

Chapter 5 ALIMONY

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PART I: STRATEGY

ALIMONY

§ 5.01 Scope

This chapter covers:

- The statutory factors considered in making alimony determinations.
- The purpose of and considerations when making temporary alimony orders.
- Differences between permanent alimony, nominal alimony, lump sum alimony, and the durational considerations regarding alimony.
- Considerations and requirements when seeking an alimony modification.
- Evidentiary proof considerations with cohabitation.
- Effect of appeals on alimony orders.

§ 5.02 Objective and Strategy

This chapter will provide the practitioner with an understanding of the statutory factors considered by a court in making all alimony determinations. Attention will be drawn to the distinctions between temporary alimony and permanent alimony orders. There is an in-depth discussion of the different types of alimony which may be awarded at the time of a dissolution of marriage, such as permanent, nominal, and lump sum alimony. The circumstances and conditions under which modifications may be sought are discussed in the chapter. The meaning of cohabitation and proof requirements for modification are explored in this chapter. Finally, the chapter concludes with the impact of alimony orders when an appeal is filed.

PART II: EVALUATING THE ALIMONY STATUTORY FACTORS

ALIMONY

§ 5.03 CHECKLIST: Evaluating the Alimony Statutory Factors

5.03.1 Evaluating the Alimony Statutory Factors

- Understanding alimony jurisdiction and overview:
 - Personal jurisdiction over the payor is required for a valid alimony order.
 - A court with personal jurisdiction may order alimony and security for alimony.
 - The court must consider the statutory factors when awarding alimony.
 - The statutory factors need not be given equal weight. **Authority:** Conn. Gen. Stat. § 46b-82; *Smith v. Smith*, 249 Conn. 265 (1999), *Carpenter v. Carpenter*, 188 Conn. 736 (1982), *Valante v. Valante*, 180 Conn. 528 (1980), *Posada v. Posada*, 179 Conn. 568 (1980), *Fucci v. Fucci*, 179 Conn. 174 (1979), *Beardsley v. Beardsley*, 144 Conn. 725 (1957), *Chyung v. Chyung*, 86 Conn. App. 665 (2004), *Panganiban v. Panganiban*, 54 Conn. App. 634 (1999), *Cashman v. Cashman*, 41 Conn. App. 382 (1996), and *Lopes v. Lopes*, 1994 Conn. Super. LEXIS 1276 (1994). **Discussion:** See § 5.04, *below*. See also Chapter 2, §§ 2.17–2.21, *above*.
- Determining the length of the marriage:

- The period from the marriage until its dissolution is the length of the marriage.
- Premarital cohabitation or a prior marriage does not count for the length of the marriage. However, it may be considered in relation to other statutory criteria. **Authority:** Conn. Gen. Stat. §§ 46b-28a, 46b-38rrr(a), and 46b-82; *Mueller v. Tepler*, 312 Conn. 631 (2014), *Loughlin v. Loughlin*, 280 Conn. 632 (2006), *Boland v. Catalano*, 202 Conn. 333 (1987) *Langley v. Langley*, 137 Conn. App. 588 (2012). **Discussion:** See § 5.05, *below*.
- Considering the causes for the dissolution of the marriage:
 - Fault may only be considered if it is the cause for the breakdown of the marriage.
 - Post separation fault is typically irrelevant to the cause of the breakdown of the marriage. **Authority:** Conn. Gen. Stat. § 46b-82; *Venuti v. Venuti*, 185 Conn. 156 (1981) and *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987). **Discussion:** See § 5.06, *below*.
- Determining health:
 - Health typically impacts on other criteria such as needs or employability.
 - If health is at issue, capable evidence must be provided. **Authority:** Conn. Gen. Stat. § 46b-82; *Borkowski v. Borkowski*, 228 Conn. 729 (1994), *McPhee v. McPhee*, 186 Conn. 167 (1982), *Tevolini v. Tevolini*, 66 Conn. App. 16 (2001), *Schorsch v. Schorsch*, 53 Conn. App. 378 (1999), *Henin v. Henin*, 26 Conn. App. 386 (1992), *Roach v. Roach*, 20 Conn. App. 500 (1990), and *Cohen v. Cohen*, 11 Conn. App. 241 (1987). **Discussion:** See § 5.07, *below*.
- Establishing the age of the parties:
 - The age of the parties is typically considered with other criteria.
 - Age plays a bigger role if there is a big disparity in the ages of the parties. **Authority:** Conn. Gen. Stat. § 46b-82; *Simmons v. Simmons*, 244 Conn. 158 (1998). **Discussion:** See § 5.08, *below*.
- Determining the amount and sources of income:
 - Income is easy to determine for a W-2 employee.
 - Court orders should specify whether deferred income is to be considered income for alimony purposes or as property division.
 - An exchange of assets is not income, especially where the asset was awarded to a party at the time of the dissolution.
 - Capital gains, unless it represents a recurring and steady stream of income, is not included in income.
 - Regularly recurring gifts may be considered in setting alimony.
 - A cohabitant or new spouse who contributes to household expenses may alleviate the expenses of the alimony payor, freeing up income to pay more alimony.
 - Alimony orders entered after January 1, 2018 should be analyzed based upon the Tax Cuts and Jobs Act of 2017.
 - Defining income clearly is essential for purposes of a final judgment, to prevent double dipping, and to prevent inclusion of income categories meant to be excluded from alimony considerations. **Authority:** P.L. 115-97, §§ 11011, 11012, 11021, 11022, 11041, 11042, 11043, 11051 and 11597; 26 U.S.C. §§ 61, 63, 151, 163, 164, 199A, 241, and 461; *Gay v. Gay*, 266 Conn. 641 (2003), *Zahringer v. Zahringer*, 262 Conn. 360 (2003), *Rubin v. Rubin*, 204 Conn. 224 (1987), *DeJana v. DeJana*, 176 Conn. App. 104 (2017), *Nadel v. Luttinger*, 168 Conn. App. 689 (2016), *Yomtov v. Yomtov*, 152 Conn. App. 355

(2014), *Anderson v. Anderson*, 191 Conn. 46 (1983), *McGuinness v. McGuinness*, 185 Conn. 7 (1981), *Boyd-Millineaux v. Mullineaux*, 203 Conn. App. 664 (2021), *Marshall v. Marshall*, 200 Conn. App. 688 (2020), *Sander v. Sander*, 96 Conn. App. 102 (2006), *Schorsch v. Schorsch*, 53 Conn. App. 378 (1999), *Manaker v. Manaker*, 11 Conn. App. 653 (1987),

Halperin v. Halperin, 65 Conn. L. Rptr. 294 (2018)

, *Weihs v. Weihs*, 2016 Conn. Super. LEXIS 1679, and *Melton v. Melton*, 2007 Conn. Super. LEXIS 1661 (2007). **Discussion:** See § 5.09, below.

□ Assessing the occupation, vocational skills, education, and employability of each party:

- If a party is earning commensurate with his or her abilities, then proof of current income may be used to determine alimony.

- Consideration of education and earning capacity are newly added statutory factors.

- An earning capacity may be found in a number of circumstances:

- A party who is unemployed or underemployed may have an earning capacity assigned to him or her.

- Earning capacity may be used where a party depresses his or her earnings in an attempt to lower an alimony obligation.

- Resignation from a position, without reasonable cause, may lead the court to find an earning capacity.

- Earning capacity must be supported by the evidence:

- It may include what the party previously earned.

- Use of tax returns, adding back in perquisites and other personal expenses paid by the business may support an earning capacity.

- A party's lifestyle and expenditures may be used to show earning capacity.

- Earning capacity may be predicated upon educational background if there is actual proof of the degree received.

- An order based upon earning capacity must state the amount or range of amounts found to be a party's earning capacity.

- Earning capacity may be based upon the investment income derived from the assets retained after the property is divided.

- Earning capacity is not always to provide an increased number, but may be a earnings less than the current earnings of a party.

- The order must be based upon the net income which would be derived from the earning capacity found by the court.

- A litigant who fails to provide documentation on earnings will likely be found to have an earning capacity which will be hard to overturn on appeal.

- If an order is based upon earning capacity, a modification of that order will require proof of a change in the earning capacity, despite a change in actual earnings. **Authority:** Conn. Gen. Stat. § 46b-82; *Tanzman v. Meurer*,

309 Conn. 105 (2013), *Morris v. Morris*, 262 Conn. 299 (2003), *Miller v. Miller*, 181 Conn. 610 (1980), *Schmidt v. Schmidt*, 180 Conn. 184 (1980), *O'Neill v.*

O'Neill, 209 Conn. App. 165 (2021), *Fronsaglia v. Fronsaglia*, 202 Conn. App. 769 (2021), *Merk-Gould v. Gould*, 184 Conn. App. 512 (2018), *Steller v. Steller*,

181 Conn. App. 581 (2018), *Hammel v. Hammel*, 158 Conn. App. 827 (2015), *Brown v. Brown*, 148 Conn. App. 13 (2014), *McKeon v. Lennon*, 155 Conn. App.

423 (2015), *Schoenborn v. Schoenborn*, 144 Conn. App. 846 (2013), *Traystman v. Traystman*, 141 Conn. App. 789 (2013), *Keller v. Keller*, 141 Conn. App. 681

(2013), *McRae v. McRae*, 139 Conn. App. 75 (2012), *Bruno v. Bruno*, 132 Conn.

App. 339, 31 A.3d 860 (2011) 146 Conn. App. 214 (2013), *Brown v. Brown*, 130 Conn. App. 522 (2011), *Boyne v. Boyne*, 112 Conn. App. 279 (2009), *Schade v. Schade*, 110 Conn. App. 57 (2008), *Weinstein v. Weinstein*, 87 Conn. App. 699 (2005), *Chyung v. Chyung*, 86 Conn. App. 665 (2004), *Carasso v. Carasso*, 80 Conn. App. 299 (2003), *Bleuer v. Bleuer*, 59 Conn. App. 167 (2000), *Werblood v. Birnbach*, 41 Conn. App. 728 (1996), *Vandal v. Vandal*, 31 Conn. App. 561 (1993), *Hart v. Hart*, 19 Conn. App. 91 (1989), and *Wilkins v. Wilkins*, 10 Conn. App. 576 (1987). **Discussion:** See § 5.10, *below*.

□ Establishing needs, station in life, and Estates of Each Party:

- Needs are reflected in the expense portion of a party's financial affidavit.

- Station in life represents the party's style of living.

- The alimony award may or may not correspond to the station in life enjoyed during the marriage.

- The court may take into account a disparity in the award of assets in determining alimony. **Authority:** Conn. Gen. Stat. § 46b-82; *Simmons v. Simmons*, 244 Conn. 158 (1998), *Whitney v. Whitney*, 171 Conn. 23 (1976), *Lynch v. Lynch*, 153 Conn. App. 208 (2014), *England v. England*, 138 Conn. 410 (1951), *Panganiban v. Panganiban*, 54 Conn. App. 634 (1999), *Watson v. Watson*, 20 Conn. App. 551 (1990), and *Wendt v. Wendt*, 1998 Conn. Super. LEXIS 1023 (1998). **Discussion:** See § 5.11, *below*.

□ Determining the need for caretaking of the minor child:

- A court may take into account, in determining alimony, whether it is advisable for the custodial parent to work based upon the child's needs and age.

- One consideration will be how much the parent can earn, as compared to what will be expended for childcare costs. **Authority:** Conn. Gen. Stat. § 46b-82; *Loughlin v. Loughlin*, 93 Conn. App. 618 (2006), *Dees v. Dees*, 92 Conn. App. 812 (2006), and *Wolfburg v. Wolfburg*, 27 Conn. App. 396 (1992).

Discussion: See § 5.12, *below*.

§ 5.04 Understanding Alimony—Jurisdiction and Overview

To order a party to pay alimony, the court must have personal jurisdiction over the payor. *Beardsley v. Beardsley*, 144 Conn. 725 (1957) and *Cashman v. Cashman*, 41 Conn. App. 382 (1996). Should the defendant not reside in Connecticut, personal jurisdiction may be exercised if he or she receives actual notice of the litigation and the due process requirements have been met. *Panganiban v. Panganiban*, 54 Conn. App. 634, 639 (1999). For a more thorough discussion on personal jurisdiction, see Chapter 2, §§ 2.17–2.21, *above*.

A Connecticut court with personal jurisdiction over the parties has the authority to order alimony paid by either party to the other, and may order that security, such as life insurance, be given for such payments. Conn. Gen. Stat. § 46b-82. “[T]he purpose of both periodic and lump sum alimony is to provide continuing support.” *Smith v. Smith*, 249 Conn. 265, 275 (1999).

The court, in making its determination whether to award alimony, in what amount, and for what duration, is to consider a number of statutory factors. Conn. Gen. Stat. § 46b-82. These factors are: “the length of the marriage, the causes for the annulment, legal separation or dissolution, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 and in the case of a parent to whom

the custody of minor children has been awarded, the desirability of such parent's securing employment." *Conn. Gen. Stat. § 46b-82*.

While the court must consider all of the statutory factors in determining alimony, it need not give each factor equal weight. *Chyung v. Chyung*, 86 Conn. App. 665, 669–670 (2004). In making an alimony order, no single factor determines the financial award. *Valante v. Valante*, 180 Conn. 528, 532 (1980). Although it is error to exclude testimony on any of the statutory factors, the court can properly conclude that it has ~~taken into account~~*considered* all of the statutory criteria relevant to an alimony award without making specific findings as to each factor. *Posada v. Posada*, 179 Conn. 568, 573 (1980). See also *Fucci v. Fucci*, 179 Conn. 174, 179–180 (1979) (where the court had financial affidavits before it and could observe the parties' physical condition, it was not required to make specific findings on health, station in life, liabilities, or need). The importance of one or more factors in determining a proper alimony award depends on the facts of each case and will vary based upon context. *Carpenter v. Carpenter*, 188 Conn. 736, 740–741 (1982). The court's wide latitude and equitable powers in making alimony awards are necessary because each case has its own unique facts. *Smith*, 249 Conn. at 284–285.

While the parties are limited by the claims for relief requested in the complaint and cross-complaint, the court may act equitably to enter orders not requested in the claims for relief. Despite an alimony recipient failing to file a cross-complaint seeking alimony, the court will be able to award it based upon the payor's claim of "such other and further relief" in the complaint. *Lopes v. Lopes*, 1994 Conn. Super. LEXIS 1276 (1994).

§ 5.05 Determining the Length of the Marriage

The length of the marriage is the first statutory factor to be considered in determining alimony orders. *Conn. Gen. Stat. § 46b-82*. While it appears obvious, the length of the marriage is measured from the celebration of the marriage until the issuance of the decree of dissolution, legal separation, or annulment. The court cannot consider the length of cohabitation, relationship, or the length of time from the parties' first marriage until a second dissolution. *Loughlin v. Loughlin*, 280 Conn. 632, 644 (2006). Parties who are cohabiting stand in a very different legal relationship than parties to a marriage, supporting the rationale behind not considering the time of cohabitation in the length of the marriage. *Loughlin*, 280 Conn. at 643–644. Likewise, the length of the marriage is based upon the date the action is filed or when the parties separate.

While a court may not consider a prior marriage or cohabitation as part of the length of the marriage, such events may be considered as they affect other criteria. *Langley v. Langley*, 137 Conn. App. 588 (2012).

#Comment Begins

Strategic Point: If raising the issue of a prior cohabitation or marriage, the evidence being elicited should specifically relate to other statutory criteria. For instance, it may be argued that a party contributed funds to an asset owned by the other, thus contributing to its acquisition or appreciation.

#Comment Ends#Comment Begins

Warning: Many practitioners claim there is a "rule of thumb" that the term of alimony is equal to one-half of the length of the marriage. There is no such rule of thumb.

#Comment Ends

While *Loughlin*, 280 Conn. 632 (2006) established that a court may not consider the period of cohabitation as part of the length of the marriage this general rule of law may not apply across the board to same-sex couples. In a move that suggests it would not, the Connecticut Supreme Court expanded a common law loss of consortium claim to a couple who would have been married at the time of the tortious conduct if such marriage had not been barred by state law. *Mueller v. Tepler*, 312 Conn. 631, 649 (2014).

When considering the attachment of premarital cohabitation, for a same sex couple, to the length of the marriage, significant dates would include the date of a commitment ceremony, the date on which the couple may have drafted documents identifying the other as a health care proxy or custodian of his or her remains, a date on which mirror wills may have been executed or any other date the couple recognizes within the relationship as a significant anniversary. Given the Connecticut Supreme Court's decision in *Mueller*, it is quite possible a court would determine that the *Loughlin* limitation of the length of the marriage would not apply to a same-sex couple should it be proven that, on a specific date, such as the date of a commitment ceremony, the couple would have entered into a legal marriage had they been able to do so and that, as soon as legal marriage became available to the couple, the couple in fact did enter into a legal marriage.

#Comment Begins

Warning: When engaging in a “length of the marriage” analysis, the practitioner should be aware of other reasons why a couple may not have entered into a legal marriage or legally recognized relationship as those relationships became available. Marrying someone of the same sex, for example, could have jeopardized a couple's ability to adopt a child from a foreign country or could have resulted in an individual's discharge from the military under the now-repealed “Don't Ask, Don't Tell” law. *Mueller* does not discuss how these factors could impact a spouse's ability to bring a loss of consortium claim and therefore does elucidate further this particular discussion.

#Comment Ends

It also may be possible that there are several “dates of marriage” for one couple. For example, a couple may have entered into a civil union in Vermont and a marriage in Massachusetts. Both of these relationships will be recognized as marriages under Connecticut law. Conn. Gen. Stat. § 46b-28a. Even though the earlier date of relationship recognition will control the “length of the marriage” criterion for both alimony and property division, all dates should be included in the complaint, and relief should be sought for the dissolution of all relationship types. This is because even though Connecticut will recognize all such relationships as marriages, the states from which those relationships originated may not, and the couple does not want to find themselves remaining domestically partnered in California, for example, because Connecticut only dissolved their marriage and not their domestic partnership.

#Comment Begins

Warning: Even though marriage did not become available to same-sex couples in Connecticut until 2008, civil unions, unless a dissolution action commenced prior to October 1, 2010, merged into marriages by operation of law. Conn. Gen. Stat. § 46b-38rr(a). Additionally, Connecticut will recognize as a marriage a legal relationship entered into elsewhere that carries the same rights, benefits, and obligations as marriage in Connecticut. Conn. Gen. Stat. § 46b-28a. As early as 1989, registered partnerships, which were substantially similar to marriage, were available in Denmark and, in the past twenty years, many other jurisdictions have legalized marriage or marriage-like relationships for same-sex couples. It is quite possible, therefore, for a couple to

have a “date of the marriage” that predates same-sex marriage in Connecticut.

#Comment Ends

In any case in which the couple has been together for a significant period of time prior to entering into a legally recognized relationship status, serious thought should be given to pleading an additional count sounding in contract pursuant to the principles enunciated by the supreme court in *Boland v. Catalano*, 202 Conn. 333 (1987). This additional count would be similar to claims made for opposite-sex couples who cohabitated for a period of time prior to marriage and would be based on contract-in-fact, constructive trust, quantum meruit, or unjust enrichment. Should the court agree that the length of the marriage predates the marriage, as envisioned under *Mueller*, such a count may not be necessary, but until such time as that legal issue has been clarified, it would be wise for the practitioner to include the second count.

§ 5.06 Considering the Causes for the Dissolution of the Marriage

~~In order for~~For “fault” to be considered in making alimony orders, it must be the cause for the breakdown of the marriage. Thus, while Connecticut permits a dissolution of marriage on a no-fault basis, the causes for the dissolution of the marriage may be considered in establishing financial orders. Conn. Gen. Stat. § 46b-82. Hence, adultery or other fault occurring after the breakdown of the marriage is arguably irrelevant to establishing an alimony award, since it does not bear on the actual breakdown of the marriage. *Venuti v. Venuti*, 185 Conn. 156, 159 (1981). However, the court is not prohibited from considering post-separation behavior, particularly where it finds that the marriage eroded over a period of time due to multiple extramarital relationships. *Ferrucci v. Ferrucci*, 11 Conn. App. 369 (1987).

#Comment Begins

Strategic Point: The date ascribed by the opposing party of the breakdown of the marriage should be ascertained to determine whether the cause(s) should affect the financial orders. Arguably, the date of the complaint for the plaintiff and of the cross-complaint for the defendant will be the latest possible date of the cause of the breakdown, as each party will be alleging that as of that date of the complaint or cross-complaint the marriage has broken down irretrievably.

#Comment Ends#Comment Begins

Warning: While the court may consider the cause for the breakdown of the marriage, clients should be educated that this is one of several factors for the court to consider and is very seldom a primary factor.

#Comment Ends#Comment Begins

Strategic Point: If your client has committed adultery or there is a “fault” factor of which his or her spouse is unaware, it might be wise to take the deposition of the other spouse to cement his or her testimony as to the causes for the breakdown of the marriage. This can prevent the spouse from rewriting history when he or she learns of your client’s behavior.

#Comment Ends

§ 5.07 Determining Health

A court in rendering an alimony order will consider the health of the parties, standing alone or in conjunction with other factors. Conn. Gen. Stat. § 46b-82. A party’s health likely impacts upon other relevant criteria to be considered in making alimony awards, such as needs

and employability. *Schorsch v. Schorsch*, 53 Conn. App. 378, 386 (1999). Capable evidence must be presented of a party's health for it to be considered in making alimony awards. *Tevolini v. Tevolini*, 66 Conn. App. 16 (2001). The court may not base its findings as to the health of a party only upon counsel's statements that he or she is unhealthy or is receiving social security disability payments, but rather must consider substantive evidence of health. *Tevolini*, 66 Conn. App. at 24–25.

#Comment Begins

Strategic Point: If you have a client with health issues that may impact his or her ability to earn income or may militate against a finding of earning capacity, expert medical testimony should be provided. Without that testimony, a court may disregard a party's claim that health bars or limits employability.

#Comment Ends

Relevant health issues can be physical or mental in nature. *Borkowski v. Borkowski*, 228 Conn. 729 (1994), *Henin v. Henin*, 26 Conn. App. 386 (1992), and *Roach v. Roach*, 20 Conn. App. 500 (1990). Health problems can be traditional ailments but may also include addictions, such as alcoholism. *McPhee v. MCPhee*, 186 Conn. 167 (1982).

#Comment Begins

Strategic Point: If a client's health is an issue in obtaining or maintaining employment, the client should testify as to the limitations posed by the medical condition on the duties faced for the employment that he or she seeks. For instance, certain illnesses may prevent a person from standing or sitting for long periods of time and any job with those requirements would be unsuitable and likely unsustainable for that person.

#Comment Ends

Proven costs for treatment of ailments will have an impact on the alimony order, possibly requiring the payor to pay more than otherwise might be the case. *Cohen v. Cohen*, 11 Conn. App. 241 (1987). Moreover, such costs, to significantly impact the order, must be well beyond costs typically incurred for health issues.

§ 5.08 Establishing the Age of the Parties

The age of the parties, while not typically discussed in-depth in trial court decisions, is one of the statutory factors always mentioned. Conn. Gen. Stat. § 46b-82. Often age and other factors, such as the length of the marriage or employability, are considered in tandem. Age may play a factor when there is a big disparity in the ages of the parties and where they are in their careers. See *Simmons v. Simmons*, 244 Conn. 158 (1998) (the wife was entitled to nominal, modifiable alimony when she was 20 years older than the husband, supported him and their family while he was in medical school, and the divorce occurred when he was entering the lucrative years of a surgical career).

#Comment Begins

Strategic Point: The courts are unlikely to view similarly a 55-year-old stay-at-home mother who raised three children and has been out of the workforce for 25 years and a 27-year-old who recently quit his job because he did not like it. The younger spouse likely is more employable than the older one.

#Comment Ends

§ 5.09 Determining the Amount and Sources of Income

[1] Determining the Amount and Tax Consequences of Income

The amount of income earned by a party is an important statutory factor in determining the amount of alimony to be paid. With the passage of the Tax Cuts and Jobs Act of 2017, [P.L. 115-97](#), any initial order of alimony entered after January 1, 2019 will not be tax deductible to the payor nor taxable to the payee. [P.L. 115-97](#), § 11051. If a party is a W-2 wage earner, it is easy to determine the amount and sources of income. The issue becomes more complicated when a payor receives income that is not as easily quantifiable, such as commissions, variable bonuses, and other forms of compensation. Oftentimes, disagreements center on when alimony payments will be due in relation to when income is received and also, what categories of receipts will constitute income.

#Comment Begins

Strategic Point: If an alimony obligor receives an annual bonus, the alimony provision should provide for the payment to the obligee upon the receipt of the bonus, not spread out over 12 months.

#Comment Ends

Some employees, especially if they work at a large corporation, will also receive various forms of deferred compensation including stock grants, long-term incentive payments, stock options, and restricted stock grants, to name a few. The inclusion of these forms of compensation in the definition of income, be it in the separation agreement or proposed orders, is imperative. Failure to do so could lead to unnecessary post judgment litigation to determine the extent to which these forms of income come within the ambit of the definition of bonus or incentive income for alimony purposes. [DeJana v. DeJana](#), 176 Conn. App. 104 (2017), [Weihs v. Weihs](#), 2016 Conn. Super. LEXIS 1679.

#Comment Begins

Strategic Point: In [Weihs](#), the husband did not show any bonus income on his financial affidavit at the time of the dissolution, but was to pay the wife, as additional alimony, 30% of his gross bonus. He subsequently received grants in a Value Assignment Incentive Plan, a Long-Term Incentive Plan and a Leadership Performance Plan. To determine the wife's entitlement to alimony from these three grants, the court had to look at the definition of bonus, which is income in addition to that which is expected or due to be paid to an employee. Based upon this definition, the court found that the husband owed the wife alimony based upon these grants. This litigation would have been wholly unnecessary with a clear definition of income.

#Comment Ends

However, it is possible that such deferred compensation may be viewed as a property division. The same compensation may not be viewed as both a source of income for alimony payments and a property division. [Nadel v. Luttinger](#), 168 Conn. App. 689 (2016). Nor should incentive compensation be considered income for alimony purposes when that same incentive plan was earmarked for and used to pay college. [DeJana v. DeJana](#), 176 Conn. App. 104 (2017).

#Comment Begins

Strategic Point: A hybrid solution for deferred compensation is to allocate those awarded prior to the dissolution as property awards while deferred compensation awarded subsequently will be considered for alimony purposes. In this instance, the deferred compensation utilized for property division and alimony must be specifically delineated so there are no future issues.

#Comment Ends#Comment Begins

Strategic Point: If representing the party who earns or receives deferred compensation, it should be reflected on his or her financial affidavit in a manner consistent with how it will be viewed at the dissolution *i.e.*, income for support purposes or property division.

#Comment Ends

What becomes more difficult is to determine a party's income when self-employed, a member of an LLC, or a shareholder in a subchapter S entity. In those instances, any agreement or judgment should define how income for alimony purposes is calculated. A separation agreement which defines income as being that actually received or in which the obligor has a right to receive, means his or her actual earnings, not the earnings of the entity from which the income is derived. *Yomtov v. Yomtov*, 152 Conn. App. 355 (2014). The status of the entity may not be ignored when calculating the obligor's income. *Yomtov*, 152 Conn. App. at 364–365. In addition, an agreement which utilized a business evaluator to determine reasonable compensation from which the alimony and support orders were based, but did not say how that would be calculated in future years, left the court to make that determination. *Marshall v. Marshall*, 200 Conn. App. 688 (2020). On remand from the Appellate Court, the trial court was left with the means to determine the husband's income. The wife advocated a definition of income available for distribution, while the husband argued for his W-2 income. The court correctly pointed out that income available for distribution would be an over inflation of what he actually received, while W-2 income can be manipulated by the husband. Accordingly, the methodology employed originally to determine reasonable compensation was employed on remand.

The passage of the Tax Cuts and Jobs Act of 2017 has further complicated the considerations when faced with pass through income from an LLC, Schedule C, or subchapter S corporation. Owners of pass-through entities receive a 20% deduction on qualified business income, subject to certain limitations. P.L. 115-97, § 11011, 26 U.S.C. § 199A. For service businesses, except for architects and engineers, there are income thresholds over which the deduction does not apply. P.L. 195-97, § 11011, 26 U.S.C. § 199A (a) and (b).

#Comment Begins

Warning: When faced with either party in a dissolution case who earns income through a passthrough entity, counsel should seek an opinion from a CPA as to the taxability and tax consequences of such pass-through income.

#Comment Ends#Comment Begins

Strategic Point: When preparing proposed orders or drafting a separation agreement, care must be taken in defining income so as not to have unintended consequences. There is certain boilerplate language discussing the inability to deduct business expenses from a subchapter S entity. Review the tax return and tax filings to determine exactly how the income should be calculated and ensure that it is done based upon what is actually received and not what the business receives.

#Comment Ends#Comment Begins

Strategic Point: The tax returns for the entity, be it a C Corporation, S Corporation, LLC, or Schedule C sole proprietorship, should be reviewed to determine actual expenses and income. Certain expenses, such as depreciation and amortization, are accounting and tax tools and are not necessarily reflective of cash flow. In terms of income, certain perquisites (*i.e.*, automobile

expenses) are deducted as a business expense, but may ~~actually be~~ includable as income for support purposes. It is also possible to set up a limit to the so-called personal expenses that are passed through as business expenses, such as for entertainment and restaurant charges.

#Comment Ends

Prior to the passage of the Tax Cuts and Jobs Act of 2017, taxpayers were permitted to carry back net operating losses for two years and carry such losses forward for a limited period of time. The new act no longer permits the net operating loss to be carried back, but does permit it to be carried forward indefinitely. *P.L. 115-97*, § 11012, *26 U.S.C. 461*.

[2] Excluding an Exchange of Assets as Income

The exchange of an asset for cash does not transform that asset into income. *See Schorsch v. Schorsch*, 53 Conn. App. 378 (1999) (the principal payments on a mortgage, taken back upon the sale of real property, did not constitute income). This is especially true in a modification of alimony where the asset in question was one awarded to the payor, as a court does not have the power to modify a property division. *Schorsch*, 53 Conn. App. at 385. Basing an alimony order on the cash from that asset could be considered a modification of the property division.

[3] Excluding Capital Gains from Income

Capital gains, provided they are not a steady and recurring stream of income, may not be included as income for an alimony determination. *Gay v. Gay*, 266 Conn. 641, 644 (2003). Similarly, although the liquidation of an asset may be considered income for tax purposes, that does not mean it is income for alimony purposes. *See Melton v. Melton*, 2007 Conn. Super. LEXIS 1661 (2007) (sale of restricted stock units are not considered a steady stream of income).

[4] Including Regularly Recurring Gifts as Income for Alimony Purposes

Consistent, regular familial payments to a spouse, whether he or she is a payee or a payor of alimony, properly may be considered in setting financial orders. *Zahringer v. Zahringer*, 262 Conn. 360, 369 (2003) and *Anderson v. Anderson*, 191 Conn. 46 (1983). The concern with including regular gifts in income for alimony purposes is that they may cease to be made, and the modifiability of alimony awards reduces this risk. *Rubin v. Rubin*, 204 Conn. 224, 238–239 (1987).

[5] Assessing the Impact of the Contributions by a Cohabitant or New Spouse

Contributions to the expenses of a payor spouse by a new spouse or significant other can be considered in determining alimony awards, under the theory of regularly recurring gifts. A payor of alimony who shares expenses and income with a subsequent spouse may, as a result, have an increased ability to pay alimony. *McGuinness v. McGuinness*, 185 Conn. 7 (1981). Additionally, the court may consider the financial resources of a “housemate” when making or modifying an alimony award. *Manaker v. Manaker*, 11 Conn. App. 653, 655–656 (1987). A cohabitant who could make a financial contribution, but who does not, may result in the court considering what his or her financial contributions could be when determining alimony. *Sander v. Sander*, 96 Conn. App. 102 (2006).

#Comment Begins

Strategic Point: A client who either remarries or cohabits should be advised to keep finances

separate from those of the spouse or cohabitee. Contributions each person makes to the common household expenses should be in accordance with a realistic formula and no payment of the other individual's personal expenses should be made. If one of the cohabitants needs money from the other, a loan should be memorialized in a validly executed promissory note.

#Comment Ends

[6] Determining the Tax Consequences of Alimony

The passage of the Tax Cuts and Jobs Act of 2017 has made the assessment of tax issues, especially for alimony purposes, much more crucial.

Most notably, initial alimony orders for dissolutions occurring on or after January 1, 2019 will no longer be taxable to the recipient, nor tax deductible to the payor. [P.L. 115-97](#), § 11051. As a result, the amount of alimony to be paid must be determined based upon the net after tax income of the payor. This requires several considerations:

1. Does the payor receive pass through income? If so, the type of business impacts whether or not there are any tax benefits as a result. Pass through income for service businesses, except for architects and engineers, enjoy a 20% deduction of income up to certain income limitations. [P.L. 115-97](#), § 11011, [26 U.S.C. § 461](#).
2. Does the payor have a business net operating loss carry forward? In such event, that loss may be carried forward indefinitely, resulting in a decrease in taxes and therefore more disposable income for alimony purposes. [P.L. 115-97](#), § 11012, [26 U.S.C. § 461](#).
3. Effective January 1, 2018 until December 31, 2025, the dependency exemption has been suspended. [P.L. 115-97](#), § 11041, [26 U.S.C. § 151](#). Do not be fooled into thinking that allocation of a prime residence or the tax dependent status of children no longer matters. While there may be a suspension of the dependency exemption, the ~~child~~ [carechildcare](#) credit remains and has increased to \$2,000 per year from January 1, 2018 until December 31, 2025. [P.L. 115-97](#), § 11022, [26 U.S.C. § 24](#).
4. While the dependency exemption was suspended, the standard deduction increased to \$12,000 for single filers and \$18,000 for joint filers. Additionally, the amounts are to be adjusted annually based upon the cost-of-living. [P.L. 115-97](#), § 11021, [26 U.S.C. § 63](#).
5. Although the Tax Cuts and Jobs Act of 2017 increased dramatically the standard deduction, it greatly decreased the amount of deductions to be taken for state and local taxes to a maximum of \$10,000 per year. [P.L. 115-97](#), § 11042, [26 U.S.C. § 164](#). This change is temporary, [settingset](#) to expire on December 31, 2025. This provision was especially impactful for Connecticut dissolutions given the state income tax for both Connecticut and nearby New York, and the high real estate taxes. However, Connecticut passed an act which permits pass through entities to pay the Connecticut income taxes for partners on their business tax returns which can then be claimed by the partner on his or her personal tax return, thus getting around the Federal limitation. Connecticut Public Act 18-49.

6. The deduction for mortgage and home equity loan interest changes are effective until December 31, 2025. Up to \$750,000 of interest on debt incurred to acquire a residence occurring after December 15, 2017, unless there is a purchase contract entered into prior to December 15, 2017 for which the closing occurs prior to April 1, 2018 is deductible. [P.L. 115-97](#), § 11043, [26 U.S.C. § 163](#). Deductions for home equity lines of credit are no longer permitted. P.L. § 11597.

These changes to the tax law profoundly affect how alimony will be determined on a going forward basis. There is no longer any benefit to an unallocated alimony and support order. The benefit to an unallocated order was the combination of the alimony and child support into one figure which was tax deductible to the payor and taxable to the payee. With the change in the tax law, both alimony and child support are treated in the same fashion—non-tax deductible to the payee and non-taxable to the payor. There is always a possibility that this may change back to a taxable and tax-deductible order in the future.

#Comment Begins

Strategic Point: Most separation agreements prior to 2019 contained a provision for a redetermination of alimony should the law change to preclude its tax deductibility or includability. Separation agreements entered into after 2019 should contain a provision for a redetermination of alimony should the law revert to allow for the tax deductibility and includability of the alimony should the law change in the future.

#Comment Ends

The 2017 Tax Cuts and Jobs Act permits any alimony order entered prior to December 31, 2018 to retain the tax-deductible, tax includable status enjoyed prior to its enactment. Any subsequent modifications of the order may retain the original tax status provided the modification explicably states this. [P.L. 115-97](#), § 11051, [26 U.S.C. § 61](#).

#Comment Begins

Strategic Point: Any dissolution judgment providing for alimony prior to December 31, 2018 should include a provision that any modification of the amount of alimony will enjoy the same benefits as the original award and will not be subject to the provisions of the 2017 Tax Cuts and Jobs Act.

#Comment Ends#Comment Begins

Strategic Point: When filing for a modification of alimony that is tax deductible/includible, the motion should contain a request for relief that the tax status continue for the modified order.

#Comment Ends

[7] Defining Income for Alimony Purposes

When drafting proposed orders or a separation agreement, care should be taken in how income is defined. If the alimony is predicated upon the payors gross earned income, while specifically excluding income from investments, the subsequent investment in a limited liability partnership associated with the payors employment and for which he was required to invest was considered an investment under the alimony definition, and therefore any income received there from was not to be used to pay alimony. [Boyd-Millineaux v. Mullineaux](#), 203 Conn. App. 664 (2021).

#Comment Begins

Warning: The *Boyd-Millineaux* case should not be used by counsel or a party to try to rejigger the manner by which they receive their income in the hopes of escaping an alimony obligation.

#Comment Ends

In particular, if a form of deferred compensation will be used to pay a specific obligation, such as college, or as a part of an asset division, that should be clearly delineated. *DeJana v. DeJana*, 176 Conn. App. 104 (2017). Not only should the current deferred compensation be specified, but the treatment of future deferred compensation should likewise be addressed.

While an over-inclusive definition of income may be prudent, care should be taken in how such a definition will impact future investment decisions, especially regarding assets distributed at the time of the dissolution. Courts cannot double dip by considering an asset as a stream of income and as part of the property division. Thus, the definition of income should not inadvertently cause a double dip. By basing alimony on line 22 of the Federal Income Tax Return, excluding interest, dividends, and capital gains, income derived from companies purchased by the alimony payor with assets from the property division was included as income for alimony purposes. *Halperin v. Halperin*, 65 Conn. L. Rptr. 294 (2018). It is important to set forth exactly how income is defined and not to merely refer to a line on a tax return without setting forth the year of the tax return and reviewing the same to determine what forms of income are included therein.

§ 5.10 Assessing the Occupation, Vocational Skills, Education, and Employability of Each Party

[1] Proving Earnings

A person's occupation, skills, education, and employability are other statutory factors in determining alimony. *Conn. Gen. Stat. § 46b-82*. The 2013 revision to *Conn. Gen. Stat. § 46b-82* has added education as a factor to be considered. This is a logical extension of assessing occupation and vocational skills as employability often relates to a person's educational background. Earnings derived from employment will constitute the basis for an alimony award. Where a party is earning commensurate with his or her skills and/or employment history, straightforward proof of current earnings should be presented to the court. However, where a party is unemployed or underemployed, the court may set orders based upon a proven earning capacity.

A significant error in calculating a party's earnings used to determine alimony will not withstand appellate scrutiny. *See, Traystman v. Traystman*, 141 Conn. App. 789 (2013) (an error of \$72,000 was a significant error requiring reversal of the alimony order).

[2] Determining Earning Capacity

The 2013 revision to *Conn. Gen. Stat. § 46b-82* added earning capacity as a specific factor to be taken into account in determining alimony. Previously, it was a consideration predicated upon case law. Where a party is underemployed or unemployed, the court may assign to him or her an earning capacity upon which an alimony order is based. Earning capacity is an amount a person can realistically be expected to earn considering that person's employability, age, vocational skills, and health. *Weinstein v. Weinstein*, 87 Conn. App. 699, 706 (2005).

The first cases employing earning capacity were based upon a finding that the alimony obligor depressed or depleted earnings to limit his or her alimony obligation to the other party. *Schmidt v. Schmidt*, 180 Conn. 184, 189–190 (1980). Accordingly, an alimony payor who purposefully drives his business to ruin can be found to have an earning capacity despite having no current earnings. *Bleuer v. Bleuer*, 59 Conn. App. 167, 170 (2000). Litigants who leave a lucrative job for a much lower paying job or avoid employment in his or her field of work, may be found to have an earning capacity higher than his or her actual earnings. *Hart v. Hart*, 19 Conn. App. 91, 95 (1989).

Courts may find an earning capacity where one party voluntarily resigns a position. *Miller v. Miller*, 181 Conn. 610, 612 (1980) and *Wilkins v. Wilkins*, 10 Conn. App. 576 (1987). A court may also enter or modify alimony orders based upon earning capacity when an alimony obligor was fired because of employment misconduct. See *Schade v. Schade*, 110 Conn. App. 57 (2008) (an alimony obligor who was terminated due to his own conduct and who was not actively pursuing employment was found to have an earning capacity upon which modified orders properly were based).

A court properly may base alimony orders upon earning capacity when a party is underemployed. Underemployment occurs when a person is engaging in employment ~~providing him or her with which produces~~ income substantially lower than that which reasonably could be earned with his or her educational background. See *Werblood v. Birnbach*, 41 Conn. App. 728 (1996) (husband was found to have an earning capacity equal to the wife's earnings when both were clinical psychologists and both had doctoral degrees, although the husband was not exploiting this earning potential).

Most earning capacity decisions focus on ascribing an earning capacity in excess of the actual earnings. However, a court may determine that a party has an earning capacity less than his or her earnings. *Steller v. Steller*, 181 Conn. App. 581 (2018).

When a court uses earning capacity, instead of actual earnings, in rendering its decision, it must state the amount or range of the earning capacity found. *Tanzman v. Meurer*, 309 Conn. 105 (2013). Failure to do so will prevent a future court from being able to modify the original order as there is no dollar figure with which to compare the current financial circumstances of the parties.

Earning capacity, while typically focused on employment income, can actually be based upon investment income. However, the investment income must be determined based upon the assets retained by the spouse for whom an earning capacity is found, not the total assets prior to division. *Merk-Gould v. Gould*, 184 Conn. App. 512 (2018).

#Comment Begins

Warning: The holding in *Merk-Gould* should not be read so broadly as to include investment income in all awards of alimony. The alimony obligor had been unemployed for some time and the alimony recipient was unable to work. These circumstances fueled the court's equitable considerations in the orders it made.

#Comment Ends#Comment Begins

Strategic Point: Since the court is required to specifically state the earning capacity found, primarily to aid the Appellate Court in any review of the order and for purposes of future modifications, it would be wise to set forth the amount of earning capacity used to determine orders when the parties arrive at their own agreement. Otherwise, the same issue present in

Tanzman will occur.

#Comment Ends

[3] Proving Earning Capacity

The evidence must support an alimony order based upon earning capacity. Earning capacity may be based upon a parties' educational background. However, a court must have evidence of the specific education and may not infer the receipt of a degree without evidence of the particular degree received. *Hammel v. Hammel*, 158 Conn. App. 827 (2015). Such evidence may include what the alimony obligor earned at an earlier point in time or the individual's vocational skills in a particular trade. *Chyung v. Chyung*, 86 Conn. App. 665 (2004). The evidence may also include the salary for a person of the obligor's ability and experience in his or her occupation. *Schmidt v. Schmidt*, 180 Conn. 184, 190–191 (1980). To base an alimony order on prior earnings, evidence of earnings within the range of the earning capacity found must be provided to the court. *Boyne v. Boyne*, 112 Conn. App. 279 (2009). A recalcitrant litigant, who fails to comply with discovery request regarding documentation which would show his earnings, the review by the court of his profit and loss statements, bank records, credit card records and emails to prove earning capacity was sufficient. *Fronsaglia v. Fronsaglia*, 202 Conn. App. 769 (2021). A litigant who is found to be evasive and not credible could not successfully appeal and earning capacity based upon his gross receipts, the amount of work he built out, his tax returns and summaries prepared by his accountant. *O'Neill v. O'Neill*, 209 Conn. App. 165 (2021).

#Comment Begins

Strategic Point: Some litigants feel that if they do not provide evidence of their earnings, or withhold the same in discovery, the court will be without the ability to determine earning capacity. As *O'Neill* shows, they are wrong. Those litigants are more likely to face a finding of an earning capacity.

#Comment Ends

A court may determine that an earning capacity is not applicable, despite education, training, and past employment experience, when the license required to achieve those earnings has lapsed. *Brown v. Brown*, 148 Conn. App. 13 (2014).

#Comment Begins

Strategic Point: If an earning capacity is going to be determined based upon something other than the past earnings of the party, expert testimony will likely be necessary. A vocational expert will be able to testify as to the areas of employment that would be appropriate in light of the skills and education of the party. If a party is having difficulty obtaining employment, a headhunter or similar professional can be retained to testify as to the job market within the party's area of expertise.

#Comment Ends#Comment Begins

Strategic Point: After the *Chyung* decision was released, where the court recited the wife's earnings from 24 years prior to the trial to determine the upper limit of her earning capacity, many attorneys felt that this opened the door to using historic earning data to demonstrate earning capacity. Cases since that decision have increasingly required more recent earnings to show an appropriate earning capacity. If demonstrating earning capacity relies on earnings received several years prior to the order being sought, counsel must show that there are no current impediments to realizing these earnings. Otherwise, the court will not have sufficient evidence to make an accurate earning capacity determination.

#Comment Ends

Earning capacity may also be found for a party who does not disclose records necessary to show earnings, without any credible excuse. *Vandal v. Vandal*, 31 Conn. App. 561 (1993). In this instance, a recalcitrant litigant will not be rewarded for failure to provide adequate discovery. Such an earning capacity may be based upon previous earnings shown on a financial affidavit when the affiant admits at trial the affidavit is erroneous coupled with the failure to provide discovery. *Schoenborn v. Schoenborn*, 144 Conn. App. 846 (2013). Where it is difficult to determine actual income, the court may use the party's tax returns and add back in perquisites and other deductions that do not impact on cash actually received, such as depreciation, to make a determination of income. *Vandal*, 31 Conn. App. at 567.

As a final resort, earning capacity can be derived from proof of lifestyle and personal expenses. *Brown v. Brown*, 130 Conn. App. 522 (2011) and *Carasso v. Carasso*, 80 Conn. App. 299, 304 (2003).

#Comment Begins

Strategic Point: When trying to prove income through expenditures, bank statements will be helpful to demonstrate which expenses are paid through checking accounts. Comparison of a party's financial affidavit to the expenses shown in checking account and credit card statements may yield no record of payments for certain expenses, suggesting that they are paid in cash or through another undisclosed bank account.

#Comment Ends#Comment Begins

Strategic Point: If you suspect that the opposing party is hiding money or receiving compensation in cash, it would be beneficial to obtain a sworn financial affidavit early in the case to establish lifestyle before the affiant realizes the claims being made regarding his or her earnings.

#Comment Ends

[4] Determining the Impact of Earning Capacity on Future Modifications

Once a court finds and bases alimony orders on one party's earning capacity, any future modification will be viewed in light of that earning capacity. Accordingly, to modify the alimony, it must be demonstrated that there is a change in earning capacity. *Bruno v. Bruno*, 132 Conn. App. 339 (2011). Alternatively, there must be a demonstration of actual earnings and that the earning capacity previously attributed to a party has changed. *McRae v. McRae*, 139 Conn. App. 75 (2012). However, a change in actual earnings may not result in a modification where there has been no change in skills, education, or ability resulting in the same earning capacity as the previous order. *McKeon v. Lennon*, 155 Conn. App. 423 (2015), rev'd on other grounds, 321 Conn. 323 (2006).

It is important that the court state what it finds to be the earning capacity upon which the alimony is based. With no finding as to the earning capacity, the alimony obligor will be unable to seek a modification because the court has no baseline against which the current circumstances may be compared. *Tanzman v. Meurer*, 309 Conn. 105 (2013). While the court may later be required to articulate the actual earning capacity, it would be prudent to have that determination made at the time of the order instead of at a later date. The parties in *Tanzman* were faced with

the daunting task of determining at the time of a subsequent modification the husband's earning capacity in 2006, when the dissolution entered.

#Comment Begins

Strategic Point: If an alimony order is based upon earning capacity, that party should keep a log of all attempts to obtain employment, all compensation associated with the employment sought, and all offers of employment made, to support any future modification.

#Comment Ends#Comment Begins

Strategic Point: When the memorandum of decision is received on a case in which an earning capacity is used, make sure the court has clearly articulated either an exact amount or a range of the earning capacity. If the court has not done so, or if the range is overly broad, seek an articulation to have the amount determined or range narrowed to provide the basis of any future modification.

#Comment Ends

§ 5.11 Establishing Needs, Station in Life, and Estate of Each Party

[1] Establishing Needs

The court must consider the needs and station of each party in determining whether, for how long, and how much alimony should be awarded. [Conn. Gen. Stat. § 46b-82](#). A party's needs are reflected in the expense portion of their financial affidavits. Those needs should be actual and may not be projected. If future expenses are set out on a party's financial affidavit, those expenses must be definitive in amount, not estimated. [Watson v. Watson, 20 Conn. App. 551, 559 \(1990\)](#).

In some cases, an absence of need may not be determinative of the amount of alimony to be awarded. See [Simmons v. Simmons, 244 Conn. 158, 181 \(1998\)](#) (where the wife's lifestyle was commensurate with her salary alone because she had been the sole support of the family unit to allow the husband to obtain his medical degree, an alimony award is not properly limited by her needs).

#Comment Begins

Strategic Point: One of the easiest ways to cast doubt on a person's credibility is through examination of the expense portion of his or her financial affidavit. If the affidavit is not prepared with an eye towards being "cross examination proof" and is discredited, a client's actual needs may receive less attention than if the expenses are accurate.

#Comment Ends

[2] Determining Station in Life

Station in life represents a party's style of living, such as where he or she vacations, shops, or whether he or she has household help. [Wendt v. Wendt, 1998 Conn. Super. LEXIS 1023 \(1998\)](#). The court's conclusions as to a payor's ability to pay are often carefully considered in conjunction with a party's claims of need and requests for alimony based upon station. Accordingly, a party who claims a standard of living beyond what the family income will support may receive alimony based upon actual earnings, rather than alimony that supports the claimed standard of living. [Whitney v. Whitney, 171 Conn. 23, 28 \(1976\)](#). Conversely, a party who claims that an impoverished standard of living should be imposed on his or her spouse, despite being able to pay more, may be required to pay alimony in accordance with his or her ability to pay. [England v. England, 138 Conn. 410, 414-415 \(1951\)](#). A court may properly order alimony that

will provide the payee with a higher standard of living than she enjoyed during the marriage if the alimony payor can afford to make such payments. *Panganiban v. Panganiban*, 54 Conn. App. 634, 642–643 (1999).

#Comment Begins

Strategic Point: It is wise at the initial client meeting to encourage a prospective client to have realistic expectations of final alimony orders. It is critical to explain to the client that in most cases the style of living that was enjoyed by an intact family cannot be replicated after a divorce where the same income is then supporting two homes.

#Comment Ends

[3] Determining the Estate of Each Party

While typically the prime factor in determining alimony is income, courts will also adjust an alimony award based upon the division of assets. Disparate retirement assets can be used as a rationale to award alimony. *Lynch v. Lynch*, 153 Conn. App. 208 (2014). Such considerations are consistent with the view of a “mosaic” in the financial orders.

§ 5.12 Determining the Need for Caretaking of the Minor Child

The court may consider whether it is advisable for the custodial parent to seek employment based upon the ages and needs of the children. Conn. Gen. Stat. § 46b-82. This criterion concerns the minor children, not include the voluntary support of adult children. *Loughlin v. Loughlin*, 93 Conn. App. 618 (2006). The special needs of a minor child and the mother’s role in caring for the child properly may affect an alimony award. See *Dees v. Dees*, 92 Conn. App. 812 (2006) (where the evidence showed that the mother was not the only person who could meet a handicapped, school-aged child’s special needs, but that her earning capacity was limited because of the time she devoted to caring for the child, it was appropriate to award seven years of alimony, nonmodifiable as to term, the termination of which coincided with the child’s 18th birthday).

A court may award alimony to a parent who, although able to earn more money working full time, is working part-time in order to care for the parties’ minor child. *Wolfburg v. Wolfburg*, 27 Conn. App. 396 (1992).

#Comment Begins

Strategic Point: While the court may take into account the caretaking needs of the children, it will not always alleviate the parent from needing to obtain gainful employment. However, if representing the custodial parent, research should be undertaken to determine what the parent could earn in light of the cost of providing and paying for childcare.

#Comment Ends

PART III: PREPARING FOR THE TEMPORARY ALIMONY DETERMINATION

ALIMONY

§ 5.13 CHECKLIST: Preparing for Temporary Alimony Determinations

5.13.1 Preparing for Temporary Alimony Determinations

- Timing of temporary alimony orders:
 - Temporary alimony orders may be entered at any time after the return date.
 - The orders may be made retroactive to the filing of the motion, with credit for payments made since that date.
 - As a result of the Pathways program, these motions are not being heard in court but on a case date.
 - For those without sufficient means to support themselves pendente lite, they may seek an expedited hearing within 60 days of filing such motion.
 - If there is an agreement, it may be submitted on the papers for approval without a court appearance. **Authority:** Conn. Gen. Stat. §§ 46b-83 and 46b-83(a). **Discussion:** See § 5.14, below. **Forms:** JD-FM-280—Affidavit in Support of the Request for Approval of Final Agreement on Motion(s), see Chapter 20, § 20.89, below and JD-FM-282—Request for Approval of Final Agreement without Court Appearance, see Chapter 20, § 20.91, below.
- Producing documents at hearing:
 - Request documents to be produced pursuant to P.B. § 25-30 five days prior to hearing on temporary alimony.
 - Financial affidavits are to be filed five days in advance.
 - With remote hearings, these documents must be filed in advance with the court, as should exhibits.
 - Notwithstanding, the court may enter orders in the absence of a financial affidavit. **Authority:** P.B. §§ 25-30(a) and 25-56. **Discussion:** See § 5.15, below. See also Chapter 4, § 4.25[3], above. **Forms:** JD-FM-6—Financial Affidavit Long and Short Form, see Chapter 20, § 20.03, below. JD-FM-71—Advisement of Rights, see Chapter 20, § 20.06, below.
- Determining factors to be considered in ordering temporary alimony:
 - All statutory factors for alimony are to be considered except for the cause of the breakdown of the marriage.
 - The purpose of temporary alimony is to provide support in accordance with needs and ability to pay.
 - Temporary alimony is designed to maintain the status quo.
 - Temporary alimony, where appropriate, may be based upon earning capacity. **Authority:** Conn. Gen. Stat. § 46b-83; *Wolk v. Wolk*, 191 Conn. 328 (1983), *Lucy v. Lucy*, 183 Conn. 230 (1981), *Casanova v. Casanova*, 166 Conn. 304 (1974), *Papa v. Papa*, 55 Conn. App. 47 (1999), and *Rathblott v. Rathblott*, 22 Conn. L. Rptr. 656 (1998). **Discussion:** See § 5.16, below.
- Requiring temporary alimony to be paid out of assets or borrowing:
 - Generally, it is impermissible to pay temporary alimony out of assets unless there is a financial misrepresentation or the court imputes income or an earning capacity to the payor.
 - If there is insufficient cash flow from income sources to pay alimony, the court may order alimony to be paid from assets.
 - The court may require the parties to borrow if they have done so previously in order to pay expenses. **Authority:** Conn. Gen. Stat. §§ 46b-82 and 46b-83; *Dumbauld v. Dumbauld*, 163 Conn. App. 517 (2016), *England v. England*, 138 Conn. 410 (1951), *Kiniry v. Kiniry*, 71 Conn. App. 614 (2002), and

Stafford v. Stafford, 2000 Conn. Super. LEXIS 115 (2000); P.B. § 25-5(b)(1).

Discussion: See § 5.17, *below*.

□ Considering premarital agreements when making temporary alimony orders:

○ The validity of a prenuptial agreement will not be determined until the time of trial and should not be considered when making temporary alimony orders.

○ If both parties seek the enforcement of the prenuptial agreement in their pleadings, the court may consider the prenuptial agreement in rendering pendente lite orders. **Authority:** P.B. § 25-2A; *Fitzgerald v. Fitzgerald*, 169 Conn. 147 (1975),

Clarke v. Clarke, 65 Conn. L. Rptr. 327 (2018)

and *Scharer v. Scharer*, 2001 Conn. Super. LEXIS 2140 (2001).

Discussion: See § 5.18, *below*.

□ Merging of temporary alimony orders into the final decree:

○ The temporary orders terminate with the final judgment. **Authority:** *Connolly v. Connolly*, 191 Conn. 468 (1983), *Wolk v. Wolk*, 191 Conn. 328 (1983), and *Febbrioriello v. Febbrioriello*, 21 Conn. App. 200 (1990). **Discussion:** See § 5.19, *below*.

□ Modifying temporary alimony orders:

○ Temporary alimony orders vest with each payment due so that there can be no retroactive modification of such orders, absent proper notice.

○ The final decree must incorporate arrearages from temporary alimony, as failure to do so will be an impermissible modification. **Authority:** Conn. Gen. Stat. § 46b-83; *Evans v. Taylor*, 67 Conn. App. 108 (2001), *Papa v. Papa*, 55 Conn. App. 47 (1999), *Milbauer v. Milbauer*, 54 Conn. App. 304 (1999), *Weinstein v. Weinstein*, 18 Conn. App. 622 (1989), and *Elliott v. Elliott*, 14 Conn. App. 541 (1988). **Discussion:** See § 5.20, *below*.

§ 5.14 Timing of Temporary Alimony Orders

After the return day of a complaint for dissolution, annulment, or legal separation, the court may order alimony or support to be paid to either of the parties to the action during the pendency of the action. Conn. Gen. Stat. § 46b-83. If the parties cannot agree to temporary alimony orders, the court must hold a hearing. Conn. Gen. Stat. § 46b-83. The court may order temporary alimony, retroactive to the filing of the motion seeking such an order, and must give full credit for all sums paid to the movant by the other spouse, from the filing of the motion to the time the temporary alimony order is made. Conn. Gen. Stat. § 46b-83.

#Comment Begins

Strategic Point: When representing a potential alimony obligor, advising him or her to keep track of all payments made to or on behalf of the other party or children can be used to offset any retroactivity on the *pendente lite* award.

#Comment Ends

As a result of the new Pathways program, the courts have established Case Dates in lieu of short calendar, although there are periodic motion calendars in each judicial district. For a Case Date, the parties are assigned a specific date and time for a 45-minute hearing with the court, which may include a hearing on any outstanding matter pending at the time of the hearing. Immediately prior to the hearing, counsel and the parties must have a conference with family relations to see if there is an ability of resolving any outstanding matters. Failure to resolve the

matter with family relations will leave it exposed to a hearing on the Case Date. If there is a resolution, the parties can have their agreement approved by the court at the Case Date.

Effective January 1, 2024, [Conn. Gen. Stat. § 46b-83](#) was amended to provide for a hearing within sixty days of the filing of a motion for alimony or support pendente lite and an affidavit stating: (1) the party seeking an alimony or support order has insufficient funds to meet the reasonable needs of the movant and/or children; (2) the non-moving party is not providing sufficient funds to the moving party to meet such needs; and (3) the moving party believes that the non-moving party has sufficient ability or earning capacity to provide such support. [Conn. Gen. Stat. § 46b-83\(a\)](#). If the hearing cannot occur as scheduled, it must be rescheduled no later than 14 days after the original hearing date. [Conn. Gen. Stat. § 46b-83\(a\)](#).

If there is an agreement prior to the court hearing the parties may seek to have the court approve the agreement on the papers. In order to do so, the parties must submit: the signed written agreement; financial affidavits for both parties; the affidavit in support of the request for approval of final agreement on motions; and the request for approval of final agreement without a court appearance.

#Comment Begins

Strategic Point: In the event there are any nuances to the agreement which would need to be explained to the court in a canvas of either party, you should provide an addendum to the affidavit requesting approval of the agreement to set forth those nuances. Otherwise, the court may not approve the agreement.

#Comment Ends#Comment Begins

Forms: JD-FM-280—Affidavit in Support of the Request for Approval of Final Agreement on Motion(s), [see Chapter 20, § 20.89, below](#) and JD-FM-282—Request for Approval of Final Agreement without Court Appearance, [see Chapter 20, § 20.91, below](#).

#Comment Ends

§ 5.15 Producing Documents at Hearing

Each party must file a sworn financial statement of current income, assets, liabilities, and expenses at least five days before the hearing date of a motion concerning alimony or support. Connecticut Practice Book (hereinafter “P.B.”) § 25-30(a). However, the court can enter *pendente lite* or permanent alimony orders in the absence of a financial affidavit. P.B. § 25-30(a). At the time of a hearing seeking an alimony order, whether temporary or permanent, one of the parties must file an advisement of rights re: wage withholding form so that the court may enter either a mandatory or contingent wage withholding order.

#Comment Begins

Strategic Point: Usually a temporary alimony motion will be heard prior to obtaining full discovery. One manner of obtaining the documents necessary is the taking of a deposition with a timely notice of deposition requiring the deponent to bring documents. If that is not possible, ask for documents to be produced at hearing by the opposing party via a P.B. § 25-56 request to produce at hearing. For a more thorough discussion on the request to produce at hearing, [see Chapter 4, § 4.25\[3\], above](#).

#Comment Ends

The Pathways program has removed the regular weekly short calendar practice. Now motions will be heard at either case dates or the periodic motion calendars if the court places the matter on

such calendar. More likely, they will be held on a Case Date, which is a 45-minute court appearance preceded by a conference with family relations. All of the documents which would be filed with the court at the time of the hearing must be filed in advance of the hearing.

#Comment Begins

Strategic Point: As of the updating of this volume, there was no uniform guidance about the presentation of exhibits at a virtual hearing. It should be remembered that the Trial Management Orders provide for trial management compliance 10 days prior to the hearing unless the court exempts it from such orders or it is not a specially assigned hearing. Nonetheless, exhibits should be exchanged with counsel prior to the hearing to see if there is an agreement on the admissibility of those exhibits.

#Comment Ends#Comment Begins

Forms: JD-FM-6—Financial Affidavit, *see* [Chapter 20, § 20.03, below](#). JD-FM-71—Advisement of Rights, *see* [Chapter 20, § 20.06, below](#).

#Comment Ends

§ 5.16 Determining Factors to be Considered in Ordering Temporary Alimony

When making temporary alimony orders, the court is to consider all of the statutory factors relevant to a permanent alimony order, “except the grounds for the complaint or cross complaint.” [Conn. Gen. Stat. § 46b-83](#).

One purpose of temporary alimony is to provide the payee with funds to support his or her needs in accordance with the payor’s ability to pay for those needs. [Papa v. Papa, 55 Conn. App. 47, 53 \(1999\)](#). What the alimony obligor can afford to pay is “a material consideration” in establishing *pendente lite* orders. [Casanova v. Casanova, 166 Conn. 304, 304–305 \(1974\)](#). Another purpose of temporary alimony is to provide support for a spouse living apart from the other pending final determination of the issues in the case. [Wolk v. Wolk, 191 Conn. 328, 331 \(1983\)](#). This is sometimes referred to as “maintaining the status quo.” [Rathblott v. Rathblott, 1998 Conn. Super. LEXIS 2271 \(1998\)](#).

In appropriate circumstances, a court may make temporary orders based upon earning capacity. [Lucy v. Lucy, 183 Conn. 230 \(1981\)](#).

#Comment Begins

Strategic Point: Oftentimes, temporary alimony is awarded to maintain the current needs of the parties. There may be times when a temporary order may be greater than the final order, due to payment of expenses during the pendency of the case, such as the mortgage on a home, as a means of maintaining the status quo. Focus should be on the actual needs of the parties and the available income to meet those needs.

#Comment Ends

§ 5.17 Requiring Temporary Alimony to be Paid out of Assets or Borrowing

The assets that a party can use to support himself or herself pending final judgment can be important to the court’s determination of the temporary orders. [England v. England, 138 Conn. 410, 412–413 \(1951\)](#). The payment of temporary alimony out of assets is generally prohibited as

it is considered an impermissible *pendente lite* distribution of assets. *Dumbauld v. Dumbauld*, 163 Conn. App. 517 (2016). However, to the extent that an obligor has misrepresented his finances or the court determines it appropriate to impute income or find an earning capacity for the obligor, such payment may be permissible. *Dumbauld*, 163 Conn. App. at 531. The court can order a spouse to pay alimony from assets if there is insufficient cash flow from earnings or investments to meet the alimony recipient's needs. *Stafford v. Stafford*, 2000 Conn. Super. LEXIS 115 (2000). The automatic orders acknowledge the potential use of assets for the payment of usual and customary household expenses. P.B. § 25-5(b)(1). The "estate" of each party is a specific statutory factor to be considered by the court in entering a temporary alimony order. Conn. Gen. Stat. §§ 46b-82 and 46b-83. However, a court is unlikely to order alimony to be paid from assets unless absolutely necessary. The court may also require that a party borrow to meet temporary needs, especially if the family has done so in the past. *Kiniry v. Kiniry*, 71 Conn. App. 614 (2002).

#Comment Begins

Warning: The *Dumbauld* decision speaks in absolute terms and does not acknowledge that there could be a myriad of other instances in which it would be appropriate to authorize the use of assets to pay for the expenses of the parties. This decision ignores the specific language of the automatic orders. In addition, there may be additional non-nefarious reasons for which a court might reasonably order the payment of temporary alimony out of assets, which was an issue raised by the concurring opinion in this case.

#Comment Ends

§ 5.18 Considering Premarital Agreements When Making Temporary Alimony Orders

When the parties have executed a premarital agreement, the terms of the agreement should not affect temporary alimony orders, as its validity will not be determined until the final hearing. *Fitzgerald v. Fitzgerald*, 169 Conn. 147, 153 (1975). Accordingly, while there may be an alimony waiver in a prenuptial agreement, that waiver may not impair the court's ability to make temporary orders. However, since the parties are now required to plead the enforcement of the prenuptial agreement in the complaint, with a responsive pleading due within 60 days, such pleading may affect a temporary alimony order. P.B. § 25-2A. Thus, if both parties seek enforcement of a prenuptial agreement, the court may grant summary judgment and deny a motion for temporary alimony where alimony is specifically precluded in the prenuptial agreement. *Clarke v. Clarke*, 65 Conn. L. Rptr. 327 (2018). Temporary alimony is for the support of a spouse pending a final determination, which is a reason why the prenuptial agreement should not dictate temporary alimony orders. *Scharer v. Scharer*, 2001 Conn. Super. LEXIS 2140 (2001).

#Comment Begins

Warning: ~~Despite the fact that~~ Even though the court, when making temporary alimony orders, may ignore the prenuptial agreement, it does not mean that any such orders will be ignored at a final hearing when the enforceability of the agreement is determined. Thus, if there is a provision in the prenuptial agreement that any temporary alimony will be deducted from the recipient's property division, the recipient must be made aware of this possibility.

#Comment Ends#Comment Begins

Warning: It should be remembered that *Fitzgerald* was decided prior to the Premarital Agreement Act and the adoption of P.B. § 25-2A. As such, if both parties seek, as in *Clarke*, an enforcement of the prenuptial agreement, the court may then enforce, through summary judgment, the prenuptial agreement as there is no genuine issue of law or fact. Such agreement by the parties for enforcement will not preclude the court from making orders regarding issues not addressed in the prenuptial agreement.

#Comment Ends

§ 5.19 Merging of Temporary Alimony Orders into the Final Decree

A temporary alimony order terminates with the issuance of the dissolution judgment. *Febbrioriello v. Febbrioriello*, 21 Conn. App. 200, 206 (1990). Since final orders provide for a division of assets and may include orders for alimony and support, temporary orders cease at dissolution as their purpose is fulfilled. *Connolly v. Connolly*, 191 Conn. 468, 479 (1983) and *Wolk v. Wolk*, 191 Conn. 328, 331 (1983).

§ 5.20 Modifying Temporary Alimony Orders

Temporary alimony obligations accrue as each installment comes due. Unpaid installments are “in effect, debts which have become vested property rights which the court cannot take away.” *Elliott v. Elliott*, 14 Conn. App. 541, 545 (1988). Temporary alimony obligations, whether a sum certain or an obligation to pay certain expenses, accrue with each installment due and constitute a debt which cannot be discharged in a final judgment. *Papa v. Papa*, 55 Conn. App. 47, 53 (1999). The court, when rendering the final judgment, may not discharge an arrearage of a temporary alimony obligation. The final dissolution decree must incorporate arrearages of court ordered temporary obligations. *Papa*, 55 Conn. App. at 53. Accordingly, the court cannot retroactively modify nor forgive temporary alimony that has been paid or has come due.

A modification of temporary alimony is permissible if a substantive order is entered on a motion to modify before the dissolution judgment is issued. In such circumstances, the court can modify the temporary alimony order retroactive to the date the motion was filed. *Conn. Gen. Stat. § 46b-83*, *Evans v. Taylor*, 67 Conn. App. 108, 118 (2001), and *Milbauer v. Milbauer*, 54 Conn. App. 304, 311–312 (1999).

Failure to include an arrearage resulting from the nonpayment of temporary alimony in a court’s final judgment is error. *Evans*, 67 Conn. App. at 117–118. Such a failure is an impermissible retroactive modification.

#Comment Begins

Strategic Point: Prior to the final hearing, if there is an alimony arrearage, a motion for contempt should be filed. If it has not been heard by the court prior to the final hearing ask for the motion to be heard before the trial commences, or with the permission of opposing counsel, be incorporated into the trial and final orders. *Milbauer v. Milbauer*, 54 Conn. App. 304 (1999). If the case is resolved by agreement, failure to include an arrearage in a written agreement may preclude the payee from obtaining the amounts due once the divorce has been granted.

#Comment Ends

When a motion for modification has been filed, it is not proper for the court to defer ruling on that motion until final hearing or for the modification to be dependent upon the dissolution

court's determination of whether to award permanent alimony. Such orders defeat the purpose of temporary alimony, which is to provide support while the action is pending. *Weinstein v. Weinstein*, 18 Conn. App. 622, 640–642 (1989).

A court cannot, at the time of the dissolution decree, credit the payor with amounts paid in accordance with a temporary alimony order, as that credit is an impermissible retroactive modification of a *pendente lite* alimony order. *Wolf v. Wolf*, 39 Conn. App. 162, 167 (1995).

PART IV: ESTABLISHING PERMANENT ALIMONY ORDERS

ALIMONY

§ 5.21 CHECKLIST: Establishing Permanent Alimony Orders

5.21.1 Establishing Permanent Alimony Orders

- Distinguishing between final and temporary alimony orders:
 - Final alimony takes into account the long-term effects of such order, including the division of assets.
 - The court may consider the cause for the breakdown of the marriage when making the final order. **Authority:** Conn. Gen. Stat. § 46b-82; *Greenan v. Greenan*, 150 Conn. App. 289 (2014); *Wolk v. Wolk*, 191 Conn. 328 (1983). **Discussion:** See § 5.22, below.
- Distinguishing lump sum alimony from periodic alimony:
 - The same statutory criteria are considered when determining periodic and lump sum alimony.
 - Although the lump sum may be paid from property owned by the spouse, it does not mean the order is converted to a property division.
 - A court may award security for the payment of a lump sum alimony order.
 - Lump sum alimony is payable after the remarriage of the recipient. **Authority:** Conn. Gen. Stat. § 46b-82(a); *Tremaine v. Tremaine*, 235 Conn. 45 (1995), *Pulvermacher v. Pulvermacher*, 166 Conn. 380 (1974), *Brody v. Brody*, 136 Conn. App. 773 (2012), and *Pacchiana v. McAree*, 94 Conn. App. 61 (2006). **Discussion:** See § 5.23, below.
- Failing to award any alimony to either party:
 - If there is no award of alimony at the time of the dissolution, neither party may return to court in the future to seek alimony.
 - The property division may take into account the lack of alimony. **Authority:** *Carten v. Carten*, 203 Conn. App. 598 (2021), *Greenan v. Greenan*, 150 Conn. App. 289 (2014), *Wiegand v. Wiegand*, 129 Conn. App. 526 (2011), *Bartels v. Bartels*, 85 Conn. App. 772 (2004), and *Brown v. Brown*, 29 Conn. Supp. 507 (1972). **Discussion:** See § 5.24[1], below.
- Awarding nominal alimony:
 - An award of nominal alimony allows the recipient to seek a modification in the event of a future substantial change in circumstances.
 - A nominal award of alimony may be appropriate where one party is seeking an advanced degree.
 - A nominal award may also be appropriate where one party is at the

beginning of a very lucrative career. **Authority:** Conn. Gen. Stat. § 46b-86(a); *Smith v. Smith*, 249 Conn. 265 (1999), *Simmons v. Simmons*, 244 Conn. 158 (1998), *Ridgeway v. Ridgeway*, 180 Conn. 533 (1980), *Wilson v. Di Iulio*, 192 Conn. App. 101 (2019), *Burns v. Burns*, 41 Conn. App. 716 (1996), and *Crocker v. Crocker*, 13 Conn. App. 129 (1987). **Discussion:** See § 5.24[2], *below*.

□ Establishing periodic alimony:

- How and when alimony is paid will depend upon the manner and frequency with which the alimony payor is paid.
- Compensation in addition to a base salary or draw should be paid when it is received.
 - The court may require payment of alimony based upon the total annual income in equal monthly installments, not when it is received by the payor.
- Self-executing orders may be made and will provide that the payor is to pay a certain percentage of his income, as defined.

○ A self-executing provision may be used to provide the alimony payor with a credit against his or her alimony obligations based upon the earnings of the alimony recipient in excess of a certain amount. **Authority:** *Wells v. Wells*, 196 Conn. App. 309 (2020), *Cohen v. Cohen*, 327 Conn. 485 (2018), *Eldridge v. Eldridge*, 244 Conn. 523 (1998), *Guarascio v. Guarascio*, 105 Conn. App. 418 (2008), *Behrns v. Behrns*, 80 Conn. App. 286 (2003), and *Kiniry v. Kiniry*, 71 Conn. App. 614 (2002). **Discussion:** See § 5.24[3], *below*.

□ Basing orders on net income and determining the amount of alimony payable:

- Alimony orders must be based upon the net income of the parties.
- The order may be a function of gross income, provided it is based upon net income.
- A modification may not be solely based upon an increase in the obligor's income absent proof of the original order not fulfilling its purpose. **Authority:** P.L. 115-97, § 11051, *Dan v. Dan*, 315 Conn. 1 (2014), *Morris v. Morris*, 262 Conn. 299 (2003), *Bray v. Bray*, 206 Conn. App. 46 (2021), *Procaccini v. Procaccini*, 157 Conn. App. 804 (2015), *Valentine v. Valentine*, 149 Conn. App. 799 (2014), *Hughes v. Hughes*, 95 Conn. App. 200 (2006), *Kelman v. Kelman*, 86 Conn. App. 120 (2004), *Greco v. Greco*, 82 Conn. App. 768 (2004), and *Ludgin v. McGowan*, 64 Conn. App. 355 (2001). **Discussion:** See §§ 5.24[4] and 5.24[5], *below*.

□ Avoiding Double Dipping:

- Double dipping occurs when the same income is used to determine alimony and the value of an asset.
- One way to avoid a double dipping claim is to base alimony on earning capacity and not actual earnings.
- Double dipping will be permitted provided that any lump sum and/or award to the non-business owning spouse does not undermine the business owner's ability to earn income from the business. **Authority:** *Oudheusden v. Oudheusden*, 338 Conn. 761 (2021), *Halperin v. Halperin*, 196 Conn. App. 603 (2020), *Oudheusden v. Oudheusden*, 190 Conn. App. 169 (2019) and *Callahan v. Callahan*, 157 Conn. App. 78 (2015). **Discussion:** See § 5.24[6], *below*; see also § 6.36[4], *below*.

□ Defining income for purposes of alimony determinations:

- When making alimony orders, the components of income to be included in the alimony determination may be set forth.

○ Care should be taken to ensure that the definition of income is modifiable even if the amount is non-modifiable. **Authority:** *Birkhold v. Birkhold*, 343 Conn. 786 (2022), *Eckert v. Eckert*, 285 Conn. 687 (2008), *Brown v. Brown*, 199 Conn. App. 134 (2020), *Halperin v. Halperin*, 196 Conn. App. 603 (2020), *Grogan v. Penza*, 194 Conn. App. 72 (2019), *Ayres v. Ayres*, 193 Conn. App. 224, cert. denied, 224 Conn. 902 (2019), *Winthrop v. Winthrop*, 189 Conn. App. 576 (2019), *Mountain v. Mountain*, 189 Conn. App. 228 (2019), *Salzbrunn v. Salzbrunn*, 155 Conn. App. 305 (2015) and *Weihs v. Weihs*, 2016 Conn. Super. LEXIS 1679. **Discussion:** See § 5.24[7], *below* and § 7.29 *below*.

□ Ordering payment of certain expenses as alimony:

○ Alimony may be ordered in the form of payment of expenses on behalf of the recipient.

○ The payment of such expenses will be modifiable in the same fashion as other alimony orders. **Authority:** 26 C.F.R. § 1.71-1T, A-6; *Aley v. Aley*, 97 Conn. App. 850 (2006), *Damon v. Damon*, 23 Conn. App. 111 (1990), and *Hines v. Hines*, 2013 Conn. Super. LEXIS 1429 (June 25, 2013). **Discussion:** See § 5.24[8], *below*.

□ Awarding time-limited alimony:

○ There must be a factual basis for the time-limited alimony.

○ Time-limited awards may be appropriate in certain circumstances:

- To provide incentive to the alimony recipient to attain self-sufficiency.
- To allow the alimony recipient to further his or her education and attain self-sufficiency.

• To allow the occurrence of a certain future event which will provide the alimony recipient funds for his or her support.

○ A modest time period between the event causing the time-limited alimony and the termination of alimony may be permissible under some circumstances.

○ There is no established rule of thumb that time limited alimony is for one-half the length of the marriage.

Authority: *Buchenholz v. Buchenholz*, 221 Conn. App. 132 (2023), *Horey v. Horey*, 172 Conn. App. 735 (2017), *Altraide v. Altraide*, 153 Conn. App. 327 (2014), *Cunningham v. Cunningham*, 140 Conn. App. 676 (2013), *Marmo v. Marmo*, 131 Conn. App. 43 (2011), *Dees v. Dees*, 92 Conn. App. 812 (2006), *Porter v. Porter*, 61 Conn. App. 791 (2001), *Ippolito v. Ippolito*, 28 Conn. App. 745 (1992), *Wolfburg v. Wolfburg*, 27 Conn. App. 396 (1992), *Henin v. Henin*, 26 Conn. App. 386 (1992), *Watson v. Watson*, 20 Conn. App. 551 (1990), *Roach v. Roach*, 20 Conn. App. 500 (1990), *O'Neill v. O'Neill*, 13 Conn. App. 300 (1988), and *Markarian v. Markarian*, 2 Conn. App. 14 (1984). **Discussion:** See § 5.25[1], *below*.

□ Awarding lifetime alimony:

○ If a time-limited award is not appropriate, lifetime alimony should be awarded.

○ A court ordering lifetime alimony must articulate the basis for such an order. **Authority:** Conn. Gen. Stat. § 46b-82; *Oudheusden v. Oudheusden*, 190 Conn. App. 169 (2019), *Keenan v. Casillo*, 149 Conn. App. 642 (2014), *Taylor v. Taylor*, 117 Conn. App. 229 (2009), *Hughes v. Hughes*, 95 Conn. App. 200 (2006), and *Ippolito v. Ippolito*, 28 Conn. App. 745 (1992). **Discussion:** See § 5.25[2], *below*.

□ Terminating provisions for alimony:

○ Typically, alimony will terminate upon the recipient's remarriage.

- The court may make alimony orders that do not terminate upon the recipient's remarriage.
 - Alimony, to retain its tax favorable status, must terminate upon the death of the recipient.
 - If the judgment provides that alimony is terminated upon the cohabitation of the recipient, a judicial determination of cohabitation is required.
 - With no definition of cohabitation, the statutory definition will apply.
 - If the order states that alimony terminates upon cohabitation, the court may not utilize the remedies in Conn. Gen. Stat. § 46b-86(b) in lieu thereof.
- Authority:** 26 U.S.C. § 71(b)(1)(D); Conn. Gen. Stat. § 46b-86(b); *Nation-Bailey v. Bailey*, 316 Conn. 182 (2015), *Williams v. Williams*, 276 Conn. 491 (2005), *DeMaria v. DeMaria*, 247 Conn. 715 (1999), *Kaplan v. Kaplan*, 186 Conn. 387 (1982), *Viglione v. Viglione*, 171 Conn. 213 (1976), *Burns v. Burns*, 41 Conn. App. 716 (1996), *Vandal v. Vandal*, 31 Conn. App. 561 (1993), *Mihalyak v. Mihalyak*, 30 Conn. App. 516 (1993), and *Howe v. Howe*, 2010 Conn. Super. LEXIS 1822 (2010). **Discussion:** See § 5.25[3], *below*.
- Providing for non-modifiable orders:
 - The dissolution decree may provide that alimony is non-modifiable as to amount, duration or both.
 - A preclusion of modification must be clear and unambiguous, otherwise the order will be modifiable. **Authority:** Conn. Gen. Stat. § 46b-86(a); *Oudheusden v. Oudheusden*, 338 Conn. 761(2021), *Eckert v. Eckert*, 285 Conn. 687 (2008), *McGuinness v. McGuinness*, 185 Conn. 7 (1981), *Scoville v. Scoville*, 179 Conn. 277 (1979), *Robaczynski v. Robaczynski*, 153 Conn. App. 1 (2014), *Way v. Way*, 60 Conn. App. 189 (2000), *Rau v. Rau*, 37 Conn. App. 209 (1995), and *Bronson v. Bronson*, 1 Conn. App. 337 (1984). **Discussion:** See § 5.25[4], *below*.
 - Making unallocated alimony and support orders—tax considerations:
 - An unallocated alimony and support order will be entirely tax deductible to the payor and taxable to the payee.
 - If there is a reduction in the unallocated alimony and support, which is related to an event pertaining to a child, the amount of the reduction will be deemed child support and therefore taxable to the payor and non-taxable to the payee. **Authority:** 26 U.S.C. §§ 71(c)(1) and 71(c)(2); 26 C.F.R. § 1.71-1T, A-18. **Discussion:** See § 5.26, *below*. See also Chapter 18, § 18.07, *below*.
 - Using safe harbor provisions:
 - A safe harbor provision allows one party to earn up to a specified amount before the other party may file a motion for modification.
 - The safe harbor provision should be carefully defined as to whether income under the safe harbor amount will or will not be included in the determination of the modified amount. **Authority:** *Brown v. Brown*, 148 Conn. App. 13 (2014), *Burke v. Burke*, 2009 Conn. Super. LEXIS 3357 (2009) and *Suriani v. Suriani*, 2007 Conn. Super. LEXIS 784 (2007). **Discussion:** See § 5.27, *below*.
 - Providing security for alimony:
 - The court may order life insurance to secure alimony obligations.
 - The burden of proof is on the alimony payor to demonstrate that he or she cannot obtain the amount of life insurance requested.
 - The ordering of security is discretionary.

- When alimony is modified, the amount of security for the alimony may likewise be modified.
- If the life insurance was limited by a specific premium amount, any modification must modify the premium amount or the dollar amount ordered by the court will prevail. **Authority:** Conn. Gen. Stat. §§ 46b-82, 46b-82(a), and 46b-86(a); *Mecartney v. Mecartney*, 206 Conn. App. 243 (2021), *Wolk v. Wolk*, 191 Conn. 328 (1983), *Szynkiewicz v. Szynkiewicz*, 140 Conn. App. 525 (2013), *Jansen v. Jansen*, 136 Conn. App. 210 (2012), *Boyne v. Boyne*, 112 Conn. App. 279 (2009), *Billings v. Billings*, 54 Conn. App. 142 (1999), *Cordone v. Cordone*, 51 Conn. App. 530 (1999), *Crowley v. Crowley*, 46 Conn. App. 87 (1997), *Mauro v. Mauro*, 16 Conn. App. 680 (1988), and *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987). **Discussion:** See § 5.28, *below*.

§ 5.22 Distinguishing Between Permanent and Temporary Alimony Orders

Final alimony and support orders “address the long-term conditions under which the reorganization of the family is to take place and include distribution of assets.” *Wolk v. Wolk*, 191 Conn. 328, 331 (1983). Since the purposes of temporary and permanent alimony orders are disparate, they can differ and the court need not articulate reasons for entering different alimony and support orders at final dissolution. *Wolk*, 191 Conn. at 330–331. The mere fact that there was a *pendente lite* order in effect does not automatically require the court to enter a permanent alimony order at the final hearing. *Greenan v. Greenan*, 150 Conn. App. 289 (2014).

Should the court determine to award alimony, it has the power to fashion the award to meet the particular facts of each case, taking into consideration the statutory factors set out at Conn. Gen. Stat. § 46b-82. Unlike when making temporary alimony orders, the court may consider the causes for the breakdown of the marriage in rendering a permanent alimony order. Conn. Gen. Stat. § 46b-82.

§ 5.23 Distinguishing Lump Sum Alimony from Periodic Alimony

At the time of the final decree, the court may order that either party pay alimony to the other, “in addition to or in lieu of” a property award. Conn. Gen. Stat. § 46b-82(a). The court must consider all of the statutory criteria, whether it determines to award periodic alimony or a lump sum. If the court determines to award a lump sum, that alimony award is not modifiable at a later date. *Tremaine v. Tremaine*, 235 Conn. 45, 59 (1995).

A lump sum alimony award, with no periodic alimony award after a short marriage, is permissible as long as the court has taken into account the statutory criteria relevant to an award of alimony. *Pacchiana v. McAree*, 94 Conn. App. 61 (2006). If the primary means to pay the lump sum alimony is through a property division, that alone does not convert the lump sum payment to a property division. *Brody v. Brody*, 136 Conn. App. 773 (2012).

Lump sum alimony, even if payable in installments, is payable in full, even if the payee remarries or the payor dies. *Pulvermacher v. Pulvermacher*, 166 Conn. 380, 385 (1974). Since the obligation is fixed, it is logical that the lump sum, to the extent unpaid, is payable to the payee’s estate, if the payee predeceases, full payment and would be an indebtedness of the payor’s estate, if not fully paid at the time of the payor’s death. In this respect it has the attribute of a property division.

Just as a court may order security for periodic alimony, so too may it provide security for

a lump sum alimony award. *Brody*, 136 Conn. App. at 791.

§ 5.24 Determining the Amount of Periodic Alimony

[1] Failing to Award Any Alimony to Either Party

At the time of the final dissolution, the court may determine that the statutory factors result in neither party being obligated to pay any alimony to the other. If the court does not make an award of alimony at the time of the final decree, neither party can come back to any court post-judgment for any reason to obtain an alimony order. *Brown v. Brown*, 29 Conn. Supp. 507 (1972). Despite one party's superior earning power, the court may deny alimony to the other party, especially where the court has allocated the property division, in part, based upon the lack of alimony order. *Bartels v. Bartels*, 85 Conn. App. 772 (2004). Despite finding that the husband had an earning capacity of \$350,000, while currently earning \$41,000, and the wife's earnings was \$150,000, it was not error for the trial court to deny alimony to the wife. *Carten v. Carten*, 203 Conn. App. 598 (2021). The trial court was clearly not enamored with the wife, citing much of her bad behavior, which the Appellate Court cautioned in a footnote should not be a consideration with respect to the award of alimony, but should be considered regarding an award of counsel fees.

However, it would be improper to fail to award alimony for an unemployed spouse, especially where he or she was ordered to assume a large portion of the marital debt. *Wiegand v. Wiegand*, 129 Conn. App. 526 (2011).

The court may, in assessing the propriety of awarding alimony, take into account the asset distribution and allocation of the family finances. It is permissible to consider, as a rationale for denying permanent alimony, the use and dissipation of assets *pendente lite*. *Greenan v. Greenan*, 150 Conn. App. 289 (2014).

[2] Awarding Nominal Alimony—\$1 Per Year

If the court determines that an alimony award at the time of the dissolution judgment is warranted, but the then existing financial circumstances do not support a substantial award, it can preserve the court's power to set a material periodic alimony award at a later time. In such cases, the court issues an order for modifiable alimony at a nominal amount, such as \$1.00 per year. Nominal awards permit the court to make an appropriate monetary award, upon motion and proof of a substantial change in circumstances. Conn. Gen. Stat. § 46b-86(a) and *Ridgeway v. Ridgeway*, 180 Conn. 533, 543 (1980).

Mutual nominal alimony awards may be appropriate to keep open the possibility that alimony of a material amount can be awarded if a party develops needs in the future. *Smith v. Smith*, 249 Conn. 265, 284–285 (1999). It may also be appropriate to order nominal alimony where one party is seeking an advanced degree, although employed while doing so. *Crocker v. Crocker*, 13 Conn. App. 129 (1987).

A nominal alimony order may be appropriate where the prospective payor is at the beginning of what could be a very lucrative career and the recipient is at the end of his or her career. *Simmons v. Simmons*, 244 Conn. 158, 185–186 (1998). A reduction to a nominal award of alimony also may be appropriate based upon the circumstances existing when a motion for modification is filed. In such a case, the nominal award may be later modified upward if circumstances warrant, which would not be possible if the alimony order were terminated. *Burns v. Burns*, 41 Conn. App. 716, 726–727 (1996).

#Comment Begins

Strategic Point: It may occur that an alimony recipient is willing to waive alimony based upon the belief that he or she will be married in the near future. It is wise to have at least a nominal alimony order in the event the marriage does not occur.

#Comment Ends

Nominal alimony awards may also take the form of providing for alimony to be paid until a debt is retired, in lieu of periodic alimony. This can occur where a party is ordered to pay alimony until he or she can retire a mortgage debt on a residence to be retained by the other party, which debt retirement can be considered in lieu of alimony. *Wilson v. DiIulio*, 192 Conn. App. 101 (2019).

#Comment Begins

Strategic Point: The alimony obligor in *Wilson* included in her proposed orders the provision for the payment of the mortgage. The rationale of paying the debt in lieu of the alimony was the savings to the alimony recipient of a mortgage expense of over \$800 per month. In addition, by having a limited alimony amount and duration, the alimony obligor was able to protect herself from future modification claims.

#Comment Ends

[3] Establishing Periodic Alimony Orders

[a] Timing of Alimony Payments

The structure and manner of paying a periodic alimony order will depend upon the frequency of and manner in which the payor spouse is compensated. If the payor is compensated solely on a W-2 basis, the alimony order can be structured to provide for alimony payments to be made when the payor is paid, i.e., weekly, biweekly, or twice monthly.

#Comment Begins

Strategic Point: Establishing alimony payments to coincide with the payor's pay schedule will allow for the payments to be more manageable for the payor. If he or she is required to pay the alimony at the beginning of the month, it will be difficult for the payor to manage his or her own bill payments.

#Comment Ends

Where there is compensation in addition to a salary, the alimony to be paid on such additional compensation should be tied to its receipt. For instance, if the alimony payor receives an annual bonus, then any additional alimony should be paid at the time the bonus is received. If such additional compensation is paid more frequently than annually, such as with commission income, the additional alimony should be paid when the additional compensation is received.

However, the court need not structure alimony orders so that they are concomitant with a payor's compensation schedule. Where the payor receives a relatively small base salary and relatively large bonuses, the trial court may require the payor to pay a certain, regular sum of monthly periodic alimony based upon his or her total earnings. *Kiniry v. Kiniry*, 71 Conn. App. 614 (2002). This type of order may prove difficult for a payor, since bonuses may be received irregularly and infrequently, even annually. If a bonus is significant and is not utilized to pay household expenses, but rather is sitting in a bank account, the financial affidavit and evidence

should clearly delineate the trail of funds so that the court does not “double count” the bonus as both an asset, which it may award in whole or in part to either party, and as income and a source of alimony.

#Comment Begins

Strategic Point: Another means by which alimony payments may be structured is to establish a regular amount to be paid premised on the base amount of salary with percentages of additional income, such as bonuses and commissions, to be paid as alimony when that additional income is received. Alternatively, if the dissolution case is tried after the receipt of the yearly bonus, note on the financial affidavit the account in which the bonus has been deposited, indicating that alimony should be paid from that account if the court orders alimony in excess of the base amount of earnings.

#Comment Ends

[b] Establishing Self-Executing Orders

Where the payor’s income, from salary and any additional compensation, is variable, alimony may be defined so that the payor’s alimony obligation is a percentage of the actual compensation received. Establishing alimony in this fashion will allow for payments based upon actual receipts rather than requiring the parties to return to court annually for modifications. Such alimony orders will not be considered a future modification without having to demonstrate the need of a change in circumstances, but rather is a permissible way to alter the alimony in the future as the income varies. *Guarascio v. Guarascio*, 105 Conn. App. 418 (2008).

Care must be taken in drafting self-executing provision, as any ambiguity will defeat the provision, requiring the parties to seek a clarification or modification of the order. *Behrns v. Behrns*, 80 Conn. App. 286, 290 (2003).

#Comment Begins

Strategic Point: A self-executing provision may be a useful tool to prevent future modifications. Commonly, it is used to set forth percentages of income to be paid as alimony over a certain threshold. The percentages and time of payments must be clearly set forth to prevent any ambiguity, which would defeat the purpose of the self-executing provision.

#Comment Ends

In addition to providing for additional alimony based upon percentage of income earned by the payor over a base amount, a self-executing provision may be used to provide a credit to an alimony payor based upon the recipient’s income, providing the provision is not ambiguous. *Eldridge v. Eldridge*, 244 Conn. 523 (1998). Typically, such a provision would state that upon the recipient’s income reaching a certain level, a stated percentage of the amount over that level would be a credit to the alimony payor. Where there is language providing for alimony to be paid at decreasing percentages based upon tiers of income, clearly, unambiguously and without any qualifications, cannot be interpreted with the inclusion of additional qualifying language to limit the alimony obligor’s requirement to pay the full amount of alimony. *Wells v. Wells*, 196 Conn. App. 309 (2020).

#Comment Begins

Strategic Point: In *Wells*, the separation agreement provided for alimony of 50% of the first \$220,000 of income, which coincided with the obligor’s base salary, and reduced percentages over \$220,000 up to a cap of \$600,000 per year. The obligor received a bonus of \$480,000, bringing his total income up to \$700,000 for the year. Instead of paying alimony on maximum amount up to the cap of \$600,000, the obligor incredulously argued that the first \$220,000 of his

bonus he could keep and only pay the increased percentages for the amount of his bonus over \$220,000 and up to \$480,000. The obligors reading resulted in an underpayment of \$40,000. Although the language of the agreement was clear, the trial court sided with the obligor's argument. This erroneous interpretation could have been avoided if an example was included in the agreement showing the amount of alimony to be paid based upon a hypothetical amount of income over the initial threshold.

#Comment Ends

When establishing alimony orders based upon percentages for income over a certain level, it must be determined if there should be a cap on the income over which the alimony recipient will not share. If there is not a cap, in any future modification the court may determine that the original purpose of the alimony was to permit the alimony recipient to share in the payor's income in the future. *Cohen v. Cohen*, 327 Conn. 485 (2018).

#Comment Begins

Strategic Point: In drafting a separation provision regarding a decrease in the amount of alimony to be paid due to the payee's income, the formula should be clearly stated. It should also be clearly stated as to when the deduction should be made, i.e., from every payment once the payee's income has exceeded the threshold, or in equal installments over the year based upon the annualized income of the payee. There should also be a date by which a "true up" calculation is done, so that a final determination may be made as to the alimony that should have been paid for a given year.

#Comment Ends

[4] Basing Orders on Net Income

In setting either temporary or permanent alimony orders, Connecticut courts are bound to fashion their orders based upon net income. *Morris v. Morris*, 262 Conn. 299 (2003), *Greco v. Greco*, 82 Conn. App. 768, 773 (2004), and *Ludgin v. McGowan*, 64 Conn. App. 355, 358–359 (2001). This mandate will be more important in light of the Tax Cuts and Jobs Act of 2017 which provides that alimony orders entered after January 1, 2019 are not taxable to the payee nor tax deductible to the payor. P.L. 115-97, § 11051.

When the issue of the basis of the alimony award is raised on appeal, the Court often reviews the lower court record to determine whether there was sufficient evidence of net income to conclude that the trial court did not impermissibly base its alimony order upon gross income. Such evidence can include the party's financial affidavits and child support guidelines that set forth net income. *Kelman v. Kelman*, 86 Conn. App. 120, 123–124 (2004). If there is sufficient evidence of the party's net income, the court may express a formulaic alimony order as a function of gross income. *Hughes v. Hughes*, 95 Conn. App. 200, 207 (2006). However, where there is no evidence of net income and the court specifically denied the motion to modify based upon a lack of change in gross income, such an order will not withstand appellate review. *Procaccini v. Procaccini*, 157 Conn. App. 804 (2015).

#Comment Begins

Strategic Point: When seeking alimony, evidence of the obligor's net income must be presented to the court through testimony and documentary evidence. That will allow a motion to articulate or clarify to be filed in the event the trial court fails to reference net income in the decision and to prevent the order from being overturned on appeal.

#Comment Ends#Comment Begins

Warning: In light of the 2017 Tax Cuts and Jobs Act, the evidence presented to determine net income is crucial. If possible, a CPA should be brought in to testify as to the payor's net income if the parties are unable to stipulate to this in advance, there is no guarantee that a court will accept computer calculations on their face in lieu of such expert testimony.

#Comment Ends

An agreement which provided for payment of alimony based upon the ~~husband~~husband's net income, but which did not define net income, led to years of litigation over the definition of the term. *Bray v. Bray*, 206 Conn. App. 46 (2021). The wife argued it should be calculated based upon his actual withholding, while the husband argued it should be based upon his marginal tax rate. The trial court ruled that it should be based upon the effective tax rate from the previous year that led to further litigation in which the wife argued that the actual taxes paid was the effective tax rate, while the husband argued that the marginal rate was the actual taxes. The court found that the basis of the trial court's decision was an erroneous reading of the agreement and subsequent stipulation which did require reconciliation.

#Comment Begins

Strategic Point: The *Bray* case points out the unnecessary litigation which results when terms are not properly defined in an agreement. As the Appellate Court pointed out, to base the order on what is withheld from pay allows the pay or to manipulate his or her withholding. Obviously, the fairest way to handle this is to determine what the taxes were on this particular income. There are two ways to handle this. One is to have the tax return as filed prepared and a second tax return prepared excluding the income from which alimony is to be paid. The difference between the taxes on those two returns would be that which is associated with the alimony. The other way is to look at the percentage of taxes as compared to the total income as shown on the tax returns, and multiply that percentage by the income subject to alimony to determine the tax on that sum.

#Comment Ends

[5] Determining the Amount of Alimony Payable

Theoretically, the court has broad discretion in making the alimony order. However, if an award of alimony and payment of other expenses exceed the obligors' income, the order cannot be sustained. *Valentine v. Valentine*, 149 Conn. App. 799 (2014). In establishing the amount of alimony, consideration must be given to the amount of the award in relation to meeting the needs of the obligor or his or her ability to maintain the standard of living enjoyed during the marriage. Such considerations are important in the event of a future modification as an increase in the obligor's income cannot form the basis of a modification absent proof that the original order did not and does not fulfill its original purpose. *Dan v. Dan*, 315 Conn. 1 (2014). Thus, when the alimony is insufficient to meet the obligee's needs, that should be clearly specified in the court order or agreement.

[6] Avoiding Double Dipping

Until 2021, double dipping was found to occur when the alimony payor who owns his or her own business, which is valued as an asset, and the income derived therefrom is considered for purposes of an alimony order. The primary way to value many small businesses ~~are~~is based upon an income approach where the actual income of the business owner is contrasted with the "normalized earnings," i.e., what it would cost to hire someone to do the business owner's job. The differential between the two numbers being excess earnings from which the value of the

business may be calculated. The double dipping derives from using that same income as both an asset and a source of payments for alimony. This is especially acute when the alimony recipient's expert cautions a court from counting the entirety of the payor's income as both an alimony source and part of the business value, which warning the court ignores when rendering its orders. *Oudheusden v. Oudheusden*, 190 Conn. App. 169 (2019).

However, a court is not precluded from awarding alimony to be paid from an income producing asset. In fact, the Connecticut Supreme Court took the issue of double dipping, as it has been historically argued in Connecticut and turned it on its head in *Oudheusden v. Oudheusden*, 338 Conn. 761 (2021). The *Oudheusden* court found that despite the court valuing the asset based in large part on the income approach, it was not error to also award alimony derived from that business. The court cautioned that in doing so, the orders must not undermine the ability of the business owning spouse to earn an income from that business. Previously, the only other time the court allowed double dipping argument was when the agreement defined income from alimony purposes as that reported on line 22 of the tax return, such that the obligors' income, from businesses purchased by him out of assets awarded to him at the time of the dissolution. *Halperin v. Halperin*, 196 Conn. App. 603 (2020). In a footnote, the court determined that it would only constitute double dipping if the alimony recipient was seeking a portion of the equity of the business.

#Comment Begins

Warning: Both the Appellate and Supreme Court decision in *Oudheusden* are outlined above. There could be arguments made which would implicate the reasoning of the Appellate Court decision, thus not rendering it totally overruled. In addition, the Supreme Court overturned the Appellate decision in *Oudheusden* on other grounds and did not need to weigh in regarding the double dipping argument, but they did anyhow.

#Comment Ends#Comment Begins

Strategic Point: The wife in *Oudheusden* argued that a double dip occurs only when the alimony recipient receives the entirety of the asset (business) from which alimony is to be paid. This argument was not supported by the appellate court as even the smallest percentage awarded to the alimony payor would defeat a double dip. However, the argument was essentially sanctioned by the Supreme Court.

#Comment Ends#Comment Begins

Strategic Point: The court in *Oudheusden* was provided with detailed evidence as to the earnings used to value the business, which was ignored when rendering the alimony and property division awards. However, the approach taken by counsel in providing the expert testimony and delineating between excess income used for valuation of the business and the remainder of the income, is the proper approach to be taken in these cases when arguing about double dipping.

#Comment Ends#Comment Begins

Strategic Point: While on its face the Supreme Court decision in *Oudheusden* seems to endorse double dipping, it should not be assumed that argument will prevail in each case. The business at issue was valued based upon two income approaches and a market approach. It was not strictly an excess earnings method. Additionally, there were sufficient assets in this case to permit a lump sum buyout of the business, theoretically without impacting the business or the income derived therefrom. Thus, to now overcome the double dipping argument, it must be shown how the proposed alimony and property division awards will impact the business and the ability to derive an income therefrom.

#Comment Ends#Comment Begins

Warning: Despite some basic understanding of double dipping, the *Oudheusden* court oversimplified the issue of double dipping. The decision in finding double dipping came down to the court's assertion that the payor had no other means or assets from which to satisfy the alimony payments. This finding is particularly disturbing because it would allow a court to transmute a property division into an alimony award when in fact, one of the considerations to be made in an alimony order is the property division. You cannot award a party an asset and then tell him he can pay alimony out of that asset, under the guise that he or she is also retaining a business which was valued using the same earnings from which alimony can be paid. It is a never ending circular argument.

#Comment Ends

One way, theoretically, to avoid double dipping is by calculating the alimony based upon earning capacity and not actual earnings. *Callahan v. Callahan*, 157 Conn. App. 78 (2015). For a more thorough discussion on double dipping issues, see Chapter 6, § 6.36[4], below.

#Comment Begins

Warning: If income for alimony purposes is determined based upon earning capacity, it will likely be difficult for the payor to obtain a modification in the future despite a decrease in his or her actual earnings as there may be no change in the earning capacity.

#Comment Ends

[7] Defining Income for Purposes of Alimony Determinations

Depending upon the structure and manner in which the obligor is paid, the parties may define in the agreement the components of income that will or will not be included to determine the alimony. When drafting the definition, it is best to be inclusive, as any item that is excluded will not be counted for determining the amount of alimony. Failure to be inclusive could result in either unnecessary post judgment litigation determining whether a piece of compensation is income or a finding that some form of compensation is not income for alimony purposes. *Weihs v. Weihs*, 2016 Conn. Super. LEXIS 1679.

#Comment Begins

Strategic Point: In determining income, it is wise to include a provision that the intention of the agreement is to define income broadly and inclusively. Another provision to include is that the alimony payor will not take any steps to classify income received by him or her so as to preclude it from being defined as income for alimony purposes. Even if an alimony obligor is being paid with a salary and discretionary bonus at the time of the dissolution, including other deferred compensation grants in the definition of income is imperative to protect the alimony obligee in the event the obligor's manner of compensation is changed.

#Comment Ends

An agreement which defined income for alimony purposes to be as reflected in the payor's W-2 will govern despite the fact that he received the benefit of a forgivable loan, which was included on his W-2 for income purposes, and he legitimately paid unreimbursed business expenses. *Winthrop v. Winthrop*, 189 Conn. App. 576 (2019). Where an agreement defined the

obligor's income for alimony purposes as presently defined to be line 1 on his K-1, the obligor's subsequent reporting of income on other lines of his K-1 ~~were~~was not included as income for alimony purposes. *Grogan v. Penza*, 194 Conn. App. 72 (2019). An obligor ordered to pay alimony based upon his gross annual base income from employment and gross cash bonus, was sufficiently broad to encompass income passing through an LLC created by the obligor, despite a claim that the funds paid to him by his LLC was a loan. *Birkhold v. Birkhold*, 343 Conn. 786 (2022). Further, the husband was not permitted to deduct the personal expenses in the LLC in determining the amount of alimony to be paid to the wife. *Id.*

#Comment Begins

Warning: *Winthrop* and *Grogan* demonstrate why drafting is so important. In *Winthrop*, the husband, at the time of the dissolution, was a commission-based employee and had unreimbursed business expenses. Moreover, the forgivable loan had been received prior to the dissolution and was part of the asset division. However, because the agreement was clear about the manner by which alimony was determined, the court was governed by the language of the agreement. In *Grogan*, despite the wording about how the obligor's income defined, by using the word "presently", seemingly as long as his compensation was reflected on a K-1 that is the income upon which alimony would be paid.

#Comment Ends#Comment Begins

Strategic Point: *Birkhold* demonstrates that attempts to exclude income to evade an alimony obligation typically will not work. As the Supreme Court stated, the funds received from his LLC were treated as income in every way but for purposes of alimony payments. Further, the husband did not help himself by attempting to deduct personal expenses he passed through his LLC to lower his "income" subject to alimony.

#Comment Ends The danger in referencing a line on a tax return or a specific tax form to be used to define income for alimony purposes is that we cannot prognosticate a parties' future earnings and the sources thereof. An agreement stating that the alimony is based upon the income historically reported on line 22 of the Federal Income Tax return will be construed to include income from businesses purchased by the obligor from assets received at the dissolution since such business income is included on line 22. *Halperin v. Halperin*, 196 Conn. App. 603 (2020).

Determining elements of deferred compensation to be included in income for alimony purposes must be done very carefully. However, when including restrictions or definitions of the types of deferred compensation to be included or excluded, care must be taken so as not to inadvertently exclude income which was intended to be included. Where an agreement includes performance-based bonuses, but excludes stock options or stock awarded, such definition will surely require subsequent litigation over what does or does not constitute performance-based bonuses. *Ayres v. Ayres*, 193 Conn. App. 224, cert. denied, 224 Conn. 902 (2019). In *Ayres*, the court looked at the manner in which the award was classified paid to determine if it was includable in alimony. Deferred compensation in the form of phantom ownership, paid in cash, was includable for alimony purposes, but that paid in stock was not.

The court has discretion in determining the income attributable for alimony purposes, which may include rental income. *Salzbrunn v. Salzbrunn*, 155 Conn. App. 305 (2015). A guide for includible income is the child support guidelines. It is hard to argue that income includible for child support purposes is excludible for alimony determinations. For a more thorough discussion on income pursuant to the child support guidelines, see [Chapter 7, § 7.29, below](#).

#Comment Begins

Strategic Point: The 2015 Child Support Guidelines have expanded the definition of income to

include deferred and incentive-based income. Many times, such income was treated as an asset and not includable in income for alimony purposes. The Guidelines now provide justification for the inclusion of these types of compensation in income for alimony purposes.

#Comment Ends

Despite an agreement in which income for alimony purposes was defined as gross annual income, the husband was not able to prorate the amount paid to the wife from his bonus received in February, when the wife remarried in August. *Brown v. Brown*, 199 Conn. App. 134 (2020).

#Comment Begins

Strategic Point: *Brown* reminds us to really think about how our agreements are drafted. If you are representing the alimony payor, what happens in the event bonuses, deferred compensation and other elements of income are considered in paying alimony, but the alimony recipient remarries at some point during the year. Is she entitled to 100% of these excess payments, even if she remarries the day after they are paid? Or, should there be a pro-ratio? What this case demonstrates is that without specific language, the payment is due under the terms of the agreement, irrespective of a remarriage the following day.

#Comment Ends

Caution should be exercised when defining what constitutes income for purposes of paying alimony when the alimony order is non-modifiable as to amount. If the payor is being compensated in a manner other than the one specified in the definition of income, no modification may be sought in the definition of income, as it will also impermissibly modify the amount. *Eckert v. Eckert*, 285 Conn. 687 (2008).

#Comment Begins

Strategic Point: When defining income, so as to deal with future changes in compensation forms and structures, specifically provide that the definition of income is modifiable, even if the amount is not. Otherwise, a payor spouse can change the structure of his or her compensation to a method not included in the definition of income and escape his or her alimony obligation.

#Comment Ends

Conversely, to the extent that deductions from income are to be defined, they should be done with precision. Where an alimony obligor is self-employed, the decision or agreement should specify that any deductions from income should be for expenses actually incurred, not deductions solely for the purpose of tax reporting, i.e. depreciation and amortization. *Hines v. Hines*, 2013 Conn. Super. LEXIS 1429 (June 25, 2013).

#Comment Begins

Strategic Point: When setting forth the definition of income, the issue of deductions should not be ignored. Some deductions including meals, travel, entertainment, and gifts may be used to disguise personal expenses. Make sure that the deductions are defined to include legitimate and incurred business expenses, not personal or tax effecting expenses.

#Comment Ends

In a particularly disturbing case, an alimony obligor was required to pay alimony so long as he could borrow funds and meeting his obligations. Because there was no concrete definition limiting the borrowing of funds to meet his obligations, he could be required to incur significant unanticipated debt to pay alimony without obtaining a modification. *Mountain v. Mountain*, 189

Conn. App. 228 (2019).

[8] Ordering Payment of Certain Expenses as Alimony

In addition to awarding the alimony recipient a set amount of money each month, the court may order the payor to pay expenses directly on behalf of the other party as alimony. *Aley v. Aley*, 97 Conn. App. 850 (2006). As long as the payments are specified to be on behalf of the spouse and are not for property owned by the payor, it will be considered taxable alimony to the payee. 26 C.F.R. § 1.71-1T, A-6. Orders to pay expenses of the alimony recipients are modifiable in the same manner as orders for periodic alimony. *Damon v. Damon*, 23 Conn. App. 111 (1990).

§ 5.25 Setting the Duration of Alimony

[1] Awarding Time-Limited Alimony

Connecticut trial courts can and do order time-limited alimony, which is alimony of a defined length, even though periodic. Appellate courts have held that the trial court record must provide a basis for a time-limited award. *Markarian v. Markarian*, 2 Conn. App. 14, 16 (1984). The facts must support the particular duration of the award. *Henin v. Henin*, 26 Conn. App. 386, 392 (1992).

Limiting the duration of an alimony award can legitimately “provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency.” *Henin*, 26 Conn. App. at 392. The alimony duration may be tied to the time by which the recipient will finish school and begin to establish a career. *Marmo v. Marmo*, 131 Conn. App. 43 (2011). Time-limited alimony awards are usually intended to be rehabilitative, but the payee must be able to receive training and reach self-sufficiency during the time specified for alimony. *Roach v. Roach*, 20 Conn. App. 500, 506 (1990). Evidence that it will take three years for the wife to attain self-sufficiency will sustain a three-year alimony award. *Altraide v. Altraide*, 153 Conn. App. 327 (2014). The sale of the husband’s business, since he was nearing retirement age, supported a termination of the alimony upon the date of sale. *Horey v. Horey*, 172 Conn. App. 735 (2017). Health issues, which do not permit an alimony recipient to work, will not support a time-limited award. *Roach*, 20 Conn. App. at 506. The duration of the award must be consistent with the purpose of the rehabilitation in the context of the case facts. *Watson v. Watson*, 20 Conn. App. 551 (1990) and *O’Neill v. O’Neill*, 13 Conn. App. 300 (1988). However, a modest time period between the event constituting the reason for the time-limited alimony and the date the alimony terminates will not result in a reversal of the alimony duration. *Cunningham v. Cunningham*, 140 Conn. App. 676 (2013).

#Comment Begins

Warning: The court, in upholding the alimony termination date in *Horey*, reasoned that since the court retained jurisdiction over the sale of the business, any issues the wife raised regarding the husband structuring the sale ~~so-as-to~~ avoid paying her part of the sale proceeds to which she was entitled under the judgment could be addressed. The alimony order was essentially self-executing, in that alimony terminated upon the sale of the business. Irrespective of the court retaining jurisdiction over the sale, it could not revive the alimony order in the event the husband structured the sale to provide him with an income stream and not a lump sum payment.

#Comment Ends#Comment Begins

Warning: Despite a five-month difference between the termination date of alimony and the

husband's mandatory retirement date, when his pension would go into pay status, the court in *Cunningham* would not overturn the alimony order. This seemed predicated in part on the modest time difference and on the fact that the wife would not be rendered destitute during this time. Caution should be used when applying this case in other instances of time-limited alimony.

#Comment Ends

A time-limited award can be proper if it provides support until the occurrence of a future event, which event can include maturation of a mortgage in the payee's favor or a trust disbursement. *Henin*, 26 Conn. App. at 393. Another legitimate basis for ending time-limited alimony is the attainment of the age of majority of a child of the marriage. *Dees v. Dees*, 92 Conn. App. 812 (2006) and *Porter v. Porter*, 61 Conn. App. 791 (2001). This is especially the case if the recipient spouse quit working full-time during the marriage in order to care for a minor child. *Wolfburg v. Wolfburg*, 27 Conn. App. 396 (1992).

A time-limited award does not have a rational basis where there was no evidence that the payee could attain self-sufficiency over the alimony term, if ever. *Ippolito v. Ippolito*, 28 Conn. App. 745 (1992). This is particularly true where an alimony recipient is in ill health, preventing employment, or has no skills or training, having been a stay-at-home parent for the majority of the marriage.

#Comment Begins

Strategic Point: When seeking or defending against a time-limited alimony order, specific evidence should be provided demonstrating why a particular duration may or may not lead to self-sufficiency. The award should not be limited to the time it takes to obtain education or have a child complete school, but should also include additional time to start and establish a career.

#Comment Ends

For some unknown reason, a "rule of thumb" has developed that time limited alimony should be for one-half of the length of the marriage. Such a "rule of thumb" has no bearing on the legal considerations for time limited alimony. The Appellate Court would not find error by the trial court for failure to award alimony for only one-half of the length of the marriage. *Buchenholz v. Buchenholz*, 221 Conn. App. 132 (2023).

[2] Awarding Lifetime Alimony

Alimony that is of an indefinite duration is sometimes referred to as lifetime alimony. By implication, if a time-limited award of alimony is not appropriate, then the court must award "lifetime" alimony. *Ippolito v. Ippolito*, 28 Conn. App. 745 (1992). In 2013, Conn. Gen. Stat. § 46b-82 was amended to provide that a trial court entering an alimony order that terminates only upon the death of either party or the obligee's remarriage must articulate the basis for making such order. Thus, as with time-limited alimony, where there must be a rational basis for the duration of the award, so too must there be a basis for a lifetime order. Where a court articulates a basis for a non-modifiable lifetime award of alimony which is specifically contrary to the evidence, it cannot stand. *Oudheusden v. Oudheusden*, 190 Conn. App. 169 (2019).

Absent customary termination events, such as the death or remarriage of the payee, a party seeking to terminate this type of alimony will have to prevail on a motion to modify his or her alimony obligation to the other party. Indefinite duration alimony is usually, but not necessarily, appropriate in longer marriages, where a spouse has not worked during the marriage, and one of

the parties has a materially greater ability to acquire income and assets in the future than the other. *Hughes v. Hughes*, 95 Conn. App. 200 (2006). One such reason to provide for lifetime alimony for a marriage of short duration is the health or disability of a recipient. *Keenan v. Casillo*, 149 Conn. App. 642 (2014).

#Comment Begins

Strategic Point: As a starting point for determining the propriety of a lifetime alimony award, the practitioner should look to the reasons why a time-limited award would not be appropriate, i.e. the obligee will not be able to attain self-sufficiency or there are health issues that present an impediment to employment. The rationale for the lifetime alimony request should be clearly set forth in the proposed orders submitted to the court at the time of trial.

#Comment Ends#Comment Begins

Strategic Point: It is advisable to add circumscriptions to an agreed upon order of lifetime alimony. One such circumscription would be the identification of when or under what circumstances an alimony obligor may voluntarily retire, absent a medical reason rendering him or her unable to work. Another may be to add a *de novo* “second look” upon retirement which would allow the court to review the then circumstances of the parties instead of requiring a demonstration of a substantial change in circumstances. *Taylor v. Taylor*, 117 Conn. App. 229, 231 (2009).

#Comment Ends

[3] Terminating Provisions for Alimony

Most alimony orders automatically terminate upon the remarriage of the recipient, without the necessity of seeking a court order. *Howe v. Howe*, 2010 Conn. Super. LEXIS 1822 (2010). Since alimony is generally in the nature of support, remarriage of the recipient will ordinarily terminate the alimony order. *Viglione v. Viglione*, 171 Conn. 213, 215 (1976). A demonstrated change in the financial circumstances of the alimony payee is not ordinarily required for alimony to be terminated upon remarriage. *Kaplan v. Kaplan*, 186 Conn. 387, 394 (1982).

On the other hand, Connecticut courts are permitted to make alimony orders that do not terminate upon remarriage or orders that provide that remarriage constitutes a basis for modification but does not trigger automatic termination. *Williams v. Williams*, 276 Conn. 491 (2005). An order that alimony not terminate upon remarriage is permissible because the court has the statutory power to order nonmodifiable alimony and the equitable power to determine when and under what circumstances alimony will terminate. *Vandal v. Vandal*, 31 Conn. App. 561, 565 (1993). The court need not articulate a specific reason for making an alimony award that does not terminate upon remarriage, as long as the evidence in the case provides a basis for the order. *Burns v. Burns*, 41 Conn. App. 716, 725 (1996). When the facts of a case merit a certain amount and duration of alimony but the payor’s income cannot support the simultaneous payment of debt and alimony at an appropriate amount, a court may provide that the alimony award will not terminate upon remarriage. *Vandal*, 31 Conn. App. at 564–565.

#Comment Begins

Strategic Point: It may be particularly appropriate to order alimony that does not terminate upon remarriage if there are few assets to be divided, if the payor spouse dissipated assets, or if one spouse was put through school and is beginning a new career.

#Comment Ends

Another circumstance under which alimony terminates is upon the death of either spouse.

In order to constitute an alimony payment for tax deductibility purposes, alimony cannot be payable after the death of the recipient. 26 U.S.C. § 71(b)(1)(D). This provision continues to apply to alimony orders entered prior to 2019 and a modification of those orders which continue the tax deductible/includible status.

If an agreement or court order states that the alimony terminates upon the recipient's cohabitation, such a provision will require a judicial decision to determine whether there is cohabitation. *DeMaria v. DeMaria*, 247 Conn. 715 (1999). Even though the judgment may not specifically reference the statute, absent a definition of cohabitation in the judgment, the statutory definition of cohabitation must be used to determine if there is cohabitation. *DeMaria*, 247 Conn. at 721–722. However, where an agreement states that alimony terminates upon the cohabitation occurring, the court is to terminate alimony upon the date of cohabitation, even if that date predates the filing of the motion for termination of alimony. *Mihalyak v. Mihalyak*, 30 Conn. App. 516 (1993). An agreement providing for alimony to terminate upon cohabitation, pursuant to Conn. Gen. Stat. § 46b-86(b), will automatically terminate the alimony on the date of the cohabitation, irrespective of whether or not the cohabitation continues to the time of the motion being filed or decided. *Nation-Bailey v. Bailey*, 316 Conn. 182 (2015). Furthermore, the court may not, where alimony is specifically found to terminate upon cohabitation, utilize the remedial powers under Conn. Gen. Stat. § 46b-86(b) to suspend alimony during the period of cohabitation. *Nation-Bailey*, 144 Conn. App. at 193–194. The use of the words “until cohabitation” is a limitation that requires the termination of alimony without the ability of the court to modify the contract and provide other remedies. *Nation-Bailey*, 144 Conn. App. at 193–194.

#Comment Begins

Strategic Point: Oftentimes the court in a decision, or the parties in an agreement, will indicate that alimony terminates upon “cohabitation.” This is sometimes due to a mistaken belief that the cohabitation statute requires termination of the alimony. However, Conn. Gen. Stat. § 46b-86(b) provides that upon a finding that the alimony recipient is living with another person which changes the payee's financial circumstances, the court may not only terminate the alimony, but alternatively, may modify, suspend, or reduce the alimony obligation. Thus, if representing the alimony recipient, there should not be a provision in the judgment that alimony terminates in the event of cohabitation, but rather the provision should state that the payor has all of the rights provided in Conn. Gen. Stat. § 46b-86(b).

#Comment Ends#Comment Begins

Warning: When preparing a separation agreement or proposed orders, be very careful of the language being used for alimony terminating events. Is the intention to terminate alimony based upon cohabitation, irrespective of the duration of the cohabitation? If so, the language in *Nation-Bailey* is appropriate. If not, then care must be taken to carve out exceptions and time limitations to file such motions before the alimony may be terminated based upon cohabitation. The best practice is to remain silent and have a cohabitation claim be statutorily predicated.

#Comment Ends

[4] Providing for Non-Modifiable Orders

Connecticut courts have both the statutory authority and equitable power to award non-modifiable alimony. Conn. Gen. Stat. § 46b-86(a). However, Connecticut statutory and case law favor modifiability of alimony orders. *Scoville v. Scoville*, 179 Conn. 277, 279 (1979). To prevent the court from modifying the orders, the dissolution decree must expressly preclude modification.

Rau v. Rau, 37 Conn. App. 209, 211 (1995). The preclusion must be clear and unambiguous to be enforceable. *McGuinness v. McGuinness*, 185 Conn. 7, 9 (1981). Where the decree references an intention to make the orders non-modifiable, but those words are not contained in the final orders section, the intent is enough for the order to clearly and unambiguously preclude modification. *Robaczynski v. Robaczynski*, 153 Conn. App. 1 (2014). If the non-modification provision is deemed ambiguous, the order will be modifiable. *Bronson v. Bronson*, 1 Conn. App. 337, 339 (1984). If, however, the parties' separation agreement, incorporated into the dissolution decree, clearly provides for no modification as to amount or duration of alimony, modification is precluded. Conn. Gen. Stat. § 46b-86(a) and *Way v. Way*, 60 Conn. App. 189, 195–196 (2000).

An alimony order, that is clearly non-modifiable as to both amount and duration, can preclude a party from obtaining a modification of the definition of income subject to alimony. Such a modification of the definition would equate to a modification of amount. *Eckert v. Eckert*, 285 Conn. 687 (2008).

#Comment Begins

Warning: When including language that precludes modification of alimony as to amount, and if there is a definition as to what constitutes income, clearly state that the definition of income is modifiable so that the payor cannot engineer his or her manner of compensation to avoid paying alimony.

#Comment Ends

However, a court that makes an alimony order nonmodifiable as to amount and duration, without giving due consideration to the payors other resources to pay that alimony should his fortunes diminish, the possibility that his health may deteriorate based upon current problems with alcohol abuse, and other statutory factors is not an order that can withstand appeal. *Oudheusden v. Oudheusden*, 308 Conn. 761 (2021). In the circumstances, it is viewed that the court has set the alimony pay or up for a future contempt just by virtue of its orders, and not any willful conduct by the payor.

§ 5.26 Making Unallocated Alimony and Support Orders—Tax Considerations for Pre 2019 Orders

The court may order an unallocated alimony and support order, which combines the alimony and child support amounts, and which is tax deductible to the payor and tax includible to the payee, only if such order is made prior to December 31, 2018. 26 U.S.C. § 71(c)(1). Accordingly, provided the order does not fix an amount attributable to child support, the entire amount can be taxable to the recipient and tax deductible to the payor. 26 U.S.C. § 71(c)(1). The portion of the unallocated alimony and support order that is related to a contingency regarding a child will lose its tax preferential treatment. 26 U.S.C. § 71(c)(2). Such contingencies would include a child “attaining a specified age, marrying, dying, leaving school, or a similar contingency.” 26 U.S.C. § 71(c)(2)(A). Reductions in the unallocated alimony and support that occur within six months of one of the contingencies will result in the reduction being treated as child support. 26 C.F.R. § 1.71-1T, A-18.

An alimony order entered prior to 2019 retains its tax deductible and tax includible status. The court has the ability, in a modification of such orders even after 2019, to retain the tax status of such alimony orders.

For a more thorough discussion of the tax ramifications of alimony, see Chapter 18,

§ 18.07, *below*.

§ 5.27 Using Safe Harbor Provisions

The judgment may provide a “safe harbor” provision allowing the alimony recipient to earn up to a specified amount before a modification may be sought by reason of an increase in his or her income. *Brown v. Brown*, 148 Conn. App. 13 (2014). This safe harbor provision gives an incentive to the alimony recipient to earn a living without fear of an adjustment to his or her alimony. The alimony payor may also be provided with a safe harbor that will be effective after a certain threshold of earnings are used to pay alimony, particularly if the alimony recipient has a safe harbor in his or her favor. It is also typical to provide the alimony payor with a ceiling of income on which he or she will pay alimony such that any earnings in excess of that ceiling will not be subject to an alimony obligation.

However, a safe harbor provision must be drafted with care. The provision should state whether or not the alimony recipient’s income under the safe harbor amount will be considered in arriving at a new alimony amount. Absent a clear delineation, the court will likely find that it can consider all income, not just that over the safe harbor amount. *Burke v. Burke*, 2009 Conn. Super. LEXIS 3357 (2009) and *Suriani v. Suriani*, 2007 Conn. Super. LEXIS 784 (2007).

§ 5.28 Providing Security for Alimony

Since alimony is not paid beyond the obligor’s death, it is customary to provide security for alimony in the event of the death of the obligor. The security serves as a replacement for the lost alimony to the recipient. One form of security is life insurance. Conn. Gen. Stat. § 46b-86(a). If life insurance is in place at the time of dissolution, it is customary for the court to order the life insurance to be maintained on the life of the alimony payor in favor of the alimony payee. *Wolk v. Wolk*, 191 Conn. 328 (1983). The court, however, is not required to order security, even if the payor has life insurance. *Cordone v. Cordone*, 51 Conn. App. 530, 535 (1999). The ordering of security for alimony is discretionary and not mandatory. Conn. Gen. Stat. § 46b-82 and *Cordone*, 51 Conn. App. at 534. A life insurance order may be made, even independent of an alimony award. *Mauro v. Mauro*, 16 Conn. App. 680 (1988) and *Papageorge v. Papageorge*, 12 Conn. App. 596 (1987).

If a party does not have life insurance, a court may require life insurance to be provided, unless it can be demonstrated that such life insurance is not available to that party. Conn. Gen. Stat. § 46b-82(a) and *Boyne v. Boyne*, 112 Conn. App. 279 (2009). Accordingly, the burden of proof is on the alimony payor to demonstrate that he or she cannot obtain the life insurance. *Szynkowicz v. Szynkowicz*, 140 Conn. App. 525 (2013).

#Comment Begins

Warning: Prior to the revision of Conn. Gen. Stat. § 46b-82(a) on October 1, 2003, the court was unable to order additional life insurance without proof of cost, effectively placing the burden of proof on the alimony recipient. The cases both before and after 2003 citing this prior law should be read with caution.

#Comment Ends#Comment Begins

Strategic Point: If representing the alimony payor who does not have an appropriate amount of life insurance, the cost for additional life insurance should be determined. It may be beneficial to speak with opposing counsel as to the amount of life insurance that he or she requires, so that it may be determined before trial. Otherwise, the first time the amount of life insurance being

sought is learned is immediately before trial, which will be too late to obtain the necessary information to defend against such a claim. If this is not done, a court may enter an order of life insurance that may be unduly burdensome to the alimony recipient, who will have no recourse regarding this order.

#Comment Ends

Effective July 1, 2010, [Conn. Gen. Stat. § 46b-86\(a\)](#) was revised to allow an order requiring either party to maintain life insurance for the other party or a minor child, to be modified upon proof of a substantial change of circumstances of either party. [Conn. Gen. Stat. § 46b-86\(a\)](#). The court must decide whether an order is a property assignment, in which case it does not have the authority to modify it, or is “a guarantee for alimony” in which case it must find a substantial change of circumstances as a precursor to modifying it. [Jansen v. Jansen](#), 136 Conn. App. 210, n.4 (2012).

If the award of life insurance in a dissolution decree is part of the assignment of property, it is a non-modifiable order. [Conn. Gen. Stat. § 46b-86\(a\)](#), [Billings v. Billings](#), 54 Conn. App. 142 (1999), and [Crowley v. Crowley](#), 46 Conn. App. 87, 98 (1997).

#Comment Begins

Strategic Point: Since the purpose of a life insurance order is usually to provide security for the alimony order, it is not meant to be a property division. Accordingly, it should be requested of the court or stated in the separation agreement that the life insurance is in the nature of support and may be modified in the same manner as alimony and support.

#Comment Ends

The parties can agree to have a life insurance award enter ~~so-as-to~~ provide life insurance that can be purchased by a limited dollar amount for the premium. Where such orders are modifiable and later modified, if there is not new premium limit in the modified order, then the obligor must provide life insurance in the modified amount, irrespective of the premium, until that order is modified again. [Mecartney v. Mecartney](#), 206 Conn. App. 243 (2021).

While the statute specifically mentions life insurance as security, it does not mean other types of security could not be sought, such as the establishment of a trust or a mortgage.

PART V: SEEKING A MODIFICATION OF ALIMONY ORDERS

ALIMONY

§ 5.29 CHECKLIST: Seeking a Modification of Alimony Orders

5.29.1 Seeking a Modification of Alimony Orders

- Analyzing statutory provisions for modification:
 - An alimony order is modifiable upon showing a substantial change in circumstances, provided there is no prohibition against modification.
 - Upon finding a substantial change, the court will then assess the

propriety of a new order. **Authority:** Conn. Gen. Stat. § 46b-86(a); *Borkowski v. Borkowski*, 228 Conn. 729 (1994) *Ridgeway v. Ridgeway*, 180 Conn. 533 (1980), and *Tittle v. Skipp-Tittle*, 161 Conn App. 542 (2015). **Discussion:** See § 5.30, *below*.

□ Dealing with provisions prohibiting or limiting modification:

- Limitations on modifiability must be clear and will be narrowly construed.

- Preclusion of modification prior to a specified date will allow the motion to be filed but not heard prior to that date.

- Ambiguous provisions will render the alimony modifiable. **Authority:**

Conn. Gen. Stat. § 46b-86; *Eckert v. Eckert*, 285 Conn. 687 (2008), *Amodio v. Amodio*, 247 Conn. 724 (1999), *Scoville v. Scoville*, 179 Conn. 277 (1979), *Malpeso v. Malpeso*, 165 Conn. App. 151 (2016), and *Wichman v. Wichman*, 49 Conn. App. 529 (1998). **Discussion:** See § 5.31, *below*.

□ Determining the underlying order from which alimony is to be modified:

- For a modification to be permissible, there must be an underlying order to be modified.

- The order to be modified is the last alimony order that entered.

- The court must compare the income components of the prior order to the current circumstances.

- The modification should not be based upon the time of a prior denial of modification. **Authority:** Conn. Gen. Stat. §§ 46b-81, 46b-86, and 46b-86(a);

Borkowski v. Borkowski, 228 Conn. 729 (1994), *Olson v. Mohamadu*, 169 Conn. App. 243 (2016), *Fulton v. Fulton*, 156 Conn. App. 739 (2015), *Marshall v. Marshall*, 151 Conn. App. 638 (2014), *Larson v. Larson*, 138 Conn. App. 272 (2012), *Sabrowski v. Sabrowski*, 95 Conn. App. 625 (2006), *Simms v. Simms*, 89 Conn. App. 158 (2005), *Crowley v. Crowley*, 46 Conn. App. 87 (1997), *Pearl v. Pearl*, 43 Conn. App. 541 (1996), *Avella v. Avella*, 39 Conn. App. 669 (1995), *Richard v. Richard*, 23 Conn. App. 58 (1990), *O'Bymachow v. O'Bymachow*, 12 Conn. App. 113 (1987), and *Brown v. Brown*, 29 Conn. Supp. 507 (1972).

Discussion: See § 5.32, *below*.

□ Defining changes in circumstances which are contemplated:

- The judgment may set forth those changes that are contemplated in the future when making an alimony order.

- This should not be confused with cases prior to 1987 that required a finding that the substantial change in circumstances was not contemplated at the time of the dissolution. **Authority:** Conn. Gen. Stat. §§ 46b-82 and 46b-86(a); *Pite v. Pite*, 135 Conn. App. 819 (2012). **Discussion:** See § 5.33[1], *below*.

□ Finding a substantial change in circumstances due to a change in income:

- An increase in the income of the alimony payee may be sufficient to show a substantial change in circumstances.

- Absent proof that the alimony order does not fulfill its original purpose, a modification may not be based solely upon an increase in the payor's income, unless there was a prior modification decreasing alimony.

- The change will need to be more than usual raises in pay. **Authority:** *Cohen v. Cohen*, 327 Conn. 485 (2018), *Dan v. Dan*, 315 Conn. 1 (2014), *Olson v. Mohamadu*, 310 Conn. 665 (2013), *McCann v. McCann*, 191 Conn. 447 (1983), *Hardisty v. Hardisty*, 183 Conn. 253 (1981), *Sanchione v. Sanchione*, 173 Conn. 397 (1977), *Trent v. Trent*, 226 Conn. App. 791 (2024), *L.K. v. K.K.*, 226

[Conn. App. 279 \(2024\)](#), *Bialik v. Bialik*, 215 Conn. App. 559 (2022), *Peixoto v. Peixoto*, 185 Conn. App. 272 (2018), *Spencer v. Spencer*, 177 Conn. App. 504 (2017), *Rubenstein v. Rubenstein*, 172 Conn. App. 370 (2017), *Marshall v. Marshall*, 151 Conn. App. 638 (2014), *Talbot v. Talbot*, 148 Conn. App. 279 (2014), *O'Donnell v. Bozzuti*, 148 Conn. App. 80 (2014), *Crowley v. Crowley*, 46 Conn. App. 87 (1997), *Curzi v. Curzi*, 21 Conn. App. 5 (1990), and *Schofield v. Schofield*, 12 Conn. App. 521 (1987). **Discussion:** See § 5.33[2], *below*.

- Finding a substantial change in circumstances based upon retirement:
 - There is no guarantee that retirement will be viewed as a substantial change in circumstances.
 - An involuntary retirement is more likely to be viewed as a substantial change, especially where health is a concern.
 - A voluntary retirement, which is viewed as an attempt to be released from his or her alimony obligation, is less likely to be deemed a substantial change in circumstances. **Authority:** *Simms v. Simms*, 283 Conn. 494 (2007), *Jansen v. Jansen*, 136 Conn. App. 210 (2012), *Misinonile v. Misinonile*, 35 Conn. App. 228 (1994), and *Epstein v. Epstein*, 43 Conn. Supp. 400 (1994).

Discussion: See § 5.33[3], *below*.

- Finding an increase in assets to be a substantial change in circumstances:
 - An inheritance or contingent trust that vests after the dissolution may be used as a basis for finding a substantial change in circumstances.
 - An exchange of an asset, especially one awarded at the time of the dissolution, should not be considered income for purposes of establishing a substantial change in circumstances.
 - The court in determining if there has been a substantial change in circumstances may consider a change in the value of the assets.

Authority: *Simms v. Simms*, 283 Conn. 494 (2007), *Gay v. Gay*, 266 Conn. 641 (2003), *Bartlett v. Bartlett*, 220 Conn. 372 (1991), *Rubin v. Rubin*, 204 Conn. 224 (1987), *Ceddia v. Ceddia*, 164 Conn. App. 266 (2016), *Schorsch v. Schorsch*, 53 Conn. App. 378 (1999), and *Denley v. Denley*, 38 Conn. App. 349 (1995).

Discussion: See § 5.33[4], *below*.

- Finding a Substantial Change in Circumstances for Other Reasons
 - A modification may be based upon other changes, such as dramatic increases in college educational costs assumed by a party. **Authority:** *Malpeso v. Malpeso*, 189 Conn. App. 486 (2019). **Discussion:** See § 5.33[5], *below*.

- Modifying Orders Where There are Restrictions on Modification:
 - Preclusion of modification of an unallocated order based upon cohabitation will preclude modification of the child support based upon cohabitation. **Authority:** *Gabriel v. Gabriel*, 159 Conn. App. 805, *cert. denied*, 319 Conn. 948 (2015). **Discussion:** See § 5.33[6], *below*.

- Seeking An Extension of Alimony
 - A party may seek an extension of alimony if the original purpose of alimony has not been realized.
 - In seeking an extension of alimony, the alimony recipient should have acted in good faith during the alimony term. **Authority:** *Weihs v. Weihs*, 2016 Conn. Super. LEXIS 1679. **Discussion:** See § 5.33[7], *below*.

- Determining the criteria to be considered for a modified award:
 - Once a substantial change in circumstances is found, the court is to consider the same statutory criteria as when making the original order.

- The court is not limited in making the new order by the reasons for the substantial change in circumstances.
- The income of the payor's new spouse may be considered to determine the payor's increased ability to pay alimony.
- The court may consider the unmet needs of the recipient, which existed at the time of the last order, when modifying the order.
- Converting an unallocated order to an allocated order requires a determination of the child support portion of the original order and then determining if there is a substantial change. **Authority:** *Borkowski v. Borkowski*, 228 Conn. 729 (1994), *Ross v. Ross*, 200 Conn. App. 720 (2020), *McCann v. McCann*, 191 Conn. 447 (1983), *McGuinness v. McGuinness*, 185 Conn. 7 (1981), *Sanchione v. Sanchione*, 173 Conn. 397 (1977), *Malpeso v. Malpeso*, 165 Conn. App. 151 (2016), *Couvy v. Coury*, 161 Conn. App. 271 (2015), *Dan v. Dan*, 137 Conn. App. 728 (2012), and *Howat v. Howat*, 1 Conn. App. 400 (1984). **Discussion:** See § 5.34, *below*.
- Preparing a motion for modification:
 - The motion for modification must state the current order, the date of that order, and the factual and legal basis for the modification.
 - A motion for modification should be served with an order to show cause.
 - All reasons for a modification should be pled, as the court will not base a modification on that which is not pled.
 - If modification results from a change in custody, the alimony modification must be filed; it is not automatically retroactive to the date of the custody change. **Authority:** Conn. Gen. Stat. § 52-50; *Sanchione v. Sanchio*, 173 Conn. 397 (1977), *Spencer v. Spencer*, 177 Conn. App. 504 (2017), *Bauer v. Bauer*, 173 Conn. App. 595 (2017), *Coury v. Coury*, 161 Conn. App. 271 (2015), *Hane v. Hane*, 158 Conn. App. 167 (2015), *Zahringer v. Zahringer*, 124 Conn. App. 672 (2010), *Clark v. Clark*, 66 Conn. App. 657 (2001); P.B. §§ 11-4, 25-26(e), and 25-28(b). **Discussion:** See § 5.35, *below*. See also Chapter 2, §§ 2.10–2.15, *above*. **Forms:** JD-FM-162—Order to Attend Hearing and Notice to Respondent, see Chapter 20, § 20.13, *below*. JD-FM-174—Motion for Modification, see Chapter 20, § 20.19, *below*.
- Seeking a retroactive modification:
 - A marshal or other proper officer should serve the motion for modification ~~in order to~~ seek retroactivity.
 - Retroactivity is not guaranteed, even where there is personal service. **Authority:** Conn. Gen. Stat. §§ 46b-86(a) and 52-50; *Simms v. Zucco*, 214 Conn. App. 525, cert. den'd 345 Conn. 919 (2022), *Olson v. Mohammadu*, 169 Conn. App. 243 (2016). *Shedrick v. Shedrick*, 32 Conn. App. 147 (1993). **Discussion:** See § 5.36, *below*.
- Interpreting second look provisions:
 - An order that permits the court to take a second look at the alimony order will, absent a different definition, be a review *de novo*.
 - A motion for modification should be filed to invoke the second look review, but should not be denied when it is stale for good cause. **Authority:** *Nuzzi v. Nuzzi*, 164 Conn. App. 751 (2016), *Taylor v. Taylor*, 117 Conn. App. 229 (2009). **Discussion:** See § 5.37, *below*.
- Modifying alimony based upon the cohabitation of the recipient:
 - An alimony order may be modified based upon cohabitation if it is demonstrated that the recipient is living with another person and the living

arrangement alters the recipient's needs.

- A separation agreement may define the circumstances under which alimony will be altered as a result of cohabitation.
- Must distinguish between defining cohabitation and apply appropriate remedies, which, if not defined, will be in accordance with the statute and case law.
- If the alimony order is non-modifiable and there is no reservation of the cohabitation statute as a means for modification, no modification based upon cohabitation will be permitted.
- Cohabitation, unless it is defined in the agreement or court order, will be deemed as living together as man and wife.
- If the agreement provides for termination upon cohabitation, the court may not employ the remedies of [Conn. Gen. Stat. § 46b-86\(b\)](#) but must terminate alimony. This is different from termination pursuant to the cohabitation statute.
- Under appropriate circumstances the court can preclude modification based upon cohabitation with a specific person.
- The financial needs of the recipient must be altered in a quantifiable manner to obtain a modification based upon cohabitation.
- The motion for modification should plead both the statute and any provisions in the judgment as a basis for the motion.
- The court, upon finding cohabitation as defined by statute, may reduce, modify, suspend, or terminate the alimony. **Authority:** [Conn. Gen. Stat. § 46b-86\(b\)](#); *Nation-Bailey v. Bailey*, 316 Conn. 182 (2015), *Remillard v. Remillard*, 297 Conn. 345 (2010), *D'Ascanio v. D'Ascanio*, 237 Conn. 481 (1996), *O'Neill v. O'Neill*, 209 Conn. App. 165 (2021), *Schott v. Schott*, 205 Conn. App. 237 (2021), *Boreen v. Boreen*, 192 Conn. App. 303, cert. denied, 333 Conn. 941 (2019), *Murphy v. Murphy*, 181 Conn. App. 716 (2018), *Spencer v. Spencer*, 177 Conn. App. 504 (2017), *Hurlburt v. Norberg-Hurlburt*, 162 Conn. App. 661 (2016), *Fazio v. Fazio*, 162 Conn. App. 236 (2016), *Brown v. Brown*, 148 Conn. App. 13 (2014), *Connolly v. Connolly*, 191 Conn. 468 (1983), *Nation-Bailey v. Bailey*, 144 Conn. App. 319 (2013), *Lehan v. Lehan*, 118 Conn. App. 685 (2010), *Blum v. Blum*, 109 Conn. App. 316 (2008), *Sander v. Sander*, 96 Conn. App. 102 (2006), *Gervais v. Gervais*, 91 Conn. App. 840 (2005), *DiStefano v. DiStefano*, 67 Conn. App. 628 (2002), *Wichman v. Wichman*, 49 Conn. App. 529 (1998), *DeMaria v. DeMaria*, 47 Conn. App. 729 (1998), *Draper v. Draper*, 40 Conn. App. 570 (1996), *Mihalyak v. Mihalyak*, 30 Conn. App. 516 (1993), *Taylor v. Taylor*, 17 Conn. App. 291 (1989), *Manaker v. Manaker*, 11 Conn. App. 653 (1987), *Fazio v. Fazio*, 2014 Conn. Super. LEXIS 2195 (Sept. 8, 2014), and *DiViesta v. DiViesta*, 1997 Conn. Super. LEXIS 2845 (1997). **Discussion:** See § 5.38, *below*.

§ 5.30 Analyzing Statutory Provisions for Modification

When seeking a modification of alimony, whether periodic, permanent, or *pendente lite*, or life insurance orders securing alimony, other than due to the payee's living with another person, the moving party must demonstrate a substantial change in circumstances. [Conn. Gen. Stat. § 46b-86\(a\)](#). Where an alimony order was suspended, a motion to reinstate the alimony by the obligee is to be treated as a motion to open or motion to modification subject to proving a substantial change in circumstances. *Title v. Skipp-Title*, 161 Conn. App. 542 (2015). A modification may be sought unless the decree precludes a modification. The separation agreement

or memorandum of decision may identify circumstances that were contemplated and are specified as not constituting a change in circumstances warranting modification. [Conn. Gen. Stat. § 46b-86\(a\)](#).

The determination of a motion for modification is a two-step process. Firstly, it must be determined that there has been a substantial change in circumstances from the time of the last order to the pending modification. [Borkowski v. Borkowski](#), 228 Conn. 729, 734 (1994). If there has been a substantial change in circumstances, the court will review the statutory criteria to determine the appropriateness of a modification in light of the party's present circumstances. [Borkowski v. Borkowski](#), 228 Conn. at 736. It is for this reason that should there ever be a need to enter an alimony order in the future, an order of \$1 per year should be awarded at the time of the dissolution. [Ridgeway v. Ridgeway](#), 180 Conn. 533, 543 (1980).

§ 5.31 Construing Provisions Prohibiting or Limiting Modification

Connecticut courts have construed the language of [Conn. Gen. Stat. § 46b-86](#) to favor modifiability of orders for periodic alimony. [Amodio v. Amodio](#), 247 Conn. 724, 730 (1999) and [Scoville v. Scoville](#), 179 Conn. 277, 279 (1979). Limitations on modifiability must be clear and will likely be narrowly construed. [Eckert v. Eckert](#), 285 Conn. 687, 693 (2008). Where the separation agreement limits modification until a date certain, the filing of the motion for modification prior to the date certain is permitted provided that the modification does not occur until after the date in the agreement. [Malpeso v. Malpeso](#), 165 Conn. App. 151 (2016). A separation agreement which “clearly and unambiguously” prohibits modification of the amount and duration of alimony, precludes modification of the definition of what is and is not included in income. [Eckert](#), 285 Conn. at 693.

#Comment Begins

Strategic Point: The *Eckert* case demonstrates why it is important for the definition of income to remain modifiable even if the amount and duration of the alimony is not modifiable. If the definition of income is not modifiable, the payor may change his or her method of compensation, taking the income outside the definition and thus not available to pay alimony.

#Comment Ends

An order of non-modifiable alimony that is to terminate upon the recipient's remarriage or death, would not be modifiable based upon cohabitation. [Wichman v. Wichman](#), 49 Conn. App. 529 (1998). If the intent is to allow the right to seek a modification based upon the cohabitation statute, the judgment should expressly state such a reservation. [Wichman](#), 49 Conn. App. at 536.

#Comment Begins

Strategic Point: There is no established procedure to bifurcate the proceedings with respect to a motion to modify. However, if the grounds alleged for the substantial change are discreet and may not be proven, it may be wise to ask for a bifurcated hearing before each party will be required to exchange documents satisfying the second part of the inquiry.

#Comment Ends

§ 5.32 Determining the Underlying Alimony Order to be Modified

It is essential that there be a periodic alimony order at the time of final dissolution, the modification of which is not clearly prohibited, in order for the provisions permitting

modification of alimony to apply. Orders for the assignment of property under [Conn. Gen. Stat. § 46b-81](#) are expressly exempted from modification. [Conn. Gen. Stat. § 46b-86\(a\)](#). A court lacks the power to resurrect alimony where there was no order at the time of the dissolution. [Brown v. Brown](#), 29 Conn. Supp. 507, 509 (1972).

A party seeking modification of an alimony order bears the burden of proving a substantial change in circumstances of either party. [Olson v. Mohammadu](#), 169 Conn. App. 243 (2016) and [Richard v. Richard](#), 23 Conn. App. 58, 62 (1990). The changes must have arisen since the last order entered regarding alimony, not since a denial from an intervening motion to modify. [Conn. Gen. Stat. § 46b-86](#) and [Borkowski v. Borkowski](#), 228 Conn. 729, 736, 741 (1994). It is, therefore, error for the trial court to hear evidence about financial circumstances that predated the last order modifying alimony. [Borkowski](#), 228 Conn. at 746–747 and [Crowley v. Crowley](#), 46 Conn. App. 87 (1997). However, in the event both parties relied upon and presented evidence and argument based upon these financial affidavits, where the original trial court found the husband's income to be different than as set forth on his original affidavit, they cannot complain on appeal that the court improperly reviewed such affidavits. [Olson](#) at 257. The last court order means an actual alimony order, not a denial of a motion for modification. [Pearl v. Pearl](#), 43 Conn. App. 541 (1996). If there was an intervening modification since the dissolution, which did not concern alimony, it is proper to compare the circumstances of the parties from the hearing on the second motion for modification and the date of dissolution. [Avella v. Avella](#), 39 Conn. App. 669 (1995). Likewise, if there is an intervening modification of alimony and a later motion to modify alimony and child support, the alimony is measured from the previous modification and the child support is measured from the original judgment. [Larson v. Larson](#), 138 Conn. App. 272 (2012).

The court will compare the party's current financial circumstances to those contained in his or her financial affidavit from the prior order. If a party understated his or her income in the prior order, that cannot be used as a reason for or defense of a motion to modify. [Sabrowski v. Sabrowski](#), 95 Conn. App. 625 (2006). Typically, the values to be compared are those represented in the previous proceedings, usually through the financial affidavit, to the current circumstances. [O'Bymachow v. O'Bymachow](#), 12 Conn. App. 113 (1987). However, if there was an error on the prior financial affidavit that was unintentional or not misleading, then the court may consider facts outside of the financial affidavit, if it would be inequitable to rely on the mistaken information. [Fulton v. Fulton](#), 156 Conn. App. 739 (2015).

#Comment Begins

Warning: Do not use *Fulton* as a means to play games in preparing a financial affidavit. Only in the most extreme circumstances will a court be allowed to go behind the finances of the prior order.

#Comment Ends

Likewise the court, with an order based upon the payor's reasonable compensation as a business owner, instead of his actual earnings, must look at the components of the original order in making the determination of a substantial change in circumstances. Accordingly, a subsequent modification that ignores a component of income (i.e., direct benefits) when assessing a change in circumstances is reversible error. [Marshall v. Marshall](#), 151 Conn. App. 638 (2014).

Even if an alimony order provides for a self-executing formula permitting the automatic modification of alimony, upon the filing of a motion for modification the circumstances to compare are those when the last alimony order entered to those at the time the motion is

prosecuted. *Simms v. Simms*, 89 Conn. App. 158, 162 (2005).

§ 5.33 Proving a Substantial Change in Circumstances

[1] Defining Changes in Circumstances Which Are Contemplated

The judgment may set forth those circumstances that are contemplated to change in the future when making an alimony order. Conn. Gen. Stat. § 46b-82. Accordingly, the specified changes anticipated will not support a modification. Where circumstances anticipated to occur at the time of the original order do not occur, that may provide a reason for the modification of the order. *Pite v. Pite*, 135 Conn. App. 819 (2012).

#Comment Begins

Warning: In 1987, Conn. Gen. Stat. § 46b-86(a) was amended to remove the requirement that changed circumstances had been unanticipated by the parties at the time of the dissolution decree, in order for them to be a basis for modification. The statutory amendment no longer requires a court to address, or a party to prove, that changed circumstances were not contemplated in order to be the basis for modification, unless they are specifically identified as contemplated and not to be changed in a written agreement, stipulation, or court decision. Accordingly, cases that discuss whether the changed circumstances were contemplated should be read with caution.

#Comment Ends

[2] Finding a Substantial Change in Circumstances Due to a Change in Income

One of the most common reasons for a modification is a change in the income of one or both parties. The income of the payor increasing since the date of the last alimony order may constitute a change in circumstances. *McCann v. McCann*, 191 Conn. 447 (1983), *Hardisty v. Hardisty*, 183 Conn. 253 (1981), and *Crowley v. Crowley*, 46 Conn. App. 87 (1997). However, if the original award of alimony was and continues to be sufficient to meet its intended purpose (i.e., to attain self-sufficiency or to provide the same standard of living as when the parties were married), then an increase in the income of the payor alone will not justify a modification of alimony. *Dan v. Dan*, 315 Conn. 1 (2014). If the court finds that the original award is insufficient to meet the intended purpose, the review of the statutory factors in assessing a new order may not be used to change the original purpose of the award. *Dan*, 315 Conn. at 18. Thus, an award that was originally designed to be rehabilitative may not then, for purposes of a modification, be reclassified to provide for a marital standard of living. However, if there has been a previous modification which decreased the alimony order, a subsequent modification due to an increase in the payor's income will not be subject to *Dan*. *Cohen v. Cohen* 327 Conn. 485 (2018).

When applying *Dan* or even reviewing a motion for modification, courts are looking at the purpose for which alimony was originally ordered. Since the alimony orders rarely, if ever, state the purpose, that must be determined at the time of the modification. Even if there is an intervening modification of alimony before a current increase is sought, the court may go behind the prior alimony order to determine the purpose of the order. *Cohen v. Cohen*, 327 Conn. 485 (2018).

#Comment Begins

Strategic Point: Do not limit the possible purposes of an alimony award to those delineated in *Dan*, i.e., allowing the alimony recipient to attain self-sufficiency or to sustain a standard of

living. There may be other purposes for the alimony order which a court may consider including: sharing income in the future; compensation for putting a spouse through a graduate or professional education; or a lack of adequate assets to divide at the time of the dissolution.

#Comment Ends

The logic of *Dan* does not apply to an alimony order where the obligor, by reason of her abduction of the child during the dissolution action, caused the obligee to incur substantial debt to find his child and the obligor has recently received an inheritance. In this instance, the obligee could seek a modification of alimony based upon the receipt of the inheritance, which constituted a substantial change in circumstances. *Rubenstein v. Rubenstein*, 172 Conn. App. 370 (2017).

#Comment Begins

Strategic Point: The initial outcry after *Dan* was released centered on a belief that alimony awards would no longer be modifiable. However, careful review of the language in the decision shows that to be an oversimplification. Most alimony orders do not meet the needs of the obligee or allow for the continuation of the same standard of living. This fact alone would permit the modification of alimony based upon the increase in the obligor's income. In addition, as *Rubenstein* demonstrates, the court is not just blindly extending and applying the *Dan* rationale to all circumstances and cases.

#Comment Ends#Comment Begins

Warning: When involved in a modification for alimony where the payor's income has decreased, the agreement or court order should include language that upon an increase in the obligor's income, any modification filed would not be subject to *Dan*.

#Comment Ends

An alimony obligor who did not show up at or file a financial affidavit for the final hearing, cannot use *Dan* to defend against a modification when the original orders were based upon a lower amount than his actual earnings at the time. *Peixoto v. Peixoto*, 185 Conn. App. 272 (2018).

The increased income of the payee may justify a finding of a substantial change in circumstances. *Schofield v. Schofield*, 12 Conn. App. 521 (1987). The failure of the court to properly find the amount of the obligee's income, which was a basis for modification, will not sustain a denial of a modification. *Trent v. Trent*, 226 Conn. App. 791 (2024). Additionally, the court will look at the increase in income in light of the needs of the alimony recipient to determine if a modification is warranted. *Curzi v. Curzi*, 21 Conn. App. 5 (1990). In determining what will be sufficient to constitute a change in circumstances, the time period over which the increase in income occurs is a relevant factor. It is less likely that a court will find a change in circumstances if the increases appear to be regular raises in pay, instead of something dramatic.

Strategic Point: In a footnote, the court in *Trent v. Trent*, 226 Conn. App. 791 (2024), "encouraged" the trial court to specify in detail the factual and legal basis for the rulings, including the evidence considered and the credibility determinations. In that case, it was clear that the trial court did not like the husband and its rulings were clearly skewed in the wife's favor. The Appellate Court was attempting to give the trial court guidance of the boots and suspenders needed to preserve its rulings. Counsel should guide the court in making these findings whether

by a closing argument or post-trial briefs.

A decrease in the earnings of an alimony payor may constitute a change in circumstances. Prior to 2013, ~~the general consensus was that~~ typically a voluntary decrease in earnings would ~~not~~ be insufficient to support a downward modification of alimony. However, in 2013, the Connecticut Supreme Court ruled that if there is a voluntary decrease in earnings, the court must analyze the reasons behind the change and determine if there is any culpable conduct on the part of the payor. *Olson v. Mohammodu*, 310 Conn. 665 (2013). Accordingly, a parties' culpable conduct may not support the requisite substantial change in circumstances for a modification but a good reason may support the finding of a substantial change in circumstances. *Olson*, 310 Conn. at 677. When assessing the issue of what constitutes culpable conduct, the focus should be on "the moving party's own extravagance, neglect, misconduct or other unacceptable reason." *Sanchione v. Sanchione*, 173 Conn. 397 (1977).

The court may find that the stated reasons for seeking a modification, i.e. a decrease in income and an increase in liabilities, have occurred, but still deny the modification. *L.K. v. K.K.*, 226 Conn. App. 279 (2024). The court looked at other factors i.e. failure to disclose an asset on his financial affidavit, the purchase of luxury automobiles and continued lavish lifestyle as reasons to deny the modification.

Strategic Point: Counsel is well served to refrain from a myopic view of the actions of the party seeking the modification. In *L.K.*, while his income went down, he refused to change his lifestyle; essentially, he only sought to alter his court ordered obligations to support his ex-wife. Taking such a position will not garner support from a trial court.

An alimony payor who suffers from a decrease in his or her income and seeks a modification should be prepared to credibly demonstrate the reasons for the decrease in income and that he or she has done what is reasonably possible to mitigate such decrease. *Spencer v. Spencer*, 177 Conn. App. 504 (2017).

#Comment Begins

Strategic Point: The obligor in *Spencer*, who had one business partner, credibly provided that the income changes imposed by his partner were beyond his control and that he had no choice but to accept his partner's terms. Supporting this determination was the fact that the obligor made payments toward his alimony obligation as he received money and went into debt by being unable to pay his own tax obligations. Possibly a different result would have occurred had he taken care of his personal debt and expenses before making any alimony payments.

#Comment Ends

Oftentimes litigants believe that a decrease in income automatically entitles them to a modification of alimony. What they overlook is that a court will review the entire circumstances to determine if there is a change in circumstances. A decrease in income, failure to make any payments for alimony, and no change in the payors' spending, may result in a court denying a motion for modification. *Talbot v. Talbot*, 148 Conn. App. 279 (2014).

#Comment Begins

Strategic Point: Clients should be counseled that their overall behavior and decisions will be reviewed by a court. Claiming an inability to pay court ordered alimony and refusing to change personal spending habits is unlikely to garner the sympathy of a court in a modification

proceeding.

#Comment Ends

A court, in ruling a modification of alimony, should have considered the receipt of PPP loans by the obligor's business when determining whether there was a change in circumstances. *Bialik v. Bialik*, 215 Conn. App. 559 (2002).

#Comment Begins

Strategic Point: While *Bialik* is fact specific in terms of a PPP loan, it is possible that this case can be used by analogy to any other forms of government aid, assistance or grants that may be offered to a business. Care must be taken to determine the taxability of such funds either to the underlying entity receiving it or to the obligor.

#Comment Ends

Of importance in determining if there is a substantial change is the income at the time of the last order upon which the alimony is based. The mere fact that an obligor submits an affidavit setting forth an income does not bind a future court, rather, it is the earnings found by the trial court that is relevant in assessing a change in circumstances. *O'Donnell v. Bozzuti*, 148 Conn. App. 80 (2014). Similarly, the court must base the change by looking at all income, not just selected portions of income. For instance, a court will commit error by considering only W-2 income while ignoring income derived from direct benefits or distributions from a business owned by the obligor. *Marshall v. Marshall*, 151 Conn. App. 638 (2014).

#Comment Begins

Strategic Point: A client's financial affidavit should reflect his or her actual income and not inflate or deflate income in anticipation of future proceedings.

#Comment Ends

[3] Finding a Substantial Change in Circumstances Based Upon Retirement

There are no guarantees that the court will find retirement to be a substantial change in circumstances. If it is found to be a substantial change, the alimony will not automatically terminate. An involuntary retirement may result in a suspension but not a termination of alimony, even if there is relative financial parity of the parties at the time of the modification. *Epstein v. Epstein*, 43 Conn. Supp. 400 (1994).

Voluntary retirement may constitute a substantial change of circumstances warranting modification, especially when coupled with health problems. *Simms v. Simms*, 283 Conn. 494 (2007) and *Misinonile v. Misinonile*, 35 Conn. App. 228 (1994). However, these health problems should be demonstrated and linked to the reason for retirement.

One consideration with retirement is whether the retirement was for purposes of avoiding the alimony obligation. Where retirement is not done to avoid alimony, the courts have found a change in circumstances. *Misinonile*, 35 Conn. App. at 232. This does not always mean that a bona fide retirement will result in a modification of the order, especially where the alimony obligor has the ability of paying the order. *Jansen v. Jansen*, 136 Conn. App. 210 (2012).

#Comment Begins

Strategic Point: There is no automatic right to retire and obtain relief from alimony obligations as a result. It is possible to provide in the judgment an age by which the alimony payor may retire and alimony will terminate. Alternatively, it could be stated that there will be a “second look” at alimony upon retirement.

#Comment Ends

[4] Finding an Increase in Assets to be a Substantial Change in Circumstances

One area where there may be a post judgment increase in assets is a party’s receipt of an inheritance. Since a court is unable to make an asset division based upon a future inheritance, which is speculative, the only manner in which that inheritance may be considered is in a future modification of alimony, when the inheritance vests. *Rubin v. Rubin*, 204 Conn. 224 (1987). In a modification proceeding, the court must consider a vested, although undistributed, inheritance. *Bartlett v. Bartlett*, 220 Conn. 372 (1991). Likewise, a contingent trust which became vested after the dissolution may be considered in determining a substantial change of circumstances for modification purposes. *Ceddia v. Ceddia*, 164 Conn. App. 266 (2016).

Conversely, the court should not find an increase in income based upon the sale or exchange of an asset. “The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income.” *Denley v. Denley*, 38 Conn. App. 349, 353–354 (1995). Similarly, the principal payments on a mortgage taken back after the sale of an asset awarded at the time of the dissolution should not be included as income, as it is an exchange of assets. *Schorsch v. Schorsch*, 53 Conn. App. 378, 386 (1999). While an exchange of assets for cash does not convert the asset into income, the court can consider the change in value of assets when modifying an alimony order. *Simms v. Simms*, 283 Conn. 494, n.12 (2007).

#Comment Begins

Strategic Point: At the conclusion of a dissolution action, a client should be advised to maintain accurate records, with supporting documentation, which trace the assets he or she was awarded at the time of the dissolution. This will prevent alimony from being modified based upon the increase in the value of these assets.

#Comment Ends

Growth in assets is not income for purposes of setting alimony. A capital gain, at least where it does not represent a “steady stream of income,” is not considered income when setting initial or modified alimony orders. *Gay v. Gay*, 266 Conn. 641, 644 (2003). However, that rule does not mean that “changes in value, whether realized or not may never be taken into consideration by a court in considering a modification of alimony.” *Gay*, 266 Conn. at 648.

[5] Finding a Substantial Change in Circumstances for Other Reasons

Changes in income are not the only financial differences from the time of the original order which can justify a modification of alimony. A dramatic increase in the cost of college from that anticipated at the time of the dissolution until such expenses were incurred, despite the

alimony obligor agreeing to pay all of college, was a substantial change in circumstances to justify an alimony modification. *Malpeso v. Malpeso*, 189 Conn. App. 486 (2019).

[6] Modifying Orders Where There are Restrictions on Modification

Frequently, the parties enter into agreements in which there is a preclusion of modification in certain circumstances. This can occur with either an alimony order or an unallocated alimony and support order. A court may not modify the child support component of an unallocated order based upon the Wife's cohabitation when the court is precluded from modifying the alimony portion of the order based upon cohabitation. *Gabriel v. Gabriel*, 159 Conn. App. 805, cert. granted, 319 Conn. 948 (2015).

[7] Seeking an Extension of Alimony

Although infrequent, there are times where an alimony recipient may seek an extension of the original alimony term beyond the contemplated termination date. Since term limited alimony typically is to get the alimony recipient to a point of financial self-sufficiency, whether by employment or otherwise, there should typically be a change in the reason for the time-limited alimony ~~in order to~~ support an extension. Extensions typically will not be granted if there is bad faith on the part of the alimony recipient. An alimony recipient who has been residing with her fiancé for three years prior to the end of the alimony terms and then calls off the wedding, which had been scheduled for shortly after the termination of alimony, could not persuade a court to extend her alimony, especially since the fiancée did not contribute to the support of the household despite his ability to do so. *Weihs v. Weihs*, 2016 Conn. Super. LEXIS 1679.

§ 5.34 Determining the Criteria to be Considered for a Modified Award

[1] Applying the Same Statutory Criteria as When Making the Original Alimony Determination

Once a trial court determines that there has been a substantial change of circumstances, the same criteria used to determine an initial award of alimony are relevant to the modified order. *Sanchione v. Sanchione*, 173 Conn. 397, 401–402 (1977). One of these considerations would include the causes for the dissolution of the marriage. *Borkowski v. Borkowski*, 228 Conn. 729, 742–744 (1994). A party may not seek to limit the court's consideration to those facts that constitute the substantial change in circumstances. *Dan v. Dan*, 137 Conn. App. 728 (2012).

[2] Modifying the Amount Does Not Need to be Based Upon the Changed Circumstances

While a party may allege an increase in a particular expense category as the substantial change, a court is not limited to only consider the increase in these expenses for modifying the order. Accordingly, a party basing the substantial change of circumstances on health issues is not then only able to receive an increase in the alimony equal to the financial impact of the payee's health problems. *McGuinness v. McGuinness*, 185 Conn. 7 (1981). Once the court finds a substantiated change, for whatever reason, the entire present circumstances of the parties are reviewed to determine the appropriate award.

[3] Considering the Income of the Payor's New Spouse

Upon having a substantial change of circumstances demonstrated, the court may look to

the income of the payor's new spouse to demonstrate the payor's increased ability to pay alimony. *McGuinness v. McGuinness*, 185 Conn. 7, 12–13 (1981). This often has an impact in that it lowers the expenses of the payor, freeing up more of his or her income to pay alimony.

[4] Considering Unmet Needs

Once the court finds a substantial change in circumstances, the court may look at the continuing or unmet needs from the prior order and consider the current needs when fashioning the modified order. *Howat v. Howat*, 1 Conn. App. 400, 407 (1984). The fact that the needs would not have warranted modification in and of themselves does not prevent the court from considering those needs, regardless of whether they existed at the time of the last order. *McCann v. McCann*, 191 Conn. 447, 451 (1983).

[5] Changing Unallocated Alimony and Support Awards into an Allocated Order

Frequently, parties enter into an unallocated alimony and support award, primarily due to the tax savings provided by such an order. However, there are instances where such orders are modified either due to the alimony obligor being awarded custody of the minor child or the attainment by a child of the age of majority. In those instances, the court must make a determination as to the amount of child support contained within the original unallocated order, prior to modifying the order. *Gabriel v. Gabriel*, 324 Conn. 324 (2016) and *Coury v. Coury*, 161 Conn. App. 271 (2015). Once the original child support number is determined, the court will then know the amount of the order attributable to alimony and review the evidence to determine if there has been a substantial change in circumstances to warrant a modification of the alimony. *Malpeso v. Malpeso*, 165 Conn. App. 151 (2016). In determining the child support number, the court must look at an actual number and not an arbitrary percentage that it determines represents the child support. *Ross v. Ross*, 200 Conn. App. 720 (2020).

To determine the amount of the child support in the prior unallocated order, the court must look at the prior order to determine the child support amount. That amount could and should be contained in child support guidelines filed at the time of hearing. In the absence of such evidence of the amount of child support in the unallocated order, the court must conduct a hearing to determine the amount of child support at the time of the last order. *Gabriel v. Gabriel*, 324 Conn. 324 (2016).

#Comment Begins

Strategic Point: The court decisions setting forth the steps to be taken to determine the original amount of child support do so on an overly simplistic basis. Clearly, one of the main reasons for an unallocated order is the tax treatment of such order. Accordingly, since the child support has been tax effected for purposes of the unallocated order, then evidence should be presented as to the tax adjustment necessary to alter an unallocated alimony order to an allocated order. Taking a simple child support guideline calculation and deducting that amount from the unallocated order will artificially inflate the amount of the remaining alimony order.

#Comment Ends

§ 5.35 Preparing a Motion for Modification

[1] Determining the Technical Requirements for a Motion for Modification

A motion for modification of an alimony order must state the current order, the date of that order, and the factual and legal basis for modification. Practice Book (hereinafter “P.B.”) § 25-26(e). The factual basis would include the reasons why there is a substantial change in circumstances. The legal basis is that there is a substantial change in circumstances that justifies the award or allegations of cohabitation.

If it is a post-judgment motion, the application for an order to show cause and motion for modification shall be submitted to the clerk of the superior court. P.B. §§ 11-4 and 25-28(b). The clerk will set the date for a hearing and return the papers for service. The papers must then be served upon the respondent by a marshal or other proper officer in accordance with the time limitations set out in the order to show cause. *Conn. Gen. Stat. § 52-50*. The served papers with the officer’s return of service should then be filed with the court. For a more thorough discussion on service of process, *see Chapter 2, §§ 2.10–2.15, above*.

If there is both a statutory reason and a basis grounded in the language of the parties’ agreement for a modification, plead both because the court may only consider that which is pled. *Clark v. Clark*, 66 Conn. App. 657 (2001).

#Comment Begins

Forms: JD-FM-162—Order to Attend Hearing and Notice to Respondent, *see Chapter 20, § 20.13, below*. JD-FM-174—Motion for Modification, *see Chapter 20, § 20.19, below*.

#Comment Ends

[2] Assessing Practical Considerations in Filing and Prosecuting a Motion for Modification

Typically, an alimony obligor whose income has been reduced does not seek court intervention until such time as the change in circumstances, i.e. his or her decrease in income, has occurred. Likely, while the motion is pending, there will be discovery as well as scheduling issues which will delay an immediate hearing. How the alimony obligor behaves during this time can be crucial to the outcome of the modification. Time and again, decisions demonstrate that efforts to make payments, even if reduced, to the alimony recipient are received positively. *See Spencer v. Spencer*, 177 Conn. App. 504 (2017).

Often, a motion for contempt is filed against the alimony obligor. The largest issue in such a contempt hearing will be the willfulness for not paying the order. A huge factor to assess willfulness is how the obligor is using his or her resources. *See Sanchione v. Sanchione*, 173 Conn. 397 (1977). Paying for one’s expenses out of assets awarded at the time of the dissolution will not be viewed as willful contempt. *Bauer v. Bauer*, 173 Conn. App. 595 (2017).

§ 5.36 Seeking a Retroactive Modification

The court may modify periodic permanent alimony or support orders only during the period a motion for modification is pending and only retroactive to the date of service by a marshal or other proper officer of the pending motion upon the respondent. *Conn. Gen. Stat.*

§§ 46b-86(a) and 52-50. Service, as dictated by statute, is required to ensure that the respondent's due process rights are protected by receipt of notice that a modification is being sought. *Shedrick v. Shedrick*, 32 Conn. App. 147, 149 (1993). A party was unable to claim that service by certified mail, signed by his stepdaughter, after which he filed several motions in the superior court, was inadequate service for notice purposes. *Simms v. Zucco*, 214 Conn. App. 525, cert. den'd 345 Conn. 919 (2022). In addition, because each alimony payment is considered to be a final judgment, the court has the power to modify only installments due in the future. *Shedrick*, 32 Conn. App. at 149. If a party has received a modification of an unallocated alimony and support order due to a change in custody, for which a statutory suspension of the child support occurs pursuant to Conn. Gen. Stat. § 46b-224, the modification of the alimony motion will only be modifiable retroactively if it is served consistent with Conn. Gen. Stat. § 52-50. *Coury v. Coury*, 161 Conn. App. 271 (2015).

#Comment Begins

Warning: Many parties appear in court on the date established in the show cause order, but are not ready to proceed with the motion, typically due to incomplete discovery. Yet, counsel will frequently stipulate that the orders will be retroactive to that date or the date of service. However, there is no guarantee, absent this stipulation, that the court would have made the order retroactive.

#Comment Ends

When service is made in accordance with the statutory requirements, the movant may seek, but is not guaranteed, retroactivity back to the date of service. The court may take into account the time period which has lapsed between the filing of the motion and the hearing, changes in the partiesparties' finances during the pendency of the motion for modification, or a resulting inequity in providing or denying a retroactive modification of alimony. *Zahringer v. Zahringer*, 124 Conn. App. 672 (2010). However, *Zahringer* does not create a bright line rule on when retroactivity is or is not proper. *Hane v. Hane*, 158 Conn. App. 167 (2015).

#Comment Begins

Warning: The *Hane* decision should be read very narrowly regarding the issue of retroactivity. In this case, the Wife appealed the decision of the trial court only on the narrow grounds of asserting that *Zahringer* represented a bright line rule for the court to follow. She did not, unfortunately, appeal in general on the lack of retroactivity which seemingly bothered the Appellate Court. The trial court had originally modified the order from \$14,000 per month to \$2,800 per month which was the outstanding order at the time the Wife brought the current motion for modification. While the motion was pending, the Husband was earning between \$335,000 and \$530,000 per year, yet the trial court denied the modification retroactively claiming that it would be too harsh. It is difficult to reconcile that finding with the Husband's earnings.

#Comment Ends

The *Zahringer* rationale may also be used where a case has been appealed and is then remanded for additional proceedings. In those instances, there may be a significant period of time which has elapsed from the time the original motion was filed until there is a final judgment. Although circumstances may have changed since the original filing of the motion, the court should look at the interim circumstances and make an appropriate award. *Olson v. Mohammadu*, 169 Conn. App. 243 (2016).

§ 5.37 Interpreting “Second Look” Provisions

A decree providing that the alimony provisions are subject to a “second look” by the court in certain defined circumstances allows a *de novo* post-judgment review of the alimony obligation, without a finding of a substantial change of circumstances. *Taylor v. Taylor*, 117 Conn. App. 229, 233 (2009). If a “second look” provision was interpreted to constitute a preliminary finding of a substantial change of circumstances, it would be superfluous where the alimony is otherwise modifiable pursuant to statute. In other words, there would have been no need to include a “second look” provision if the intent was to interpret it in the same manner as a statutory modification. *Taylor*, 117 Conn. App. at 233.

Providing for a second look “de novo” without the need to prove a substantial change in circumstances, cannot be denied merely because a court feels that it is a stale motion under P.B. § 25-34(e) when there is good cause for the delay, as it would render this provision in the decree meaningless. *Nuzzi v. Nuzzi*, 164 Conn. App. 751 (2016).

#Comment Begins

Warning: When providing for a “second look” the requirement of finding a substantial change of circumstances is not required, in essence allowing a second bite at the apple. Notwithstanding the holding in *Nuzzi*, counsel should not delay in having the motion heard in that a delay will likely impact the ability to claim retroactivity.

#Comment Ends#Comment Begins

Strategic Point: A “second look” provision may prove to be a good compromise position to resolve the issue of what happens to the alimony order upon the retirement of the payor. At least the circumstances existing at the time of retirement may be reviewed to determine what, if any, alimony order would be appropriate ~~post-retirement~~post-retirement, without the need to show a substantial change in circumstances.

#Comment Ends

Where there is a provision for a “second look” at alimony, one dilemma faced by the alimony obligor is when to start curtailing his or her work schedule in contemplation of such second look. Since there is no guarantee that the court will modify the order at the time of a second look, it may be difficult to make the work change prior to the hearing on the matter, unless it is by reason of a medical issue, which will provide an alternate basis for modification. Notwithstanding, an obligor must be prepared to present evidence of how his or her employment will change and specifically the financial repercussions of such changes. *Steller v. Steller*, 181 Conn. App. 581 (2018).

§ 5.38 Modifying Alimony Based Upon the Cohabitation of the Recipient

[1] Determining the Statutory Criteria for Cohabitation

An alimony order may be subject to modification upon the alimony recipient cohabiting with another. Conn. Gen. Stat. § 46b-86(b). To modify alimony based upon cohabitation, the alimony recipient must be living with another person, which living arrangement alters the financial needs of the recipient, causing a change in circumstances. *Blum v. Blum*, 109 Conn. App. 316 (2008) and Conn. Gen. Stat. § 46b-86(b). Cohabitation, as defined by statute, does not

connote merely a sexual relationship.

The parties may also provide in their separation agreement circumstances under which alimony may be modified, suspended, reduced or terminated by reason of cohabitation, which shall be enforceable by the court. [Conn. Gen. Stat. § 46b-86\(b\)](#).

A court is not precluded from ordering, at the time of the initial alimony order, that it terminates upon a finding of cohabitation pursuant to [Conn. Gen. Stat. § 46b-86\(b\)](#). [Brown v. Brown, 148 Conn. App. 13 \(2014\)](#). Such an order does not prohibit a modification from being sought in the event of cohabitation, but merely provides for the automatic termination of alimony in the event of cohabitation. [Brown, 148 Conn. App. at 26](#).

An agreement providing that the alimony would continue until a determination of the cohabitation of the recipient pursuant to [Conn. Gen. Stat. § 46b-86\(b\)](#) will automatically terminate the alimony effective on the date of the cohabitation, irrespective of whether the alimony recipient is cohabiting at the time the motion is filed or determined. [Nation-Bailey v. Bailey, 316 Conn. 182](#). However, an agreement providing that alimony terminates pursuant to the cohabitation statute is ambiguous in that it could mean the incorporation of the entire cohabitation statute, including the remedies, and not just the definitional section. [Fazio v. Fazio, 162 Conn. App. 236 \(2016\)](#).

#Comment Begins

Strategic Point: A provision for automatic termination of alimony upon cohabitation is a landmine which must be navigated carefully. Technically, the cohabitation may occur several years before a motion is brought which would then result in a large arrearage accruing by the alimony recipient. If such a provision is included in an agreement, it may be wise to provide for the termination of alimony as long as a motion is filed within a certain period of time after the claimed cohabitation.

#Comment Ends

[2] Assessing Non-Modifiable Alimony Provisions When There Is Cohabitation

If the decree provides that the alimony is non-modifiable for any reason, that may preclude modifications based upon cohabitation. [Wichman v. Wichman, 49 Conn. App. 529 \(1998\)](#).

#Comment Begins

Strategic Point: If it is intended that the alimony payor should retain his or her right to seek a modification based upon cohabitation, where alimony is otherwise non-modifiable, the agreement or decision should specify that the payor reserves his or her rights under the cohabitation statutes.

#Comment Ends

[3] Defining Cohabitation

Typically, separation agreements will provide for the consequences to the alimony recipient in the event of a cohabitation. There are two aspects of cohabitation, one being how it is defined and the other being what is the appropriate remedy in the event of cohabitation. Where the term cohabitation is not defined it will be awarded the meaning set forth in [Conn. Gen. Stat.](#)

§ 46b-86 (b). If the term cohabitation is defined in the agreement and the parties fail to waive the provisions of [Conn. Gen. Stat. § 46b-86 \(b\)](#), then a motion may be filed based on either the definition in the judgment or the statute. If the separation agreement defines the remedy, then that definition will control. [Spencer v. Spencer](#), 177 Conn. App. 504 (2017).

An agreement providing for the termination of alimony upon cohabitation and defining cohabitation as a finding by a court that the alimony would be reduced pursuant to [Conn. Gen. Stat. § 46b-86\(b\)](#), requires the court to terminate the alimony based upon such a finding. The court was not free to implement any of the remedies set forth in the statute as the agreement clearly stated the remedy. [Boreen v. Boreen](#), 192 Conn. App. 303, cert. denied, 333 Conn. 941 (2019). Likewise, the termination of alimony “based upon her cohabitation according to statute” mandates a termination as of the date of such cohabitation. [Schott v. Schott](#), 205 Conn. App. 237 (2021).

#Comment Begins

Strategic Point: The *Boreen* decision provides some historic perspective regarding the enactment of the cohabitation statute. In part, it was enacted to provide a remedy when the alimony recipient was living with another, but refraining from marrying in order to continue to receive alimony.

#Comment Ends#Comment Begins

Strategic Point: Unlike the filing of a motion for modification based upon a change in circumstances which only permits retroactivity back to the date of service, a provision indicating that alimony terminates upon cohabitation results in a modification that can be well prior to any date a motion is filed. In other words, the cohabitation may have occurred in 2018, the motion not filed until 2021, but if proven the termination of alimony will be effective as of 2018, requiring the alimony recipient to repay any alimony received after the date of cohabitation. If such a provision is contained in an agreement, it should only be done with the caveat that the earliest date for termination of the alimony is upon service of the motion. In addition, although it is not yet been tried in the Connecticut courts, query whether or not a laches defense would work when there really is an unreasonable delay, after the alimony paid your nose of the cohabitation, in bringing the motion.

#Comment Ends

If an agreement does not define cohabitation, a court will ascribe its usual meaning of living together as husband and wife. [Taylor v. Taylor](#), 17 Conn. App. 291 (1989). An alimony recipient who had another person sleep over seven nights per week and travelled together was found to be cohabiting. [D’Ascanio v. D’Ascanio](#), 237 Conn. 481 (1996). Conversely, a person who only occasionally sleeps over and maintains a separate residence is not living together with the alimony recipient. [DiViesta v. DiViesta](#), 1997 Conn. Super. LEXIS 2845 (1997). If the separation agreement provides that the alimony will terminate upon the recipient’s cohabitation with an unrelated male, a showing of cohabitation pursuant to the statutory criteria is not required. [DeMaria v. DeMaria](#), 47 Conn. App. 729 (1998). An agreement providing for modification of alimony for cohabitation, defined as a relationship similar to husband and wife, allowed a court to terminate alimony based upon a newspaper article describing the payee’s boyfriend as her fiancé. [Norberg-Hurlburt v. Hurlburt](#), 162 Conn. App. 661 (2016).

#Comment Begins

Warning: *Norberg-Hurlburt* should be viewed as an outlier case and not relied upon for precedent. The alimony payee did not appear at the hearing for which her motion for continuance

had been denied. She had also failed to appear three previous times to the hearing. Accordingly, the court drew an adverse inference of her failure to appear at the hearing and rebut the evidence presented.

#Comment Ends

It is important to determine what is meant by cohabitation, especially if the agreement is non-modifiable in other respects. Failure to define cohabitation could lead the court to find the provision ambiguous and subject to interpretation, potentially adversely impacting the non-modifiable provisions. *Remillard v. Remillard*, 297 Conn. 345 (2010).

An agreement should be clear as to the remedy if there is a cohabitation, i.e. the order automatically terminates or is subject to modification. An order that states that it terminates upon cohabitation will permit the filing of a motion to modify with the ultimate termination effective as of the date of cohabitation, since such provision is self-executing. *Nation-Bailey v. Bailey*, 144 Conn. App. 319 (2013).

#Comment Begins

Strategic Point: It is very dangerous to provide that cohabitation automatically terminates alimony, especially if it is viewed as self-executing. Such a provision allows a motion to be brought at any time, and upon demonstrating the cohabitation, irrespective of the brevity of time in which it occurred, the court must terminate alimony. If the intent is not to have the alimony automatically terminate, that must be made clear in the order.

#Comment Ends

The court has the ability of ordering alimony to be non-modifiable based upon cohabitation, especially when it is with a specific person upon whom the payee is reliant for support when the support will be insufficient to meet his or her needs. *O'Neill v. O'Neill*, 209 Conn. App. 165 (2021).

[4] Altering the Alimony Recipient's Financial Needs

Without a showing of an alteration in the alimony recipient's financial needs as the result of living with another person, the court may not statutorily modify the alimony order based upon cohabitation. *DiStefano v. DiStefano*, 67 Conn. App. 628 (2002). The altering of the financial needs must be in a quantifiable manner to enable the court to modify the amount. *Lehan v. Lehan*, 118 Conn. App. 685 (2010). Accordingly, there must be a showing as to exactly how the cohabitant is contributing to the alimony recipient's finances.

The alteration of financial needs can be proven in one of two ways. The first is direct contributions to the alimony recipient by the person with whom he or she is cohabitating. The second is by showing a decrease in the living expenses as a direct result of the cohabitation. *Murphy v. Murphy*, 181 Conn. App. 716 (2018).

The burden of proving a change in financial circumstances sufficient for a modification based upon cohabitation is on the moving party. *Blum v. Blum*, 109 Conn. App. 316, 324 (2008). However, the financial circumstances need not be a substantial change. *Gervais v. Gervais*, 91 Conn. App. 840, 853 (2005). Such change must be quantifiable. *Murphy v. Murphy*, 181 Conn. App. 716 (2018).

#Comment Begins

Strategic Point: *Murphy* clearly holds that when presenting a claim for an alimony modification due to cohabitation, the financial benefits of the cohabitation must be quantified. That will require evidence of the recipient's finances prior to the cohabitation as compared to after the cohabitation. After all, while there may not be the direct payment of expenses on behalf of the alimony recipient, there could be reductions by virtue of expense sharing due to the cohabitation.

#Comment Ends#Comment Begins

Strategic Point: Justice Prescott issued a dissent in *Murphy* and raised the issue of an alimony recipient having insufficient funds from alimony to support himself or herself, which essentially forces a cohabitation to occur. Such a claim could prove to be valid and should be considered in that if the initial alimony award was insufficient to meet the reasonable needs of the recipient, a future modification based upon cohabitation may be unjust.

#Comment Ends

Additionally, the court may consider the financial resources of a "housemate" when making or modifying an alimony award. *Manaker v. Manaker*, 11 Conn. App. 653, 655–656 (1987). A cohabitant who could make a financial contribution, but who does not, may result in the court considering what his or her financial contributions could be when determining alimony. *Sander v. Sander*, 96 Conn. App. 102 (2006).

[5] Filing a Motion for Modification Based Upon Cohabitation

A motion for modification based upon the "cohabitation" of the other party must say so. *Connolly v. Connolly*, 191 Conn. 468, 478 (1983). In the event there is no waiver of the cohabitation statute as a basis for modification and the agreement separately references cohabitation as a means to modify or terminate alimony, any motion to modify should plead both the statute and the agreement provision. Failure to do so will only permit the court to rule on the grounds pled. *Mihalyak v. Mihalyak*, 30 Conn. App. 516 (1993).

#Comment Begins

Strategic Point: If there is any question as to whether the judgment provides a different standard than the statute for cohabitation, both the statute and the provision in the judgment should be pled.

#Comment Ends

[6] Defining Remedies in a Motion to Modify Based Upon Cohabitation

If the moving party has met his or her burden of proof regarding the cohabitation, the court may terminate, suspend, reduce, or modify the alimony order. Conn. Gen. Stat. § 46b-86(b). The remedy is not solely termination.

How the court order is drafted will determine when the alimony may be altered for cohabitation. If cohabitation is an event that will trigger termination of alimony and it is to occur as of the time that the recipient began cohabiting, then the court may retroactively terminate the alimony to a date that precedes any motion to modify. *Draper v. Draper*, 40 Conn. App. 570 (1996).

#Comment Begins

Strategic Point: In essence, by providing for termination or modification of alimony on the date cohabitation began, the alimony recipient is waiving his or her due process rights of notice of the motion for modification. This provision could be very costly to an alimony recipient, especially if the payor waits to file the motion.

#Comment Ends#Comment Begins

Strategic Point: When establishing the initial alimony order, do not provide that the alimony will terminate on cohabitation. To do so waives the other statutory remedies which may be better suited to the case.

#Comment Ends

PART VI: ASSESSING ALIMONY ORDERS PENDING APPEAL

ALIMONY

§ 5.39 CHECKLIST: Assessing Alimony Orders Pending Appeal

5.39.1 Assessing Alimony Orders Pending Appeal

- Applying automatic stay provision:
 - An alimony order is not stayed pending appeal.
 - The *pendente lite* order terminates with the rendition of the judgment.
 - If the final alimony orders are not sufficient, a motion for modification should be filed. **Authority:** *Ahneman v. Ahneman*, 243 Conn. 471 (1998), *Febbrioriello v. Febbrioriello*, 21 Conn. App. 200 (1990), and *Ehrenkranz v. Ehrenkranz*, 2 Conn. App. 416 (1984); RAP §§ 61-11(a) and 61-11(b). **Discussion:** See § 5.40, below.
- Appealing a final judgment when no alimony is awarded in the judgment:
 - If there is no alimony awarded at the time of the judgment, the court is without power to award alimony pending appeal. **Authority:** *Connolly v. Connolly*, 191 Conn. 468 (1983) and *Casey v. Casey*, 2003 Conn. Super. LEXIS 2831 (2003); RAP § 61-11(b). **Discussion:** See § 5.41, below.
- Paying arrearages pending appeal:
 - If an alimony obligor becomes delinquent pending appeal, depending upon the assets being held, the court may order the payor to pay the delinquency out of assets. **Authority:** *Champagne v. Champagne*, 2003 Conn. Super. LEXIS 2329 (2003) and RAP § 61-11(b). **Discussion:** See § 5.42, below.

§ 5.40 Applying Automatic Stay Provisions

In the event an appeal is filed from the trial court determination of an alimony order, the alimony order is not stayed pending appeal. Rules of Appellate Procedure (hereinafter “RAP”) § 61-11(b). Accordingly, the order from the trial court that is on appeal continues until the appeal is determined. This can prove to be problematic in that the final order for alimony is typically

intertwined with the property division, as a “carefully crafted mosaic.” *Ehrenkranz v. Ehrenkranz*, 2 Conn. App. 416, 424 (1984). Accordingly, there are times when the alimony order is set at a certain amount due to the property division which will be received by the alimony payee. However, since the property division is stayed pending appeal, the alimony recipient will not have the benefit of the property division, unless the property is already in his or her name, unless the stay is lifted. RAP § 6-11(a).

The *pendente lite* order terminates with the rendition of the judgment dissolving the parties’ marriage. *Febbrioriello v. Febbrioriello*, 21 Conn. App. 200, 206 (1990). Many times, the temporary alimony orders provide for the home to be paid for either directly from the alimony payor or through additional alimony paid to the alimony recipient. However, the final orders, which are applicable on appeal, do not usually contain such a provision. Accordingly, the only remedy is to file a motion for modification in the event the alimony orders will be insufficient to pay for the household expenses pending appeal. *Ahneman v. Ahneman*, 243 Conn. 471 (1998).

§ 5.41 Appealing a Final Judgment When No Alimony Is Awarded in the Judgment

Since the alimony orders from the final judgment are not subject to the automatic stay pending appeal, the court, if no alimony was awarded in the decision, is without power to award alimony pending the appeal. *Casey v. Casey*, 2003 Conn. Super. LEXIS 2831 (2003) and RAP § 6-11(b). The *pendente lite* orders may not be reinstated because *pendente lite* orders terminate with the judgment. *Connolly v. Connolly*, 191 Conn. 468, 480 (1983).

#Comment Begins

Strategic Point: When the appeal is decided and if the trial court decision is overturned, there are essentially no alimony orders remaining in the case. The *pendente lite* orders terminated with the final court decision, and the final court orders terminate with the appellate decision. Accordingly, a motion to establish alimony should be filed immediately after an appeal overturning a final court order.

#Comment Ends#Comment Begins

Strategic Point: If there is a possibility that the trial court will not award alimony to either party when there had been a temporary alimony order, a \$1 per year of alimony should be requested pending final judgment, so that there may be an alimony order entered if an appeal is taken.

#Comment Ends

§ 5.42 Paying Arrearages Pending Appeal

When an appeal is taken, the property division orders are stayed pending resolution of the appeal, whereas the alimony orders are not subject to the automatic stay provisions. RAP § 61-11(b). If an alimony obligor does not pay the alimony pending appeal on a motion for contempt on the arrearage, it is possible that the only funds from which to pay the arrearage will be from assets. To obtain an order to pay the arrearage, the court will likely look at the totality of the assets and how they may be divided, post appeal, to ensure there are sufficient funds for any arrearage paid from assets to be reallocated after the appeal. *Champagne v. Champagne*, 2003 Conn. Super. LEXIS 2329 (2003).