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Unintended Consequences of "An Act to Reform and Improve Alimony," in Massachusetts: Avoiding the Pitfalls on the Road to Reform

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"An Act to Reform and Improve Alimony" Chapter 208, s. 48 of the General Laws of the Commonwealth becomes effective March 1, 2012. As a group of four divorce professionals our collaboration to discuss the new Alimony Law began when Chris Chen, CDFA* sent Janet Wiseman, Certified Divorce Mediator, Jeanne Kangas Esq., and Howard Goldstein, Esq. a copy of, "In Many States, Alimony Reform Has Gone Too Far", an article by Jeff Landers, CDFA, published, July 11, 2011 as Divorce Dollars and Sense from the Forbes blog post. Landers elaborated 10 reasons for supporting the new alimony reform bill, which include the reduction of alimony payment for payment of health insurance and life insurance, the exclusion of a second job or overtime income from alimony modification, the limitation on alimony term extensions without a showing of “good cause” and supported by written findings of a material change of circumstances, based upon clear and convincing evidence. Landers continued by stating that he thinks a few of the proposed reforms are "simply wrong".

Avoiding Pitfalls of New Co-Habitation Clauses

Landers expressed concern about how the then proposed Massachusetts Alimony Reform Act of 2011, would change the law in several specific areas. He disagreed with provisions that suspend, reduce or terminate alimony when the recipient engages in cohabitation. He said, "That's a bad idea. Cohabitation does not necessarily mean the person you're living with is supporting you". Jeanne Kangas, asks, tongue-in-cheek, why not automatically increase the alimony amount when the payor (usually the ex-husband) cohabits? Why financially punish just the ex-wife? We wonder whether it wouldn't be more prudent and equitable to have cohabitation trigger an alimony review rather than cause a termination.

Alimony reform was seen as necessary because there was a perception that alimony payors were paying too much alimony for too long. There was also, under our previous alimony statute a feeling that recipients of alimony were receiving alimony long after they had begun receiving additional income to live on as a result of cohabitation. This lack of fairness to payors, we believe, may well have led to a pendulum swing in the opposite direction of mandating that alimony may be reduced, terminated or suspended after an alimony recipient cohabits for more than three months time.

Jeanne Kangas states that the permanent loss of alimony upon cohabitation tells women (the usual recipients of alimony), but not men (the usual payors), to avoid cohabitation with anyone, while men can cohabit all they please with impunity likewise potentially increasing their household incomes. Janet Miller Wiseman, indicates that all candidates for divorce with alimony provisions who are engaging in mediation, negotiation or litigation will now have to write clauses into their Separation

Agreements with regard to possible termination, suspension or reduction of alimony after a three-month period of time. At minimum, we will want clients to understand the co-habitation provisions of the new law, whether they are payors or recipients of alimony. We will want to discuss with clients whether or not they want provisions that avoid the cohabitation provisions of the new law, or that extend the amount of time before cohabitation will have an impact on alimony. The clients may believe that a different period of time is appropriate to determine the stability and longevity of a live-in relationship. If the new relationship does not provide more income to the household perhaps it should have no impact on alimony and in that event, neutral language requiring a review of alimony at one year (or some other time) from the date of cohabitation might be more appropriate. How will Judges look at these types of statements in Agreements? Will they see them as "bargaining in the shadow of the law", or as circumventing the law?

Howard Goldstein believes that so long as the amount and duration of alimony "survives",* -- is non-modifiable-- clients may write into their Agreements their own definitions and terms under which cohabitation will effect alimony.

Will clients whose live-in partner is disabled, underemployed, or who is one of the vast numbers of currently unemployed citizens want to have written into their Agreements that under no circumstances shall alimony be reduced, suspended or terminated so long as this partner is residing with him or her and has no employment, or no employment higher than a specific dollar amount? Will the co-habitation provisions discourage individuals from getting into relationships that might result in remarriage and the elimination of alimony? Or will the cohabitation provisions discourage partners from living together who need to care for one another, or who want to be a family, although there is no additional income?

If there is no mention of co-habitation in a Separation Agreement, i.e. it is "silent" as to cohabitation, clients will need to return to mediation, negotiation or the court after a three month period of cohabitation, or when his or her live-in partner moves out. Will the co-habitation clause, unless carefully written and "survived" --being non-modifiable-- create revolving merry-go-round mediation, negotiation and court doors?

There are at least two important problems created by the provisions of the new alimony reform law providing for suspension, reduction or termination of alimony upon co-habitation of three consecutive months. The first is that three months may be an insufficient time to know whether a co-habiting relationship will last. Secondly, there is an inequality between recipients and payors with regard to their right to increase their household income through co-habitation and their right to live with a partner of their own choosing, without marrying.

The new law does not require evidence of a sexual relationship, between the recipient and the person living with him or her. The new law defines cohabitation as sharing a primary residence together. The Court may consider oral or written statements or representations made to third parties regarding the relationship, the economic interdependence of the couple or economic dependence of one person on the other/ the persons engaging in conduct and collaborative roles in furtherance of their life

together, the benefit in the life of either or both of the persons from their relationship, the community reputation of the persons as a couple, or any “other relevant and material factors.” It is not clear how this provision will be implemented by the courts and although this is an important clarification of the meaning of cohabitation, it may result in more litigation not less, because of the need for interpretation by judges.

Because the new law states that a permanent termination of alimony occurs if a recipient former spouse co-habits for more than 3 months, any attempt by parties to make any provisions other than those set out in the new law would have to be by contract that survives the entry of judgment.

Automatic Term Limits of Alimony

The "factors" judges used to determine division of property and alimony under Chapter 208, s. 34 are unchanged by the new law. The duration of alimony is determined by a schedule of five-year increments up to twenty years. After twenty years of marriage alimony lasts until the payor reaches his federal maximum federal retirement age. The Court may deviate from these durational requirements for reasons set out in the new law. In his blog post, Jeff Landers states his opinion that the goal of alimony limits "should be based on the payor's ability to pay and the payee's need. The goal, in most cases, is to allow the payee to maintain a post-divorce lifestyle that is at least somewhat comparable to the lifestyle she enjoyed during the marriage." In our opinions maintaining a lifestyle comparable to the marital lifestyle, will be difficult to impossible in most situations. The new law establishes a limit on how high alimony can be but does not mandate particular formulas as is done with child support. The law says that the amount of alimony that can be awarded should not exceed 30-35% of the difference between the parties’ gross income. These durational and percentage formulas do not account for stay-at-home moms, or dads, who haven't pursued careers, other ex-spouses with little or no income of their own who have been out of the work-force for decades, or those who have an income that is substantially less than the other ex-spouse, except for the limited discretion of the Court to deviate from the law. It won’t be clear for some time how the judges will use their ability to deviate.

We have already seen in our practices, husbands and some wives inviting his/her spouse for a 20th anniversary dinner, announcing that "Oh, by the way, I filed for divorce last week". What he or she has not said is that the term limit of alimony will be 80% of the months married as opposed to unlimited general term alimony for marriages over twenty years.

Furthermore, we question the wisdom of automatically terminating general term alimony when the payor retires or is eligible for the old-age retirement benefit under the Federal Social Security laws, as does Landers. When the Court enters an initial alimony judgment, the Court may set a different alimony termination date for good cause shown, and that offers flexibility, but what if at the time of the initial judgment there appears to be no reason to set a different date? In most cases, at that time the payor does not know if he will be working beyond his or her full retirement age.

As Landers states, "if the recipient still has the need to receive alimony," and we point out, for example when a division of retirement funds between spouses is not enough for a stay at home recipient to live on, "and a payor continues to work, why should reaching the retirement age for the

collection of Social Security benefits matter at all?" Jeanne Kangas points out that in many marriages, the husband is older than the wife. Since the husband is usually the payor, he will reach full Social Security retirement age before the wife, in some cases a decade or more before her. That would leave her with no alimony, and potentially ineligible for Social Security benefits if she is unable to work and the only recourse she will have is to request a deviation from the durational requirements. An ex-spouse at that point could have no income. What the recipient will have upon her or his retirement is the retirement funds he or she has been allocated, if any, plus his or her social security or the portion allocated to an ex-spouse, when she or he becomes eligible. Janet Miller Wiseman adds that when there are no or not enough retirement savings, as she sees more and more often these days, what will happen to a recipient who thought she was getting alimony for life, and s/he was unsuccessful in obtaining an agreement that survived with respect to alimony (i.e. non-modifiable) and that individual is incapable of finding employment, or incapable of working? What will she or he do? This is where the Court's authority to deviate from the law comes into play, but there is no certainty about how individual judges will use that authority.

Landers mentions those spouses who have given up property or other rights and financial benefits to obtain a better financial settlement through alimony. What happens when they learn that the "better" alimony she or he bargained for will not be available if his or her ex-spouse loses his or her job, has reduced income, or retires and the recipient has not reached the full Social Security retirement age herself? These are cases in which the payor legititamaly cannot pay much or any alimony and the recipient will have bargained away property or other rights.

Like Landers, Chris Chen, also a CDFA, favors an up-front alimony payment where there are enough assets and income to support it. Howard Goldstein, is concerned for payor spouses who may lose their jobs in the future, and who have given up significant marital assets in exchange for an alimony waiver. They would have to be in a position to support themselves after an alimony buy-out that gives increased assets to the recipient if it is structured as a property settlement. Chris indicates that the alimony recipient will not pay ordinary income tax on her or his alimony buy-out and need not worry about future modification if the agreement provides for survival of the alimony waiver. Additionally Chris posits that the proposed payor of alimony might pay a reduced amount of alimony, since it will not be taxed at the receiving end; and ongoing monthly payments of alimony goes away for the payor, as does the continued financial link between the parties, and the need to be concerned about co-habitation. Janet Miller Wiseman adds that the need for life insurance as "security" for the alimony would also go away. Chris Chen states that the buy-out amount of alimony should be carefully calculated on the basis of the amount and duration of the alimony that otherwise would be given.

There are many good reforms in the new alimony law. The authors and many divorcing couples and divorcing professionals are grateful for the outstanding work done by those whose tireless efforts created the legislation leading to the new Law. Clear guidelines for duration of alimony, depending upon years of marriage, and the deviations or exceptions to duration, make our and our clients lives preeminently better. Having some new formulas for alimony amounts creates points of departure for every alimony case which none-the-less must be carefully scrutinized and custom designed.

Janet Miller Wiseman wonders about the fairness potentially achievable through provisions in the new Alimony Statute of adjusting alimony for the payments of life and health insurance as the new law provides. Life Insurance to secure alimony is a customary obligation under many current agreements and judgments of divorce; and the payor spouse's payment of health insurance premiums is not unusual, especially for stay-at-home spouses whose efforts during the marriage supported the payor's career. It is possible that a payor of alimony could seek reduction of his alimony payment by the cost to him of the life and health insurance premiums he has been paying perhaps for many years. The recipient will lose income he or she has come to rely upon.

We believe that paying careful attention to the new co-habitation provisions and durational limits will provide not just ounces but pounds of prevention of errors and omissions to divorce professionals and their clients using the new alimony reform law.

We enthusiastically invite your comments on our thoughts and hope these reflections and opinions will help the professionals who assist families through separation and divorce, and divorcing couples themselves, to fill the holes and avoid some pitfalls on the road to Alimony Reform. You may reach Chris Chen, CDFA, Certified Divorce Financial Analyst in Arlington at chris@chen.vg; Janet Miller Wiseman, Certified Divorce Mediator in Lexington, MA. at MediationBoston@gmail.com, Howard Goldstein, Attorney, in Newton at Hgoldstein@rfglawyers.com, and Jeanne Kangas, Attorney in Concord at Jkangas@arnoldkangas.com.

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