

CHAPTER 6

ALIMONY, PENSIONS
AND OTHER RELIEF

CHERYL L. GARRITY, ESQ.
Burlington

ABBE L. HERSHBERG, ESQ.
Greater Boston Legal Services, Boston

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ALIMONY

The Probate and Family Court must have personal jurisdiction over both parties in order to enter an award of alimony. Personal jurisdiction means that the court is able to order a person to appear in front of them. While there are some technical exceptions, personal jurisdiction requires that the person live in Massachusetts.

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Generally speaking, very few spouses receive an award of permanent alimony following divorce. Alimony is based upon the need of one spouse to maintain the standard of living he or she had before the divorce and the ability of the other spouse to pay support to meet that need. In determining if one spouse will receive alimony, the court must look at all sixteen factors outlined in G.L. c. 208, § 34. No one factor alone determines if alimony will be ordered. Instead, you should outline your case based on each and every factor. The following is a list of the statutory factors:

Statutory Factors

1. **Length of the marriage**—Generally, the parties need to have been married for a long time for the court to enter an order to pay alimony. For marriages of less than seven years, the likelihood of an order to pay alimony is very slim. For marriages of seven to twelve years, there might be alimony depending on how the other factors come into play. *Drapek v. Drapek*, 399 Mass. 240 (1987). For marriages exceeding twelve years, particularly if one party has limited ability to earn income in the future and the other party is able to pay alimony, the court will likely enter an order.
2. **Conduct of parties during the marriage**—Not all conduct impacts alimony, but only that conduct that has economic consequences on the family. For example, if one spouse used marital assets to support a person with whom they had an affair, or gambled large sums of money, that might affect an award of alimony or property division. *Kittredge v. Kittredge*, 441 Mass. 28 (2004).
3. **Age of the parties**—The older the parties, the more likely the court will award alimony, especially if one spouse was the primary caretaker of the children and home, thereby limiting that person's career or work experience.
4. **Health of the parties**—Ill health may affect a person's ability to earn money and support himself or herself. In such cases, the court might award alimony to the ill spouse. Similarly, the court is unlikely to order someone with declining health to pay alimony to their spouse.
5. **Station of the parties**—This refers to the financial condition of the parties during the time of the marriage. Did they have a low income, middle income, or upper income lifestyle? If the economic status of the parties was poor, alimony may not be awarded at all.
6. **Occupation of the parties**—This is an especially important factor if one party has a career while the other spouse served as a homemaker and primary-care parent. If, on the other hand, both parties have careers and are able to support themselves, alimony is unlikely. Sometimes a court will order alimony to be paid for a set period of time to allow a party to obtain education or training for a career, although this is not favored in Massachusetts. *Gordon v. Gordon*, 26 Mass. App. Ct. 973 (1988).
7. **Amount and sources of income**—All income from any source may be considered by the court. This includes inheritances, investment income, trust income, or any other regular source of income. It is important to find out what income the other party receives on a regular basis.
8. **Vocational skills**—This refers to any job skills a person has and includes technical skills, education, and job experience. A party with no skills is more likely to have alimony awarded than a party who has developed job skills.
9. **Employability**—This is related to vocational skills. What skills does a person have, and how likely are they to find work in that field? Do they have job skills in an industry that is no longer readily available; have they kept up their skills even if they were out of the job market for a period of time; or have they been injured in some way so that even with those skills they cannot work in that type of job?
10. **Estate of the parties**—A person's estate means any property that he or she holds title to, regardless of how it was acquired. The estate includes inheritances, gifts, lottery winnings, and items bought for himself or herself.
11. **Liabilities of the parties**—The court can consider joint and individual debts in determining how much alimony to award. If the parties have significant debts, alimony is less likely to be awarded. In a case where

there are a lot of debts and very little property, the court might be dividing up who pays what debts instead of who gets what property.

12. **Needs of the parties**—The court attempts to determine whether or not each party can maintain their current standard of living without alimony. The court then tries to adjust the rights of both parties in order to fashion an order that allows both to live in their current standard of living. Remember that the court cannot solve your money problems. They can only work with the incomes and assets that you and your spouse already have.
13. **Opportunity of each of the parties for future acquisition of capital assets and income**—The court will consider if one person is likely to have more ability to own future assets and earn more income. For example, a person whose income from their work includes potential stock options is likely to have future assets. On the other hand, a person who has full custody of young children is limited in their ability to work more hours and increase their income. If one spouse comes from a very wealthy family, there is a good chance he or she will receive a large inheritance when the parents die. The potential inheritance of a party may be considered in determining alimony, but it cannot be divided as property. *Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985).
14. **Contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates**—This relates more to the division of property than alimony, but may still be considered in determining an alimony order. The court looks to see who was the driving force behind the acquisition of assets during the marriage.
15. **Contribution of husband or wife or both as homemaker**—This is particularly important where one spouse has limited his or her career opportunities in order to render services as a homemaker. Often the court will award the homemaker alimony to compensate for the sacrifice he or she made by staying home so that the other spouse could pursue a career, particularly if it has an economic impact on that person.
16. **Present and future needs of dependent children of the marriage**—This factor applies mainly to property division, but may affect an order of alimony. If a child is likely to have special needs that have financial implications, this information should be brought to the court's attention.

G.L. c. 208, § 34.

Each of these factors is considered and the overall impact determines whether one party must pay alimony to the other. No single factor can determine an order of alimony. However, the overriding consideration in establishing alimony will be the needs of one party and the ability of the other party to pay.

Generally you receive alimony payments on a regular schedule, such as weekly or monthly. Alternatively, the court can order a lump sum of alimony, which means you would receive one large alimony payment at the end of the divorce, although this is not very common. You could then do what you wanted with that money. There is also rehabilitative alimony. Rehabilitative alimony is paid on a regular schedule for a set period of time to allow the spouse receiving alimony to obtain job skills and eventually become self-supporting. Massachusetts does not like rehabilitative alimony because it is so difficult to guess at what the future holds for each person. If a spouse receives alimony and later is able to find a decent paying job, the other person can bring a complaint for modification to reduce or end alimony. See Chapter 16, Modifications.

How Long Will Alimony Be Paid?

If the parties have an agreement, the agreement will state when alimony will end. Usually alimony ends when the person receiving it remarries or the person paying it dies. It can also end upon retirement or other predictable events. *Cohan v. Feuer*, 442 Mass. 151, 158 (2004). Where the future finances of the parties is uncertain, the court cannot limit alimony to a set number of years. *D.L. v. G.L.*, 61 Mass. App. Ct. 488 (2004). If either person's financial situation changes, they can bring a complaint for modification asking that alimony be increased, decreased, or stopped altogether.

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Practice Note

If you receive alimony, it will probably stop if you remarry and may even stop if you live with someone but decide not to marry if you and the person you live with are sharing income and expenses. If you have a separation agreement, you can state clearly what will happen if you marry or live with someone. In some cases, the court has ordered alimony to continue even after remarriage. This is generally just enough money so that the person will not be dependent on government programs such as welfare. *O'Brien v. O'Brien*, 417 Mass. 477 (1993). Alimony always ends when the party ordered to pay it dies, unless the court order clearly says otherwise.

PROPERTY DIVISION

During the divorce, the court will divide the property of the parties. This is the only time the court will make a property determination. Unlike alimony or child support, property divisions cannot be modified in the future. Therefore, it is extremely important to determine all the property a person has and to present the best case for you to receive the largest share of property possible. “Property” includes all property—whether a party received it before or after the marriage. In dividing property, the court considers the same sixteen factors as when determining alimony. The court does not have to divide the property equally, but must make written findings based on the factors of G.L. c. 208, § 34.

There are several important things to consider in deciding whether you will ask for a larger portion of the property or alimony.

First, property divisions are final and can never be changed, whereas alimony may be modified in the future. Alimony can be increased, decreased, or stopped altogether. Second, alimony is taxable income to the person receiving it. There are exceptions to the capital gains taxes for property divisions in a divorce and you should check with an accountant to determine any taxes you would have to pay. The Internal Revenue Service will closely scrutinize payments to make sure they are really meant as alimony and not property settlements. *Griffith v. Griffith*, 24 Mass. App. Ct. 943 (1987). Third, property settlements might be discharged in a bankruptcy filing, but alimony and child support orders are not dischargeable. This means that someone under a court order to pay support cannot file bankruptcy and stop paying. *In re Michaels*, 157 B.R. 190, 195–96 (Bankr. D. Mass. 1993).

Money that is owed or being paid as alimony, maintenance, or child support cannot be discharged in bankruptcy. However, it must be paid because there is a court order to pay it and it cannot be a division of property that you are calling support or alimony. If one party is paying another person (for the mortgage, for example), instead of support, that may not be discharged in bankruptcy. However, the bankruptcy court will look carefully at what you are calling alimony or support to make sure it is not really something else. *See* the Bankruptcy Code, Title 11, Chapter 5, Subchapter II, § 523(a)(5); Title 11, Chapter 3, Subchapter IV, § 362. If you file for bankruptcy, the property you receive in the divorce may become part of your bankruptcy estate, meaning your creditors will be able to get it to pay the debts you owe them.

Practice Note

If you are thinking about filing for bankruptcy, it is a good idea to speak to a bankruptcy attorney before filing the divorce. If you have already filed the divorce, be sure to speak to a bankruptcy attorney before entering an agreement about alimony, support, or property division.

Marital Home

For most families, the marital home is usually the largest asset. Often the property division requires a sale of the marital home and the parties to divide the equity (the amount of money left after paying the mortgage and other expenses). Experts are usually needed to value the home, although you can testify as to what you think the home is worth based on your own knowledge, property assessments, values obtained by the bank, or by some other means.

Postponing the Sale of the Marital Home

If you have children, and have sufficient assets and income to postpone the sale of the home, it might be possible for you or your spouse (whichever of you has custody of your children) to remain in your home with your children until they are emancipated (i.e., until they turn eighteen, join the military, or are no longer dependent by some other means). The court can order that one parent live in the home with the children until that parent remarries, decides to sell the property, or the children are emancipated. The divorce agreement must provide when and how the proceeds of the sale of the home will be divided (usually a percentage is given to each parent, or one parent is guaranteed a set dollar amount). It is also important to determine who will pay the mortgage, taxes, and repairs to the home until the sale, and how this will affect the division of the proceeds. In any agreement or divorce decree, it is important to state that the spouse is to live in the marital home free of charge; this prevents the other party from forcing a sale of the home or attempting to collect rent. *Hartog v. Hartog*, 27 Mass. App. Ct. 124 (1989); *Stylianopoulos v. Stylianopoulos*, 17 Mass. App. Ct. 64 (1983); *Downing v. Downing*, 12 Mass. App. Ct. 968 (1981) (rescript opinion); *Thompson v. Thompson*, 12 Mass. App. Ct. 917 (1981).

Practice Note

If you want to stay in the marital home, you need to make sure you can afford to pay the mortgage, taxes, and repairs with the money you receive each month. Otherwise, the bank can still foreclose on the home, no matter what the Probate and Family Court agreement or judgment says. Many times the home will need to be sold because there simply is not enough money to pay for everything. If you are the spouse who is not living in the marital home, you may want the other person to refinance the mortgage in his or her name because it affects your credit rating if payments are late or missed. You may also propose that you keep certain assets to offset the value of the marital home (you keep a retirement account and investments, while the other spouse keeps the home).

Using the Property as Security to Secure Payments of Child Support

If the parent who is paying child support is not subject to wage assignments (for example, if he or she is self-employed or living in another county), you might be able to obtain security for future payments by obtaining a lien on his or her property until your child is emancipated. G.L. c. 208, §§ 28, 36; *Levine v. Levine*, 394 Mass. 749, 751 n.1 (1985); *Pare v. Pare*, 409 Mass. 292 (1991).

Bank Accounts

Bank accounts are also considered marital property, but not if the money is held in trust for others, such as children, and is clearly not meant to be money for either party. It does not matter if the account is a joint account or in the name of one of the parties, it is still considered marital property to be divided at the divorce.

Royalties, Copyrights, and Patents

Royalties, copyrights, patents, stocks and bonds, stock options, and business interests including the goodwill of the business are all considered property. Unfortunately you will need an expert to determine their value.

Anticipated Damages from Lawsuit

If one spouse has the right to bring a lawsuit against another person for injuries, debt, or money, this is a chose in action and is subject to the property division, although it may be subject to future division “if and when received.” *S.L. v. D.L.*, 55 Mass. App. Ct. 880 (2002).

Pensions

Pensions are considered property to be divided in the divorce. You must find out what pensions the other party has in order to have a fair property distribution. You should seriously consider hiring an attorney to represent you so that you do not waive your right to a pension unwittingly. You also have to be aware of the tax consequences of dividing

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or assigning a pension interest. For defined benefit plans, experts specializing in the valuation of pensions are needed to determine the present value of a pension. The expert will need information on how long the person worked for the company, when they are allowed to collect their retirement, their income, their projected benefit, and the length of the marriage. In order to assign pension benefits in a divorce action, one must draft a Qualified Domestic Relations Order (QDRO). A QDRO can only provide for benefits or options that are allowed under the terms of the retirement plan. If a pension is to be divided, it is a good idea to send the proposed QDRO to the plan administrator prior to going to court. That person can tell you if there needs to be any change to follow the plan benefits. Also, many companies or their plan administrator can send you a form to use if you contact the human resources department. Otherwise, you need to go to a law library and find sample forms that you can use. For more information on dividing pensions, you can also go to <http://www.dol.gov/ebsa/publications/qdros.html#section4>.

SPECIAL ORDERS AND CONSIDERATIONS

Permanent Restraining Order

The Probate and Family Court may enter an order prohibiting one party from imposing any restraint upon the personal liberty of the other party in cases where the court finds there has been abuse or extreme harassment. A party may ask for such an order pending the divorce pursuant to G.L. c. 208, § 18. The order can then become permanent at the conclusion of the case. G.L. c. 208, § 34D. Unlike a restraining order under G.L. c. 209A, this order does not need to be extended every year.

Health Insurance

When a judge enters an award of alimony, he or she must determine if the person paying has health insurance available to him or her through an employer or organization or at reasonable cost. If insurance is available, the court will enter an order requiring the spouse to exercise the option of additional coverage for the other spouse. Depending on the facts of each case, the court can order either spouse to pay any additional cost for the insurance.

PAYMENT OF DEBTS

In reviewing the financial affairs of the divorcing parties, the court considers not only assets, but also debts. These debts are considered in relation to the other factors, such as each person's needs, estate, and income. The court will consider who incurred the debts and who benefitted. The court can determine how a debt is going to be paid between the two parties. *Duckett v. Duckett*, 27 Mass. App. Ct. 1164 (1989).

CHILD SUPPORT AND CUSTODY

Alimony and property division also relate to the issues of child support. In determining the ideal result for you in a divorce situation, you need to decide how each factor will help or hurt you. For example, you may decide to ask for a larger child support award to help with extra child-related expenses rather than ask for alimony. Or you may want extra alimony rather than child support because your children are almost finished with school. You should sit down with pen and paper and make calculations based on the different factors given the facts of your case. See Chapter 8 for more information about child support orders.

Practice Note

Child support, alimony, and property division are somewhat related in a divorce. In any divorce, there is a limited amount of money and property to divide between the parents and to support the children. You need to decide, based on the facts of your case, what combination of child support, alimony, and property division makes sense. If you have assets, you may consider meeting with a financial planner to help you decide what course of action to take. You can look up a certified financial planner at <http://www.cfp.net/search>, or ask your friends and family who they use.

Child support can never be waived or bargained away by the parents. *McCarthy v. McCarthy*, 36 Mass. App. Ct. 490 (1994). Therefore, it is inadvisable to agree to a lump sum of child support or for property in exchange for receiving child support. As situations change, the custodial parent may bring a modification action seeking child support regardless of what was agreed upon in the divorce.

Child support is paid until the children are emancipated, which is usually when they turn eighteen. However, the court may order child support to be paid until the child is twenty-one years old, if the child lives at home and is dependent on the parent. Support is also payable until age twenty-three if the child is living at home, dependent on the parent, and is enrolled in an educational program full time to obtain an undergraduate degree. G.L. c. 208, § 28. Child support can also be ordered for a child over twenty-one if that child is physically or mentally impaired and incapable of supporting himself or herself. *Viccaro v. Milunsky*, 406 Mass. 777 (1990).

Alimony can be waived by the parties, paid in a lump sum, or paid in regular installments. Alimony generally ends when the person receiving it remarries or lives with another person or the person paying it dies.

Child support is not tax deductible by the person paying it, and the person receiving it does not have to pay taxes on the amount received. However, alimony is tax deductible by the person paying it and taxable by the person receiving it. The Internal Revenue Service looks at all support orders carefully to determine if payments are to be made for child support or alimony.

Practice Note

Consult with an accountant if you receive alimony. You may need to pay estimated taxes every three months based on the amount of alimony you receive and your other types of income.

Both child support and alimony are always subject to modification if the situation of the parties changes. Support orders can be increased, decreased, or stopped altogether. However, the division of the property set forth in the divorce agreement is final and can never be modified.

You should carefully consider how old your children are, how likely it is that alimony will be ordered, and how much property you and your spouse own; you should also determine how likely it is that the support orders will be modified in the future. Think about how all three areas are related in your case, and how you would settle them with your spouse or how you would ask the court for appropriate orders.

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