

CHAPTER 16

MODIFICATIONS

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GENERAL OVERVIEW

If a previously entered temporary court order or judgment no longer suits the parties because circumstances have changed in a significant way since the order or judgment was issued, the court can “modify” the prior order or judgment. Cases where a modification might be appropriate include those where the children are significantly older than at the time when the last child support order was issued, or where one of the parties’ income or employment circumstances have significantly changed. In order to change a prior judgment, a party must file a complaint for modification. In order to change a temporary order, a party must file a motion to modify a temporary order. A

judgment can be modified more than once so long as the reason for requesting a modification is that there has been a significant change in circumstances.

In general, the courts can make changes in any of the following areas:

- alimony or other forms of spousal support;
- custody of children;
- parenting time arrangements with children;
- child support received or paid and other matters affecting the care and wellbeing of minor children, such as
 - dental or medical insurance;
 - who can claim a child as a dependent for income tax purposes; and
 - how to allocate college expenses between the parents; or
- any other provision of the prior order or judgment that do not involve division of property.

Practice Note

Child support is controlled by statute and the Massachusetts Child Support Guidelines, including modification actions. G.L. c. 119A, §§ 1–17; *Hoegen v. Hoegen*, 89 Mass. App. Ct. 6 (2016). In addition, the standard for modifying a child support order is *not* the same “substantial change in circumstances” required in modifications of non-child support matters. Modification of child support orders and judgments is presumptively required whenever there is an inconsistency between the amount of current child support and the amount that would be paid under the Guidelines. *Morales v. Morales*, 464 Mass. 507 (2013). It is important to review the Massachusetts Child Support Guidelines in effect at the time of the request for modification to ensure accurate calculations of support.

Usually, judgments regarding the division of marital assets such as real estate, pension accounts, and other financial assets are not modifiable unless the parties specifically agree that they will be. However, in some situations a matter related to a division of property may be considered to be in the nature of child or spousal support and is therefore modifiable. *See Hartog v. Hartog*, 27 Mass. App. Ct. 124 (1989) (changing the judgment to permit wife and children to stay in the marital home longer than provided for in prior judgment was in the best interests of the children and considered to be “in the nature of support” which can always be modified). Judgments can be modified more than once so long as there has been a change in circumstances that warrants a change.

TYPES OF MODIFICATIONS OF ORDERS AND JUDGMENTS THAT CAN BE OBTAINED BY FILING A MOTION

Modifications Made Pursuant to Mass. R. Dom. Rel. P. 60

Sometimes a party may want to change an order or judgment because there is a legitimate need to do so, and it would be unfair not to allow a change. For example, when there is a typographical mistake in the written judgment, or when the opposing party lied about the value of a significant asset on his or her financial statement, and the lie influenced the judgment of the court.

If there is a “clerical mistake” in your judgment or order that arose from an “oversight” or an “omission,” the court may correct it on its own, or on the motion of any party. Mass. R. Dom. Rel. P. 60(a). This rule “seeks to ensure that the record of judgment reflects what actually took place,” and to correct mistakes created by some oversight or omission of the court, a clerk, or a party. It does not apply to mistakes resulting from deliberate action, such as lying about the value of a significant asset. This rule relates to all written records in the case. When the judgment is being appealed, mistakes may be corrected before the appeal is docketed (initiated in the Appeals Court). The mistake can be corrected with the consent of the appellate court after the appeal is docketed. Mass. R. Dom. Rel. P. 60(a).

A judge may “relieve” a party from a final judgment or order to accomplish justice for the following reasons:

- mistake, inadvertence, surprise, or excusable neglect;

- newly discovered evidence which reasonably could not have been discovered within ten days after the judgment is entered (i.e., in time to move for a new trial under Mass. R. Dom. Rel. P. 59(b));
- fraud, misrepresentation, or other misconduct of an opposing party;
- the judgment is void (meaning the judgment is not valid, has no legal effect);
- the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer fair that the judgment should have prospective application; or
- any other reason that justice would require.

Filing a motion under Rule 60 does not affect the finality of a judgment or suspend its operation (i.e., it does not affect the time by which an appeal must be filed) unless the motion is served within ten days of the entry of the judgment. Mass. R. Civ. P. 60 (2013 amendment).

A motion for substantive (as opposed to clerical) relief must be made “within a reasonable time.” Motions for relief based on any of the first three reasons listed above (those relating to mistake, misconduct, and newly discovered evidence) must be made within one year after the judgment or order enters. Mass. R. Dom. Rel. P. 60(b).

POSTDIVORCE MATTERS: NO PROVISION REGARDING ALIMONY OR NO PROVISION REGARDING PROPERTY DIVISION IN THE DIVORCE JUDGMENT OR SEPARATION AGREEMENT

If the court did not consider an issue during the divorce hearing, including issues involving the division of marital property and alimony, the parties do not need to show that there has been a material change of circumstances since the divorce was granted. G.L. c. 208, § 34. If the parties do not have an agreement dividing marital property (or a document that could be interpreted as dividing property), if the issue was not presented during the divorce hearing, or if the judge’s order does not make a ruling on property division, either spouse can file a complaint for division of property. G.L. c. 208, § 34; *Maze v. Mihalovich*, 7 Mass. App. Ct. 323 (1979); *Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985).

Similarly, if the parties do not have an agreement about alimony, or a document that states its intent to settle all of the issues between the parties, one may be able to file a complaint for alimony. You do not need to show a change of circumstances since the time of the divorce judgment to obtain a favorable ruling. You must show that you meet the criteria for support using the same standards that would have been used in the divorce proceeding. See chapter 6, Alimony, Pensions, and Other Relief. If the separation agreement expressly states that there is a right to bring future claims for alimony, the party bringing the claim must show a change in circumstances since the divorce was granted. *Buckley v. Buckley*, 42 Mass. App. Ct. 716 (1997).

Again, if you file either a complaint for alimony or a complaint for division of property, you do not need to show that there has been a change of circumstances since the time of the divorce judgment. G.L. c. 208, §§ 34, 37; *Maze v. Mihalovich*, 7 Mass. App. Ct. 323 (1979). The factors the court considers in dividing marital property as well as in awarding alimony in these actions are the same factors the court would consider if the claim arose in the original divorce action. These factors are discussed in chapter 6, Alimony, Pensions, and Other Relief.

Both Parties Agree to Make a Change in the Separation Agreement

A separation agreement itself may include a provision regarding how to modify the separation agreement when both parties agree, so that you may not need to go to court. For example, the separation agreement may be changed by putting the new provision in writing and requiring both parties to sign the revisions in front of a notary public. However, Probate and Family Court judges are not required to accept the revisions or to enforce revisions that were not presented for court approval and made a part of a court order. This means that a person who does not comply with the changes that were agreed upon by the parties and that are not part of a court order cannot be subjected to a contempt action. However, the person who does not comply with the revisions could be sued in a civil court for breach of contract.

Joint Petitions (Following Approval of Agreement, but Before Entry of Judgment)

If the parties filed a joint petition for divorce under G.L. c. 208, § 1A, and the judge approved the agreement, they can change the agreement by filing a joint motion requesting that the court approve the modifications if they do so before the judgment of divorce nisi is entered. This generally occurs thirty days after the hearing in front of the judge on the joint petition for divorce. If the thirty days have expired, the parties, if in agreement, may withdraw their joint petition for divorce by filing a motion before the judgment of divorce becomes final, which occurs ninety days after the judgment of divorce nisi is entered. If the time frames seem confusing, see chapter 5, Divorce, for a detailed explanation of a joint petition for divorce.

If there is no agreement between the parties to modify a separation agreement that has been approved by the court, a motion can still be presented to the court before the entry of the judgment divorce nisi, which occurs thirty days after the court hearing on the petition. The person who wants to change the agreement must be able to show that there has been a significant change of circumstances. The court may modify the agreement. The agreement as modified will continue as the order of the court. G.L. c. 208, § 1A.

Practice Note

Although it is not explicitly stated in Section 1A, it appears that, without the agreement of both parties, the court may only

- modify the terms of a separation agreement (as opposed to a judgment based on a separation agreement) that merges with the judgment of divorce under Section 1A; or
- modify only the judgment or order (as opposed to the agreement itself) based on an agreement which is to survive the divorce judgment as an independent contract between the parties.

In the second situation, the judgment will contradict the terms of the separation agreement, and the party opposing modification may have an action for damages or for specific performance. See *Knox v. Remick*, 371 Mass. 433 & n.4, 435 (1976) (“although mandated support may be reduced, the Probate Court judge has no authority to modify the agreement itself. . . .”); *Schillander v. Schillander*, 307 Mass. 96 (1940) (Probate and Family Court did not have authority to modify provisions of a valid separation agreement). But, it is possible that the judgment nonetheless can be modified upon a showing of “something more than a material change in circumstances.” *DeChristofaro v. DeChristofaro*, 24 Mass. App. Ct. 231, 235–36 (1987). See “Effect of Separation Agreements on Modification Actions,” below.

No Final Judgment—Changing Temporary Orders

A complaint for modification can be filed at any time after an earlier case has ended in a final judgment; if the case is still pending and you want to change the temporary order, then you need to file a “motion.” You can ask the court to change the temporary orders by filing a written motion with the court and giving notice to the other party or his or her attorney. See chapter 2, Overview of the Probate and Family Court. The standard to change a temporary order is a change in circumstances since the original temporary order; the change generally does not need to be as significant as it needs to be to change a final order, but must be reasonable.

Appeal

If the Probate and Family Court refuses to change your order, you may be able to appeal the decision. An appeal is a resort to a higher court for the purpose of obtaining a review of the trial court’s decision. See chapter 18, Appellate Issues.

THE MODIFICATION COMPLAINT

In general, to obtain a modification through a complaint for modification, a person must prove to the court that a material change in circumstances has occurred since the last judgment was issued, and the change makes a modification of the orders necessary. When the change concerns a child or children, you must also prove that the proposed change is in the best interest of the child or children. A sample complaint for modification is included as **Exhibit 16A**.

Practice Note

Modifications of child support orders or judgments are subject to a slightly expedited process if the *only* issue is changing the child support order. There are specific forms that can be used for this purpose which are found at the courthouse or at <https://www.mass.gov/service-details/child-support-and-custody-modifications-court-forms>.

Where Do I File the Modification Complaint?

In most cases the judgment must be modified in the same state court and county that heard the original matter. In the event that both parties to the action have moved out of state, the state where the child or former spouse seeking a change in the judgment resides may be the proper place for the matter to be heard. If one of the parties still lives in the state that made the judgment, and the modification does not involve custody or visitation issues, that state must hear the matter, unless there is an emergency and an immediate temporary order is necessary. *Peddar v. Peddar*, 43 Mass. App. Ct. 192 (1997) (Georgia has jurisdiction over child support when parties obtained divorce judgment governing child support in Georgia, father remained in Georgia and mother moved to Massachusetts with children); *see also Draper v. Burke*, 450 Mass. 676 (2008) (Massachusetts may take jurisdiction over a child-support matter where support order was entered in Oregon, mother lives in Massachusetts, and father lives in Idaho). If the matter concerns child custody and visitation, see G.L. c. 209B, § 2. See also chapter 9, Child Custody. If the matter concerns the modification of child support, see G.L. c. 209D. See also chapter 8, Child Support.

“Venue” refers to the local county court that has proper jurisdiction to hear the modification complaint. The local county court that originally entered the judgment is the proper place to hear the modification action. For example, if the Dukes County Probate and Family Court entered the judgment to be modified, that court is the proper place to hear the modification. Even if neither party still lives in the county that entered the judgment, or if it would be an undue hardship on one of the parties to litigate the matter in the original county, the complaint must still be filed in the county that entered the judgment. It may be possible to have the case transferred to another county (referred to as a change in venue) by the filing of a motion for a change in venue by either party. The motion is presented to a judge in the original Probate and Family Court, who must then approve the motion. Once the motion is allowed, a copy of it and a cover letter requesting a change must be sent to the Executive Office of the Trial Court, which will approve or not approve the change. Once approval is given, hearings can be held in the new venue, but any paper filings must still be made in the original court. *See* G.L. c. 208, § 6.

How Do I Fill Out the Forms?

Practice Note

Some Probate and Family Courts have court service centers staffed by volunteer lawyers who can help litigants fill out the correct forms and get information about the process that needs to be followed. These volunteers cannot, however, give legal advice. Check your local Probate and Family Court to see if this kind of assistance is available.

A sample complaint for modification with instructions is included as **Exhibit 16A**. You should complete it in blue or black ink. You are the “plaintiff” in the complaint for modification even if you were the “defendant” in the earlier case. You need to state a change in circumstances in the complaint or the court may dismiss your complaint for modification. *Vedensky v. Vedensky*, 86 Mass. App. Ct. 768 (2014); *Schuler v. Schuler*, 382 Mass. 366 (1981).

Practice Note

Always keep copies of everything that is filed in the case.

Fees

In Massachusetts, there is a \$50 charge for filing a complaint for modification relating to the support, maintenance, parenting time, or education of a child; there is a \$150 charge for filing other types of modification complaints. There is usually a fee of \$5 for the summons issued by the court and a “surcharge” of \$15. There is a fee for serving the complaint. If you cannot afford to pay these costs, you may request to have these fees waived or paid by the state. See chapter 2, Overview of the Probate and Family Court, and **Exhibit 2A**.

The court will review your motion to waive fees, your affidavit of indigency, and your financial statement to determine whether the state will pay for the costs in your case. The court then will send you a copy of the “allowed” motion to waive fees or “approved” affidavit of indigency and an original domestic relations summons.

The summons is a legal document that needs to be completed when service is made to prove to the court that the defendant received a copy of your complaint for modification, and that he or she knows about the case. By having a completed summons in your file at the courthouse, you will be able to proceed with your case even if the defendant fails to appear in court.

Service

It is your responsibility to make sure that the defendant is “served” (i.e., given) a copy of the complaint for modification. If you know that the defendant is willing to agree to the modification, then you may give him or her the original domestic relations summons and request that he or she sign it in the presence of a notary public. Most banks, post offices, and town halls have a notary public available for a small fee. If you know that the defendant is not willing to be cooperative, you should arrange for a sheriff to complete service.

To arrange for a sheriff to complete service, send a cover letter to the deputy sheriff’s office for the county in which the defendant resides along with the original summons, a copy of the complaint, a copy of any motion you may have filed at the same time, and the original affidavit of indigence signed by the court. Remember to keep copies of everything for yourself. In the cover letter, request that the sheriff serve (deliver) the papers on the defendant and that the sheriff bill the state for his or her work. The sheriff may send the “executed” (completed) domestic relations summons directly to the court or to you. You should file the completed domestic relations summons with the court as soon as possible. See chapter 2, Overview of the Probate and Family Court.

Practice Note

Some private constables will also serve summonses and complaints and will bill the state for the service.

What Happens Next?

The defendant has twenty days to file a written “answer” to the complaint for modification. After the twenty days, the person seeking a modification should file a request for assignment asking for a court date. If the defendant does not file an answer, then the person seeking a modification should ask for an uncontested trial; if the defendant does file an answer, then the person seeking a modification should ask for a pretrial conference and explain the issues that are contested. The court will mail both parties a written notice with your court date.

Answer

If you are served with a complaint for modification and you wish to oppose the modification, then you need to file an answer. See chapter 2, Overview of the Probate and Family Court. If the modification seeks to modify a spousal support order that was entered into by a separation agreement that exists as an independent contract between the parties, the other spouse should bring the separation agreement to the court’s attention in his or her answer. *Mass. R. Dom. Rel. P. 12(b); Knox v. Remick*, 371 Mass. 433, 439 (1976).

Property Division

For the most part, you cannot modify a judgment that divides marital property. *Bush v. Bush*, 402 Mass. 406 (1988); *Maze v. Mihalovich*, 7 Mass. App. Ct. 323 (1979); *Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985). You may be able to modify a judgment that divided marital property when there has been fraud or a mistake, and, when you have a separation agreement, where you signed the agreement against your will. On rare occasions, the court may also decide that a matter that is closely associated with the division of property is actually an issue of support. For example, a court may find that the right to occupy the former marital home may be in the nature of support and not a division of marital property, even if modification affects the economic value of the former distribution. *Hartog v. Hartog*, 27 Mass. App. Ct. 124 (1989). The court may look at a number of factors to decide whether a matter related to property division is in the nature of support, including the parties’ intent, which can be found by looking at language of agreement within surrounding circumstances, the parties’ financial circumstances at the time of the settlement, and the function served by the obligation. *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990) (bankruptcy

discharge). Judges may find obligations that help pay for daily necessities, such as food, housing, or transportation, in the nature of support. *In re Gianakas*, 917 F.2d 759. Judges may also look to see

- whether the payments are made in regular installments instead of in a lump sum;
- whether one former spouse has significantly less income than the other, or one former spouse needs job training, which would indicate a need for support;
- whether there are minor children involved; and
- whether one former spouse's obligation would terminate upon the death of the other former spouse, or is otherwise modifiable upon a showing of changed circumstances.

In re Swampson, 142 B.R. 957, 959–60 (D. Colo. 1992) (bankruptcy discharge).

Support Orders

Practice Note

Unlike alimony, at least in the case of children of divorced parents, a child support order may be modified by a judge without the occurrence of a change in circumstances if the current order differs from the amount indicated by using the Child Support Guidelines. See “Considerations Specific to Child Support,” below.

In general, to modify support orders—especially orders for the support of a spouse, as opposed to child support orders—there must be a material change in circumstances. *Pierce v. Pierce*, 455 Mass. 286 (2009) (quoting *Schuler v. Schuler*, 382 Mass. 366 (1981)). The court must consider all relevant circumstances. *Pierce v. Pierce*, 455 Mass. at 295–96; *Kelley v. Kelley*, 64 Mass. App. Ct. 344 (2005). In general, this means that the court must consider one former spouse's need for support or the other former spouse's ability to pay. *Gottsegen v. Gottsegen*, 397 Mass. 617 (1986) (court could not provide for termination of alimony untied to recipient's economic circumstance or need for alimony or the supporting spouse's ability to pay); *Flaherty v. Flaherty*, 40 Mass. App. Ct. 289 (1996) (discussion of attribution of income and requirement for findings in a child support modification action); *Cournoyer v. Cournoyer*, 40 Mass. App. Ct. 302 (1996); *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732 (1995). The change must be “material” and must affect either the need for support or the ability to pay. *Kelley v. Kelley*, 64 Mass. App. Ct. 733 (2005) (modification to reduce alimony should be denied where wife's decrease in expenses is offset by husband's improved circumstances); see *Heins v. Ledis*, 422 Mass. 477 (1996) (“an award of alimony is improper absent a finding of financial need on the part of the recipient spouse”).

More specifically, however, the type of alimony or spousal support awarded will determine whether and how the support order can be modified. General term alimony may be modified upon a material change in circumstances. G.L. c. 208, § 49(2)(e). Rehabilitative alimony may be modified as to the length of time payable if “unforeseen events” prevents the recipient spouse from becoming self-supporting even though he or she tried and the payor spouse is able to continue to pay without undue burden. The amount of rehabilitative alimony may be modified upon a showing of a material change in circumstances. G.L. c. 208, § 50(b), (c). Reimbursement alimony and transitional alimony cannot be modified. G.L. c. 208, §§ 51, 52. See chapter 6, Alimony, Pensions, and Other Relief. When looking at the change in circumstances, the court may consider the same factors it used to set the original order. Maureen McBrien & Patricia A. Kindregan, *Family Law and Practice (3 Massachusetts Practice Series)*, § 90:4 (West 4th ed. 2017).

For example, the court will use the alimony factors in actions to modify the alimony provision of a divorce judgment (see chapter 6, Alimony, Pensions, and Other Relief), the separate support factors in separate support modifications (see chapter 4, Separate Support), and the factors set out in the Child Support Guidelines (many of the factors are not written on the Child Support Guidelines Worksheet) to modify child support orders when the presumption that the Guidelines apply has not been rebutted. See chapter 8, Child Support. In a modification action, however, the court does not need to consider all of the factors used to set an original in order. The court must weigh all relevant circumstances. *Schuler v. Schuler*, 382 Mass. 366 (1981). “Relevant circumstances” commonly include

- the needs of each party;
- the needs of the parties' children;
- the assets of each party;
- the debt of each party;

- the income of each party;
- the capability of each party to earn income;
- whether a party has changed his or her lifestyle or “standard of living”;
- whether a change is temporary, short-term or long-term, or permanent;
- whether a change was voluntary or involuntary; and
- how honestly the parties tried to fulfill their obligations under an order (i.e., their “good faith”).

The court will not decrease a support order when a party voluntarily reduces his or her income or assets without justification. In addition to considering a party’s actual income, the court may consider a party’s assets and capability to earn income. *Crowe v. Fong*, 45 Mass. App. Ct. 673 (1998) (in action to increase child support, trial court properly took into account support payer’s present and future earning capacity, including demonstrated ability to earn income and acquire assets). The court can “attribute” income to a person who voluntarily reduces his or her income or assets; the court, in effect, will credit that person with income or assets that he or she may not actually have but could have with reasonable effort. *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 735–36 (1995) (a voluntary retirement from high-income employment in order to become a missionary or a voluntary career change is not a basis for modification). Attribution of income is particularly appropriate when a judge determines that a party (most often the primary earner and support provider) is voluntarily earning less than he or she is capable of earning through reasonable effort. *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. 146 (2008) (citing *Kelley v. Kelley*, 64 Mass. App. Ct. at 733). “Income may be attributed where a finding has been made that [the payor] is capable of working and is unemployed or underemployed,’ . . . or where the payor owns ‘substantial assets.’” *P.F. v. Dep’t of Revenue*, 90 Mass. App. Ct. 707, 710 (2016) (quoting *Wasson v. Wasson*, 81 Mass. App. Ct. 574, 581 (2012), quoting *Flaherty v. Flaherty*, 40 Mass. App. Ct. 289, 291 (1996)).

The court might not attribute income when the change in ability to pay was not voluntary, the party is making reasonable efforts to get additional income, and he or she does not have additional assets that could be used to pay. *Flaherty v. Flaherty*, 40 Mass. App. Ct. 289 (1996).

Also, the court will not attribute income to the parent who has the parties’ child or children who are under the age of six living in the home. This exception does not apply to people who stay at home to raise a child of a later, different relationship, even if the child of the later relationship is under age six. *Canning v. Juskalian*, 33 Mass. App. Ct. 202 (1992) (court had discretion to attribute income to mother staying home to care for child of a later relationship, even though the child was under age six). However, the court can consider obligations a person paying support has assumed to his or her other family since the prior order or judgment. Child Support Guidelines, § II. K (2017), Existing Support Obligations and Responsibility for Children Not in the Case Under Consideration. Note that separation agreements may affect the ability of a party to modify a spousal support order. See “Effect of Separation Agreements on Modification Actions,” below.

Common Changes of Circumstances Relating to Modification of Alimony

The chief consideration in changing an award of alimony is whether the financial circumstances of one of the parties has substantially changed. *Pagar v. Pagar*, 9 Mass. App. Ct. 1, 2 (1980). The change in circumstances must be “material,” taking into account the needs of the person receiving the alimony and the ability to pay of the person with the obligation. *See, e.g., Talbot v. Talbot*, 13 Mass. App. Ct. 456, 459 (1982) (increase in husband’s income combined with wife’s increased mental illness warranted a modification in alimony). If a supporting spouse has the ability to pay, the recipient spouse’s need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage. *Pierce v. Pierce*, 455 Mass. 286 (2009).

Remarriage

One common example of a change in circumstances affecting someone’s need for support is the remarriage of a person receiving alimony. Remarriage will end a person’s right to receive alimony unless the original divorce decree or agreement provides otherwise or the parties legally amend their agreement to provide otherwise. *Cohan v. Feuer*, 442 Mass. 151 (2004); *see also* G.L. c. 208, § 49(a) (general term alimony); G.L. c. 208, § 50(a) (rehabilitative alimony); G.L. c. 208, § 51(a) (reimbursement alimony); G.L. c. 208, § 52(a) (transitional alimony).

Remarriage of the person paying alimony generally will not justify a reduction of an alimony award, because he or she knew of the obligation and voluntarily married anyway. However, if the obligor's expenses related to remarriage have significantly increased, that could constitute a reason to reduce alimony. For example, a judge could consider the expenses a person paying alimony has when a child from a later marriage has special needs that require substantial sums of money for extensive medical treatment. *Winternitz v. Winternitz*, 19 Mass. App. Ct. 228, 233 n.8 (1985). But the income and assets of the payor's spouse shall not be considered in a redetermination of alimony in a subsequent modification action. G.L. c. 208, § 54(a). The court may refuse a request to make a first-time award of alimony or to increase alimony when the person from whom the alimony is sought has remarried before the request.

Death

The requirement to pay alimony will usually end with the death of the person required to pay. G.L. c. 208, §§ 49(a), 50(a), 51(a), 52(a); *Cohan v. Feuer*, 442 Mass. 151 (2004). However, a person who is owed money from nonpayment of alimony may be able to collect it from the estate of the person who was supposed to pay. *Barron v. Puzo*, 415 Mass. 54 (1993). The parties can agree that the alimony will continue after a remarriage or death of either party, and can put such a provision in a separation agreement. *Cohan v. Feuer*, 442 Mass. 151 (2004); *Barron v. Puzo*, 415 Mass. at 54.

Cohabitation

For alimony awards made prior to March 1, 2012, cohabitation alone does not amount to a material change of circumstances; a party must show that the cohabitation created a material change in the party's economic circumstances. *Gottsegen v. Gottsegen*, 397 Mass. 617 (1986) (a former wife's cohabitation is not by itself a reason to terminate her alimony award); *Chin v. Merriot*, 470 Mass. 527 (2015) (cohabitation provisions of the Alimony Reform Act of 2011, 2011 Mass. Acts c. 124, apply only prospectively).

General term alimony obligations incurred after March 1, 2011, can be suspended, reduced, or terminated if the payor can show that the recipient spouse has maintained a "common household" with another person for a continuous period of at least three months. G.L. c. 208, § 49(d). Note, however, that the court can deviate from duration and amount limits under certain circumstances. G.L. c. 208, § 53(e).

Inheritance

A significant inheritance can be a material change in circumstance. *Harris v. Harris*, 23 Mass. App. Ct. 931 (1986) (inheritance of \$125,000 in cash and of jewelry valued at \$40,000 by person receiving alimony established a material and substantial change in circumstances, and justified reduction and eventual elimination of alimony, even when the recipient did not invest the inheritance to generate income).

Modification of Alimony Arrearage

Without a separation agreement that provides otherwise, the judge may modify alimony arrearage in a contempt proceeding or a modification action if the person attempting to get the reduction proves that a material change of circumstance has occurred since the earlier alimony order. *Kennedy v. Kennedy*, 17 Mass. App. Ct. 308 (1983). See "Effect of Separation Agreements," below.

Child Support

Modification of child support is governed by the Child Support Guidelines. *Hoegen v. Hoegen*, 89 Mass. App. Ct. 660 (2016). Modification is required whenever there is an inconsistency between the amount of an existing child support order and the amount that would be paid under the Guidelines. *Morales v. Morales*, 464 Mass. 507 (2013). There is no requirement that the discrepancy or inconsistency between the existing order and the Guidelines amount be the result of a material and substantial change in circumstances. *Morales v. Morales*, 464 Mass. at 507; G.L. c. 208, § 28; G.L. c. 209, § 37; G.L. c. 209C, § 20.

Whether or not a modification in the amount of child support is necessary, the court must modify a child support order to include health insurance coverage for the child if it is necessary and available to a parent at a reasonable cost. G.L. c. 208, § 28; G.L. c. 209, § 37; G.L. c. 209C, § 20.

Child support for the children of unmarried parents is also governed by the Massachusetts Child Support Guidelines. However, a court may modify the judgment of support whenever a substantial change in the circumstances of the parties or the child has occurred. G.L. c. 209C, § 20.

The Guidelines modification standard in a case involving support of children born out of wedlock is discussed in *Crowe v. Fung*, 45 Mass. App. Ct. 673 (1998). The court stated that the standard requiring only a discrepancy between a current order and the Guidelines applied to children of parents who were not married to each other, but did not apply to children whose parents were divorced. *Crowe v. Fung*, 45 Mass. App. Ct. at 677–78 & n.3. The case upheld an order increasing weekly child support payments, and held that once a judge finds a change in circumstances, he or she may rely on some of the circumstances that existed both at the time of the current order and at the time of modification in determining ability to pay support.

Practice Note

Although it has not been directly stated, the modification standard set out in the Massachusetts Child Support Guidelines is, as a practical matter, applied in cases where the parents are not married. First, one purpose of the Guidelines is “[t]o protect a subsistence level of income at the low end of the income range.” *Crowe v. Fung*, 45 Mass. App. Ct. at 677–78 (citing Preamble to Child Support Guidelines). Also, Massachusetts law states that children born to parents who are not married to each other are entitled to the same rights and protections of the law as all other children (G.L. c. 209C, § 1), so it might not be fair to allow a child of divorced parents to be entitled to more support than a child of parents who did not marry each other. Second, the law relating to modification of child support for children born out of wedlock includes the same language as the law pertaining to children of divorced parents, namely that “[i]n furtherance of the public policy that dependent children be maintained as completely as possible from the resources of their parents,” a court shall modify an order “if there is an inconsistency” between an existing order and the Guidelines amount, though the law pertaining to children born out of wedlock also contains a contradictory requirement of a “substantial change in circumstances.” G.L. c. 209C, § 20. Future law may resolve or clarify these variations in standards.

The court may also modify a child support order if there has been a material change in circumstances that would not be reflected by application of the Guidelines—for example, a child’s development of special needs that require expensive treatment. (See chapter 8 of this book for a discussion of factors that affect child support.) However, a court may also consider the changed circumstances of a person defending against an increase in child support—for example, when someone who pays child support has, since the date of the last order, assumed responsibilities through another relationship in addition to his or her children. Child Support Guidelines, § II. K(3) (children of a subsequent marriage); *Canning v. Juskalian*, 33 Mass. App. Ct. 202 (1992) (in modification action, court had discretion not to apply Guidelines where father had visitation for five weeks in the summer and one week for Christmas, and mother had moved across country so that father had to incur costs to effectuate his visitation). In a case where a person has assumed responsibility for another child, such as a stepchild, the payor must prove a legal obligation toward that child and the gross income of that child’s other parent is considered when setting a child support order. *Canning v. Juskalian*, 33 Mass. App. Ct. at 202. Again, the court will not generally allow a modification on the basis of a voluntary change by the person seeking modification.

Child support orders can be modified by agreement of the parties. The agreed-upon amount must be consistent with the Child Support Guidelines. This is done by filing a joint petition for modification of child support judgment. The forms required for the joint petition are available at the Probate and Family Court and at <https://www.mass.gov/service-details/required-forms-for-changing-a-judgment-or-temporary-order-by-agreement>. A sample petition is included as **Exhibit 16B**. Along with the petition, the parties must file complete and accurate financial statements with W-2s attached, a completed Child Support Guidelines worksheet, and a completed order for support and health-care coverage if the current support is being paid by wage assignment. A hearing on the petition will be held only if the court believes a hearing is necessary or helpful. Otherwise the judge will make a decision based upon the papers filed in court and the parties will receive the decision by mail. Supp. Mass. R. Dom. Rel. P. 412.

Child Support Arrearage—No Retroactive Modification

Massachusetts courts may not modify a valid child support order for any time before the day that a complaint for modification or for contempt was served on the opposing party. G.L. c. 119A, § 13(a); *Smith-Clarke v. Clarke*, 44 Mass. App. Ct. 404 (1998) (no retroactive modification of child support obligation for any period preceding the date

the modification complaint was filed, even though two years after a child support order of \$60 per week, father was earning substantial additional income that he camouflaged as business income). However, the court is permitted under its equity powers to retroactively modify a child support order where the parties' separation agreement set out the reasons that child support might change. *Calabria v. Calabria*, 91 Mass. App. Ct. 763 (2017) (judge had equitable authority to enter award increasing father's court-issued child-support payments retroactive to date his income increased, which was before mother filed her postdivorce complaint for modification of child support).

Practice Note

In extraordinary circumstances a judge might exercise his or her discretion to go above or below the Guidelines' recommended support amounts if it would be just to do so.

Custody / Parenting Time

If you want to change a custody judgment, you must be able to show that there is a significant change of circumstances since the custody order was entered *and* that your desired change is in the child's best interest. Even if you are able to prove a substantial change, the order will not be modified without also showing that the change is in the child's best interest. *Ardizoni v. Raymond*, 40 Mass. App. Ct. 734 (1996) (judge's finding that a material and substantial change in circumstances occurred was not clearly erroneous, but appellate court found no evidence from which the judge could have properly concluded that a split physical custody arrangement would be in the children's best interest); G.L. c. 208, §§ 28, 29 (divorce); G.L. c. 209C, § 20 (paternity); G.L. c. 209, § 32 (separate support). See chapter 9, Child Custody.

EFFECT OF SURVIVING AGREEMENTS ON MODIFICATION ACTIONS

Separation agreements commonly affect postdivorce modification actions in three important ways. A separation agreement may affect

- the court's power to change spousal support and, to a more limited extent, child support;
- the court's power of enforcement; and
- the availability of remedies when a court modifies a support order.

Although this section specifically deals with separation agreements in postdivorce modification actions, agreements between parties relating to modification of paternity orders often have the same effect.

As noted previously, an agreement will not affect the court's ability to make postjudgment orders in matters pertaining to custody of or parenting time with minor children. Separation agreements also do not change the legal standard a judge uses when making postdivorce orders relating to removing children from the state. *Williams v. Pitney*, 409 Mass. 449 (1991) (court must apply usual standard regarding removal of a child from the Commonwealth despite a surviving agreement between parents that prohibited such removal of the children).

To determine the effect a separation agreement may have on a modification, you must first determine which of the three types of agreement you have: merged, incorporated and surviving, or nonincorporated. These labels identify the status the agreement has after the judgment.

After the entry of a judgment, an agreement between the parties may

- stand as a judgment only—i.e., the separation agreement “merges” with the judgment, basically becoming the judgment (“merged”);
- stand as a judgment and also as a contract—i.e., the agreement is “incorporated” into (built into) the divorce judgment, and so stands as a judgment of the court, but also “survived” (does not merge with) the judgment, and exists after the judgment as a contract between the parties and therefore has “independent legal significance” (legal significance in addition to being a judgment of the court) (“incorporated and surviving”); or
- stand as a contract only—i.e., the separation agreement is not incorporated into the judgment at all, and therefore is not a judgment of the court, but does stand as a contract between the parties (“surviving”).

Many agreements have some provisions that are merged and others that are incorporated and surviving. As a preliminary matter, in general, in order for the court to be able to enforce a provision of a separation agreement, the agreement must be fair and reasonable at the time of the divorce judgment, and must be free from fraud and illegal coercion, and the parties clearly agreed on the finality of the agreement on the subject.

“Fair and reasonable” does not mean that each party received an equally good deal under the agreement. Also, if the parties present a separation agreement to the judge to incorporate in the divorce judgment, it will be deemed that “[t]he judge implicitly found that the agreement was fair and reasonable when made.” *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. at 234 n.5; see *Dominick v. Dominick*, 18 Mass. App. Ct. 85, 91 (1984) (and cases cited).

“Free from fraud” means each party dealt fairly and in good faith. *Larson v. Larson*, 37 Mass. App. Ct. 106 (1994) (judge properly ordered former husband to pay a reasonable amount of alimony despite the written terms of a surviving agreement that provided for alimony as a portion of the former husband’s earned income, where the husband breached his implied contractual duty of good faith and fair dealing in voluntarily retiring in good health from a successful career years before his normal retirement age without making some other provision for his former wife’s support). All contracts have an implied duty of good faith and fair dealing, so that a court may modify literal terms of agreement to impose the duties the parties voluntarily undertook. *Larson v. Larson*, 37 Mass. App. Ct. 106 (1994).

Modification, Enforcement, and Remedies

Agreements that Merge with the Judgment

Like dinosaurs, after the judgment, an agreement merged into the judgment becomes “extinct.” The parties have only one source of obligations and rights—the judgment. They can bring an action for contempt to enforce the provisions of the judgment, and they can bring a modification action to have the judgment modified if there is a material change in circumstances. They do not have any contract claim from the agreement if the other party does not live up to the terms of the agreement (whether by simply disobeying the judgment or by having the judgment modified), because the agreement did not “survive” the judgment. “There is, of course, no conflict if a separation agreement was not intended to survive the entry of the divorce judgment. . . . In such a case, the support obligations of the parties are expressed only in the divorce judgment which is subject to modification on petition.” *Knox v. Remick*, 371 Mass. at 435 (citation omitted). The court will apply the usual modification standard in actions to modify a judgment when the parties had an agreement that merged with the judgment.

Agreements that Survive the Judgment

Agreements that survive the judgment—both incorporated agreements and nonincorporated agreements—make it harder to change support obligations, especially spousal support.

Standard to Modify Order to Require More than that Provided in Surviving Agreement

To order alimony in excess of that provided in a surviving separation agreement—whether the excess occurs in the amount of each payment or by increasing the length of time payments are to be made—there must be more than a material change in circumstances; there must be “countervailing equities.” *Hayes v. Lichtenberg*, 422 Mass. 1005 (1996); *Stansel v. Stansel*, 385 Mass. 510 (1981); *Knox v. Remick*, 371 Mass. 433 (1976); *Cournoyer v. Cournoyer*, 40 Mass. App. Ct. 302 (1996); *Randall v. Randall*, 17 Mass. App. Ct. 24 (1983). “Countervailing equities” are extraordinary circumstances that make it fair for a judge to disregard the commitments that the parties voluntarily made to each other.

There are two examples in Massachusetts case law of circumstances that meet the “countervailing equities” standard. The first example is when a former spouse is or will become a public charge—that is, receive public assistance. In addition to cash assistance, “public assistance” may also be any other form of assistance funded by the “taxpayers of the Commonwealth.” *Knox v. Remick*, 371 Mass. at 437. In this case, the court should limit the order of alimony to the amount and duration that would keep the wife off of public assistance. *O’Brien v. O’Brien*, 416 Mass. 477 (1993); *Broome v. Broome (Broome II)*, 43 Mass. App. Ct. 539 (1997). The court may consider the spouse’s prospects for employment and his or her earning capacity when determining whether the spouse will become a public charge. *Hayes v. Lichtenberg*, 422 Mass. at 1006. The other spouse must also be able to pay support.

Practice Note

There may not be much positive practical effect to a person bringing an action for alimony in excess of that provided for by a surviving agreement, because that person is limited to that amount that keeps him or her from receiving public assistance. It is possible that a party to an agreement that survives may be sued in an action for breach of contract.

The second example in Massachusetts case law of circumstances that meet the “countervailing equities” standard is when the party seeking to enforce the agreement fails to comply with a provision of the agreement themselves. *Cournoyer v. Cournoyer*, 40 Mass. App. Ct. 302 (1996) (both the material change of circumstances and countervailing equity standards were met when the wife sought to bar modification but did not comply with an agreement to pay child support). While the court might find that a judgment that finds someone in contempt establishes a countervailing equity, the Appeals Court has been reluctant to hold that complaints for contempt that are dismissed or settled constitute a countervailing equity, particularly where the party against whom the contempts were filed ultimately fulfilled their obligations under the agreement. *Broome II*, 43 Mass. App. Ct. at 539. It is important to remember that a judgment finding someone in contempt is not the same thing as a contempt complaint that is resolved through settlement.

Other types of circumstances may meet the “countervailing equity” standard. To find that “countervailing equities” exist, a judge must first find circumstances at least as significant as these two examples. *Stansel v. Stansel*, 385 Mass. at 516.

Standard to Modify Order to Require Lower Payment than What Parties Agreed to in a Surviving Separation Agreement

The judge has discretion whether to reduce an order for support when such an order would contradict the terms of a surviving agreement, even in the absence of countervailing equities. A judge may lower a support order, even though doing so would contradict the terms of a surviving agreement to remove the threat of a contempt action to the extent of the reduction. *Knox v. Remick*, 371 Mass. at 435. When a support provider has demonstrated that he or she is unable to pay, a judge may lower a support order despite a surviving agreement. *Parrish v. Parrish*, 30 Mass. App. Ct. 78, 88–89 n.13 (1981).

If the court modifies a support order and that order contradicts the terms of a surviving agreement, the “injured” party can pursue a contract action for “damages” (for the difference between the amount under the agreement and the amount under the modified judgment). A Probate Court judge does not have the authority to modify the agreement itself (*Knox v. Remick*, 371 Mass. at 435; *Schillander v. Schillander*, 307 Mass. at 98–99); a court’s modification judgment changes the court’s order only, not the terms of the surviving agreement. However, a breach-of-contract claim may not have much practical value, because the person who successfully seeks a modification may not have the resources to pay a breach-of-contract judgment.

Incorporated Agreements

There are two sources of obligations in a case where the agreement is incorporated into the judgment and survives the judgment: the judgment, and the agreement, which stands as a contract between the parties.

Nonincorporated Agreements

Agreements that survive, but are not incorporated into the judgment, have only one source of obligation: the contract (i.e., the agreement). In the case of a nonincorporated agreement, neither party can bring a complaint for modification; a complaint for modification is an action to modify a court order or judgment only, not a contract. The court does not have the authority to modify the agreement itself. Using the same logic, without a court order, a party cannot bring a contempt action against the other party for breaking the terms of the agreement, since the basis of a contempt action is that a party has violated a court order. Steven H. Gifis, *Law Dictionary*, at 94 (Barrons 2d ed. 1984) (“contempt” defined as “an act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority”).

However, there may be a way to seek relief from the Probate and Family Court. First, a party to a nonincorporated agreement may be able to bring an action for support to create the same effect as a modification. *Schillander v. Schillander*, 307 Mass. at 96, 99 (though Probate and Family Court did not have authority to modify provisions of a

valid separation agreement, court suggested that a party to a nonincorporated separation agreement could ask the court for an award of alimony to counteract or supplement the contract obligations). To reduce support payments, the person paying support asks the court for an order of support from the person who receives support under the agreement. To increase support payments, the person receiving support asks for an order of support from the person who must pay support under the agreement. The court would then consider all the factors in G.L. c. 34, because technically there was no order relating to alimony. See *Randall v. Randall*, 17 Mass. App. Ct. 24, 28 n.4 (1982). See also “Postdivorce Matters: No Provision Regarding Alimony or No Provision Regarding Property Division in the Divorce Judgment or Separation Agreement,” above. In the case of a request of additional support, the court would use the countervailing equities standard. The party opposing the order may bring an action for damages for breaking the agreement.

Second, to enable a court to enforce support through contempt, a party can get an order for specific performance of the contract. Specific performance is where the judge commands a party to fulfill its commitments under an agreement. Once this order is in place, the party can bring an action for contempt of the specific performance order if the other party still fails to comply with the terms of the agreement. The specific performance remedy is only available when a legal remedy—for example, an action for money damages—is an insufficient remedy. An action for damages is insufficient in the case of a continuing support obligation where, for example, to recover damages, a person would have to bring repeated damages actions, likely on a monthly basis, to recover damages as they are incurred. *Fleming v. Fleming*, 34 Mass. App. Ct. 913 (1993). The Probate and Family Court can do this because it has jurisdiction for an action for specific performance even though the separation agreement was not incorporated into the divorce judgment, and specific performance lies where repeated actions to recover monthly damages as they are incurred would be needed. A court may decline to enforce an agreement when there are countervailing equities. *Randall v. Randall*, 17 Mass. App. Ct. 24 (1982).

Last Note on Remedies

Specific performance actions can be brought in both the Probate and Family Court and the Superior Court. They are available to those with incorporated agreements as well as those with unincorporated agreements. An action for money damages cannot be brought in the Probate and Family Court, although the Probate and Family Court does have jurisdiction over actions for specific performance that include a direct payment of money, such as an agreement to sell property and pay some or all of the money to one of the parties. You can bring an action seeking money damages for breach of contract in Superior Court.

Other remedies besides those mentioned in this chapter may be available in your case, but could not be included because they are beyond the scope of this manual.

Child Support Orders and Surviving Agreements

The court may not enforce a separation agreement provision for child support if the provision prevents a modification that would allocate a parent’s resources in a fair and reasonable manner and the modification is in the child’s best interest. G.L. c. 119A, § 1. An agreement between parents that provides for the support of a minor child cannot be enforced if it bars a modification of the amount of support due on behalf of the minor child, unless the court finds all of the following:

- that the agreement survives the original judgment;
- that the agreement was fair and reasonable and free from fraud and coercion at the time of the judgment;
- that the provisions for support of the minor child continue to be fair and reasonable considering the Child Support Guidelines and the circumstances of the parties and the child; and
- that the enforcement of the agreement is in the best interest of the child.

G.L. c. 119A, § 13.

This standard applies to all applicable surviving child support agreements, even those entered into before the law became effective. *Benson v. Benson*, 422 Mass. 698, 702–03 (1996) (future considerations of child support issues are governed by changes in child support law, which declares that it is against Massachusetts’ public policy to enforce an agreement between parents if a modification is required to ensure that the “allocation of parental resources continues to be fair and reasonable and in the child’s best interests” (citing G.L. c. 119A, § 1)).

Note that these standards pertaining to monetary child support do not necessarily apply to other types of child support. For example, expenses pertaining to a child's college education are treated differently from monetary child support. In *McCarthy v. McCarthy*, 36 Mass. App. Ct. 490 (1994), the court used the “countervailing equity” standard to prevent a modification for an increase of support related to payment of a child's college education expenses when the parties' relative economic situation had not changed, the parties' oldest child was fifteen years old at the time of divorce and therefore the expense was foreseeable, and neither party possessed significant wealth. *McCarthy v. McCarthy*, 36 Mass. App. Ct. at 490.

Child Support Arrearage

Generally, in a modification action, child support arrearage cannot be retroactively modified. G.L. c. 119A, § 13(a). However, in limited circumstances, the language in a separation agreement may be read by the court as conferring an ability to modify child support arrearage. See *Hamilton v. Pappalardo*, 42 Mass. App. Ct. 471 (1997) (where language in a merged separation agreement stating the parties have intentionally omitted any description of further liability for the education, tuition, room, boarding, and books of their children, with the stipulation that if the parties could not agree, the court shall adjudicate such liability, the trial court's jurisdiction to interpret and enforce the agreement should be determined as much by fairness and equity as by date of filing). In addition, a judge may determine whether compelling circumstances of an equitable nature warrant the allowance of a credit in calculating child-support arrearages where support of the child was accomplished by means other than payment pursuant to the original child support order. *Rosen v. Rosen*, 90 Mass. App. Ct. 677 (2016) (equitable credit allowed for father's direct support of child after child moved in with father, even though no complaint for modification of support was pending during time period for which credit was granted; child's move was not result of duress, coercion, or undue influence exerted by father; child received adequate support from father while living in father's home; mother was relieved of supporting child during that period; mother consented to accept father's direct support of child as alternative method of fulfilling his support obligation by entering into agreement; and no undue hardship or injustice arose from arrangement). In certain narrowly described circumstances, a child support obligor may receive a credit against support arrearages for payments or expenditures made that were not in strict compliance with the support order or judgment, provided, among other things, that the alternative support arrangement is not contrary to the child's best interests and that the credit would not result in injustice or undue hardship to the support recipient. *Calabria v. Calabria*, 91 Mass. App. Ct. 763 (2017).

What Happens if I Signed a Separation Agreement (Which Made a Provision for Child Support) Before the Law Changed the Age of a Duty to Pay Child Support?

The Massachusetts legislature has changed the relevant child support “age of majority” law three times—in 1975, in 1976, and again in 1991. These changes do not automatically affect separation agreements signed prior to the law. Unless at the time of signing the parties intended to have the agreement be governed by future law, a separation agreement that states that child support shall be paid until the child reaches the age of “majority” is governed by the law of majority in effect at the time the parties signed the agreement. *Turner v. McCune*, 4 Mass. App. Ct. 864 (1976). A party may file a modification complaint to modify the child support obligation to be consistent with law in effect at the time of filing the modification action.

How the Court Determines the Status of an Agreement

To determine the status of an agreement, the court will look to the intent of the parties at the time they entered the agreement. *Freedman v. Freedman*, 29 Mass. App. Ct. 154, 155 (1990); *Mansur v. Clark*, 25 Mass. App. Ct. 618 (1988); *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231 (1987). The court will look to the agreement as a whole to determine the parties' intent. *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231 (1987). The language of the agreement usually indicates the parties' intent. For example, the agreement may state whether the agreement is to survive, merge, have independent legal significance, be incorporated, or is meant as a final determination of the parties' rights and obligation that should not be modified. See *Stansel v. Stansel*, 385 Mass. 510 (1982) (when “parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced unless the judge finds countervailing equities” (citing *Knox v. Remick*, 371 Mass. at 436–37)).

While use of the word “merge” provides a “substantial indication,” it is not conclusive when there are other contrary indications of intent in the agreement, in the divorce decree, or in a statute. *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. at 238 (used in agreement); *Stansel v. Stansel*, 385 Mass. at 512–13 (used in G.L. c. 208, § 1A and in divorce decree). On the other hand, the court has held that if language in an agreement provides for “merger” of the agreement and judgment, this is proof that the parties did not intend for the agreement to survive as an independent contract. *Bercume v. Bercume*, 428 Mass. 635 (1999). “If the language of an agreement leaves any doubt as to its ordinary meaning, the court will ‘examine the subject matter of the agreement and the language employed, and will attempt to ascertain the objective sought to be accomplished by the parties.’” *Cooper v. Cooper*, 43 Mass. App. Ct. 51, 56 (1997) (citing *Parrish v. Parrish*, 30 Mass. App. Ct. 78, 86 (1981)). Also, the judge will look at other language in the divorce decree, but only to determine the parties’ intent. *Knox v. Remick*, 371 Mass. 433 (1976); see *Randall v. Randall*, 17 Mass. App. Ct. 24 & n.1 (1982) (the language of the divorce decree, “[a]ll until further order of the Court,” did not incorporate the agreement in the judgment); *Mansur v. Clark*, 25 Mass. App. Ct. 618 (1988) (when divorce judgment noted that the separation agreement was exhibited to the court, but was not filed or incorporated, and the judgment did not make a separate provision for alimony, the word “ordered” in the phrase “ordered that alimony and the economic rights and responsibilities of the parties . . . are as provided for in the agreement” meant “provided,” and was in the judgment as an explanation by the judge why he was not making provision in the judgment for alimony and the like). A comprehensive agreement may provide an indication that the parties intended the agreement to “survive” the judgment as an independent contract. *Cooper v. Cooper*, 43 Mass. App. Ct. 51 (1997). Courts will look at the number of pages of an agreement and whether the agreement appears to have been carefully drafted. *Randall v. Randall*, 17 Mass. App. Ct. at 25 (comprehensive, carefully drafted document that was twenty-two pages long indicated parties intended the agreement to survive).

The court will also consider the parties’ conduct to determine their intent. *Freedman v. Freedman*, 29 Mass. App. Ct. 154, 155 (1990) (in case where agreement itself said it was “to be merged,” agreement had detailed and comprehensive clauses, divorce decree stated it had “merged,” party raising issue on appeal did not object to form of judgment, and case tried and presented using material change of circumstances standard, the court would use the same standard on appeal and would not consider the wife’s arguments regarding the agreement’s survival). The court may also look to the statutory law in “no-fault” divorces—the court may presume the separation agreement merges if the divorce was granted under G.L. c. 208, § 1, and the court may presume the separation agreement survives if the divorce was granted under G.L. c. 208, § 1B unless the agreement states otherwise.

Massachusetts policy appears to favor survival of separation agreements. *Cooper v. Cooper*, 43 Mass. App. Ct. 51, 56 (1997); see *Ames v. Perry*, 406 Mass. 236, 240–41 (1989) (“[a] policy of enforcement supports finality and predictability, allows the parties to engage in future planning, and avoids recurrent litigation in the highly emotional area of divorce law”); *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. at 237 (Massachusetts policy).

SUMMARY JUDGMENT IN MODIFICATION ACTIONS

Motion for Summary Judgment

When there is no genuine disagreement about the essential facts of a case, a party may desire to avoid the financial, emotional, and other costs of trial by asking the judge to apply the law to the undisputed facts and issue a judgment without having a trial. In modification actions, either party—whether the plaintiff or the defendant in the modification action—may ask the judge to apply the law to the established facts and to issue a judgment without further litigation. A “material” fact is a fact that might affect the outcome of the case if it were established as true. The request is made by filing a motion for summary judgment. See chapter 2, Overview of the Probate and Family Court. Either party may bring the motion for summary judgment at any time after the filing of the complaint for modification or the action to modify an out-of-state judgment. Mass. R. Dom. Rel. P. 56 (summary judgment motions are also available in actions to enforce an out-of-state domestic relations judgment).

The person making the motion (the “moving party”) must create and file with the court a statement of the undisputed facts that he or she must sign under the penalties of perjury; this statement is called an affidavit of undisputed facts. Each statement of fact should be placed in a separate numbered paragraph. If any of these facts appear in any pleading, affidavit, deposition, answers to interrogatories, admission, or other document, the moving party must cite the portion of the document in the written motion or in the affidavit of undisputed facts. The moving party must also file with the court any document that he or she cites. The moving party must serve the motion and the affidavit of

undisputed facts, along with any document cited in the affidavit, on the other party (the “opposing party”) at least ten days before the date of the hearing on the motion for summary judgment. The court will deny any motion for summary judgment if the moving party fails to file and serve the affidavit on the opposing party. The moving party also must give the opposing party proper notice of the hearing date. See chapter 2, Overview of the Probate and Family Court.

Opposing Summary Judgment Motion

To oppose a motion for summary judgment, the opposing party must copy each itemized fact listed in the moving party’s affidavit of undisputed facts; after each fact, the party must state whether he or she admits the fact, in which case the fact is “undisputed,” or denies the fact, in which case the fact is “disputed.” For each fact that the opposing party denies, he or she must cite the particular portions of any document that supports the denial, including any pleading, affidavit, deposition, answers to interrogatories, admission, or other document, and file with the court this affidavit and any cited document. The opposing party must also serve a copy of this document on the other party.

The opposing party may oppose the summary judgment motion when he or she needs to have information from the moving party to either support the opposition for summary judgment (for example, when discovery would reveal that there are material facts in dispute—see chapter 2, Overview of the Probate and Family Court), or to confirm or deny the facts that the moving party has asserted. When opposing the summary judgment on the basis that discovery is needed, the opposing party must state the particular facts or issues on which discovery is needed.

The opposing party also has the option to file an affidavit of disputed facts, to list all the significant disputed facts that the moving party did not list in their affidavit, and to cite portions of any supporting documents.

A checklist for parties filing or opposing summary judgment motions is included as **Checklist 16.1**.

Stipulated Facts

Both parties may voluntarily file a joint stipulation of undisputed facts, and the parties can state that the stipulation is only to be used for the purpose of the court’s decision on the summary judgment motion, so that the parties will not be bound by the stipulations for any other purpose. The judge may order the parties to meet with each other and submit a joint statement of undisputed facts to the court.

Forms of Affidavits

Affidavits must be made on personal knowledge, and not, for example, on what someone supposedly knows because someone else said he or she saw something.

Facts in the affidavit must be admissible in evidence. For example, hearsay (an out-of-court statement used as evidence to prove the truth of the matter asserted in the statement) is generally not admissible in evidence.

The party completing the affidavit must be competent to testify to the fact. A common example of a matter a person would not be “competent” to testify about would be a spouse testifying to the contents of a confidential conversation he or she had in private with his or her spouse while married to each other. In Massachusetts, spouses are not “competent” to testify to these conversations. However, threats are not considered conversations, and therefore you can testify about them.

All documents or parts of documents referred to in an affidavit must be attached to or served with the affidavit, and must be sworn or certified copies.

Further Testimony

The judge may allow the parties to supplement or oppose affidavits by depositions, answers to interrogatories, or additional affidavits.

Defense Required

A simple denial of the statements alleged in a pleading is not enough to defeat a motion for summary judgment. The person opposing summary judgment must produce evidence. Sworn statements (that is, statements made under oath) are evidence; therefore, affidavits, answers to interrogatories, and answers given in depositions are all evidence. If a party does not respond to the motion for summary judgment, the judge may enter summary judgment if it appears from the evidence submitted by the moving party that there are not any genuine issues for trial.

When Affidavits Are Unavailable

When the opposing party states in his or her affidavit that he or she cannot state facts to justify his or her position and why he or she cannot present these facts (for example, when the party needs time to get answers to interrogatories), the court may deny the summary judgment motion, allow the opposing party time to permit them to get the evidence (which is called a continuance), or make any other order the judge determines is fair.

Affidavits Made in Bad Faith

If at any time the court feels that any of the affidavits submitted were submitted in “bad faith” (for example, where a person submitting an affidavit knew the affidavit contained false information, or where a person submitted an affidavit solely for the purpose of delay), the court will order that party to pay the other party the amount of the reasonable expenses that the filing of the affidavit caused the innocent party to incur, including reasonable attorney fees. The court may also find the offending party or attorney guilty of contempt.

Judgment

If the court finds that there are material facts in dispute, the judge will deny the motion to issue a summary judgment.

If the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue regarding any material fact, then the judge may apply the law to the established facts and enter the summary judgment. The judgment can be for or against the party who sought summary judgment.

TEMPORARY ORDERS AND REQUEST FOR ASSIGNMENT

Generally, courts may not consider making temporary orders regarding any issue other than child support in a modification proceeding except in cases of emergency where harm may result without the temporary order. Most of the issues you will need to present to the judge at a hearing for temporary orders in a modification proceeding will be the same as those for the hearing on the complaint itself. In order to issue temporary orders, the court must make written findings of fact “that clearly demonstrate the injury, harm or damage that might reasonably be expected if relief pending the judgment is not granted.” A temporary order relating to the care and custody of children may be granted “ex parte” (without notice to the other party) in the case of an emergency, when harm would occur if the temporary order were not granted before the time the other party could have proper notice. The party seeking an ex parte order must also file an affidavit explaining the emergency as well as a proposed order. The ex parte order can last no longer than five days, at which point a hearing will be held if the ex parte motion is to be continued, and the opposing party will have an opportunity to be heard at the hearing. See chapter 2, Overview of the Probate and Family Court.

In cases where the order or judgment to be modified involves only child support, motions for temporary orders are permitted if the Department of Revenue Child Support Enforcement Unit (DOR/CSEU) has any connection to the case. If a judgment requires modification, a party may use a unified complaint for modification and motion to modify or only a complaint for modification. Probate and Family Court Standing Order 3-11 (2013); *see* <https://www.mass.gov/probate-and-family-court-rules/probate-and-family-court-standing-order-3-11-modification-pilot>. The usual rules for service of these types of documents do not apply in these cases. Complaints filed under this standing order may be served by first-class mail. The summons that will issue under this process already has a hearing date on it.

If the other side does not file an answer to your modification complaint, you may file a “request for assignment” asking for a hearing date. See chapter 2, Overview of the Probate and Family Court. If the opposing party does not appear after service of the expedited process, the court may enter an order to modify assuming there is proof that the opposing party was properly notified of the date for the hearing.

Discovery

If you are the person bringing the modification action, you need to prove that there has been a material change in circumstances. If you are opposing the modification, you will want to prove that the change in circumstances, if any, is not material, or that there is no countervailing equity, or that the proposed modification is not in the best interest of the child or children. Each party has a duty to deliver to the other party copies of certain types of documents pertaining to his or her financial situation and access to health insurance, unless both parties agree not to or the court orders them not to. See chapter 2, Overview of the Probate and Family Court.

Support Actions

You will need to obtain information of the opposing parties’ current financial situation, including a list of his or her sources and amount of income, expenses, liabilities, and value of assets. You can obtain this information through a “demand for a current financial statement,” and if more thorough and objective information is needed, by sending out a “request for production of documents,” requesting copies of the opposing side’s paystubs for the past few months and income tax returns for the relevant time period, or benefits that the person has access to through his or her employer, and request the same information relating to the date of the order or judgment that is sought to be modified. You may also find out this information through “interrogatories,” asking questions about the opposing party’s change in circumstances. If you have applied for services with the DOR/CSEU, it may be able to supply some of this information on the person paying support. See chapter 8, Child Support. You will also need to compile the same information for yourself; the judge will compare both parties’ financial situations at the time the former judgment was issued with the present in order to determine whether a change in circumstances has occurred. Note that the rules of practice in family law matters require parties to exchange financial statements at least two days before the hearing on support.

Custody Actions

Again, you will want to focus on asking questions—and perhaps, requesting documents—which will prove to the court that there has been a substantial and material change in circumstances, and also that the change is or is not in the child’s or children’s best interest.

THE HEARING

See chapter 8, Child Support, and chapter 9, Child Custody.

Special Concerns in Preparing for Modification Hearing

In general, once the court issues a judgment on a modification action, the judgment cannot be changed again unless and until there is another material change in circumstances. It is also important to remember that the judge can dismiss a modification complaint if the party bringing the modification action does not meet the responsibility of proving that the required standard of change in circumstances—whether material, substantial, and in the best interest of the child, or so material that there are countervailing equities—has occurred.

Before the day of the hearing, you may want to write down the facts regarding the change you want the judge to “find” (formally accept as true) and a list of the orders you would like the judge to make. You will also want to consider any arguments the other side is likely to make and your responses to them, if any, regarding the change in circumstances. For support issues, you will want to review the opposing party’s current and former financial statements, if they are available, so that you can prepare questions regarding any changes in circumstances. If you are on speaking terms with the other party, and after you file your complaint they tell you they will agree to the change or they offer something you would like to accept as a settlement, you may write the agreement up and have

them sign it in front of a notary. But remember, unless the action involves a separation agreement which controls how a modification is to be made, the court can only enforce a modification that was issued as a judgment or order.

Practice Note

Be careful when negotiating with an attorney representing the opposing party. He or she does not represent you; his or her job is to advocate the position of the opposing party. If the lawyer representing the other side does not make a settlement offer that you feel completely comfortable with, you may want to wait until the day of the hearing and negotiate with the help of the probation officer or present your arguments before the judge.

What to Expect

You need to check in with the clerk at the courthouse. If the defendant does not appear, then you should go directly into the courtroom; if the defendant does appear, then you may be required to meet with a probation officer (also known as a family services officer) to work out a solution to your problem. You cannot be forced to mediate your case if there is a 209A abuse prevention order between you and the defendant. You may complete a “stipulation” (written agreement) about a solution. If you reach an agreement, you and the defendant then will go before a judge to obtain his or her approval of your stipulation. If you are unable to find a solution to the problem with the help of the Probation Office (also known as the Family Service Office), then you and the defendant will appear before the judge and ask him or her to decide the case for you.

When seeking a modification, you will need to tell the judge specifically what changes in circumstances have occurred and what specific modifications of the order you are looking for. The judge may ask you questions. Try to answer them clearly and quickly. You also should focus on what orders you would like to have changed, why you feel they should be changed, and what new orders you would like. The judge will give the defendant a chance to respond to your statements. Do not interrupt the judge or the defendant. You will have an opportunity to tell your side of the story as well.

AFTER THE HEARING—THE JUDGE’S DECISION

The judge either makes a decision that day and enters an immediate judgment or “takes the matter under advisement” to review your file and to make a decision at a later time. The court will send you and the defendant copies of the new judgment. If your case is complicated, the judge may schedule it for a longer hearing on another day.

PARTIES RECEIVING DOR/CSEU SERVICES

Individuals receiving services (including wage assignment services) from the Child Support Enforcement Unit of the Massachusetts Department of Revenue, or the same type of child support collection and enforcement services from another state, are entitled to DOR’s modification services for child support orders (including orders for health-care coverage) regardless of whether the child receives any type of public assistance. G.L. c. 119A, § 2. The agency may charge a fee for these services.

DOR-Initiated Modification

The law requires DOR to use one or more of the three methods described below for review and modification, and to apply the same rule to all cases; DOR cannot pick and choose methods on a case-by-case basis.

Either parent in a family who receives DOR assistance (and also DOR itself if there is an assignment to the state) may request DOR to review or modify the child support amount at least once every three years. G.L. c. 119A, § 3B(a). DOR then has to take one of the three actions described below, taking into account the best interest of the child involved.

Method One

If the amount of support provided by the current child support order differs from the amount of child support that would result from applying the Child Support Guidelines, DOR will prepare a proposed stipulation to modify the order in accordance with the Guidelines.

Method Two

DOR can also choose to prepare a proposed stipulation to modify the order by using a specified cost-of-living adjustment to the order if the amount of support provided by the current child support order differs from the amount of child support that would result from applying the Child Support Guidelines.

Method Three

If such a discrepancy arises, DOR can also use automated methods, including comparisons with wage or state income tax data, to identify orders eligible for review. It will then conduct a review, identify orders eligible for modification, and, if appropriate, prepare a proposed stipulation to modify an order.

The law does not specify whether DOR must use the Child Support Guidelines, a cost-of-living adjustment standard, or some other adjustment standard in reviewing orders by this method.

Obtaining the Modification

If DOR prepares a proposed stipulation to modify the order, it will mail a notice of intent to modify the order as well as the proposed stipulation to each parent. G.L. c. 119A, § 3B(b). The notice must

- state the reason for the modification; and
- identify the sources of the parties' financial information used to calculate the amount of support in the proposed stipulation. Sources of this information include tax and wage information. G.L. c. 119A, § 3B(f).

DOR may prepare a proposed stipulation for modification of child support for the parties to sign. The proposed modification may reflect a cost-of-living increase or may reflect application of the Massachusetts Child Support Guidelines. G.L. c. 119A, § 3B(a).

If both parents sign and return the proposed stipulation to DOR within thirty days of the date of mailing, then DOR will file the signed stipulation with a complaint for modification, and the court will modify the order without a hearing. G.L. c. 119A, § 3B(b). If either parent opposes the modification, DOR may still file a complaint to modify the order. G.L. c. 119A, § 3B(b).

Where Will DOR File a Modification Complaint?

If a Massachusetts Probate and Family Court issued the child support order that is subject to a modification complaint, then DOR will file in that court. Otherwise, DOR will file the modification complaint in the Probate and Family Court in the county where the child resides. G.L. c. 119A, § 3B(c).

When DOR files a modification complaint within its regular cycle (probably no longer than three years), it does not have to prove a change in circumstances to have the court modify a child support order. If DOR has already provided modification services relating to a child support order during a cycle, then the party requesting a review must demonstrate a substantial change in circumstances before DOR will file a modification complaint. G.L. c. 119A, § 3B(g).

DOR must mail a copy of the modified order to each of the parties. G.L. c. 119A, § 3B(c).

At least once every three years, DOR must notify both parties of their right to request DOR to review, and, if appropriate, their right to seek modification of the order. G.L. c. 119A, § 3B(h).

MCLE and the author are grateful to Kimberly A. Yox, Esq., for her contribution to a previous version of this chapter.

✓ CHECKLIST 16.1

Summary Judgment

- ❑ A judge may deny a Motion for Summary Judgment for the following reasons:
 - there is a genuine issue of material fact that needs to be determined through a trial; or
 - there is a need for discovery
 - because it is unknown whether the facts are as moving party claims they are; or
 - because the moving party is not correct and discovery would show this.
- ❑ The moving party must file the following paperwork:
 - an Affidavit of Undisputed Facts; and
 - any supporting documents.
- ❑ The moving party must cite the relevant portions of other relevant documents. All supporting documents filed must be sworn or certified copies.
- ❑ The opposing party must file the following paperwork:
 - an Affidavit of Undisputed Facts; and
 - any supporting documents.
- ❑ The opposing party must cite the relevant portions of other relevant documents. All supporting documents filed must be sworn or certified copies. The opposing party may also file the following documents:
 - an Affidavit of Disputed Facts; and
 - any supporting documents.
- ❑ Both parties may want to file the following additional documents:
 - a Stipulation of Facts Basis for Denying the motion; and
 - a motion discussing a genuine issue of material fact that needs to be determined through a trial.

EXHIBIT 16A—Complaint for Modification

Commonwealth of Massachusetts

The Trial Court

Probate and Family Court Department
COMPLAINT FOR MODIFICATION

Division _____

Docket No. _____

_____, Plaintiff v. _____, Defendant

1. Plaintiff resides at _____ (Street Address) _____ (City/Town) _____ (County)
_____; defendant resides at _____ (Street address)
_____ (State) _____ (zip) _____ (City/Town) _____ (County) _____ (State) _____ (zip)

2. This Court, on _____ (date) entered a judgment ordering that

3. Since that date,

there is now a difference between the amount of the existing child support order and the amount that would result from application of the Child Support Guidelines issued by the Chief Justice for Administration and Management.

the following change(s) in circumstance have occurred:

4. Wherefore, plaintiff requests that the Court order the judgment of _____ (date)
be modified by _____

Date _____

(Signature of attorney or plaintiff, if pro se)

(Print name)

(street address)

(city/ town) (state) (zip)

Tel. No. _____

B.B.O. # _____

EXHIBIT 16B—Joint Petition for Modification of Child Support Judgment

Commonwealth of Massachusetts
The Trial Court

Division _____ Probate and Family Court Department Docket No. _____

JOINT PETITION FOR MODIFICATION OF CHILD SUPPORT JUDGMENT

_____ and _____
(Petitioner A) (Petitioner B)

_____ (Street address) _____ (Street address)

_____ (City/Town) _____ (State) _____ (Zip) _____ (City/Town) _____ (State) _____ (Zip)

1. This Court on _____ (Date) ordered Petitioner A Petitioner B to pay child support in the amount of \$ _____ weekly biweekly monthly _____ and said child support is paid directly to Petitioner A directly to Petitioner B by wage assignment to the Department of Revenue.

2. Since that date, the following change(s) in circumstance have occurred:

3. The parties agree, consistent with the Child Support Guidelines, that the order be modified so that the weekly biweekly monthly _____ child support be in the amount of \$ _____ commencing _____ (Date).

Date _____

(Signature of Petitioner A or Attorney)

(Print name)

(Print Attorney's address)

_____ (City/Town) _____ (State) _____ (Zip)

(Signature of Petitioner B or Attorney)

(Print name)

(Print Attorney's address)

_____ (City/Town) _____ (State) _____ (Zip)

Tel. No. _____

B.B.O. # _____

Tel. No. _____

B.B.O. # _____

