MEMORANDUM

To: Steve Hitner
From: Carmen D. Legato
Date: May 15, 2017
RE: Constitutionality of HR740

HR 740 creates a dichotomy between divorce judgments under which Parties have elected to make their agreements regarding alimony non-modifiable by courts in the future and those in which the Parties have elected to subject their agreement to modification by courts or to have the courts impose an order subject to such changes. In the latter case, the courts have adjusted the rights and obligations of the parties upon application by one party to account for a material change in circumstances that arose from the time that the Parties framed their agreement. In doing so they expressly confer upon the courts the ongoing ability to modify their agreement and do so without establishing any limits upon the judiciary to decide what might constitute a material change in circumstances. The standard is one of great generality necessarily giving the courts wide latitude to adjust the obligations of the parties based upon a change of circumstances. In doing so, parties electing to confer upon the courts such authority, cede their own right to create a determination of the circumstances under which alimony might change in favor of granting broad authority without standards to the judiciary.

HR 740 establishes standards for decisionmaking regarding a material change of circumstances in several instances. First, it subjects such prior orders to durational limits established in recent prior law unless a judge finds that a deviation from those standards is warranted. Second, it establishes that cohabitation in a marriage like relationship shall constitute a material change warranting a cessation of alimony—as would marriage under existing law— provided, however, that the alimony obligation would spring back into effect should the cohabitation end.

A question has been posed whether these changes as applied to orders granting alimony subject to change upon a material change of circumstances would create a retroactive application of a change of law that would violate the Constitution.

That this change does not violate constitutional norms is not a close question. Rather, legislative change of this kind making the standards governing future determinations under a broad standard such as a material change of circumstances is the everyday stuff of legislation. There are three constitutional provisions that give rise to limitations on legislation affecting prior settled expectations. First, ex-post facto laws pertains to changes making conduct formerly lawful criminal and is confined to the field of criminal law. Second, is the “Contracts Clause” that limits the ability of a State to change settled expectations of parties to a private contract. That limitation has its most significant effect in preventing the legislature from changing contracts under which the state is a party. That certainly is not the case here and, in any event, no party could claim that it had a settled expectation to a certain set of circumstances not constituting a material change. Under existing law, judges have the responsibility to determine what constitutes a material change and have the authority to alter their perceptions of those circumstances based upon changes in society or of their perceptions of fairness. Plainly, there is no impediment to the legislature giving content to the standard for particular matters. Indeed, alimony is a creature of legislation rather than the common law and particularly dependent upon legislative action.

The final issue is whether the expectation of parties arising from the state of the law at the time the order was issued in the original divorce action would, if altered, result in a denial of the due process of

law. That determination is governed by a standard of "rationality." Is the legislature's change rationally related to its objectives. There are three pertinent factors that make it clear that there is no issue of constitutionality. First, the State has allowed parties to establish their own determination of how future events might affect the alimony obligation and the State in HR 740 specifically excludes those agreements from the changes of HR 740. It is only in the cases in which the parties refused to enter into an agreement of that kind and where under the law at the time the State had provided for a procedure for one party to apply to the judiciary for an adjustment based upon a material change in circumstances that HR 740 applies. Obviously, the settled expectation of the parties was that an adjustment is possible and that it was to be governed under a broad discretionary standard under which they could not possibly know how a court would apply it to circumstances arising, 10, 20 or 30 years hence.

No party could have reasonably known how the courts would have addressed a particular circumstance with the passage of time and a different understanding of what is fair. Typically, at least outside of criminal law, judges are free to change their views of the law and to state the law as applicable to all without carving out classes of individuals. To do otherwise would requiring "vintages" of judge- made law applicable to classes of individuals. That endeavor would be difficult enough where the issue is binary, but impossible when the standard is so broad that different judges might decide it differently and when there are so many possible circumstances constituting a material change of circumstances.

In this case the rationality standard easily has been met. Alimony in Massachusetts has been a long-term obligation that could last anywhere from 10 to 30 or more years during which the lives of the parties could take substantial deviation from the circumstances at the time of origination of a divorce modifiable agreement or decree. Secondly, vast changes in society have occurred to which the legislature is responding. Cohabitation was rare, indeed a crime, when some of these obligations were incurred. Now, by contrast, cohabitation has become for many a substitute for marriage, a datum to which the legislature was certainly bound to consider. Second, gender equality under the law has recast the roles of men and women in the workforce and pay inequality has diminished. Indeed, it would not be uncommon for an alimony obligee to now earn more than an alimony obligor. The economy now changes much more rapidly, as does the ability of individuals to retrain and to change their economic fortunes. The increasing lifespan makes the scope for these changes to occur within a party's lifespan much more prominent. For the legislature to address these changed societal conditions is hardly irrational. Indeed, it might be considered irrational for the legislature not to recast the law in the light of these monumental changes.

Finally, though not necessary, the provision granting a judge to create an exception to the presumption regarding the duration of alimony further removes the change in standards from constitutional question. Similarly with the provision allowing the alimony obligation to spring back if the cohabitation ends (equally unnecessary).

In sum, the changes wrought by HR 740 are the everyday stuff of valid legislative action to conform concepts of economic and social fairness based on evolving social and economic changes and which nearly always apply equally without creating classes of citizens to whom apply differently the current understandings of what is fair. Indeed, it would be more problematical to attempt to create such vested interests in this context rather than to treat all citizens equally in the modern context particularly when orders fashioned 20 or 30 years ago could not have given rise to an expectation that alimony would continue during a marriage-like relationship then unknown though automatically terminated upon re-marriage.