

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2013-P-0332

Essex County

ELAINE M. HOLMES
Appellee

vs.

KENNETH E. HOLMES
Appellant

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

Reply Brief for the Appellant

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i.

TABLE OF CONTENTS

I. Statement of the Issues Presented for Review.....	1
II. Statement of the Case & Facts.....	1
III. Summary of the Argument.....	1
IV. Argument.....	1
A. The Trial Judge Erred by Ruling that the Duration of Alimony Was to Be Calculated Starting From the Date of the Divorce Judgment and Not From the Date of a Temporary Order of Alimony	1
i) The Alimony Reform Act Permits the Trial Judge to Set an Alimony Termination Date Under the Facts of This Case.....	2
ii) The Language of the Alimony Reform Act Requires the Inclusion of Temporary Alimony in the Calculation of the Term of Alimony.....	5
iii) On Any Remand, It Would Be Premature for the Trial Judge to Address and/or Make Findings Regarding Any Deviation From the Fixed Alimony Termination Date Alimony.....	10
V. Conclusion - Request for Relief.....	11
Addendum.....	13

TABLE OF AUTHORITIES

Cases

Caveney vs. Caveney, 81 Mass.App.Ct. 102 (2012) 9
Heins vs. Ledis, 422 Mass. 477 (1996) 9
Knox vs. Remick, 371 Mass. 433 (1976) 5, 8
Moore vs. Moore, 389 Mass. 21 (1983) 8
Schuler vs. Schuler, 382 Mass. 368 (1981) 3

Statutes

Chapter 124 of the Acts of 2011, Section 4(a) 3
Chapter 124 of the Acts of 2011, Section 4(b) 4
Chapter 124 of the Acts of 2011, Section 5 4
M.G.L. ch. 208 §17 5, 6
M.G.L. ch. 208 §48 7, 9
M.G.L. ch. 208 §49(b) (4) 9
M.G.L. ch. 208 §49(e) 9
M.G.L. ch. 208 §49(f) (1) 10
M.G.L. ch. 208 §49(f) (2) 10
M.G.L. ch. 208 §53(b) 6

Other Authorities

Deeley, *Splitting the Difference: The Historical Context and practical Ramifications of the 2012 Massachusetts Alimony Reform*, 30 Mass. Family L.J. 13 (April 2012) 5

Statement of the Issues Presented for Review.

As referenced in the Appellant's original brief, the issue is whether the trial judge erred in determining the term of alimony (i.e., the length of time) the Husband would be obligated to pay spousal support to the Wife in consideration of the language of the Alimony Reform Act.

Statement of the Case & Facts.

The Husband relies upon the statement contained in his original brief and will not repeat it here (see H's Brief @ p.1-13).

Summary of the Argument.

The trial judge erred by excluding the period of time the Husband made temporary alimony payments to the Wife in calculating the overall length (or term) of his alimony obligations as defined by the Alimony Reform Act (see H's Brief @ p.14-27; see infra @ p.1-11).

Argument.

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

In her brief, the Wife argues the trial judge (i)

should not have fixed a termination date of alimony in the modification judgment in the first place but, if that decision was required, then in doing so, she (ii) acted appropriately in light of the language of the Alimony Reform Act and permissibly and practically exercised her discretion by excluding the period of temporary alimony in her calculation, but that, (iii) if temporary alimony is to be included in calculating the term, then a remand for additional findings is necessary (see W's Brief @ p.8-18).

i) The Alimony Reform Act Permits the Trial Judge to Set an Alimony Termination Date Under the Facts of This Case.

The Wife claims the provisions of the Alimony Reform Act may only be applied "prospectively" and, since the underlying divorce judgment was entered on October 7, 2008, the trial judge should not have applied the durational limits required under the Act when she fixed a termination date in the modification judgment (A.69) (see W's Brief @ p.8-9).¹

¹ See generally Chapter 124 of the Acts of 2011, Sections 1 through 7 (codified at M.G.L. ch. 208 §§34, 48-55) (reproduced in the Addendum).

In support of this claim, she cites to Section 4(a) of Chapter 124 of the Acts of 2011, suggesting that it only applies durational limits to alimony judgments on a prospective basis, "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 [the Alimony Reform Act]."

Here, the Wife's complaint alleged a material change in circumstances relating to changes in the parties' respective incomes (A.45), whereas the Husband's counterclaim was based on the fact that parties' son was then living with him (A.46-48). As the trial judge recognized, the parties could seek a modification of the original alimony order, set forth in a separation agreement which, in part, merged into the divorce judgment (A.27;32;36-37), given the evidence she found of a "material change of circumstances since the entry of the earlier judgment" (A.66-68;70-73). Schuler vs. Schuler, 382 Mass. 366, 368 (1981).

It's noteworthy that the underlying modification action was brought for reasons unrelated to the Alimony Reform Act. For his part, the Husband did not

bring his counterclaim for modification action simply to obtain a fixed alimony termination date; in fact, his request for relief makes no mention of a termination date (A.47). This is true because such a request would have been premature, since the Alimony Reform Act cannot be considered a material change of circumstances that, in and of itself, justifies the modification of the term of an existing alimony order. See Chapter 124 of the Acts of 2011, Section 4(b).²

Because the parties only sought an alimony adjustment under the historical, material change in circumstances standard, the modification judgment which entered on November 14, 2012 (A.69), constituted the sort of a "subsequent modification" which permitted the trial judge to take the opportunity, upon the Husband's request (A.53-54), to logically, permissibly and separately fix an alimony termination date. The trial judge no doubt understood that, by adding the "end date," she eliminated the

² As found by the trial judge, the length of the marriage was fifteen (15) year, seven (7) days (A.72). Under the filing time limits related to the effective date of the Act, had the Husband desired only to modify the original judgment to obtain a fixed alimony termination date, he would have had to wait until September 1, 2015 to file such a complaint. See Chapter 124 of the Acts of 2011, Section 5.

need for the Husband to bring a future modification action, at a time permitted under the statute, which is what the Wife's suggested interpretation of the statute would require. Such a cumbersome and impractical approach would be contrary to the intent of the Alimony Reform Act which, in part, seeks to reduce and/or eliminate unnecessary litigation. See Deeley, *Splitting the Difference: The Historical Context and practical Ramifications of the 2012 Massachusetts Alimony Reform*, 30 Mass. Family L.J. 13 (April 2012). See also *Knox vs. Remick*, 371 Mass. 433, 438 (1976) ("We believe that all aspects of the dispute between the former spouses should be resolved in one proceeding.").

ii) The Language of the Alimony Reform Act Requires the Inclusion of Temporary Alimony in the Calculation of the Term of Alimony.

The Wife's brief notes that, since the Alimony Reform Act does not specifically address temporary alimony payments, which are authorized by a separate statute (namely M.G.L. ch. 208 §17), those should be not be included in any calculation of the term of the payment (see W's Brief @ p.9-12). However, the Wife's

analysis is misplaced.

The Alimony Reform Act did not frustrate or interfere with the underlying authority of a trial judge to issue an order of temporary alimony; that remained intact and unchanged. For that reason, there was no need to make any specific reference to temporary alimony.

Instead, the Act sought to clarify or remedy some of the more controversial issues relating to alimony as a whole. One of these was the question of how much alimony should be paid at any time, which the Act pegged at an amount relating to the recipient's "need" or an amount equal to 30%-35% of the difference between the parties' gross incomes established at the time the order of support is issued. See M.G.L. ch. 208 §53(b). The use of the word "order" in Section 53(b) would allow for the application to an order of temporary alimony issued under M.G.L. ch. 208 §17.

Additionally, and as referenced in his original brief (H's Brief @ 14-27), the manner in which alimony is defined under the Act is very broad and applies to both temporary and judgment-based forms of alimony (i.e., general term, rehabilitative, reimbursement and transitional alimony). Specifically, alimony is

defined as being "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." See M.G.L. ch. 208 §48. No limiting language - to either temporary or final, judgment-based alimony - is found anywhere in the Act.

In her brief, the Wife also raises policy arguments why temporary alimony should not be included in the calculation of the alimony term (see W's Brief @ p.15-16). She cites the fact that, initially the Husband paid temporary alimony of \$368/week (A.15) which amount was then increased to \$700/week under the original divorce judgment (A.36). But, this is really apropos of nothing since, each time the amount of support was determined by the negotiations and agreement of the parties. She also notes that, including the temporary alimony payment in the term calculation would allow the Husband to receive a "windfall" of \$40,000.³

However, there are as many, equally compelling

³ This amount is the difference between the temporary alimony amount (\$368), the general term alimony amount under the original judgment (\$700), multiplied by the number of years temporary alimony was paid, a period the Wife defines as "2.3 years" (A.16).

policy arguments which further support the conclusion that temporary alimony should be included in the term calculation. For example, carving out a period of temporary alimony payments, in the manner the Wife suggests, provides the ultimate disincentive for the recipient spouse to efficiently and effectively prosecute the case; it also provides the ultimate incentive for that spouse to delay or prolong discovery and to resist (or also delay) any meaningful settlement discussions in the case. All are inconsistent with the public policy of the Commonwealth which favors settling divorce-related disputes through negotiated agreements by the parties. Knox vs. Remick, 371 at 437-438; Moore vs. Moore, 389 Mass. 21, 24 (1983) (public policy "favors settlement of ... disputes resulting from a divorce through equitable, enforceable separation agreements, freely entered into by the parties").

As for a windfall, it is the Wife who benefits, as the failure to include the temporary alimony payments in the calculation of the term means that, at the current level of alimony called for under the modification judgment, the Husband will pay her

additional alimony equal to \$153,000.⁴

Finally, the inclusion of temporary alimony payments in the calculation is a logical extension of the notion that, when the divorce summons is served, the marriage "ends" and the trial judge's discretion to order some form of spousal support and alimony, based on need and the ability to pay, "for a reasonable length of time under a court order," then commences. See M.G.L. ch. 208 §48.⁵ See also Heins vs. Ledis, 422 Mass. 477, 484 (1996); Caveney vs. Caveney, 81 Mass.App.Ct. 102, 116 (2012) ("wife had the requisite need and the husband had the requisite ability to pay alimony to approximate the standard of living enjoyed by the parties during the marriage").

⁴ Instead of a termination date of June 5, 2018, or a date equal to 80% of the number of months of the marriage (i.e., 144 months), per M.G.L. ch. 208 §49(b)(4), calculated from the date of the initial temporary order of alimony, the Husband must pay additional alimony until October 7, 2020, a period equal to an additional 28 months (or 121 weeks), which equates to an additional \$157,300 in alimony (i.e., an amount equal to \$1,300/week x 121 weeks = \$157,300).

⁵ This can be contrasted by the severe limitation that the Alimony Reform Act places on the modification of a surviving alimony obligation in a separation agreement. See M.G.L. ch. 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" - emphasis supplied).

The Alimony Reform Act did not change this fundamental right, but merely sought to clarify and refine it, including the addition of the aforementioned limiting language.

iii) On Any Remand, It Would Be Premature for the Trial Judge to Address and/or Make Findings Regarding Any Deviation From the Fixed Alimony Termination Date.

At the end of her brief, the Wife suggests that, if a remand is necessary to address the term limits of the alimony payment, the trial judge's earlier findings regarding the Wife's circumstances would permit a finding that a "deviation" beyond the fixed date, and a continuing alimony payment by the Husband, is necessary (see W's Brief @ p.17).

When a general term alimony obligation (like the Husband's obligation here) ends, the trial judge may, in her discretion, order that a different termination date be used provided that, at that time, findings (a) based on clear and convincing evidence and (b) justifying the deviation, are made. See M.G.L. ch. 208 §49(f)(1) & (2). The modification judgment fixed an alimony termination date of June 8, 2020 (A.69). However, it is unknown whether (or if) there will be

"clear and convincing" evidence - seven (7) years from now - which would to justify a deviation from that June 2020 termination date.

Therefore, after a remand, it would be premature for the trial judge to take any action in terms of a possible "deviation" under Section 49.

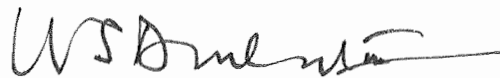
Conclusion - Request for Relief.

For the reasons set forth in his original brief and in this reply brief, the Husband again urges this Court to vacate the modification judgment and issue an order correcting the calculations relating to the Husband's alimony term, so that it includes the period he paid temporary alimony. In the alternative, he requests that the case be remanded, with an order requiring the trial judge to correct the judgment so as to assign an alimony termination which, again, includes "credit" for any temporary alimony payments made.

KENNETH E. HOLMES

By his attorneys,
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July 19, 2013



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Certificate of Service

I certify that on July 19, 2013, I served two copies of the within Reply Brief on the Appellee, by mailing two copies thereof, via first class mail, postage prepaid, to her counsel, namely James M. Walsh, Walsh & Associates, 222-224 Essex Street, Salem, Massachusetts 01970. Signed under the pains and penalties of perjury.



W. Sanford Durland III

Certificate of Compliance

I, W. Sanford Durland III, Esquire, hereby certify that the Appellant's Reply Brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. A. P. 16(a)(6); 16(e); 16(f); 16(h); 18; and 20. Signed under the pains and penalties of perjury this 19th day of July 2013.



W. Sanford Durland III

Addendum

Pertinent Court Orders

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT
PROBATE & FAMILY COURT

ESSEX, ss.

DOCKET NO. ES06D1013DV1

ELAINE M. HOLMES,
Plaintiff/Defendant in Counterclaim

v.

KENNETH E. HOLMES,
Defendant/Plaintiff in Counterclaim

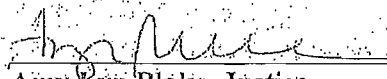
JUDGMENT

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

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

1. In lieu of child support, Defendant shall pay the tuition, books, fees and other costs appearing on the invoices for Zachary and Rebecca at North Shore Community College until they are emancipated as defined by G.L. Chapter 208, section 28.
2. Defendant shall pay Plaintiff alimony of \$1,300 per week until the first to occur of the following:
 - a. either party's death,
 - b. Plaintiff's remarriage,
 - c. Defendant's attainment of full social security retirement age,
 - d. June 8, 2020;
 - e. or any other applicable provision of the Act Reforming Alimony of 2012.
3. Alimony shall be includable by Plaintiff and deductible by Defendant for state and federal income tax purposes.
4. All other requested relief is denied.
5. Each party shall be responsible for their own counsel fees and costs incurred in these matters.

Dated: November 14, 2012


Amy Lyn Blake, Justice

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT
PROBATE & FAMILY COURT

ESSEX, ss.

DOCKET NO. ES06D1013DV1

ELAINE M. HOLMES,
Plaintiff/Defendant in Counterclaim

v.

KENNETH E. HOLMES,
Defendant/Plaintiff in Counterclaim

RATIONALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1. "To be successful in an action to modify a judgment for alimony . . . the petitioner must demonstrate a material change of circumstances since the entry of the earlier judgment." Schuler v. Schuler, 382 Mass. 366, 368 (1981).
2. "The change may be in the needs or the resources of the parties ... or in their respective incomes." Kernan v. Morse, 69 Mass. App. Ct. 378, 383 (2007) (quoting Fugere v. Fugere, 24 Mass. App. Ct. 758, 760 (1987)).
3. "In determining whether to modify a support or alimony order, a Probate Judge must weigh all relevant circumstances." Schuler v. Schuler, 382 Mass. 366, 370 (1981).
4. "A substantial and permanent decrease in the income of the support provider is one of the material circumstances to be considered in a request for reduction of a support award. However, while a substantial decrease in income or financial status may warrant

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

5. “Where a reduction in the alimony is sought, this includes consideration of ‘the financial status of the support provider, and the station in life of the respective parties,’ as well as whether, on all of the economic circumstances, the obligor spouse has ‘the present ability to pay the amounts required by the agreement and judgment.’” Greenberg v. Greenberg, 68 Mass. App. Ct. 344 (2007) (quoting Schuler v. Schuler, 382 Mass. 366, 370, 375-376 (1981)).
6. “[T]he statutory authority of a court to award alimony continues to be grounded in the recipient spouse’s need for support and the supporting spouse’s ability to pay.” Gottsegen v. Gottsegen, 397 Mass. 617, 623-624 (1986). “After a judgment for alimony or . . . the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony . . . and the payment thereof, and may make any judgment relative thereto which it might have made in the original action.” G. L. c. 208, § 37.
7. “A dependent spouse’s support needs, whether at the point of initial determination or later, when a modification is sought, are to be ‘measured by the ‘station’ of the parties—by what is required to maintain a standard of living comparable to the one enjoyed during the marriage.’” Greenberg v. Greenberg, 68 Mass. App. Ct. 344, 347 (2007) (quoting Grubert v. Grubert, 20 Mass. App. Ct. 811, 819 (1985)).
8. “The evaluation of vocational skills takes into account a party’s age, health, and reasonable employment prospects. ‘The fact that both parties have vocational skills and are capable of being self-supporting and maintaining individually their marital station in life suggests that an order which separates the economic lives of the parties as much as possible after the divorce may be appropriate.’” Heins v. Ledis, 422 Mass. 477, 484 (1996).
9. “A party has no right to waste an asset deliberately or ignore a feasible source of income and then request an increase in support.” Pagar v. Pagar, 9 Mass. App. Ct. 1, 4 (1980).
10. “Alimony is generally improper absent a finding of financial need on the part of the recipient spouse.” Heins, 422 Mass. at 484.
11. “There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the

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

12. "The Court . . . may deviate from the guidelines and overcome the presumptive application of the guidelines provided the Court enters specific written findings stating: (1) the amount of the order that would result from application of the guidelines; (2) that the guidelines amount would be unjust or inappropriate under the circumstances; (3) the specific facts of the case which justify departure from the guidelines; and (4) that such departure is consistent with the best interests of the child." Massachusetts Child Support Guidelines at 7 (effective January 1, 2009).
13. For purposes of determining child support, "[t]he earning capacity rather than the actual income of a parent may be considered." Flaherty v. Flaherty, 40 Mass. App. Ct. 289, 291 (1996)(citation omitted); see also Schuler v. Schuler, 382 Mass. 366, 374 (1981).
14. The Child Support Guidelines aim "(1) to encourage joint parental responsibility for child support in proportion to, or as a percentage of income; [and] (2) to meet the child's survival needs in the first instance, but to the extent either parent enjoys a higher standard of living to entitle the child to enjoy that higher standard." Brooks v. Piela, 61 Mass. App. Ct. 731, 737 (2004)(quotations omitted). Moreover, "'children's needs are to be defined, at least in part, by their parents' standard of living,' which in some cases 'includes the ability to provide certain opportunities . . . such as private school education'". Mandel v. Mandel, 74 Mass. App. Ct. 348, 355 (2009)(quoting Brooks v. Piela, *supra*, at 737 & n. 8).

Dated: November 14, 2012



Amy Lyn Blake, Justice

215

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

Essex, ss.

Docket No.: ES06D1013DV1

Elaine M. Holmes,
Plaintiff

v.

Kenneth Holmes,
Defendant

The Within Motion Is Hereby
~~ALLOWED~~/DENIED

Amy Lyn
Amy Lyn Blake, Justice
Probate & Family Court, Essex Division

Dated: 12/20/12

*after review of
both parties
submissions
and the
applicable
statute*

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

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

Defendants states as reason therefore, that the Court:

I

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

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

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

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

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

II

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

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

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

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

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

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

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

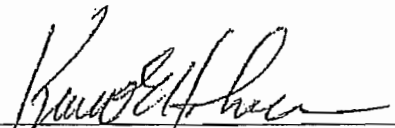
Thus, defendant's alimony duration would be .70004 of 180 months equaling 10.5 years instead of 12 years. This is a substantial savings to the defendant and a barrier preventing an

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

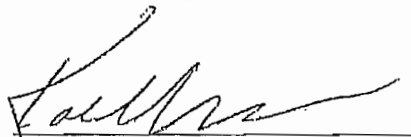
REQUEST FOR HEARING

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

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


Kenneth Holmes

Respectfully Submitted,
Kenneth Holmes,
By his Attorney,


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

Date: December 7, 2012

Statutes/Rules



Acts
2011
CHAPTER 124 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:

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.

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:-

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.

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.

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.

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.

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.

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.

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.

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.

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

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

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

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

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

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

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

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

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

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

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

Approved, September 26, 2011.



PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS (Chapters 183 through 210)
TITLE III DOMESTIC RELATIONS
CHAPTER 208 DIVORCE
Section 17 Pendency of action; allowance; alimony

Section 17. The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action. When the court makes an order for alimony on behalf of a party, and such party is not a member of a private group health insurance plan, the court shall include in such order for alimony a provision relating to health insurance, which provision shall be in accordance with section thirty-four.

General Laws: CHAPTER 208, Section 48

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 48 Definitions applicable to Secs. 49 to 55

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

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

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

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

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

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

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

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

General Laws: CHAPTER 208, Section 48

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

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

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 49 Termination, suspension or modification of general term alimony

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

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

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

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

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

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

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

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

General Laws: CHAPTER 208, Section 49

(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.

General Laws: CHAPTER 208, Section 49

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

- (i) a material change of circumstance that occurred after entry of the alimony judgment; and
- (ii) reasons for the extension that are supported by clear and convincing evidence.

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 50 Termination, extension or modification of rehabilitative alimony

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

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

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

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

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

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

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

General Laws: CHAPTER 208, Section 51

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

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

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

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

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

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

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

Section 52 Termination of transitional alimony; modification or extension

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

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

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

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

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

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

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

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

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

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

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

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

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

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

(2) tax considerations applicable to the parties;

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

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

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

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

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

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

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

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

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

General Laws: CHAPTER 208, Section 54

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

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

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

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

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

- (1) a party works more than a single full-time equivalent position; and
- (2) the second job or overtime began after entry of the initial order.

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

TITLE III DOMESTIC RELATIONS

CHAPTER 208 DIVORCE

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

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

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

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

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