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Cohabitating Before Marriage Can Increase Alimony Payments in MA

By Nicole K. Levy | May 31, 2018

Family Law Alimony Divorce

A recent Appeals Court decision highlights how alimony orders can last longer when spouses lived together (cohabitated) before getting married.

In Massachusetts, the length of an alimony order – that is, how long a former spouse will be required to pay spousal support following a divorce – is determined based on the length of the marriage. For a short-term marriage of less than five years, the duration of alimony is calculated at 50% of the length of the marriage. For a marriage over 15 years, the duration of alimony is calculated at 75% of the length of the marriage. For long term marriages over 20 years, there is no specific time limit on alimony.

The length of the marriage is typically calculated as the date of marriage until the date a complaint for divorce is served on either party. A new case from the Massachusetts Appeals Court shows that even this simple concept can be tricky, and that the answer can impact important issues in the divorce judgment, including a potential alimony award.

How the Length of a Marriage Impacts Alimony Duration

Alimony, which is sometimes called *spousal support*, is the amount of money that the financially dominant spouse may be obligated to pay to a financially dependent spouse after the termination of the marriage. The goal of these alimony payments is not to punish the financially dominant spouse, but to ensure that the financially dependent spouse is able to support him or herself after the divorce becomes final. The amount of payments made and the duration for which they are made vary from case to case, depending on the lifestyle enjoyed by the parties during the marriage, and are subject to the terms of the Massachusetts Alimony Reform Act.

One of the rationales behind alimony is that it allows the financially dependent spouse to have access to resources he or she needs to support him or herself. Another rationale is that it allows the dependent spouse to acquire skills he or she may have not had in order to enter or re-enter the workforce. Of course, these skill sets are more difficult to acquire the longer the spouse has been out of work. With the professional world evolving so rapidly with technological developments, old skill sets obsolete or stale. Issues such as one spouse suffering from a medical disability can also impact alimony.

Another rationale is that alimony ensures the well-being of a financially dependent spouse by compensating them for the sacrifices they have made to the marriage. In many marriages—particularly those that involved children—one spouse sacrifices their professional life and ambitions in order to care for the children and the home. When the divorce finalizes, that spouse may not be able to simply earn an income to support themselves, especially if the children are still young.

When two people have been married for a long time, these alimony factors become more and more relevant and require a closer review of financial support after the divorce. Therefore, the length of the marriage becomes a significant factor in a divorce court's alimony order.

The Case of *Bortolotti v. Bortolotti: When Does a Marriage Really Start?*

Under the Alimony Reform Act, the duration of alimony is calculated based on the length of the marriage. The durational clock for alimony "clock starts ticking" when the Judgment of Divorce enters. Determining the length of the marriage proved to be tricky in the unpublished Appeals Court decision in *Bortolotti v. Bortolotti (2018)*, decided on April 13, 2018, due to the length of time the couple had spent living together before tying the knot.

According to the Appeals Court, the parties in *Bortolotti* began living together in 1998. They did not get married, however, until 2004. During those six years, the Wife worked, but the Court indicated that "there was evidence that she was economically dependent" on her future husband during the premarital period. The question, therefore, was whether the court should include the six years of unmarried cohabitation in the length of the parties' marriage for the purpose of calculating the duration of alimony.

How Courts Typically Determine the Length of a Marriage: M.G.L. c. 208 s. 48

Because the length of a marriage is something that courts have to determine in every divorce case, the court follow M.G.L.c. 208 s. 48, which instructs courts to count the "…months from the date of legal marriage to the date of service of a complaint or petition for divorce" when calculating the duration of alimony. However—and this was critical for the *Bortolotti* case—the statute also says that a court "*the court may increase the length of the marriage if there is evidence that the parties' economic marital partnership began during their cohabitation period prior to the marriage.*" This language allows the court some discretion in extending the length of marriage depending on the economic circumstances during cohabitation but prior to marriage.

(It should be noted that when the Alimony Reform Act was passed in 2011, many viewed the provision allowing courts to "tack on" previous years of cohabitation to the length of the marriage was intended to benefit same sex spouses who were prevented from getting married in Massachusetts before 2004. The thinking was that same sex spouses who would have gotten married, had it been legal, should not suffer from artificially short alimony under the statute. As the *Bortolotti* case makes clear, however, the effect of the cohabitation provision is certainly not restricted to same sex divorced parties.)

The trial in *Bortolotti* took place in the Barnstable Probate and Family Court before Hon. Robert A. Scandurra. According to the trial judge, because Laura received financial support but did not economically contribute to the relationship, the judge reasoned that an economic marital partnership did not exist that could increase the length of the marriage. Instead, the judge insisted that the financial support had to be mutual for there to be a "partnership." The Appeals Court disagreed.

What is an "Economic Marital Partnership"?

The Massachusetts Appeals Court noted that the statute does precisely define what is meant by "economic marital partnership":

> Section 48 does not specifically define "economic marital partnership," but G. L. c. 208, § 49(d)(1)(ii) … which pertains to general term alimony, authorizes a judge to consider many factors when determining subsequent cohabitation by a recipient spouse, including the "economic dependence of

> [one] person on the other." The Supreme Judicial Court also recently reasoned that "the Legislature intended to use the terms cohabitation, economic marital partnership, and common household" roughly synonymously. Accordingly, if Laura was economically dependent on Robert during their period of cohabitation, there may exist an "economic marital partnership" even in the absence of any financial contribution by her to the relationship. Accordingly, we vacate the alimony award and remand for the judge to reconsider the period of the parties' cohabitation where Laura was economically dependent on Robert in determining the length of marriage for purposes of setting alimony. (Internal citations omitted.)

Alimony duration has proven to be a surprisingly complex area of law since the passage of the Alimony Reform Act. The Appeals Court in *Bortolotti* decided that the terms “cohabitation,” “economic marital partnership,” and “common household” should be read “roughly synonymously,” and therefore, an economic partnership could have existed between the spouses prior to their marriage.

It is important to note that the Appeals Court remanded the decision back to Barnstable court in *Bortolotti* for further proceedings. The Appeals Court rejected the trial judge’s bright-line rule – i.e. that an “economic partnership” required financial contributions from both parties – but left open the possibility that the judge might exclude the six years of premarital cohabitation on other grounds. That said, the Court’s focus on premarital economic dependency – which the trial court judge found was present in *Bortolotti* - suggests that an extension of the length of the marriage will be the proper outcome following a remand.

Tacking on Cohabitation: Economic Dependence a Key Factor

The purpose of alimony is to provide financial support to a former spouse who was economically dependent on the financially dominant spouse during the marriage. Given this purpose, it is perhaps unsurprising that the Appeals Court would view premarital economic dependency as a key factor in determining whether a period of premarital cohabitation should be tacked on to the length of the marriage when calculating the duration of alimony.

In *Bortolotti*, the trial court judge took the exact opposite approach, finding that a period of cohabitation should only be tacked onto the marriage if both parties made similar financial contributions to the premarital household. Of course, alimony is rarely necessary for spouses with equal or roughly equal earning power.

One major takeaway from *Bortolotti* is that parties who are seeking to extend the length of the marriage based on premarital cohabitation should focus closely on whether one party was economically dependent on the other during the premarital period. *Bortolotti* suggests that parties who are economically dependent on a future spouse during the premarital period are more likely to prevail when arguing that premarital cohabitation should be tacked onto the length of the marriage for the purposes of alimony duration.

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