



MCLE: NEGOTIATING ALIMONY

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DEFINITION OF ALIMONY

- General Laws c. 208, §48:
 - “Alimony”, 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.

LAWS REGARDING ALIMONY

- **General Laws c. 208, §34:**

- In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.

- **General Laws c. 208, §53:**

- (a) In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material.
- (c) When issuing an order for alimony, the court shall exclude from its income calculation:
 - (1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34; and
 - (2) gross income which the court has already considered for setting a child support order.

CALCULATING ALIMONY

- Look to:
 - 1. Receiving Spouse's need for alimony
 - 2. Supporting Spouse's ability to pay alimony
 - 3. Statutory limits and percentages

PREFACE: ASSET DIVISION

WHEN IS THE MARITAL ESTATE DETERMINED?

- Schulz v. Schulz, 101 Mass. App. Ct. 1117 (2022) M.A.C. Rule 23.0 formally referred to as 1:28 decision
 - Facts: After 15 years of marriage, Wife filed a complaint for Divorce from Husband. Following trial, the judge issued a judgment of divorce nisi. The judge included in the marital estate the Husband's personal injury settlement proceeds from an injury sustained years earlier but received after separation. The judge found that the Husband sustained the injury during the marriage and that the wife was entitled to 33% of the net proceeds. The husband challenged the judge's division of the marital estate.
 - Holding: The marital estate is typically determined as of the date of the divorce trial, rather than at the time of separation. Citing to Moriarty v. Stone 41 Mass.App.Ct.151, 154 (1996).
 - Husband's personal injury settlement proceeds he received after separation, but before divorce trial, were properly included in the marital estate.
 - "In making an equitable division of the parties' property, the judge had available for distribution 'all or any part of the estate of the other'". Citing to Heins v. Ledis, 422 Mass 477, 483-484 (1996)
 - There was no alimony award.

Note: The 3 panel Court had an incomplete record before them as the Husband did not obtain most of the transcripts.

PREFACE: ASSET DIVISION

WHEN IS THE MARITAL ESTATE DETERMINED CONTINUED...

However, contrast with:

- **Savides v. Savides, 508 N.E.2D 617 (1987)**

- Facts: Husband and Wife married in 1956 and lived together until 1974, when both parties began extramarital relationships. The Court found that the parties' marriage terminated in 1974, when they no longer held themselves out as a married couple. After 1974, Wife contributed nothing to the acquisition of assets, while Husband's business grew substantially.
- SJC affirmed valuation of the marital estate at the time of separation where the parties were separated for nine years before Husband filed a complaint for divorce, and post-separation appreciation of the Husband's assets was not attributable to the Wife's efforts.

Consider: (1) the amount of time between the separation and divorce trial, and (2) any post-separation contributions of each spouse to asset appreciation.

ASSET DIVISION

WHAT HAPPENS WHEN THERE IS AN EXPECTED INHERITANCE?

- **Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016)**

- Facts: Parties were married in 2000 and Husband filed complaint for divorce in 2010. Husband was a beneficiary of an irrevocable discretionary trust formed in 2004 that benefited an open class. At the time of trial, there were 11 living beneficiaries, meaning that Husband had a 1/11 interest totaling \$2,265,474.
- The Court found Husband's present right to distributions from the trust was speculative, because the terms of the trust permit unequal distributions among an open class of numerous beneficiaries, and because his right to receive anything was subject to the trustee having first exercised discretion in determining the needs of an unknown number of beneficiaries. Therefore, Husband's future acquisition of assets from the trust was not sufficiently certain such that it may be included in the marital estate.
- Holding: An expectancy (such as a future inheritance) is generally deemed too speculative to be included in the divisible marital estate and is thus appropriately considered under the § 34 criterion of opportunity for future acquisition of capital assets and income in determining what disposition to make of the property that is subject to division. This is because expectancies have only theoretical value, and do not create a fixed entitlement to income.

- **Frasca v. Frasca, 93 Mass. App. Ct. 1101 (2018) Rule 23.0 Decision.**

- Facts: Parties were married for 34 years and lived a lifestyle funded in large part by the Husband's mother. The Judge found the Wife was completely financially dependent on the Husband and his family's wealth and assigned to the Wife 35% of any future inheritances that the Husband may receive.
- When allocating the marital property, the Court found it was well within the judge's discretion to consider the high probability that the Husband would inherit from his still-living mother at some point in the future. However, because he had no vested interest in an inheritance at the time of divorce, it was error for the judge to assign any of Husband's future inheritance to the Wife.
- Holding: When interests are properly characterized as mere expectancies they may not be included in the divisible estate of the divorcing parties however can be considered in dividing marital property. See Davidson v. Davidson, 474 N.E.2d 1137 (1985)

ASSET DIVISION

WHAT HAPPENS WHEN THERE IS AN EXPECTED INHERITANCE CONT.

- **Zeh v. Zeh, 35 Mass. App. Ct. 260 (1993)**

- Facts: Parties were married in 1964. From 1970-1984, the Husband's father supplemented the parties' income. After his father's death in 1984, Husband was to receive \$421,918. The wife left the marital home and brought an action for divorce in 1988. However, at the time of the divorce hearing, the Husband's legacy had not yet been distributed.
- Holding: While an expectancy of an inheritance does not qualify as property subject to division under MGL c. 208, § 34, it may be considered by the judge under the criterion of opportunity of each for future acquisition of capital assets and income in determining what disposition to make of the property which is subject to division. However, an inheritance in possession clearly stands on different footing and constitutes part of the estate of the recipient subject to division under § 34.
- In these circumstances, the Husband's inheritance falls within the category of assets subject to division because it vested as of the date of the father's death.



*HOW DOES THIS RELATE TO
ALIMONY?*

MGL C. 208 §34:

- “In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other...”
- Therefore, alimony and equitable division are interrelated remedies. While equitable division may involve consideration other than those determinative of alimony, an order for division of property cannot be viewed apart from alimony.
 - Quoting *Grubert v. Grubert*, 20 Mass. App. Ct. 811 (1985)

ALIMONY CASES

- **Gottsegen v. Gottsegen, 397 Mass. 617 (1986)**

- “The statutory 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. A court may not limit alimony for reasons unrelated to its statutory base.”

- **Pierce v. Pierce, 455 Mass. 286 (2009)**

- Facts: As part of their separation agreement, Husband was required to pay Wife \$110,000/year as alimony. Husband later retired at the age of 65 and filed a motion asking the court to eliminate his alimony obligation. The court reduced his payments to \$42,000/year, finding that he had the financial ability to pay, despite his diminished income. Husband argued that his obligation should have been terminated.
- Issue: Should a former spouse's voluntary retirement from employment at or beyond the customary age of 65 create a rebuttable presumption that any alimony obligation owed by the retiring spouse should be terminated?
- Answer: No, voluntary retirement at a customary age is simply one factor to be considered by the judge in deciding whether to modify the alimony obligation set forth in a divorce judgment.
- “If a supporting spouse has the ability to pay, the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to the termination of the marriage.”

ALIMONY AND ASSET DIVISION IS THERE NEED IF YOU HAVE ASSETS?

- **Downey v. Downey, 55 Mass. App. Ct. 812 (2002)**

- Facts: Divorce agreement provided Husband would pay Wife \$225/week for alimony and child support. When Husband was no longer required to pay child support, Husband was ordered to pay \$300/week to meet the present financial needs of Wife.
- At time of modification trial: Wife's Assets = ~\$101,000. Husband's Assets = ~\$267,500.
- The judge found that Wife's weekly expenses substantially exceed her weekly income, and that the Wife is unable to provide adequately for her needs. Although the Wife possesses assets worth in excess of \$100,000, the judge properly could conclude that the wife "should not be required to deplete her assets in order to maintain herself."

- **Doktor v. Doktor, 470 Mass. 547 (2015)**

- On appeal, Husband alleged judge erred by not considering Wife's use of principle of her assets to meet her reasonable expenses.
- The judge considered the Parties' station in life during the marriage; the nature, source, and value of the Wife's assets; her current income and reasonable expenses; and Husband's stipulated ability to pay alimony and properly concluded that without the alimony, the Wife's weekly expenses exceeded her income, and she should not be required to deplete her assets in order to maintain herself.

ALIMONY AND ASSET DIVISION CONTINUED...

- **Cournoyer. Cournoyer, 91 Mass.App.Ct. 1125 (2017)**
 - Facts: Parties divorced after 18 years of marriage.
 - Wife ordered to pay Husband alimony.
 - Wife lost job and sought to terminate alimony.
 - At trial, alimony terminated, and court found Husband could liquidate his assets to reduce expenses.
 - Issues included durational limits of which Husband argued extension due to medical chronic illness. Case also addressed other issues but reiterated Doktor v. Doktor and Downey v. Downey, that “a recipient spouse “should not be required to deplete her assets in order to maintain herself””.
 - Remanded. Holding that Husband could use his assets was in conflict with Doktor.

ATTRIBUTION OF INCOME IN ALIMONY CASES

WHAT IS ATTRIBUTION OF INCOME?

- Income may be attributed where a finding has been made that either parent is capable of working and is unemployed or underemployed.
- If the Court determines that either parent is earning less than he or she could earn through reasonable effort, the Court should consider *potential* earning capacity rather than actual earnings in making its child support order.
- Considerations:
 - 1.Age, number, needs, and care of the children covered by the child support order,
 - 2.The specific circumstances of the parent, to the extent known and presented to the Court including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history,
 - 3.The parent's record of seeking work and the availability of employment at the attributed income level, as well as the availability of employers willing to hire the parent, and
 - 4.The relevant prevailing earnings level in the local community.

CASES WHERE ATTRIBUTION OF INCOME WAS APPLIED

Schuler v. Schuler, 382 Mass. 366 (1981)

- Facts: at the time of divorce, Husband's income was approximately \$46,500. Two years later, Husband's employment was terminated. At the time of the modification hearing, Husband had not accepted other employment and had instead formed a consulting business with an income of \$21,000. Although positions in his line of work (design engineering) paid \$24,000/year and were reasonably available, Husband had decided not to pursue those opportunities because he hoped to become the president of a small corporation.
The judge found that Husband had not sought new employment and did not intend to do so and relied on his potential income as a design engineer rather than his actual income in setting alimony obligations. It was also unreasonable for Husband to wait indefinitely upon the limited prospect of becoming president of a corporation, when a position with a \$24,000 salary was reasonably available. Husband appealed.
- Holding: The general rule is that "where the support provider is earning less than he could with reasonable effort, the trial judge may consider potential earning capacity rather than actual earnings." Therefore, it was not an abuse of the judge's discretion to consider Husband's potential rather than actual income as one factor in his decision not to modify the original separation agreement.
- Note: a judge may also weigh a party's ownership of "substantial assets," and continued standard of living following a job loss, in determining whether attribution is proper.

ATTRIBUTION OF INCOME CONTINUED

Macri v. Macri, 96 Mass. App. Ct. 362 (2019)

- Facts: The parties divorced in 2008. Between 2008-2011, the Husband earned an annual income between \$700,000-\$1 million. After an appeal and remand on the issue of attribution, the trial judge attributed an annual income of \$400,000 to the Husband, who was unemployed at the time of trial, finding that he had not exercised reasonable efforts to obtain appropriate employment.
 - In attributing income, the judge found that the husband was 51 years old and in good health. He had worked in the financial sector for over 25 years and had voluntarily terminated his job. At trial, a vocational expert witness testified that the Husband was “highly employable,” that over 5,000 positions were available in the Boston area, and that his annual earning capacity was ~\$440,000. These factors led the judge to conclude that the Husband was unreasonably unemployed.
- Holding: The trial court did not err in attributing an income of \$400,000/year to the Husband because the judge’s detailed findings demonstrated appropriate consideration of the availability of employment at the attributed income level, the availability of employers willing to hire him, and the relevant prevailing earnings level in the Boston area. The findings reflected consideration of all factors required by the guidelines.

CONTRAST WITH CASES WHERE THERE WAS NO ATTRIBUTION OF INCOME

Flaherty v. Flaherty, 40 Mass. App. Ct. 289 (1996)

- Facts: Husband was a 46-year-old professional with a Ph.D. Two months prior to trial, Husband was laid off from his job. At the time of trial, he was receiving unemployment benefits and was readying himself to seek new employment. The trial judge ordered him to pay \$400/week in child support based on a computation attributing to the Husband full-time employment income, instead of his unemployment income he was actually receiving. However, the judge made no specific findings in support of attribution. Husband appealed.
- Holding: the trial judge's findings were inadequate to support the attribution of income.
- Attribution of income may be appropriate when a judge determines a career change is voluntary or where a party fails to take another job despite its easy availability (*Schuler*). A party's ownership of substantial assets also may be weighed in determining whether attribution is proper.
- Where, however, as here, there is no evidence that a change in job status was voluntary, the party is making a reasonable effort to secure additional income, and he or she has no additional assets with which to pay the increased support order, child support orders must be based upon present income.

ATTRIBUTION NOT PERMITTED CONTINUED

Emery v. Sturtevant, 91 Mass. App. Ct. 502 (2017)

- Modification filed at the end of the divorce trial but before entry of Judgment.
- The Husband resigned from his employment after having an affair with a subordinate.
- The Husband accepted employment making \$135,000. Previous compensation package exceeded \$450,000.00.
- Court stated “[w]hen determining the earning capacity of a party who has recently undergone a career change, we have said that “[a]ttribution of income may be appropriate when a judge determines a career change is voluntary.” Flaherty v. Flaherty, 40 Mass.App.Ct. 289 (1996).
- In Flaherty v. Flaherty, attribution based on a party's prior earning capacity applied when party voluntarily left his or her job and then failed to make reasonable efforts to secure comparable employment. “This may occur when a party has taken an early retirement or has chosen to pursue work in a totally unrelated field at a substantially reduced salary, despite the availability of higher-paying jobs commensurate with that party's education, training, and experience.” See, Bassette v. Bartolucci, 38 Mass.App.Ct. 732, 735-736 (1995) (affirming attribution where husband voluntarily retired from his job as letter carrier earning \$735 per week to work as missionary with pension income of \$235 per week).
- Here, the judge attributed income because of a voluntary career change. The appeals court found this to be error. “The facts of this case are distinguishable from the voluntary career change line of cases”.
- Judge was required to determine Husband could earn more with reasonable effort. “The reasonable efforts inquiry is critical, and is generally the determining factor in whether to affirm the attribution of income to a party based on his prior earning capacity. See, e.g., C.D.L. v. M.M.L., 72 Mass. App. Ct. at 157 (in affirming attribution of income to husband, court gave “special weight to the judge's finding that the husband was ‘earning less than he could with reasonable efforts’”). Indeed, as we have previously observed, “neither this court nor the Supreme Judicial Court has affirmed an attribution of income made without a finding concerning the party's reasonable efforts to secure employment.” Ulin v. Polansky, 83 Mass. App. Ct. at 307. ”

Emery v. Sturtevant Continued

- Court should "consider all relevant factors including without limitation the education, training, . . . past employment history of the party, and the availability of employment at the attributed income level." Guidelines § I-E. See Flaherty v. Flaherty, 40 Mass. App. Ct. at 291 ("judge should determine by specific and detailed findings of fact whether an individual will be able to earn additional income with reasonable effort before attributing income"). The Judge did not make a specific finding regarding the reasonableness of the husband's efforts to secure employment. Instead, the judge simply "credit[ed] the [h]usband's testimony about his job search efforts after his resignation from NMH." The testimony credited by the judge details the husband's extensive job search spanning eleven months (from June, 2011, to May, 2012) (see case for full job search efforts the husband accepted)"
- "Rather than assessing the reasonableness of the husband's job search leading up to his acceptance of the SEED position, the judge instead found that "once the [h]usband obtained his position with the SEED Foundation in May, 2012, he ceased making any efforts to find employment that paid a salary commensurate with that he had made at NMH." It is neither reasonable nor fair to expect the husband, after he has engaged in an extensive job search in his field of expertise and has secured employment commensurate with his training and experience, to continue his job search efforts indefinitely to avoid the risk of income attribution. Compare Schuler v. Schuler, 382 Mass. at 371-372; C.D.L. v. M.M.L., 72 Mass. App. Ct. at 150, 158. Accordingly, not only did the judge fail to make a specific finding that the husband could earn more with reasonable effort, it is apparent that such a finding cannot be made on this record. "
- Court found criteria was not met. Remanded for support order based on actual income

FURTHER ISSUES OF ATTRIBUTION

Second Jobs: Attributed Income

- Zaleski v. Zaleski, 469 Mass., 230 (2014)

Here the Wife payee was educated and had been employed outside the home, had been unemployed about 2 years at filing and was highly employable. The judge ordered rehabilitative alimony instead of generally term in this 16-year marriage. Also look to this case for rehabilitative alimony where a spouse is expected to become self-supporting in the future.

Vedensky v. Vedensky, 86 Mass.App.Ct.768 (2014)

Appeal, included issue of attribution of income to former Wife (payor) on her second job. The Probate found the Wife was earning \$214,000 working full time at the hospital and was also working part-time per diem at a rehabilitation hospital. The judge not only took the second job into account in calculating alimony but considered payor's ability to work additional hours at the second job and attributed income to her.

"We conclude that a party who works at a full-time or full-time equivalent job may not be found to be "unemployed" or "underemployed" based on the level compensation received from a second job obtained 'after entry of the initial order' unless the judge concludes, based on finding supported by the evidence, that a basis exists for rebutting the presumption of immateriality applicable to the income earned from the second job".

The Court found that was in error citing to the Alimony act "[i]ncome from a second job or overtime work shall be presumed immaterial to alimony modification if: (1) a party works more than a single full-time equivalent position; and (2) the second job or overtime began after entry of the initial order." G.L. c. 208, § 54(b). Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 22 N.E.3d 951 (Mass. App. 2014).

TAKEAWAY

- “[T]he voluntariness of a career change is not dispositive for purposes of income attribution, and we do not suggest here that a party is foreclosed from making a good faith, voluntary career change simply because the change results in less income. The relevant inquiry in all income attribution cases, whether the party “could earn more with reasonable effort,” requires consideration of the party's “specific circumstances,” including a broad list of factors specified in the Guidelines. The weight afforded to each factor is a matter within the trial judge's discretion, and depending on the circumstances of a particular case, certain factors may be weighed more heavily than others.”
 - Quoting *Macri v. Macri*, 96 Mass. App. Ct. 362 (2019)
- Therefore, a judge will generally not attribute income without persuasive evidence that:
 - 1. One party failed to make reasonable efforts to find employment, and
 - 2. That jobs are available at the income level being attributed