Reforming Alimony:
Massachusetts Reconsiders Postdivorce Spousal Support

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ABSTRACT

When John Adams wrote the Massachusetts Constitution during the American Revolution, he included a provision allowing for alimony awards in divorce cases. Thus Massachusetts has recognized awards of spousal support longer than any other state. From a national perspective, the evolution of alimony law began to undergo changes in the last half of the twentieth century in many states, including time limits on the obligation, use of rehabilitative orders, and greater flexibility to modify. The introduction of equitable property division in divorce actions in the last decades of the twentieth century throughout the United States helped to reduce the need for alimony in many cases. Changes in societal habits, including the growing ability of women to become self-supporting, played a role in diminishing expectations of spousal support over recent decades. In the meantime, efforts were being made to develop models for alimony legislation for states to consider, but few had any national impact. Certainly, these influences played a role in Massachusetts, just as they did in other states. But in practice, the idea of maintaining a lifetime lien on the income of alimony obligors also persisted among many lawyers and judges. The refusal of the Massachusetts Supreme Judicial Court in 2010 to create a presumption in favor of an obligor's request to be relieved of his alimony obligation to his long-divorced wife when he reached the age of full retirement, as defined by the Social Security Act, helped to set off a discussion in the bar and among the public about whether alimony needed rethinking. It led to an effort to reform the statutory standards governing alimony, which eventually led all the major bar associations in the state, as well as members of both houses of the state legislature and the governor, to work together to produce a modern law on spousal support. This article reviews the substance of

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this new law, referred to as the Alimony Reform Act of 2011, and some of its implications.

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I. INTRODUCTION

The subject of alimony has again come into the national spotlight in recent years, and the Massachusetts legislature has taken the lead in rethinking the subject of postdivorce spousal maintenance.[1] The attempt to "reform" alimony has undergone various phases in the United States,[2] and the Massachusetts

1. *See* L.J. Jackson, *Alimony Arithmetic: More States Are Looking at Formulas to Regulate Spousal Support*, A.B.A. J., Feb. 2012, at 15, 15 (noting Massachusetts Alimony Reform Act of 2011 "would dramatically change how maintenance payments are awarded," alongside growing national reconsideration of place of alimony in family law).

2. For insight into various efforts to reform the ancient law of spousal support in the context of modern family law, see generally Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM.

Alimony Reform Act (Alimony Reform Act of 2011) is the latest and the most comprehensive of such legislation.[3] Other states will likely watch courts' interpretation and enforcement of the new statute because, notwithstanding the legislature's attempt to draft a specific and comprehensive law, there is potential for dispute as to particular issues.

The power of a court to authorize an order requiring one divorcing party to pay spousal support to the other has been recognized by statute in Massachusetts almost since the creation of the Commonwealth, and had its origins in the practice of the ecclesiastical courts of England even before the American Revolution.[4] Authorization for enactment of laws governing alimony was provided for in the Massachusetts Constitution by part 2, chapter 3, article V, which specifically mentions "causes of marriage, divorce, and alimony."[5] The first statute authorizing the courts to hear and determine divorce cases, enacted in 1786, provided for alimony awards.[6] While the statute has been amended over time, the concept of alimony has remained an intimate part of Massachusetts divorce law. The word "alimony" as used in this article means some form of spousal monetary payment, following a divorce of the payor and the recipient,[7] pursuant to a court order or an agreement.[8]

Although an absolute right to alimony never existed in Massachusetts law,[9] for many years in actual practice, courts tended to view alimony as a method of enforcing a husband's marital obligation to support his wife.[10] The law, prior

L.Q. 29 (2004) (describing alimony reform efforts in New Mexico and comparing to Arizona, California, Kansas, Michigan, Nevada, Oregon, Pennsylvania, and Virginia). For articles reviewing attempts to modernize the law governing alimony in various states and Canada, see generally *Alimony Issue*, 38 FAM. L.Q. 1 (2004).

3. Alimony is entirely a matter of statutory law, and in the absence of statutory authority there is no common-law basis for ordering one person to support another based solely on the fact that they were previously married to each other. *See* Orlandella v. Orlandella, 347 N.E.2d 665, 665 (Mass. 1976) (holding statutes governing alimony provide complete basis for civil liability for maintenance between husband and wife).

4. An historical relic of the influence of the English ecclesiastical courts on the development of family law is still found in Massachusetts law, which provides that "if the course of proceeding is not specially prescribed," the courts may hear and determine cases "according to the course of proceedings in ecclesiastical courts or in courts of equity." *See* MASS. GEN. LAWS ANN. ch. 208, § 33 (West 2012).

5. MASS. CONST. pt. 2, ch. 3, art. V.

6. Act of Mar. 16, 1786, ch. 69, 1785 Mass. Acts 564.

7. In Massachusetts such payments are called "alimony," but in some other states they are called "maintenance" or "spousal support." The American Law Institute (ALI) calls such payments "compensatory spousal payments." *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 5:01-5:13 (2000) (outlining different denomination of compensatory spousal payments associated with divorce, distinguishable from child support and property division).

8. For the most part, this article is concerned with alimony ordered by courts, or court orders interpreting alimony agreements that use statutory language. Because alimony contracts are generally enforceable if reasonable, even if payments are not required or expressly provided for by statute, the questions about spousal support obligations or rights imposed by law are the appropriate focus when discussing changes in the law.

9. Brown v. Brown, 111 N.E. 42, 43 (Mass. 1916) (explaining alimony statute based on duty of husband to provide for his wife).

10. "[O]ne important purpose of alimony is to provide a substitute for the spousal right of support which

to the legislative amendment of the alimony statute in 1974, tended to bolster this concept by providing for alimony to a wife while the husband was limited to awards "in the nature of alimony."[11] The 1974 amendment eliminated gender distinctions, at least in theory, by "cut[ting] to the quick the concept that alimony is based on the husband's duty to support his wife."[12] Finally, the enactment of the Alimony Reform Act of 2011 forever ended the concept of any historical connection to gender status or outdated gender stereotypes.[13] The court may award alimony to "either of the parties" upon a divorce or on a complaint brought after a divorce if the court has personal jurisdiction over both spouses.[14]

II. THE IMPACT OF EFFORTS TO DEVELOP NATIONAL ALIMONY STANDARDS

As can be inferred from some portions of the Alimony Reform Act of 2011, the drafters gave some consideration to the widely noted American Law

exists during marriage." 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 223 (2d ed. 1987). Even after the passage of the Married Women's Property Act (codified at MASS. GEN. LAWS ANN. ch. 209, §§ 2-13 (West 2012)), which allowed married women financial independence from their husbands, and more women began to enter the employment market, the concept of alimony had become so deeply rooted in the thinking of lawyers, judges, and the general public, that until very recent decades, courts continued to order permanent alimony in many divorce cases. *See* Lara Lenzotti Kapalla, Comment, *Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form*, 2004 MICH. ST. L. REV. 207, 211 (2004) (discussing continuance of alimony awards even after states passed Married Women's Property Act). For views about the evolution of alimony law in recent decades, see generally Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001); Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163 (2007); Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL LAW. 61 (2008); Laura W. Morgan, *Where Are We Now? Current Trends in Alimony Law*, FAM. ADVOC., Winter 2012, at 8; David S. Rosettenstein, *Alimony and Alimony Surrogates and the Imputation of Income in American Family Law*, 25 QUINNIPIAC L. REV. 1 (2006); Cynthia Lee Starnes, Commentary, *Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles*, 8 DUKE J. GENDER L. & POL'Y 137 (2001).

11. *See* Topor v. Topor, 192 N.E. 52, 53 (Mass. 1934) ("What is taken from a wife's estate and is received by the husband under a decree based on our statute must be 'in the nature of alimony.'"). Under the law before 1974, an award in the nature of alimony to the husband must have been based on the theory of providing for his support and maintenance. *Id.* at 52-53.

12. Monroe L. Inker et al., *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U. L. REV. 1, 15 (1975) (discussing 1974 amendments to Massachusetts alimony law).

13. *See* Alimony Reform Act of 2011, ch. 125, 2011 Mass. Acts 574 (codified at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)); Megan Deeley, Note, *Splitting the Difference: The Historical Context and Practical Ramifications of the 2012 Massachusetts Alimony Reform*, 30 MASS. FAM. L.J. 13, 18 (2012) (concluding Alimony Reform Act of 2011 preserves judicial flexibility and discretion). *See generally* Gabrielle Clemens & Jared Wood, *The Massachusetts Alimony Reform Act of 2011*, 26 AM. J. FAM. L. 95 (2012) (providing examples of Alimony Reform Act of 2011's possible applications to diverse factual situations); Maureen McBrien, *The Impact of Cohabitation Under the Alimony Reform Act of 2011*, 30 MASS. FAM. L.J. 39 (2012) (interpreting cohabitation provisions of MASS. GEN. LAWS ANN. ch. 208, § 49(d) (West 2012)).

14. MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012).

Institute's *Principles of the Law of Family Dissolution* (ALI *Principles*).[15] As discussed below, some of the ALI *Principles* were partially incorporated into the final legislation. However, the ALI *Principles* were not uniformly incorporated into the Massachusetts legislation, and in many places, the text of the Alimony Reform Act of 2011 varies widely from the ALI *Principles*. The ALI *Principles* employ concepts such as "domestic partnerships," which are unknown in Massachusetts law, while recognizing consideration of premarital cohabitation contributions and rehabilitative alimony, which the new Massachusetts law does recognize. Presumably, Massachusetts courts and attorneys will be free to cite the ALI *Principles* when relevant, but care should be exercised to distinguish Massachusetts statutory law and the ALI *Principles* when they differ in material respects.

Various efforts made to develop a national uniform alimony law have been unsuccessful to date. When the National Conference of Commissioners on Uniform State Laws (NCCUSL) was established in 1892, it was thought that the best potential for development was a uniform commercial law and a uniform law on marriage and divorce, which would include provisions on spousal support and maintenance.[16] However, decades passed while the Uniform Commercial Code rapidly found acceptance, and the Uniform Marriage and Divorce Act (UMDA) floundered until its eventual release in 1970.[17] The UMDA seems less influential than the ALI *Principles* on the drafters of the Alimony Reform Act of 2011, although there are some similarities. For example, section 308(b) of the UMDA suggested that alimony cannot be based on marital misconduct and must be limited to a period of time deemed just, rather than a permanent order; similar standards were not expressly found in Massachusetts law until the enactment of the Alimony

15. *See* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution*, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 573-76 (2008) (noting 1187 page ALI *Principles* received much praise when proposed, and yet not widely enacted or incorporated into state legislation or court decisions). Although the ALI *Principles* have not been broadly incorporated into Massachusetts family law, Massachusetts was among the first states to cite them in court decisions on particular topics. *See* T.F. v. B.L., 813 N.E.2d 1244, 1257-58 (Mass. 2004) (Greaney, J., concurring in part and dissenting in part) (arguing for equitable basis for imposing child support, based on ALI *Principles*); *In re* Custody of Kali, 792 N.E.2d 635, 641-43 (Mass. 2003) (citing but not applying ALI *Principles* regarding need to preserve pre-existing relationship between primary caretaker and child when possible); Youmans v. Ramos, 711 N.E.2d 165, 171 (Mass. 1999) (citing ALI *Principles* for de facto parent concept).

16. *See* UNIF. MARRIAGE & DIVORCE ACT prefatory note (1973).

17. The UMDA was amended in 1971 in response to some concerns raised by the American Bar Association's Section of Family Law. However, states did not widely enact the UMDA and in fact it was finally downgraded by NCCUSL from a "uniform act" to the status of a "model act." *See* John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 684-85 (2008) (noting only eight states enacted UMDA); *see also* Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its Policies*, 1991 BYU L. REV. 43, 43-45 (1991) (noting controversy following NCCUSL's proposal of UMDA).

Reform Act of 2011.[18] Section 316(b) of the UMDA also provided for termination of an alimony obligation on the death of either party or the remarriage of the alimony recipient in the absence of an agreement providing otherwise, a legal standard that was in some doubt in Massachusetts until the enactment of the Alimony Reform Act of 2011.[19]

Prior efforts to provide national standards to govern alimony may appear to contain similarities to the Alimony Reform Act of 2011; however, these proposals had only incidental impact on the drafters of the Alimony Reform Act of 2011. While other states will continue to legislate in accord with their own concepts of fairness, the Alimony Reform Act of 2011 could provide a potential model for consideration elsewhere.

Some other state statutes contain a few provisions that are also included in the Alimony Reform Act of 2011, but the new Massachusetts law is distinctive because it constitutes a comprehensive effort to address numerous issues in alimony law. While a number of states have addressed particular issues, such as the use of time-limited orders for rehabilitative alimony, few have attempted to comprehensively provide guidelines and standards to the same extent as Massachusetts. The common pattern in the United States has been for the legislature to enact a statute authorizing spousal support orders, with some specific language, while leaving it to the courts to fill out the law based on factual problems raised in specific cases. Many of these judicial decisions will be useful in attempting to understand the legislative intent of the Massachusetts Legislature and the proponents of the new law in drafting the Alimony Reform Act of 2011.

III. CONSIDERATION OF FEDERAL TAX CONSEQUENCES

From a national perspective, the use of alimony has been substantially affected by the federal Internal Revenue Code, which makes qualified spousal support payments deductible to the payor.[20] The alimony provisions of the Internal Revenue Code have in part preserved the use of qualifying spousal support as a useful method of tax avoidance. Nationally, alimony is used less in divorce cases than it was a half century ago, but the tax advantages of the alimony deduction continue to make it a relevant and useful tool in divorce

18. Chapter 208, section 53(a) of the Massachusetts General Laws does not include the factor of "the conduct of the parties," which was found in the prior alimony law before the enactment of the Alimony Reform Act of 2011. Section 48 added the words "for a reasonable length of time" in the definition of alimony.

19. Chapter 208, section 49(a) of the Massachusetts General Laws, as added by the Alimony Reform Act of 2011, provides that general term alimony shall terminate on the death of either party or the remarriage of the recipient. The court may require the payor to buy life insurance or provide other security in the event of his or her death. The parties are always free to make a different contractual arrangement in the event of death or remarriage. *See* ch. 208, § 49(e).

20. *See* 26 U.S.C. § 71(a) (2006) (establishing alimony received includable in gross income of recipient); *id.* § 215(a) (allowing deduction from gross income of alimony payor).

planning. Lawyers advising their clients about alimony will often explain the tax advantages and/or consequences of using alimony as part of divorce financial planning. As long as the tax law remains in effect simultaneously with the Alimony Reform Act of 2011, some care must be exercised in understanding the potential consequences of the Massachusetts reform.[21] The new alimony law expressly recognizes that in fixing or modifying alimony, the court can deviate from the general limits set out in the statute,[22] in recognition of the "tax considerations applicable to the parties."[23] While there were prior court decisions recognizing consideration of tax issues, this is the first instance in which the Massachusetts statute expressly recognizes tax considerations as a factor in setting and modifying alimony.[24] There may be a substantial danger of recapture with some of the new forms of alimony allowed by the Alimony Reform Act of 2011. For example, transitional alimony has a cap of three years under the Alimony Reform Act of 2011.[25] If a payor claims the alimony deduction for payments of transitional alimony, the Internal Revenue Service could recapture these amounts on the payor's returns.[26]

The Alimony Reform Act of 2011 does take express note of the federal tax law that permits a state court, or an agreement, to fix alimony as child support, commonly called unallocated or undifferentiated alimony.[27] The Alimony Reform Act of 2011 provides that the court has the power, recognized in the *Massachusetts Child Support Guidelines*, to cast a presumptive child support order as unallocated or undifferentiated alimony in relation to child support.[28]

21. *See* David H. Lee, *Pitfalls of the New Massachusetts Alimony Law: Recomputation and Alimony Fixed as Child Support*, MASS. LAW. WKLY., Mar. 8, 2012, http://masslawyersweekly.com/2012/03/08/pitfalls-of-the-new-massachusetts-alimony-law-recomputation-and-alimony-fixed-as-child-support/ (noting while not yet any authoritative application of tax laws to Alimony Reform Act of 2011, particular attention should be paid to issues of recapture of alimony deductions by tax authorities and provisions relating to alimony fixed as child support).

22. Under the provisions of the Alimony Reform Act of 2011, alimony should generally not exceed the recipient's needs or thirty to thirty-five percent of the difference between the gross incomes of the parties at the time the order issues. *See* Alimony Reform Act of 2011, ch. 124, sec. 3, § 53(b), 2011 Mass. Acts 574, 578 (codified at MASS. GEN. LAWS ANN. ch. 208, § 53(b) (West 2012)).

23. *Id.* sec. 3, § 53(e)(2).

24. Other states have long had express statutory recognition of tax considerations as an appropriate factor in setting alimony. While tax considerations were not previously recognized by statute in Massachusetts, the Massachusetts Appeals Court noted the federal tax policy discouraging front loading alimony in *Griffith v. Griffith*, 509 N.E.2d 38, 40 n.1 (Mass. App. Ct. 1987). For an example of a state statute expressly allowing consideration of tax issues, see N.Y. DOM. REL. LAW § 236(B)(6)(a)(14) (McKinney 2012) (advising courts shall consider tax consequences to each party in determining amount and duration of spousal maintenance).

25. *See* Alimony Reform Act of 2011, sec. 3, § 52(a) (codified at MASS. GEN. LAWS ANN. ch. 208, § 52(a) (West 2012)).

26. *See* 26 U.S.C. § 71(f) (2006) (allowing recapture of amounts deducted as alimony when excess front-loaded alimony payments).

27. *See id.* § 71(c) (permitting fixed alimony as child support); Alimony Reform Act of 2011, sec. 3, § 53(d) (codified at MASS. GEN. LAWS ANN. ch. 208, § 53(d) (West 2012)) (referencing "unallocated or undifferentiated alimony and child support").

28. Alimony Reform Act of 2011, ch. 124, sec. 3, § 53(d), 2011 Mass. Acts 574, 578 (codified at MASS.

While child support payments as such are not entitled to the favorable tax treatment accorded to deductible alimony payments,[29] the order should not terminate or be reduced on some event related to the child, such as the child reaching the age of majority, reaching a certain income level, dying, marrying, leaving school or the parent's household, or gaining employment.[30]

IV. ALIMONY AND ITS SPOUSAL SUPPORT FUNCTION

The general underlying concept of spousal support is based on the relatively simple proposition that when a marriage ends, and one party who is financially dependent has needs that can be met by the other divorcing spouse, the court has discretion to order alimony. "[T]he . . . authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay."[31] This accords with the definition of alimony provided in the Alimony Reform Act of 2011 as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support."[32] The definition in the Alimony Reform Act of 2011 adds the words "for a reasonable length of time, under a court order."[33] The previous enactment of the alimony law in 1974[34] did not alter the fundamental purpose of alimony, which is to provide economic support for a divorcing dependent spouse in need by a spouse who has the ability to pay.[35] That formulation remains in place under the Alimony Reform Act of 2011, independent of considerations of gender. Also remaining relevant is the earlier appeals court

GEN. LAWS ANN. ch. 208, § 53(d) (West 2012)); *see* CHILD SUPPORT GUIDELINES § IIA (Commonwealth of Mass. Admin. Office of the Trial Courts 2009); *see also* CHARLES P. KINDREGAN, JR. & MONROE L. INKER, KINDREGAN AND INKER'S MASSACHUSETTS DOMESTIC RELATIONS RULES AND STATUTES ANNOTATED 362 (2012). *See generally* Melvyn B. Frumkes, *Unallocated Alimony and Child Support Can Be All Taxable/Deductible Alimony*, FLA. B.J., June 2006, at 72 (discussing how unallocated alimony for child support may qualify as deductible alimony).

29. *Compare* 26 U.S.C. § 215(a) (allowing payor deductions for qualified alimony payments), *with id.* § 71(c)(1) (establishing payments for support of payor's children not deductible as alimony). Even if labeled as "alimony," payments will be fixed as child support if they are reduced upon the happening of a contingency relating to a child of the payor or at a time clearly associated with such a contingency. *Id.* § 71(c)(1)-(2).

30. Temp. Treas. Reg. § 1.71-1T (1984) (defining unallocated alimony payments fixed as child support).

31. Gottsegen v. Gottsegen, 492 N.E.2d 1133, 1138 (Mass. 1986), *abrogated by* Keller v. O'Brien, 683 N.E.2d 1026 (Mass. 1997); *see also* Partridge v. Partridge, 436 N.E.2d 447, 448-49 (Mass. App. Ct. 1982) (noting spouse's need for support in relation to "respective financial circumstances of the parties" crucial issue in alimony dispute). In *Caveney v. Caveney*, 960 N.E.2d 331, 342 (Mass. App. Ct. 2012), the appeals court affirmed the trial court's alimony award, in which the trial judge stated that "the wife had the requisite need and the husband had the requisite ability to pay alimony to approximate the standard of living enjoyed by the parties during the marriage."

32. Alimony Reform Act of 2011, sec. 3, § 48 (codified at MASS. GEN. LAWS ANN. ch. 208, § 48 (West 2012)).

33. *Id.* The phrase "under a court order" distinguishes alimony under a judgment or order from payments that a party obligates himself or herself to make to the other through a contract.

34. *See* Act of July 19, 1974, ch. 565, 1974 Mass. Acts 544 (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)).

35. Heins v. Ledis, 664 N.E.2d 10, 16 (Mass. 1996).

explanation that "[w]hen a spouse's employment prospects are limited, and the other has an income-producing occupation, other factors being also considered, the court may be more inclined to grant alimony."[36]

V. THEORIES OF ALIMONY

One of the difficulties in any "reform" of long-term alimony is lack of any consistent theory for the reasons that spousal support is justified after divorce, in many cases as a kind of permanent lien on the income of the obligor spouse. This is particularly controversial because in many cases such orders seem to be gender-based, even though the law outlaws a gender basis for alimony. The ALI suggested a need for continued consideration of gender by noting that "wives continue, in the great majority of cases, to . . . care for their children, in reliance upon continued market labor by their husbands."[37] This reliance "typically results in a residual loss in earning capacity that continues after the children no longer require close parental supervision."[38] This, of course, is factually true in many marriages, but as an operating principle for reform, it does not eliminate gender considerations in spousal support cases and does not apply to all situations. Where, however, in a long-term marriage a substantial difference between the earning capacities of the spouses has materialized due to the parties assuming different roles over the years, then a reason for what the Massachusetts statute calls "general term alimony" can be justified, not by the genders of the parties, but by these economic differences. Additional justification for long-term alimony awards can be found in the traditional argument for alimony that the law should try to avoid casting support burdens on the taxpayers if possible, and the fact that one party leaves the marriage with an inability to be self-supporting due to the nature of the marital role-playing chosen voluntarily by the spouses. Further, some commentators propound the idea that when the financial consequence of a failed marriage is a reduction of a spouse's earning capacity compared to what she would have earned if she had not married, then general term alimony may be awarded.[39] The Alimony Reform Act of 2011 seems to accept this lost opportunities theory by including the "lost economic opportunity as a result of the marriage" in its list of factors to consider in determining the form, amount, and duration of alimony.[40]

What is interesting and helpful about the new alimony law in Massachusetts

36. Woodside v. Woodside, 949 N.E.2d 447, 454 (Mass. App. Ct. 2011) (quoting CHARLES P. KINDREGAN, JR. & MONROE L. INKER, FAMILY LAW AND PRACTICE: WITH FORMS 624 (3d ed. 2002)).

37. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.05 reporter's notes, cmt. c (2002).

38. *Id.* § 5.05 cmt. a; *see* Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 5 (2008) (noting divorce law leaves caretakers in economic distress by failing to account for reduced earning capacity).

39. *See* Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 53-54 (1989).

40. Alimony Reform Act of 2011, ch. 124, sec. 3, § 53(a), 2011 Mass. Acts 574, 578 (codified at MASS. GEN. LAWS ANN. ch. 208, § 53(a) (West 2012)).

is that the drafters recognized four different kinds of alimony, not one of which is based on any one theory. In addition to general term alimony, the new statute also authorizes the courts to award more time-limited support to allow the recipient the opportunity to become self-supporting rather than continue in a state of dependency; this is called "rehabilitative alimony."[41] The Alimony Reform Act of 2011 also recognizes another type of order frequently referred to as "reimbursement alimony."[42] This is actually quite distinct from the theory that underlies other forms of alimony and is, in truth, simply a form of justifiable restitution rather than classical alimony. It has been explained as a form of gain recognition, i.e., capitalized earnings attributable to the additional education of the obligor spouse by the efforts of the recipient spouse.[43] Finally, the Alimony Reform Act of 2011 recognizes a practical kind of spousal payment which does not fit under any other accepted theory, but recognizes that when a family ends, some kind of transitional assistance may be needed by one of the partners in order to be able to start a postdivorce life; this is called "transitional alimony."[44]

VI. ALIMONY UNDER THE 1974 STATUTE

When the provision allowing property assignment in divorce was added to the Massachusetts General Laws by amendment in 1974, the first sentence of the new law simply provided that "[u]pon a divorce or upon petition at any time after a divorce, the court may order either of the parties to pay alimony to the other."[45] This simple provision provided for a Massachusetts court to award alimony after a divorce here or elsewhere, if the court had personal jurisdiction over both parties in or after a divorce judgment. However, while the statute listed factors that the court must consider in setting an alimony order, it did not specify any standards governing the permanency of the award or standards for modification. The law did not provide specific standards for modification, except the longstanding rule that modification of a prior order required a material change in the circumstances.[46] The statute did provide for

41. MASS. GEN. LAWS ANN. ch. 208, § 50(a) (West 2012). For an early example of time-limited alimony awarded by a Florida court, see *Pfohl v. Pfohl*, 345 So. 2d 371, 374-78 (Fla. Dist. Ct. App. 1977), where a husband was awarded eighteen months of alimony to allow him to become self-supporting.

42. Alimony Reform Act of 2011, sec. 3, § 51(a) (codified at MASS. GEN. LAWS ANN. ch. 208, § 51(a) (West 2012)).

43. *See* Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 416-17 (1980).

44. Alimony Reform Act of 2011, sec. 3, § 52(a) (codified at MASS. GEN. LAWS ANN. ch. 208, § 52(a) (West 2012)).

45. Act of July 19, 1974, ch. 565, 1974 Mass. Acts 544 (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)).

46. *See id.*; Act of Jan. 4, 1983, ch. 642, 1982 Mass. Acts 1486-87 (1983) (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)) (allowing for revision of support orders); Pagar v. Pagar, 397 N.E.2d 1293, 1294 (Mass. App. Ct. 1980) (holding no modification of prior alimony judgment without change

consideration of standards that would apply in both alimony and property assignment incident to divorce, but made no distinction as to the relevant factors between property assignment and alimony. This was somewhat unusual because most states applied statutory factors to alimony separate from those considered in property division.[47]

The authors of the 1974 amendment to the divorce statute apparently intended that by simply providing for alimony without defining the various kinds of potential alimony orders, judges could use their best discretion to formulate alimony judgments affecting divorcing spouses based on the facts of each case and the needs and resources of the parties. In other words, in authorizing alimony, the statute presented judges with a blank slate, as long as the resulting judgment was based on evidence of the circumstances of each case and justified by findings of fact made by the court.[48] The authors of the 1974 law also intended to tie alimony and property division closely together, as shown by the fact that both spousal support and property assignment were governed by the same controlling factors. The new Alimony Reform Act of 2011 separates these factors into different sections of chapter 208 of the Massachusetts General Laws, but keeps a connection by amending section 34 of chapter 208 to provide that in addition to other factors, the court is to consider the "amount and duration of alimony" when dividing property.[49]

By the turn of the twenty-first century, the original concept of the 1974 statute, i.e., the ability of courts to use the alimony law in a flexible manner, was gradually fading from legal theory. For example, the 1974 statute could be interpreted to allow time-limited alimony in order to rehabilitate the earning capacity of an alimony recipient,[50] even though this was not expressly provided for in the statute. Although the 1974 statute did not expressly so provide, neither did it bar termination and time-limited alimony in certain circumstances.[51] Also, under the 1974 law there was no bar to the use of restitution orders, often called reimbursement alimony. The statutory language did not expressly provide for restitution orders, but it was believed that courts had inherent equitable power to allow such relief.[52]

in circumstances). *See generally* Alyssa Ann Rower, *Postjudgment Relief: Which Crises or Crossroads Constitute a Substantial Change of Circumstances?*, FAM. ADVOC., Winter 2012, at 32.

47. *See* N.Y. DOM. REL. LAW § 236(B)(5)-(6) (McKinney 2012) (providing for property disposition and postdivorce maintenance).

48. *See generally* Inker et al., *supra* note 12 (discussing revision of prior alimony law in relation to property division in Chapter 565 of Massachusetts Acts and Resolves of 1974, which remained in effect between October 19, 1974 and March 1, 2012, when Alimony Reform Act of 2011 became effective).

49. *See* MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012).

50. *See* Bak v. Bak, 511 N.E.2d 625, 633 (Mass. App. Ct. 1987) (discussing theory of rehabilitative alimony even though not specifically mentioned in statute under enactment of 1974 reform).

51. *See* Ross v. Ross, 734 N.E.2d 1192, 1195 (Mass. App. Ct. 2000) (discussing time-limited alimony, now expressly provided for in MASS. GEN. LAWS ANN. ch. 208, § 48 (West 2012)).

52. *See* Drapek v. Drapek, 503 N.E.2d 946, 950 (Mass. 1987) (citing New Jersey case allowing

Between 1974 and 2011, however, the alimony statute's vagueness caused various judges and lawyers to interpret it differently. This led many bar groups, members of the legislature, and other interested persons to finally come together to draft and support a new statute that would more precisely spell out the different kinds of alimony, time limits on alimony awards, and circumstances governing modification. Remarkably, both houses of the legislature unanimously passed the Alimony Reform Act of 2011 and Governor Patrick signed the bill into law on September 26, 2011, effective on March 1, 2012.

The Alimony Reform Act of 2011,[53] is a more specific statute that essentially brings new clarity to the law, changes some of the terminology, and provides specific standards to govern time factors and modification of prior orders. However, general term alimony is still defined in terms of a need for support and the ability of the payor to provide it for a reasonable time. The Alimony Reform Act of 2011 modifies the prior chapter 208, section 34 of the Massachusetts General Laws to essentially remove alimony from section 34, cross-referencing the new alimony provisions at chapter 208, sections 48-55,[54] and leaving provisions regarding assignment of property intact.

VII. ALIMONY DEFINED UNDER THE REFORM ACT

In accord with the Alimony Reform Act of 2011, alimony is defined as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order."[55] The Alimony Reform Act of 2011 recognizes and defines four different kinds of alimony, as follows: (1) "General term alimony" is "the periodic payment of support to a recipient spouse who is economically dependent"; (2) "[r]ehabilitative alimony" is "the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted

restitution when wife supported husband while he studied for MBA degree during short-term marriage).

53. Alimony Reform Act of 2011, ch. 124, 2011 Mass. Acts 574 (codified at MASS. GEN. LAWS ANN. ch. 208, §§ 34, 48-55 (West 2012)).

54. *See id.* secs. 1-2 (codified at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)). Section 34 now provides that

> [u]pon divorce or upon a complaint in an action brought at any time after a divorce, . . . the court of the Commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other under sections 48 to 55, inclusive.

Ch. 208, § 34.

55. MASS. GEN. LAWS ANN. ch. 208, § 48 (West 2012). This provision does not prevent the divorcing parties from making a contract that will govern the terms of alimony payments. *See* Knox v. Remick, 358 N.E.2d 432, 435-36 (Mass. 1976) (noting law encourages divorcing parties to resolve financial issues by fair and reasonable contracts); *see also* ch. 208, § 49(e) ("Unless the payor and recipient agree otherwise, general term alimony may be modified in duration or amount upon a material change of circumstances warranting modification.").

time"; (3) "[r]eimbursement alimony" is a "periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse";[56] and (4) "[t]ransitional alimony" is "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce."[57]

A. The New Standard of Full Retirement Age

Currently no consensus exists in the United States on whether the retirement of an alimony obligor may serve as a basis for modifying the obligation. A number of states consider retirement of an alimony obligor as a potential factor in modification of alimony, but reported cases suggest reluctance to do so.[58] Some courts have determined specific formulas to resolve the retirement issue.[59] Other courts have shown a greater willingness to reduce or eliminate alimony in relation to declining health, rather than the obligor's independent decision to retire.[60] The Massachusetts statute is unusual because it seems to accept the obligor's reaching the full retirement age as set out by the Social Security Administration as presumptively controlling the termination of his or her obligation, except in cases where the court, in entering the order, set a different standard for good cause shown or when there has been a showing by clear and convincing evidence of good cause shown for continuance of the order. It will take time for the courts to apply these standards in a wide range of cases before we can see if, in fact, the new statutory standard will control termination of alimony or if the exception becomes the norm.

The new statutory language regarding retirement of the obligor certainly has

56. Although defined as "support," reimbursement alimony really is not support or alimony in the classic sense, but a form of restitution for the sacrifices made by the recipient spouse during a short-term marriage.

57. *See* ch. 208, § 48 (defining various forms of alimony). As to different kinds of alimony from a national perspective, see generally Morgan, *supra* note 10.

58. *See, e.g.*, Maddox v. Maddox, 612 So. 2d 1222, 1223-24 (Ala. Civ. App. 1992) (denying modification when husband voluntarily retired at age sixty-two); Daley v. Daley, No. 1 CA-CV 09-0389, 2010 WL 1779320, at *1 (Ariz. Ct. App. May 4, 2010) (holding obligor failed to show early retirement due to health or other problems); *In re* Marriage of Stephenson, 46 Cal. Rptr. 2d 8, 11 (Cal. Ct. App. 1995) (holding income attributed if not earning up to capacity and person's earning capacity determines whether retirement of obligor changes circumstances); Husband, J. v. Wife, J., 413 A.2d 1267, 1270 (Del. Fam. Ct. 1979) (suggesting modification not necessary because of obligor's reduction in income when obligee's needs have increased).

59. *See In re* Marriage of Swing, 194 P.3d 498, 501 (Colo. App. 2008) (considering whether modification is warranted on retirement of obligor determined by good faith and reasonableness of retirement decision, including obligor's age, health, and industry practice).

60. *See* Parrett v. Parrett, No. FA780159581S, 2009 WL 3839001, at *1-2 (Conn. Super. Ct. Oct. 14, 2009) (ending sixty-nine-year-old obligor's thirty-year alimony obligation on showing of severe health problems, where Social Security provided obligor's only income); Moniz v. Moniz, 979 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 2008) (finding reduction in husband's alimony warranted where husband retired from law enforcement at normal age of fifty-two and in poor health).

the potential to create a substantial change in alimony law from past practice. In *Pierce v. Pierce*,[61] the Massachusetts Supreme Judicial Court declined to recognize a presumption in favor of terminating general term alimony when an obligor reaches the age at which he or she is entitled to full Social Security benefits, i.e., the generally recognized age of retirement.[62] This controversial decision came in the middle of a period of growing belief about the need to rethink lifetime alimony. The new statute attempts to legislate a clearer standard akin to a presumption in favor of terminating alimony when the obligor reaches the full retirement age; this is the very thing the court declined to do in *Pierce*.

Full retirement age means the payor's normal retirement age at which he or she is eligible to receive full retirement benefits under the federal Social Security Act.[63] This does not mean the "early retirement age" at which a person can opt for partial benefits instead of waiting for full benefits eligibility. The current age of eligibility for full Social Security benefits for persons born during or before 1937 is sixty-five; increased on the basis of a monthly formula for persons born between 1938 and 1942; increased to age sixty-six for persons born between 1943 and 1954; increased on the basis of a monthly formula for persons born between 1955 and 1959; and currently tops off at age sixty-seven for persons born in 1960 and later.[64] Thus, to the extent that the retirement age of the alimony payor is relevant, the Alimony Reform Act of 2011 makes clear that a normal retirement age is based on eligibility to receive full Social Security benefits, not eligibility for reduced benefits if a beneficiary chooses to take early retirement.[65] When the payor actually retires is irrelevant under the statute, except insofar as it might create a change in circumstances warranting a modification of an alimony obligation.

The significance of this introduction of the full retirement age concept into the alimony statute is that "[o]nce issued, general term alimony orders shall terminate upon the payor attaining the full retirement age."[66] In entering an initial alimony order, however, the court may provide for a different

61. 916 N.E.2d 330 (Mass. 2009).

62. *See id.* at 334 (rejecting husband's argument that presumption in favor of ending alimony exists when payor reaches age of full retirement benefits as set by Social Security). In *Pierce*, the court reduced but did not eliminate the husband's alimony obligation to his former wife. *Id.* The husband had retired as a partner in his law firm, but kept "of counsel" status, which enabled him to handle some fee-generating cases. *Id.* at 335. For a discussion of retirement issues in states other than Massachusetts, see generally David S. Dolowitz, *Alimony Options in a Postretirement World: Is Modification Predictable?*, FAM. ADVOC., Winter 2012, at 20.

63. 42 U.S.C. § 416(l) (2006) (defining retirement age).

64. *See* U.S. Soc. Sec. Admin., *Retirement Planner: Full Retirement Age*, SOC. SECURITY ADMIN. (Oct. 18, 2012), http://www.ssa.gov/retire2/retirechart.htm.

65. *See* Alimony Reform Act of 2011, ch. 124, sec. 3, § 48, 2011 Mass. Acts 574, 575 (codified at MASS. GEN. LAWS ANN. ch. 208, § 48 (West 2012)).

66. MASS. GEN. LAWS ANN. ch. 208, § 49(f) (West 2012). For an analysis of the issue of an obligor's forthcoming retirement, see generally Linda J. Ravdin, *Settlement of Spousal Support Claims When the Payor Is Approaching Retirement*, 22 AM. J. FAM. L. 38 (2008).

termination date if good cause is shown in written findings for so doing.[67] The court may also grant an extension of general term alimony beyond the payor reaching the full retirement age provided that it enters written findings showing a material change of circumstances has occurred since the order was entered and that the reasons for the extension are supported by clear and convincing evidence.[68] Of course, the parties have the right to contract for different provisions regarding the termination of general term alimony.[69]

B. The Relevance of Marriage Length

The longer a marriage lasts, the more likely a closer economic union and dependence on support exists. This is why marriage length has long been a traditional alimony factor.[70] Under the statute, marriage length means "the number of months from the date of legal marriage to the date of service of a complaint or petition for divorce or separate support duly filed in a court of the commonwealth or another court with jurisdiction to terminate the marriage."[71]

Chapter 208, section 49 of the Massachusetts General Laws now governs the termination of general term alimony based on the length of a marriage. The continuing alimony obligation is now calculated based upon intervals of how long the marriage lasted, as follows:

67. Ch. 208, § 49(f)(1).

68. *Id.* § 49(f)(2).

69. Massachusetts's public policy favors settling divorce disputes through equitable, enforceable separation agreements, freely entered into by the parties, at least since the legislature repealed the common-law prohibition on contracts between husband and wife with the enactment of chapter 209, section 2 of the Massachusetts General Laws. The Massachusetts Supreme Judicial Court has described the rights of parties to enter into an agreement governing alimony in the following words:

> We see no reason why parties to a separation agreement which anticipates that the marriage will be terminated by divorce may not agree to a permanent resolution of their mutual rights and obligations, including support obligations between them. If a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement was not the product of fraud or coercion, that it was fair and reasonable at the time of entry of the judgment nisi, and that the parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced, absent countervailing equities. This has been the result indicated by this court numerous times in the past.

Knox v. Remick, 358 N.E.2d 432, 435-36 (Mass. 1976); *see also* Ratchford v. Ratchford, 489 N.E.2d 1015, 1017 (Mass. 1986); Moore v. Moore, 448 N.E.2d 1255, 1257 (Mass. 1983).

70. Grubert v. Grubert, 483 N.E.2d 100, 105 (Mass. App. Ct. 1985) (deciding after thirty-two-year marriage, property division and alimony orders should keep spouse in same station of life lived during marriage); Serino v. Serino, 380 N.E.2d 1323, 1324 (Mass. App. Ct. 1978) (noting after thirty-six-year marriage, wife should not be left in straitened circumstances compared to relatively more affluent husband).

71. Ch. 208, § 48 (defining length of marriage). In some states the marriage ends only on the date of the divorce judgment, while in others the test is what date the parties ceased cohabiting. By defining the end date as the date of a divorce filing, separation complaint, or petition, the new statute provides a specific time test to determine the length of the marriage.

> (1) If the length of the marriage is 5 years or less, general term alimony shall continue for not longer than one-half the number of months of the marriage.
>
> (2) If the length of the marriage is 10 years or less, but more than 5 years, general term alimony shall continue for not longer than 60 per cent of the number of months of the marriage.
>
> (3) If the length of the marriage is 15 years or less, but more than 10 years, general term alimony shall continue for not longer than 70 per cent of the number of months of the marriage.
>
> (4) If the length of the marriage is 20 years or less, but more than 15 years, general term alimony shall continue for not longer than 80 per cent of the number of months of the marriage.[72]

When a marriage has lasted longer than twenty years, the court may order alimony for an indefinite length of time, but is not required to do so.[73] This obligation of the payor to pay alimony for an indefinite length of time will terminate upon his or her attaining full retirement age.[74]

C. General Term Alimony

A general term alimony order may last an indefinite length for marriages longer than twenty years, except that when the alimony payor reaches the full retirement age as defined by the Social Security Administration, a presumption exists that his or her obligation to pay terminates.[75] However, when entering the general term alimony order, the court may specify a different termination date than that of the payor's full retirement age, but the court must set forth in writing the findings that justify deviation from the usual rule.[76] The court also has the power to order an extension of the obligation, but only for good cause, with written findings showing that there has been both a material change in circumstances since the order entered, and that the reasons for the extension are supported by clear and convincing evidence.[77]

A general term alimony obligation terminates on the death of either the

72. MASS. GEN. LAWS ANN. ch. 208, § 49(b) (West 2012). The appeals court noted these new durational limitations on general term alimony in dictum explaining that while not relevant in this decision, the Alimony Reform Act "changed the landscape of alimony in the Commonwealth." T.E. v. A.O., 976 N.E.2d 803, 811 n.19 (Mass. App. Ct. 2012).

73. *Id.* § 49(c).

74. *Id.* § 49(f).

75. *See id.* This qualifies the prior rule, which was applied in *Ross v. Ross*, 734 N.E.2d 1192, 1196 (Mass. App. Ct. 2000), where it was held to be error for a judge to order that alimony will terminate when the obligor-husband reaches the age of sixty-five, because this cut-off date has no relation to the wife's needs. The fact that the payor has the ability to work beyond the full-retirement age is not of itself a reason to extend the alimony obligation.

76. Ch. 208, § 49(f)(1).

77. *Id.* § 49(f)(2).

payor or the recipient.[78] This accords with the federal tax code, because in order for alimony payments to qualify as deductible under the Internal Revenue Code, the payor must not have "liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse."[79] However, the death of a payor is different, and the court may require that the payor provide life insurance or other security to pay the recipient in the event of the payor's death during the alimony term.[80]

D. Premarital Economic Partnership

In accord with some prior case law,[81] the alimony statute now expressly permits the court to consider the existence of a premarital economic partnership in a cohabitation situation when determining the length of the marriage.[82] In community-property and most equitable states, assets that a party owned before marriage are considered separate property and therefore not subject to division in divorce. However, Massachusetts law did not incorporate the concept of separate property when it authorized property assignment and alimony in 1974.[83] It was inevitable that the courts would consider the contributions of an economic union that the parties made during premarital cohabitation. Accordingly, the statute allowing the court to consider the premarital economic partnership is not revolutionary in Massachusetts, although it might be considered such in other states.[84]

E. Recipient's Postdivorce Cohabitation

A continuing problem in many states is how to deal with alimony when the recipient cohabits with a third person but is not married to that person. Because the formal remarriage of a recipient terminates his or her alimony rights in most

78. MASS. GEN. LAWS ANN. ch. 208, § 49(a) (West 2012).

79. 26 U.S.C. § 71(b)(1)(D) (2006).

80. Ch. 208, § 49(a).

81. "In determining the duration of a marriage . . . the court should include any period immediately preceding the formal marriage during which the parties lived together as domestic partners . . . ." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.06(4) (2002). Prior Massachusetts law allowed the court to consider contributions to a partner's estate by the other during premarital cohabitation. *See* Moriarty v. Stone, 668 N.E.2d 1338, 1343-44 (Mass. App. Ct. 1996) (considering ten years of premarital cohabitation during which wife made contributions to husband in building his business followed by eight-year marriage); *see also* Londergan v. Carrillo, No. 08-P-1699, 2009 WL 2163186, at *1-2 (Mass. App. Ct. July 22, 2009) (involving dissolution of same-sex marriage in which court treated parties as having been married since their commitment ceremony in 1997, even though unable to enter same-sex marriage until 2004).

82. Ch. 208, § 48 (defining length of marriage).

83. *See* Act of July 19, 1974, ch. 565, 1974 Mass. Acts. 544 (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)) (allowing assignment of all or any part of estate of divorcing person).

84. *But see* Sprouse v. Sprouse, 678 S.E.2d 328, 329-30 (Ga. 2009) (holding court may consider entire relationship of divorcing parties, including premarital cohabitation, even though not provided by state's statute).

states, the alimony payor views cohabitation without marriage as an attempt to preserve alimony while simultaneously enjoying the financial benefits of a new relationship. Some states have enacted statutes that attempt to define when cohabitation is a basis for modifying alimony by examining whether the cohabitation resembles a marital relationship.[85] Other states consider postdivorce cohabitation of the alimony recipient as a basis for terminating maintenance,[86] or at least creating a rebuttable presumption of a change of circumstance.[87] Some states have made a distinction between remarriage of the recipient and cohabitation, treating the latter as irrelevant to modification.[88] Other states agree that cohabitation is irrelevant, but allow it to be considered when evidence shows it affects the financial situation of the alimony recipient.[89] Some states have left the resolution of this issue to the courts on a case-by-case basis, with emphasis on the economic consequences of the cohabitation.[90] Other states ask the judge to resolve the issue based on the totality of the circumstances.[91]

An important provision of the Alimony Reform Act of 2011 attempts to clarify the problem of a recipient cohabiting with another after a divorce without entering into a marriage with that person.[92] Until the enactment of the

85. *See* 750 ILL. COMP. STAT. ANN. 5/510 (West 2012) (establishing, unless parties agree otherwise, future maintenance terminated when recipient cohabits with another on a residential, continuing, conjugal basis); *see also In re* Marriage of Gray, 731 N.E.2d 942, 945 (Ill. App. Ct. 2000) (holding cohabitation factually amounting to husband/wife relationship provides basis for terminating alimony); Markhoff v. Markhoff, 639 N.Y.S.2d 565, 566-67 (N.Y. App. Div. 1996) (asserting alimony recipient's cohabitation with person of opposite sex potentially relevant based on whether couple hold themselves out as spouses, receive mail at each other's residences, own checks in common, and write checks using each other's addresses).

86. *See* S.C. CODE ANN. § 20-3-150 (West 2011) (establishing alimony terminates on continued cohabitation of recipient). *But see In re* Marriage of Vandenberg, 229 P.3d 1187, 1196-97 (Kan. Ct. App. 2010) (holding alimony not denied based only on cohabitation of recipient because fault not factor in alimony; however, financial consequences considered).

87. Wallace v. Wallace, 12 So. 3d 572, 575 (Miss. Ct. App. 2009) (holding proof of cohabitation creates rebuttable presumption of change in circumstances); Wright v. Quillen, 83 S.W.3d 768, 775 (Tenn. Ct. App. 2002) (holding cohabitation of recipient creates rebuttable presumption alimony no longer needed).

88. Myers v. Myers. 560 N.E.2d 39, 43 (Ind. 1990) (holding alimony recipient's cohabitation not basis for modification); Lyon v. Lyon, 728 A.2d 1273, 1275 (Me. 1999) (holding cohabitation not reason to modify alimony order).

89. Cherpelis v. Cherpelis, 914 P.2d 637, 638 (N.M. Ct. App. 1996) (asserting live-in relationship not grounds for modification, but court may consider economic factors); Goldman v. Goldman, 543 A.2d 1304, 1306-07 (R.I. 1988) (noting cohabitation not basis for modification unless changes financial circumstances of alimony recipient).

90. Popp v. Popp, 432 N.W.2d 600, 608-09 (Wis. Ct. App. 1988) (concluding when wife's needs met by fiancé and cohabitant, alimony no longer needed).

91. Smith v. Smith, 748 N.W.2d 258, 262 (Mich. Ct. App. 2008) (indicating whether cohabitation exists depends on totality of circumstances); *In re* Raybeck, 44 A.3d. 551, 555 (N.H. 2012) (noting factors to consider in determining if live-in relationship constituted cohabitation as used in alimony agreement).

92. *See* Alimony Reform Act of 2011, ch. 124, sec. 3, § 49(d), 2011 Mass. Acts 574, 576 (codified at MASS. GEN. LAWS ANN. ch. 208, § 49(d) (West 2012)). In *Raybeck*, the Supreme Court of New Hampshire cited but did not fully adopt the language of the Alimony Reform Act of 2011, when listing factors to consider in determining the meaning of "cohabitation" used in a surviving agreement. 44 A.3d. at 553. The court

new Massachusetts statute, the decision of an alimony recipient to live in a cohabitating, intimate, nonmarital relationship did not terminate the payor's alimony duty unless the recipient waived alimony in the event of cohabitation in a surviving separation agreement.[93] The Alimony Reform Act of 2011 now expressly provides that cohabitation by the alimony recipient is a basis for modifying a right to continue receiving alimony. The law provides that general term alimony shall be suspended, reduced, or terminated when the alimony recipient has maintained a common household with another person for at least three continuous months.[94] The payor must establish the common-household cohabitation of the recipient by showing that the recipient shares a primary residence with or without others, a requirement likely to cause factual

stressed the need to consider the facts and circumstances of each case, primarily the financial arrangements such as sharing of expenses, support of one person by the other, joint bank accounts, shared investments or retirement plans, and life insurance policies. *Id.* at 555. The court also noted that other relevant factors include the age of the cohabitants, evidence of an intimate connection, how the couple holds themselves out and are perceived by others as to an intimate personal commitment, how they use and enjoy property, and whether these factors show that the two people are so closely involved that their relationship resembles that of a marriage.

93. *See* Gottsegen v. Gottsegen, 492 N.E.2d 1133, 1138 (Mass. 1986), *abrogated by* Keller v. O'Brien, 683 N.E.2d 1026 (Mass. 1997) (holding court may not terminate alimony because recipient lives in nonmarital cohabitation relationship with third party); *see also* Bell v. Bell, 468 N.E.2d 859, 860 (Mass. 1984) (enforcing alimony waiver of surviving separation agreement upon cohabitation of recipient); Freedman v. Freedman, 557 N.E.2d 1386, 1386-87 (Mass. App. Ct. 1990) (holding wife's cohabitation that economically benefited her considered change in circumstance justifying modification of alimony); Palmer v. Palmer, 535 N.E.2d 611, 615 (Mass. App. Ct. 1989) (holding surviving separation agreement terminates alimony if ex-wife cohabits, but not if she merely dates or engages in sexual acts with others). Other states have varied laws that are both similar and dissimilar to Massachusetts. *See* Peter L. Gladstone & Andrea E. Goldstein, *Codifying Cohabitation as a Ground for Modification of Termination of Alimony—So What's New?*, FLA. B.J., Mar. 2006, at 45 (noting Florida's rules regarding cohabitation's effect on alimony). *See generally* Cynthia L. Ciancio & Jamie L. Rutten, *Modifying or Terminating Maintenance Based on Cohabitation*, COLO. LAW., June 2009, at 45 (examining Colorado's law regarding effect of cohabitation on termination of alimony); Allan L. Karnes, *Terminating Maintenance Payments When an Ex-Spouse Cohabitates in Illinois: When Is Enough Enough?*, 41 J. MARSHALL L. REV. 435 (2008) (discussing other states' statutes regarding termination of alimony in response to cohabitation).

94. MASS. GEN. LAWS ANN. ch. 208, § 49(d) (West 2012). *See generally* McBrien, *supra* note 13 (interpreting cohabitation provisions of ch. 208, § 49(d)). Section 5.09 of the ALI *Principles* contains broader provisions regarding the effect of a recipient's postdivorce cohabitation on alimony, but section 5.09(1) provides for automatic termination if the obligee has a domestic partner relationship with a third party, unless the original decree provides otherwise or the court makes written findings that termination would work a substantial injustice. Section 5.09(3)(b) allows the obligee to raise, as a defense to termination based on cohabitation, that he or she and the other person do not share a life together as a couple; the Massachusetts statute does not expressly recognize such a defense. Section 5.09(2) allows an obligor to seek termination in specific instances of an obligee maintaining a common household with a third party that amounts to a "domestic partnership"; Massachusetts law does not recognize the concept of domestic partnership. However, chapter 208, section 49(d) of the Massachusetts General Laws does borrow the three-months test, as provided in ALI *Principles* section 5.09(3), to determine when the recipient's maintaining a common household with a third party suspends the alimony obligation. While the Massachusetts statute does enact a reinstatement provision when the third-party relationship ends, as in ALI *Principles* section 5.09(4), it does not recognize an exception for cohabitation rising to the level of a domestic partnership, which the same ALI provision does recognize.

disputes.[95] For example, suppose the cohabitation occurs during an "on-again and off-again" relationship. Is a residence "primary" when one party maintains a separate apartment and sleeps there during the week but spends the weekend in the residence of the other? The statute attempts to deal with this by allowing evidence of oral or written statements made to third parties about the alleged cohabitation relationship, the economic interdependence of the alleged cohabitants, their conduct and collaborative roles, the benefits to the parties, the community reputation of the persons as a couple, and other relevant factors.[96] However, even if the alimony has been suspended, reduced, or terminated due to the recipient's cohabitation in a common household for at least three months, general term alimony may be reinstated if the cohabitation in a common household ends. The reinstatement cannot be extended beyond the termination date of the original order.[97]

There are other unanswered questions raised by the cohabitation provisions of the Alimony Reform Act of 2011. In time, these questions must be addressed by the courts. For example, one commentator suggests that the statutory provision applies only to cohabitation that begins after the effective date of the statute, because the enactment of the statute itself is not deemed a material change of circumstance; thus, the provision does not apply to cohabitation relationships that predate the passage of the statute.[98]

The language of the statute does not require that cohabitation of the recipient be intimate in nature. This opens the door to potential differences in opinion among judges until the appellate courts more expressly interpret the statute. Will the courts read the need for an intimate relationship into the law, or will the focus be on the economic aspects of the relationship? The provision in the law that allows evidence of oral or written comments made to third parties about the cohabitation relationship and reputation of the cohabitation in the community is likely to open the door, in some cases, to observations about the intimacy of the relationship.[99]

The statute does not require that the alimony recipient's new cohabitation relationship be economic in nature, although once the existence of cohabitation is established, the court must determine if suspension, reduction, or termination

95. Ch. 208, § 49(d)(1).

96. *See id.*

97. *Id.* § 49(d)(2).

98. *See* Cynthia Grover Hastings et al., *Modifications Under the New Alimony Reform Act*, MASS. LAW. WKLY., May 24, 2012, http://masslawyersweekly.com/2012/05/24/modifications-under-the-new-alimony-reform-act/ (including discussion of cohabitation as basis for modification); Maureen McBrien, *Impact of Cohabitation Under Alimony Reform Act*, MASS. LAW. WKLY., Apr. 26, 2012, http://masslawyersweekly.com/2012/04/26/impact-of-cohabitation-under-alimony-reform-act/ (noting application of Alimony Reform Act of 2011 prospective only). *See generally* McBrien, *supra* note 13 (interpreting cohabitation provisions of ch. 208, § 49(d)).

99. *See* ch. 208, § 49(d)(1)(v).

of alimony is appropriate.[100] This determination is likely to involve consideration of the economic impact of cohabitation on the alimony recipient. Indeed, the statute allows for the consideration of the economic interdependence or dependence of the alleged cohabitants.[101]

F. Remarriage of the Alimony Recipient

Clarifying an issue that has not always been treated uniformly under prior Massachusetts law,[102] the Alimony Reform Act of 2011 provides that alimony terminates when the recipient chooses to remarry.[103] This accords with both the majority rule in the United States and with the provisions of the ALI *Principles*.[104] Alimony may not be reinstated after the end of a recipient's remarriage unless the parties have, by written agreement, provided otherwise.[105] Under prior law in Massachusetts, a remarriage of a recipient was considered prima facie evidence of a change in circumstances, but the new statute adds greater clarity by providing that alimony cannot be reinstated after remarriage of the alimony recipient unless the parties have so agreed in writing.[106]

G. Rehabilitative Alimony

The alimony statute now expressly recognizes rehabilitative alimony,[107] which was previously allowed in some other states by statute[108] or court

100. MASS. GEN. LAWS ANN. ch. 208, § 49(d) (West 2012).

101. *See id.* § 49(d)(1)(ii).

102. *See, e.g.*, Keller v. O'Brien, 652 N.E.2d 589, 592 (Mass. 1995) (stating alimony recipient's remarriage constitutes prima facie evidence of change of circumstances); O'Brien v. O'Brien, 623 N.E.2d 485, 488 (Mass. 1993) (recognizing lack of consistent rule regarding termination of alimony under Massachusetts law); Surabian v. Surabian, 285 N.E.2d 909, 913 (Mass. 1972) (suggesting remarriage of alimony recipient does not automatically terminate obligation).

103. *See* Alimony Reform Act of 2011, ch. 124, sec. 3, § 49(a), 2011 Mass. Acts 574, 575 (codified at MASS. GEN. LAWS ANN. ch. 208, § 49(a) (West 2012)). This provision makes no distinction as to whether the recipient's remarriage is valid or invalid. It also applies when the alimony recipient under a prior order later enters into a same-sex marriage.

104. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.07 (2002).

105. Ch. 208, § 49(e).

106. MASS. GEN. LAWS ANN. ch. 208, § 49(e) (West 2012). Prior Massachusetts decisional law considered the ALI *Principles* section 5.07, which provides for automatic termination of alimony on the remarriage of the obligee or death of either party, unless the original decree provides otherwise or the court makes written findings that termination of alimony would work a substantial injustice because of facts not present in most cases. *See* Cohan v. Feuer, 810 N.E.2d 1222, 1228 (Mass. 2004) (holding silence of alimony agreement on effect of death should not be interpreted as providing for postdeath continuance of payor's obligation). However, there is no express prohibition on reinstatement of alimony in regard to remarriage in section 5.07 of the ALI *Principles*, in contrast to the express prohibition on reinstatement in chapter 208, section 49(e) of the Massachusetts General Laws.

107. *See* ch. 208, § 48.

108. HAW. REV. STAT. § 580-47(a) (West 2012) (providing that in setting alimony, court should consider time recipient needs to become self-supporting); ME. REV. STAT. ANN. tit. 19-A, § 951-A(2)(B)(2) (2011) (establishing alimony potentially awarded for physical rehabilitation, emotional rehabilitation, vocational

decision.[109] Dictum in prior appellate decisions disfavored time-limited rehabilitative alimony in Massachusetts except in unusual cases.[110] Rehabilitative alimony aims to make a divorcing spouse self-sufficient for a predicted period of time, so that he or she can complete job training or education.[111] Under the Alimony Reform Act of 2011, rehabilitative alimony is limited to no more than five years, but may be extended on a showing of compelling circumstances, such as unforeseen events that prevented the recipient from becoming self-supporting if the court finds that the person tried to become self-supporting and the payor can pay without undue burden.[112] Within the rehabilitative period, modification of the amount can be made if there is a showing of a material change in circumstances.[113] Rehabilitative

training, or education); MO. ANN. STAT. § 452.335(2)(2) (West 2012) (providing duration of alimony based on time necessary to acquire training or education); MONT. CODE ANN. § 40-4-203(2)(b) (West 2011) (requiring consideration of time necessary for recipient to acquire training needed to obtain appropriate employment); NEB. REV. STAT. ANN. § 42-365 (LexisNexis 2012) (allowing court to weigh ability of spouse to engage in gainful employment without interfering with interests of child in that person's custody); N.J. STAT. ANN. § 2A:34-23(d) (West 2012) (allowing rehabilitative alimony awards based on plan showing future steps toward self-sufficiency); TEX. FAM. CODE ANN. § 8.054(a)(2) (West 2011) (providing time-limited alimony limited to shortest period to allow recipient spouse to earn sufficient income); W. VA. CODE ANN. § 48-8-105(a) (West 2012) (allowing time-limited alimony for spouse to become self-supporting).

109. *See, e.g.*, Fritz v. Fritz, 21 A.3d 466, 472 (Conn. App. Ct. 2011) (affirming two-year award of nonmodifiable rehabilitative alimony to husband after eleven-year marriage during which husband's health affected by automobile injury); Horton v. Horton, 62 So. 3d 689, 692 (Fla. Dist. Ct. App. 2011) (holding error for judge to limit rehabilitative alimony to wife's tuition in paralegal course without anything to cover legal expenses while studying); Saromines v. Saromines, 641 P.2d 1342, 1349 (Haw. Ct. App. 1982) (holding party receiving spousal support under duty to exert reasonable effort to achieve self-sufficiency); Shurtliff v. Shurtliff, 739 P.2d 330, 333-34 (Idaho 1987) (holding court has power to allow support for training of spouse to facilitate enhanced earning capacity when statute silent); *In re* Marriage of Bruton, No. 10-1918, 2011 WL 3480979, at *1 (Iowa Ct. App. Aug. 10, 2011) (upholding rehabilitative alimony to wife at $1500 per month for two years, followed by $1000 per month for five years, to enable wife to complete education and become self-supporting after fifteen-year marriage); *In re* Marriage of Bee, 43 P.3d 903, 909 (Mont. 2002) (holding rehabilitative alimony intended to promote self-sufficiency of divorcing spouse); Bowers v. Lens, 648 N.W.2d 294, 299 (Neb. 2002) (holding judgment could provide that alimony terminates four months after wife receives degree); Belless v. Belless, 21 P.3d 749, 752 (Wyo. 2001) (holding court may award alimony during postdivorce transitional period to gain education, skills, and experience).

110. *See* Barron v. Barron, 556 N.E.2d 111, 113 (Mass. App. Ct. 1990) (holding limiting fifty-six-year-old wife to five years of unsecured alimony did not adequately provide for her; alimony should have been ordered up to time of her death or remarriage); Bak v. Bak, 511 N.E.2d 625, 633 (Mass. App. Ct. 1987) ("Rehabilitative alimony is viewed with some circumspection in Massachusetts."); Zildjian v. Zildjian, 391 N.E.2d 697, 706-07 (Mass. App. Ct. 1979) (holding award of rehabilitative alimony should not leave spouse only marginally independent). *But see* T.E. v. A.O., 976 N.E.2d 803, 811-12 (Mass. App. Ct. 2012) (affirming alimony award of one year after a short term marriage intended to enable wife to recover from emotional health issues and to be able to resume full-time employment again); Londergan v. Carrillo, No. 08-P-1699, 2009 WL 2163186, at *2 (Mass. App. Ct. July 22, 2009) (affirming two-year rehabilitative alimony award to one divorcing spouse in same-sex marriage); Gordon v. Gordon, 528 N.E.2d 876, 878 (Mass. App. Ct. 1988) (holding when disabled spouse capable of part-time employment, rehabilitative alimony potentially appropriate, but subject to future modification if spouse cannot become self-supporting).

111. *See* ch. 208, § 48 (defining rehabilitative alimony).

112. MASS. GEN. LAWS ANN. ch. 208, § 50(b) (West 2012).

113. *Id.* § 50(c).

alimony terminates upon the death of either spouse, or upon the occurrence of a specific event in the future.[114] The court may, however, require the payor to provide reasonable security for the sums due to the recipient during the rehabilitative period in the event of the payor's death.[115]

H. Reimbursement Alimony

Reimbursement alimony was previously given some decisional recognition in Massachusetts,[116] as it had been in some other states.[117] Any doubt about the ability of the courts to order reimbursement in divorce actions is now removed by its express statutory authorization.[118] Unlike other forms of alimony, this form of court-ordered payment is not intended for support. Thus, it is not alimony in the classic sense of the word. Rather, it is a form of restitution whereby the recipient spouse has contributed to the financial resources of the payor spouse. An example is where the payee spouse has sacrificed by enabling the payor to complete job training or education, therefore contributing to the payor's income-earning capacity. Reimbursement alimony cannot be modified after the order enters,[119] and is not governed by the alimony statute's income guidelines.[120] Reimbursement alimony terminates upon the death of the recipient or on such other date as specified in the order.[121] Because as a practical matter reimbursement alimony will only be useful in short-term marriages, usually involving young couples who are in the early stages of their economic partnership, the legislature limited its application to marriages that have lasted for less than five years.[122] Often, such young couples have little property to be divided and have not reached their potential high-income-producing years. Thus, for the party who contributed to the other party's income-producing potential, this may be the only form of economic compensation for his or her sacrifice.[123] Reimbursement alimony, as

114. *Id.* § 50(a).

115. *Id.*

116. *See* Drapek v. Drapek, 503 N.E.2d 946, 948-50 (Mass. 1987) (holding while husband's professional degree or license not a divisible asset, wife's contributions to helping him achieve degree considered in alimony and property division).

117. *See* Guy v. Guy, 736 So. 2d 1042, 1046 (Miss. 1999) (allowing reimbursement of spouse's contributions to other spouse's education); Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982) (recognizing reimbursement alimony considering wife's contribution to husband's MBA degree); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.12(1) (2002) (entitling spouse to reimbursement for financial contribution to other spouse's education or training under certain circumstances).

118. *See* MASS. GEN. LAWS ANN. ch. 208, §§ 48, 51 (West 2012).

119. *Id.* § 51(b).

120. *Id.* § 51(c).

121. *Id.* § 51(a).

122. Ch. 208, § 48 (defining reimbursement alimony).

123. A childless and relatively short marriage does not ordinarily entitle either spouse to share the other's income after dissolution; however, some financial assistance may be needed in order to correct an economic disparity and return the parties to their respective premarital living standards. *See* PRINCIPLES OF THE LAW OF

authorized under Massachusetts law, is distinguishable from the legal presumption of an entitlement of a spouse to compensation for earning-capacity loss arising from that spouse's disproportionate share for care of children during the marriage, which is recognized by the ALI *Principles*.[124]

I. Transitional Alimony

The Alimony Reform Act of 2011 provides for an award of transitional alimony when a marriage has lasted less than five years.[125] Transitional alimony differs from rehabilitative alimony and reimbursement alimony; it is intended to address immediate needs following the end of a short-term marriage.[126] Transitional alimony is somewhat similar to the ALI's proposal for compensatory spousal payments based on restoration of premarital living standards after a short marriage, although the ALI proposal is much more detailed.[127] Transitional alimony in Massachusetts allows a needy spouse to transition out of a marriage, with time to adjust his or her lifestyle or perhaps relocate following a divorce. It cannot be extended, modified, or replaced with any other form of alimony.[128] It terminates upon the death of the recipient or on a date certain within three years from the date of the divorce.[129] The three-year limitation may cause potential issues of recapture if the payor attempts to claim the alimony deduction for the payments.[130] The court may order the payor of transitional alimony to provide reasonable security to pay the sums owed during the period of transitional alimony in the event of his or her death during that term.

FAMILY DISSOLUTION § 5.13 cmt. a (2002) (discussing restoration of premarital living standards after short marriage). Note, however, that ALI *Principles* section 5.13 deals with the correction of an inequitable disparity after a short, childless marriage, whereas the Alimony Reform Act of 2011's concept of transitional assistance aims to transition a spouse into an adjusted lifestyle or location, caused by a divorce, following a marriage of less than five years. The Massachusetts definition of transitional assistance does not contain language regarding childlessness.

124. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.05 (2002). While childcare sacrifices that affect the earning capacity of the childcaring spouse and result in a benefit to the earning capacity of the other spouse may be relevant to an award of reimbursement alimony in Massachusetts, this does not create a presumption of entitlement and is not governed by the detailed rules and standards set out in the ALI *Principles* section 5.05.

125. Alimony Reform Act of 2011, ch. 124, sec. 3, § 48, 2011 Mass. Acts 574, 575 (codified at MASS. GEN. LAWS ANN. ch. 208, § 48 (West 2012)) (defining transitional alimony).

126. Cox v. Cox, 762 A.2d 1040, 1046 (N.J. Super. Ct. App. Div. 2000) (explaining transitional or "limited duration" alimony differs from other forms of spousal support; intended to address needs of spouse transitioning out of short-term marriage).

127. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.13 (2002). The ALI standard is based on the concept of economic disparity between the short-term marital partners and the goal of restoring them to their premarital standard of living. In comparison, the Massachusetts statute focuses on providing a kind of economic bridge out of a short-term marriage.

128. MASS. GEN. LAWS ANN. ch. 208, § 52(b) (West 2012).

129. *Id.* § 52(a).

130. 26 U.S.C. § 71(f) (2006) (allowing recapture of front-loaded alimony deduction amounts).

VIII. FACTORS FOR DETERMINING AMOUNT AND DURATION OF ALIMONY

The Alimony Reform Act of 2011 sets out specific factors that the court "shall consider"[131] in determining the form, amount, and duration of alimony. These factors are:

> [L]ength of the marriage;[132] age of the parties;[133] health of the parties;[134] income,[135] employment and employability of both parties, including employability through reasonable diligence and additional training, if

131. Alimony Reform Act of 2011, ch. 124, sec. 3, § 53(a), 2011 Mass. Acts 574, 578 (codified at MASS. GEN. LAWS ANN. ch. 208, § 53(a) (West 2012)). Under the prior alimony statute, which still applies to property assignment, most of the factors to be considered in setting alimony were mandatory, but the statute provided that the court "may" consider the contribution factors, i.e., these factors were discretionary rather than mandatory. *See* Act of July 19, 1974, ch. 565, 1974 Mass. Acts 544 (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)). The word "shall," contained in the Alimony Reform Act of 2011, makes mandatory all the factors specifically listed in chapter 208, section 53(a) of the Massachusetts General Laws; although in addition to the specific factors, the statute allows the court to consider "other factors as the court considers relevant and material."

132. Ch. 208, § 53(a). Professor Clark commented that larger awards of alimony would seem to be most justified in the case of marriages of long-term duration in which a spouse has an uncertain prospect of being self-supporting. *See* CLARK, *supra* note 10, at 260. The use of general term alimony would be most appropriate in the case of long-term marriages. Because reimbursement alimony and transitional alimony are limited to marriages of less than five years, these forms of alimony are more appropriate for short-term marriages. In *Goldman v. Goldman*, 554 N.E.2d 860, 864-65 (Mass. App. Ct. 1990), the appeals court, in calculating the length of the marriage, disregarded the fact that the marriage was deteriorating over a period of years.

> That the marriage began to deteriorate before the parties' life-style escalated is also no reason to limit alimony to the parties' earlier station. Unlike the situation in *Savides v. Savides*, 400 Mass. 250, 252, 508 N.E.2d 617 (1987), where it was uncontested that both parties had established separate relationships and had ceased to hold themselves out to the community as husband and wife, here, despite their difficulties, the parties clearly remained married.

Goldman, 554 N.E.2d at 864-65.

133. Ch. 208, § 53(a). The older the recipient spouse, the less likely he or she will become self-supporting by developing skills at an advanced age.

134. MASS GEN. LAWS ANN. ch. 208, § 53(a) (West 2012). Poor health can obviously affect the ability of a divorcing spouse to become self-supporting. *See, e.g.*, King v. King, 364 N.E.2d 1218, 1219 (Mass. 1977) (wife's poor health threatened ability to continue working); Barron v. Barron, 556 N.E.2d 111, 113 (Mass. App. Ct. 1990) (court considered wife's emphysema when evaluating alimony); Aronson v. Aronson, 516 N.E.2d 184, 185-86 (Mass. App. Ct. 1987) (wife had long history of mental instability requiring psychiatric care that severely limited her employability); Yee v. Yee, 503 N.E.2d 674, 675 (Mass. App. Ct. 1987) (husband sixty-six years old, in poor health, and unable to work, while sixty-four-year-old wife in fair health, employed, and of middle income).

135. Ch. 208, § 53(a). In Massachusetts, income can be attributed to a party who intentionally and without justification reduces his income. *See* C.D.L. v. M.M.L., 889 N.E.2d 63, 65 (Mass. App. Ct. 2008) (husband resigned from high-paying legal job and thereafter earned much lower income). The Alimony Reform Act of 2011 recognizes the attribution of income in chapter 208, section 53(f) of the Massachusetts General Laws. *See* Charles P. Kindregan & Christina M. Knopf, *Attributing Income in Massachusetts Domestic Relations Cases*, MASS. LAW. J., Dec. 2012, at 1.

necessary;[136] economic and non-economic contribution of both parties to the marriage;[137] marital lifestyle;[138] ability of each party to maintain the marital lifestyle;[139] lost economic opportunity as a result of the marriage;[140] and such other factors as the court considers relevant and material.[141]

IX. GENERAL GUIDELINES FOR ALIMONY ORDERS

Alimony generally should not exceed the recipient's need or thirty to thirty-five percent of the difference between the parties' gross incomes as established at the time the alimony order enters.[142] Note, however, that there are two exceptions to this general proposition: The general guideline does not apply to reimbursement alimony,[143] and the general guideline does not apply when the court has made written findings that justify deviation from the general guideline.[144]

A. Income Defined

Income is determined by the now familiar definition set out in the child support guidelines,[145] but it excludes income from capital gains, as well as dividend income and interest, which results from assets that were assigned as

136. Ch. 208, § 53(a). "The evaluation of vocational skills takes into account a party's age, health, and reasonable employment prospects." Heins v. Ledis, 664 N.E.2d 10, 16 (Mass. 1996).

137. Ch. 208, § 53(a). Before the Alimony Reform Act of 2011 was enacted, contributions were discretionary in the sense that the statute did not mandate their consideration, although many judges actually considered contributions.

138. *Id.* This parallels prior law. *See* Sampson v. Sampson, 816 N.E.2d 999, 1003-04 (Mass. App. Ct. 2004) (holding alimony award of $200 per week for three years inadequate because wife could not continue to live at same upper-middle-class station in life couple enjoyed during long-term marriage on net yearly income of $35,100, while husband continued to live at much higher standard); Kehoe v. Kehoe, 583 N.E.2d 283, 284-85 (Mass. App. Ct. 1992) (holding wife entitled to alimony award supporting modestly affluent life similar to economic station of parties during twenty-three-year marriage, if husband can afford it).

139. Ch. 208, § 53(a). Until the enactment of the Alimony Reform Act of 2011, this factor was called the "station of the parties." It is likely that most of the prior decisions interpreting the meaning of "station of the parties" will have continuing viability in interpreting the meaning of "marital lifestyle."

140. MASS. GEN. LAWS ANN. ch. 208, § 53(a) (West 2012). "Lost economic opportunity" is a new express factor to be considered in setting the amount and duration of alimony, and it was added by the Alimony Reform Act of 2011.

141. *Id.* This factor was added by the Alimony Reform Act of 2011 and will open the door to counsel presenting other considerations in arguing for and against alimony. For example, in *Caveney v. Caveney*, 960 N.E.2d 331, 343 (Mass. App. Ct. 2012), the court awarded the wife alimony based on the fact that her business interests had been severely affected by the national economic downturn.

142. Ch. 208, § 53(b). This formula was inserted into the Massachusetts General Laws by the Alimony Reform Act of 2011 and was not found in prior statutory law. In *Zeghibe v. Zeghibe*, 976 N.E.2d 824, 828 n.9 (Mass. 2012), the husband made reference to standards in the Alimony Reform Act, which was enacted while the appeal was pending. On remand, the court ordered the trial court to address the issue of a possible application of the Act. *Zeghibe*, 976 N.E.2d at 828 n.9.

143. Ch. 208, § 53(b).

144. *Id.* § 53(e).

145. *Id.* § 53(b); *see* CHILD SUPPORT GUIDELINES § IA-E (Commonwealth of Mass. Admin. Office of the Trial Courts 2009); *see also* KINDREGAN & INKER, *supra* note 28, at 367-69.

property in the resolution of the divorce.[146] Gross income is also excluded for alimony purposes, if the court has already considered this income when setting child support.[147] This provision raises serious problems of interpretation for the courts. On its face this definition of excludable income for purposes of alimony has the effect as a practical matter of excluding an alimony order in favor of a parent who has been awarded child support when gross income is less than $250,000 a year, i.e., the amount up to which a court should consider the income for the presumptive purposes of child support. Indeed, in many cases it would result in no alimony for a spouse who has been a parent, while alimony could be awarded to another divorcing spouse who is not a parent of a minor child. It would seem unfair, for example, that a parent devoted to childcare and neglecting potential for professional development should be left with little or no alimony because of such devotion. While some child support can be designated as unallocated or undifferented alimony this is for tax purposes and has no direct effect on the amount of money actually received by that spouse. Some judges may try to avoid this problem by awarding alimony first and only afterwards awarding child support; this appears to be a practical but dubious interpretation of the statutory wording. Unless the appellate courts can interpret the wording of the Act more fairly, it may be necessary for the legislature to reconsider its definition of income for purposes of spousal support.

B. Deviation from the Factors

The Alimony Reform Act of 2011 specifically allows the courts to deviate from the statutory factors in setting an initial order or in modifying an order for general term or rehabilitative alimony as to the amount and duration of the obligation.[148] However, the deviation must be supported by written findings by the court showing that the deviation is necessary. A nonexclusive list of factors that could support deviation includes:

> (1) advanced age; chronic illness; or unusual health circumstances of either party;[149] (2) tax considerations applicable to the parties;[150] (3) whether the

146. MASS. GEN. LAWS ANN. ch. 208, § 53(c)(1) (West 2012).

147. *Id.* § 53(c)(2).

148. Alimony Reform Act of 2011, ch. 124, sec. 3, § 53(e), 2011 Mass. Acts. 574, 578 (codified at MASS. GEN. LAWS ANN. ch. 208, § 53(e) (West 2012)).

149. Ch. 208, § 53(e)(1).

150. *Id.* § 53(e)(2). Prior statutory law did not expressly recognize these considerations as a factor in alimony. Charles P. Kindregan, *Non-Statutory Factors in Property Division in a Divorce Case*, 68 MASS. L. REV. 194, 196 (1983) (noting alimony/property division factors did not include all considerations, such as tax consequences). But if a party brought the tax consequences to the attention of the court, the court could consider them. *See* Fechtor v. Fechtor, 534 N.E.2d 1, 5 (Mass. App. Ct. 1989) (noting parties should advise court of tax consequences of proposed order).

payor spouse is providing health insurance and the cost of health insurance for the recipient spouse;[151] (4) whether the payor spouse has been ordered to secure life insurance for the benefit of the recipient spouse and the cost of such insurance;[152] (5) sources and amounts of unearned income, including capital gains, interest and dividends, annuity and investment income from assets that were not allocated in the parties divorce;[153] (6) significant premarital cohabitation that included economic partnership or marital separation of significant duration, each of which the court may consider in determining the length of the marriage;[154] (7) a party's inability to provide for that party's own support by reason of physical or mental abuse by the payor;[155] (8) a party's inability to provide for that party's own support by reason of that party's deficiency of property, maintenance or employment opportunity;[156] and (9) upon written findings, any other factor that the court deems relevant and material.[157]

C. Factors No Longer Directly Considered in Alimony

Until the Alimony Reform Act of 2011 became effective on March 1, 2012, "the conduct of the parties during the marriage"[158] was a factor to be considered in alimony cases; although, the courts did not previously consider marital wrongdoing as particularly relevant in deciding to award or deny alimony.[159] The omission of this phrase from the list of factors now considered

151. Ch. 208, § 53(e)(3).

152. MASS. GEN. LAWS ANN. ch. 208, § 53(e)(4) (West 2012); *see* Britton v. Britton, 865 N.E.2d 1174, 1178 n.6 (Mass. App. Ct. 2007) (acknowledging court may order obligor to purchase life insurance even if order does not provide that alimony continues after obligor's death).

153. Ch. 208, § 53(e)(5); *see* Adams v. Adams, 945 N.E.2d 844 (Mass. 2011) (identifying separate basis for property assignment and income considerations in setting support order).

154. Ch. 208, § 53(e)(6).

155. *Id.* § 53(e)(7).

156. *Id.* § 53(e)(8).

157. *Id.* § 53(e)(9).

158. Act of July 19, 1974, ch. 565, 1974 Mass. Acts. 544 (codified as amended at MASS. GEN. LAWS ANN. ch. 208, § 34 (West 2012)).

159. *See, e.g.*, Miller v. Miller, 314 N.E.2d 443, 444 (Mass. 1974) (holding wife's adultery irrelevant to alimony determination); O'Brien v. O'Brien, 91 N.E.2d 775, 777 (Mass. 1950) (holding wife's excessive use of alcoholic beverages not critical factor in deciding alimony); Talbot v. Talbot, 434 N.E.2d 215, 217 (Mass. App. Ct. 1982) (concluding wife's adultery, which bore two children by another, irrelevant to alimony; especially where wife in danger of becoming public charge if alimony not awarded); Singer v. Singer, 391 N.E.2d 1239, 1243 (Mass. App. Ct. 1979) (noting husband's alleged adultery not determinative on support issues); Lynch v. Lynch, 360 N.E.2d 661, 663 (Mass. App. Ct. 1977) (holding wife's prolonged social visits with psychiatrist did not bar awarding her alimony); Putnam v. Putnam, 358 N.E.2d 837, 840 (Mass. App. Ct. 1977) (noting alimony not awarded or denied solely on basis of party's blameworthy conduct); Ober v. Ober, 294 N.E.2d 449, 451 (Mass. App. Ct. 1973) (holding husband not entitled to alimony based on wife's misconduct). In *Gottsegen v. Gottsegen*, 492 N.E.2d 1133, 1138 (Mass. 1986), the court noted that the ex-wife's cohabitation with a man other than her husband was an improper basis for eliminating her alimony rights; however, the Alimony Reform Act of 2011 now allows for modification of general term alimony on a showing of a recipient's cohabitation in a common household for three continuous months or more. *See* MASS. GEN. LAWS ANN. ch.

is obviously important. However, an exception to the elimination of the "conduct" factor is that the court may consider a party's inability to work if the inability is attributed to mental or physical abuse by the payor.[160]

The legislature also omitted consideration of the "estates" of the parties, which has significantly more weight in dividing property, from the list of factors set out in the Alimony Reform Act of 2011. However, the law does permit deviation from the alimony factors by considering the "sources and amounts of unearned income, including capital gains, interest and dividends, annuity and investment income from assets that were not allocated in the parties divorce."[161]

D. Income Excluded as to the Payor from Consideration in Modification Action

The Alimony Reform Act of 2011 enacted the common-sense proposition that if the payor remarries, the new spouse's income or assets may not be considered in redetermining or modifying alimony.[162] The statute also excludes consideration of income that comes from a second job or overtime work that began after the initial order, if the party works more than the equivalent of a full-time position.[163]

E. Security

Massachusetts previously empowered the court to require an alimony and child support obligor to provide security for payment of the judgment.[164] The Alimony Reform Act of 2011 reaffirms this by requiring that an obligor insure his life to continue spousal and child support in the event of his death.[165] "The court may require reasonable security for alimony in the event of the payor's death," which may include a requirement to maintain life insurance during the alimony period, but the order may be modified on a "material change of circumstance."[166]

208, § 49(d) (West 2012). Some states still consider marital fault relevant to the grant or denial of alimony, but increasingly the view is that financial losses that arise in the dissolution of a marriage should be allocated "without regard to marital misconduct." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.02(2) (2002).

160. Ch. 208, § 53(e)(7).

161. *Id.* § 53(e)(5).

162. *See* Alimony Reform Act of 2011, ch. 124, sec. 3, § 54(a), 2011 Mass. Acts 574, 579 (codified at MASS. GEN. LAWS ANN. ch. 208, § 54(a) (West 2012)).

163. Ch. 208, § 54.

164. *Id.* § 36 (law not amended since 1986).

165. *See* Alimony Reform Act of 2011, sec. 3, § 55(a) (codified at MASS. GEN. LAWS ANN. ch. 208, § 55(a) (West 2012)); *see also* Freedman v. Freedman, 730 N.E.2d 913, 918 (Mass. App. Ct. 2000) (ordering husband to obtain life insurance to secure spousal and child support in event of his death). Chapter 208, section 36 of the Massachusetts General Laws provides that when a judgment provides for alimony or child support "the court may require sufficient security for its payment."

166. MASS. GEN. LAWS ANN. ch. 208, § 55(a), (c) (West 2012).

X. EFFECT OF THE ALIMONY REFORM ACT OF 2011 ON EXISTING ORDERS

The Alimony Reform Act of 2011 applies prospectively.[167] The provisions of the Alimony Reform Act of 2011 "shall not be deemed a material change of circumstance that warrants modification of the amount of existing alimony judgments" entered prior to the effective date of the law, i.e., March 1, 2012.[168] Such prior judgments continue to be governed by the traditional change-of-circumstance rule governing modification. However, existing alimony orders that exceed the durational limits set out in chapter 208, section 49 of the Massachusetts General Laws are deemed to be a material change of circumstance and can be modified unless the court finds deviation from the durational limits is warranted.[169] When a party seeks modification of an existing general term alimony order because it exceeds the durational time limits in section 49, such claims are subject to time limits that are based on the effective date of the statute. An individual may file a complaint for modification subject to the following time factors: If a couple was married five years or less, filing can be made after March 1, 2013; couples married for five years to ten years can file on or after March 1, 2014; couples married for ten to fifteen years can file on or after March 1, 2015; and couples married fifteen to twenty years can file on or after September 1, 2015.[170] Outside of these time limits, a payor who has reached full retirement age on or before March 1, 2015, may file a complaint for modification on or after March 1, 2013.[171]

XI. SURVIVING CONTRACTS

The law has long permitted parties to provide for alimony through contracts that survive divorce judgments as agreements having independent legal significance. The parties in a divorce case may freely enter into agreements that survive judgments, have independent legal significance, and provide for or waive alimony. Such agreements are not subject to modification, and are enforceable except that they can be overridden when a needy party is in danger of becoming a public charge, or if other countervailing equities are present.[172] For that reason, modification of the agreement provisions by an order of the

167. Alimony Reform Act of 2011, ch. 124, sec. 4(a)-(b) (codified at MASS. GEN. LAWS ANN. ch. 208, § 48-55 (West 2012)).

168. Alimony Reform Act of 2011, ch. 124, sec. 4(a)-(b), 2011 Mass. Acts 574, 579 (codified at MASS. GEN. LAWS ANN. ch. 208, §§ 48-55 (West 2012)).

169. *Id.* sec. 4(b).

170. *Id.* sec. 5.

171. *Id.* sec. 6.

172. A number Massachusetts decisions developed the rights of parties to a divorce action to arrange their postdivorce financial affairs by a contract that survives the divorce judgment. *See, e.g.*, O'Brien v. O'Brien, 623 N.E.2d 485, 487 (Mass. 1993); Stansel v. Stansel, 432 N.E.2d 691, 694 (Mass. 1982); Knox v. Remick, 358 N.E.2d 432, 435 (Mass. 1976); DeCristofaro v. DeCristofaro, 508 N.E.2d 104, 108-09 (Mass. App. Ct. 1987).

court is not permitted between parties who have otherwise agreed by a contract that survived the divorce, when the contract is final and provides that the support agreement is final.[173] Thus, surviving agreements are not modifiable under the provisions of the Alimony Reform Act of 2011.

173. Hayes v. Lichtenberg, 663 N.E.2d 566, 567 (Mass. 1996); Barry v. Barry, 569 N.E.2d 393, 395 (Mass. 1991).