

Alimony: Past Present and Future

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Alimony is in the midst of an identity crisis. Since 1973, Connecticut's alimony schema has served a simple but amorphous purpose: equity. The statutory factors are not prioritized, the case law is pragmatic and fact specific and the basic emphasis is on judicial discretion to do right for individuals and families. The system can be faulted for inconsistent outcomes and lack of predictability which can make it more difficult to settle cases. However, General Statutes § 46b-82 works in most cases, evidenced in part because the vast majority of family cases settle.

Family structures have evolved markedly since Connecticut adopted No Fault Divorce in 1973. The no fault movement at that time was a reaction to changing social needs, and to a divorce system in Connecticut that found origins in a 1677 statute, which in turn was based on English common law dating back before Henry VIII. Connecticut families and the national culture have evolved further since 1973, and not in a uniform way for all families.

Alimony reform is on the agenda throughout the United States, and the reform movement now has reached Hartford. Current reform movements, both locally and nationally, seek to promulgate the use of formulas that will provide greater consistency and predictability for litigants. Reformers point to the success of child support guidelines, and the basic notion that persons in similar circumstances should be treated similarly by the court. They also argue anecdotally based upon a few trial court decisions that seem excessive and undermine confidence in broad judicial discretion, and appellate court affirmation under the abuse of discretion standard.

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Proponents of a more flexible approach, embodied in General Statutes §§ 46b-81, 46b-82, 46b-84 and other statutes, view alimony as part of a mosaic of equitable orders that cannot be predetermined by a formula. They argue that families and spousal relationships are as unique as fingerprints and the implications, both social and societal, of rigid formulas are extremely problematic.

This debate is a clash between rules and judicial discretion. The implications are far reaching for marital dissolution in Connecticut, and reform may have unintended consequences. These course materials will attempt a cursory overview of law, history, sociology and theory that are driving current trends in alimony reform.

I. Alimony's Roots in English Common Law

Alimony was originally a remedy of the English ecclesiastical courts.¹ It developed at a time when complete divorce was available only by special legislation, and gender roles in marriage were rigid and unquestioned. It was a concept based on the husband's legal and customary duty to support his wife.² England passed the first law permitting the public to obtain a divorce in 1857.³ Until the creation of the Commonwealth in England, the ecclesiastical courts had jurisdiction over all matters affecting the dissolution of marriage, and recognized two types of divorce.⁴ The most common, a divorce "a mensa et thoro" or "from bed to board",⁵ was essentially the legal separation of today.⁶ The marriage was held to have been of good origin, but its sanctity had been destroyed by some intervening cause, such as adultery, infidelity, cruelty, or

¹ A.L.I., *Overview of Chapters 4 (Division of Property Upon Dissolution) and 5 (Compensatory Spousal Payments)*, Principles of the Law of Family Dissolution (1997).

² *Id.*

³ *Alimony Pendente Lite for Husbands*, 32 YALE L.J. 478, 478 (1923).

⁴ *Id.*

⁵ Robert Kirkman Collins, *The Theory of Marital Residuals: Applying An Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28 (2001).

⁶ *Alimony Pendente Lite for Husbands*, *supra* note 3, at 479.

"entering into religion, which justified its partial suspension."⁷ While a divorce "a mensa et thoro" allowed a husband and wife to live apart, the two parties were still tied together by the bond of marriage.⁸ The children were legitimate, the parties could not remarry, and the husband's investiture in the entirety of the wife's property still held true, as did his duty to support her.⁹ Under common law, a single woman was considered a whole person with rights as such, but once married, a woman could not enter into contracts, sue or be sued.¹⁰ By law, after the marriage, the rights of a woman to personal property and profits from realty were vested in her husband.¹¹ The husband was seen as the ruler of the family, and thus was responsible for management of the marital property.¹² Because the husband was the property owner, and the wife depended upon him to provide for her, the courts consistently ruled that the husband had the duty to provide for the wife after an "a mensa et thoro" divorce.¹³

The second form of divorce, "a vinculo" or absolute divorce, which literally meant severing the chains of matrimony, although technically available, was extremely rare because it required an act of Parliament and was generally reserved for noblemen.¹⁴ The results of such a divorce were that any children were deemed illegitimate, either party had the right to remarry, the husband was barred of curtesy and the wife of dower, and the wife was given back all the property she had brought into the marriage.¹⁵ The parties were considered as never having been husband and wife, and as such did not owe each other any of the duties stemming from the marriage.¹⁶

⁷ *Id.*

⁸ William L. Tabac, *Alimony and Child Support in Ohio: New Directions After Dissolution*, 26 CLEV. ST. L. REV., 395, 396, (1977).

⁹ *Alimony Pendente Lite for Husbands*, *supra* note 3, at 479.

¹⁰ Tabac, *supra* note 8, at 396.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Mani v. Mani*, 869 A.2d 904 (2005).

¹⁵ *Id.*

¹⁶ *Id.*

Traditionally, alimony was granted only in a divorce “a mensa et thoro” on the theory that the husband was obliged to continue to support his wife as long as they remained married.¹⁷ As time passed, the distinction between true divorce and mere separation was obliterated and alimony began to be awarded in all cases.¹⁸

Divorce based on the English model was available in the American colonies from the earliest times except that in America divorce was absolute whereas England primarily only granted divorces “a mensa et thoro.”¹⁹ As a result, an English divorce generally meant that the woman remained married but separated rather than divorced from her husband, and the rights of a single woman were not restored to her causing her to be forever dependent upon her husband for support.

The first statute authorizing divorce in Connecticut by a decree of a judicial court was enacted in 1677. Prior to the statute, divorces were granted, without the authority of statute, by the courts on biblical grounds, i.e. adultery and malicious desertion. The statute remained constant, with few minor changes, until the mid to late 19th century.²⁰ “For the first three hundred years in Connecticut, divorce was not favored, and rights relating to divorce were strictly circumscribed. For most of Connecticut’s history alimony could only be ordered to be paid by the husband to the wife.”²¹

Even though divorce in America at that time was absolute, courts continued with the ecclesiastical court's policy of providing the wife with support after the marriage was dissolved, through what we call "alimony.”²² The same concept of fault and women as property survived in

¹⁷ Collins, *supra* note 5, at 28-29.

¹⁸ *Mani*, 869 A.2d at 909 (2005).

¹⁹ JOEL P. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION, 852-857 (1891).

²⁰ *Wendt v. Wendt*, 1998 WL 161165 (Mar.31, 1998, Tierney, J), *aff'd*, 59 Conn. App. 656, cert. denied, 255 Conn. 918 (2000).

²¹ *Id.*

²² The Latin roots of alimony are the words *alere* meaning to nourish, and *alimonia* meaning sustenance. As Abrose Bierce noted in *The Cynic's Word Book* (1881-1906) “one who, having dined, is charged with the care of the plate.”

America even in absolute divorces. Fault was the only basis on which a divorce could be granted, and if a husband was guilty of such misdeeds as to necessitate granting his wife a divorce, he was obligated to support her for the rest of her life. In such cases she would have other no viable means of support. Conversely, when a wife was at fault she was not entitled to alimony-nor would she be-until the 20th century.

II. The Evolution of Alimony Law in Connecticut

a. The Married Women's Act

The Married Women's Act was the first law to arguably alter the underpinnings of alimony in Connecticut and was enacted by the legislature in 1877. This law now is codified in Conn. Gen. Stat. §46b-36 and provides, *inter alia*, that:

The separate earnings of the wife shall be her sole property. She shall have power to make contracts with her husband or with third persons, to convey to her husband or to third persons her real and personal estate and to receive conveyances of real and personal estate from her husband or from third persons as if unmarried. She may bring suit in her own name upon contracts or for torts and she may be sued for a breach of contract or for a tort...²³

Historically, under common law, a single woman was considered a whole person with rights as such, but once married; a woman could not enter contracts or be sued.²⁴ This new law enabled married women to own and control her own property as well as to sue and be sued. Essentially, a woman remained a separate legal entity with her own rights. Before the passage of this law, women could not contract with anyone including her own husband but they were now free to enter into contracts and make their own economic decisions. The original theory of alimony was that women were not able to support themselves and thus needed to be supported following the marriage. The passage of the Married Women's Act, however, afforded women

²³ Conn. Gen. Stat. §46b-36 (2009).

²⁴ Tabac, *supra* note 8, at 396.

the legal right to pursue economic growth and acquire assets during the marriage. They could own property and thus they might no longer need to have their husbands unending support.

b. The Uniform Marriage and Divorce Act (UMDA)

The model act known as the UMDA, first published in 1970, was a radical departure from history. The UMDA did away with fault as a required basis in divorce cases and attempted to limit awards of alimony.²⁵ Under the UMDA, alimony should only be awarded if the supported spouse lacks sufficient property to provide for her reasonable needs and is unable to support herself through employment or is a custodial parent unable to seek employment outside the home.²⁶ The commentary of the UMDA defined “reasonable needs” as whether the spouse seeking support “is unable to secure employment appropriate to his skills and interests,” strongly suggesting that when a spouse could work they would be responsible for their own support. In fact, the drafters changed the name from alimony to “maintenance” to put the emphasis on the employability of the payee. Under the UMDA, maintenance was to be awarded in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors.²⁷ By the 1990s twelve states had adopted the UMDA maintenance provision directly and three others cited it in adopting similar rules through decisional law.

c. Connecticut’s No Fault Divorce Act of 1973

The history of the “No Fault Divorce Act,” Public Act 1973, No. 73-373, indicates that it started as a Connecticut Bar Association proposal in the late 1960s. The CBA’s proposal was

²⁵ UNIF. MARRIAGE AND DIVORCE ACT §302 (1970), available at <http://www.uniformdivorce.com/UMDA.pdf>.

²⁶ *Id.* at §308.

²⁷ *Id.* These factors include: (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. *Id.*

introduced as a bill in 1969, but it did not pass. The CBA proposal was revised and reintroduced in 1973.

Prior to passage of the No Fault Divorce Act, Connecticut statutes provided for “Divorce and Separation” in General Statutes § 46-13 *et. seq.* A single statute addressed property division and alimony together, and it stated “[a]ny order for the payment of alimony from income may, at any time thereafter, be set aside or altered by such court.”²⁸

The No Fault Divorce Act repealed this and numerous other divorce statutes. It recast the law in many areas relating to marital dissolution, such as: establishing new grounds for granting marital dissolution (§1 -- *see* General Statutes § 46b-40); breaking property division and alimony into two distinct statutes (§§ 20 and 21 -- *see* General Statutes §§ 46b-81 & 46b-82); and allowing for modification based on a substantial change in circumstances (§23 -- *see* General Statutes § 46b-86).

Public hearings on the No Fault Divorce Act addressed legislative policies that the bill was designed to implement, including: preserving families, allowing individuals to divorce when a marriage had broken down irretrievably, gender equity, eliminating preclusions against financial awards to individuals who were at “fault,” permitting alimony awards to men as well as woman, encouraging alimony recipients to achieve self-sufficiency through time limited awards, and protecting the best interests of minor children.²⁹

With this legislation, the focus shifted from the guilt of the husband or wife to the condition of the marriage. With respect to financial issues, the No Fault Divorce Act largely codified existing common law into statutory criteria, rather than implementing completely new concepts to the law (although it also did introduce new statutory criteria that is particularly significant for property division). The statute relating to alimony awards, now codified as

²⁸ Conn. Gen. Stat. § 46-21 (Rev. to 1973).

²⁹ *See e.g.* Joint Standing Committee Hearings: Judiciary 1973, 207-13, 461-64 (Testimony by Attorney Schoonmaker), and 589-93 (Testimony by Attorney McAnerney).

Conn. Gen. Stat. 46b-82, called for the court to consider the length of the marriage, the age, health, station, occupation, amount, and sources of income, vocational skills, employability, estate, liabilities and needs of the parties. Yet, these largely preexisting criteria took on different meaning and practical effect, as the General Assembly had rejected fault as a prerequisite for financial awards. Courts could tailor alimony awards to the individual needs and circumstances of many more cases, while at the same time promoting the notion of self reliance.

d. Recent Cases

In the thirty-nine years since passage of the No Fault Divorce Act, appellate courts have examined the flexible language in General Statutes § 46b-82 and related statutes, and decisions have evolved with an evolving society. These written materials will not examine that history in detail. A partial list of notable decisions includes: *Grinold v. Grinold*, 172 Conn. 192 (1976)(questioning rehabilitation as a purpose of alimony) *Scoville v. Scoville*, 179 Conn. 277 (1979)(General Statutes §46b-86 favors modifiability); *Miller v. Miller*, 181 Conn. 610 (1980) (earning capacity); *Venuti v. Venuti*, 185 Conn. 156 (1981)(where adultery not the cause of the breakdown); *Blake v. Blake*, 207 Conn. 21 (1988)(station); *O'Neil v. O'Neil*, 13 Conn. App. 300 *cert. denied*, 207 Conn. 806 (1988)(rehabilitative alimony); *Ippolito v. Ippolito*, 28 Conn. App. 745, *cert. denied*, 224 Conn. 905 (1992)(self-sufficiency); *Henin v. Henin*, 26 Conn. App. 386 (1992)(alimony as support until a future event); *DeMaria v. DeMaria*, 247 Conn. 715 (1998)(cohabitation and alimony payee's financial needs); *Smith v. Smith*, 249 Conn. 265 (1999)(dual award); *Simms v. Simms*, 283 Conn. 494 (2007)(affirming substantial change findings but reversing alimony reduction); *Maturo v. Maturo*, 296 Conn. 80 (2010)(contrasting alimony and child support).

Perhaps equally interesting in light of the current debate on alimony reform is a recent line of appellate court decisions reversing financial awards as abuses of discretion.³⁰ These decisions place limits on judicial discretion under existing statutes, thereby dampening arguments that Connecticut's statutory scheme needs reform to avoid excessive alimony awards. However, there is a far longer list of affirmation of trial court decisions under the abuse of discretion standard, including in the past three months *Olson v. Mohamradu*, 134 Conn. App. 252, *cert. granted*, 304 Conn. 930 (2012)(relocation to live in same state as minor child was an

³⁰ See e.g. *Greco v. Greco*, 275 Conn. 348 (2005); *Pellow v. Pellow*, 113 Conn. App. 122 (2009); *Kovalsick v. Kovalsick*, 125 Conn. App. 265 (2010).

unacceptable reason for decrease in income); *Pite v. Pite*, 135 Conn. App. 819 (2012)(modifying a time limited award into a lifetime award) and *Jansen v. Jansen*, ___ Conn. App. ___ (2012)(forced retirement was not a substantial change of circumstances).

III. Social Changes

Historically, women were delegated the responsibility for caring for the home and family,³¹ often leaving her with no independent source of income. That tradition has changed dramatically during the last 40 to 50 years. Modern women are increasingly free to pursue careers, and with their own income, are less dependent on the support of their husbands.³²

Women have a greater presence in the workforce than ever. A 2007 Bureau of Labor and Statistics study showed that women comprised 46% of the total U.S. labor force, and accounted for 51% of all workers in high-paying management, professional, and related occupations in 2007.³³ In 1950, the percentages of women participating in the labor force between the ages of 25 to 34 and 35 to 44 were 34 and 39.1 percent respectively.³⁴ In 1998, the percentages rose to 76.3 and 77.1 percent respectively.³⁵ From 1972 to 1985 women's share of professional jobs increased from 44 to 49 percent and their share of "management" jobs nearly doubled growing from 20 to 36 percent.³⁶

Based on these statistics one would think that women fair just as well as men following a divorce. However, the strides women have made in the workforce may not accurately tell the whole story regarding circumstances surrounding divorce. Despite increases in labor force

³¹ Rosemaey Shaw Sackett & Cheryl K. Munyon, *Alimony: A Retreat from Traditional Concepts of Spousal Support*, 35 DRAKE L. REV. 297, 306 (1986).

³² Margaret F. Brinig & June R. Carbon, *The Reliance Interest in Marriage and Divorce*, 62 Tul. L. Rev. 855, 866 (1988).

³³ WOMEN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR, QUICK STATS 2007, <http://www.dol.gov/wb/stats/main.htm>

³⁴ THE EDITOR'S DESK, BUREAU OF LABOR STATISTICS, CHANGES IN WOMEN'S LABOR FORCE PARTICIPATION IN THE 20TH CENTURY (2000), <http://www.bls.gov/opub/tesd/2000/feb/wk3/art03.htm>.

³⁵ *Id.*

³⁶ George Guilder, *Women in the Work Force*, THE ATLANTIC, Sept. 1986, <http://www.theatlantic.com/doc/198609/women-work-force>.

participation and hours worked upon separation and divorce, most studies indicate that women continue to suffer economically.³⁷ In 2007, it was reported that experts found that the average woman experiences a 45% decrease in her standard of living after going through a divorce. Meanwhile, the average man experiences a 15% improvement in his standard of living.³⁸

Additionally, though there is a marked increase of working women who have their own careers, experience as family law practitioners shows there are still many young women (and some men) choosing to forego or postpone their careers to raise a family. The stay at home parent in that situation, generally by mutual agreement with their spouse, is opting out of the corporate world. There also is a growing population of “supermoms” who serve the dual roles of primary caregiver and primary breadwinner. Some even remain primarily responsible for daily maintenance of the household.

Each family is unique. Spousal contributions are not symmetrical, nor do they necessarily occur at the same time. For example, a “stay-at-home” parent may make tremendous contributions during the early years of a marriage, whereas the parent who is employed outside the home may be starting a career and earning modest income. Spouses’ relative contributions to a marriage may shift. A parent employed outside the home may advance in a career and earn greater compensation. A parent who primarily contributes as a homemaker may contribute less once the parties’ minor children reach the age of majority. The relative contributions of two married spouses may shift again upon retirement, or if one party becomes sick.

The social implications of alimony reform transcend dollars and cents. Marital dissolution law may impact decisions an adult makes during a marriage, such as how much to invest in the collective family unit rather than in oneself. Should the law create a disincentive for

³⁷ Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why do Women Bear a Disproportionate Cost?*, 17 ANNU. REV. SOCIAL. 51, 59 (1991).

³⁸ *From money to emotions: Get over your divorce*, MSNBC, <http://today.msnbc.msn.com/id/20363199/ns/today-relationships/t/money-emotions-get-over-your-divorce/#.T7w6aujdGj0> (last visited May 31, 2012).

stay-at-home parents? Is that consistent with the overwhelming public policy of promoting the best interests of minor children? Conversely, should marriage entail lifetime profit sharing, or should the law push both parties toward self-reliance?

IV. Current Theory/Purposes

Some of those who advocate for alimony reform contend that no social need or legitimate public policy currently anchors alimony. Yet, alimony awards continue to address two practical issues: (1) Disparate marital roles position individual spouses differently at the time of marital dissolution, and (2) Alimony can address an inequity that otherwise would result from this disparity.³⁹

Numerous academics have struggled to determine the purpose of alimony. There are three main categories into which a multitude of alimony theories fall: **Loss Theory, Gain Theory and Contribution Theory**.⁴⁰ Each category has some relationship to contract law.

Loss theory emphasizes compensation for loss experienced at divorce, and is similar to reliance damages.⁴¹ The purpose of alimony under this theory is to put the parties in the position they would have been if the marriage contract had never been created. A party who forgoes opportunities for career advancement and/or development in an effort to support and/or provide for the family and home does so in reliance on the fact that they will receive the benefits of the increased earnings and economic support provided by the supported party's career growth.⁴² "Human capital" theorists often rely on loss theory as a basis for alimony, and seek to compensate for lost earning capacity. Loss theory is consistent with the concept of a no fault divorce, and does not rely on prior notions of fault.⁴³

³⁹ Cynthia Lee Starnes, *Alimony Theory*, 45 Family Law Quarterly 271, 273 (Summer 2011).

⁴⁰ *Id.*, at 279.

⁴¹ *Id.*

⁴² Brinig & Carbone, *supra* note 32, at 879.

⁴³ Loss theory also finds support in decisions rendered before 1973. *See e.g.*, *Stoner v. Stoner*, 163 Conn. 345 (1972); *Thomas v. Thomas*, 159 Conn. 477 (1970); *Christiano v. Christiano*, 131 Conn. 589 (1945).

Gain Theory emphasizes returns on marital investments, is similar to expectation damages.⁴⁴ Expectation damages return the parties to the same position they would have been in if the breach, in this case divorce, had not occurred. Gain theory treats marriage like a partnership: joint investment generates returns for the marital unit, and neither partner should keep the entire return on investment. When a marriage ends, alimony imposes an exit price on the individual who otherwise would take a disproportionate share of the marital investment.⁴⁵

Contribution Theory emphasizes reimbursement for marital contributions upon divorce.⁴⁶ It presumes that one party confers a benefit on the other, and the person who received the benefit should restore that benefit to the other party. A problem with contribution theory is that both parties confer benefits upon the other during a marriage, and often those benefits are conferred gratuitously.

⁴⁴ Starnes, *supra* note 39, at 280.

⁴⁵ *Id.* at 283.

⁴⁶ *Id.*

V. The ALI Proposal

On May 16, 2000, after a decade of study, the American Law Institute (ALI) adopted *Principles of the Law of Family Dissolution*.⁴⁷ The Principles include a rationale for alimony based on loss theory, as well as alimony guidelines. The ALI focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage.⁴⁸ The ALI guidelines are premised on the assumption that when a marriage is dissolved there usually are associated losses, such as lost employment opportunities or opportunities to acquire education or training. These losses lead to disparities in post-divorce earning capacities.⁴⁹ The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners in the marriage.⁵⁰ The Principles assume a loss of earning capacity when one parent has been the primary caregiver of the children.⁵¹ They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage.⁵² Finally, under the ALI's Principles, compensation could be awarded based on a loss of a return on an investment in human capital (where one spouse has supported the other through school).⁵³

The ALI proposed a two step process to be used in determining alimony awards.⁵⁴ The first step is to calculate the disparity in the spouses incomes at divorce and the second is the

⁴⁷ SUSAN PRICE-LIVINGSTON, CONNECTICUT OFFICE OF LEGISLATIVE RESEARCH, AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 2002, <http://www.cga.ct.gov/2002/rpt/2002-R-0977.htm> (last visited May 31, 2012).

⁴⁸ Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 *Journal of American Academy of Matrimonial Lawyers* June 2008, at 72 available at <http://www.aaml.org/sites/default/files/MAT112.pdf>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 73

⁵⁴ Starnes, *supra* note 39, at 289.

multiply that disparity by a percentage based on the length of the marriage.⁵⁵ Under the ALI guidelines, to calculate the duration of an alimony award the court would multiply the length of the marriage by a percentage, for example fifty percent, set by the state.⁵⁶ These guidelines are similar to the basic provisions in many states which have developed formulaic guidelines.

VI. The AAML Proposal

The American Academy of Matrimonial Lawyers studied and emphatically rejected the ALI proposal. “The [ALI] Principles are premised on the theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission.”⁵⁷ The AAML avoided endorsing any alimony theory, and instead proposed guidelines and a formula that left trial courts with discretion to deviate from formulaic alimony determinations.

Under the AAML formula,⁵⁸ alimony would equal 30% of the payor’s gross income minus 20% of the payee's gross income, with the payee's total income including alimony not to exceed 40% of the combined gross income of the parties.⁵⁹ In addition, the duration of the alimony award would be determined by multiplying the length of the marriage by certain percentages.⁶⁰ If a marriage lasted three years or less, the duration factor would be thirty percent, meaning the award would last for a term of thirty percent the length of the marriage.⁶¹ If the marriage was between three and ten years the duration of alimony would be fifty percent of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Kisthardt, *supra* note 48, at 61-62.

⁵⁸ REPORT OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS ON *CONSIDERATIONS WHEN DETERMINING ALIMONY, SPOUSAL SUPPORT OR MAINTENANCE* APPROVED BY BOARD OF GOVERNORS 4-5 (Mar. 9, 2007), <http://www.aaml.org/sites/default/files/AAML-ALI-REPORT-Final%205-02-07.pdf> .

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

⁶¹ *Id.*

the time the couple was married.⁶² For marriages between ten and twenty years the duration would be seventy-five percent of the length of the marriage, and if the couple was married for more than twenty years, alimony would be permanent.⁶³

The AAML's deviation criteria end up giving the trial court broad discretion to depart from the alimony guidelines. The deviation criteria are: (1) A spouse is the primary caretaker of a dependent minor or a disabled adult child; (2) A spouse has pre-existing court-ordered support obligations; (3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses); (4) A spouse has unusual needs; (5) A spouses' age or health; (6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse; (7) A spouse has received a disproportionate share of the marital estate; (8) There are unusual tax consequences; (9) Other circumstances that make application of these considerations inequitable; or (10) The parties have agreed otherwise.⁶⁴

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *Id.* at 4-5.

VII. Alimony Reform Around the Country

Several jurisdictions throughout the United States have implemented alimony reform, including Massachusetts.⁶⁵ The new statutory guidelines in Massachusetts limit the duration of alimony awards, and in most cases eliminate lifetime alimony.⁶⁶ Under this new law, a payor's obligation for alimony ends when the payor reaches retirement age.⁶⁷ Additionally, the Massachusetts law calls for the suspension, reduction or termination of general alimony 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.⁶⁸ With regard to the amount of alimony, the court is still called on to consider the list of familiar factors, but the amount of alimony should generally not exceed the recipient's need or thirty percent to thirty five percent of the difference between the parties' gross incomes established at the time of the order being issued.⁶⁹ These guidelines are almost identical to the proposed law in Connecticut, with the exception of a few key differences including, inter alia, the availability of retroactive application of the proposed legislation in Connecticut, and related post judgment alimony modification, as well as a distinct interplay between calculation and awards of alimony and child support.

⁶⁵ Jess Bidgood, *Alimony in Massachusetts Gets Overhaul, With Limits*, N.Y. TIMES, Sept. 26, 2011, http://www.nytimes.com/2011/09/27/us/massachusetts-curbs-lifetime-alimony-payments.html?_r=1 (last visited May 31, 2012).

⁶⁶ Mass. Gen. Laws ch.208 §49b (2012).

“(1) If the duration of marriage is 5 years or less, general term alimony shall be no greater than one-half the number of months of the marriage.

(2) If the duration of marriage is 10 years or less, but more than 5 years, general term alimony shall be no greater than 60 per cent of the number of months of the marriage.

(3) If the duration of marriage is 15 years or less, but more than 10 years, general term alimony shall be no greater than 70 per cent of the number of months of the marriage.

(4) If the duration of marriage is 20 years or less, but more than 15 years, general term alimony shall be no greater than 80 per cent of the number of months of the marriage.

(c) The court shall have discretion to order alimony for an indefinite length of time for marriages longer than 20 years.” *Id.*

⁶⁷ Mass. Gen. Laws ch.208 §49f (2012).

⁶⁸ Mass. Gen. Laws ch.208 §49d (2012).

⁶⁹ Mass. Gen. Laws ch.208 §53 (2012).

While not changing the laws for post judgment alimony awards, other states have codified guidelines for temporary alimony awards. In 2010, New York adopted a formula for awards of pendente lite alimony.⁷⁰ Under the formula, alimony is set at thirty percent of the higher-earning spouse's income, minus twenty percent of the lower-earning spouse's, as long as the recipient doesn't end up with more than forty percent of the couple's combined income.⁷¹ The formula only applies when the annual income of the payor is up to and including five hundred thousand dollars.⁷² When income of the payor exceeds the income cap the court shall use the standard formula to determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap, and for the payor's income in excess of the income cap the court shall determine any additional amount of temporary maintenance through consideration of several familiar factors.⁷³ Pennsylvania and Colorado also have guidelines in temporary alimony.

Under the Colorado Law, for couples with a combined income less than \$75,000 per year,⁷⁴ the calculation of temporary alimony is done by taking 40% of the higher income earner's income, and subtracting 50% of the lower income earner's wages.⁷⁵ When the family law judge is considering what maintenance should be payable after a dissolution, there is no formula to guide him/her. Instead, Colorado divorce law sets out the factors to consider when determining an award, which are similar to those in Connecticut and many other states.⁷⁶

⁷⁰ Alexandria Harwin, *Ending the Alimony Guessing Game*, N.Y. TIMES, July 3, 2011, <http://www.nytimes.com/2011/07/04/opinion/04harwin.html> (last visited May 31, 2012).

⁷¹ N.Y. Dom. Rel. Law §236B 5-a (2011).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Colo .Rev .Stat. §14-10-114 (2011). If the parties have a combined income over \$75K, Colorado law allows the judge considerable discretion in determining the appropriate amount of support, including the parties' individual financial circumstances, the standard of living during the marriage, and their individual earning capacities (as determined education, training and work experience). *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

In Pennsylvania the formula for the calculation of spousal support and alimony pendente lite is codified under their civil procedure law,⁷⁷ while the statute authorizing payments of alimony is located in the family law section.⁷⁸ The formula provides that temporary alimony awards equal 40% of the difference in the parties' net income where there is no child support and 30% when there is child support.⁷⁹ These guidelines apply only when the net monthly income of both spouses is less than \$15,000 a month and there are less than six children.⁸⁰ Like Colorado, alimony following divorce is determined by considering several factors.⁸¹

Some states, including Maine, limit the duration of alimony but leave the amount of the support award to judicial discretion. Maine classifies alimony into five categories, including general support which may be awarded to provide financial assistance to a spouse with substantially less income potential than the other spouse so that both spouses can maintain a reasonable standard of living after the divorce.⁸² While Maine does not statutorily provide a formula for the amount of general support, they do have a rebuttable presumption limiting the duration of General Support.⁸³ Under this presumption, there is no alimony for marriages less than 10 years and for marriages lasting more than 10 years the terms for which alimony can be award cannot exceed half the number of years of marriage but in no case more than 20 years.⁸⁴

In Kansas, a court may award alimony to either party in an amount the court finds to be fair, just and equitable under all of the circumstances.⁸⁵ In any event, the court may not award maintenance for a period of time in excess of 121 months.⁸⁶ There are currently no statutory

⁷⁷ Pa. Cons. Stat. Ann., Tit 231. § 1910.16-4(a). (2011).

⁷⁸ Pa. Cons. Stat. Ann. Tit 23 § 3702 (2011).

⁷⁹ Pa. Cons. Stat. Ann., Tit 231. § 1910.16-4(a). (2011).

⁸⁰ *Id.*

⁸¹ Pa. Cons. Stat. Ann. tit 23 § 3701 (2011).

⁸² Me. Rve. Stat. Ann. Tit 19-A § 951-A (2012).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Kan. Stat. Ann. §60-1610 (b)(2) (2012).

⁸⁶ *Id.* However, the court may reinstate alimony for subsequent periods, but no single period of reinstatement ordered by the court may exceed 121 months. *Id.*

guidelines for the amount of an alimony award. However the Johnson County Bar Association (“JCBA”) has created an alimony formula for courts and practitioners to use when determining temporary or permanent alimony awards.⁸⁷ The formula does not differentiate between marriages with children and without children.⁸⁸ The alimony calculation is 20% of the difference between the respective gross earning capacities of the parties.⁸⁹ True to Kansas state law the duration is one-third of the total length of the marriage, to a maximum of 121 months.⁹⁰

New Mexico state law does not contain any guidelines, but New Mexico has established, by Supreme Court rule, temporary support, which provides that each party gets one half of any remaining income after fixed expenses are paid.⁹¹ Also in 2006 the New Mexico Statewide Alimony Guideline Committee (“Committee”) proposed a formula to be used for calculating alimony.⁹² For cases with no child support between the parties, the calculation is 30% of payor’s gross income minus 50% of recipient’s gross income.⁹³ For cases with child support between the parties, the alimony calculation is 28% of payor’s gross income minus 58% of recipient’s gross income.⁹⁴ According to the Committee, cases that involve high income, age or disability are not amenable to the formula.⁹⁵ The Committee did not make a recommendation on how to determine duration.⁹⁶

Even though there is no state-mandated formula, some California courts are using the Santa Clara County guidelines, which calculate alimony as follows: alimony equals the payor’s

⁸⁷ JOHNSON COUNTY BAR ASSOCIATION, FAMILY LAW BENCH BAR COMMITTEE, FAMILY LAW GUIDELINES FOR FAMILY LAW PRACTICE IN JOHNSON COUNTY, KANSAS, Sec. 5.5 (Revised March 2010), <http://www.jocobar.org/associations/10019/files/FAMILY%20LAW%20GUIDELINES%202010%20-%20complete.pdf>.

⁸⁸ *Id.* at § 5.7

⁸⁹ *Id.* at § 5.5.

⁹⁰ *Id.*

⁹¹ Virginia R. Dugan and Jon A. Feder, *Alimony Guidelines: Do They Work?*, 25 FAM. ADVOC. 4, 21 (2003).

⁹² STATEWIDE ALIMONY GUIDELINE COMMITTEE, SUPREME COURT STATE OF NEW MEXICO, ALIMONY GUIDELINES AND COMMENTARIES (2006), available at <http://www.nmbar.org/Attorneys/lawpubs/BB/bb2007/BB121007.pdf>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

net income multiplied by 40% minus the payee's net income multiplied by 50%.⁹⁷ The net income is derived by taking the payor's gross monthly income and deducting income tax and Social Security payments.⁹⁸ The Santa Clara County formula also has a durational component, which calculates alimony based on the length of the marriage.⁹⁹ For marriages of ten years or less in duration, the duration of alimony is half the length of the marriage, and for marriages between ten and twenty years the duration is the number of months the marriage lasted multiplied by the number of months again and then divided by 240.¹⁰⁰ If a marriage lasted twenty years or more, the duration of alimony would be equal to the length of the marriage.¹⁰¹

Like California, Arizona state law does not contain alimony guidelines and awards alimony based on a list of factors to be considered.¹⁰² However, like Santa Clara County, Maricopa County has developed guidelines based on the American Law Institute's recommendations.¹⁰³ Using the Maricopa County guidelines, alimony equals the difference between the parties' income multiplied by the "marital duration factor".¹⁰⁴ The "marital duration factor" equals 0.015 multiplied by the number of years of the marriage with a maximum value of 0.5, with the exception that there is no alimony in marriages less than five years or when the payee's income is more than 75% of the obligor's income.¹⁰⁵ The Arizona Court of Appeals upheld the use of the Maricopa County Spousal Maintenance Guidelines for the calculation of a

⁹⁷ See SCOTT R. STEVENSON AND JUSTIN L. KELSEY, THE DIVORCE SPOUSAL SUPPORT CALCULATOR: AN ALIMONY FORMULA RESOURCE, 13 (2011), <http://www.kelseytrask.com/Docs/SpousalSupport.pdf> (last visited May 17, 2012). See also Alimony: You Are the Weakest Link http://www.divorcenet.com/states/nevada/alimony_weakest_link (last visited May 17, 2012).

⁹⁸ STEVENSON & KELSEY, *supra* note 97, at 14.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² COURT OF ARIZONA, MARICOPA COUNTY, FAMILY COURT DEPARTMENT. SPOUSAL MAINTENANCE GUIDELINES, 1 (Oct. 2002), http://www.abrams-familylaw.com/forms/Spousal_Maintenance_Guidelines_2002.pdf.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.*

spousal maintenance award, so long as the statutory factors listed were considered in making that award.¹⁰⁶

In 2010, Florida passed a law that established limited alimony payments for short term marriages and some guidelines for awards.¹⁰⁷ The Florida reform efforts continued and in January 2012 the Florida State House of Representatives passed an alimony reform bill similar to Massachusetts' new laws.¹⁰⁸ The reform efforts stalled, however in March when the state Senate failed to vote on legislation matching a bill that passed in the House.¹⁰⁹ Despite this set back, the Florida Alimony Reform group seems determined to continue their campaign.¹¹⁰ The Florida Bar Association Family Law Section opposes the legislation primarily based on skepticism of the horror stories.¹¹¹

Not all states have reformed alimony in such a way that the new law is more restrictive than the older law. Texas is another state that recently reformed their alimony laws; however the reform in Texas created a less restrictive system. The new law increased the maximum amount of spousal support that courts may award from \$2,500 to \$5,000 per month, although still limited to 20 percent of the payer's average gross monthly income.¹¹² The amount of alimony is determined by reviewing several of the standard factors.¹¹³ The duration of spousal support was

¹⁰⁶ Cullum v. Cullum, 160 P.3d 231 (2007).

¹⁰⁷ See Yamiche Alcindor, *Demands for Reform of Alimony Laws Sweep USA*, USA TODAY, January 18, 2012 <http://www.usatoday.com/money/perfi/basics/story/2012-01-05/alimony-law-reform/52642100/1>.

¹⁰⁸ Lizette Alvarez, *In Age of Dual Incomes, Alimony Payers Prod States to Update Laws*, N. Y. TIMES March 4, 2012 http://www.nytimes.com/2012/03/05/us/alimony-payers-prod-states-to-update-divorce-laws.html?_r=3&ref=lizettealvarez (last accessed May 17, 2012).

¹⁰⁹ Gary White, *Proposed Alimony Overhaul Fizzles in Legislature*, THE POLK LEDGER, March 10, 2012, <http://www.theledger.com/article/20120310/POLITICS/120319923> (last accessed May 17, 2012).

¹¹⁰ Florida Alimony Reform, <http://floridaalimonyreform.com/> (Last visited May 17, 2012).

¹¹¹ Elizabeth Benedict, *The New Alimony Laws in MA—And Maybe in FL, NJ, CT, And OR?*, THE HUFFINGTON Post, March 7, 2012, http://www.huffingtonpost.com/elizabeth-benedict/the-new-alimony-laws-in-m_b_1313015.html (last visited May 17, 2012).

¹¹² Tex. Fam.Code Ann. §8.055 (2011).

¹¹³ Tex. Fam.Code Ann. §8.052 (2011).

extended from a maximum of 3 years to a maximum of 5, 7 or 10 years, generally depending on the length of the marriage.¹¹⁴

A State of New Jersey Assembly Joint Resolution introduced on January 30, 2012 created a commission to study all aspects of State alimony law and avenues of potential reform and to propose any new legislation it deems appropriate.¹¹⁵ In the meantime, the use of a formula to determine an alimony award was disfavored in the unreported (non-precedential) decision of *Eick v. Eick* by the New Jersey Appellate Division.¹¹⁶ The Court held that

We decline to speculate whether the remand judge used such a formula. Nevertheless, as a general proposition, we agree with plaintiff that use of a percentage formula based only on the parties' incomes is not authorized by law. Such a formula does not weigh and balance particular factors as listed in the statute and as might affect each individual case.¹¹⁷

The commission has nine months to issue a report on their findings.¹¹⁸

Virginia along with Arkansas, South Carolina and a few other states are also in the early stages of developing reform efforts.¹¹⁹ However, certain counties in Virginia have guidelines which are applied in determining alimony awards. The Fairfax and Rockingham counties use temporary spousal support guidelines.¹²⁰ The Fairfax County calculation is when no child support is involved alimony equals 30% of the gross income of the payor, minus 50% of the gross income of the payee.¹²¹ If child support is involved, alimony equals 28% of the gross income of the payor, minus 58% of the gross income of the payee.¹²² The guidelines are not

¹¹⁴ Tex. Fam.Code Ann. §8.054 (2011).

¹¹⁵ S.J. Res. 34, 215th Leg. (N.J. 2012).

¹¹⁶ *Eick v. Eick*, No. A-4710-10T2 (N.J. Super. Ct. App. Div. Mar 16, 2012) available at <http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2012/a4710-10.html>.

¹¹⁷ *Id.*

¹¹⁸ S.J. Res. 34, 215th Leg. (N.J. 2012).

¹¹⁹ Alcindor, *supra* note 103.

¹²⁰ Kisthardt, *supra* note 48, at 77.

¹²¹ *Id.*

¹²² *Id.*

binding and are adjustable by factors such as fault, payment of other expenses, or where the gross income of the parties is relatively high (over \$10,000 per month).¹²³

VIII. Formulas, Guidelines and the Unique Connecticut Landscape

If Connecticut reforms its statutes to reduce or eliminate judicial discretion in awarding alimony, what would that mean for individuals and families?

a. Some advantages of rules based alimony

Alimony formulas and guidelines would produce more predictable results. Treating similarly situated individuals similarly seems fair. While there is no guarantee that guidelines would adopt any particular substantive theory, more likely than not current legislators would focus on questions of equality, self-sufficiency and individual responsibility. These goals are consistent with modern social values. A system that serves prevailing social values and produces consistent results may be preferable to a discretionary system that produces the occasional extreme orders that are reviewed on appeal under the abuse of discretion standard.

Alimony guidelines also might be helpful to parties and attorneys when drafting premarital and postnuptial agreements. Since parties can waive alimony under General Statutes § 46b-36d(a)(4), alimony guidelines would greatly help individuals evaluate the legal consequences of premarital agreements before executing them. More premarital agreements could commit parties to pay alimony under a set schedule, which presumably would be based on the alimony guidelines. Providing guidelines and formulas actually may benefit potential alimony recipients.

Greater clarity in alimony statutes also may ease burdens on the Judicial Branch. Approximately 85% of marital dissolution cases now involve at least one self-represented litigant. The sheer volume of marital dissolution cases in a system constrained by inadequate

¹²³ *Id.*

resources makes case-by-case equitable determinations problematic. Determining equity requires time; applying formulas requires a calculator and cursory judicial approval.

Further, creating alimony guidelines may help develop a more consistent body of interrelated alimony and child support law. Although alimony may find its roots in property statutes, the Supreme Court has recognized similarities between child support and spousal support. Further, the Family Magistrate Court is a model of efficient application of child support guidelines, and General Statutes § 46b-231(m)(2) and (4) already allow that quasi-judicial court to render alimony orders.

b. Some disadvantages of rules based alimony

No rule fits all cases. A formula may better serve some individuals, but it would produce grossly unfair results for others.

Inflexible alimony guidelines¹²⁴ would be a radical departure from equitable, case-by-case application of General Statutes § 46b-82. Judicial discretion is central to marital dissolution law and to the creation of a mosaic of financial orders. The statutory factors that a trial court must consider to award alimony under General Statutes § 46b-82 are sensible, and those factors are similar to those considered under General Statutes § 46b-81 and 46b-84. Marital dissolution statutes are interrelated, and together they allow judges to tailor orders to vastly different families and individuals.

Alimony guidelines would require frequent monitoring and revision. Prepare for many legislative battles as various interests groups vie for longer/shorter duration; greater/lesser amounts. Every year someone will try to shift a denominator by 0.05%, or alter calculation of a numerator, possibly by inserting innocuous looking language into unrelated legislation.

¹²⁴ Reform proponents may undercut inflexibility criticism by allowing judges to employ deviation criteria so that courts may depart from the alimony guidelines. The deviation criteria in the AAML proposal may provide a helpful guide, though reformers may balk at their breadth.

Statutory formulas may even lag rapid social evolution in this electronic information age. Outdated formulas may linger as legislators struggle to garner votes, defeat entrenched interest groups, or overcome an executive veto. By contrast, General Statutes § 46b-82 is sufficiently flexible to adapt to changes in society without legislative action. As society evolves the judiciary evolves, and so does the application of alimony law.

IX. Conclusion

Society has undergone innumerable social and legal changes since the adoption of No Fault Divorce Act thirty-nine years ago. Yet, alimony continues to address two basic issues: (1) Disparate marital roles position individual spouses differently at the time of marital dissolution, and (2) The law provides few tools to address any inequity caused by this disparity, and alimony is a primary remedial tool. Even the most radical reformers accept the notion that some post decree alimony is appropriate. What is in dispute is alimony's purpose, duration and amount.

It is a testament to the legislature that General Statutes § 46b-82 has survived thirty-nine years of social change. The statute was written to accommodate judicial discretion. That discretion is dynamic, forever evolving and guided by the legislature, decisional law and changing social context. Although Connecticut's alimony statute may look almost exactly the same as it did in 1973, outcomes under the statute differ. Alimony orders now serve a broader range of families and purposes. If the No Fault Divorce movement instead had produced an inflexible alimony statute, that statute probably have required numerous major revisions by 2012.

That said, a vibrant society should reevaluate statutes in light of social progress. Whether Connecticut now would be better served by standardized alimony guidelines and formulas, as opposed to discretionary alimony awards tailored to the unique circumstances of each family, is a legitimate topic for debate. Perhaps Connecticut law should provide more consistent and predictable alimony awards, and deemphasize divergent needs of individuals and families.

Perhaps in the midst of fiscal crisis, and with growing numbers of self-represented parties, Connecticut no longer can afford the judicial resources necessary to render alimony orders based on broad judicial discretion. Rigid and poorly crafted alimony rules would be a disaster for Connecticut citizens. Yet, reformers make a valid point that lack of consistency in alimony creates a perception of unfairness.

It is easy to identify problems under existing law. Yet, turning a perception of unfairness into a workable statute, capable of achieving fair outcomes for all individuals and families, is extremely difficult. Family lawyers should consider the relative merits of judicial discretion versus legislative rules, and they should contribute to a constructive debate of alimony reform.