

Memo to Senator Richard Sears  
And  
Senate Judiciary Committee

From: Kimberly B. Cheney  
4 Towne St  
Montpelier, Vt. 05602  
[Kim@barrlaw.com](mailto:Kim@barrlaw.com)  
802-272-3762  
In consultation with. P.Scott McGee,  
Christopher Davis, and Lawrence Myer

January 31,2017

Re: ALIMONY LEGISLATION

WHAT IS THE PURPOSE OF ALIMONY? Until the many strands of social policy which are embedded in that question are teased out, no wise policy changes are possible. Some of those strands follow:

1. PURPOSE OF MARRIAGE. The existence of laws providing for exchange of money between former spouses upon dissolution of a marriage are based on social policy establishing economic consequences for the act of marriage. The various status enhancements imposed by law upon spouses – favorable tax treatment, promise of economic equity between spouses, social recognition of a presumed common interspousal interests – to name a few, have two apparent goals (1) encouraging both social and individual stability fostered by the newly created marital relationship while providing expected monogamy in the relationship and (2) enhancing economic and social equity between the sexes.
2. PARADIGM CASE. If the unambitious high school drop out marries a hard working brilliant person who becomes wealthy (or inherits) how should income be allocated on divorce? Presently income, including retirement benefits, are equally divided upon divorce, if the marriage is “long” (say 20 years), the parties are older than approximately mid to late 50s with no critical health issues, and the retirement benefits were earned during the marriage. This policy recognizes that if two people choose to

rely on a relationship for economic and social benefits over a long period of time the economically advantaged spouse is estopped from depriving the other from the economic benefits of the relationship . “Fault” in causing the relationship to end is irrelevant. So is the fact that the marriage did not change the earning capacity of either spouse. All marital work is presumed to be equal value so “partnership” contributions are ignored.

### 3. PURPOSE OF ALIMONY BASED ON PARADIGM CASE.

- a) Marriage is legally encouraged to provide social stability.
- b) Gender equity is promoted – in a society where for various reasons men generally earn more than women, alimony provides economic protection for the disadvantaged, usually but not always, , female spouse.
- c) Remarriage is not cause for mitigation of payments as the disadvantaged spouse is deemed to have “earned” the right to economic security by expending the wasting asset of youth and career potential.
- d) This is a policy of social insurance for aging. Youth is a wasting asset requiring compensation for its loss if money is available, which the economically advantaged spouse pays to enhance both spousal and social stability. In this construct, marriage is like a mortgage, the longer you pay on it the more equity accrues

### 4. SOCIAL EFFECTS OF PARADIGM ALIMONY

- a) Economically advantaged spouses are encouraged to divorce early to avoid perceived unfair distributions, yet unsatisfactory marriages continue for a variety or important non-economic reasons such as religion, children, stigma, fear of unknown life changes, fear of Court's etc.
- b) The current standard that seeks to maintain the standard of living achieved during the marriage is predictably unfair since two households cannot be supported at that level.
- c) Alimony awards are functionally impossible to modify under current law in which both unanticipated change and substantial changed financial circumstances of

either party must be shown. Therefore remarriage , job loss, economic catastrophe, etc. which can be foreseen are not cause for modification.

- d) Perceived fear of alimony may discourage marriage, or encourage prenuptial agreements.
- e) Perceived disparity of results as basis of decisions not clearly articulated or quantified

#### 5. ADJUSTMENTS TO ALIMONY AS CIRCUMSTANCES DEPART FROM PARADIGM CASE

- a) Health of the parties – sick people need care and it's the risk of a marriage (“for better or for worse”)
- b) Length of the marriage – short marriages limit or reduce alimony as disadvantaged spouse has time and ability meet economic needs according level of own talent and ambition at date of marriage.
- c) Age of the parties: youth is a wasting asset.
- d) Compensation for forgone economic opportunities awarded for child rearing
- e) Compensation awarded disadvantaged spouse for contributions to increased income of advantaged spouse.
- f) Both parties should be given an incentive to work to the maximum of their economic ability. No alimony drones. Freedom to “get ahead.”

#### 6. PURPOSE OF ALIMONY

These considerations lead to the conclusion that the purpose of alimony is to foster social stability as identified in paragraph 1, by requiring an economically advantaged spouse to make payments to the disadvantaged spouse that are identifiable as growing out of the duration and economic status of the parties during the relationship. The extent of the payments are to be measured by the ability of the advantaged spouse to pay, and the need of the disadvantaged spouse to recoup economic loss resulting from the marriage which cannot reasonably be regained without assistance

## 7. LEGISLATIVE CONSIDERATIONS.

- a) The proposed alimony formula is not like the child support formula. That formula has a stated purpose to maintain children at the standard of living they would have had but for divorce, and is based on scientific studies of the average percentage of combined marital income it costs to raise a child and thus is predictable.
- b) A starting analysis for an alimony award is to measure the case under consideration against the paradigm case. An appropriate alimony award must consider not only the purpose of alimony but explain and quantify the award for a subject case in light of all the factors in paragraph 5 leading to a departure from the paradigm case.
- c) The proposed alimony formula recognizes only two variables, disparity in income and length of marriage. It is not flexible enough to achieve a reasonable alimony award based on the multifaceted purposes, and factors relating to alimony awards. The percentages used appear to be based on some sort of “conventional wisdom” about how much is enough to achieve the purposes of alimony. It should not be used either as a presumption or mandatory outcome
- a) A list of factors for Judges to consider without an explanation of the weighting of the importance of the factors in relation to the purpose of alimony is an invitation to arbitrary decisions. (The pin ball machine method – send the ball down the slope to light up the factors without scoring them). A system akin to the federal criminal sentencing system might be established. Current practice fosters idiosyncratic Judicial discretion.
- b) A more sophisticated algorithm incorporating many factors could be created, which would be useful to guide application of the factors. Mathematicians at UVM should be invited to submit proposals.<sup>1</sup> For example, a 20 year marriage ending at age 38 might be

---

<sup>1</sup> See Lewis *The Undoing Project*, WW Norton 2017, Ch 5 @ 171 ff. Doctors at Oregon Research Institute identified seven major signs from which it was possible to diagnose stomach cancer from X-rays such as size of ulcer, shape of borders etc.. Algorithm created from which it could be determined if the ulcer was malignant weighting each factor equally. 96 stomach X-rays,

weighed at 3 instead of 10, or 5 year marriage be a 2, or economic ability a 5, economic impacts of health a 6, etc etc until an appropriate deviation from the paradigm case was established.

- d) It is highly unlikely that a consensus can be achieved based on current data to identify criteria that will lead to uniform alimony awards, unless judges are required to use common criteria.
- e) The rules relating to division of property in a divorce suffer from the same shortcomings as those for alimony.

#### 6. PRACTICAL CHANGES WHICH WOULD MAKE ALIMONY AWARDS MORE JUST

- c) Alimony decisions should be more easily modifiable to account for changed economic status of the parties that depart significantly from status as time of award. Remarriage alone should not, standing alone, be a changed economic status, but circumstance of enhanced economic status may make remarriage relevant.
- d) The legislature should state a purpose to be achieved by an alimony award.
- e) Trial Judges should be required by law to clearly state what social purpose their alimony award is intended to advance and identify the factors and weight given them to achieve that purpose.
- f) Current Vermont Supreme Court doctrine gives trial judges wide discretion in alimony awards, insisting only that what was decided and why it was decided be clearly stated. That doctrine should be changed. Review of alimony decisions should determine whether the trial judge's stated purpose is consistent with the legislative purpose for

---

including 50% duplicates, given to several doctors requiring them to diagnose one A-ray twice. Results algorithm predicted method of diagnosis but showed no agreement regarding diagnosis among experts, many doctors contradicted their own diagnosis and t graduate students were as good as experienced doctors at diagnosis. Further research showed you were better off with the algorithm diagnosis than doctor diagnosis. Conclusion: When people make judgments they compare whatever they are Judging to some model in their minds rather than by analysis of many factors. There is a belief in the law of small numbers , i.e few numbers are needed to made decisions; although there was medical unanimity on the pertinent factors, individual judgments were bizarre- a characterization appropriate to some judicial decisions – at least in the eyes of many alimony payors..

alimony, whether the weighting of the statutory factors reasonably advances that purpose, and whether the social goals fostered by the decision are supported by the reasons for the decision.