

THE EFFECT OF COHABITATION ON ALIMONY IN THE UNITED STATES

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Introduction

Family law in Massachusetts was in a state of upheaval for a long time. The court's had a great deal of discretion, and the rules regarding alimony awards were vague, which led to inconsistent results and discontent among divorced payors, historically a demographic dominated by men. The Alimony Reform Act of 2011 is a result of the legislature's effort to alleviate some of the issues regarding alimony, and bring Massachusetts more in line with other states' procedures. There are various provisions of the act that have drawn criticism. The focus of this article will be those sections of the act governing the suspension, reduction, or termination of alimony upon the recipient's spouse's cohabitation with a member of the opposite sex. This paper will explore the history and justifications behind the new alimony law, and will discuss varying perspectives on the issue of cohabitation, including how some other states have dealt with the issue.

History

Alimony has been a long time staple in family law doctrine in Massachusetts. In fact, Massachusetts was the first state to recognize alimony awards, with its first statutory provision for alimony being passed in 1786.¹ Early on, antiquated notions of gender roles were heavily relied upon by the courts in determining alimony awards, as alimony was used "as a method of enforcing a husband's marital obligation to support his wife," and to prevent the wife from becoming destitute.² Alimony, therefore, was a legal concept originally based on traditional gender roles and, in particular, the common law presumption that the husband is the sole provider; a view which was further enforced by court decisions which explicitly defined alimony as "an award to be made to the wife by the husband's separate estate."³

The rationale behind alimony and factors to be considered in determining alimony awards became more

ambiguous as societal changes led to greater property rights for married women.⁴ In 1916, in the Massachusetts case of *Brown v. Brown*, the Supreme Judicial Court set out the standard for determining alimony awards, which included factors such as the resources of the husband, needs of the wife, standard of life, and conduct of the parties.⁵ These factors, particularly the fact that the courts considered the couples' standard of life and conduct of the parties, suggest that alimony awards went beyond the scope of the common law rationale of providing mere support, with some arguing that the *Brown* factors actually created confusion as to the purposes behind alimony.⁶

In 1974, Massachusetts passed amendments under M.G.L. c. 208, § 34, the first sentence of which stated that upon a divorce, the court "may make a judgment for either of the parties to pay alimony to the other."⁷ Since by statute either party may be ordered to pay alimony to the other, the new amendments essentially eliminated the common law duty for the husband to provide for his wife following a divorce.⁸ This significant change in the law is likely due to increased women's independence in the 20th century and the move toward greater equality.⁹ In the 1950s, Massachusetts' alimony laws were based on gender distinctions.¹⁰ By eliminating the wife's common law presumptive right to alimony, and using gender neutral terms, the 1974 amendment also acted to prevent potential equal protection attacks on the laws regarding alimony.¹¹

The 1974 amendment was also significant because it included a list of mandatory factors that the judge must consider in determining alimony awards.¹² While the list of factors provides guidance, the amendment also deliberately eschewed "any proscribed formulas" in order to provide flexibility in dealing with the many vastly different types of marriages.¹³ Although such flexibility has some benefits, others argue that the "the very vagueness of the alimony statute caused it to be given different interpretations by various judges and lawyers" between 1974 and enactment of the Alimony Reform Act of 2011.¹⁴

⁴ See *id.* at 71.

⁵ See *id.* at 71 (quoting *Brown v. Brown*, 222 Mass. 415, 417 (1916)).

⁶ See *id.* at 72.

⁷ 1 Mass. Prac., *Family Law and Practice* § 1:13 (4th ed.).

⁸ See Inker, et al. at 72-73.

⁹ See *id.* at 73.

¹⁰ See *id.* at footnote 70.

¹¹ See *id.*

¹² See Mass. Prac., See also Inker, et al. at 75.

¹³ See Inker, et al. at 75.

¹⁴ See Mass. Prac. *supra* at footnote 7.

¹ Charles P. Kindregan Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. REV. 13, 15 (2013).

² See *id.*

³ Monroe L. Inker, Joseph H. Walsh & Paul P. Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 11 FAM. L.Q. 59, 70-71 (1977).

In order to address the issue of vagueness, the Massachusetts legislature in 2011 passed the Alimony Reform Act, which contained many specific provisions, including the allowance of termination or reduction of the payor's alimony obligation if the recipient is cohabitating with another.¹⁵ The next section of this article will explore the rationale behind this cohabitation provision, as well as relevant court decisions from Massachusetts analyzing its effect and a comparison with other states in the U.S. that have similar provisions.

Cohabitation and the Alimony Reform Act of 2011

Prior to the passage of the Alimony Reform Act, there was confusion among both legal practitioners and laypeople seeking a divorce about how the court would reach its conclusions. One Boston Magazine article, published in 2009, described Massachusetts as “a singularly nightmarish place to get a divorce—especially for the better-off spouse.”¹⁶ Frustration with the vague and seemingly unfair alimony system was clearly growing. The rules for determining alimony were being described in the media as “murky at best”, and divorce attorneys complained about a lack of predictability in the courts and a lack of logical explanation in decisions.¹⁷

While other states, such as New Hampshire, reduce alimony payments over time in order to gradually encourage the recipient to be self-sufficient, Massachusetts' judges rarely set a cutoff limit for alimony.¹⁸ Under the old law in Massachusetts, an alimony order was issued following a divorce and continued until the death of either party, the remarriage of the recipient, or until there was an order of the court for a modification based on a complaint showing a material change in circumstances since the issuance of the order.¹⁹ As such, most judges ordered alimony to continue indefinitely, and of the few who issued a set duration, many were overturned on appeal.²⁰

In order to continue receiving alimony payments, recipients would simply avoid marriage solely to prevent the termination of their alimony order, even if they were in a

marriage-like romantic relationship.²¹ This undoubtedly caused frustration on the part of the payors, as they were obligated to continue making alimony payments to an ex-spouse who was romantically involved with another person, often times cohabitating, and simply refusing to marry in order to maintain the stream of alimony support.²²

In 2008, the organization Massachusetts Alimony Reform issued a 26-page report, titled “The Shame of Massachusetts: Alimony Horror Stories” that reflected the opinions of numerous alimony payors, predominantly male, who believed that it was unfair for their alimony obligations to persist, unchanged, while their ex-spouse lived with a new partner.²³ One contributor noted that “live-in boyfriends . . . reap the benefits of that check paid by their girlfriend's ex-husband.”²⁴ Similar stories made their way through the Boston area news outlets, and public support for the Alimony Reform Bill grew.²⁵

One of the major provisions of the Alimony Reform Act, therefore, is that under the amended law, alimony “shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient has maintained a common household . . . with another person for a continuous period of at least three months.”²⁶ In determining whether the recipient has maintained a common household, the act lists the following factors for consideration by the courts:

- (i) oral or written statements or representations made to third parties regarding the relationship of the persons;
- (ii) the economic interdependence of the couple or economic dependence of 1 person on the other;
- (iii) the persons engaging in conduct and collaborative roles in furtherance of their life together;
- (iv) the benefit in the life of either or both of the persons from their relationship;

²¹ See McBrien.

²² See *id.*

²³ Press Release, MASS. ALIMONY REFORM (Dec. 5, 2008).

²⁴ *The Shame of Massachusetts: Alimony Horror Stories*, MASS. ALIMONY REFORM 12.

²⁵ Elizabeth Benedict, *Lifetime Alimony in Massachusetts: You're Kidding, Right? Wrong*, HUFFINGTON POST BLOG, (Feb. 8, 2011, 11:55 AM) (http://www.huffingtonpost.com/elizabeth-benedict/lifetime-alimony-in-massa_b_816259.html); Jack Flynn, *Gov. Patrick OKs 'sweeping overhaul' of Massachusetts alimony laws*, MASS LIVE (Sept. 26, 2011, 10:01 PM) (http://www.masslive.com/news/index.ssf/2011/09/gov_patrick_oks_sweeping_overh.html).

²⁶ McBrien, quoting G.L.C. 208, § 49(d), *emphasis added*.

¹⁵ See *id.*

¹⁶ Kris Frieswick, *Till Death Do Us Pay*, BOS. MAGAZINE, July 2009 (<http://www.bostonmagazine.com/2009/06/alimony-laws/>).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Maureen McBrien, *Impact of Cohabitation Under Alimony Reform Act*, MASS. LAW. WEEKLY, 26 Apr. 2012, republished at <http://levinedisputeresolution.com/divorce-mediation-blog/impact-of-cohabitation-under-alimony-reform-act>.

²⁰ See Frieswick, at 2.

- (v) the community reputation of the persons as a couple; or
- (vi) other relevant and material factors.²⁷

These factors seek to distinguish cohabitation with a romantic partner from cohabitation with non-romantic living partners, such as a roommate, family member, or nanny.²⁸ However, the statute does not, by its text, require a romantic relationship, and furthermore, it is silent on the issue of financial contribution of the cohabitating partner.²⁹ Therefore, while the law is likely based on the presumption that an alimony recipient who is cohabitating with a romantic partner is less 'needy' as a recipient, there is actually no inquiry into whether the cohabitating partner is contributing monetarily to the recipient's support.

So theoretically, an alimony recipient who wishes to cohabitate with a partner who does not contribute financially to the relationship may actually result in a situation whereby the recipient's financial situation has not changed significantly (or certainly has not changed for the better), but now must have their alimony amount reduced, suspended, or terminated based solely on the fact that they are in a cohabitating relationship.³⁰ In this way, while the cohabitation rule solves one perceived injustice on the part of the payors, it may lead to inequitable results in some situations. As one commentator describes the issue, "financial independence will not be achieved by some cohabitating recipients simply by virtue of their cohabitation arrangement."³¹

This highlights an additional inconsistency pointed out by Maureen McBrien in a 2012 Massachusetts Lawyers Weekly article. The way the law is written implies that the alimony amount must be reduced, suspended, or terminated if the recipient is cohabitating, regardless of whether the cohabitating partner is financially contributing to the recipient's support or not. However, on the flip side, when the alimony recipient files a complaint for modification seeking an increase in amount, section 54(a) of the act explicitly states that "income and assets of the payor's spouse shall not be considered in a redetermination of alimony in a modification action."³² These provisions being read together has the effect of treating the cohabitating recipient and her partner (alimony recipients in Massachusetts are predominantly female) as one financial

unit even though they are unmarried, while treating the alimony payor as financially separate from his new spouse when determining income and ability to pay.³³

Feminist Critique

There are undoubtedly criticisms of the new law. Some argue that reducing or terminating alimony due to the recipient's cohabitation suggests a negative moral view of cohabitation.³⁴ In addition, the issue of cohabitation before marriage necessarily has a sexual component to it, evidenced by the fact that the Massachusetts Appeals Court has defined cohabitation as "living together as a married couple customarily do."³⁵ Since a vast majority of alimony recipients are female and payors are male, the issue is also inherently gendered.³⁶ While women receiving alimony are disadvantaged by cohabiting with a new partner, their ex-husbands suffer no such punishment by cohabiting with a new girlfriend. As one critic describes the double standard: "Most courts as of yet have not reached the point of view that a former wife is entitled to privacy, autonomy, and sexual fulfillment outside of matrimony . . . [T]he practical effect . . . is to impose a chastity belt on the wife where none is imposed on the former husband."³⁷

In addition, one legal scholar notes that there could be an equal protection claim here, as the Supreme Court case of *Texas v. Lawrence* "suggests that termination of alimony based on a recipient's post-divorce sexual conduct is an unconstitutional punishment."³⁸ Furthermore, the fact that there is no inquiry as to whether the recipient's cohabiting partner is supporting her financially, reveals that "avoiding double support" is not the sole motivation for these types of laws, and rather, they could in fact unfairly punish women for engaging in activity deemed immoral by legislators.³⁹

The Massachusetts case of *Bell v. Bell* is an early case that illustrates the feminist perspective on cohabitation as

²⁷ MASS. ANN. LAWS ch. 208 § 49(d)(1).

²⁸ See McBrien.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² MASS. ANN. LAWS. ch. 208 § 54(a).

³³ See *id.*

³⁴ Emily M. May, *Should Moving in Mean Missing Out?*, 62 DUKE L.J. 403, 423 (2012) (<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3360&context=dlj>).

³⁵ See *Palmer v. Palmer*, 535 N.E.2d 611 (Mass. App. Ct. 1989).

³⁶ See *id.* at n.11.

³⁷ Robert I. Komitor, *Alimony Modification: Cohabitation of Ex-Wife with Another Man*, 7 HOFSTRA L. REV. 471, 481 (1979) (<http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1239&context=hlr>).

³⁸ May, *supra* note 34, at 422.

³⁹ See Komitor, *supra* note 35, at 480.

ground for suspending, reducing, or terminating alimony.⁴⁰ The primary issue in that case was a provision in a husband and wife's separation agreement (incorporated in the judgment) which provided that the husband pay alimony to the wife until any one of a number of contingencies occurred, including "the wife's living together with a member of the opposite sex, so as to give the outward appearance of marriage."⁴¹ After the divorce, the wife entered into a relationship with a man in which she would, at times, stay at his apartment and share a bedroom with him.⁴² The evidence put forward showed that she maintained a separate home where she received mail, her boyfriend's apartment lease was in his name only, he paid the rent, they took trips together and divided the costs, they socialized together, etc., however she never represented to anyone that she was married to him, nevertheless the Probate Court determined that she lived "part-time" with him in his apartment, sharing a bedroom, and therefore gave the outward appearance of marriage and, as such, her alimony payments were terminated.⁴³

The Appeals Court then reversed, based on a second provision in the separation agreement which provided that "neither the husband nor the wife will hereafter interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint by the other."⁴⁴ The court reasoned that, if the ex-husband were entitled to terminate alimony payments in response to the wife's living arrangements with her boyfriend, then he could coerce her conduct "in a way that was inconsistent with the intent of the parties as expressed in their agreement."⁴⁵ The Supreme Judicial Court ("SJC") did not agree, and affirmed the Probate Court's findings, holding that "[t]ermination of alimony payments in such circumstances cannot be considered interference with the plaintiff's personal liberty or 'criticism or restraint' within the meaning of the agreement."⁴⁶ In addition, counsel for the wife argued that "[c]ohabitation clauses which operate to bar the receipt of support payments by the wife upon the commencement of a non-marital relationship with a man, unfairly discriminate against women, both pursuant to the equal protection clause of the United States Constitution and the Massachusetts Equal Rights Amendment."⁴⁷ However, the SJC declined to consider this argument as it was raised for the first time on appeal.⁴⁸ The holdings in this case by the SJC set a strong precedent and were met

with strong dissent by some of the other justices, most notably Justice Abrams.

Justice Abrams' thoughtfully penned dissent is legally persuasive, and also illustrates the feminist argument well. Her dissent focuses on the fact that the outcome in this case allows the ex-husband to exert too much control over his ex-wife's personal matters.⁴⁹ She explains that by interpreting the Bells' separation agreement in this way, the court "hinges the [ex-wife's] entitlement to support on her conformity to life-style requirements imposed by the [ex-husband]" and "the court encourages economically-dominant husbands to meddle arbitrarily with the post-divorce lives of their wives."⁵⁰ This is especially problematic because "the typical alimony recipient is a woman who has sacrificed her earning capacity to her marriage," and therefore is reliant upon her ex-spouse for financial support following a divorce.⁵¹ Due to the financial reality of most divorce situations, the women have less bargaining power and therefore "must rely on judicial supervision to ensure that their entitlement to support is not made contingent on unjust and unreasonable conditions."⁵² As such, even if the cohabitation clause must be interpreted to terminate the alimony (although Justice Abrams thinks this is the wrong conclusion), public policy considerations should preclude this result as any other reading would amount to a contractual restraint on fundamental private rights.⁵³

While Justice Abrams concedes that provisions terminating alimony upon the wife's cohabitation can make sense in circumstances where her financial need is eliminated or met by another source, she is critical of the court's interpretation of the cohabitation clause in this case, because there was no financial inquiry and instead the court "terminated the plaintiff's right to support solely because of her involvement in a relationship that does not have the defendant's approval, without any inquiry into its effect on her need for support and without reciprocal restraint on her husband."⁵⁴

Justice Abrams' opinion is that such an interpretation is punitive in nature and clearly at odds with the separation agreement's provision stating that each spouse shall live free of restraint from the other.⁵⁵ She is supported on this issue by Justice Wilkins, who also authored a dissent in this case, and agreed that the court seemed to completely ignore the provision that each spouse shall live free of restraint from the other in issuing its decision.⁵⁶ Justice Wilkins

⁴⁰ See *Bell v. Bell*, 393 Mass. 20, 20 (1984).

⁴¹ *Id.* at 21.

⁴² *Id.* at 22.

⁴³ *Id.* at 21.

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at 23-24.

⁴⁷ *Id.* at 24.

⁴⁸ *Id.* at 24.

⁴⁹ See *id.* at 26.

⁵⁰ *Id.* at 26.

⁵¹ *Id.* at 26.

⁵² *Id.* at 26.

⁵³ *Id.* at 26-27.

⁵⁴ *Id.* at 26.

⁵⁵ *Id.* at 26.

⁵⁶ *Id.* at 24.

also explicitly highlights the fact that he thinks the court may be exercising an impermissible moral judgment on the ex-wife in this case, by stating that “[i]t is not for us to apply our moral judgment to conclude that the sharing of a bedroom over a period of time should be treated as giving an outward appearance of marriage when in fact, in today’s world, such a sharing of a bedroom gives no such appearance.”⁵⁷ The multiple dissents in this case highlight the concerns regarding protection of women in divorce cases, as well as the public policy concerns regarding their privacy and ability to live an autonomous life free from control of their ex-husbands, while still maintaining their financial support. For now it is unclear how these concerns will be addressed by courts in future cases regarding the Alimony Reform Act, but in my opinion they are very much worth calling attention to.

Comparison with Other States

The cohabitation provision on Massachusetts’ Alimony Reform Act actually brings it in line with many other states, particularly in the Northeast region. One New England state, Connecticut, has had a cohabitation statute on the books since 2001. The Connecticut statute gives the court discretion to suspend, reduce, or terminate alimony payments “upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party.”⁵⁸ It appears the critical inquiry here seems to be the avoidance of “double support,” as the suspension, reduction, or termination of alimony is explicitly based on a change in the recipient party’s change in financial situation, not necessarily the sole result of the cohabitation on its own.⁵⁹

A recent case which applied this law, *Nation-Bailey v. Bailey*, stemmed from a request for modification based on the fact that the alimony recipient had executed a lease with her new fiancé, whom the court found had been “sharing some of the plaintiff’s living expenses . . . thus altering her financial needs.”⁶⁰ The trial court applied the substantive terms of § 46b–86 (b), and suspended the ex-husband’s alimony and support payments for four months.⁶¹ The Appellate Court reversed, holding that the trial court should not have applied the cohabitation statute, and rather should have enforced the parties’ divorce agreement, which was incorporated by reference in the divorce judgment and stated that the

husband shall pay alimony until the wife’s remarriage or cohabitation.⁶² As such, the husband’s alimony payments terminated upon a showing that the wife was cohabiting.⁶³

This case seems to imply that in Connecticut, parties may contract around the cohabitation statute in divorce cases, since the Appellate Court held that the trial court did not have the discretion to suspend, reduce, or terminate the alimony payments if the parties’ divorce agreement required a certain result.⁶⁴ The *Nation-Bailey* decision came down in July 2013, and the holding was important enough to be codified into the amended cohabitation statute which became effective in October 2013.⁶⁵ The amended statute added a new sentence to the cohabitation section which reads:

In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith.⁶⁶

This is an important change, as it gives parties greater incentive to negotiate on the matter of cohabitation, and divorce attorneys in Connecticut need to be mindful of this as they draft their divorce agreements.

New York has similar laws to that of Massachusetts and Connecticut regarding cohabitation and alimony, with one major difference being that the New York statute uses gendered terms, highlighting the fact that most payors are male and recipients are female.⁶⁷ The statute states that “[t]he court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made . . . directing payment of money for the support of such wife.”⁶⁸ At first glance it seems problematic that the legislature has declined to make gender-neutral amendments, however it is important to note that the cases of *Orr v. Orr* and *Wood v. Wood* have made it so that husbands in New York may now be awarded support payable by their wives and the cohabitation statute can also be applicable to men who receive support.⁶⁹ This interpretation has likely prevented the

⁵⁷ *Id.* at 24.

⁵⁸ CONN. GEN. STAT. § 46b-86.

⁵⁹ *See id.*

⁶⁰ *Nation-Bailey v. Bailey*, 144 Conn. App. 319, 322 (2013).

⁶¹ *Id.* at 323.

⁶² *Id.* at 327.

⁶³ *Id.* at 327.

⁶⁴ *See id.* at 327.

⁶⁵ *See id.* at 319.

⁶⁶ CONN. GEN. STAT. § 46b-86.

⁶⁷ N.Y. DOM. REL. LAW § 248.

⁶⁸ *Id.*

⁶⁹ Alan D. Scheinkman, *Practice Commentaries*, N.Y. DOM. REL. LAW § 248 (McKinney 2015).

statute from being struck down based on constitutional claims of gender discrimination in violation of the equal protection clause.⁷⁰

An additional major difference between the New York statute and the Massachusetts Alimony Reform Act is that the New York statute requires a two-part test.⁷¹ In order for the statute to take effect, the wife must first be “habitually living with another man” and, second, “holding herself out as his wife,” whereas in Massachusetts, the wife does not need to be holding herself out as her partner’s wife in order to risk losing her alimony.⁷² Examples of types of conduct that demonstrate a wife to be holding herself out as another man’s wife include “applying for a telephone, designating him as her spouse and asking that she be listed in the directory with his surname; and changing the names on their joint checking account so that she uses his surname.”⁷³ Although this requirement is different from the Massachusetts statute, many of the policy reasons justifying cohabitation as grounds for alimony modification or termination are the same.⁷⁴ For example, one commentator on the New York statute expressed that the *Northrup* decision could lead to unfair results, whereby “a former wife can live with another man and insist that her former husband subsidize their relationship by continued spousal support payments, provided that she makes it plain that she not married to her cohabitant.”⁷⁵

Conclusion

There are undoubtedly many policy reasons which would justify a suspension, reduction, or termination of alimony payments upon cohabitation, particularly where the cohabitation impacts the recipient spouse’s financial condition. However, there are also competing interests which are equally as valid. One way to address both sides of the issue would be to place less of an emphasis on the private living arrangements of the recipient party, and instead focus more on the financial conditions. Since the recipient spouse may receive increased support in the form of shared expenses while the cohabitation is going on, but the lack of marriage makes it so that support is not guaranteed by this new partner, the alimony payments should be reinstated to their original amount if the cohabitation ends.

⁷⁰ See *id.*

⁷¹ See *id.*; see also *Northrup v. Northrup*, 43 N.Y.2d 566, 570-571 (1978).

⁷² See *Northrup*, at 570-571.

⁷³ *Id.*, at 571.

⁷⁴ See Scheinkman.

⁷⁵ *Id.*