COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12228

(Appeals Court Case No. 2016-P-0479)

ROBERT L. POPP,
Appellee

Vs.

JOANNE M. POPP,
Appellant

ON APPEAL FROM A JUDGMENT OF
THE MIDDLESEX PROBATE AND FAMILY COURT

APPELLEE'S BRIEF

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STATEMENT OF ISSUES

In *Holmes v. Holmes*, 467 Mass. 653 (2014), the Supreme Judicial Court considered and rejected the claim that the Alimony Reform Act's presumptive durational limits cannot be applied to judgments entered before the Act became effective. The appellant raises a near identical issue here. Is there any reason to reach a different result in this case?

Under Mass.R.App.P. 8, the appellant is obligated to provide the reviewing court with a record that is sufficient for analysis of the issues raised on appeal. Here, the appellant failed to produce a full transcript or reconstruction of her full direct testimony and any of her cross-examination. Where the appellant relies on her direct testimony in arguing that the probate court abused its discretion by, e.g., denying her request for a deviation from the presumptive durational limits, has she waived some or all of the issues raised in her brief?

Rule 16 of the Massachusetts Rules of Civil Procedure require that all arguments be supported by legal argument, authorities, and citation to the record. Here, the appellant mentions only in passing or in a footnote, with no supporting legal authorities, that the probate judge should have included the parties' first marriage in her calculating the duration of marriage for purposes of calculating the presumptive durational limits, and she does not provide the date on which the first divorce complaint was served. Has the appellant waived any claim related to the first marriage or calculation of the length of marriage?

Under the Alimony Reform Act, a probate judge may deviate from the presumptive durational limits upon consideration of the factors set forth in G.L. c. 208, § 53, and written findings are required only if deviation is allowed. Here, the probate court denied the appellant's request for deviation. Did the court abuse its discretion?

This Court may award attorney fees and costs to the appellee if the appellant's appeal is frivolous or she raises frivolous issues. Here, the appellant failed to

cite controlling caselaw which holds that the rebuttable presumptive durational limits may be applied to judgments entered before the Alimony Reform Act went into effect and failed to provide an adequate record for the appeal. Is the appellee entitled to attorney fees and costs?

STATEMENT OF THE CASE

This case concerns the application of the presumptive durational limits set forth in the Alimony Reform Act to merged alimony provisions in a pre-Act judgment. As set forth below, the presumptive limits were constitutionally applied and the probate court was well within its discretion in denying the appellant's request for a deviation.

Relevant Procedural History

The parties, Joanne Popp (Joanne) and Robert Popp (Robert) (collectively, the Popp's), first married on December 11, 1988. The record is silent as to when the complaint for divorce was served; according to Joanne, the divorce judgment entered on February 28, 1994. JP-Br/2.

Joanne and Robert married for a second time on June 4, 1996. On January 28, 2010, Joanne served her complaint for divorce. The judgment of divorce *nisi* entered on January 28, 2011. The parties' Settlement Agreement survived judgment except for those provisions related to

the children, alimony,[1] and medical insurance. Add-1/3-4.

On February 7, 2014, Robert filed a motion to modify alimony -- specifically, to reduce it, in light of a substantial decrease in his employment income. [2] On March 27, 2015, Joanne filed a complaint for contempt, alleging that Robert was in arrears, in the amount of $25,146.65. Add-1/7.

The complaints for modification and contempt were consolidated for trial, which commenced on April 21 and continued on April 22 and June 2, 2015 in the Middlesex Probate and Family Court (Gorman, J.). Joanne, having fired two previous attorneys in the month leading up to trial, appeared *pro se* (she is a long-standing member of the Massachusetts bar). During her direct testimony, the recording equipment may have malfunctioned, leading to an incomplete transcript of her direct testimony and no transcript of her cross-examination, and Joanne did not seek to reconstruct the record pursuant to Mass.R.App.P. 8(c) - (e). Add-1/5-7; RA/623.

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[1] Only one provision relating to alimony survived; it relates to modification of the amount of alimony, not duration. RA/14.

[2]He did not seek modification of the durational limits, nor could he have done so before March 1, 2105, per St. 2011, c. 124, § 5(4). *Holmes*, 467 Mass. at 661 n. 9.

The probate court issued a modification judgment on September 1, 2015, reducing Robert's alimony obligation from $12,000 to $8575 per month, retroactive to the date of his complaint for modification. The court also set a termination date for Robert's alimony obligation: "Unless otherwise modified by this Court, [his] obligation to pay alimony to [Joanne] shall terminate upon the first to occur of the death of either Party, [Joanne]'s remarriage, or August of 2020." Add-1/2. In setting the durational limit, the Court found that the marriage lasted 13.67 years and applied the rebuttable presumptive durational limits set out in G.L. c. 208, § 49(b)(3). Add-1/1-2, 14. The court did not explain its rationale for denying Joanne's request for a deviation from the rebuttable presumptive durational limits, nor was it required to do so. See *Holmes*, 467 Mass. at 658.

Joanne filed a timely notice of appeal on September 22, 2015. RA/838. She does not challenge the reduction in alimony or the dismissal of her contempt complaint, focusing solely on the application of the rebuttable presumptive durational limits and the court's denial of her request for a deviation therefrom.

Statement of Relevant Facts[3]

Joanne and Robert have three children together, born in 1989, 1990, and 1991. At the time of trial, they ranged in age from 23 to 26 years old. Add-1/7.

After the first divorce, Joanne attended and graduated from law school. She interned as a "public defender" and at the Nashua Street jail, at one point writing a motion and memorandum that ultimately went to the Supreme Judicial Court. She also worked at a law firm, albeit for a short period of time. RA/592, 614.

"After passing the bar, [Joanne] opened her own real estate business so she could stay at home and take care of the parties' children" (Add-1/13). Through today, she maintains an active license to practice law in Massachusetts and she has renamed her real estate business as "Joanne Popp Realty, LLC" (RA/727). In 2006 or 2007, she worked at Starbucks and in 2011, she started a bakery, which ultimately failed. The probate judge found that Joanne's employment options are limited by her health issues, but did not find that she is un-employable, and at trial, Joanne testified that she was still trying to make her real estate business

[3] These facts are derived from the probate court's written findings and supplemented by the evidence adduced at trial. *Whitney v. Whitney*, 325 Mass. 28, 28-29 (1949).

successful, while working part time due to her health. In 2014, she earned approximately $11,000 from her real estate business. Add-1/13-14; RA/617, 731.

During their second marriage, Robert and Joanne lived with their three children in a large, 4,200 square foot home in Holliston, Massachusetts, most recently appraised at $831,200. Joanne now lives alone in the marital home with her dogs. As she states in her proposed findings, she "has no intent to sell [the marital] home" (RA/730). Add-1/13-14; RA/679, 729.

Most issues regarding division of the marital estate were resolved before executing their Separation Agreement. Ultimately, the parties split the marital estate 50/50. As for alimony, the merged[4] part of the Agreement provides that Robert would pay Joanne $24,500 per month in 2011; $10,000 per month in 2012; and commencing on January 1, 2013, Robert would pay Joanne alimony in the amount of $12,000 per month. As for duration, the merged agreement states: "Alimony payments shall … continue until further order of this Court, the death of either party or the remarriage of the Wife, whichever event occurs first" (RA/14). RA/12-15.

[4] In the surviving alimony provision, Robert agreed that he would not seek modification based solely on Joanne's income, up to $100,000 per year, or if her needs reduce. RA/14.

The Agreement also requires Robert to pay for the children's college educations and other expenses, and to provide Joanne's health insurance. Add-1/12; RA/10-33, 694, 697.

At the time of trial, Robert was 53 years old and in good health. Joanne was 47 years old and suffered from several chronic health ailments, almost all of which existed during the parties' marriage and through the time of trial. She did not call any experts or medical professionals to testify about how her ailments affect her ability to work. Add-1/12-13.

Between the time she divorced Robert and trial, Joanne had less than $1,000 in her bank accounts and had accrued substantial debts. After Robert moved out, Joanne refinanced the home at least twice and now owes $614,618.19 on a first mortgage, and $109,999.92 on a second. Together, her monthly mortgage payments total $5600. As she states in her proposed findings, Joanne has "no intent to sell the home" (RA/730).

At the time of trial, she had "no income other than alimony" (Add-1/15) and with weekly expenses totaling $4,664 per week, the probate judge determined that she "needs to reduce her living expenses" because she cannot meet her expenses even when receiving $12,000 per month in alimony, which totals $144,000 per year (Add-1/16).

During the marriage, Joanne spent less money on expenses. RA/500-501.

Before and after the divorce, Robert was the Chief Executive Officer of National Security Innovations (NSI), which performs social science consulting work for the U.S. Department of Defense. He owns 69% of NSI as well as a 15% ownership interest in a National Business Innovations, which has only one employee. Between the time of divorce and trial, NSI's revenues had dropped and Robert's income decreased substantially, and his $12,000 monthly alimony obligation to Joanne amounted to more than 50% of his income. Add-1/8.

SUMMARY OF ARGUMENT

In *Holmes v. Holmes*, the Supreme Judicial Court held that the Alimony Reform Act's presumptive durational limits, set forth in G.L. c. 208, § 49(b), may be applied to modify alimony provisions of judgments entered prior to March 1, 2012, when the Act went into effect. *Holmes v. Holmes*, 467 Mass. 653 (2014). In reaching that holding, the Court considered and rejected the wife's argument that the durational limits cannot be applied to pre-Act judgments. *Id.* at 661 n. 9. This aspect of Holmes was subsequently affirmed in a series of three cases decided the following year, *Chin v. Merriot*, 470 Mass. 527, 536 (2015); *Rodman v. Rodman*,

470 Mass. 539, 544 (2015); and *Doktor v. Doktor*, 470 Mass. 547, 550 (2015).

Because *Holmes* and its progeny remain controlling law, this Court need not consider Joanne's claim that the retroactive application of the rebuttable presumptive durational limits is unconstitutional. Even if the Court does consider the issue, the statute is constitutional because it is a reasonable means of achieving the Legislature's objective of providing clarity and consistency to the determination of alimony, including its duration. Moreover, because the limits are presumptive and not fixed, the statute regulates procedure and does not create any new substantive rights nor does it destroy any existing substantive rights. This is so because by allowing probate judges to deviate from the rebuttable presumptive durational limits, the Legislature built into the statute a safety valve to protect recipient spouses and ensure that the interests of justice are met. Also, the Act precludes judges from modifying the duration of alimony where the parties agree that alimony is non-modifiable or where the alimony provisions of a separation agreement survive. But where the provisions merge, alimony is always subject to modification, thus creating no vested rights

or settled expectations as to either the amount or duration of alimony. See *infra* at pp. 12-34.

Under Mass.R.App.P. 8, Joanne is obligated to provide this Court with a record that is sufficient for the Court's consideration of the issues raised in her brief. Joanne failed to satisfy that obligation by providing only a partial transcript of her summary. Because several of her claims rely upon the incomplete record of her testimony, this Court need not consider those claims. See *infra* at pp.35-39.

Because the probate court denied Joanne's request for a deviation from the presumptive durational limits, the court is not required to explain why. Nevertheless, the court's findings reflect that the judge properly considered all relevant statutory factors and Joanne fails to otherwise show an abuse of discretion. See *infra* at pp. 39-45.

STANDARDS OF REVIEW

This Court reviews questions of statutory interpretation under the de novo standard, keeping in mind that "a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be

remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Chin v. Merriot*, 470 Mass. at 531-532, citations omitted.

The probate judge's factual findings are binding unless clearly erroneous[5], *In re Estate of Moretti*, 69 Mass. App. Ct. 642, 650 (2007), and review of modification judgments are under the abuse of discretion or "plainly wrong" standards. *Chin,* 470 Mass. at 538; *Hassey v. Hassey*, 85 Mass.App.Ct. 518, 524 (2014). An abuse of discretion occurs when, for example, "the judge made a clear error of judgment in weighing the factors relevant to the decision ... such that the decision falls outside the range of reasonable alternatives." *L.L. v. Commonwealth,* 470 Mass. 169, 185 n. 27 (2014) (quotation marks omitted).

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[5] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."' *J.A. Sullivan Corp. v. Commonwealth,* 397 Mass. 789, 792 (1986), citation omitted.

ARGUMENT

I. The Alimony Reform Act's presumptive durational limits are constitutional.

First, Joanne claims that, as applied to her[6], the Act's presumptive durational limits judgment unconstitutionally infringes upon her so-called "vested, bargained-for and judicially approved substantive rights." JP-Br/12.[7] She is wrong.

A. The Supreme Judicial Court has already considered and rejected the argument that the presumptive durational limits cannot be applied to alimony provisions of judgments entered before March 1, 2012 when a complaint for modification is properly before the probate court.

In *Holmes v. Holmes*, 467 Mass. 653 (2014) -- **a case that Joanne fails to cite in her brief** -- the Supreme Judicial Court considered and rejected the alimony

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[6] As set forth *infra* in Argument II of this brief, this Court need not consider any of Joanne's case-specific claims because by omitting her full testimony or an acceptable substitute, Mass.R.App.P. 8(c) - (e), she failed to provide an adequate record for review.

[7] More specifically, she asserts the claims that she "had no notice, let alone fair notice, that in a few years hence her support could automatically terminate based on a legislatively devised mathematical formula;" that in planning for her financial future, she reasonably relied upon the alimony award set forth in the judgment; and that she had "`settled expectations' that while the amount of alimony might fluctuate, the duration would principally be guided by `death or remarriage.'" JP-Br/15. These claims are addressed *infra* as they become relevant.

recipient's argument that the presumptive durational limits cannot be applied to alimony provisions in judgments of divorce *nisi* entered before the Alimony Reform Act was signed into law. In *Holmes*, the parties divorced in 2008, almost 4 years before the Act went into effect. After the Act went into effect, the wife filed a complaint for modification, seeking an increase in alimony, while the husband counterclaimed to reduce child support. The probate court declined to increase or reduce alimony and child support, but modified the judgment such that the husband could claim both as alimony for tax purposes. After the husband's motion to amend the judgment was denied, he appealed, arguing that the court erred by failing to consider the time period during which he paid temporary alimony and by awarding alimony for the maximum durational limit. *Id.* at 654-655.

Although the wife did not cross appeal, she argued in her brief that the durational limits should not apply at all because the parties divorced before the Act went into effect. The Supreme Judicial Court expressly considered her claim and rejected it, holding that once a complaint for modification is "properly before the judge, she [i]s <u>obligated</u> … to modify the judgment so that the duration of alimony did not exceed the limit

established in G.L. c. 208, § 49 (*b*)[], unless the judge found that deviation from the durational limit was warranted," *id.* at 661 n. 9, emphasis added, citing St. 2011, c. 124, § 4(b).

A year after *Holmes*, the SJC held in *Chin v. Merriot*, 470 Mass. 527, 536 (2015):

> Alimony judgments entered prior to the alimony reform act may be modified only under the existing material change of circumstances standard, with the single exception that the new durational limits of the act will be considered a material change of circumstances for purposes of this standard.

Emphasis added. Accord, *Rodman v. Rodman*, 470 Mass. 539, 544 (2015); *Doktor v. Doktor*, 470 Mass. 547, 550 (2015).

This case is similar to *Holmes* in all material respects: the judgment of divorce nisi entered before the Act went into effect; the relevant alimony provisions merged with the judgment; and the matter of modification was properly before the Court on grounds other than durational limits. As such, the outcome of this case must be the same as in *Holmes*, that is, this Court must hold that the Act's presumptive durational limits may be constitutionally applied.

B. If this Court nevertheless reaches Joanne's first issue, it will conclude that the presumptive durational limits were constitutionally applied.

Despite the clear holdings of *Holmes, Chin, Rodman, and Doktor* that the presumptive durational limits apply to pre-Alimony Reform Act judgments, we address the merits of Joanne's constitutional claims, starting with an overview of the relevant law.

1. Overview of the law

a. The statutory predecessor to the Alimony Reform Act

Since 1785, the power to award alimony has derived solely from statutes,[8,9] *Pierce v. Pierce*, 455 Mass. 286, 294 (2009), citing St. 1785, c. 69, § 7, and so "the role of the judiciary is to interpret the governing statutes, not to fashion its own solutions under the common law." *Pierce, supra*.

The alimony statute in effect at the time of the Popp divorce was G.L. c. 208, § 34 (Section 34), which was enacted in 1974. Section 34 presented a dramatic

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[8] The power to enact alimony legislation arises from the Massachusetts Constitution, part 2, chapter 3, article V, which specifically mentions "causes of marriage, divorce, and alimony." Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. Rev. 13, 15 (2013).

[9] The only exception is when the Supreme Judicial Court created a rebuttable presumption that alimony terminates upon the recipient's remarriage, absent "some extraordinary circumstances, established by the recipient spouse, warranting its continuation." *Keller v. O'Brien*, 420 Mass. 820, 826-827 (1995).

change at the time, in part because it authorized alimony without regard to gender, and also because it set forth, for the first time, a non-exhaustive list of mandatory factors that judges were required to consider in every case when considering whether to award alimony and the amount. *Pierce v. Pierce*, 455 Mass. 286, 294-296 (2009), citing St.1974, c. 565; G.L. c. 208, § 34.

Section 34 would later be criticized as lacking clarity, thus leading to inconsistent results throughout the Commonwealth. Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. New Eng. L. Rev. 1, 20 (2014), footnotes omitted; Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. Rev. 13, 24, 33 (2013).

b. The Alimony Reform Act

Around 2006 or 2007 -- 4 or 5 years before the Popps executed their Separation Agreement[10] -- the topic of "[a]limony … captured the public's imagination … in

[10] According to Joanne, at the time she decided to execute the Separation Agreement, she had "had no notice, let alone fair notice, that in a few years hence her support could automatically terminate based on a legislatively devised mathematical formula." JP-Br/15, emphasis in original. The publicity attached to the issue of alimony reform, coupled with the fact that she was represented by able counsel, at the time of the divorce suggests otherwise.

Massachusetts as stories about the state's 'antiquated' alimony laws proliferated in the media." Biscardi, 36 W. New Eng. L. Rev. 1 at 2, footnote and citation omitted. See Kindregan, Jr., 46 Suffolk U. L. Rev. at 14-15.

Momentum for reform intensified in 2009, when the first alimony reform bill was introduced and a task force created. The momentum continued through 2011, when then Governor Deval Patrick signed the Alimony Reform Act (the Act), set forth in G.L. c. 208, §§ 48-53, into law, with an effective date of March 1, 2012. Biscardi, 36 W. New Eng. L. Rev. at 3; Kindregan, 46 Suffolk U. L. Rev. at 24. The Act, including its uncodified provisions, is reproduced in the Addendum to this brief.

Alimony under the Act continues to serve the same general purpose, *i.e.*, "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support," while adding that alimony should be awarded "for a reasonable length of time." G.L. c. 208, § 48. *See* Kindregan, Jr., 46 Suffolk U. L. Rev. at 24 (fundamental purpose of alimony remains unchanged with passage of Alimony Reform Act).

While the purpose is the same, the Act provides for four different types of alimony whereas the pre-ARA statute recognized only general term alimony, thus

affording judges more discretion[11] to fashion an appropriate award in each individual case. See *Holmes*, 467 Mass. at 656. The Act allows for general term alimony[12] as well as rehabilitative[13], reimbursement[14], and transitional[15] alimony, thus allowing judges even

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[11] The Alimony Reform Act requires probate judges to consider and weigh mandatory statutory factors; the new factors are materially similar to the facts set forth in the prior statutory scheme. Compare G.L. c. 208, §§ 53 and 34.

[12] "Alimony" is defined under the Act as "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." G.L. c. 208, § 48. "General term alimony" is defined as "the periodic payment of support to a recipient spouse who is economically dependent." *Id.*

[13] "Rehabilitative alimony" is defined as "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." G.L. c. 208, § 48. Historically, rehabilitative alimony had been a creature of case law and "viewed with some circumspection," especially after a long marriage with children. *Bak v. Bak*, 24 Mass.App.Ct. 608, 622 (1987).

[14] "Reimbursement alimony" is defined as "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." G.L. c. 208, § 48.

[15] "Transitional alimony" is defined as "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to

more discretion to create appropriate and case-specific alimony orders based on the unique facts presented. G.L. c. 208, §§ 48, 53; *Holmes,* 467 Mass. at 658.

The Act also sets forth rebuttable presumptive durational limits, i.e., time frames for termination of the payor spouse's alimony obligations. *Duff-Kareores v. Kareores,* 474 Mass. 528, 540 (2016); *Holmes*, 467 Mass. at 656-57. The presumptive limits are tied directly to the length of the parties' marriage and apply only when the alimony provisions of a separation agreement merge with the judgment. G.L. c. 208, § 49(b).

As relevant here -- where the probate judge found[16] that the parties were married for 13.67 years -- G.L. c. 208, § 49(b) (Section 49(b)) provides:

> 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:
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transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce." G.L. c. 208, § 48.

[16] Joanne does not claim that this finding was clearly erroneous. To the extent that she claims that the probate court erred by not including the parties' first marriage in this calculation, the claim is waived. See *infra*, Argument III-B.

> (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.

For pre-Act divorces, once a complaint for modification is properly filed, no matter the grounds, the probate judge "[is] obligated … to modify the judgment so that the duration of alimony did not exceed the limit established in G.L. c. 208, § 49(*b*)," *Holmes*, 467 Mass. at 661 n. 9, but the durational limits are not mandatory. In fact, they do not apply at all when the alimony provisions of a separation agreement survive the judgment, St. 2011, c. 124, § 4. Moreover, the Act authorizes probate judges to deviate from the presumptive termination dates, thus allowing for a built-in "safety valve" to protect recipient spouses, G.L. c. 208, §§ 49(b), 53. Accord, *Holmes, supra*; Biscardi, 36 W. New Eng. L. Rev. at 18.

The presumptive termination dates are discussed in more detail *infra*.

c. The power to modify

Since the first statutory scheme was created, courts have held the "broad and general" power to modify alimony "from time to time to meet the changing conditions of the parties so as to make a fair and reasonable provision for the support and maintenance of

[the recipient spouse] and minor children." *Whitney* v. *Whitney*, 325 Mass. 28, 31 (1949). See G.L. c. 208, § 37 ("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 or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action").

The standard for modification depends upon whether provision at issue is "merged" into judgment or whether it "survived" judgment as an independent legal contract. *Bercume* v. *Bercume*, 428 Mass. 635 (1999). Where the agreement merges, alimony may be modified upon a showing that there has been a material change[17] in circumstances since the alimony judgment entered or since the last modification. *Schuler* v. *Schuler*, 382 Mass. 366, 368 (1981).

C. Application of the presumptive durational limits to pre-Alimony Reform Act divorces satisfies constitutional requirements for retroactive laws and due process.

[17] Except for the presumptive durational limits, which never apply to surviving agreements, the party seeking modification of a surviving alimony provision has a higher burden and must show "something more than a 'material change of circumstances' must be shown." *Chin* v. *Merriot*, 470 Mass. at 535 n. 12, citation omitted.

Should this Court revisit the issue decided in *Holmes*, 467 Mass. 653, it will no doubt conclude that the application of the presumptive durational limits satisfies constitutional requirements, for the reasons set forth below.

1. The Legislature intended for the presumptive durational limits to apply to pre-Alimony Reform Act judgments.

"Where it appears that the Legislature intended an act to be retroactive, this intent should be given effect in so far as the Massachusetts and Federal Constitutions permit." *St. Germaine v. Pendergast,* 416 Mass. 698, 702 (1993), citing *Canton v. Bruno,* 361 Mass. 598, 606 (1972).

That the Legislature intended[18] for the presumptive termination dates to apply to pre-Act divorces is well-settled. *Holmes*, 367 Mass. at 661 n. 9. Accord, *Chin v. Merriot*, 470 Mass. at 536; *Rodman,* 470 Mass. at 544; *Doktor*, 470 Mass. at 550. Contrast, *Hay v. Cloutier*, 389 Mass. 248, 253-254 (1983) (holding that new

[18] This intention is set forth in an uncodified provision of the Alimony Reform Act, St. 2011, c. 124, § 4, which provides: "Existing alimony awards which exceed the durational limits established in section 48 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." Emphasis added.

provisions of G.L. c. 208, § 34 did not apply retroactively where, *inter alia*, statute "does not indicate an intention of the Legislature to have the amended § 34 apply retroactively in this regard").

2. Joanne fails to meet her heavy burden of demonstrating that the presumptive termination dates are unconstitutional.

As the party challenging the constitutionality of G.L. c. 208, § 49(b), Joanne "bears a heavy burden to demonstrate, beyond a reasonable doubt, that there are no conceivable grounds supporting [the] validity" of the statute at issue. *Pielech v. Massasoit Greyhound, Inc.*, 441 Mass. 188, 193 (2004). Accord, *El Paso v. Simmons*, 379 U.S. 497, 508-509 (1965). She cannot meet her burden. To be sure, as a starting point, this Court must presume that the Legislature had knowledge of the law of retroactivity and that the application of the presumptive durational limits to pre-Act divorces satisfies constitutional requirements. *Case of Tobin*, 424 Mass. 250, 252 (1997); *School Committee of Greenfield v. Greenfield Ed. Ass'n*, 385 Mass. 70, 80 (1982).

3. The Act reasonably applies presumptive durational limits to pre-Alimony Reform Act judgments where the parties' separation agreement merges with the judgment.

To prevail on her claim that retroactive application of the presumptive durational limits is unconstitutional, Joanne must demonstrate that the application of presumptive termination dates to pre-Act divorces is "unreasonable," *Leibovich v. Antonellis,* 410 Mass. 568, 577 (1991), quoting *American Mfrs. Mut. Ins. Co. v. Comm'r of Ins.,* 374 Mass. 181, 189-190 (1978). This inquiry focuses on three related factor: (1) the nature of the public interest motivating the legislation; (2) the nature of the rights affected; and (3) the extent of the 1egislation's impact on those rights. *Anderson v. BNY Mellon*, 463 Mass. 299, 306 (2012). Here, these factors weigh in favor of constitutionality.

As for the nature of the public interest, the Alimony Reform Act, including its presumptive durational limits, was enacted at least in part to further the public interest of providing courts, litigants, and lawyers specific guidelines for alimony. As one professor explains:

> Between 1974 and 2011, … the alimony statute's vagueness caused various judges and lawyers to interpret it differently. This led many bar groups, members of the legislature, and other interested persons to finally come together to draft and support a new statute that would more precisely spell out the different kinds of alimony, time limits on alimony awards, and circumstances governing modification.

Kindregan, Jr., 46 Suffolk U. L. Rev. at 23. At the same time, "[b]y enacting the Alimony Reform Act, the Legislature reaffirmed the importance of alimony and repudiated the argument that alimony is archaic and unnecessary." Biscardi, 36 W. New Eng. L. Rev. at 37-38.

As for the nature and extent of the rights affected, the Act differentiates between alimony awards that derive from merged separation agreements and those that survive as independent contracts.[19] St. 2011, c. 124, § 4(b), (c). The distinction is a critical one because when parties negotiate a separation agreement that survives as an independent legal contract, they have "secure[d] with finality the parties' respective rights and obligations … according to established contract principles." *Krapf v. Krapf,* 439 Mass. 97, 103 (2003).[20]

Where the parties either expressly agree that alimony is non-modifiable or the alimony provisions of their separation agreement survive the judgment, the

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[19] *See* G.L. c. 208, § 1A ("the agreement either shall be incorporated and merged into the court's judgment or by agreement of the parties, it shall be incorporated and not merged, but shall survive and remain as an independent legal contract").

[20] See also *DeCristofaro v. DeCristofaro,* 24 Mass.App.Ct. 231, 235-237 (1987); *Larson v. Larson,* 37 Mass.App.Ct. 106, 108-109 (1994).

probate court may not, in any circumstance, apply the presumptive durational limits set forth in G.L. c. 208, § 49(b).[21] St. 2011, c. 124, § 4(c)[22]; *Lalchandani v. Roddy,* 86 Mass.App.Ct. 819, 822-823 (2015); Kindregan, Jr., 46 Suffolk U. L. Rev. at 42-43 ("surviving agreements are not modifiable under the provisions of the Alimony Reform Act of 2011"). This prohibition against modifying durational limits in surviving agreements is in accord with prior law and the public interest, which strongly favors allowing divorcing spouses to settle their differences in a written separation agreement. *Moore v. Moore,* 389 Mass. 21, 24 (1983); *DeMarco v. DeMarco*, 89 Mass. App. Ct. 618, 623-24 (2016).

The same is not true, however, when the agreement merges: with merged agreements, alimony, in terms of

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[21]In this regard, the Act is even more protective of recipient spouses like Joanne because it "represents a change of emphasis in that alimony … now cannot be modified under the statute if the parties have agreed that alimony survives the judgment of divorce." *Becker v. Phelps*, 86 Mass. App. Ct. 169, 172 (2014).

[22]St. 2011, c. 124, § 4(c) is an uncodified provision of the Alimony Reform Act. It provides that "[u]nder no circumstances shall [the Alimony Reform Act] ... 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." Emphasis added.

both amount and duration, is always subject to modification. See and compare G.L. c. 208, § 37 ("After a judgment for alimony or an annual allowance for the spouse or children, 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 or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action."), with G.L. c. 208, § 49(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.")

Put another way, the recipient spouse's "right" to alimony under a merged divorce judgment is "'ephemeral in that it (can) be revised downward at any time,'" -- even retroactively. *Binder v. Binder*, 7 Mass. App. Ct. 751, 760-61 (1979), citations omitted. Thus, where alimony is and always has been subject to modification, including termination, the recipient spouse has no "vested"[23] or other constitutionally protected right to

[23] There is no set formula for deciding whether a property right is "vested," so to determine nature of party's property interest, courtS must measure the

a set amount or duration of alimony.[24] *Becker v. Phelps*, 86 Mass.App.Ct. at 766 ("we consider termination to be

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"likelihood that person claiming a vested right will eventually come to enjoy that right," and "[w]here there is a substantial likelihood" of such, interest deemed to be "vested" for retroactivity purposes. *Bird Anderson v. BNY Mellon, N.A.*, 463 Mass. 299, 309-10 (2012).

[24] Relying entirely on cases from other jurisdictions, Joanne claims that she has a "substantive right" to receive alimony from Robert until her death or remarriage. See JP-Br/30-34. Her reliance on those cases, however, is misplaced. For example, Joanne cites the Oklahoma Supreme Court's decision in *Messenger v. Messenger*, 1992 OK 27, 827 P.2d 865 (Okla. 1992) for the proposition that "the legislature is constitutionally powerless to burden a judgment with conditions not present in the law at the time of its rendition," JP-Br/31, quoting *Messenger, supra,* yet fails to acknowledge *Nantz v. Nantz*, 1988 OK 9, 749 P.2d 1137, 1140 (Okla. 1988), where the Oklahoma Supreme Court held that because "support alimony is terminable and modifiable, then the right is not vested at the time of the decree, but only at the time each payment becomes due." Joanne is similarly selective as to Georgia and New York law. See JP-Br/30-31, citing *McClain, supra;* but see *Byrd v. Ault*, 260 Ga. 893, 401 S.E.2d 690 (1991)(not cited in Joanne's brief)(holding that husband's child support obligation was subject to temporary modification, even though original divorce decree was entered prior to effective date of statute governing permanent and temporary modifications of child support obligations, because husband filed complaint for modification after effective date of statute); JP-Br/33-34, citing *Waddey v. Waddey*, 290 N.Y. 251, 254, 49 N.E.2d 8, 9 (1943); but see *Gleason v. Gleason*, 26 N.Y.2d 28, 40, 256 N.E.2d 513 (N.Y. Ct. Appeals 1970)(not cited in Joanne's brief)(rejecting wife's argument that retroactive application of new "no fault" divorce statute unconstitutionally infringed her "vested" rights to husband's social security and pension, inheritance, and in the marital status itself because "[m]arital rights … have always been treated as inchoate or contingent and may be taken away by legislation before

no more than a maximum form of modification"). See also, *Hanscom v. Malden & Melrose Gaslight Co.*, 220 Mass. 1, 8 (1914)(cited at pp. 24 and 35 of Joanne's brief)("The law of taxation may be changed at any time. In the absence of some binding contract no one has a vested interest in the continuance of such laws.")

Because probate courts have always had the authority to modify alimony where the agreement merges with the judgment, and termination is merely a form of modification, the Act's presumptive durational limits neither create nor destroy substantive rights. Contrast, *Hay v. Cloutier*, 389 Mass. 248, 364-365 (1983)(Section 34's property division provisions cannot be applied retroactively because it creates new substantive right to equitable division of property, whereas the predecessor statute to Section 34 had only

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they vest"); *Coffman v. Coffman*, 60 A.D.2d 181, 190, 400 N.Y.S.2d 833, 838 (1977) (not cited)("rights growing out of the (marriage) relationship may be modified or abolished by the Legislature without violating the provisions of the Federal or State Constitution which forbid the taking of life, liberty or property without due process of law")(citations omitted). Moreover, Joanne cites cases where the statutes at issue are silent on the topic of retroactivity, unlike the statute at issue here. See *Waddey, supra* (statute silent); *McClain v. McClain*, 241 Ga. 422, 423, 246 S.E.2d 187, 189 (1978)(same); contrast, St. 2011, c. 124, § 4(b)(expressly stating that presumptive durational limits apply retroactively).

authorized probate court to award specific "in the nature of alimony" and for the sole "purpose of support and not for the purpose of a division of property").

Finally, contrary to Joanne's view, the presumptive durational limits do not benefit only the payor spouse.[25] Rather, by allowing for deviation, the Act "effectively balance[s] the need for predictability in the law while maintaining the judicial discretion necessary to safeguard against strict guidelines. By employing deviation factors, courts will have the discretion to stray from the recommended formula in cases with unique circumstances. Such discretion allows judges flexibility, providing a safety valve for alimony recipients in extreme circumstances necessitating an adjustment from the guidelines." Biscardi, 36 W. New Eng. L. Rev. at 35 fn 259.

In sum, the Legislature did not act unreasonably in enacting the presumptive durational limits or in making them retroactive to judgments entered before March 1, 2012. As such, Section 49(b) may be applied

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[25] See JP-Br/23, arguing that application of durational limits to pre-Act divorces without allowing the parties to renegotiate property division "is fundamentally unfair and effectively alters the rules after the game started by benefitting only one side." Property division, however, is not subject to modification. *Drapek v. Drapek*, 399 Mass. 240, 244 (1987).

to the instant case without violating constitutional rights.

4. Joanne does not have any "settled expectations" of receiving alimony until her death or remarriage.

Joanne also asserts that the Act is unconstitutional as applied to her because the presumptive durational limits, she says, "altered [her] `settled expectations'" that she would receive alimony until her death or remarriage. JP-Br/15, emphasis in original. To the extent that Joanne may have had such expectation at the time of the divorce, it was unreasonable because unlike property division, which is final and not subject to modification, *Drapek v. Drapek*, 399 Mass. 240, 244 (1987), alimony has always been modifiable -- even retroactively, *Watts v. Watts,* 314 Mass. 129, 133 (1943); *Binder,* 7 Mass.App.Ct. at 760. Also, and as stated above, Joanne's "right" to alimony was "ephemeral," not vested, due to the merged alimony provisions. *Binder*, 7 Mass.App.Ct. at 760. This is especially so in this case, where the Separation Agreement expressly contemplates that the probate court may terminate Robert's alimony obligations for reasons other than death or remarriage. RA/14 ("[a]limony payments … shall continue until further order of this

Court, the death of either party or the remarriage of the Wife, whichever occurs first") (emphasis added).

Accordingly, what Joanne bargained for was alimony that has always been modifiable, subject only to a material change in circumstances.[26] *Kennedy v. Kennedy*, 10 Mass.App.Ct. 113, 117 (1980) (because order for support "is subject to continuing reappraisal and modification by the probate court … the docket always remains open on a separate support order to accommodate" any change of circumstances that may warrant modification). As such, Joanne cannot have any "settled expectations" as to the amount or duration of alimony, as she claims. JP-Br/15.

5. Section 49(b) does not "unconstitutionally change the burden of proof," rather, it creates a rebuttable presumption of termination and thus satisfies due process.

Next, Joanne asserts that her constitutional rights are violated because, in her view, the Alimony Reform

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[26] If the parties had intended for the alimony provisions to be non-modifiable, the Separation Agreement would so state. It does not. Contrast, e.g., *Lalchandani*, 86 Mass.App.Ct. at 820-821 (2015)(husband's alimony obligations cannot be terminated under the ARA upon his attainment of full retirement age because agreement survived judgment as binding contract with independent legal significance).

Act "unconstitutionally changed the burden of proof." JP-Br/36. She is wrong, for at least three reasons. First, the Act neither "change[s] the burden of proof" nor does it place any particular burden on recipient spouses. Instead, the Act merely sets forth a rebuttable presumption of termination, set to reflect the length of the parties' marriage. See *Duff-Kareores*, 474 Mass. at 540 ("a judge has discretion to deviate from a presumptive alimony award")(emphasis added); *Holmes*, 467 Mass. at 658 ("[a]lthough the reform act establishes presumptive termination dates for general term alimony, a judge is not obliged to order alimony for the presumptive maximum time period") (emphasis added).

It is black letter law that (1) litigants do not have a constitutional right to any particular rule of evidence or presumption and (2) new procedural and evidentiary rules and statutes do not impair vested rights or contractual obligations. *Tobin's Case,* 424 Mass. 250, 255-256 (1997) (rebuttable presumption of non-eligibility for workers' compensation benefits for workers over age sixty-five who have not worked for at least two years and are eligible for retirement benefits is procedural and may be applied retroactively); *Smith v. Freedman,* 268 Mass. 38, 40-41 (1929) (rebuttable presumption that motor vehicle involved in accident was

under control of person for whose conduct vehicle's owner was responsible does not change substantive law of negligence and may be applied retroactively). Accord, *O'Brien's Case,* 424 Mass. 16, 19-25 (1996); *Commonwealth v. Wayne W.*, 414 Mass. 218, 224 (1993); *DiLoreto v. Fireman's Fund Ins. Co.*, 383 Mass. 243, 248 (1981); *Bohner v. Bohner*, 18 Mass.App.Ct. 545 (1984).

Second, the Act does not assign burdens. By its express terms, G.L. c. 208, § 49(b)(4) requires written findings that a deviation beyond the presumptive durational limits is "in the interest of justice." To the extent that recipient spouses may feel compelled to make an affirmative showing to obtain a deviation, legislative changes to "the ultimate burden of persuading the fact finder" do not implicate substantive rights. *Commonwealth v. Porter*, 462 Mass. 724, 730 (2012); *Wayne W.*, 414 Mass. at 224.

Finally, for a rebuttable presumption to satisfy due process, "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *DiLoreto*, 383 Mass. at 248, emphasis added, citation omitted. Here, there is clearly a rational connection between the fact

proved (*i.e.*, the length of the Popps' marriage) and the ultimate fact presumed (i.e., the appropriate termination date).

II. This Court need not consider Joanne's third, fourth, or fifth claims of error because she has failed to provide a sufficient record of her testimony.

The obligation to provide this Court with an adequate record lies squarely with Joanne, as she is the appellant. Mass. R. App. P. 8(b)(1) and 1973 Reporter's Notes. Here, however, she fails to include a full record of her own testimony. While the full transcript of her direct and all of her cross-examination may have been lost due to an equipment error, RA/623 (indicating that recording ended mid-sentence during Joanne's direct testimony), she is nevertheless obligated to reconstruct the missing parts of her testimony; she failed to do so. Mass.R.App.P. 8(c), (d), and (e); *Arch Med. Associates, Inc. v. Bartlett Health Enterprises, Inc.*, 32 Mass. App. Ct. 404, 406 (1992).

While the record is sufficient to allow this Court to determine whether the Alimony Reform Act's retroactive durational limits pass constitutional muster on their face, matters related to alimony, modification, and deviation from presumptive durational limits are necessarily case-specific and fact-intensive by nature. See, e.g., G.L. c. 208, §§ 49(b), 53; *Zaleski v. Zaleski*,

469 Mass. 230, 243 (2014). Without Joanne's full testimony, including and especially her cross-examination,[27] the record she provides is insufficient to allow for review of at least her third, fourth, and fifth claims of error. See JP-Br/39-41 (arguing that probate court abused its discretion by failing to consider mandatory statutory factors); 41-45 (arguing that probate court "erred when it required that Robert's alimony obligations automatically terminate in August, 2020"); and 45-50 (arguing that probate court abused its discretion by denying her request for a deviation from presumptive durational limits).

This is especially so because despite the lack of a complete transcript, Joanne's case-specific arguments rely in whole or in part upon her (incomplete) direct testimony. See, e.g.:

- *JP/Br at 23,* arguing that "unquestionable, payees such as Joanne would have attempted to negotiate a different asset allocation if the law at the time of divorce imposed a presumptive termination date" and "[y]ears after the divorce, after relying on what she viewed as an indefinite alimony award and after spending down the majority of those assets awarded to her, Joanne finds herself with yet more `chronic health issues,' with

[27] There are few equivalents to the truth-finding function of the "crucible of cross-examination." *Crawford v. Washington,* 541 U.S. 36, 50-52, 59 (2004).

only a modest home[28], in debt, no meaningful job prospects and a fixed cut-off date of her support;"

- *id. at 40-41,* relying solely on portions of Joanne's direct testimony included in record to support her claim that she produced sufficient evidence to warrant deviation (emphasis added);

- *id. at 42-43,* arguing that probate court failed to consider all statutory deviation factors because "[t]he record is silent as to any future event or predictable prospects of meaningful employment that would enable Joanne to be economically self-sufficient at any time, let along by August, 2020. *Clearly there were none*" (emphasis added);

- *id. at 43-44,* arguing that Joanne's "earning capacity continued to be virtually nonexistent at the time of trial" and that she "is not currently self-supporting and … lacks the ability to be so -- now or at any specific point in the future";

- *id. at 44,* arguing that "there was ample evidence that this was, in effect, a marriage of long-term duration, and there was *no evidence* that Joanne could earn in excess of what she earned in her `best' year" (emphasis added);

- *id. at 45,* arguing that 2020 termination date is "`arbitrary' in light of her `current and predictable needs'"(emphasis added);

- *id. at 47,* arguing that probate court's rejection of Joanne's request for deviation is

[28] We note that as of the time of trial, Joanne was residing in the marital home she previously shared with her husband and three children; it is approximately 4,200 square feet in size and has custom landscaping as well as $100,000 built-in swimming pool. RA/501.

"not `in the interests of justice,' 'necessary,' or `warranted,'" and that if deviation is not required in this case, "it is difficult to conceive of a case in which it would be";

- *id. at 48*, arguing error in denial of deviation because "given the … `on going' (sic) nature of her health issues, it is more likely than not that her ailments will only worsen going forward" and that "[a]t a minimum, there was no evidence to suggest that Joanne's health will improve sufficiently by August, 2020 to enable her (then at age 52) to explore more expansive employment options," (emphasis added);

- *id. at 49*, arguing that "it is clear from the trial court's findings that at the time of trial Joanne had more debt than assets … and [t]he judge's findings do not reflect *how* … Joanne would be able to acquire sufficient assets by August, 2020 that she could use to meet her needs" (emphasis added);

- *id.*, arguing that "it is reasonable to infer, based on the trial court's findings, that after her alimony terminates Joanne may become a public charge" (emphasis added); and

- *id.* at 50, arguing that "it is presently `uncertain or unpredictable' whether and to what extent Joanne will be able to become economically self-sufficient by August, 2020."

Because Joanne has failed to provide a record of her full direct and omits entirely her cross-examination, this Court need not consider her third, fourth, or fifth claims of error. See *Hawkins v. Hawkins*, 397 Mass. 401, 409 (1986); *New Bedford Gas & Edison Light Co. v. Bd. of Assessors of Dartmouth*, 368 Mass.

745, 749-751 (1975); *Arch Med. Associates, Inc.*, 32 Mass. App. Ct. at 406.

III. Even if this Court considers Joanne's third, fourth, and fifth claims of error, she fails to demonstrate any abuse of discretion or that the denial of a deviation from the presumptive durational limits is plainly wrong.

The gist of Joanne's third, fourth, and fifth claims of error is that the probate court abused its discretion by denying her request for a deviation. In fact, there was no abuse of discretion and her request was properly denied.

A. The probate court properly considered the factors set forth in G.L. c. 208, § 53.

The Alimony Reform Act sets forth a list of statutory factors that courts must consider when determining the appropriate form of alimony and in setting the amount and duration of support. G.L. c. 208, § 53. Those factors include: "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." *Id.*

Joanne claims that the probate court failed to consider her "ability to maintain marital lifestyle [independent of support from Robert]" and her "lost economic opportunity as a result of her marriages to Robert." JP-Br/39, brackets in original. Joanne is wrong, as the probate judge's written findings clearly reveal that these matters were considered. See Add-1/7, ¶¶ 44-45 (findings regarding Joanne's current finances); *id.*, ¶ 46 ("[a]fter passing the bar, Ms. Popp opened her own real estate business so she could stay at home and take care of the parties' children"); *id.*, ¶ 47 (noting that Joanne "suffers from many chronic health issues which limit her employment options"); Add-1/14 (rationale) ("Ms. Popp owned her own real estate business and had a law degree. However, she primarily focused on raising the parties' three children"); Add-1/15-16 (rationale) ("Currently, Ms. Popp has no income other than alimony and weekly expenses of $4,663.11."); Add-1/16 (rationale) ("Even with the current alimony order of $12,000 per month, Ms. Popp is unable to meet her weekly expenses.")

B. Joanne has waived any argument relative to the length of marriage.

Below, Joanne argued that the probate court should count her first and second marriages to Robert for purposes of calculating the duration of the marriage. RA/790-797. On appeal, however, she fails to adequately raise any such issue for this Court's consideration, mentioning it only in a footnote in her Statement of the Facts, JP-Br/6, and in the body of her argument, she mentions the issue only in passing and without citation to any legal authority.[29]

A mere assertion of error, without more, does not rise to the level of appellate argument, nor do arguments raised in footnotes. Mass.R.App.P. 16(a)(4), as amended, 428 Mass. 1603 (1999); *Selmark Associates, Inc. v. Ehrlich*, 467 Mass. 525, 540 (2014); *Kellogg v. Board of Registration in Medicine*, 461 Mass. 1001, 1003 (2011).E

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[29]See JP-Br/42 (arguing that probate court "offers no justification for terminating … alimony in August, 2020 other than its rote reliance on the durational provisions of the Act, and even then, considering only the second marriage, the court's findings make no mention of Joanne's argument that additional time should have been `tacked on' to the second marriage, commenting, `You broke the chain'"); JP-Br/44 ("there was ample evidence that this was, in effect, a marriage of long-term duration"). The only other times Joanne mentions the first marriage in relation to the length of marriage under G.L. c. 208, § 48(b) is in the statement of issues. JP-Br/1.

Moreover, even if the issue were properly raised in accordance with Mass.R.App.P. 16's requirements, Joanne's failure to provide an adequate record prevents this Court from resolving the issue because "length of the marriage" is defined as "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." G.L. c. 208, § 48. But here, Joanne failed to include the first divorce complaint in her record appendix, the first complaint is not referenced in the lower court docket, RA/1-7, and she fails to otherwise reference the date that the first complaint was served. As such, this Court cannot calculate the "length of the marriage" within the meaning of the relevant statutory scheme.

Finally, Joanne has failed to challenge as clearly erroneous the probate court's factual finding that her second marriage to Robert lasted 13.67 years and thus, the finding is binding on this Court. *In re Estate of Moretti*, 69 Mass.App.Ct. at 650.

C. Joanne fails to demonstrate that it was an abuse of discretion to deny her request for a deviation from the presumptive durational limits.

Lastly, Joanne claims that the probate court abused its discretion by denying her request for a deviation[30]

[30] Per G.L. c. 208, § 53, the following factors are relevant to deviation factors include: "(1) advanced age; chronic illness; or unusual health circumstances of either

from the presumptive durational limits. JP-Br/45-50. More specifically, she argues that the court failed to "explain[] how Joanne's presently limited options will so markedly improve with the passage of time as to enable her to meet her future needs without support from Robert" (JP-Br/47-48). Moreover, Joanne asserts, "it is more likely than not that her ailments will only worsen going forward." *Id.* at 48.

There are two fatal flaws in Joanne's reasoning: First, the court did not find that Joanne is unable to work, only that her employment options are "limited." Given Joanne's current law license and her then-present

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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 [sic.] 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; [and](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." G.L. c. 208, § 53. The court may also consider, "upon written findings, any other factor that the court deems relevant and material." *Id.*

intent to make her real estate business a success, even Joanne herself did not claim to be un-employable. Moreover, while Joanne may be of the mindset that her health will further deteriorate, she offered no such evidence at trial (or at least, the incomplete record fails to reveal any such evidence). Moreover, the surviving alimony provision of the Separation Agreement also anticipates that Joanne is capable of working, possibly earning $100,000 or more in annual income. RA/14.

Joanne's second and third reasons -- that she has no assets and is unable to maintain her expenses of over $20,000 per month -- also fall short. To be sure, as the probate court expressly found, Joanne "needs to reduce her living expenses." RA/16. Moreover, under the terms of the Separation Agreement and exclusive of any property division, Robert has paid Joanne nearly, or in excess of, $700,000, from February 1, 2011 through today. There is no reason why she could not have saved a large percentage of that money if she had not been so reckless with her finances. On this record, there is no abuse of discretion in denying a deviation.

IV. Robert is entitled to attorney fees and costs.

This Court has the authority to award attorney fees and up to double costs to the prevailing party when all

or substantially all of the appellant's appellate arguments are "wholly insubstantial, frivolous, and not advanced in good faith." *Fronk v. Fowler*, 456 Mass. 317, 324-325 (2010). See also *Avery v. Steele*, 414 Mass. 450, 454 (1993); G.L. c. 211A, § 15; G.L. c. 231, § 6F; Mass.R.App.P. 25.

For the reasons discussed above, Joanne's appeal is frivolous, including and especially because she fails to (1) acknowledge controlling law which directly undercuts her claims (*supra*, Argument I) and (2) provide an adequate record for review of her claims (*supra*, Argument II). Moreover, the law on each issue raised in Joanne's is well-settled, she fails to challenge the probate judge's subsidiary findings of fact, and she has not demonstrated a reasonable expectation of reversal. *Allen v. Batchelder*, 17 Mass.App.Ct. 453, 458, rev. denied, 391 Mass. 1104 (1984). As such, Robert respectfully requests that this Court order Joanne to pay his legal fees and costs associated with defending this appeal.

CONCLUSION

For the reasons set forth above, Appellee Robert Popp respectfully requests that this Honorable Court affirm the decision of the probate court to deny a deviation from the rebuttable presumptive durational limits and to award him attorney fees and costs.

Respectfully submitted,
ROBERT POPP,
By and through counsel,

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CERTIFICATION OF COMPLIANCE WITH MASS.R.App.P.

I certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure:

Patricia A. DeJuneas
Patricia A. DeJuneas

CERTIFICATE OF SERVICE

I certify, under the pains and penalties of perjury, that on this 12th day of October, 2016, I electronically filed and served this brief upon Richard Novitch, counsel for Appellant Joanne Popp.

Patricia A. DeJuneas
Patricia A. DeJuneas

Addendum-1

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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

MIDDLESEX DIVISION DOCKET NO. MI-10D-0340

ROBERT L. POPP,
Plaintiff

v.

JOANNE M. POPP,
Defendant

JUDGMENT

(On Plaintiff's Complaint for Modification filed on February 7, 2014
On Defendant's Complaint for Contempt filed on March 27, 2015)

This matter came before the Court (Gorman, J.) for a trial on the merits on April 21 and 22, 2015 and June 2, 2015. Robert L. Popp (hereinafter referred to as "Mr. Popp") was present and represented by Attorneys Gail K. Gelb and Michelle Lamendola. Joanne M. Popp (hereinafter referred to as "Ms. Popp") was present and proceeded *pro se*. Fifty-two (52) exhibits were entered into evidence and the following seven (7) witnesses testified at trial: Bryan Rasmussen; James Henderson; Kimberly Marshall; David Glaser; Thomas Rieger; Mr. Popp; and Ms. Popp.

After trial, and consideration of the evidence and all reasonable inferences drawn therefrom, the Court hereby enters the following:

1. Alimony. Commencing on October 1, 2015, Mr. Popp shall pay monthly alimony to Ms. Popp in the amount of $8,575.

2. In addition to the $8,575 per month, Mr. Popp shall pay to Ms. Popp an amount equal to 36.75% of any income earned by him, in excess of $280,000 annually up to an income cap of $875,000.00. Mr. Popp shall each year, no later than March 15th provide Ms. Popp with a letter and supporting documentation evidencing his earnings from the prior year. Payment of any support owed to Ms. Popp shall be paid to her no later than April 15th each year.

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3. Unless otherwise modified by this Court, Mr. Popp's obligation to pay alimony to Ms. Popp shall terminate upon the first to occur of the death of either Party, Ms. Popp's remarriage or August of 2020.

4. **Retroactive Modification.** Mr. Popp's alimony reduction shall be retroactive to the date of service on his Complaint for Modification (*i.e.* February 11, 2014). From March 1, 2014 to September 1, 2015, Mr. Popp paid monthly alimony in the amount of $12,000 (overpaid by $3,425.00 for a period of 19 months, resulting in an overpayment of $65,075.00).

5. Ms. Popp shall provide Mr. Popp with a mortgage and note on her current residence (Mr. Popp's counsel to draft and Ms. Popp to execute) to secure payment for the $65,075.00. 50% of any payments owed to the Ms. Popp as set out in paragraph 2 above shall be retained by Mr. Popp and credited against the $65,075.00 owed to him by Ms. Popp. If any monies are still owed to Mr. Popp at the time of the sale or transfer of Ms. Popp's residence, Mr. Popp shall be paid in full.

6. **Ms. Popp's March 27, 2015 Complaint for Contempt.** Mr. Popp is not in contempt.

7. **Prior Judgments.** The terms of all prior Judgments not inconsistent herewith shall remain in full force and effect.

Date: September 1, 2015

Patricia A. Gorman, Associate Justice
Middlesex Probate and Family Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

MIDDLESEX DIVISION DOCKET NO. MI-10D-0340

ROBERT L. POPP,
Plaintiff

v.

JOANNE M. POPP,
Defendant

RELEVANT PROCEDURAL HISTORY, FINDINGS OF FACT, RATIONALE, AND CONCLUSIONS OF LAW

(On Plaintiff's Complaint for Modification filed on February 7, 2014
On Defendant's Complaint for Contempt filed on March 25, 2015)

This matter came before the Court (Gorman, J.) for a trial on the merits on April 21 and 22, 2015 and June 2, 2015. Robert L. Popp (hereinafter referred to as "Mr. Popp") was present and represented by Attorneys Gail K. Gelb and Michelle Lamendola. Joanne M. Popp (hereinafter referred to as "Ms. Popp") was present and proceeded *pro se*. Fifty-two (52) exhibits were entered into evidence and the following seven (7) witnesses testified at trial: Bryan Rasmussen; James Henderson; Kimberly Marshall; David Glaser; Thomas Rieger; Mr. Popp; and Ms. Popp.

After trial, and consideration of the evidence and all reasonable inferences drawn therefrom, the Court hereby enters the following Relevant Procedural History, Findings of Fact, Rationale, and Conclusions of Law:

RELEVANT PROCEDURAL HISTORY

1. On January 28, 2010, Ms. Popp filed a Complaint for Divorce, alleging irretrievable breakdown of the marriage pursuant to G. L. c. 208, § 1B.

2. On January 18, 2011, a Judgment of Divorce *Nisi* issued, which incorporated a Separation Agreement signed by the parties on the same date. With the exception of the provisions related to the children, medical insurance, and alimony, the Separation Agreement

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survived the Judgment of Divorce. However, the provisions of Article II, subparagraph 1.d., relating to modification of alimony, also survived the Judgment of Divorce.

3. The parties' Separation Agreement provided, *inter alia*, that:

a. Commencing on February 1, 2011, and for each month of the 2011 calendar year only, on the first of each month, Mr. Popp shall pay to Ms. Popp as monthly alimony the sum of $17,000.00. At the end of the 2011 calendar year in December 2011, should Mr. Popp earn greater than $600,000.00 from his 2011 yearly income, Mr. Popp shall pay Ms. Popp as alimony 36.75% of any such 2011 income that is above $600,000.00, up through and no greater than $875,000.00. Said $875,000.00 shall be the income cap ("Income Cap") for the purpose of any and all such alimony calculations in any year.

b. Commencing on January 1, 2012, and for each month of the 2012 calendar year only, on the first of each month, Mr. Popp shall pay to Ms. Popp as monthly alimony the sum of $10,000.00. At the end of the 2012 calendar year in December 2012, should Mr. Popp earn greater than $600,000.00 from his 2012 income, Mr. Popp shall pay Ms. Popp as alimony 36.75% of any such 2012 income that is above $600,000.00, up through and no greater than the said $875,000.00 Income Cap.

c. Commencing on January 1, 2013, and in each year thereafter, on the first of each month, Mr. Popp shall pay Ms. Popp $12,000.00 in monthly alimony. At the end of each calendar year, Ms. Popp shall receive as additional alimony a total of 36.75% of Mr. Popp's respective calendar year income, up through and no greater than the said $875,000.00 Income Cap. All said year-end 36.75% calculations, commencing in 2013 and in each year thereafter, shall subtract the monthly alimony payments already made in each respective year to Ms. Popp. Therefore, under the within alimony payment schedule, in any year Ms. Popp is entitled to receive alimony, she shall not receive a total yearly alimony amount greater than $321,562.50 (which is 36.75% of income up through $875,000.00.) The parties shall exchange W-2 statements, tax returns, and 1099 statements within 30 days of each party's receipt or filing of the same, however, Mr. Popp and Ms. Popp shall not be required to do so unless Mr. Popp's income is less than $875,000.00 in any calendar year. If Mr. Popp claims that his income is less than $875,000.00 in any calendar year, Ms. Popp shall have the right to have her accountant review Mr. Popp's company's respective year's year-end profit and loss report and year-end balance report, corporate tax returns, December year-end corporate bank statements, December year-end redacted payroll. Ms. Popp may only provide and share such information to her accountant and legal counsel and no one else. The accountant and legal counsel shall further execute confidentiality agreements. If the confidentiality agreement is breached by either Ms. Popp, the accountant or the attorney, these documents will no longer be available to Ms. Popp.

d. In any modification proceeding brought by either party, the parties agree that Ms. Popp may exclude from consideration the first $100,000.00 of yearly income she

may earn. In addition, any income, other than alimony support, made by Ms. Popp up to $100,000.00 each year and savings therefrom, any decision by Ms. Popp to move to a smaller home, proceeds from the sale of Ms. Popp's home and savings therefrom, any reduction in Ms. Popp's expenses, and/or the emancipation of the children, or reduction of costs by Ms. Popp, shall not be grounds for modification. The provisions of this paragraph shall survive as an independent contract and shall not be merged in the parties' judgment of divorce. Alimony payments shall be deductible by Mr. Popp, and shall be taxable as income to Ms. Popp, for Federal and State income tax purposes.

4. On February 7, 2014, Mr. Popp filed a Complaint for Modification to reduce his alimony payments. Mr. Popp asserts that since the Judgment of Divorce, he has suffered a 55% involuntary reduction in his income.

5. On March 3, 2014, Attorney Robert J. Rivers filed a Notice of Appearance on Behalf of Ms. Popp.

6. On the same date, Ms. Popp filed an Answer to Complaint for Modification.

7. On the same date, Ms. Popp filed a Request for Rule 401 Financial Statement.

8. On March 12, 2014, Mr. Popp filed a Request for Financial Statement of Ms. Popp.

9. On March 27, 2014, Mr. Popp filed a Motion to Modify Judgment of Divorce Relative to Alimony Under Mr. Popp's February 7, 2014 Complaint for Modification.

10. On the same date, the parties filed a Joint Motion to Continue Mr. Popp's Motion to Modify Judgment of Divorce Relative to Alimony Under Mr. Popp's February 7, 2014 Complaint for Modification. On the same date, the Court (Gorman, J.) allowed the Motion.

11. On June 9, 2014, Ms. Popp filed an Opposition to Mr. Popp's Motion to Modify Judgment of Divorce Relative to Alimony Under Mr. Popp's February 7, 2014 Complaint for Modification.

12. On the same date, the Court (Gorman, J.) allowed Mr. Popp's Motion to Modify Judgment of Divorce Relative to Alimony Under Mr. Popp's February 7, 2014 Complaint for Modification without prejudice to seek retroactive modification back to the date of service if one is granted. On June 23, 2014, the Court vacated its Order.

13. On June 23, 2014, Ms. Popp filed an Emergency Motion for Clarification and/or Reconsideration of Temporary Order Dated June 9, 2014 (Gorman, J.). On the same date, the Court (Gorman, J.) neither allowed nor denied the Motion, indicating that the Order

of June 9, 2014 is vacated.

14. On the same date, the Court (Gorman, J.) entered a Temporary Order *nunc pro tunc* to June 9, 2014, which provided as follows: Mr. Popp's request to modify his alimony/support obligation is hereby denied without prejudice to Mr. Popp seeking a retroactive modification back to the date of service if he is successful in obtaining a modification after completion of discovery and/or hearing on the merits.

15. On July 2, 2014, Attorney Michelle Iandoli filed an Entry of Appearance on behalf of Mr. Popp.

16. On July 3, 2014, Attorney Carrie Rose Goldman filed a Motion for Withdrawal as Counsel for Mr. Popp.

17. On the same date, Mr. Popp filed an Opposition to Ms. Popp's Emergency Motion for Clarification and/or Reconsideration of Temporary Order Dated June 9, 2014 (Gorman, J.).

18. On the same date, Mr. Popp filed an Emergency Motion for Reconsideration of Temporary Order Dated June 23, 2014 Pursuant to Mass. R. Dom. Rel. P. 59(E) and Probate and Family Court Standing Order 2-99.

19. On July 11, 2014, Ms. Popp filed an Opposition to Mr. Popp's Emergency Motion for Reconsideration of Temporary Order Dated June 23, 2014 Pursuant to Mass. R. Dom. Rel. P. 59(E) and Probate and Family Court Standing Order 2-99.

20. On September 3, 2014, Ms. Popp filed an Assented-To Motion to Continue Pre-Trial Conference Date to October 7, 2014 at 10:00 a.m. On the same date, the Court (Gorman, J.) allowed the Motion and continued the pretrial conference to October 7, 2014 at 8:30 a.m.

21. On March 2, 2015, Ms. Popp filed a Motion *in Limine* to preclude Mr. Popp from introducing evidence as to his income at the time of divorce except for his sworn Rule 401 Financial Statement dated January 18, 2011. On the same date, the Court (Gorman, J.) denied the Motion.

22. On March 23, 2015, Attorney Robert J. Rivers filed a Motion to Withdraw as Counsel for Ms. Popp. On the same date, the Court (Gorman, J.) allowed the Motion.

23. On the same date, Ms. Popp filed a Notice of Appearance on behalf of herself.

24. On the same date, Ms. Popp filed a Motion for Short Order of Notice and an Affidavit of Emergency in support thereof.

25. On the same date, Ms. Popp filed a Motion for Continuance of Trial Date. On March 30, 2015, the Court (Gorman, J.) denied the Motion.

26. On the same date, Ms. Popp filed a Motion for Allowance of Counsel Fees. On March 30, 2015, the Court (Gorman, J.) denied the Motion.

27. On March 25, 2015, Attorney Jared Wood filed a Notice of Limited Appearance on behalf of Ms. Popp.

28. On the same date, Attorney Jared Wood filed a Notice of Withdrawal of Limited Appearance for Ms. Popp.

29. On March 27, 2015, Ms. Popp filed a Complaint for Contempt, alleging that Mr. Popp is in arrears of court-ordered support payments and there now remains due and unpaid to Ms. Popp the sum of $25,146.65 plus such further amounts as may accrue to the date of hearing.

30. On March 30, 2015, Mr. Popp filed an Opposition to Ms. Popp's Motion for Continuance of Trial Date; an Opposition to Ms. Popp's Motion for Allowance of Counsel Fees; and an Opposition to Ms. Popp's Motion *in Limine*.

31. On May 1, 2015, the Court (Gorman, J.) consolidated the contempt scheduled for June 5, 2015 with trial.

FINDINGS OF FACT

1. The parties were married on June 4, 1996 in Norwell Massachusetts. This was the parties' second marriage to each other; they were previously married on December 11, 1988 and divorced on February 28, 1994.

2. On January 18, 2011, a Judgment of Divorce *Nisi* issued, which incorporated a Separation Agreement signed by the parties on the same date. With the exception of the provisions related to the children, medical insurance, and alimony, the Separation Agreement survived the Judgment of Divorce. However, the provisions of Article II, subparagraph 1.d., relating to modification of alimony, also survived the Judgment of Divorce.

3. Three children were born of the marriage. Sarah Joanne Popp, born on September 13, 1991, is twenty-three years old; Robert Joseph Popp, born on May 11, 1990, is twenty-five years old; and George Robert Popp, born on April 21, 1989, is twenty-six years old. The children are all emancipated.

4. At the time of the divorce in 2011, Mr. Popp had a base salary of $339,999.96 and bonus

income of $260,000, totaling $599,999.96. Ms. Popp had self-employment income of $54.42.

5. Mr. Popp is the Chief Executive Officer of National Security Innovations (hereinafter referred to as "NSI") and since the time of the divorce, the company's revenue and Mr. Popp's salary have significantly decreased. Mr. Popp has three other partners, including Bryan Rasmussen, Tom Rieger, and Allison Astorino-Courtois. Mr. Popp owns 69% of the company.

6. NSI is a consulting firm that primarily performs social science consulting work for the Department of Defense. The company was founded by Mr. Popp in 2007.

7. Bryan Rasmussen, Vice President of Operations at NSI (hereinafter referred to as "Mr. Rasmussen"), testified credibly regarding the company's financial state from 2011 forward. Mr. Rasmussen began working at NSI in January of 2008. Mr. Rasmussen has a Master's Degree in Public Administration from George Washington University and worked for the government and a large defense firm thereafter. He handles the inflow and outflow of money for the company. For example, he does the billing and keeps the records, handles the payroll, and keeps track of the employees' expenses. Mr. Rasmussen inputs the company's financial information into QuickBooks and reconciles the program with the company's invoices and bank statements.

8. Every year, NSI is audited by the federal government to ensure the company is in compliance with the Federal Acquisition Regulations ("hereinafter referred to as "FAR"). Mr. Rasmussen testified credibly that the company's former health initiative program was in compliance with FAR. As part of this program, the company hired Kimberly Marshall.

9. Mr. Rasmussen testified credibly to the company's revenue and net income from 2011 through 2014, which is as follows: 2011 revenue of $6,058,128.12 and net income of negative $77,592.39; 2012 revenue of $3,526,810.53 and net income of negative $151.595.56; 2013 revenue of $2,270,693.52 and net income of negative $39,336.32; and 2014 revenue of $2,091,706.44 and net income of $65,636.35.

10. In 2011, NSI had its highest revenue of $6,058,128.12. Since that time, the company's revenue has steadily decreased. Mr. Rasmussen testified credibly that NSI began cutting costs after 2011. The company eliminated its leased meeting space, reduced benefits, cut salaries, and eventually had to lay off one-half of the staff. As a result of the cost cutting, the four partners took pay cuts and furloughs. These cost cutting measures allowed NSI's net income to increase each year while its revenue decreased.

11. In 2012, NSI obtained a line of credit from Sovereign Bank for approximately $200,000.00 in order to pay its greatest expense, which is payroll. The company took out additional debt in 2015 of $110,000.00 after repaying almost all of the $200,000.00

previously obtained.

12. From 2011 through 2014, Mr. Popp's base salary and bonuses were as follows: 2011 base salary of $339,999.96 and bonus of $260,000; 2012 base salary of $285,000 and no bonus; 2013 base salary of $274,385.00 and bonus of $1,000.00; and 2014 base salary of $269,923.56 and bonus of $5,120.33. Mr. Popp's income has never been as high as it was in 2011. Mr. Rasmussen testified credibly that the reason for Mr. Popp's decrease in income is the decrease in NSI's revenue and is not for personal reasons. Mr. Popp never told Mr. Rasmussen that he wanted to lower his salary because he wanted to reduce his alimony payments.

13. Mr. Rasmussen testified credibly that the four partners decide salaries together. In addition, the partners determine bonuses at the end of the year. Bonuses are both based on the individual employee's performance and the company's revenue for the year.

14. As of March 31, 2015, NSI has net income for 2015 of $4,258.99. Mr. Rasmussen projects that NSI will have approximately $2.1 million in revenue for 2015. Mr. Rasmussen does not foresee the company going back to receiving revenues of $6 million.

15. At the end of 2012, Massachusetts Institute of Technology Lincoln Laboratory (hereinafter referred to as "Lincoln Labs") hired Mr. Popp as a consultant. The initial intention was for Lincoln Labs to hire NSI, but due to security clearance Lincoln Labs was unable to hire NSI in a timely manner. However, Lincoln Labs already held Mr. Popp's security clearance, so the company decided to hire Mr. Popp as a conduit for NSI to perform the work under the contract. Mr. Popp acted as the prime contractor and NSI acted as the subcontractor. Mr. Popp billed Lincoln Labs and NSI billed Mr. Popp. Mr. Popp received $102,800.00 from Lincoln Labs for this project. Mr. Popp paid NSI $75,800 for its work on the project and he paid Kimberly Marshall $27,000 for her work on the project.

16. James Henderson is NSI's accountant. Additionally, he is Mr. Popp's personal accountant. Mr. Henderson has been a certified public accountant since 1978 and he owns his own accounting practice called Henderson, Grealis, & Associates P.C. He opened his own firm in 1983 after working for several accounting firms. Mr. Henderson was the parties' personal accountant since the mid-nineties. However, he stopped acting as Ms. Popp's personal accountant following the parties' divorce in 2011. One-half of Mr. Henderson's business comes from closely held corporations and the other half comes from personal tax returns.

17. Mr. Henderson works closely with Mr. Rasmussen in preparing NSI's corporate tax returns. With Mr. Rassmussen's capability and the oversight of the federal government, Mr. Henderson is very confident in NSI's accounting. However, Mr. Henderson does not have blind faith in the company; he also conducts an independent investigation of the

company's finances.

18. Mr. Popp never asked Mr. Henderson to do anything untoward regarding his income, including for purposes of reducing his alimony obligation. In Mr. Henderson's opinion, the reduction in the partners' income in 2012 was necessary for the financial health of NSI.

19. Mr. Popp spoke to Mr. Henderson before signing his Separation Agreement in order to understand the tax implications. At the time of this conversation, Mr. Henderson believed Mr. Popp's income would be $600,000 again the following year.

20. NSI lists the following gross receipts and total income on its federal corporate income tax returns for 2011 through 2014: 2011 gross receipts of $5,868,509 and total income of $4,426,620; 2012 gross receipts of $3,899,204 and total income of $2,957,633; 2013 gross receipts of $2,455,826 and total income of $2,071,955; and 2014 gross receipts of $2,053,997 and total income of $1,931,653. Mr. Henderson does not predict that NSI will have gross revenue of $6 million any time soon.

21. Mr. Henderson testified credibly that Mr. Popp was required to declare the $102,800 from Lincoln Labs on his personal tax return due to the fact that the money was issued under his social security number.

22. In addition to the $269,077 in wages Mr. Popp reported on his 2013 personal income tax return, Mr. Popp also reported capital gains income, IRA distributions, and pension and annuities. In 2013, Mr. Popp had capital gains income of $28,906; IRA distributions of $5,146; and pension and annuities of $51,341. Mr. Popp used the capital gains income, IRA distributions, and pension and annuities for the down payment on the home he purchased in 2013. Mr. Henderson testified credibly that Mr. Popp's only employment income for 2013 was the $269,077 in wages he reported.

23. Kimberly Marshall (hereinafter referred to as "Ms. Marshall") is Mr. Popp's girlfriend. The couple have been dating since July of 2010 and currently reside together at 20 Stable Way in Medway, Massachusetts. Ms. Marshall has two children from a previous marriage who also live at 20 Stable Way. Mr. Popp pays the mortgage and Ms. Marshall purchases the groceries.

24. Ms. Marshall testified that she went on a ski vacation with her children and Mr. Popp. Ms. Marshall paid for room and board on the vacation and Mr. Popp paid for the ski lift tickets. Additionally, Ms. Marshall went to New York to visit relatives with Mr. Popp.

25. Ms. Marshall received approximately $23,000 in gifts from Mr. Popp in 2012 and 2013. Additionally, Ms. Marshall received a loan from Mr. Popp in the spring of 2014. Ms. Marshall asked Mr. Popp for this loan because she had to pay some of her ex-Mr. Popp's

credit card liabilities as part of her divorce judgment. The loan was in the amount of approximately $12,000 and Ms. Marshall has paid back $6,500. Ms. Marshall does not have signing privileges on Mr. Popp's accounts and the couple has no joint assets.

26. Ms. Marshall owns her own company called Corporate Health Promotion. She previously performed health consultant work for NSI as described in paragraph eight above.

27. David Glaser (hereinafter referred to as "Mr. Glaser") is a mortgage originator; he qualifies people for mortgages and helps them get mortgage loans. Mr. Glazer is a Senior Loan Officer at Mortgage Equity Partners and he has been in this position for approximately nine years. Mr. Glaser prepared the mortgage application information for the property Mr. Popp purchased in 2013. Mr. Popp filled out two Massachusetts No-Income Verification Loan Disclosure forms. The first form listed Mr. Popp's gross monthly income as $24,166.60 and a subsequent form listed Mr. Popp's gross monthly income as $50,000. Both forms are dated March 28, 2013. Mr. Glaser testified credibly that the lower figure represents Mr. Popp's base pay and the higher figure includes additional income Mr. Popp was hoping to earn. Mr. Glaser encouraged Mr. Popp to optimistically predict his future earnings, which is represented in the $50,000 figure. Mr. Glaser testified credibly that Mr. Popp was honest in all of his dealings and that he had no concerns regarding the numbers.

28. Thomas Rieger (hereinafter referred to as "Mr. Rieger") is the President of NSI and President and Chief Executive Officer of National Business Innovations (hereinafter referred to as "NBI"). He is responsible for collecting the financial data for NBI. Mr. Rieger enters the day-to-day expenses and revenue into Quick Books. Mr. Rieger testified credibly regarding the purpose of NBI. NBI is a means for NSI to do work in the commercial sector. One of the purposes of NBI is to set up a firewall between classified work. Mr. Rieger testified credibly that NBI contracts with NSI and pays NSI as a vendor.

29. One of NBI's commercial contracts is with Blizzard Entertainment, which is an online gaming company. NBI works with Blizzard Entertainment to estimate the number of people that will be playing the company's games on any given day. Additionally, NBI scrapes social media to find out what Blizzard Entertainment's customers are complaining about.

30. Mr. Rieger is NBI's only employee, but he does not receive a salary. Mr. Rieger is a 60% owner of NBI; Mr. Rasmussen is a 10% owner; Allison Astorino-Courtois is a 15% owner; and Mr. Popp is a 15% owner. The only form of compensation Mr. Popp receives from NBI are distributions; Mr. Popp is not an employee of NBI.

31. In 2012, NBI had revenue of $188,064.68 and net income of $9,159.37. In 2013, NBI had revenue of $248,835.96 and net income of $5,415.82. As of March 31, 2015, NBI had revenue for 2015 of $31,475.00 and net income of $6,139.66.

32. NBI listed the following gross receipts and ordinary business income on its tax returns for 2012 through 2014: 2012 gross receipts of $188,065 and ordinary business income of $10,813; 2013 gross receipts of $248,836 and ordinary business income of $5,835; and 2014 gross receipts of $521,387 and ordinary business income of $27,338.

33. Mr. Popp testified credibly that when he signed the Separation Agreement, he expected to make $600,00 in 2011, which is what he made the previous year. At that time, Mr. Popp knew NSI's workload was similar to what it was the previous year, so he expected to make a similar amount of money. Mr. Popp testified credibly that the parties expected Mr. Popp's income to go up, which is why they included an income cap of $875,000 in the alimony calculation. Mr. Popp did not list the amount of his bonus on his January 18, 2011 financial statement because the amount was undetermined. Both Mr. Rasmussen and Mr. Henderson testified credibly that the company sets a bonus target at the beginning of the year, but the final amount is not determined until December of each year.

34. Currently, Mr. Popp's income is $5,384.62 per week. Mr. Popp testified credibly that his change in income has been very stressful and that he is living a very different lifestyle in order to be able to live within his means. It is very difficult for Mr. Popp to meet his alimony obligation because it is currently over 50% of his income. Mr. Popp has weekly expenses deducted from pay of $3,697.15, including $2,769.23 in weekly alimony to Ms. Popp. Additionally, Mr. Popp has weekly expenses not deducted from pay of $3,663.42.

35. Mr. Popp owns the property located at 20 Stable Way, Medway, Massachusetts. The property has an estimated fair market value of $681,783 and is subject to a first mortgage of $424,879.46 and a second mortgage of $99,985.06, thereby leaving equity of $156,918.48.

36. Mr. Popp owns the following motor vehicles:
    a. 2008 Hummer H2 SUT- $22,888; and
    b. 2000 Heritage Softail Classic FLSTC Motorcyle- $6,942.

37. Mr. Popp has the following financial accounts:
    a. Santander Checking Account No. 8724- $215.90; and
    b. Santander Money Market Account No: 4185- $144,490.60.

38. Mr. Popp has stocks with a total current value of $56,576.87.

39. Mr. Popp has a 401(k) with a current value of $34,095.49.

40. Mr. Popp has the following liabilities:
    a. U.S. Dept. of Education- $162,568.60;
    b. Navient- $28,980.95;

c. AmeriCU Visa Credit Card- $34,976.39;
d. Santander Personal Line of Credit- $24,990.00;
e. Town of Medway 2014 Real Estate Taxes- $6,173.08; and
f. IRS 2013 Income Taxes- $10,117.00.

41. Mr. Popp was born on May 29, 1962 and is fifty-three years old. He is in good health.

42. Currently, Ms. Popp's only source of income is her weekly alimony of $2,769.24. Ms. Popp has weekly expenses of $4,663.11.

43. Ms. Popp owns the property located at 20 Kingsbury Drive, Holliston, Massachusetts. The property has an estimated value of $831,200.00 and is subject to a first mortgage of $614,618.19 and a second mortgage of $109,999.92, thereby leaving equity of $106,581.89.

44. Ms. Popp has the following checking and savings accounts:
a. TD Bank Checking Account No. 6917- $861.01;
b. Santander Checking Account No. 1021- $0.00;
c. Santander Savings Account No. 9629- $31.18.

45. Ms. Popp has the following liabilities:
a. Sallie Mae/Navient- $130,291.26;
b. Mohela/Dept. of Educ.- $12,487.93;
c. AES/American Education Services- $4,806.04;
d. Santander Checking Credit Line- $4,999.03;
e. Barclay Bank/US Air Credit Card- $16,554.17;
f. Middlesex Savings Bank Elan Credit Card- $7,878.94;
g. Nordstrom Bank Credit Card- $8,269.17;
h. Paypal Credit Card- $3,312.70;
i. Capital One Credit Card- $2,906.84;
j. Chase/Amazon Credit Card- $2,712.13;
k. Loan from Mother- $15,000;
l. IRS 2013 Federal and State Income Tax- $27,360.67;
m. IRS 2014 Federal and State Income Tax- $25,000.00; and
n. Lee & Rivers, LLP- $18,008.18.

46. Ms. Popp has a law degree, but she does not practice law. After passing the bar, Ms. Popp opened her own real estate business so she could stay at home and take care of the parties' children. Ms. Popp earned $11,000 in business income last year, but almost all of the money went to business expenses.

47. Ms. Popp was born on December 9, 1967 and is forty-seven years old. She suffers from many chronic health issues which limit her employment options. Ms. Popp suffered from

many of these medical conditions at the time of the divorce, including high blood pressure and chronic migraines.

Ms. Popp's March 27, 2015 Complaint for Contempt

48. The Court finds that Mr. Popp's only employment income for 2013 was the $269,077 listed as wages on his personal income tax return. The rest of the income listed on the tax return was interest income; dividend income; capitals gains income; IRA distributions; and income from pensions and annuities. Additionally, the income beyond the $269,077 in wages included the $102,800 Mr. Popp paid to NSI and Ms. Marshall.

49. The Court finds that Mr. Popp fully cooperated with Ms. Popp in her attempt to obtain life insurance policies on his life. Ms. Popp is permitted to get a life insurance policy on Mr. Popp's life of up to two million dollars. Mr. Popp provided the insurance broker with the information she asked for as part of the application. Additionally, Mr. Popp had a medical exam. Some time elapsed and Mr. Popp was contacted by Ms. Popp and she indicated that she decided to go with another provider. Mr. Popp was then contacted by this new provider. Mr. Popp communicated with the new provider and filled out all the required documentation.

50. Mr. Popp testified credibly that he never failed to provide Ms. Popp or her counsel with any required financial documentation.

RATIONALE

The parties were married on June 4, 1996. Mr. Popp owned his own business, NSI. Ms. Popp owned her own real estate business and had a law degree. However, she primarily focused on raising the parties' three children, who are now emancipated. Mr. Popp was the primary wage earner. The parties had been married for 13.67 years when Mr. Popp was served with the Complaint for Divorce. On January 18, 2011, a Judgment of Divorce *Nisi* issued, which incorporated a Separation Agreement signed by the parties on the same date. With the exception of the provisions related to the children, medical insurance, and alimony, the Separation Agreement survived the Judgment of Divorce. However, the provisions of Article II, subparagraph 1.d., relating to modification of alimony, also survived the Judgment of Divorce. The Judgment provided that commencing on January 1, 2013, Mr. Popp shall pay Ms. Popp $12,000.00 in monthly alimony. Additionally, at the end of each calendar year, Ms. Popp shall receive as additional alimony a total of 36.75% of Mr. Popp's respective calendar year income, up through and no greater than the $875,000.00 income cap.

On February 7, 2014, Mr. Popp filed the instant Complaint for Modification of his alimony obligation, in which he claimed that a material change in circumstance warranted a modification of support. He argued that his significant decrease in income prevents him from being able to pay his alimony obligation. At the time of the parties' divorce, Mr. Popp had a

salary of approximately $600,000 per year. The Court does not credit Ms. Popp's argument that Mr. Popp's income should be limited to his weekly salary listed on his January 18, 2011 financial statement of $6,528.46. On that same financial statement, Mr. Popp included a footnote which states the following: "[Mr. Popp's] bonus amount (with all other employee bonus amounts) is determined only at the end of the year in December as it is based on specific year end factors, including but not limited to NSI, Inc. revenue, billability, staff size, profitability and overhead rate. Government contracting and oversight are also factors." Both Mr. Rasmussen and Mr. Henderson confirmed at trial that all employees' bonuses are determined at the end of each year.

Since the parties' divorce, NSI's revenue has steadily declined and as a result, Mr. Popp's income has simultaneously decreased. NSI lost two significant contracts in 2012. One was lost in the second or third week in January and the second was lost a month or two later. These two contracts accounted for 24% of the company's expected revenue. Additionally, another contract which accounted for 50% of NSI's revenue was reduced. Overall, the company lost one-third of its expected revenue for 2012. Around March of 2012, Mr. Rasmussen determined that the monthly revenue was significantly lower than the costs. The company was unable to make payroll for March and April of 2012. Therefore, the company took out a line of credit. The company cut costs, including laying off staff, but it still ended the year in 2012 with a net loss.

Mr. Rasmussen testified credibly to the company's revenue from 2011 through 2014, which is as follows: 2011 revenue of $6,058,128.12; 2012 revenue of $3,526,810.53; 2013 revenue of $2,270,693.52; and 2014 revenue of $2,091,706.44. During this same time period, Mr. Popp had the following salary and bonus income: 2011 base salary of $339,999.96 and bonus of $260,000; 2012 base salary of $285,000 and no bonus; 2013 base salary of $274,385.00 and bonus of $1,000.00; and 2014 base salary of $269,923.56 and bonus of $5,120.33. Mr. Popp's income has never been as high as it was in 2011. Mr. Rasmussen testified credibly that the reason for Mr. Popp's decrease in income is the decrease in NSI's revenue and is not for personal reasons.

The Court finds that Mr. Popp's decrease in income is a material and substantial change in circumstances. At the time of the divorce, Mr. Popp's base alimony obligation of $12,000 per month was 24% of his $600,000 per year salary. Currently, Mr. Popp's $12,000 per month alimony obligation is 51% of Mr. Popp's $280,000 per year salary. The Court finds that the parties intended for Ms. Popp to receive 36.75% of Mr. Popp's employment income as alimony up through and no greater than the $875,000.00 income cap. Currently, Mr. Popp's income is $5,384.62 per week. Mr. Popp testified credibly that his change in income has been very stressful and that he is living a very different lifestyle in order to be able to live within his means. It is very difficult for Mr. Popp to meet his alimony obligation because it is currently over 50% of his income. Mr. Popp has weekly expenses deducted from pay of $3,697.15, including $2,769.23 in weekly alimony to Ms. Popp. Additionally, Mr. Popp has weekly expenses not deducted from pay of $3,663.42.

Currently, Ms. Popp has no income other than alimony and weekly expenses of

$4,663.11. The Court finds that Ms. Popp needs to reduce her living expenses. Even with the current alimony order of $12,000 per month, Ms. Popp is unable to meet her weekly expenses. Considering both Mr. Popp's reduced income and Ms. Popp's ongoing health problems, the Court finds it most equitable to award Ms. Popp alimony equal to 36.75% of Mr. Popp's income as the parties intended in their Separation Agreement. Therefore, Mr. Popp shall be required to pay Ms. Popp $8,575 per month in alimony. Mr. Popp's alimony reduction shall be retroactive to the date of service on his Complaint for Modification (i.e. February 11, 2014). From March 1, 2014 to September 1, 2015, Mr. Popp paid monthly alimony in the amount of $12,000 (overpaid by $3,425.00 for a period of 19 months, resulting in an overpayment of $65,075.00).

The parties were married on June 4, 1996 and Mr. Popp was served with the Complaint for Divorce on February 16, 2010. For purposes of alimony, they were married for 13.67 years. Therefore, pursuant to G. L. c. 208, § 49, the maximum alimony duration is 114 months, which is seventy percent of the number of months of the marriage. The parties' Judgment of Divorce issued on January 18, 2011. Therefore, Mr. Popp's alimony obligation shall continue until August of 2020.

On March 27, 2015, Ms. Popp filed a Complaint for Contempt, alleging that (1) Mr. Popp failed to meet his alimony obligation in 2013; (2) Mr. Popp failed to produce his year-end bank statements, balance sheets, and profit and loss statements pertaining to NBI and failed to provide his amended 2012 tax return within thirty days of its completion; and (3) Mr. Popp did not cooperate with Ms. Popp's attempts to obtain a life insurance policy on Mr. Popp's life. The Court finds that Mr. Popp's only employment income for 2013 was the $269,077 listed as wages on his personal income tax return. The rest of the income listed on the tax return was interest income; dividend income; capitals gains income; IRA distributions; and income from pensions and annuities. Additionally, the income beyond the $269,077 in wages included the $102,800 Mr. Popp paid to NSI and Ms. Marshall. Therefore, Mr. Popp did not underpay his alimony obligation in 2013. Additionally, Mr. Popp testified credibly that he never failed to provide Ms. Popp or her counsel with any required financial documentation.

Finally, the Court finds that Mr. Popp fully cooperated with Ms. Popp in her attempt to obtain life insurance policies on his life. Ms. Popp is permitted to get a life insurance policy on Mr. Popp's life of up to two million dollars. Mr. Popp provided the insurance broker with the information she asked for as part of the application. Additionally, Mr. Popp had a medical exam. Some time elapsed and Mr. Popp was contacted by Ms. Popp and she indicated that she decided to go with another provider. Mr. Popp was then contacted by this new provider. Mr. Popp communicated with the new provider and filled out all the required documentation. Therefore, Mr. Popp is not in contempt for failing to cooperate with Ms. Popp's attempts to obtain a life insurance policy on his life.

CONCLUSIONS OF LAW

1. The modification of a divorce judgment is permitted upon a finding that a "material and

substantial change in circumstances of the parties has occurred." G. L. c. 208, § 28.

2. "Alimony judgments entered prior to the alimony reform act may be modified only under the existing material change of circumstances standard, with the single exception that the new durational limits of the act will be considered a material change of circumstances for purposes of this standard. It follows, therefore, that the provisions of G. L. c. 208, § 49 (d) and (f), do not warrant relief in the absence of a material change of circumstances." Chin v. Merriot, 470 Mass. 527, 536 (2015).

3. "General Laws c. 208, § 49 (f), does not apply retroactively to alimony orders in divorce judgments that entered before March 1, 2012." Rodman v. Rodman, 470 Mass. 539, 546 (2015).

4. "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: . . . 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." G. L. c. 208, § 49 (b).

5. The length of the marriage is defined as "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." G. L. c. 208, § 48.

6. In Holmes v. Holmes, the Massachusetts Supreme Judicial Court held the following regarding temporary alimony orders: "We conclude that temporary alimony is separate and distinct from general term alimony, and that the duration of temporary alimony is not included in calculating the maximum presumptive duration of general term alimony." Holmes v. Holmes, 467 Mass. 653, 654 (2014).

Date: September 1, 2015

Patricia A. Gorman, Associate Justice
Middlesex Probate and Family Court

Addendum-2
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MASSACHUSETTS 2011 LEGISLATIVE SERVICE

General Court, 2011 First Annual Session

Additions and deletions are not identified in this document.
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

CHAPTER 124
H.B. No. 3617
COMMONWEALTH--ALIMONY

AN ACT reforming alimony in the commonwealth.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

<< MA ST 208 § 34 >>

SECTION 1. The first sentence of section 34 of chapter 208 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by adding the following words:-- under sections 48 to 55, inclusive.

<< MA ST 208 § 34 >>

SECTION 2. Said section 34 of said chapter 208, as so appearing, is hereby further amended by striking out the third sentence and inserting in place thereof the following sentence:-- In fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each of the parties, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive.

SECTION 3. Said chapter 208 is hereby further amended by adding the following 8 sections:--

<< MA ST 208 § 48 >>

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.

<< MA ST 208 § 49 >>

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.

<< MA ST 208 § 50 >>

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.

<< MA ST 208 § 51 >>

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.

<< MA ST 208 § 52 >>

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.

<< MA ST 208 § 53 >>

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.

<< MA ST 208 § 54 >>

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.

<< MA ST 208 § 55 >>

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.

<< Note: MA ST 208 § 48; 208 § 49; 208 § 50; 208 § 51; 208 § 52; 208 § 53; 208 § 54; 208 § 55 >>

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.

<< Note: MA ST 208 § 48; 208 § 49; 208 § 50; 208 § 51; 208 § 52; 208 § 53; 208 § 54; 208 § 55 >>

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.

<< Note: MA ST 208 § 48; 208 § 49; 208 § 50; 208 § 512 208 § 52; 208 § 53; 208 § 54; 208 § 55 >>

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.

<< Note: MA ST 208 § 34; 208 § 48; 208 § 49; 208 § 50; 208 § 51; 208 § 52; 208 § 53; 208 § 542 208 § 55 >>

SECTION 7. This act shall take effect on March 1, 2012.

Approved September 26, 2011.

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 1A

§ 1A. Causes for divorce; irretrievable breakdown of marriage; commencement of action; complaint accompanied by statement and dissolution agreement; procedure

Currentness

An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced with the filing of: (a) a petition signed by both joint petitioners or their attorneys; (b) a sworn affidavit that is either jointly or separately executed by the petitioners that an irretrievable breakdown of the marriage exists; and (c) a notarized separation agreement executed by the parties except as hereinafter set forth and no summons or answer shall be required. After a hearing on a separation agreement which has been presented to the court, the court shall, within thirty days of said hearing, make a finding as to whether or not an irretrievable breakdown of the marriage exists and whether or not the agreement has made proper provisions for custody, for support and maintenance, for alimony and for the disposition of marital property, where applicable. In making its finding, the court shall apply the provisions of section thirty-four, except that the court shall make no inquiry into, nor consider any evidence of the individual marital fault of the parties. In the event the notarized separation agreement has not been filed at the time of the commencement of the action, it shall in any event be filed with the court within ninety days following the commencement of said action.

If the finding is in the affirmative, the court shall approve the agreement and enter a judgment of divorce nisi. The agreement either shall be incorporated and merged into said judgment or by agreement of the parties, it shall be incorporated and not merged, but shall survive and remain as an independent contract. In the event that the court does not approve the agreement as executed, or modified by agreement of the parties, said agreement shall become null and void and of no further effect between the parties; and the action shall be treated as dismissed, but without prejudice. Following approval of an agreement by the court but prior to the entry of judgment nisi, said agreement may be modified in accordance with the foregoing provisions at any time by agreement of the parties and with the approval of the court, or by the court upon the petition of one of the parties after a showing of a substantial change of circumstances; and the agreement, as modified, shall continue as the order of the court.

Thirty days from the time that the court has given its initial approval to a dissolution agreement of the parties which makes proper provisions for custody, support and maintenance, alimony, and for the disposition of marital property, where applicable, notwithstanding subsequent modification of said agreement, a judgment of divorce nisi shall be entered without further action by the parties.

Nothing in the foregoing shall prevent the court, at any time prior to the approval of the agreement by the court, from making temporary orders for custody, support and maintenance, or such other temporary orders as it deems appropriate, including referral of the parties and the children, if any, for marriage or family counseling.

Prior to the entry of judgment under this section, the petition may be withdrawn by mutual agreement of the parties.

An action commenced under this section shall be placed by the register of probate for the county in which the action is so commenced on a hearing list separate from that for all other actions for divorce brought under this chapter, and shall be given a speedy hearing on the dissolution agreement insofar as that is consistent with the wishes of the parties.

Credits

Added by St.1975, c. 698, § 2. Amended by St.1977, c. 531, § 1; St.1979, c. 362, §§ 1, 2; St.1985, c. 691, §§ 1 to 3.

Notes of Decisions (34)

M.G.L.A. 208 § 1A, MA ST 208 § 1A
Current through Chapter 282 of the 2016 2nd Annual Session

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Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 34

§ 34. Alimony or assignment of estate; determination of amount; health insurance

Effective: March 1, 2012
Currentness

Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other under sections 48 to 55, inclusive. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each of the parties, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

Credits

Amended by St.1974, c. 565; St.1975, c. 400, § 33; St.1977, c. 467; St.1982, c. 642, § 1; St.1983, c. 233, § 77; St.1988, c. 23, § 67; St.1989, c. 287, § 59; St.1989, c. 559; St.1990, c. 467; St.2011, c. 124, §§ 1, 2, eff. Mar. 1, 2012.

Notes of Decisions (934)

M.G.L.A. 208 § 34, MA ST 208 § 34
Current through Chapter 282 of the 2016 2nd Annual Session

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Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 37

§ 37. Alimony; revision of judgment

Currentness

After a judgment for alimony or an annual allowance for the spouse or children, 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 or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action.

The court, provided there is personal jurisdiction over both parties, may modify and alter a foreign judgment, decree, or order of divorce or separate support where the foreign court did not have personal jurisdiction over both parties upon the entry of such judgment, decree or order.

The court, provided there is personal jurisdiction over both parties to a foreign judgment, decree, or order of divorce for support, where such foreign court had personal jurisdiction over both parties, may modify and alter such foreign judgment, decree, or order only to the extent it is modifiable or alterable under the laws of such foreign jurisdiction; provided, however, that if both parties are domiciliaries of the commonwealth, then the court may modify and alter the foreign judgment in the same manner as it could have had the judgment, order, or decree been issued by the court; and provided further, that the court may not modify or alter the judgment, order or decree of a foreign jurisdiction which had personal jurisdiction over both parties concerning the division or assignment of marital assets or property.

Credits
Amended by St.1975, c. 400, § 38; St.1977, c. 495; St.1982, c. 642, § 2.

Notes of Decisions (218)

M.G.L.A. 208 § 37, MA ST 208 § 37
Current through Chapter 282 of the 2016 2nd Annual Session

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Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 48

§ 48. Definitions applicable to Secs. 49 to 55

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

Notes of Decisions (6)

M.G.L.A. 208 § 48, MA ST 208 § 48
Current through Chapter 282 of the 2016 2nd Annual Session

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Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 49

§ 49. Termination, suspension or modification of general term alimony

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

Notes of Decisions (7)

M.G.L.A. 208 § 49, MA ST 208 § 49
Current through Chapter 282 of the 2016 2nd Annual Session

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Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 51

§ 51. Termination of reimbursement alimony; modification; applicability of income guidelines

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 51, MA ST 208 § 51
Current through Chapter 282 of the 2016 2nd Annual Session

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Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 52

§ 52. Termination of transitional alimony; modification or extension

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 52, MA ST 208 § 52
Current through Chapter 282 of the 2016 2nd Annual Session

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Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 53

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

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

Notes of Decisions (9)

M.G.L.A. 208 § 53, MA ST 208 § 53
Current through Chapter 282 of the 2016 2nd Annual Session

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Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 54

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

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 54, MA ST 208 § 54
Current through Chapter 282 of the 2016 2nd Annual Session

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Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 55

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

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 55, MA ST 208 § 55
Current through Chapter 282 of the 2016 2nd Annual Session

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Massachusetts General Laws Annotated
Massachusetts Rules of Appellate Procedure (Refs & Annos)

Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 8

Rule 8. The Record on Appeal

Currentness

(a) Composition of the Record on Appeal. The original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases. In a civil case, in an appeal from an appellate division, the original papers and exhibits shall include the report of the trial judge to the appellate division with any exhibits made a part of such report.

(b) The Transcript of Proceedings.

(1) *Civil Cases, Except Child Welfare Cases: Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered.* Within ten days after filing the notice of appeal the appellant shall order from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) *Criminal Cases: Duty of Clerk; Duty of Court Reporter.* Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court, within ten days, shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The parties are encouraged to stipulate to those parts of the proceedings which are unnecessary to the appeal. Upon receipt of an order, the court reporter shall prepare one original typed transcript. The court reporter shall deliver the original typed transcript to the clerk of the lower court who shall, by means of xerography or other similar method which produces legible copies, prepare one copy thereof for each of the appellate court, the appellant, and the appellee. The clerk of the lower court shall deliver one copy each to the appellant and the appellee and shall certify that the copies of the appellant and appellee have been delivered. The clerk of the lower court shall retain custody of the original typed transcript and one copy thereof until the record is transmitted to the appellate court as provided by Rule 9(d).

The Commonwealth shall pay the cost of the original of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)(4), the cost of the copy for the appellant shall be paid for by the appellant.

(3) *Electronically Recorded Proceedings, Except Child Welfare Cases.*

(i) Applicability. Rule 8(b)(3) applies to proceedings which were recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter.

If, however, a complete transcript of the electronic recording has been produced for use by the trial court, and it or a copy is available to the parties, such transcript or copy shall be utilized in lieu of preparing another pursuant to this Rule 8(b)(3). Upon receipt of the notice of appeal in such cases, the clerk shall advise the parties of the name of the preparer of the transcript; the parties shall then follow the procedure under Rule 8(b)(1) in a civil case, or Rule 8(b)(2) in a criminal case, as if a court reporter had been present, except the appellant's time for ordering a transcript shall be extended to within ten days after appellant's receipt of the clerk's notification of the name of the preparer of the transcript.

(ii) Duties of the Appellant and of the Clerk; Selection of Transcriber. If the appellant deems all or part of the electronic recording necessary for inclusion in the record, the appellant shall, simultaneously with filing a notice of appeal, order from the clerk of the lower court, in accordance with any rule or established policy of the court, a cassette copy of the electronic recording, which is hereinafter called "the cassette." The clerk shall promptly provide the cassette, unless the provisions of the second paragraph of Rule 8(b)(3)(i) apply. If a portion of the electronic recording has already been transcribed for use by the trial court, and such transcript or a copy is available to the parties, the clerk shall, in addition to providing the cassette, at the same time advise the parties of the name of the preparer of the transcript.

Within fifteen days of receipt of the cassette from the clerk, appellant shall file in court and serve on each appellee a document which includes the date of receipt of the cassette; a designation of the parts of the cassette the appellant intends to include in the transcript; and the name, address, and telephone number of the individual or firm selected to prepare the transcript, provided that the appellant and each appellee have agreed to this choice and the appellant so states. If the appellant and appellees have not so agreed, said document shall also specifically notify the clerk to select the transcriber.

The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion.

If such selection of an individual or firm to prepare the transcript is not included, or if the transcript is to be provided at the expense of the Commonwealth, the individual or firm shall be selected by the clerk. When the selection is made by the clerk, the individual or firm shall be selected in accordance with procedures promulgated by the Chief Administrative Justice. The clerk shall promptly notify all parties of any such selection made by the clerk. Any individual or firm selected to transcribe the record pursuant to Rule 8(b)(3) is hereinafter called "the transcriber."

If the appellant has designated the entire cassette for transcription, then within said fifteen days of receipt of the cassette from the clerk, appellant shall also send or deliver to the transcriber the cassette provided by the clerk and a written order designating the entire cassette for transcription. If the appellant has not designated the entire cassette, then after twenty days have expired from the service upon the appellee of appellant's designation of transcript, the appellant shall promptly send or deliver to the transcriber the cassette provided by the clerk and a written order which states those parts of the cassette designated by the parties for transcription. In addition, the order, whether for all or part of the transcript, shall include a statement that the original of the designated portions of the transcript should be sent to the clerk of the lower court, and shall indicate the number of copies, if any, to be sent to the appellant. The appellant shall promptly file with the clerk and serve on the other parties a copy of the order placed with the transcriber. Unless the entire cassette is to be transcribed, the appellant shall, together with appellant's designation of transcript, file and serve on the appellee a statement of the issues the appellant intends to present on the appeal.

The appellant shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription, and, where the Commonwealth is not responsible for the cost of transcription, make satisfactory arrangements with the transcriber to pay for the trial court's original of the designated portions of the transcript and any copies ordered by the appellant for the appellant's own use.

(iii) Duties of the Appellee. If the appellee deems it necessary to have a cassette in order to consider counter-designating, or for any other purpose, the appellee shall, after receipt of the notice of appeal, promptly order the cassette from the clerk or promptly arrange with the appellant to use appellant's cassette. If the appellant has not designated and ordered the entire transcript and if the appellee deems a transcript of other portions of the proceedings to be necessary, the appellee shall within fifteen days after receipt of the appellant's designation, file in court, and serve on the appellant, a designation of such additional parts. The designation of the parts of the cassette to be transcribed should be precise and include such details as the name of the witness whose testimony has been designated and the specific portions to be included, giving an exact quote of the beginning words and concluding words of each designated portion. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the lower court for an order requiring the appellant to do so. If the appellee desires a copy of designated portions of the transcript, the appellee shall promptly communicate to the transcriber the number of copies wanted and, in cases where the Commonwealth is not responsible for the cost of the transcript, make satisfactory arrangements with the transcriber for payment for the appellee's own copies.

The appellee shall cooperate with the transcriber by providing such information as is necessary to facilitate transcription.

(iv) Duties of the Transcriber. The transcriber shall prepare an original typed transcript of the designated portions and the requested number of copies, in accordance with the designations, and shall deliver said original to the clerk, with the following certificate of accuracy:

I, _____, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the appellant or appellee of a trial or hearing of the _____ Division of the _____ Court Department in the proceedings of _____ v. _____, case(s) no.(s) _____ before Justice _____ on _____(Day and Date).

Date: .....

Transcriber's Signature

The transcriber shall deliver legible copies to all parties who have so requested.

(v) Unintelligible Portions of the Cassette. If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.

(vi) Transcripts Paid for by the Commonwealth. In criminal cases, the Commonwealth shall pay the cost of the original of the designated portions of the typed transcript and a copy for the appellate court. Except as provided in Rule 8(b)

(4), the cost of the copy for the appellant shall be paid for by the appellant who shall make arrangements with the transcriber to pay for such copy.

Whenever the Commonwealth is to pay for an original or copy of the designated portions of the transcript, each party designating any portion of the cassette for transcription shall, at the time of filing the designation, also file a certificate that the parts designated are necessary to permit full consideration of the issues on appeal. Unless one of the parties specifically requests otherwise, that part of the cassette dealing with impanelment of a jury shall not be transcribed.

(4) *Cost of Transcripts for Indigents.* In all cases in which counsel is required to be made available pursuant to Supreme Judicial Court Rule 3:10, the cost of any transcript for such a party shall be paid for by the Commonwealth.

(5) *Child Welfare Cases.*

(i) Proceedings Recorded by an Official Court Reporter. On the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the lower court on behalf of the appellant, shall order from the court reporter a transcript of the entire proceeding or of such parts of the proceeding not already on file. The clerk of the lower court shall notify all parties of the date the transcript was ordered by sending a copy of the order form to all parties.

On receipt of the order the court reporter shall prepare an original typed transcript for filing with the lower court and a copy for the appellant and any party who so requests. The court reporter shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the court reporter shall deliver legible copies to the appellant and to any party who so requests.

(ii) Electronically Recorded Proceedings

(a) Applicability: Rule 8(b)(5)(ii) applies to child welfare cases which were recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter. If, however, a complete transcript of the electronic recording has been produced for use by the lower court, and it or a copy is available to the parties, that transcript or copy shall be used.

(b) Duties of the Appellant and Clerk. Upon the filing of a notice of appeal, the clerk of the lower court shall produce a cassette copy of the electronic recording. Within 10 days of production of the cassette, the clerk of the lower court shall, unless the parties file a stipulation designating the parts of the cassette which need not be transcribed, on behalf of the appellant order a transcription of the entire cassette from a transcriber selected by the clerk in accordance with procedures promulgated by the Chief Justice for Administration and Management. The clerk shall also notify all parties of the name of the transcriber and the date the cassette was sent for transcription by sending a copy of the order form to all parties.

On receipt of the order the transcriber shall prepare an original typed transcript for filing in the lower court and a copy for the appellant and any party who so requests. The transcriber shall deliver the original to the clerk of the lower court who shall immediately notify all parties of its receipt, and the transcriber shall deliver legible copies to the appellant and to any party who so requests. The appellant and appellee shall cooperate with the transcriber by providing information necessary to facilitate transcription.

The transcriber shall certify the original transcript using the following certificate of accuracy:

I, _____, do hereby certify that the foregoing is a true and accurate transcript, prepared to the best of my ability, of the designated portions of the cassette provided to me by the clerk of the lower court of a trial or hearing of the _____ Division of the _____ Court Department in the proceedings of _____, case(s) no(s). _____ before Justice _____ on _____.

Date: .....

Transcriber's Signature

(iii) Unintelligible Portions of the Cassette. If portions of the cassette cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate their content. If agreement cannot be reached, the parties shall promptly present their differences as to such portions to the trial judge who heard the testimony. The trial judge shall, if possible, settle the content of the unintelligible portions, which shall then be included in the transcript.

(iv) Costs. The appellant shall pay for the cost of the original transcript filed with the lower court and for any copies ordered by the appellant. If there is more than one appellant, the cost of the original and any copies shall be divided between the various appellants. Any other party who requested a copy of the transcript shall pay for its copy. For any party for whom counsel is made available pursuant to Supreme Judicial Court Rule 3:10, the cost of any transcript requested by, or on behalf of, such party shall be paid in accordance with G.L. c. 261.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within thirty days after the notice of appeal is filed, file a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may file objections or proposed amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments thereto shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may, within thirty days after the notice of appeal is filed, prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the lower court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the lower court, and as approved shall be retained in the lower court as the record on appeal.

Copies of the agreed statement shall be filed as the appendix required by Rule 18.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court, either before or after the record is transmitted to the appellate court, or the appellate court, or a single justice, on proper suggestion or on its own motion, may direct that the omission or

misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to a single justice.

Credits

Amended June 27, 1974, effective July 1, 1974; amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; June 28, 1979, effective July 1, 1979; February 17, 1983, effective April 1, 1983; May 29, 1986, effective July 1, 1986; June 23, 1986, effective July 1, 1986; October 1, 1998, effective November 2, 1998; July 28, 1999, effective September 1, 1999; June 26, 2002, effective September 3, 2002.

Editors' Notes

REPORTER'S NOTES--1973

Based on F.R.A.P. 10, Appellate Rule 8 describes the record on appeal, which should be carefully distinguished from the record appendix. The record consists of the original papers and exhibits, plus a transcript of the proceedings and a certified copy of the docket entries, as well as any certified copy of the lower court's final order. The record appendix (see Appellate Rule 18) is that distillation of the decision-essential portions of the record which is filed in connection with appellate brief.

The appellant is responsible for attending to the preparation of a transcript; this transcript must be sufficiently extensive to cover all points raised by the appeal. The phrase "description of the parts of the transcript," refers to such a description as "the plaintiff's entire testimony," rather than a designation by page and line, unless a more precise description is necessary.

If no transcript was made, the appellant may prepare a statement of the evidence in the proceedings in the most expeditious manner possible; after inspection by the appellee, this statement will be submitted to the lower court for approval. The statement of issues need be only extensive enough to enable the appellee to determine the need for ordering a transcript of other parts of the testimony.

The parties may, alternatively, prepare and file an agreed statement of facts. This is similar to existing practice, see G.L. c. 231, § 111; cf. Paulino v. Concord, 259 Mass. 142, 144, 155 N.E. 870, 871 (1927).

REPORTER'S NOTES--1975

As originally promulgated, Appellate Rule 8 required the inclusion, in the record on appeal, of a certified copy of the order appealed from and the opinion. Because the record includes all "original papers" anyway, this requirement was superfluous. Accordingly, it has been eliminated.

REPORTER'S NOTES--1979

The second sentence of subdivision (a) of former Rule 8 is amended to clarify that it applies to appeals in civil cases from the Appellate Division of the District Court Department (G.L. c. 231, § 108, as amended, St.1978, c. 478, § 264) and not to the Appellate Division of the Superior Court Department for review of sentences in criminal cases (G.L. c. 278, §§ 28A-28D).

Subdivision (b) of the former rule has been divided into subdivisions (b)(1), applicable to civil cases, and (b)(2), applicable to criminal cases. Subdivision (b)(1) is identical to former 8(b). Subdivision (b)(2) is wholly new.

Consonant with practice under former G.L. c. 278, §§ 33A-33H, a defendant is entitled to a complete transcript on appeal. Charpentier v. Commonwealth, Mass.Adv.Sh. (1978) 2163, 2172. Pursuant to (b)(2), upon the filing of a notice

of appeal in a criminal case, the clerk of the lower court automatically orders from the court reporter a transcript of the proceedings out of which the appeal arises. Since counsel is no longer obligated to take this mechanical step, one point of delay under prior practice is thus eliminated. The parties may--and are encouraged by the rule to--file a stipulation as to those parts of the proceedings which are unnecessary to the appeal and which therefore need not be transcribed. The provision for stipulations as to parts of the proceedings which need not be transcribed is not applicable to capital cases under G.L. c. 278, § 33E, as amended, because in such cases, the "entire case" is before the Supreme Judicial Court, "including a transcript of the entire proceedings." E.g., *Charpentier,* supra at 2173 n. 9. A "capital case" is a case in which the defendant was convicted of murder in the first degree. G.L. c. 278, § 33E, as amended. *See Commonwealth v. O'Brien,* Mass.Adv.Sh. (1976) 2926; Mass.R.Crim.P. 2(b)(3).

When the transcript is completed, the court reporter is to deliver it to the clerk of the lower court who prepares copies thereof for the appellate court, the appellant or appellants, and the appellee or appellees. The parties' copies are delivered to them, while the original and one copy are retained by the clerk for transmission to the appellate court as part of the record (Rule 9[d]).

In the district court jury sessions, the General Laws (G.L. c. 218, § 27A(h)) provide a procedure for appointment of a court reporter to transcribe the proceedings and in the alternative for an electronic recording of the proceedings. These rules as well as G.L. c. 218, § 27A(g) provide that appeals from the district court jury sessions are to proceed in the same manner as appeals from the superior court.

Because of the unavailability of a court reporter in some cases in the district court jury sessions or where the defendant has not taken advantage of section 27A(h) it may be necessary for the clerk, who has the responsibility under this rule for the completion of the record, including the transcript, to cause a transcript to be made from an electronic recording.

After this necessary preliminary step has been taken by the district court clerk copies of the transcript are to be made and distributed as provided by this rule and rule 9(d).

The cost of preparation of the original transcript and of the copies required by this rule is borne by the Commonwealth except where the defendant is not indigent. In that case the defendant is to pay the clerk for the cost of producing his copy. The provision requiring production of the whole transcript is intended to provide for more expeditious and just disposition of questions on appeal. In the first place, the Commonwealth could not in all cases determine whether a partial transcript was adequate to serve its needs until such time as the defendant's brief was filed. Secondly, without a full transcript, appellate courts cannot resolve issues of plain error, a miscarriage of justice, or harmless error.

Subdivision (c) has been amended to enlarge the time within which a statement of the evidence or proceedings may be filed from ten to thirty days. Procedure like that provided under this subdivision has been followed by the Supreme Judicial Court in a criminal case when a transcript was unavailable. Commonwealth v. Harris, Mass.Adv.Sh. (1978) 2155.

It should be noted that the appellant may prepare and submit a statement of the evidence or proceeding from the best available means. However, as stated in Ingersoll Grove Nursing Home, Inc. v. Springfield Gas Light Co., Mass.Adv.Sh. (1979) 203, 204 a substitution is available only "if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable." In a case in which the transcript is "made and available" the plaintiff is not entitled to substitute a statement of the evidence under subdivision (c).

Subdivision (d) however allows the parties to "prepare and sign a statement of the case" in lieu of the record. The term "statement of the evidence or proceeding" of subdivision (c) is not to be used interchangeably with "statement of the case" in subdivision (d) since the rules outline different procedures with respect to these terms.

The agreed statement permitted by subdivision (d) must now be filed within thirty days after the notice of appeal is filed; prior to this amendment no time limit was specified. The parties electing to proceed under the subdivision should notify the clerk that no transcript is to be ordered and, in addition, that the agreed statement shall be substituted for the record as defined in subdivision (a). Filing of the agreed statement as the appendix required by Rule 18 has been made mandatory.

Subdivision (e), relative to correction or modification of the record, as applied to criminal cases, is similar in operation to prior provisions for settling a bill of exceptions (G.L. c. 278, § 31 [St.1974, c. 540, § 1]) or for correcting errors in a transcript (G.L. c. 278, § 33A [St.1974, c. 540, § 2]), although much broader in the scope of relief available.

REPORTER'S NOTES TO ADDITION OF RULE 8(B)(3)--1983

Rule 8(b)(3) has been added to deal with tape-recorded transcripts. It is quite detailed because judges, clerks, and lawyers have complained about a lack of specificity with respect to the utilization of cassettes on appeal.

Rule 8(b)(3)(i) indicates when Rule 8(b)(3) applies. The Rule does not apply to court reporters, including voice writers, or to cases where a complete transcript has already been produced for use by the trial court, and is available to the parties. Rule 8(b)(3)(ii) gives the duties of appellants and clerks, and provides for appointment of a transcriber. A major purpose is to facilitate a speedy appeal. Consequently, an appellant must order a cassette at the time of appeal and state the date of receipt to insure that the designation is timely. Another major purpose is to reduce the number of steps required of the clerk. This rule permits the parties, if they can agree, to choose the transcriber. The appellant must inform the clerk at the time of transcript designation whether the parties have so agreed. The parties must order their copies directly from the transcriber and make their own payment arrangements; the transcriber delivers transcripts directly to them. Rule 8(b)(3)(ii), unlike 8(b)(1), does not specify when an appellant must transcribe all evidence relevant to a finding or conclusion. This is not meant to change the law, but rather leave it to the parties to determine what must be transcribed in order to protect their appeal. The Standing Advisory Committee wants to discourage unnecessary transcription.

Rule 8(b)(3)(iii) gives the duties of the appellee with respect to ordering a cassette or arranging to borrow the appellant's, counter-designation, and ordering copies. Rule 8(b)(3)(iv) describes the transcriber's duties, and the certificate which the transcriber must file. Rule 8(b)(3)(v) covers the situation where a portion of the cassette is unintelligible; it requires the parties first to attempt to stipulate the contents of such portion, and provides for the trial judge, if possible, to settle differences. Rule 8(b)(3)(vi) requires that when the Commonwealth must pay for an original transcript or copy, the designating parties must certify that they have designated only necessary portions. Again, the purpose is to reduce costs.

Rule 8(b)(3) does not have its own provision concerning enlargements of time, but is subject to the general computation and extension of time provisions contained in Appellate Rule 14.

Here is a chronology of the major steps and time periods under this rule:

1. Simultaneously with filing the notice of appeal, the appellant, if desirous of a transcript, orders the cassette. Rule 8(b)(3)(ii).

2. The clerk promptly provides the cassette (Rule 8(b)(3)(ii)), unless an entire transcript is already available; in such event, the clerk notifies the parties, and the normal designation rules in Rule 8(b)(1) or 8(b)(2) apply. Rule 8(b)(3)(i). In such event, the appellant's time for ordering a transcript is within ten days after the clerk's notification. Rule 8(b)(3)(i). The clerk also notifies the parties if there has been a previous transcription of a portion of the cassette, so that the parties may utilize the prior partial transcription if they wish. Rule 8(b)(3)(ii).

3. Within fifteen days after receipt of the cassette from the clerk, the appellant designates which portions are to be included in the transcript. Rule 8(b)(3)(ii). If the appellant wants the entire cassette transcribed, then appellant also delivers the cassette to the transcriber and places the order within said fifteen day period. Rule 8(b)(3)(ii).

4. When the appellant has not ordered the transcription of the entire transcript, the appellee has fifteen days from service of the appellant's designation to file and serve a counter-designation. Rule 8(b)(3)(iii).

5. When the appellant has not already designated the entire cassette for transcription, the appellant delivers the cassette to the transcriber and places the order promptly after twenty days have expired from service upon the appellee of the appellant's designation. Rule 8(b)(3)(ii). This, in effect, gives the appellant at least five days to deliver the cassette to the transcriber and place the order, for the appellee had to file and serve the counter-designation within fifteen days.

In summary, from the time the appellant receives the cassette from the clerk, the entire designation process takes fifteen days if appellant orders the entire cassette transcribed, and "promptly" after thirty-five days if appellant has designated less than the entire cassette.

REPORTER'S NOTES--1998

The 1998 amendment to Appellate Rule 8(b)(3) deals with appeals in proceedings that were electronically-recorded on court-controlled recording equipment and not recorded by an official court reporter.

The existing rule allows the appellant to designate either the entire cassette or only specified portions of the cassette to be transcribed for purposes of preparing the appellate record. The existing rule further provides that where less than the entire cassette is to be designated, the appellant must inform the appellee of those portions of the cassette that are to be transcribed. This allows the appellee to counter-designate additional portions of the cassette for transcription. However, the current rule does not require the appellant to inform the appellee of the issues that the appellant intends to present on the appeal, thus making it difficult for the appellee to make such counter-designation intelligently.

The 1998 amendment resolves this dilemma by requiring the appellant to file and serve on the appellee a statement of the issues together with the appellant's designation of transcript.

REPORTER'S NOTES--1999

The 1999 amendments to Appellate Rule 8(b) were part of a comprehensive set of amendments to the Appellate Rules (Rules 1, 3, 4, 8, and 10) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The purpose of the 1999 amendments is described in the 1999 Reporter's Notes to Appellate Rule 1(c).

Appellate Rule 8(b)(1) (concerning ordering the transcript) and Rule 8(b)(3) (concerning electronically-recorded proceedings) have been made inapplicable to child welfare cases. Instead, the ordering of the transcript of the proceeding is now controlled by Rule 8(b)(5). Rule 8(b)(5) shifts the duty of ordering the cassettes and transcripts from the appellant to the clerk of the lower court. Modeled in part after the procedures applicable in criminal cases, new Rule 8(b)(5) is intended to expedite preparation of the transcript in child welfare cases.

REPORTER'S NOTES TO APPELLATE RULE 8(B)(2)--2002

The 2002 amendment to Appellate Rule 8(b)(2) requires that upon the filing of a notice of appeal in a criminal case, the clerk of the lower court shall order a transcript from the court reporter within ten days. Prior to this amendment, there was no time period prescribed for ordering the transcript.

This amendment will make the practice in criminal cases consistent with that already in existence in civil cases in Massachusetts. Appellate Rule 8(b)(1) requires that in a civil case, the appellant shall order the transcript within ten days after filing of the notice of appeal. It should be noted that Rule 10(b)(1) of the Federal Rules of Appellate Procedure likewise requires that the transcript in civil and criminal cases in federal court be ordered within ten days of the filing of the notice of appeal.

Notes of Decisions (388)

Rules App. Proc., Rule 8, MA ST RAP Rule 8
Current with amendments received through July 1, 2016

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Appellate Procedure (Refs & Annos)

Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 16

Rule 16. Briefs

Currentness

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) In all briefs, a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case, which shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) The argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. In a brief with more than twenty-four pages of argument, there shall be a short summary of argument, suitably paragraphed and with page references to later material in the brief dealing with the same subject matter, which should be a condensation of the argument actually made in the body of the brief, and not a mere repetition of the headings under which the argument is arranged. The appellate court need not pass upon questions or issues not argued in the brief. Nothing argued in the brief shall be deemed to be waived by a failure to argue orally.

(5) A short conclusion stating the precise relief sought.

(6) Any written or oral findings or memorandum of decision by the court pertinent to an issue on appeal included as an addendum to the brief.

(7) In cases where geographical facts are of importance, unless appropriate plans are reproduced in the printed record or record appendix, an outline plan or chalk (preferably based on exhibits in evidence) shall be included. This outline plan should be suitable for reproduction on one page of the printed law reports.

(8) The printed names, Board of Bar Overseers (BBO) numbers, addresses, and telephone numbers of individual counsel, and, if an individual counsel is affiliated with a firm, the firm name.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(4) and (7), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of the appellate court. Reply briefs shall comply with the requirements of Rule 16(a)(1).

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court, or the actual names of the parties, or descriptive term such as "the employee," "the injured person," "the taxpayer," "the landlord," etc. If the name of a party has been impounded or has been made confidential by statute, rule, or court order, counsel shall preserve confidentiality in briefs and oral arguments.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in an appendix filed with a brief (see Rule 18(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 18(c). If the record is reproduced in accordance with the provisions of Rule 18(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected. No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference.

(f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires consideration of constitutional provisions, statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end.

(g) Massachusetts Citations. Massachusetts Reports between 17 Massachusetts and 97 Massachusetts shall be cited by the name of the reporter. Any other citation shall include, wherever reasonably possible, a reference to any official report of the case or to the official publication containing statutory or similar material. References to decisions and other authorities should include, in addition to the page at which the decision or section begins, a page reference to the particular material therein upon which reliance is placed, and the year of the decision; as, for example: 334 Mass. 593, 597-598 (1956). Quotations of Massachusetts statutory material shall include a citation to either the Acts and Resolves of Massachusetts or to the current edition of the General Laws published pursuant to a resolve of the General Court.

(h) Length of Briefs. Except by permission of the court, principal briefs shall not exceed fifty pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. Except by permission of the court, reply briefs shall not exceed twenty pages. Permission of the court shall not be granted unless the moving party specifies the relevant issue or issues and why such issues merit additional pages. A motion of a party to exceed the page limits stated in this rule will not be granted except for extraordinary reasons.

(i) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 18 and 19, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(j) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) Required Certification; Non-complying Briefs. The last page of each brief shall include a certification by counsel, or, if a party is proceeding pro se, by the party, that the 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) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers). A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the appellate court or a single justice.

(*l*) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(m) References to Impounded Material. Upon the filing of any brief or other document containing references to matters that are impounded or have been made confidential by statute, rule, or order, counsel (or a party if pro se), shall file a written notice with the clerk, with a copy to all parties, so indicating. Wherever possible, counsel shall not disclose impounded material. Where it is necessary to include impounded material in a brief, the cover of the brief shall clearly indicate that impounded information is included herein.

Credits

Amended effective February 24, 1975; amended May 15, 1979, effective July 1, 1979; May 25, 1982, effective July 1, 1982; November 17, 1986, effective January 1, 1987; November 24, 1987, effective January 1, 1988; amended effective May 5, 1989; February 1, 1991; January 1, 1992; January 1, 1997; amended June 11, 1997, effective July 1, 1997; December 1, 1998, effective January 1, 1999; February 5, 2003, effective March 3, 2003; April 27, 2005, effective October 1, 2005.

Editors' Notes

REPORTER'S NOTES--1973

Appellate Rule 16 establishes the form of the briefs: table of contents; statement of the issues; statement of the case; arguments; and conclusion. Appellate Rule 16(f) also requires the reproduction of relevant statutes and the like. None of the requirements will substantially change existing practice. Appellate Rule 16(e), stating the requirements in briefs for references to the record, likewise follows existing practice. See S.J.C. Rule 1:15; Appeals Court Rule 1:15.

REPORTER'S NOTES--1975

As originally promulgated, Appellate Rule 16(a)(4) made optional the use of a summary of argument. The new rule makes such a summary mandatory, if the brief contains more than 24 pages of argument (i.e. not including table of contents, table of cases, statutes, and authorities, statement of issues, and statement of the case). By explicit language, the summary must be something more than a mere recital of the argument headings.

Amended Appellate Rule 16(a)(4) makes explicit the long-standing principle that failure to discuss an issue in the brief may, at the discretion of the court, preclude reliance upon that point in oral argument. On the other hand, if the brief does include the question, failure to argue it orally does not waive the point.

Although earlier Massachusetts appellate citation form omitted the year of decision, the amendment to Appellate Rule 16(g) ensures that the year will be included in any citation.

REPORTER'S NOTES--1979

Rule 16 was previously incorporated into criminal appellate procedure by Appeals Court Rule 1:15 (1975: 3 Mass.App.Ct. 803) and Supreme Judicial Court Rule 1:15 (1975: 366 Mass. 861). The rule is unchanged beyond amendment of subdivision (e) to reflect the fact that there may be more than one appendix in a criminal case. (Mass.R.App.P. 19[a]).

The last two sentences of subdivision (a)(4) which provide that questions or issues not argued in the brief need not be decided, but that a failure to orally argue an issue does not waive it if argued in the brief, supersede the last two sentences of former Appeals Court and Supreme Judicial Court Rules 1:13 (1972: 1 Mass.App.Ct. 889, amended 1975: 3 Mass.App.Ct. 801. 1967: 351 Mass. 738, amended, 1975: 366 Mass. 801).

REPORTER'S NOTES--1982

Appellate Rule 16(l) is the same as F.R.A.P. 28(j), which became effective in 1979. Its purpose is to allow a concise letter to inform the court in a non-argumentative manner of a "pertinent and significant" authority discovered after the filing of a brief or oral argument. The amendment does not authorize reargument in the disguise of a supplementary citation.

REPORTER'S NOTES--1986

This amendment is to clarify that reply briefs of more than twenty pages shall contain the tables and references required of other appellate briefs of that length. Such tables and references aid opposing parties and the court. This amendment corresponds, in part, to the 1986 amendment to Fed.R.A.P. 28(c).

REPORTER'S NOTES--1991

Mass.R.A.P. 16(a)(7) and 20(a), final sentence, clause (5):

These amendments require individual counsel who are affiliated with a firm to include the firm name on filed briefs. Appellate judges need to know the firm names in order to determine correctly whether it is necessary to withdraw from a case.

REPORTER'S NOTES--1997

The amendment to Appellate Rule 16(a)(1), effective January 1, 1997, eliminates the provision that a table of contents and a table of cases, statutes, and other authorities be included only in briefs of twenty pages or more. All briefs must include these items.

The 1997 amendments to Appellate Rule 16(d) and (m) serve as a reminder to counsel to maintain confidentiality in briefs and oral argument of any information that has been impounded or designated as confidential. For example, where the name of a person is not subject to disclosure, counsel may use a generic term such as "child" or "juvenile" or may use a pseudonym or initials.

Illustrative statutes requiring confidentiality include G.L. c. 112, § 12S (petitions by minors seeking judicial determination of maturity in connection with abortion; see also Superior Court Standing Order No. 5-81, as amended, requiring that papers "shall be designated anonymously" such as with the titles "Mary Moe" or "Mary Doe"); G.L. c. 119, § 38 (names in care and protection proceedings); G.L. c. 119, § 65 (juvenile proceedings); G.L. c. 209A, § 8 (in abuse prevention proceedings, plaintiff's address and case records involving a minor); G.L. c. 209C, § 13 (papers in paternity proceedings and a party's address); and G.L. c. 210, § 5C (adoption proceedings).

Illustrative rules providing for confidentiality include Mass.R.Civ.P. 26(c) (trade secrets and other matters in connection with discovery) and Probate Court Supplemental Rule 401 (financial statements in connection with requests for support or alimony). The Uniform Rules on Impoundment Procedure also provide a mechanism to preserve confidentiality of matters contained in case papers.

Illustrative cases using pseudonyms include *Care and Protection of Stephen,* 401 Mass. 144, 514 N.E.2d 1087 (1987); *C.C. v. A.B.,* 406 Mass. 679, 550 N.E.2d 365 (1990); *Oscar F. v. County of Worcester,* 412 Mass. 38, 587 N.E.2d 208 (1992); *Adoption of Carla,* 416 Mass. 510, 623 N.E.2d 1118 (1993); *Doe v. Superintendent of Schools of Worcester,* 421 Mass. 117, 653 N.E.2d 1088 (1995); *Doe v. Purity Supreme, Inc.,* 422 Mass. 563, 664 N.E.2d 815 (1996); and *Commonwealth v. Wotan,* 422 Mass. 740, 665 N.E.2d 976 (1996).

There may be instances, however, where counsel will find it necessary to include confidential information in a brief in order to allow for full appellate review of the issue. In such instances, Rule 16(m) provides that counsel must alert the clerk's office that confidential information is contained in a filing. In this way, the rule shifts the burden to counsel to alert the clerk's office to the presence of impounded material so that the latter can take appropriate steps to safeguard the material in accordance with Supreme Judicial Court Rule 1:15, Impoundment Procedure.

These amendments, together with amendments to Appellate Rule 18, serve to preserve confidentiality of material in briefs, appendices, and oral argument.

REPORTER'S NOTES--1999

New paragraph (6), added to Appellate Rule 16(a) effective in 1999, requires that any findings (written or oral) or memorandum of decision by the trial court pertinent to an appellate issue be included in an addendum to the appellant's brief. Although findings or a memorandum of decision are already required to be included in the appendix to the brief (Mass.R.A.P. 18(a)), incorporating such matters in an addendum to the brief will enable a judge on appeal to locate quickly the trial court's rationale for its decision, especially where there is a multi-volume appendix.

The reference to oral findings is intended to cover the situation where the trial judge has dictated findings into the record that have been transcribed or otherwise recorded. These findings must now also be included in an addendum to the brief.

This additional requirement will not serve to reduce the maximum number of pages for a principal brief. The page limitations contained in Mass.R.A.P. 16(h) are inapplicable to an addendum to a brief.

REPORTER'S NOTES--1999

The 1999 amendments to Appellate Rule 16(h) were made together with the updating of Appellate Rule 20, the latter governing the form of briefs and appendices. The 1999 amendments to Appellate Rule 20 deleted references to standard

typographic printing in recognition of the practice that briefs today are produced through computer wordprocessing and no longer through a typesetting and printing process. Accordingly, the page limitation for briefs produced by "standard typographic printing" of forty pages (and fifteen pages for reply briefs) has been deleted from the rule.

The existing page limitation on principal briefs produced by computer wordprocessing remains fifty pages, with reply briefs twenty pages.

REPORTER'S NOTES--2003

By virtue of the 2003 amendment to Appellate Rule 16(h), a party seeking leave to file a brief with additional pages must specify the issues involved and why they require additional pages. The rule also sets forth a standard of "extraordinary reasons" for the allowance of such a motion.

REPORTER'S NOTES--2005

In order to reduce the number of non-complying briefs, Appellate Rule 16(k) was amended in 2005 to require a certification that the brief complies with all of the rules of court that govern briefs. Counsel should be aware that a brief that does not contain the required certification may be struck by the court for non-compliance with the rule.

Notes of Decisions (399)

Rules App. Proc., Rule 16, MA ST RAP Rule 16
Current with amendments received through July 1, 2016

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Massachusetts General Laws Annotated
Massachusetts Rules of Appellate Procedure (Refs & Annos)

Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 25

Rule 25. Damages for Delay

Currentness

If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, and such interest on the amount of the judgment as may be allowed by law.

Credits
Amended December 22, 1978, effective January 15, 1979; May 15, 1979, effective July 1, 1979.

Editors' Notes

REPORTER'S NOTES--1973
Appellate Rule 25, taken from F.R.A.P. 38, allows the court to award damages and appropriate costs if it determines that an appeal was taken frivolously. See Oscar Gruss & Son v. Lumberman's Mutual Casualty Co., 422 F.2d 1278, 1283-1284 (2d Cir.1970). This is new to Massachusetts practice.

REPORTER'S NOTES--1979
Rule 25 is limited to civil cases.

Notes of Decisions (58)

Rules App. Proc., Rule 25, MA ST RAP Rule 25
Current with amendments received through July 1, 2016

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