material and substantial change of circumstance, other facts vitiate against an increase in support. Zachary is now living full time with his Father and Mother is not contributing to his support. Father is paying Zachary and Rebecca's educational costs at NSCC without ongoing contribution from Mother. Mother purchased lap top computers for the children which is commendable, but is not a reoccurring expense.

While the children are unemancipated, they are not minors and therefore application of the Massachusetts Child Support Guidelines is discretionary, rather than presumptive. For the reasons contained herein, the Court finds the amount of support, reconfigured as an all alimony order, is appropriate in this case. Father will have an increased tax advantage by the reconfigured order and Mother will continue to be able to meet her reasonable needs. Father has been able to pay this order along with the educational expenses of the children thereby demonstrating an ability to pay the order.

The parties both suggest that an end date for alimony must be set in view of the enactment of the Act Reforming Alimony. The Court agrees. The length of the marriage, as defined by the Act Reforming Alimony, is the date of marriage to the date of service of the complaint. The parties were married on May 25, 1991. The Complaint for Divorce was served on June 1, 2006. The length of this marriage, for purposes of calculating an alimony termination date, is fifteen years and seven days (or 180 months and 7 days). Accordingly, pursuant to G.L. Chapter 208, section 49, the term of alimony shall not exceed eighty percent of the number of months of the marriage. Here, the duration limit is 144 months or 12 years. The Judgment of Divorce Nisi entered on October 7, 2008. Defendant's alimony obligation, subject to other provisions of the statute, shall terminate on October 7, 2020.

CONCLUSIONS OF LAW

1. "To be successful in an action to modify a judgment for alimony . . . the petitioner must demonstrate a material change of circumstances since the entry of the earlier judgment." Schuler v. Schuler, 382 Mass. 366, 368 (1981).

2. "The change may be in the needs or the resources of the parties ... or in their respective incomes." Kernan v. Morse, 69 Mass. App. Ct. 378, 383 (2007) (quoting Fugere v. Fugere, 24 Mass. App. Ct. 758, 760 (1987)).

3. "In determining whether to modify a support or alimony order, a Probate Judge must weigh all relevant circumstances." Schuler v. Schuler, 382 Mass. 366, 370 (1981).

4. "A substantial and permanent decrease in the income of the support provider is one of the material circumstances to be considered in a request for reduction of a support award. However, while a substantial decrease in income or financial status may warrant

a modification, such a decrease does not alone compel modification." Schuler v. Schuler, 382 Mass. 366, 370-371 (1981).

5. "Where a reduction in the alimony is sought, this includes consideration of 'the financial status of the support provider, and the station in life of the respective parties,' as well as whether, on all of the economic circumstances, the obligor spouse has 'the present ability to pay the amounts required by the agreement and judgment.'" Greenberg v. Greenberg, 68 Mass. App. Ct. 344 (2007) (quoting Schuler v. Schuler, 382 Mass. 366, 370, 375-376 (1981)).

6. "[T]he statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay." Gottsegen v. Gottsegen.397 Mass. 617, 623-624 (1986). "After a judgment for alimony or . . . the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony . . . and the payment thereof, and may make any judgment relative thereto which it might have made in the original action." G. L. c. 208, § 37.

7. "A dependent spouse's support needs, whether at the point of initial determination or later, when a modification is sought, are to be 'measured by the 'station' of the parties-by what is required to maintain a standard of living comparable to the one enjoyed during the marriage.'" Greenberg v. Greenberg, 68 Mass. App. Ct. 344, 347 (2007) (quoting Grubert v. Grubert, 20 Mass. App. Ct. 811, 819 (1985)).

8. "The evaluation of vocational skills takes into account a party's age, health, and reasonable employment prospects. 'The fact that both parties have vocational skills and are capable of being self-supporting and maintaining individually their marital station in life suggests that an order which separates the economic lives of the parties as much as possible after the divorce may be appropriate.'" Heins v. Ledis, 422 Mass. 477, 484 (1996).

9. "A party has no right to waste an asset deliberately or ignore a feasible source of income and then request an increase in support." Pagar v. Pagar, 9 Mass. App. Ct. 1, 4 (1980).

10. "Alimony is generally improper absent a finding of financial need on the part of the recipient spouse." Heins, 422 Mass. at 484.

11. "There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the

circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child." G. L. c. 208, § 28.

12. "The Court . . . may deviate from the guidelines and overcome the presumptive application of the guidelines provided the Court enters specific written findings stating: (1) the amount of the order that would result from application of the guidelines; (2) that the guidelines amount would be unjust or inappropriate under the circumstances; (3) the specific facts of the case which justify departure from the guidelines; and (4) that such departure is consistent with the best interests of the child." Massachusetts Child Support Guidelines at 7 (effective January 1, 2009).

13. For purposes of determining child support, "[t]he earning capacity rather than the actual income of a parent may be considered." Flaherty v. Flaherty, 40 Mass. App. Ct. 289, 291 (1996)(citation omitted); see also Schuler v. Schuler, 382 Mass. 366, 374 (1981).

14. The Child Support Guidelines aim "(1) to encourage joint parental responsibility for child support in proportion to, or as a percentage of income; [and] (2) to meet the child's survival needs in the first instance, but to the extent either parent enjoys a higher standard of living to entitle the child to enjoy that higher standard." Brooks v. Piela, 61 Mass. App. Ct. 731, 737 (2004)(quotations omitted). Moreover, "'children's needs are to be defined, at least in part, by their parents' standard of living,' which in some cases 'includes the ability to provide certain opportunities . . . such as private school education'". Mandel v. Mandel, 74 Mass. App. Ct. 348, 355 (2009)(quoting Brooks v. Piela, supra, at 737 & n. 8).

Dated: November 14, 2012

Amy Lyn Blake, Justice

FILED ... 2012

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

Essex, ss. Docket No.: ES06D1013DV1

Elaine M. Holmes,
Plaintiff

v.

Kenneth Holmes,
Defendant

The Within Motion Is Hereby
~~ALLOWED~~/DENIED after remand for compliance with the applicable statute
Amy Lyn Blake, Justice
Probate & Family Court, Essex Division
Dated: 12/20/12

DEFENDANT, KENNETH HOLMES' MOTION FOR RELIEF FROM JUDGMENT DATED NOVEMBER 14, 2012 ISSUED BY JUSTICE BLAKE PURSUANT TO MASS. R. CIV. P. 60(a)(b)

Now comes the defendant, Kenneth Holmes, and moves this Honorable Court pursuant to Mass. R. Civ. P. 60(a)(b) for relief from the Judgment and Order of the Court dated November 14, 2012.

Defendants states as reason therefore, that the Court:

I

1. In its Judgment, Section 2(d) set an end alimony date of June 8, 2020.
2. The Rationale, page 3, last paragraph indicates that the Complaint for Divorce was served on June 1, 2006.
3. General Laws Chapter 208, Section 48 defines the length of the marriage as encompassing that time period from the date of the legal marriage to the date when the Complaint for Divorce was served.
4. The Rationale, page 3, last paragraph finds that the parties were married on May 25, 1991, and a Complaint for Divorce was served on June 1, 2006, giving the parties a

measuring period for alimony termination purposes of 15 years and 7 days (180 months and 7 days). The Court applied an 80% multiple to the length of the marriage and determined that alimony should continue for twelve additional years. The Court then determined that the twelve year period should commence on the date of the Judgment of Divorce Nisi and arrived at a termination date of June 8, 2020.

5. The statute in assessing general alimony specifically mandates that the marriage terminates not on expiration of the nisi period, but when the Complaint for Divorce is served. This formulation expresses a clear legislative intent that a recipient of general alimony be eligible for a set period commencing not on the date of the divorce nisi, but on the date when the statute indicates that the marriage ends (service of the divorce complaint). This mandate clearly evidences a legislative intent to avoid circumstances wherein a recipient may receive, as in this case, temporary alimony and then years later have the statutorily mandated years tacked on to the nisi date, resulting in a multiple year award of alimony exceeding what the statute recognizes.

Moreover, if the legislature intended that the statutory period for general alimony begin at the nisi date it would have clearly expressed that intent in the statute. A court cannot read into a statute an intent not expressed in plain words. Tilton v. City of Haverhill, 311 Mass. 572, 578 (1942).

Using the statutorily defined marriage end date in this case instead of the nisi date would have placed the alimony termination date as June 1, 2018, instead of October 7, 2020 - a savings to the defendant of approximately $164,000.00.

II

6. The defendant agrees with the Court's finding that the marriage existed for 15 years and 7

days, but contends that the Court should have prorated the difference of between 70% and 80%.

Section 49 calls for a multiple factor of 70% for a 15 year or less marriage and an 80% multiple factor for marriages more than 15 years, but 20 years or less.

Section 49 of General Laws Chapter 208, Subsection 4 states that, "...alimony shall continue for not longer than 80% of the number of months of the marriage." (Emphasis supplied).

The phrase "not longer" clearly indicates that the 80% factor is an upper limit cap when a marriage goes beyond fifteen years and approaches twenty years. The "not longer" phrase clearly gives the court leeway in cases where the length of the marriage falls somewhere between 15 and 20 year, and allows the court based on that interval to apply a factor somewhere between 70% and 80% which can be determined with mathematical precision.

In this case, such a formula would be as follows:

1. 15 years = 70%;
2. Since the marriage continued for an additional seven days beyond 15 years, that represents .004 days of the 1,825 days in the five year period between 15 and 20 years;
3. Since the statute calls for a 10% increase between 15 years and 20 years, the 7 days represents only .004% of that time frame;
4. Since the statute calls for a 10% increase during that time frame, application of a pro-rata formula would be 70% + .004 x .1 equaling 70% plus .0004.

Thus, defendant's alimony duration would be .70004 of 180 months equaling 10.5 years instead of 12 years. This is a substantial savings to the defendant and a barrier preventing an

unwarranted windfall to the plaintiff. Applying a pro-rata percentage formula would, coupled with the mandated alimony start date, place plaintiff's termination date as November 1, 2016, instead of October 7, 2020.

REQUEST FOR HEARING

Pursuant to Rule 60(b) of the Rules of Domestic Relations Procedure and Standing Order 2-99, the defendant herein, Kenneth Holmes, requests that he be granted a hearing in order that he be given an opportunity to explain further why relief should be granted.

Signed under the pains and penalties of perjury this 7th day of December, 2012.

Kenneth Holmes

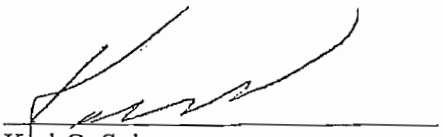
Respectfully Submitted,
Kenneth Holmes,
By his Attorney,

Karl G. Spitzer
Spitzer, Christopher & Arvanites
27 Lowell Street
Peabody, MA 01960
978-777-5100
BBO# 475720

Date: December 7, 2012

CERTIFICATE OF SERVICE

I, Karl G. Spitzer, do hereby certify that I have served a true copy of the foregoing Defendant's Motion for Relief from Judgment by mailing same, first class, postage prepaid to James M. Walsh of Walsh & Associates, 222-224 Essex Street, Salem, Massachusetts this 7th day of December, 2012.



Karl G. Spitzer

Statutes/Rules

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 48 Definitions applicable to Secs. 49 to 55

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 48. As used in sections 49 to 55, inclusive, the following words shall, unless the context requires otherwise, have the following meanings:--

"Alimony", the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order.

"Full retirement age", the payor's normal retirement age to be eligible to receive full retirement benefits under the United States Old Age, Survivors, and Disability Insurance program; but shall not mean "early retirement age," as defined under 42 U.S.C. 416, if early retirement is available to the payor or maximum benefit age if additional benefits are available as a result of delayed retirement.

"General term alimony", the periodic payment of support to a recipient spouse who is economically dependent.

"Length of the marriage", the number of months from the date of legal marriage to the date of service of a complaint or petition for divorce or separate support duly filed in a court of the commonwealth or another court with jurisdiction to terminate the marriage; provided, however, that the court may increase the length of the marriage if there is evidence that the parties' economic marital partnership began during their cohabitation period prior to the marriage.

"Rehabilitative alimony", the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment.

"Reimbursement alimony", the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to compensate the recipient spouse for

economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training.

"Transitional alimony", the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 49 Termination, suspension or modification of general term alimony

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 49. (a) General term alimony shall terminate upon the remarriage of the recipient or the death of either spouse; provided, however, that the court may require the payor spouse to provide life insurance or another form of reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) Except upon a written finding by the court that deviation beyond the time limits of this section are required in the interests of justice, if the length of the marriage is 20 years or less, general term alimony shall terminate no later than a date certain under the following durational limits:

(1) If the length of the marriage is 5 years or less, general term alimony shall continue for not longer than one-half the number of months of the marriage.

(2) If the length of the marriage is 10 years or less, but more than 5 years, general term alimony shall continue for not longer than 60 per cent of the number of months of the marriage.

(3) If the length of the marriage is 15 years or less, but more than 10 years, general term alimony shall continue for not longer than 70 per cent of the number of months of the marriage.

(4) If the length of the marriage is 20 years or less, but more than 15 years, general term alimony shall continue for not longer than 80 per cent of the number of months of the marriage.

(c) The court may order alimony for an indefinite length of time for marriages for which the length of the marriage was longer than 20 years.

(d) General term alimony 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, as defined in this subsection, with another person for a continuous period of at least 3 months.

(1) Persons are deemed to maintain a common household when they share a primary residence together with or without others. In determining whether the recipient is maintaining a common household, the court may consider any of the following factors:

(i) oral or written statements or representations made to third parties regarding the relationship of the persons;

(ii) the economic interdependence of the couple or economic dependence of 1 person on the other;

(iii) the persons engaging in conduct and collaborative roles in furtherance of their life together;

(iv) the benefit in the life of either or both of the persons from their relationship;

(v) the community reputation of the persons as a couple; or

(vi) other relevant and material factors.

(2) An alimony obligation suspended, reduced or terminated under this subsection may be reinstated upon termination of the recipient's common household relationship; but, if reinstated, it shall not extend beyond the termination date of the original order.

(e) Unless the payor and recipient agree otherwise, general term alimony may be modified in duration or amount upon a material change of circumstances warranting modification. Modification may be permanent, indefinite or for a finite duration, as may be appropriate. Nothing in this section shall be construed to permit alimony reinstatement after the recipient's remarriage, except by the parties' express written agreement.

(f) Once issued, general term alimony orders shall terminate upon the payor attaining the full retirement age. The payor's ability to work beyond the full retirement age shall not be a reason to extend alimony, provided that:

(1) When the court enters an initial alimony judgment, the court may set a different alimony termination date for good cause shown; provided, however, that in granting deviation, the court shall enter written findings of the reasons for deviation.

(2) The court may grant a recipient an extension of an existing alimony order for good cause shown; provided, however, that in granting an extension, the court shall enter written findings of:

(i) a material change of circumstance that occurred after entry of the alimony judgment; and

(ii) reasons for the extension that are supported by clear and convincing evidence.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 50 Termination, extension or modification of rehabilitative alimony

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 50. (a) Rehabilitative alimony shall terminate upon the remarriage of the recipient, the occurrence of a specific event in the future or the death of either spouse; provided, however, that the court may require the payor to provide reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) The alimony term for rehabilitative alimony shall be not more than 5 years. Unless the recipient has remarried, the rehabilitative alimony may be extended on a complaint for modification upon a showing of compelling circumstances in the event that:

(1) unforeseen events prevent the recipient spouse from being self-supporting at the end of the term with due consideration to the length of the marriage;

(2) the court finds that the recipient tried to become self-supporting; and

(3) the payor is able to pay without undue burden.

(c) The court may modify the amount of periodic rehabilitative alimony based upon material change of circumstance within the rehabilitative period.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 51 Termination of reimbursement alimony; modification; applicability of income guidelines

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 51. (a) Reimbursement alimony shall terminate upon the death of the recipient or a date certain.

(b) Once ordered, the parties shall not seek and the court shall not order a modification of reimbursement alimony.

(c) Income guidelines in subsection (b) of section 53 shall not apply to reimbursement alimony.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 52 Termination of transitional alimony; modification or extension

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 52. (a) Transitional alimony shall terminate upon the death of the recipient or a date certain that is not longer than 3 years from the date of the parties' divorce; provided, however, that the court may require the payor to provide reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) No court shall modify or extend transitional alimony or replace transitional alimony with another form of alimony.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 53 Determination of form, amount and duration of alimony; maximum amount; income calculation; deviations; concurrent child support orders

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 53. (a) In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material.

(b) Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued. Subject to subsection (c), income shall be defined as set forth in the Massachusetts child support guidelines.

(c) When issuing an order for alimony, the court shall exclude from its income calculation:

(1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34; and

(2) gross income which the court has already considered for setting a child support order.

(d) Nothing in this section shall limit the court's discretion to cast a presumptive child support order under the child support guidelines in terms of unallocated or undifferentiated alimony and child support.

(e) In setting an initial alimony order, or in modifying an existing order, the court may deviate from duration and amount limits for general term alimony and rehabilitative alimony upon written findings that deviation is necessary. Grounds for deviation may include:

(1) advanced age; chronic illness; or unusual health circumstances of either party;

(2) tax considerations applicable to the parties;

(3) whether the payor spouse is providing health insurance and the cost of health insurance for the recipient spouse;

(4) whether the payor spouse has been ordered to secure life insurance for the benefit of the recipient spouse and the cost of such insurance;

(5) sources and amounts of unearned income, including capital gains, interest and dividends, annuity and investment income from assets that were not allocated in the parties divorce;

(6) significant premarital cohabitation that included economic partnership or marital separation of significant duration, each of which the court may consider in determining the length of the marriage;

(7) a party's inability to provide for that party's own support by reason of physical or mental abuse by the payor;

(8) a party's inability to provide for that party's own support by reason of that party's deficiency of property, maintenance or employment opportunity; and

(9) upon written findings, any other factor that the court deems relevant and material.

(f) In determining the incomes of parties with respect to the issue of alimony, the court may attribute income to a party who is unemployed or underemployed.

(g) If a court orders alimony concurrent with or subsequent to a child support order, the combined duration of alimony and child support shall not exceed the longer of: (i) the alimony or child support duration available at the time of divorce; or (ii) rehabilitative alimony beginning upon the termination of child support.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 54 Remarriage of payor; income from second job or overtime work

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 54. (a) In the event of the payor's remarriage, income and assets of the payor's spouse shall not be considered in a redetermination of alimony in a modification action.

(b) Income from a second job or overtime work shall be presumed immaterial to alimony modification if:

(1) a party works more than a single full-time equivalent position; and

(2) the second job or overtime began after entry of the initial order.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 55 Reasonable security for alimony in event of payor's death; orders to maintain life insurance; modification of orders

[Text of section added by 2011, 124, Sec. 3 effective March 1, 2012 applicable as provided by 2011, 124, Sec. 4. See 2011, 124, Sec. 7.]

Section 55. (a) The court may require reasonable security for alimony in the event of the payor's death during the alimony period. Security may include, but shall not be limited to, maintenance of life insurance.

(b) Orders to maintain life insurance shall be based upon due consideration of the following factors: age and insurability of the payor; cost of insurance; amount of the judgment; policies carried during the marriage; duration of the alimony order; prevailing interest rates at the time of the order; and other obligations of the payor.

(c) A court may modify orders to maintain security upon a material change of circumstance.

Historical and Statutory Notes

2011 Legislation

St.2011, c. 124, § 3, was approved Sept. 26, 2011, and by § 7 made effective Mar. 1, 2012.

Sections 4 to 6 of St.2011, c. 124, provide:

"SECTION 4. (a) Section 49 of chapter 208 of the General Laws shall apply prospectively, such that alimony judgments entered before March 1, 2012 shall terminate only under such judgments, under a subsequent modification or as otherwise provided for in this act.

"(b) Sections 48 to 55, inclusive, of said chapter 208 shall not be deemed a material change of circumstance that warrants modification of the amount of existing alimony judgments; provided, however, that existing alimony judgments that exceed the durational limits under section 49 of said chapter 208 shall be deemed a material change of circumstance that warrant modification.

"Existing alimony awards shall be deemed general term alimony. Existing alimony awards which exceed the durational limits established in said section 49 of said chapter 208 shall be modified upon a complaint for modification without additional material change of circumstance, unless the court finds that deviation from the durational limits is warranted.

"(c) Under no circumstances shall said sections 48 to 55, inclusive, of said chapter 208 provide a right to seek or receive modification of an existing alimony judgment in which the parties have agreed that their alimony judgment is not modifiable, or in which the parties have expressed their intention that their agreed alimony provisions survive the judgment and therefore are not modifiable.

"SECTION 5. Any complaint for modification filed by a payor under section 4 of this act solely because the existing alimony judgment exceeds the durational limits of section 49 of chapter 208 of the General Laws, may only be filed under the following time limits:

"(1) Payors who were married to the alimony recipient 5 years or less, may file a modification action on or after March 1, 2013.

"(2) Payors who were married to the alimony recipient 10 years or less, but more than 5 years, may file a modification action on or after March 1, 2014.

"(3) Payors who were married to the alimony recipient 15 years or less, but more than 10 years, may file a modification action on or after March 1, 2015.

"(4) Payors who were married to the alimony recipient 20 years or less, but more than 15 years, may file a modification action on or after September 1, 2015.

"SECTION 6. Notwithstanding clauses (1) to (4) of section 5 of this act, any payor who has reached full retirement age, as defined in section 48 of chapter 208 of the General Laws, or who will reach full retirement age on or before March 1, 2015 may file a complaint for modification on or after March 1, 2013."

I.R.C. §§ 71(b)(1) & (2)

SECTION 71
Alimony and Separate Maintenance Payments

(a) General rule. Gross income includes amounts received as alimony or separate maintenance payments.

(b) Alimony or separate maintenance payments defined. For purposes of this section—

(1) In general. The term "alimony or separate maintenance payment" means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a

substitute for such payments after the death of the payee spouse.

(2) Divorce or separation instrument. The term "divorce or separation instrument" means—

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

(c) Payments to support children.

(1) In general. Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

(2) Treatment of certain reductions related to contingencies involving child. For purposes of paragraph (1), if any amount specified in the instrument will be reduced—

(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

(3) Special rule where payment is less than amount specified in instrument. For purposes of this subsection, if any payment is less than the amount specified in the instrument, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(d) Spouse. For purposes of this section, the term "spouse" includes a former spouse.

(e) Exception for joint returns. This section and section 215 shall not apply if the spouses make a joint return with each other.

(f) Recomputation where excess front-loading of alimony payments.

(1) In general. If there are excess alimony payments—

(A) the payor spouse shall include the amount of such excess payments in gross income for the payor spouse's taxable year beginning in the 3rd post-separation year, and

(B) the payee spouse shall be allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee's taxable year beginning in the 3rd post-separation year.

(2) Excess alimony payments. For purposes of this subsection, the term "excess alimony payments" mean the sum of—

(A) the excess payments for the 1st post-separation year, and

(B) the excess payments for the 2nd post-separation year.

(3) Excess payments for 1st post-separation year. For purposes of this subsection, the amount of the excess payments for the 1st post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 1st post-separation year, over

(B) the sum of—

(i) the average of—

(I) the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, reduced by the excess payments for the 2nd post-separation year, and

(II) the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) $15,000.

(4) Excess payments for 2nd post-separation year. For purposes of this subsection, the amount of the excess payments for the 2nd post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, over

(B) the sum of—

(i) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) $15,000.

(5) Exceptions.

(A) Where payment ceases by reason of death or remarriage. Paragraph (1) shall not apply if—

(i) either spouse dies before the close of the 3rd post-separation year, or the payee spouse remarries before the close of the 3rd post-separation year, and

(ii) the alimony or separate maintenance payments cease by reason of such death or remarriage.

(B) Support payments. For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment received under a decree described in subsection (b)(2)(C).

(C) Fluctuating payments not within control of payor spouse. For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment to the extent it is made pursuant to a continuing liability (over a period of not less than 3 years) to pay a fixed portion or portions of the income from a business or property or from compensation for employment or self-employment.

(6) Post-separation year. For purposes of this subsection, the term "1st post-separation years" means the 1st calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which this section applies. The 2nd and 3rd post-separation years shall be the 1st and 2nd succeeding calendar years, respectively.

(g) Cross references.

(1) For deduction of alimony or separate maintenance payments, see section 215.

(2) For taxable status of income of an estate or trust in the case of divorce, etc., see section 682.

SECTION 215

Alimony, etc., Payments

(a) General rule. In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.

(b) Alimony or separate maintenance payments defined. For purposes of this section, the term "alimony or separate maintenance payment" means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.

(c) Requirement of identification number. The Secretary may prescribe regulations under which—

(1) any individual receiving alimony or separate maintenance payments is required to furnish such individual's taxpayer identification number to the individual making such payments, and

(2) the individual making such payments is required to include such taxpayer identification number on such individual's return for the taxable year in which such payments are made.

(d) Coordination with section 682. No deduction shall be allowed under this section with respect to any payment if, by reason of section 682 (relating to income of alimony trusts), the amount thereof is not includible in such individual's gross income.

28 U.S.C.A. §1738A(b)(3)

28 U.S.C. § 1738A. Full Faith and Credit Given to Child Custody Determinations

(Amended by Pub. L. 106-386, § 1303(d), Oct. 28, 2000, 1114 Stat. 1512.)

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any child custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his

parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) is necessary in an emergency to protect the child because the child, sibling or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

NOTE 1 *See Care & Prot. of Vivian*, 420 Mass. 879 (1995) (under circumstances of the case, the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, preempted a nonemergency care and protection proceeding).

NOTE 2 "[I]f a Massachusetts law allows jurisdiction over a custody dispute where the PKPA does not, the PKPA must prevail." *Delk v. Gonzalez*, 421 Mass. 525, 531 (1995) (footnote omitted). "This conflict may occur often because the UCCJA [Uniform Child Custody Jurisdiction Act] permits concurrent jurisdiction between States, while the PKPA's rules allow only one State to assert jurisdiction at a time." *Delk v. Gonzalez*, 421 Mass. at 531 n.5; *see Hillier v. Hillier*, 41 Mass. App. Ct. 486, 488 (1996) (where the Massachusetts probate court is the "second court called upon to adjudicate a custody dispute . . . it must satisfy the jurisdictional demands of the PKPA"); *see also Fortier v. Rogers*, 44 Mass. App. Ct. 732 (1998) (Florida's prior adjudication that it had continuing jurisdiction vested it with exclusive jurisdiction per the PKPA to the exclusion of Massachusetts even though Massachusetts was child's "home state").