

## CHAPTER TEN

### **Alimony/Maintenance**

ALIMONY OR MAINTENANCE are terms that refer to payments from one spouse to the other spouse for the benefit of the spouse who is receiving payment. Some states use the term **alimony**; other states use the term **maintenance**; both mean the same thing. Only about 15 percent of divorces or separations involve payments of alimony. (For simplification in the rest of this section, we will use only the term “alimony”, but wherever “alimony” is used, “maintenance” could be substituted.)

The overwhelming majority of all alimony awards are from the husband to the wife, but in appropriate circumstances (such as a husband who takes care of the children and home while the wife works outside the home), payments from the wife to the husband also can be ordered. The United States Supreme Court has held that it is unconstitutional for a state’s statute to allow alimony payments only to the wife; payments to the husband must be permissible too. All states allow courts to order alimony, although some states are more reluctant to order alimony than others.

There are several types of alimony, each of which is designed to meet particular needs.

#### **Temporary Alimony**

**Temporary alimony** or **alimony pendente lite** is alimony given when the parties are separated, but the divorce is not final. “Pendente lite” is a Latin phrase meaning “pending the suit” Alimony may be continued under a different label after the divorce is final, but it need not be.

### **Rehabilitative Alimony**

**Rehabilitative alimony** refers to alimony that is given to a spouse so that the spouse may “rehabilitate” herself or himself in the sense of acquiring greater earning power or training in order to become self-supporting. Rehabilitative alimony also might be given to a parent who is staying home with young children until such time as it is considered appropriate for the parent to work outside the home.

There is no uniform time at which parents automatically are expected to work outside the home, but when the youngest child is in school full-time is a common time for the parent to resume work. (Of course, in many families--intact and divorced--the parents work outside the home when the children are pre-schoolers. And in some families, one parent stays home as long as the children live at home.)

Rehabilitative alimony is usually for a fixed period of time. The court (or the parties by agreement) may include a provision that the alimony is subject to **review** at the end of that period. If alimony is subject to review, it means the court may look at the facts of a case at a later time to determine whether alimony should be continued, discontinued, or changed in amount.

If the order or agreement regarding alimony does not contain a provision for review, it might still be reviewable, or it might not be reviewable, depending on the law of the state. If the recipient of alimony wants the alimony to be reviewable (with the possibility of continuation), it is best to include language to that effect. If the payor of alimony does not want alimony to be continued beyond a certain time, the payor should seek to have language to that effect in the agreement or order. A court is likely to approve cessation of alimony on a certain date if that is what the agreement or order calls for, but the court usually has the power to continue alimony in certain circumstances, such as chronic illness of the recipient.

### **Permanent Alimony**

**Permanent alimony** continues indefinitely. The main bases for ceasing payments of permanent alimony are the death of the payor, the death of the recipient, or the remarriage of the recipient. Cohabitation of the recipient with a member of the opposite sex also is a common basis for cessation of permanent alimony. Generally, the cohabitation needs to be of a permanent or near-permanent nature, with the parties who are living together sharing living expenses. A few overnight visits usually do not constitute cohabitation for the purpose of stopping alimony payments.

Unless an agreement between the parties says otherwise, payments of permanent alimony can be adjusted upwards or downwards based on a change of circumstances. If the recipient gains employment at a well-paying job or

receives a significant amount of money from another source, that might be a basis for reducing alimony payments. If the recipient incurs unexpected medical expenses (that are not covered by insurance), that might be a basis for increasing alimony payments, if the spouse paying alimony has the ability to pay more.

A drop in income by the payor, including at retirement, can be a basis for reducing alimony. Courts may examine the reason for a drop in income. If the drop in income of the payor is in good faith or not through the fault of the payor, the court is more likely to approve a reduction in alimony. If the drop in income seems to have been engineered by the payor to create a basis for reducing alimony, the court is more likely to disapprove a reduction in alimony.

### **Reimbursement Alimony**

**Reimbursement alimony**, as the name implies, is designed to reimburse one spouse for expenses occurred by the other. If, for example, one spouse helped put the other spouse through college or a training program and the couple divorces soon after the training program is complete, the spouse who supported the family during that period might be able to obtain reimbursement alimony as a payback for the resources spent.

A classic example is the nurse who marries a medical student and supports the family while the medical student finishes medical school (and perhaps a residency program). If the couple divorces soon after the medical student completed training, the nurse probably would be entitled to reimbursement alimony to compensate for the resources used during the training

program. In this case, reimbursement alimony is not necessarily being given because the nurse needs funds for day-to-day support (since the nurse would seem to be self-supporting). Instead, the alimony is given as an equitable payback for supporting the spouse through medical school.

Alternatively, a court could choose to give the supporting spouse a substantial majority of marital property in compensation. But in many cases in which one spouse has just completed a training program, the couple has not accumulated a large amount of marital assets. So, reimbursement alimony is given as an alternative. Reimbursement alimony can be paid over a period of time.

### **Lump-Sum Alimony**

**Lump-sum alimony** or **alimony in gross** refers to alimony that is a fixed payment that generally will be made regardless of circumstances that would be a basis for termination of other types of alimony. For example, lump-sum alimony or alimony in gross normally would be paid even if the recipient remarries. Depending on the wording of the agreement or order, payments also could be made to the estate of the recipient in the event the recipient dies.

This type of alimony usually is in lieu of a property settlement. Depending on how the alimony is structured, it could provide a tax advantage to the payor by being deductible to the payor and income to the recipient. Lump-sum alimony or alimony in gross could be used as a type of reimbursement alimony to insure that one spouse is paid back for certain expenditures, even if

the recipient remarries, cohabits with someone, or does not otherwise need the alimony for day-to-day support.

**Sidebar:**

**TAX ASPECTS OF ALIMONY**

Alimony usually is treated as income to the recipient and a deduction from income to the person paying alimony. This can result in a savings in the combined income tax payments of the husband and wife. The reason for the savings is that additional income to the wife (in the form of alimony) will be taxed at a lower rate than if it was treated as income to the husband.

Assume a husband and wife are about to be divorced. Before payment of alimony, the wife has a taxable income of \$10,000 and the husband has a taxable income of \$70,000. If they each were to pay taxes on these amounts, their combined tax liability would be \$17,991. (The husband would pay \$16,487; the wife would pay \$1,504, applying the 1999 federal tax tables).

If the husband were to pay the wife \$20,000 per year in alimony, his taxable income would drop to \$50,000, and the wife's taxable income would increase to \$30,000. Their combined federal income tax payments then would be \$15,720 (\$10,660 by husband and \$5,060 by wife). The savings on their combined tax bills would be \$2,271 over what would be paid if the alimony payments were taxable to the husband.

The wife's tax bills have gone up, but so has her income.

*[end of sidebar]*

**Criteria for Ordering Alimony**

The criteria for ordering alimony have been discussed, in part, in the descriptions of different types of alimony. The factors considered by a court when deciding whether to order alimony based on need of the recipient are similar to the factors considered by a court when dividing property. (See pages 6 – 11 of chapter 9.)

(1) **Income and Property of Each Party.** The greater the income and property a divorced spouse has, the less likely it is that the spouse will need alimony. Conversely, the less income and property a spouse has, the more she or he will need alimony. Payment of alimony also depends on the ability of one spouse to pay. Alimony is most likely when there is a substantial difference in the property and income of one spouse versus the other. If the spouses' levels of property and income are similar, alimony is less likely. In looking at the difference in property held by the spouses, courts consider the division of property in connection with the divorce. Some courts order a larger share of property to the less prosperous spouse in order to avoid or reduce the need for alimony to the less prosperous spouse.

(2) **Earning Capacity of Each Spouse.** A related factor is the present and future earning capacity of each spouse. If one spouse's earning capacity is much larger than the other spouse's earning capacity, that is a significant factor in favor of payment of alimony. To the extent that the earning capacities of the spouses may come closer together by giving the spouse with lower earnings



additional time to pursue training, the court may use that as a factor for granting rehabilitative maintenance.

(3) **Impairments in Earning Capacity.** If a spouse has little or no earning capacity, that is a basis for granting alimony--probably permanent alimony. Common examples of such impairments are advanced age or chronic illness. Some courts also will note that earning capacity may be limited because of the number of years the spouse spent working as a homemaker. During that time, the spouse who was the homemaker delayed or gave up the opportunity for training or building job skills that could produce a higher income. Meanwhile, the other spouse was able to increase earning capacity, in part, because his or her partner was managing the home. In such circumstances, some courts will grant permanent alimony to help make up for the difference in earning potentials.

(4) **Children at Home.** The presence of young children at home is a factor in favor of granting alimony, at least until the children are in school full-time. Even after the children are in school, the court may grant alimony so that the parent who is taking care of the children need only work part-time. This factor is more likely to apply if, during the marriage, one of the parents had been serving as a full-time homemaker. If both parents had been working outside the home during the marriage, the court is more likely to expect the *status quo* to continue. (The Census Bureau reports that more than 60 percent of mothers with pre-school children work outside the home.) As with all types of alimony, a key

factor is the ability of the more prosperous spouse to pay. If the better-off spouse has only moderate income, alimony probably will not be ordered or the amount will be moderate.

(5) **Standard of Living During the Marriage.** A phrase that was commonly bandied about in connection with divorces of more than thirty-five years ago was that “The wife is entitled to be supported in the style to which she has become accustomed.” One does not hear that phrase so much any more, but the standard of living of the husband and wife during the marriage is a factor to be considered. If the parties have sufficient money to continue the same life style when they are separate as when they were married, the court may grant sufficient alimony (and property) to accomplish that. But the reality in most cases is that the money will not go as far as it did during the marriage since it costs more to support two households than one. If the couple’s relatively high life style during the marriage was supported, in part, by incurring debt, the court will not expect that one party must continue to incur debt to support the other. Nonetheless, the standard of living of the husband and wife is a factor in setting alimony. It is to the advantage of the party seeking alimony to present testimony and exhibits reflecting a prosperous lifestyle. Exhibits might include pictures or videos of the family home, possessions, and vacations, perhaps accompanied by copies of receipts and checking account records reflecting the level of the family’s expenditures.

(6) **Duration of Marriage.** The longer the marriage, the greater likelihood of alimony, particularly if there is a significant difference in the earning power of the parties. In short-term marriages, alimony is less likely (unless there are young children at home). Alimony normally will not be granted for a time period that is longer than the marriage, but it is possible in some circumstances, such as the chronic disability of the person seeking support.

(7) **Contributions of the Spouse Seeking Support to the Education or Career of the Other Spouse.** As was discussed in the section on reimbursement alimony ([pages 4-5 of this chapter](#)), a spouse who helps put the other spouse through school or a training program can use that as a factor to gain alimony, even if the alimony is not necessary for the recipient's day-to-day support. Spouses who actively support their partners' careers, such as through frequent entertaining or through working at no wages in the family business, also can use that as a factor in seeking alimony.

(8) **Tax Consequences of Property Division and Alimony.** If the payor of alimony receives a tax benefit as the result of the property distribution, that can be a factor in favor of alimony. Conversely, if the payor of alimony must pay additional taxes because of the property division, that could be a factor for paying less alimony or no alimony. Alimony generally is deductible to the spouse who is paying it and is treated as income to the spouse who is receiving it (unless the parties agree otherwise). If the husband and wife are in different

income brackets, the tax treatment of alimony results in a net savings of tax payments when considering the combined tax payments of the husband and wife. The amount of money the payor will save in taxes by being able to deduct alimony from taxable income will be greater than the amount of additional taxes the recipient pays on the alimony, which is treated as taxable income (see box for example).

(9) **Fault.** In nearly half of states, fault is not a factor in deciding whether or not to grant alimony. (See [chart on pages 14-15.](#)) In those states, the legislatures and courts wish to focus on economic factors in deciding who receives alimony, and, if so, how much. As with property division in these states, the courts do not want to get in the middle of who-did-what-to-whom. Thus, if one spouse had an affair or was considered mean to the other spouse, that is not a factor in setting alimony. In approximately thirty states, however, fault is a factor. In some of those states, proof of fault by the spouse seeking alimony completely blocks that spouse's claim to alimony. In other states, fault is a factor that can be considered in setting alimony, although the presence of fault by the spouse seeking alimony does not necessarily preclude alimony.

(10) **Premarital Agreements.** As with division of property, a valid premarital agreement can be a trump card that determines the level of alimony that will be paid in the event of divorce. Through the premarital agreement, the parties have entered into a contract by which they waive their rights to have

alimony determined by the usual rules of court. (For discussion of premarital agreements, [see chapter 2.](#)) In many states, a premarital agreement that gives no alimony or very low alimony to the less wealthy spouse will not be honored if the less wealthy spouse will be left with no reasonable means of support. In that circumstance, the spouse who lacks capacity for self-support is likely to be granted some alimony.

## CONSIDERATION OF FAULT IN SETTING ALIMONY

**Chart 1** *Alimony/Spousal Support Factors*

STATE	Statutory List	Marital Fault Not Considered	Marital Fault Relevant	Standard of Living	Status as Custodial Parent
Alabama			x	x	
Alaska	x	x		x	x
Arizona	x	x		x	x
Arkansas		x			
California	x	x		x	
Colorado	x	x		x	x
Connecticut	x		x	x	x
Delaware	x	x		x	x
District of Columbia			x	x	
Florida	x		x	x	
Georgia	x		x	x	
Hawaii	x	x		x	x
Idaho	x		x		
Illinois	x	x		x	x
Indiana	x	x			
Iowa	x	x		x	x
Kansas		x			
Kentucky	x		x <sup>1</sup>	x	
Louisiana	x		x		x
Maine	x	x			
Maryland	x		x	x	
Massachusetts	x		x	x	
Michigan			x	x	
Minnesota	x	x		x	x
Mississippi			x		
Missouri	x		x	x	x

<sup>1</sup> Only fault on the part of the party seeking alimony.

STATE	Statutory List	Marital Fault Not Considered	Marital Fault Relevant	Standard of Living	Status as Custodial Parent
Montana	x	x		x	x
Nebraska	x	x		x	x
Nevada			x	x	x
New Hampshire	x		x	x	x
New Jersey	x		x	x	x
New Mexico	x	x		x	
New York	x		x	x	x
North Carolina	x		x	x	
North Dakota			x	x	
Ohio	x	x	x	x	
Oklahoma		x		x	x
Oregon	x	x		x	x
Pennsylvania	x		x	x	
Rhode Island	x		x	x	x
South Carolina	x		x	x	x
South Dakota			x	x	
Tennessee	x		x	x	x
Texas	x		x	x	x
Utah	x		x	x	
Vermont	x	x		x	x
Virginia	x		x	x	
Washington	x	x		x	
West Virginia	x		x		x
Wisconsin	x	x		x	x
Wyoming			x		

This chart appeared in the ABA's publication Family Law Quarterly (32 Fam. L.Q. No. 4 [Winter 2000]) and is reprinted by permission

### **Life Insurance to Guarantee Alimony**

The recipient of alimony may wish to seek an agreement or court order to guarantee support in the event of the payor's death. The usual method of guaranteeing support is to require the payor to maintain an insurance policy on the life of the payor with the recipient as beneficiary. The amount of the policy should be high enough to compensate for the loss of alimony payments.

In order to insure that the insurance policy remains in effect, the recipient may seek to require the payor to provide periodic proof that the policy is still in force. This could be accomplished by having the payor provide an annual copy of the policy showing full payment of premiums for the coming year. The recipient also may seek to have a provision in the policy that would require the insurance company to notify the recipient in the event that payments are not made on time. As an alternative to an insurance policy, the parties might agree that the payor will post a bond or that the payor will guarantee to leave the recipient a certain amount of money by will or by trust in order to insure continued support.

### **Health Insurance**

Direct payment of a former spouse's health insurance normally is not part of an alimony agreement or order, although the recipient certainly may wish to use some of the alimony payments to purchase health insurance if the recipient is not already covered.



When a couple divorces, the health insurance policy covering the family (if there was such a policy) no longer covers both spouses. The policy only covers the spouse who had insurance through work or through an individual policy. Children who were covered under a family policy generally are still covered under the policy after a divorce.

A federal law passed in the 1980s requires most employer-sponsored group health plans to offer divorced spouses of covered workers continued coverage at group rates for as long as three years after the divorce. The divorced spouse of a worker must pay for the coverage, but the coverage is available.

A divorced spouse who wishes to take advantage of this law should act as soon as the divorce is final or the coverage has been lost. He or she should contact the covered worker's employer (Human Relations or Personnel Department) to learn the steps that must be taken, but generally the notification has to be within sixty days of the divorce or loss of coverage. Continued coverage is not automatic. The law provides that the worker's employer must explain the divorced spouse's right to continue coverage within fourteen days of being notified, after which the spouse has no more than sixty days to choose to continue the coverage. The employer will advise what coverage is available, its cost, and when payments must be made, as well as any steps that must be taken to establish eligibility for the health insurance.

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