Removing the Parachute: Recent Trends in Alimony Modification: Part I of II

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A pendulum dropped from the high point never stops at the middle; it swings the other way. That's where we are now.[1]

This two-part article reviews recent legislative changes in alimony modification and how courts have interpreted these changes. Part I focuses on the legislative changes and court interpretations. Part II, which will appear in the next issue of the American Journal of Family Law, *includes practical drafting tips and clauses to be used in settlement agreements both for the economically disadvantaged spouse (assumed to be the wife for purposes of this article) and for the payor spouse (assumed to be the husband for purposes of this article).*

In 2011, Massachusetts overhauled its alimony laws and enacted a new statute. Some people believe the Massachusetts law will have a domino effect across the country as interest groups lead the charge to revamp alimony laws in other states. To a certain extent this has been true. Interest groups, many of which have spawned from groups in Massachusetts, have led movements in Colorado, New Jersey, Florida, Oregon and other states; however, many of these groups' attempts to overhaul the alimony laws in these states have fallen short due to concern from critics that the changes go too far. Other

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states, which have not seen a movement for a total overhaul, have seen several changes to their alimony laws, which align with the interests of the overhaul movement. All these changes will have a significant effect on alimony modification in the future.

NEED FOR REFORM

Many of these changes affecting alimony modification stem from a belief by some that the current system is outdated and in need of reform to keep up with changing times. During the 1960s and 1970s alimony laws were passed in response to rising divorce rates. Permanent alimony was considered a standard award for many marriages, because it was seen as necessary for survival in a society in which most women worked in the home and raised children.[2] However, things have changed over the last several decades. Divorce law has seen changes as a result of the rise of no-fault divorce and more short-term marriages. Divorce law in many states has been changed to allow for civil unions and same-sex marriage. Child support guidelines and joint or shared custody has transformed the way courts deal with children during divorce. Society has changed as well. Nearly half the workforce has become women[3] and almost a third of women earn more than their spouses.[4] Also, the baby-boomer generation has reached the age of retirement and would like to trade in their briefcases for golf bags. Unfortunately, the economic recession of 2008 wiped out jobs and nest eggs and slowed job growth. All of these changes have contributed to a rise in requests for modification of alimony awards.[5]

This article examines the recent trend of legislatures to amend alimony laws and the effect these changes will have on alimony modification. Part II of this article examines what the trends have been across legislatures and how some of the courts have interpreted these statutes. Finally, Part III discusses practical tips in drafting the settlement agreement based on the party that the attorney is representing.

Legislative Changes in Alimony Modification and Courts' Interpretation

Most of the legislative changes affecting alimony awards and modification are enacted in an effort to make alimony awards and modification more predictable.[6] Some proponents of these changes feel more structure is needed in order to reach balanced outcomes for both parties in alimony disputes.[7] Those in favor of legislative guidance believe that such guidance leads to more uniformity in the way that courts award alimony, resulting in more equitable outcomes and decreasing the cost, effort, and time associated with divorce.[8] Critics of these changes feel that unlike other areas of law, which may benefit from uniformity, alimony awards by their nature must be based on discretion due to the varying facts involved in alimony disputes.[9] These critics feel that the current structure of awarding alimony is sufficient to ensure fairness. While the debate regarding whether legislative changes are needed will likely continue, there have already been several trends across state legislatures in an effort to make alimony awards and modification more predictable.

Termination of Alimony upon the Occurrence of an Event

Legislatures in several states have recently added provisions to their alimony modification statutes that allow for termination of alimony on the occurrence of a specific event. The most frequently added events that trigger alimony modification are cohabitation and retirement. The following subsections address the trends and issues that arise when cohabitation and retirement trigger alimony modification

Cohabitation

Legislatures in various states have addressed the effect, if any, that cohabitation of a spouse might have on an award of alimony. Courts have been approving stipulations between parties that terminate alimony upon cohabitation with a member of the opposite sex for decades.[10] Although stipulations may state that alimony "automatically" terminates upon cohabitation, a spouse usually must move the court to modify a decree based upon the other spouse's cohabitation.[11] Some states have gone further by statutorily requiring termination upon cohabitation.[12] Other states have statutes that allow courts to modify alimony based upon cohabitation, but give the court discretion regarding the extent of modification.[13] A few states have implemented statutes providing that upon a finding that a recipient party is cohabitating with another person, there is a rebuttable presumption that less alimony is needed to support this spouse.[14]

Several states have recently amended their alimony statutes to join the growing number of states

that provide either automatic termination upon cohabitation[15] or termination upon cohabitation at the discretion of the court.[16] For example, recent changes in Massachusetts' law provide that courts "shall suspend, reduce or terminate" an alimony award when a recipient spouse continuously maintains a "common household" with another person for a period greater than three months.[17] These changes also provide that any modification based upon the recipient spouse's common household arrangement may be reinstated upon termination of the common household, but the reinstatement period cannot exceed the date of the original order awarding alimony.[18] The law has led to some disagreement between attorneys and judges as to whether it was meant to apply retroactively to recipient spouses maintaining common households prior to the enactment of the law, and whether the law automatically requires a modification of the alimony award.[19] The new law has led to some disputes regarding how these provisions should be applied. Other states have proposed bills to add similar provisions, which have not yet been enacted into law.[20] For example, Missouri judges have discretion to modify alimony upon a finding of cohabitation, but a 2014 bill would make such modification automatic any time that a recipient spouse cohabitates with another for 90 consecutive days.[21]

Some state lawmakers have attempted to make sure that cohabitation by an obligor spouse does not increase alimony payments.[22] Some courts may consider the decreased living expenses of the obligor when they cohabitate with another person in order to show a greater ability to pay alimony.[23] For example, a court might consider a new spouse's income under circumstances in which the obligor has argued an inability to pay, but claimed joint expenses.[24] Courts also have allowed for discoverability of the finances of an obligor's new spouse under certain circumstances that make them relevant.[25] A 2013 Florida bill would have likely prohibited the use of the obligor's decreased living expenses upon cohabitation as a means for increasing alimony. The governor vetoed the bill, which provided that an obligor's remarriage or cohabitation with another person and that other person's income could not be a basis for modification of alimony.[26]

As a result of these statutes, courts often need to interpret what constitutes "cohabitation." Not all courts agree regarding what circumstances qualify as "cohabitation."[27] Recently, some legislatures have attempted to define cohabitation.[28] For example, New Jersey Senator Anthony Bucco proposed a bill last spring that listed factors that should be considered by the court when determining whether a recipient spouse is cohabiting. These factors included "intertwined finances such as joint bank accounts and other joint holdings or liabilities, sharing or joint legal responsibility for living expenses, recognition of the relationship in the couple's social and family circle, living together, [and] sharing household chores."[29]

Another trend among legislatures has been to amend statutes to account for cohabitation between individuals of the same sex.[30] Courts often avoid addressing issues of public policy that relate to same-sex relationships when determining alimony modification.[31] In states where statutes are already gender neutral, courts have interpreted same-sex relationships as warranting cohabitation if all of the elements of cohabitation are met.[32] Courts have also interpreted gender neutral divorce agreements with similar language as including same-sex cohabitation.[33] Courts interpret statutes specifying that cohabitation must be between individuals of the opposite sex literally.[34] As a result, some legislatures have amended statutes to account for cohabitation between individuals of the same sex. For example, California law provides a presumption that less alimony is needed when an ex-spouse is cohabiting with a partner of the opposite sex.[35] A California bill would substitute the term "spouse" for the terms husband and wife and trigger the rebuttable presumption upon cohabitation with a "non-marital partner."[36]

Retirement

Several state legislatures have recently attempted to address what should happen to alimony support when the obligor reaches retirement age. Prior to 2011, no states had statutes stating that alimony could be modified when the obligor reaches the age of retirement. Since 2011, at least 11 bills have been proposed in eight states allowing for an opportunity to modify alimony as the result of an obligor's reaching retirement age.[37] Only South Carolina, Massachusetts, and Colorado have passed legislation that may lead to modification of alimony when the obligor reaches the age of retirement.[38] Florida, the state with the largest portion of its population over the age of 65,[39] was four hours away from changing its laws to allow for modification of alimony when an obligor retires at a reasonable age.[40] Florida Governor

Rick Scott vetoed the proposed bill at the last minute, because the bill's retrospective application would tamper with many settled economic expectations of divorced Floridians.[41] The failure to get these bills passed does not mean that the issue is not still ongoing. Attorney Thomas J. Sasser, who is leading a special legislative subcommittee dealing with alimony for the Family Law Section of the Florida Bar, stated that he is in the process of drafting a new statute with a "fresh take on alimony." Additionally, Florida news reports indicate that the vetoed bills will likely return to the legislature in the near future.[42] Florida is not the only state where this issue is ongoing. New Jersey recently passed a bill that is awaiting approval by Governor Chris Christie, which will allow modification or termination upon prospective or actual retirement.[43]

There are various approaches to what should occur when the obligor reaches retirement age. In Massachusetts, an alimony obligation automatically terminates when the obligor reaches the full age of retirement, but the law provides two exceptions.[44] One exception allows the court to set a different alimony termination date for good cause shown.[45] A bill that is currently before the legislature would add a provision that states that good cause may be shown when a divorce occurs within 10 years of the obligor's full retirement age and the marriage was longer than 20 years.[46] The proposed amendment would allow the court to order continued alimony if the obligor continues to work under these circumstances.[47] Massachusetts's second exceptionprovides courts with discretion to grant an extension of existing alimony for good cause shown, so long as when granting an extension, the court enters written findings of a material change in circumstances and reasons for the extension that are supported by clear and convincing evidence.[48] Four other states have also seen bills that allow automatic termination of alimony, with potential exceptions, when the obligor reaches retirement age or retires in good faith.[49]

Colorado's statute allows a rebuttable presumption that the retirement was made in good faith when the obligor reaches the age of retirement.[50] The Colorado statue, which allows parties to avoid this presumption by an agreement in writing or a contrary expression in the divorce decree, has been in effect since last year.[51] The North Carolina legislature did not pass a bill, which was recommended by the North Carolina Bar Association, that would have also provided a rebuttable presumption at retirement age.[52] An early version of a New Jersey bill put the burden upon the obligor to prove that retirement is reasonable and in good faith, the bill that is currently before the governor provides that there will be a rebuttable presumption that alimony shall terminate upon the obligor reaching normal retirement age.[53]

South Carolina was the first state to enact a statute addressing what occurs when the alimony obligor reaches retirement age.[54] Their approach does not result in a presumption or automatic termination, but instead allows for a hearing to determine whether there has been a change in circumstances for alimony.[55]

Bills proposing modification when the obligor reaches the age of retirement have been split regarding whether to use a set retirement age or evaluate each individual obligor on a case-by-case basis. For example, the statutes in Colorado and Massachusetts and an early version of 2013 Maine Bill, provided that the statute would take effect when the obligor is eligible for full Social Security benefits.[56] A 2011 North Carolina bill, which failed to get passed, allowed for a rebuttable presumption at the age of 67.[57] A 2013 Oregon bill provides that good faith retirement occurs when the obligor first becomes eligible to apply for retirement under his or her retirement plan, regardless of his or her ability to continue to work after that age.[58]

Another approach to assessing the appropriate retirement age is to consider factors as opposed to a set date or age. This allows for a subjective determination of whether the retirement is reasonable, which requires evidence and testimony for the court to make the decision based upon the judge's discretion.[59] South Carolina's statute does not provide a set date for retirement, but instead looks at the circumstances of the individual obligor's retirement.[60]

South Carolina courts look at six factors:[61]

(1) whether retirement was contemplated when alimony was awarded;

(2) the age of the supporting spouse;

(3) the health of the supporting spouse;

(4) whether the retirement is mandatory or voluntary;

(5) whether retirement would result in a decrease in the supporting spouse's income; and

(6) any other factors the court sees fit.

Florida's failed bill looked at similar factors in determining the reasonable age of retirement, and also evaluated the obligor's type of work and the normal age of retirement for that type of work.[62] The bill that is currently before Governor Christie considers similar factors including the degree and duration of economic dependency of the recipient during the marriage or civil union, whether the recipient sacrificed claims and property in exchange for a more substantial and longer alimony award, sources of income of the parties, and the ability of the recipient to have saved for retirement.[63]

In addition to these statutes, case law exists in many states that provides guidance to judges regarding whether to modify an award of alimony based upon the obligor reaching the age of retirement. Courts have found that alimony cannot be modified when retirement is done with the primary purpose of avoiding or reducing alimony payments.[64] Courts often make a subjective determination based upon a variety of factors regarding the reasonableness of retirement.[65]

Enforcing Parties' Agreement

Some legislatures appear to be trying to make alimony modifications more predictable by requiring courts to strictly enforce the language of divorce agreements and awards when the language provides for no modification or for modification under the occurrence of specific circumstances.[66] For example, in 2013 Connecticut amended its statute to provide that when a final judgment incorporates a provision of an agreement between the parties that sets forth circumstances under which alimony will be modified, the court must enforce the provision of the agreement.[67] The Connecticut statute already included a provision providing that a decree may preclude or limit modification.[68] Similarly, Arkansas has a provision in its statute allowing for automatic termination of alimony upon contingencies set forth in the order awarding alimony[69] and the legislature added a provision allowing a party to petition for modification if the recipient fails to meet the circumstances set forth in a rehabilitative plan.[70] Ohio also recently amended its statute to require courts to "consider any purpose expressed in the initial order or award and enforce any voluntary agreement of the parties."[71]

Not all legislatures are moving toward restricting modification to the terms of the agreement. Kansas currently requires the consent of the party liable for maintenance when a modification increases or accelerates the maintenance to be paid.[72] A recent Kansas bill would add a provision to this statute allowing the court discretion to modify the statute based upon evidence of need for the increase or acceleration.[73] Maine recently amended its statute, which used to prohibit modification of alimony when an order expressly provided that the award could not be modified.[74] Alimony may now be awarded "if justice so requires" on all orders awarding alimony after October 1, 2013.[75]

Permanent Alimony Still Exists, But Only in Extenuating Circumstances

Legislatures have recently enacted laws that attempt to provide more predictable end dates for alimony obligors. Permanent alimony continues indefinitely until death, remarriage, or a substantial change in circumstances.[76] Permanent alimony is awarded under special circumstances, that is, "to allow the requesting spouse, consistent with his needs, to maintain the standard of living established by the parties during the marriage, and to ensure that... one spouse is not 'shortchanged.'"[77] For several decades it was standard for judges to provide permanent alimony to a spouse who was divorced from a long-term relationship.[78] Judges have continued to use their discretion in awarding permanent alimony. For example, judges have used their discretion to award permanent alimony with rehabilitative alimony when a spouse's ability to earn is less than the needs that will be necessary to maintain the same standard of living.[79] Judges also have retained jurisdiction to modify rehabilitative alimony when a substantial change in the circumstances occurs under which the rehabilitative alimony was awarded.[80]

Legislatures have trended towards limiting awards of permanent alimony in an effort to make the economically disadvantaged spouse self-reliant by enacting statutes that give a presumption in some cases of rehabilitative alimony to allow a spouse time to find a job or for schooling or job training.[81] This trend has led some commentators to prematurely ring the death knell for permanent alimony.[82] Several attempts at eliminating permanent alimony have failed.[83]

This may indicate that even permanent alimony opponents feel that permanent alimony is necessary under some circumstances, such as when a spouse is disabled, too old to enter the workforce, or unable to earn the amount required to obtain the standard of living of the marriage.[84]

Legislatures have tried to restrict permanent alimony by imposing time limits on the duration for which alimony may be awarded.[85] These time limitations usually are based upon the length of the marriage. For example, Utah law provides that absent extenuating circumstances, the duration of an alimony award should not last longer than the duration of the marriage.[86] In *Kelley v. Kelley*, the Utah Court of Appeals interpreted extenuating circumstances to include when the parties are in a continuous marital relationship in common-law form for a period greater than the length of the marriage.[87] The dissenting judge in that case described the typical extenuating circumstances as being those that implicate the physical health, mental health, or well-being of a spouse.[88] Recent Oregon bills are more restrictive with one bill limiting alimony length to half the duration of the marriage[89] and another providing the same limitation with a maximum 10-year duration.[90] Not all proposed legislation is based upon the length of the marriage. A bill currently before the Missouri Legislature would limit alimony to 10 years and apply retrospectively to modify alimony awards currently in effect.[91] If enacted, the bill would end previously awarded alimony within 10 years from the date of the order or two years from a motion for modification, whichever date is later.[92] In New Hampshire, a bill has been proposed that would put a limit, not on the duration of the alimony award, but instead on the time in which a spouse may request to renew permanent alimony that was awarded for a definite term.[93] Instead of placing a time limit on a motion to renew from the termination date of the alimony, the proposed amendment would limit requests to renew to five years from the date of the decree of nullity or divorce.[94]

Other states have moved away from permanent alimony by providing guidance for the expected duration of alimony. For example, Rhode Island's law explains that alimony should only be provided for a "reasonable length of time to enable the recipient to become financially independent and self-sufficient."[95] Some of these guidelines function in a similar manner as the time limits of other states, but provide judges with more discretion. For example, the Massachusetts's 2012 alimony overhaul led to specific guidelines for duration based on the length of the marriage, but allows judges to deviate from the guidelines so long as they provide written findings that deviation is necessary.[96] The new law provides for alimony as follows:[97]

- 50 percent of the duration of the marriage if the marriage was less than 5 years,
- 60 percent of the duration if the marriage lasted 5–10 years,
- 70 percent of the duration of the marriage if the marriage lasted 10–15 years,
- 80 percent of the length of the marriage if the marriage last 15–20 years and allows alimony for an indefinite amount of time for marriages longer than 20 years.

Several states have seen movements to eliminate permanent alimony from their statutes, but many of these movements have not been successful. In Washington, DC, the statute allowing for permanent alimony has been repealed.[98] A New Jersey bill substituting "permanent alimony" for "open duration alimony" is currently awaiting approval by Governor Chris Christie,[99] but this change may not have any real impact on New Jersey's approach to the duration of alimony awards. Attorney Amanda S. Trigg, an officer with the New Jersey Bar Association's Family Law Executive Committee, explains that "'permanent alimony'...was always a misnomer under [New Jersey] law, so although that looks like a significant change, it really is not." Although proponents of alimony reform in Florida have been unsuccessful in their recent attempts to eliminate permanent alimony,[100] in 2010 a bill was enacted that made duration alimony applicable to long-term marriages, required a higher standard of proof for spouses seeking permanent alimony, and required courts to provide a finding that no other form of alimony is appropriate when permanent alimony is awarded.[101] Portions of a 2013 Maine bill, which were not enacted, sought to eliminate "general support" and only allow for "transitional support."[102]

Formula in Some Jurisdictions Based on Length of Marriage and Income of Spouse

In recent years legislatures have proposed the use of guidelines, similar to child support guidelines, to calculate alimony awards.[103] These guidelines primarily take into account the duration of the marriage and the income of the spouses, but do not account for intangible benefits that were received by a spouse during the marriage.[104] Formulas were first used at a local level, confined

to temporary or *pendente lite* alimony, and meant to serve only as a starting point for discretionary awards.[105] In 1977, Santa Clara County in California adopted guidelines for calculating temporary alimony pending a final judgment.[106] The Santa Clara Formula calculates alimony by subtracting 50 percent of the net income of the payee from 40 percent of the net income of the payor, not including child support payments by the payor and adjusts the outcome for tax consequences: (40 percent of payor income – child support) – 50 percent payee income.[107] Since its adoption, the Santa Clara formula has been applied in several other counties throughout California[108] and local rules in other states have experimented with their own formulas for calculating alimony.[109] Several local bar associations and family law groups, such as the Boston Bar Association and Fairfax County Bar Association, have come up with their own formulas, which primarily take into account the duration of the marriage and the income of the spouses.[110] Other local bar associations and groups, such as the New Jersey State Bar[111] and the Nassau County Bar Association, have opposed the implementation of formulas.[112]

Until recently, formulas were used mostly in scattered jurisdictions on the local level to serve as a starting point for temporary or *pendente lite* alimony. For years, Pennsylvania was the only state which provided a statewide statute using a formula.[113] The statute instructed courts to use the formula in high-income cases as preliminary analysis for calculation of *pendente lite* obligations.[114] Quantitative guidelines for temporary alimony while divorce is pending are starting to be implicated.[115] In 2010, New York adopted its own formula for temporary alimony.[116] The formula is used to calculate alimony owed by a payor who has an annual income up to and including $500,000.[117] When a payor has an annual income of more than $500,000, the formula is used to calculate the portion of the payor's income up to and including $500,000, and factors are used to calculate the alimony for the portion in excess of $500,000.[118]

Over the last three years, proponents of alimony reform have been pushing the adoption of alimony formulas to calculate all alimony payments, not just temporary alimony, in an effort to standardize alimony awards.[119] Much of the support for these reforms has come from grassroots organizations formed by spouses who have received what they consider unfair alimony judgments.[120] For example, when Massachusetts became the first state to adopt a formula[121] for calculating the amount and duration of alimony awards outside of temporary alimony in 2012,[122] many credited Steve Hitner with getting the sweeping reform legislation passed.[123] Hitner's struggled to get his alimony modified following the collapse of his business in 2001.[124] This led him to become an advocate for the group Massachusetts Alimony Reform.[125] Shortly thereafter, his second wife formed the 2nd Wives Club in an effort to campaign to change Massachusetts's alimony laws,[126] which had not been updated since 1975.[127] Hitner ended up helping to rewrite the law as a member of the Judiciary Committee Task Force, and his organization, called Massachusetts Alimony Reform, spawned similar organizations across the country including Florida, New Jersey, Connecticut, and Oregon.[128] Since Massachusetts's formula was enacted, Illinois, New Jersey, and New York have seen bills proposing statutes that would award alimony based on a formula for amount and duration.[129] Just this year, Colorado overhauled its calculation of alimony awards to implement its own formula.[130]

There are some similarities between the enacted statutes and the proposed bills. All base the amount of alimony on the party's income and the duration of the length of the marriage. With the exception of New York, all of the enacted and proposed statewide formulas provide judges with the discretion to deviate from the guidelines upon specific findings for deviation such as advanced age, illness or unusual health circumstances, tax considerations, whether the payor is providing health insurance or life insurance, the sources and amounts of unearned income, significant premarital cohabitation that included economic partnership or marital separation, physical or mental abuse by the payor, deficiency of the party's property, maintenance or employment opportunity.[131]

The formulas all provide judges with the discretion to deviate from the guidelines for reasons not listed within the statute, providing judges with discretion to take into account special circumstances that have traditionally been large non-economic factors in alimony awards, such as significant contribution to the marriage.[132] New York's proposed bill requires judges to explain their reasoning when awarding alimony for the portion of income of a payor above $500,000.[133]

The Massachusetts statute and New Jersey's proposed bill use the same formula for determining duration and amount of alimony.[134] Both limit the amount of alimony to the need of the recipient or 30–35 percent of the difference between the

parties' gross incomes.[135] Similarly, a recent bill in Oregon proposed limiting the amount that could be awarded for alimony to 25 percent of the difference between the gross incomes of the spouses.[136] They also shared the same sliding scale for duration of the alimony.[137]

Colorado's statute and Illinois' proposed statute both determine the amount of alimony by subtracting a percentage of the recipient's gross income from a percentage of the payor's gross income, but the percentages vary.[138] Colorado's statute is more favorable than the Illinois statute toward low-income recipients when the payor has a high income because it awards a greater percentage of the payor's income. For example, under Colorado's statute, when an unemployed recipient who is seeking alimony from a payor that makes $100,000, that recipient would receive $40,000 assuming that the judge does not deviate from the formulas. Under Illinois' proposed statute, a payee in the same situation as the Colorado recipient would receive $30,000. This hypothetical does not consider how the income is computed under each statute or the judge's ability to exercise discretion in special circumstances. Colorado's statute becomes less favorable for recipients when the recipient has a high gross income. For example, under Colorado's statute, when a recipient who makes $80,000 is seeking alimony from a payor that makes $100,000, that recipient would receive nothing in alimony if the judge did not use discretion to deviate from the statute. Under Illinois' proposed statute, a payee in the same situation as the Colorado recipient would receive $14,000 if the judge did not deviate from the statute. Additionally, Colorado's statute does not apply to parties with a combined annual gross income over $240,000.[139] The statute provides that a fair and equitable alimony award should be given for parties with income over $240,000 based upon factors including the financial resources of each party, lifestyle during the marriage, the distribution of marital property, whether one party has historically earned a higher or lower income, the duration of the marriage, age and health of the parties, significant economic or noneconomic contribution to the marriage or to the educational or occupational advancement of the party, and any other factor.[140] Similarly, Illinois' statute is applicable to parties with annual gross income less than $250,000.[141] For parties with income over $250,000, the proposed statute provides that alimony should be awarded after consideration of all factors including party income, the needs of each party, present and future earning capacity, and any impairment due to devoting time to domestic duties or delayed education, training, employment, or career opportunities, the standard of living established during the marriage, the duration of the marriage, the age and physical and emotional condition of the parties, the contributions and services to the career or career potential of the other spouse, and agreements by the parties.

There have been mixed reactions to the new and proposed statutes that have come out of this trend. Proponents of the formulas believe that without the formulas being imposed as a requirement, judges will ignore the guidelines and award alimony based upon their own discretion.[142] Others are concerned that judges will have the opposite reaction. These individuals worry that the guidelines will become the default for both judges and attorneys, and all divorces, regardless of the circumstances, will be treated the same.[143] Opponents of the formulas argue that unlike child support, which hinges solely on the income of the parents, alimony awards need to be more discretionary to take into account the noneconomic factors as well.[144] For example, unless judges act within their discretion to deviate from the formulas, a formula might not properly place a dollar amount on a homemaker who stayed at home giving up her dream of becoming an engineer. Many family law and mediation attorneys in the states that have enacted formulas have embraced the opportunity to improve their Web sites by implementing "alimony calculators." Some believe that people will not be able to determine the value or effectiveness of these new formulas until judges have time to interpret and apply the laws.

The biggest question regarding these new guidelines is the amount of discretion judges will exercise in applying these formulas. Fern Folin, a Massachusetts attorney who served on the 2012 Alimony Reform Task Force that wrote the Massachusetts Alimony Reform Act, shares the belief of many others that the only way that the new statute will work fairly is if judges exercise the discretion given to them to deviate from the presumptions in appropriate cases. The first state Supreme Court to analyze judge discretion under one of the new alimony guidelines recently held that "judges have broad discretion when awarding alimony under the [new] statute."[145] In *Zaleski v. Zaleski*, the Supreme Judicial Court of Massachusetts noted that the legislative history of the Alimony Reform Act "clearly

show[ed] that the broad discretion that judges historically have had in making awards of alimony was not affected by the Alimony Reform Act of 2011."[146]

Legislatures Address Retroactively Applying Modification to a Date Prior to Filing a Petition for Modification

Several legislatures have recently addressed the issue of retroactive modification of alimony awards. Under the Uniform Marriage and Divorce Act, alimony and child support decrees may be modified only prospectively from the time a motion to modify is filed.[147] Federal regulations also provide that child support orders should be modified only from the date that notice of a petition for modification is given.[148] Generally, courts do not modify child support awards retrospectively to a date prior to the filing of an application for modification.[149]

Similarly, courts have often made alimony modifications allowable from the time a motion for alimony modification is filed, so that the party who will be affected by the modification has notice of the potential modification.[150] Some courts have held that past-due alimony payments under the divorce decree constitute vested property rights, which are not subject to modification.[151]

Under certain circumstances, courts may allow for retroactive modification of alimony awards, often under theories of restitution,[152] to a date prior to the motion for modification. A court may allow an alimony award to be modified retroactively when there appears to be a fraud committed such as when a spouse attempts to hide her remarriage to avoid modification.[153] Some courts have allowed retroactive modification when a divorce agreement includes a provision allowing for retroactive modification or automatic modification upon the occurrence of some event, because the party has no reason to expect the agreement not to be modified when that event occurs.[154] However, a court may decide not to retroactively modify an alimony award if the divorce decree provides a provision requiring the court to modify alimony, such as a provision stating that "the party will receive alimony until further order of the court."[155] Some courts allow retroactive modification when a statute provides for automatic modification.[156]

Legislatures have increasingly been enacting laws likely to have an effect on retroactive modification. The bill that was recently passed by the New Jersey Legislature provides that when a party files for a modification of the alimony award based upon changed circumstances due to unemployment, "[t]he court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction in income."[157] If the Governor signs this bill, there will be a different standard for when an alimony modification can be effected and when child support modification can be effected, because New Jersey law provides that "[a] change in circumstances, such as a job loss, could ... not be used as a basis to modify retroactive arrearages that accrued under a child support order."[158] Courts are also effecting retroactive modification by enacting statutes allowing for automatic modification.[159] Allowing automatic modification in these circumstances would often lead to different standards being applied when assessing the time for modification of alimony awards and child support. Several states have laws, including the new Colorado law, that resolved these differences by stating that alimony may not be modified prior to the date of filing or service of a party.[160] The Colorado legislature has also enacted legislation to ensure that a recipient of alimony for a set duration may not retroactively reinstate alimony following the time when the alimony has ceased.[161]

Similarly, a recent New Hampshire bill proposed changing the time from when a motion for renewal of alimony could be filed to five years from the date of the divorce decree.[162]

Upward Modification of Alimony upon Termination of Child Support

Although it is difficult to predict with certainty the next emerging trend in legislatures, often trends appear to get started when a state legislature steals a new idea that has seen success in a neighboring state. Peter M. Walzer, who is a past president of the Southern California Chapter of the American Academy of Matrimonial Lawyers and former chair of the executive committee of the State Bar Family Law Section, explained that a recent change in California law has led to increased support for the recipient spouse when the recipient spouse seeks an upward modification of alimony when child support terminates. In 2011, California changed its spousal support law to provide that "termination of child support ... constitutes a change of circumstances that may be the basis for a request by either party for modification of spousal support."[163] A party may not seek modification if the jurisdiction of the court to modify spousal support has been terminated or the judgment/parties' agreement

provides that the order is nonmodifiable or specifically addresses termination of child support.[164] The statute requires a party seeking modification to file a motion to modify alimony within six months from the date the child support order terminates.[165] This new approach is unique, because courts in other jurisdictions would likely consider the termination of child support to be a foreseeable event, which is not sufficient to constitute modification.[166] As previously noted, if this new idea catches on, it would not be the first time that other jurisdictions duplicate an innovative change in California alimony law.[167]

NOTES

1. This is how Fern Folin, one of the attorneys who assisted in writing the Massachusetts's Alimony Reform Act of 2012, describes the current environment of alimony law in Massachusetts.

2. *See* Sophia Pearson, "Jail Becomes Home for Husbands Stuck with Lifetime Alimony," *Bloomberg* (Aug. 26, 2013, 11:00 p.m.), *http://www.bloomberg.com/news/2013-08-26/jail-becomes-home-for-husband-stuck-with-lifetime-alimony.html*, last accessed April 13, 2015.

3. *Women in the Labor Force in 2010*, U.S. Dep't. Labor, *http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm*, last accessed April 13, 2015.

4. Pearson, *supra* n.2.

5. *See* Jennifer Levitz, "The New Art of Alimony: Long Viewed as Payment for Life, Divorce Settlements Are Facing Strict New Limits as Some Ex-spouses—Primarily Men—Protest the Endless Support of a Former Partner. For Richer, For Poorer, Forever?," *Wall St. J.* (Oct. 31, 2009, 12:01 a.m.), *http://online.wsj.com/news/articles/SB10001424052748703399204574505700448957522*.

6. *See Boemio v. Boemio*, 994 A.2d 911, 919 (Md. 2012) ("Of the three financial issues raised by divorce—asset division, child support and spousal maintenance—the question of alimony is typically the least predictable and the most contentious." (quoting Robert K. Collins, "The Theory of Marital Residuals: Applying an Income Adjustment Analysis to the Enigma of Alimony," 24 *Harv. Women's L.J.* 23, 23 (2001)).

7. *See* Jackson, "Alimony Arithmetic: More States are Looking at Formulas to Regulate Spousal Support," *A.B.A.J.* (Feb. 1, 2012 4:30 a.m.) *http://www.abajournal.com/magazine/article/alimony_arithmetic_more_states_are_looking_at_formulas_to_regulate_spousal*, last accessed April 13, 2015; Victoria M. Ho & Stephanie A. Sussman, "Appellate Court Trends in Permanent Alimony for 'Gray Area' Divorces: 1997–2007," 82 *FLA. B.J.* 45, 49 (2008) ("Absent alimony guidelines, this area will continue to be difficult to predict as equity is often—like beauty—in the eye of the beholder").

8. *See* Bacon v. Bacon, 819 So.2d 950, 955–956 (Fla. Dist. Ct. App. 2002) (noting the benefits that would occur with a statute setting guidelines for alimony); Jackson, *supra* n.7; Andrew Zashin, "What Will Happen to my Income after Divorce?," *Cleveland Jewish News* (June 19, 2014, 12:05 p.m.), *http://www.clevelandjewishnews.com/special_sections/business/article_96a99538-f62a-11e3-a401-0019bb2963f4.html*, last accessed April 13, 2015.

9. *See* Jackson, *supra* n.7 (quoting Karen Pinkert-Lieb, partner with Schiller DuCanto & Fleck in Chicago); *see also* Gonsewski v. Gonsewski, 350 S.W.3d 99, 105 (Tenn. 2011) (Noting that spousal support is factually driven and Tennessee law has recognized that trial courts are accorded wide discretion).

10. *See, e.g., Matter of Marriage of Edwards*, 698 P.2d 542, 545 (Or. Ct. App. 1985); Scharnweber v. Scharnweber, 484 N.E.2d 129, 129 (N.Y. 1985).

11. *See, Id.* at 544.

12. *See* Ala. Code § 30-2-55; Ark. Code Ann. § 9-12-312; 750 Ill. Comp. Stat. 5/510(c); La. Rev. Stat. Ann. Art. 115; Mass. Gen. Laws ch. 208 § 49, N.C. GEN. STAT. § 50-16.9; S.C. Code Ann. § 20-3-130 (terminating periodic alimony upon cohabitation); Utah Code Ann. § 30-3-5(10).

13. Ga. Code Ann. § 19-6-19; Me. Rev. Stat. tit. 19, § 951-A(12); Mo. Ann. Stat. § 452.370; N.Y. Dom. Rel. Law § 248; Okla. Stat. tit. 43, § 134(C); S.C. Code Ann. § 20-3-130 (making rehabilitative and reimbursement alimony terminable upon cohabitation).

14. *See* Cal. Family Code § 4323; Del. Code Ann. tit. 13 § 1512(g); Va. Code Ann. § 20-109(A) (requiring termination upon cohabitation unless there is a stipulation or contract to the contrary or the spouse proves by a preponderance of the evidence that termination would be unconscionable); *see also* Tenn. Code Ann. § 36-5-121(f)(2)(B), (g)(2)(B) (providing a rebuttable presumption when a recipient of alimony in the future, *i.e.*, periodic alimony or transitional alimony lives with another person).

15. Ark. Code Ann. § 9-12-312 (amended by H.B. 1962, 89th Gen. Assemb. (Ark. 2013)); Mass Geb, Laws ch. 208 § 49 (amended by H.B. 3617, General Court, 1st Sess. (Mass. 2011).

16. *See* Me. Ref. Stat. tit. 19, § 951-A(12) (amended by H.P. 367, 126th Leg., 1st Sess. (Me. 2013).

17. Mass. Gen. Laws ch. 208 § 49(d)(1).

18. *Id.*

19. *See* Bella English, "New Mass. Alimony Law a 'Model'—But is It Working?: Some Judges Ignore Reforms," Critics Say, *Boston Globe* (Oct. 20, 2013), *http://www.bostonglobe.com/lifestyle/style/2013/10/19/new-state-alimony-law-once-hailed-model-causing-confusion-and-being-misinterpreted-ignored-judges/jeWGmkiyGiR6Q0lkshlNkI/story.html*, last accessed April 13, 2015.

20. *See* S.B. 552, 97th Gen. Assemb., 2d Sess. (Mo. 2014) (automatically terminating alimony upon cohabitation); S.B. 1808, 216th Leg., 1st Sess. (N.J. 2014) (allowing courts to terminate alimony upon cohabitation); H.B. 3531, 77th Legis. Assemb. (Or. 2013) (automatically terminating alimony upon cohabitation).

21. S.B. 552, 97th Gen. Assemb., 2d Sess. (Mo. 2014).

22. S.B. No. 718, 115th Leg., Regular Session (Fla. 2013); H.B. 2559, 77th Legis. Assemb. (Or. 2013); *see also* La. Rev. Stat. Ann. Art. 114 ("The subsequent remarriage of the obligor spouse shall not constitute a change of circumstance.").

23. *See* Mo. Ann. Stat. § 452.370 (urging the court to consider the extent to which reasonable expenses of either party should be shared with a cohabitant); Utah Code Ann. § 30-3-5(8)(i)(i)(iii)(B)(allowing consideration of the subsequent spouse's income if the court finds improper conduct justifies that consideration); Moore v. Moore, 763 N.W.2d 536, 546–547 (S.D. 2009).

24. *See, e.g.*, Roach v. Roach, 572 N.E.2d 772, 775 (Ohio Ct. App. 1989).

25. For example, courts might allow an alimony recipient to discover the new spouse's income when an obligor reduces his income to allow for modification and continues to live off his new spouse's income, or when the obligor transfers assets to a new spouse in order to disinvest income while failing to fulfill the alimony obligation. *See, e.g.*, Hayden v. Hayden, 662 So.2d 713, 716 (Fla. Dist. Ct. 1995) (allowing new spouse's income to be discoverable by former spouse when obligor reduces his income to allow for modification and is supported by new spouse's income or transfers assets to new spouse to disinvest income); Walles v. Walles, 685 A.2d 508, 520–21 (N.J. 1996) (allowing information related to new spouse's income to be turned over directly to former spouse when the new spouse is employed by obligor's professional association).

26. S.B. No. 718, 115th Leg., Reg. Sess. (Fla. 2013).

27. Compare Gordon v. Gordon, 675 A.2d 540, 547 n.11 (Md. 1996) ("[W]e do not believe sexual relations are a prerequisite for cohabitation."), *with Matter of Marriage of Edwards*, 698 P.2d 542, 547 (Or. Ct. App. 1985) (holding that "cohabitation" has a precise legal meaning that includes sexual intimacy). For an analysis of what circumstances constitute cohabitation, *see generally* Matthew Grad, "Modification of Spousal Support on Ground of Supported Spouse's Cohabitation," 6 *Am. Jurisprudence Proof Facts* 3d 765 (1989).

28. *See* Mass. Gen. Laws ch. 208 § 49(d)(1); Me. Rev. Stat. tit. 19, § 951-A(12); N.C. Gen. Stat § 50-16.9; S.B. 552, 97th Gen. Assemb., 2d Sess. (Mo. 2014); Okla. Stat. tit. 43, § 134(C); S.B. 1808, 216th Leg., 1st Sess. (N.J. 2014); H.B. 4180, 120th Gen. Assemb., 1st Sess. (S.C. 2013); W.Va. Code § 48-5-707(a)(2).

29. S.B. 1808, 216th Leg., 1st Sess. (N.J. 2014).

30. *See* H.B. 3531, 77th Legis. Assemb. (Or. 2013) (modifying alimony when parties live as "husband and wife or as domestic partners"); *see also* La. Rev. Stat. Ann. Art. 115; N.C. Gen. Stat. § 50-16.9(b); Wash. Rev. Code Ann. § 26.09.090(2).

31. *See* J.L.M. v. S.A.K., 18 So.3d 384, 390 (Ala. Ct. Civ. App. 2008); *In re Marriage of Weisbruch*, 710 N.E.2d 439, 444 (Ill. App. Ct. 1999); Stroud v. Stroud, 641 S.E.2d 142, 151 (Va. Ct. App. 2007).

32. *See* Garcia v. Garcia, 60 P.3d 1174, 1175 (Utah 2002).

33. *See, e.g., Stroud, supra* n.31, at 151 (holding that trial court erred by refusing to interpret contract based on the conclusion that same sex individuals cannot cohabit as a matter of law in Virginia).

34. *See J.L.M. supra* n.31 at 390 (citing *People ex rel.* Kenney v. Kenny, 352 N.Y.S.2d 344 (N.Y. Sup. Ct. 1974).

35. Cal. Family Code § 4323.

36. S.B. No. 1306, Regular Session (Cal. 2014).

37. *See* H.B. 1058, 69th Gen. Assemb., 1st Sess. (Colo. 2013) (enacted); SB 718, 115th Reg. Sess. (Fla. 2013); S.B.701, 188th General Court (Mass. 2013); H.B. 3617, 187th General Court (Mass. 2011) (enacted); H. Paper 367, 126th 1st Reg. Sess. (Me. 2013); B. 706, General Assemb., Reg. Sess. (N.C. 2011); H.B. 3531, 77th Leg. Assemb. (Or. 2013); S.B. 1808, 216th Leg. (N.J. 2014); S.B. 488, 2016th Leg. (N.J. 2014); S.B. 2750, 2014th Leg., 2d Ann. Sess. (N.J. 2012); S.B. 4525, 2014th Leg., 2d Ann. Sess. (N.J. 2012); S.B. 4532, 2014th Leg., 2d Ann. Sess. (N.J. 2012) H.B. 4738, 119th Sess. General Assembly, 2d Reg. Sess. (S.C. 2011).

38. Colo. Rev. Stat. 14-10-122; Mass. Gen. Laws ch. 208, § 49(f); S.C. Code Ann. § 20-3-170.

39. Carrie A. Warner, U.S. Census Bureau, The Older Population: 2010 9 (2011).

40. Ray Reyes, "Gov. Scott Vetoes Alimony Bill, but Debate Not Over," Tampa Trib. (May 2, 2013, 6:01 a.m.), *http://tbo.com/gov-scott-mulls-alimony--other-bills-on-deadline-b82486384z1*, last accessed April 13, 2015.

41. *Id.*

42. *See, e.g.*, Gina Jordan, "Florida's Vetoed Alimony Bill Likely to Return in 2014," WLRN (Aug. 7, 2013, 8:28 a.m.), *http://wlrn.org/post/floridas-vetoed-alimony-bill-likely-return-2014*, last accessed April 13, 2015; Reyes, *supra* n.40.

43. *Compare*, S.B. 2750, 2014th Leg., 2d Ann. Sess. (N.J. 2012), *and* S.B. 4525, 2014th Leg., 2d Ann. Sess. (N.J. 2012), *with* S.B. 1808, 216th Leg. (N.J. 2014), *and* S.B. 488, 2016th Leg. (N.J. 2014).

44. Mass. Gen. Laws ch. 208 § 49(f).

45. *Id.* at § 49(f)(1).

46. S.B.701, 188th General Court (Mass. 2013).

47. *Id.*

48. Mass Gen. Laws ch. 208 § 49(f)(2).

49. SB 718, 115th Reg. Sess. (Fla. 2013); H. Paper 367, 126th 1st Reg. Sess. (Me. 2013); S.B. 488, 216th Leg. (N.J. 2014); S.B. 1808, 216th Leg. (N.J. 2014); H.B. 3531, 77th Leg. Assemb. (Or. 2013).

50. Colo. Rev. Stat. 14-10-122.

51. *Id.*

52. H.B. 706, General Assemb., Reg. Sess. (N.C. 2011).

53. S.B. 1808, 216th Leg. (N.J. 2014).

54. S.C. Code Ann. § 20-3-170.

55. *Id.*

56. Colo. Rev. Stat. 14-10-122; Mass. Gen. Laws ch. 208 § 48(f); H. Paper 367, 126th 1st Reg. Sess. (Me. 2013); *see also* Social Security Act, 42 U.S.C. § 416(I) (defining retirement age based upon date of birth between 65–67 years old). New Jersey has a currently pending bill that provides for automatic termination upon reaching retirement age under the Social Security Act, but has a separate bill that would analyze each obligor's retirement on a case-by-case basis using factors. *See* S.B. 488, 2016th Leg. (N.J. 2014); S.B. 1808, 216th Leg. (N.J. 2014).

57. H.B. 706, General Assemb., Reg. Sess. (N.C. 2011).

58. H.B. 3531, 77th Leg. Assemb. (Or. 2013).

59. Fuller v. Fuller, 723 S.E.2d 235, 240 (S.C. Ct. App. 2012) (requiring the trial court to consider all relevant evidence).

60. S.C. Code Ann. § 20-3-170(B).

61. *Id.*; Fuller, *supra* n.60 at 240 ("We decline to adopt a bright-line rule that, where the supporting spouse reaches a particular age, that age alone is sufficient to justify a reduction or termination of alimony.").

62. SB 718, 115th Reg. Sess. (Fla. 2013).

63. Assemb. Comm. Substitute Assemb. 845, 971, & 1649, 216th Leg. (N.J. 2014). A separate New Jersey bill, which did not pass the legislature, allowed automatic termination at the age at which an individual is eligible for retirement under the Social Security Act, regardless of the whether the obligor decides to continue working past this age. S.B. 488, 2016th Leg. (N.J. 2014).

64. Smith v. Smith, 419 A.2d 1035, 1038 (Me. 1980); *Commonwealth ex rel.* Burns v. Burns, 331 A.2d 768, 770 (Penn. 1974).

65. For an overview of the factors considered by courts, *see* Jane Massey Draper, "Retirement of Husband as Change of Circumstances Warranting Modification of

Divorce Decree—Conventional Retirement at 65 Years of Age or Older," 11 A.L.R.6 th125 (2006).

66. There are a few states that have statutes requiring enforcement of certain terms of a divorce agreement or order. *See, e.g.*, Ark. Code Ann. § 9-12-312(a)(2)(F), (b)(3) (enforcing the conditions for termination in the alimony award and allowing to petition for modification for failure to meet requirements of rehabilitative plan); Conn. Gen. Stat. § 46b-86 (enforcing agreement as to circumstances for modification and allowing specification of circumstances not to be changed); Colo. Rev. Stat. §14-10-122 (enforcing parties' agreement for modification); Kan. Stat. Ann. 29-2903(b) (allowing decrees to be modifiable under prescribed circumstances); Minn. Stat. § 518.552 (allowing parties to expressly preclude or limit modification); Mo. Ann. Stat. § 452.335-1 (requiring maintenance order to state if it is modifiable); N.M. Stat. Ann. 40-4-7(B)(1)(a) (allowing parties to condition continuation of support on compliance with rehabilitative plan); Ohio Rev. Code Ann. § 3105.18 (requiring courts to enforce voluntary agreements of the parties); 23 Pa. Const. Stat. § 3105(c) (providing certain provisions not subject to modification); S.C. Code Ann. § 20-3-130(b)(3) (terminating rehabilitative alimony on occurrence of specific event in the future); Tenn. Code Ann. § 36-5-121 (allowing parties to contract for modification).

67. *See* Conn. Gen. Stat. § 46b-86(b); H.B. 6688, General Assemb., Jan. Sess. (Conn. 2013).

68. Conn. Gen. Stat. § 46b-86(a).

69. Ark. Code Ann. § 9-12-312(a)(2)(F).

70. Ark. Code Ann. § 9-12-312(b)(3); H.B. 1962, 89th General Assemb. (Ark. 2013).

71. Ohio Rev. Code Ann. § 3105.18 (2011)

72. Kan. Stat. Ann. 29-2903.

73. 2013 Kansas H.B. 2604, 85th Leg., 2014 Reg. Sess. (Kan. 2013).

74. Paper 367, 126th Leg., 1st Reg. Sess. (Me. 2013).

75. *See* Me. Rev. Stat. tit. 19, § 951-A.

76. *Matter of Marriage of Grove*, 571 P.2d 477, 483 (Or. 1977) (en banc); David Jones, "Rehabilitative Alimony—The Goal of Self Support," 20 J. Contemp. Legal Issues 25, 25 n.1 (2009).

77. Griffin v. Griffin, 906 So.2d 386, 389 (Fla. Dist. Ct. App. 2005).

78. Cathy Meyer, "The Great Alimony Myth: Are You Expecting Permanent or Long-term Alimony?," Divorce Support, About.com, *http://divorcesupport.about.com/od/financialissues/a/The-Great-Alimony-Myth.htm*, last accessed April 13, 2015.

79. Cerminara v. Cerminar, 699 A.2d 837, 845 (N.J. Super. Ct. App. Div. 1996).

80. Sanney v. Saney, 511 S.E.2d 865, 871 (W.Va. 1998) (citing Wood v. Wood, 438 S.E.3d 788 (W.Va. 1993).

81. *See, e.g.*, Fla. Stat. Ann. 61.08.

82. Meyer, *supra* n.78.

83. For example, Governor Rick Scott recently vetoed a bill that would have eliminated permanent alimony. "Florida Gov. Scott Vetoes Bill That Would End Permanent Alimony in State," FoxNews.com (May 2, 2013), *http://www.foxnews.com/politics/2013/05/02/florida-gov-scott-vetoes-bill-that-would-end-permanent-alimony-in-state/; infra* n.100.

84. *See* Geoff Williams, "Taking the 'Permanent' Out of Permanent Alimony: Unhappy Married Couples Tend to Believe They're Trapped in a Life Sentence—They May Be Right," *U.S. News & World Rep.* (Jan. 23, 2013, 1:50 p.m.), *http://money.usnews.com/money/personal-finance/articles/2013/01/23/taking-the-permanent-out-of-permanent-alimony.*

85. *See, e.g.*, Tex. Family Code Ann. § 8.054 (restricting the duration of alimony to five years for marriages lasting less than 20 years, seven years for marriages lasting less than 30 years and 10 years for marriages lasting more than 30 years).

86. Utah Code Ann. § 30-3-5(j). A 2012 bill, which was never passed, sought to allow courts to order longer duration alimony based on the fault of the obligor. H.B. 236, 59th Legi., 2012 Gen. Sess. (Utah 2012).

87. *See* Kelley v. Kelley, 79 P.3d 428, 439 (Utah Ct. App. 2003).

88. *Id.* at 430 (J. Davis dissenting).

89. H.B.3531, 77th Leg. Assemb. (Or. 2013).

90. H.B. 2559, 77th Leg. Assemb. (Or. 2013).

91. H.B. 2227, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

92. *Id.*

93. H.B. 604, 163d Sess. Gen. Court, 1st year (N.H. 2013).

94. *Id.; see also* N,H. Rev. Stat. 458:19.

95. R.I. Gen. Laws § 15-5-16(b)(2).

96. Mass. Gen. Laws ch. 208 § 53(e); Mass. Gen. Laws ch. 208 § 49(b).

97. Mass. Gen. Laws ch. 208 § 49(b).

98. D.C. Code § 16-912.

99. *See* Matt Friedman, "Bill to Change NJ's Alimony Law Heads to Christie," *Star Ledger* (July1, 2014), *http://www.nj.com/politics/index.ssf/2014/06/bill_to_change_njs_alimony_law_heads_to_christi* e.html; Michael Phillis, "NJ Bill Limiting Duration of Alimony Awaits Christie's Signature or Veto," N. Jersey Com. (July 7, 2014, 1:54 p.m.), *http://www.northjersey.com/news/nj-bill-limiting-duration-of-alimony-awaits-christie-s-signature-or-veto-1.1046659.*

100. Governor Rick Scott recently vetoed a bill that would have eliminated permanent alimony. "Florida Gov. Scott Vetoes Bill That Would End Permanent Alimony in State," FoxNew.com (May 2, 2013), *http://www.foxnews.com/politics/2013/05/02/florida-gov-scott-vetoes-bill-that-would-end-permanent-alimony-in-state/.* In 2004, a Florida lobbying group attempted to amend the state constitution to abolish alimony completely by claiming that it was involuntary servitude. Jackson, *supra* n.7.

101. H.B. 1111, 113th Reg. Sess. (Fla. 2011); Fla. Stat. Ann. 61.08(8) (requiring clear and convincing evidence that permanent alimony is appropriate for moderate duration marriages and written findings of exceptional circumstances following marriages of short duration).

102. H. Paper No. 367, 126th Leg., 1st Reg. Sess. (Me. 2013).

103. Zashin, *supra* n.8.

104. *Id.* at 77.

105. *Id.* at 63.

106. *Id.* at 73 (citing Victoria M. Ho & Jennifer J. Cohen, *supra* n.7; *see also* Sup. Ct. Cal., Cnty. Santa Clara, Loc. Fam. R. 3(C), *http://www.scscourt.org/court_divisions/family/family_rules/family_rule3.shtml#C.*

107. *Id.* (citing Sup. Ct. Cal., Cnty. Santa Clara, Loc. Fam. R. 3(C), *http://www.scscourt.org/court_divisions/family/family_rules/family_rule3.shtml#C).*

108. Victoria M. Ho & Jennifer J. Cohen, *supra* n.7, at 86 (2003).

109. Kisthardt, *supra* n.8 at 74–77 (discussing alimony support formulas that are used in certain counties in Arizona, Nevada, Oregon, Kansas, and Kentucky).

110. Alexandra Harwin, Op-Ed, "Ending the Alimony Guessing Game," *N.Y. Times,* July 4, 2011, A19; *see also* Kisthardt, *supra* n.8 at 63; *Report of the Joint MBA/BBA Alimony Task Force: Alimony or Spousal Support Guidelines Where There are No Dependent Children* (2009), available at *http://www.bostonbar.org/prs/nr_0910/BBA_MBA_Alimony_Task_Force_Alimony_Report.pdf.*

111. Although the New Jersey State Bar opposed bills with alimony formulas for duration and amount, it supported the bill that was recently sent to the Governor, which includes duration limits, but enumerates factors for determining alimony. *See* "Legislative Alert: Alimony Legislation," N.J. St. Bar Ass'n, *http://www.njsba.com/resources/gov-affairs/legislative-alert-alimony-legislation.html,* last accessed April 16, 2015.

112. *See e.g.,* Colleen O'Connor, "New Law Changes Alimony Landscape for Divorcing ColoradoCouples," *Denver Post* (Oct. 18, 2013, 4:46 p.m.), *http://www.denverpost.com/breakingnews/ci_24340928/new-law-changes-alimony-landscape-divorcing-colorado-couples,* last accessed April 16, 2015 (noting that the Family Law Section of the Colorado Bar unanimously opposed a 2012 bill resulting in its withdrawal); David Gialanella, "State Bar Fights Proposal to Base Alimony on Duration of Marriage," *N.J.L.J.* (Feb. 28, 2014), *http://www.njlawjournal.com/id=1202645125573/State-Bar-Fights-Proposal-To-Base--Alimony-on-Duration-of-Marriage?slreturn=20140625205200;* "Nassau Cnty Bar Ass'n Resolution Opposing Presumptive Spousal Maintenance Guidelines and Formulas" (2014), available at *http://nylawyer.nylj.com/adgifs/decisions14/070714nassaubar.pdf,* last accessed April 16, 2015.

113. Texas caps the amount of maintenance that court may award in alimony. Tex Family Code Ann. § 8.051. Oklahoma provides an equation for computing the division of an active duty and reservists military members' retirement or retainer. Okla. Stat. tit. 43, § 134.

114. Pa. R. Civ. P. 1910.16-4(a).

115. Jackson, *supra* n.7.

116. N.Y. Dom. Rel. Law § 236 (5-a).

117. *Id.*

118. N.Y. Dom. Rel. Law § 236 (5-a).

119. O'Connor, *supra* n. 113.

120. *See, e.g.*, Jess Bidgood, "Alimony in Massachusetts Gets Overhaul, with Limits," *N.Y. Times*, Sept. 27, 2011, at A11 (discussing how Steve Hitner, president of Massachusetts Alimony Reform, had to declare bankruptcy after being unable to modify his alimony payments); O'Connor, *supra* n. 113 (discussing how Mercedes Aponte joined the Women's Lobby of Colorado, which helped push the alimony formula through Colorado's legislature, when she fell into poverty after receiving an award of 18 months of spousal support following a 12-year marriage and lost her job).

121. Mass. Gen. Laws ch. 208 § 53.

122. *Id.*

123. Elizabeth Benedict, "The New Alimony Laws in MA—And Maybe In FL, NJ, CT, and OR?," Huffington Post (Mar. 7, 2012, 12:50 p.m.), *http://www.huffingtonpost.com/elizabeth-benedict/the-new-alimony-laws-in-m_b_1313015.html*, last accessed April 16, 2015. ("It is widely understood among lawmakers and lawyers that without Steve Hitner's tenacity and the political clout of Mass Alimony Reform, reform would not have happened.").

124. *Id.*

125. *Id.*

126. Levitz, *supra* n.5.

127. Benedict, *supra* n.124.

128. *Id.*

129. Although there has not been much media coverage surrounding the Illinois bill, according to WESTLAW, Illinois's bill had passed both Houses and was awaiting approval by the Governor at the time this article was written. S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013). New Jersey's bill has gone to Governor Christie for signature, but a compromise resulted in excluding a formula for determining the amount and duration of alimony. *See* S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014); David Perry Davis, "N.J. Alimony Bill Falls Far Short of Needed Reforms," Press Atlantic City (July 11, 2014, 12:01 a.m.), *http://www.pressofatlanticcity.com/opinion/commentary/david-perry-davis-n-j-alimony-bill-falls-far-short/article_932478cc-5744-5d4f-a88f-e99e3f4cd475.html*, last accessed April 16, 2015; Andrew Seidman, "N.J. Lawmakers Pass Bill to Limit Alimony Payments," *Philly.com* (July 2, 2014, *http://articles.philly.com/2014-07-02/news/51005775_1_alimony-payments-alimony-reform-* divorce-cases). Many proponents of the alimony formula are disappointed with the version of the Bill that went to the governor. *See* David Perry Davis, *N.J. Alimony Bill Falls Far Short of Needed Reforms*, Press Atlantic City (July 11, 2014, 12:01 AM), *http://www.pressofatlanticcity.com/opinion/commentary/david-perry-davis-n-j-alimony-bill-falls-far-short/article_932478cc-5744-5d4f-a88f-e99e3f4cd475.html*, last accessed April 16, 2015; Andrew Seidman, *N.J. Lawmakers Pass Bill to Limit Alimony Payments*, Philly.com (July 2, 2014, *http://articles.philly.com/2014-07-02/news/51005775_1_alimony-payments-alimony-reform-divorce-cases*, last accessed April 16, 2015) ("We need strict guidelines." (quoting Stuart D. Meissner)). According to WESTLAW, the New York bill was before the Committee on Assembly Judiciary at the time this article was written. *See* Assemb. B. 9606, 237th Leg. Sess. (N.Y. 2013).

130. Colo. Rev. Stat. 14-10-114.

131. *See* Colo. Rev. Stat. 14-10-114(3)(b)(II)(A)–(C). Mass. Gen. Laws ch. 208 § 53(e); S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013); S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).

132. Colo. Rev. Stat. 14-10-114(3)(b)(II)(A); Mass. Gen. Laws ch. 208 § 53(e)(9).

133. Assemb. B. 9606, 237th Leg. Sess. (N.Y. 2013).

134. Mass. Gen. Laws ch. 208 § 53; S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).

135. Mass. Gen. Laws ch. 208 § 53; S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).

136. H.B. 2559, 77th Leg. Assemb., (Or. 2013).

137. Both Mass. Gen. Laws ch. 208 § 53 and New Jersey's failed bill allowed recipient spouses to receive alimony

for 50 percent of the duration of the marriage if the marriage lasted from less than five years; 60 percent if the marriage lasted more than five, but less than ten years; 70 percent if the marriage lasted more than 10 but less than 15 years; 80 percent if the marriage lasted more than 15 but less than 20 years; and an indefinite duration if the marriage lasted more than 20 years. Mass. Gen. Laws ch. 208 § 53; S.B. 488, 216th Leg., 1st Ann. Sess. (N.J. 2014).

138. Colo. Rev. Stat. 14-10-114 (Awarding 40 percent of the higher earner's income minus 50 percent of the lower earner's income); S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013) (Awarding 40 percent of the payor's gross income minus 50 percent of the payee's gross income). Illinois' proposed statute also includes a provision that the amount of alimony combined with the recipient's gross income may not result in an amount greater than 40 percent of the combined gross income of both parties. S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013).

139. Colo. Rev. Stat. §14-10-114(3)(b).

140. *Id.*

141. S.B. No. 3231, 98th Gen. Assemb., 2d Reg. Sess (Ill. 2013).

142. English, *supra* n.19.

143. *See* Jackson, *supra* n.7.

144. Brenda L. Storey, "Surveying the Alimony Landscape: Origin, Evolution and Extinction," 25 *Fam. Advoc.* 10, 12 (2003). For example, some have critiqued the formulas for treating spouses who stayed at home with children and spouses who never had children the same way. Gialanella, *supra* n.113.

145. Zaleski v. Zaleski, No. SJC-11391, 2014 WL 3760809, at *3 (Mass. Aug. 1, 2014).

146. *Id.* at *3 n. 13.

147. Unif. Marriage and Divorce Act § 316(a).

148. 45 C.F.R. § 303.106.

149. *See, e.g.*, Theisen v. Theisen, 708 N.W.2d 847, 855 (Neb. Ct. App. 2006).

150. *See, e.g.*, Blaufuss v. Ball, 305 P.3d 281, n. 8 (Alaska 2013) ("retroactive modification is not allowed in the majority of states."(citing Wirtz v. Wirtz, 2010 Alas. Lexis 32, at 14 n. 48 (Alaska, Mar. 24, 2010)).

151. *See* Steffens v. Peterson, 503 N.W.2d 254, 259 (S.D. 1993).

152. *See Restate. Restitution* § 74 ("[A] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution of the judgment if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final").

153. *See, e.g.*, Jacobson v. Jacobson, 502 N.W.2d 869, 874 (Wis. 1993).

154. *See, e.g.*, Mich. Comp. Laws § 552.603(5); Dodd v. Dodd, 499 P.2d 518, 523 (Kan. 1972); *see also* Langson v. Langson, 764 A.2d 378, 388 (Md. Ct. Spec. App.) (noting that parties could have included provisions in the separation agreement, but failed to do so).

155. *See* Schneider v. Schneider, 125 N.Y.S.2d 739, 741 (N.Y. Sup. Ct. 1954).

156. *See, e.g.*, Steffens v. Peterson, 503 N.W.2d 254, 259 (S.D. 1993) ("Alimony payments which fell due prior to modification were vested, since South Dakota has not held that remarriage automatically terminates alimony").

157. *See* Assemb. Comm. Substitute Asssemb. 845, 971 & 1649, 216th Leg. (N.J. 2014). Rhode Island also provides courts with discretion to apply an alimony modification retroactively to the date of a substantial change in circumstances. R.I. Gen. Laws § 15-5-16(b).

158. Mahoney v. Pennell, 667 A.2d 1119, 1121 (N.J. Super. Ct. App. Div. 1995) (citing N.J. Stat. Ann. 2A:17-56.23a).

159. *See* Ark. Code Ann. § 9-12-312(2)(d); Mass. Gen. Laws ch. 208, § 49(a).

160. *See*, Colo. Rev. Stat. 14-10-122(2) (Providing that neither a child support order nor maintenance order may be modified prior to the date of filing); Conn. Gen. Stat. § 46b-86)(a); D.C. Code § 16-913(c); Mich. Comp. Laws § 552.603(2); Minn. Stat. § 518.518A.39; Va. Code Ann. § 20-112; W.Va. Code § 48-5-707.

161. Colo. Rev. Stat. 14-10-122(2)(a)(II); *see also* Utah Code Ann. § 30-3-5(j).

162. *See* H.B. 604, 163d Sess. Gen. Court, 1st year (N.H. 2013). The current New Hampshire law provides that the

court may consider a petition to extend permanent alimony when the petition is made within five years of the termination date of the permanent alimony order. N.H. Rev. Stat. Ann. 458:19(VII).

163. Cal. Family Code § 4326. The language of the statute initially provided that it would only be in effect temporarily, however, the legislature passed a bill in June 2014 making the statute permanent. *See* Assemb. B. No. 414, Reg. Sess. (Cal. 2013).

164. Cal. Family Code § 4326(d).

165. Cal. Family Code § 4326(b).

166. *See* Streit v. Streit, 237 A.2d 662, 663 (N.Y. App. Div. 1997) (refusing to modify alimony because it was foreseeable that parties' children would become emancipated). But *see* N.Y, Dom. Rel. Law § 248(b)(1).

167. *See supra* n.107.