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SJC: Alimony Limited to Marital Lifestyle in Massachusetts

By Nicole K. Levy | October 17, 2017

Family Law Alimony Divorce News

Nicole K. Levy reviews an SJC decision limiting Massachusetts alimony to the lifestyle enjoyed by spouses during the marriage.

In a recent case, *Young v. Young* (2017) the Massachusetts Supreme Judicial Court ("SJC") held that the amount of alimony a former spouse receives should be based on the lifestyle enjoyed by the spouse during the marriage. In a clear and well-reasoned opinion, Chief Justice Ralph D. Gants clarified multiple points of law about alimony in Massachusetts, including how to determine a former spouse's need for alimony, whether alimony should increase after a divorce if the payor's income increases, and when it may be appropriate for a judge to order alimony calculated as a percentage of the payor's income.

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SJC Delivers Clear and Decisive Opinion on Alimony Limits in MA

It's no secret that this blog has occasionally criticized the SJC for issuing dense (some might say *impenetrably* dense) alimony decisions that have sometimes resulted in confusion and unpredictability for judges, attorneys and parties in Massachusetts probate and family courts. I am pleased to say that the Young decision suffers from none of these traits. The opinion is a remarkably clear and cogent exploration of several deceptively complex subjects. Chief Justice Gants sets down several clear markers for Massachusetts alimony practitioners to follow moving forward with an analysis supported by voluminous and well-selected citations.

As an attorney, I generally don't pick sides when it comes to particular issues of law, including alimony. I represent spouses on both sides of the alimony docket. What I do cheer for, however, are well written appellate decisions that advance the law. That is what we have in Young v. Young. Regardless of how one feels about alimony in general, or the specific issues raised in this case, one cannot deny that a well-written decision merits recognition, regardless of the outcome it advocates. Bravo, Mr. Chief Justice.

The Marital Lifestyle vs. the Post Marital Lifestyle: How Much Alimony Should a Former Spouse Pay?

Rather than review the particular details of the trial court case, this blog will focus on capturing portions of the Young opinion that best articulate the issues reviewed in the case. The decision begins with a clear and concise announcement of the Court's rulings:

> We conclude that, where the supporting spouse (here, the husband) has the ability to pay, the need for support of the recipient spouse (here, the wife) under general term alimony is the amount required to enable her to maintain the standard of living she had at the time of the separation leading to the divorce, not the amount required to enable her to maintain the standard of living she would have had in the future if the couple had not divorced. We also conclude that, although there might be circumstances where it is reasonable and fair to award a percentage of the supporting spouse's income as general term alimony to the recipient spouse, those circumstances are not present in this case.

From this summary, we can understand that there were two issues in the case. The first question centers on whether former spouse's "need" for alimony should

be limited to maintaining her lifestyle during the marriage, or whether courts should base future alimony on the lifestyle a spouse would have enjoyed if the parties stayed married. This question is particularly relevant in cases in which the paying spouse's income increases after the divorce. The question being: if an alimony-paying spouse's income doubles after the divorce, should the former spouse's alimony also increase?

Back in March, Attorney Owens previewed the Young decision by focusing on the second issue, so called "self-modifying" alimony order:

> Young appears to [focus] on when courts may enter variable or self-adjusting alimony orders when the obligor's income arises out of bonuses, commission or equity compensation, such as stock options or RSUs.

The question here is whether a judge can enter an alimony order in which the amount of alimony is calculated each year as a percentage of the payor's income. Although we see these provisions quite commonly in negotiated Separation Agreements, the SJC and Appeals Court have historically disfavored judges entering "self-adjusting" orders after trial because such orders cause alimony to automatically increase without considering the alimony recipient's need. While the Courts have conceded that self-modifying alimony orders may be appropriate in very specific cases, the clear message has been that judges should stick to alimony orders based on fixed weekly or monthly payments that do not automatically increase or decrease based on the paying spouse's future earnings.

In Young, the SJC reaffirms the dislike for self-modifying alimony orders. More importantly, the decision adds clarity to the law by reviewing the narrow circumstances in which such a self-adjusting alimony order might be appropriate. This added clarity will aid attorneys and judges by limiting the grounds on which self-modifying alimony orders may be sought.

Why Alimony "Need" Matters Under the Alimony Reform Act

The Massachusetts Alimony Reform Act (ARA) is perhaps best known for its "formula". The ARA presumptively caps alimony awards at 30 to 35% of the difference between the parties' incomes. Thus, if the paying spouse earns $100,000 per year and the receiving spouse earns $0 per year, the ARA caps the amount of alimony the recipient may receive at $35,000.

However, the ARA is more than just a formula. Under Ch. 208, s. 53, the Act reads as follows:

> [T]he amount of alimony should generally not exceed the **recipient's need** or **30 to 35 per cent** of the difference between the parties' gross incomes established at the time of the order being issued. (Emphasis added.)

The "or" is critical here. In setting alimony under the ARA, the amount of alimony is limited in two ways. First, the recipient's *need* for alimony. Second, by the 30-35% cap. What is especially important to understand is that the concept of "need" for alimony predates the ARA for several decades. In other words, there are at least a dozen Massachusetts appellate decisions from the last twenty years defining "need" in the alimony context.

In practice, Massachusetts judges do not robotically calculate alimony using the 30-35% formula presented by the ARA. The requirement that a party prove his or her "need" for alimony is very real, and it is quite common for Massachusetts judges to set alimony considerably lower than the 35% of the difference between the parties' incomes because the recipient fails to prove that he or she "needs" 35% of the payor's gross income. (I place "need" in quotes to emphasis that in the alimony context, "need" has a very particular legal definition. If asked, most of us would say, "yes, of course I *need* an extra $25,000 per year." Suffice it to say that defining "need" in the alimony context is a bit more complicated than this.)

"Need" Defined in *Young*: The Lifestyle at the Time of the Separation Leading to the Divorce

I will not bore you with a detailed review of all of the appellate decisions touching on the "need" for alimony in the last twenty years. What is important is that the Young decision offers us the clearest definition of "need" in the alimony context we could hope for. I will let the decision speak for itself:

> Both the act and the case law interpret "need" in terms of the marital lifestyle the parties enjoyed during the marriage, as established by the judge at the time of the order being issued, in this case, the judgment of divorce. …. Here, given the husband's substantial ability to pay, the determination of alimony rested solely on the wife's needs, that is, the amount necessary to allow her to maintain the lifestyle she enjoyed prior to the termination of the marriage. Where, as here, the husband's income grew considerably over the years and the marital lifestyle grew with it, the wife's need for alimony reflects the need to enjoy the more expensive lifestyle she had grown accustomed to before the marriage ended.

Note the use of underline for the phrase "during the marriage" is **not** my addition; the extra emphasis is found in the opinion itself. We see immediately, that the

Court is not defining the "need" for support in terms such as the need for food, water, housing, etc. Instead, the Court is focusing on the *lifestyle* enjoyed by the spouse during the marriage. If the spouses' lifestyles during the marriage included vacations, fancy cars and expensive meals, then such luxuries are part of the recipient's "need" for alimony after a divorce.

The Interplay Between "Need" and the ARA's 30-35% Cap

After defining "need" in terms of the lifestyle enjoyed during the marriage, the Young Court immediately moves to resolve the biggest problem with defining "need" in terms of maintaining the marital lifestyle. Here's the problem: if a former spouse's "need" for alimony means that he or she has the *right* to maintain the marital lifestyle after the divorce, how can we square this right with this with the 35% "cap" under the ARA, which gives one spouse 65% of the available income and the other spouse only 35% of the income. The Court skillfully sidesteps this paradox:

> Where, as so often happens, the couple's collective income is inadequate to allow both spouses to maintain the lifestyle they enjoyed during the marriage after their household is divided in two through divorce, "the recipient spouse 'does not have an absolute right to live a lifestyle to which he or she has been accustomed in a marriage to the detriment of the provider spouse.'" … Instead, "[t]he judge must consider all the statutory factors and reach a fair balance of sacrifice between the former spouses when financial resources are inadequate to maintain the marital standard of living." … The act presumptively provides that the "fair balance of sacrifice" means that the supporting spouse generally should not be required to pay more than thirty-five per cent of the difference between the parties' gross incomes. [Internal citations omitted]

Why not split the payor's income 50/50? The Court's elegant explanation boils down to this: the ARA is a statute, and the statute is clear: alimony is capped at 35% of the payor's income. Period. Thus, the alimony recipient's right to maintain the lifestyle he or she enjoyed during the marriage is constrained by the ARA's percentage cap.

After the Divorce: Should the Alimony Recipient Receive a Share of the Payor's Increased Earnings After a Divorce?

The Young decision specifically addresses a question that has been troubling attorneys since the ARA becomes law. Namely, what happens if an alimony payor's income dramatically increases after a divorce? Can the recipient file a Complaint for Modification and seek 30 to 35% of the additional income as alimony? The decision answers these questions as follows:

> Even if the parties enjoyed an upwardly mobile lifestyle for the duration of their marriage, nothing in the language of the statute or our case law suggests that the recipient spouse is entitled, by way of alimony, to enjoy a lifestyle beyond what he or she experienced during the marriage.

In short, if a payor's lifestyle increases beyond the lifestyle he or she enjoyed during the marriage, Young makes clear that a recipient is not entitled to enjoy this extra wealth through increased alimony. Interestingly, Young leaves a more subtle question unanswered: what happens if the 35% cap under the ARA prevents a former spouse from fully reaching the marital lifestyle that she enjoyed during the marriage? In this scenario, would the former spouse be entitled to an upward modification in alimony – in order to replicate the former marital lifestyle – if the payor's income doubles?

One common sense interpretation of Young is that it limits future alimony to the "peak" earnings achieved during the marriage. In other words, no alimony should be paid from income earned by the payor that is over and above his or her top earnings from the marriage. I am not sure that Young says exactly this, but the broader principle is clear: a recipient is not entitled to share in a payor's superior post-divorce lifestyle to the extent that the payor's lifestyle is measurably better than the lifestyle he or she enjoyed during the marriage.

Self-Modifying Alimony Orders: Still Disfavored in Most Cases

In Young, the trial judge ordered the Husband to pay alimony to the Wife each year in the amount of thirty-three per cent of his annual gross income, which included base salary and annual bonus, as well as several of the additional components of the Husband's compensation package. The judge found that the parties' spending had increased on an upward trajectory throughout the marriage, consistent with the Husband's ever-increasing income. The judge reasoned that the alimony order – which automatically increased with increases in the Husband's income – should reflect the constantly improving lifestyle the parties enjoyed during the marriage.

The lower court judge's reasoning was actually quite clever here. Previous appellate decisions had not fully defined the "lifestyle enjoyed during the marriage", and the judge filled this gap by finding that the parties' lifestyle was one of constantly increasing wealth and spending. If the Wife was entitled to alimony that allowed her to maintain the lifestyle she enjoyed during the marriage, the judge reasoned, then order for constantly increasingly alimony made sense.

The Young Court does not criticize the judge's reasoning; the decision simply explains that the judge's basis for entering a self-modifying alimony order was insufficiently persuasive where such "percentage-based" orders are generally disfavored.

> The fluctuations in the husband's income in this case do not present a comparable "special case" warranting the judge's percentage-based formula for two reasons. First, given the substantial financial assets available to the husband, the fluctuations in his annual income do not materially affect his ability to pay a fixed alimony award that would meet the wife's needs. Second, as earlier noted, the percentage-based formula was intended to allow the wife's lifestyle to become more lavish than the marital lifestyle as the husband's income increases over time, not to approximate over time the amount needed to meet the wife's need to maintain her marital lifestyle. (Internal citations omitted.)

This is not the first time that the SJC and/or Appeals Court has rejected an automatically-adjusting alimony order entered by a lower court judge. Indeed, the reason these cases continue to arise is because the SJC and Appeals Court have consistently held that even while self-modifying alimony orders are "disfavored", they may be appropriate in special cases. By leaving the door open

in this way, the appellate cases have essentially invited lower court judges to try their hand at self-adjusting orders in cases the judge deems “special”.

What makes Young different from prior decisions is that the opinion offers an expansive review of when self-modifying alimony orders are mostly likely to be appropriate. This should significantly reduce the ambiguity surrounding when such order are (or are not) appropriate, resulting in fewer appeals in the future.

When Are Self-Adjusting Alimony Permissible in Massachusetts?

A complete review of the Court’s analysis of self-adjusting orders would mean reproducing the much of the opinion in this blog. (Readers with this level of curiosity should simply read the opinion itself.) Instead, I will highlight some of the of the Court’s analysis, with internal citations omitted:

> We reject the argument, as we have before in a different context, that a judge lacks statutory authority to order a supporting spouse to pay alimony in an amount that may vary according to variables or contingencies set forth in the order, such as the income of the supporting spouse, the rate of inflation, or, where the spouses reside in different countries, changes in the currency exchange rate.
>
> **Translation**: Judges do have the authority to enter self-modifying alimony orders in special cases.
>
> We do not consider every change in the amount of payment under such an alimony order to be a modification of the judgment, which we recognize would require a showing “by the party favorably affected that conditions [have] changed justifying the modification, and . . . procedural due process for the party adversely affected.”
>
> **Translation**: Not every self-executing change in alimony amounts to a “modification” of the alimony order.
>
> [T]he fact that the statute does not bar alimony orders with variable or contingent provisions does not mean that such orders are “advisable on the merits, or compatible with the fundamental purposes of alimony.” Here, the percentage-based award ran afoul of the act and therefore was an abuse of discretion not because of its variable nature, but because it was intended to award the wife an amount of alimony that exceeds her need to maintain the lifestyle she enjoyed during the marriage.

Translation: Although self-modifying orders are sometimes acceptable, the reason for the order in this case was not acceptable. The Wife's "need" was limited to the lifestyle she enjoyed during the marriage, and she wasn't entitled to a share of future improvements in the Husband's lifestyle through a variable order.

There may be cases in which a variable or contingent award is warranted, but such cases are the exception rather than the rule, and must be justified by the special circumstances of the case. In most cases, setting the amount of alimony at a fixed amount, subject to modification upon a material change in circumstances, is preferable in order to provide "a clean break between the parties" and avoid "continued strife and uncertainty".

Translation: To justify a self-adjusting order, a judge must provide special reasons that outweigh the problems inherent in such orders.

[V]ariable or contingent award may make alimony judgments more difficult to enforce, especially where the variable or contingency is inadequately defined or where it may not be clear whether the contingency has been triggered. … Awarding alimony as a percentage of income may encourage income manipulation in order to reduce the alimony obligation. Relatedly, where alimony is a percentage of income, proving contempt becomes more difficult because, instead of simply proving that payments have fallen short of a specified amount and that the supporting spouse had the ability to pay, the parties may be forced to litigate what is and is not "income." … We note that the judge thought it necessary to appoint a special master, paid for by the parties, to ensure compliance "[d]ue to the complicated nature of . . . the ongoing obligations between the parties regarding the payment of alimony." Not everyone can afford to pay a special master.

Translation: Attorneys seeking self-adjusting orders should address these problems and explain why a self-adjusting order is the best solution despite the concerns inherent in such orders.

We do not suggest that variable or contingent awards are warranted only in extraordinary circumstances. We recognize that returning to court to modify a judgment may be an unnecessary and costly burden where it is based on a foreseeable change of circumstances that can be anticipated in the alimony judgment.

Translation: The Court is not suggesting that self-adjusting orders are impossible to obtain; they are just the exception to the usual rule.

For instance, where the inflation rate is significant, a cost-of-living adjustment based on a specific consumer price index will result in changes to the actual amount of alimony paid, but is intended to keep the original award of alimony constant in terms of real purchasing power. Several Massachusetts cases have affirmed alimony judgments that included cost-of-living adjustments.

Translation: A cost of living adjustment that includes a modest annual increase in alimony over time is an appropriate self-adjusting alimony order.

There may also be special circumstances … such as where the supporting spouse's income is highly variable from year to year, sometimes severely limiting his or her ability to pay, and where a percentage formula, averaged over time, is likely not to exceed the needs of the recipient spouse.

Translation: Intriguingly, this suggests a variable order would pass scrutiny if it unlikely to result in alimony that exceeds the amount required for a spouse to maintain the marital lifestyle. For example, if the recipient's alimony is "capped" at an annual dollar figure that represents the recipient's need, a variable order might pass scrutiny.

In Wooters v. Wooters, 42 Mass. App. Ct. 929, 929-931 (1997), the Appeals Court affirmed a judgment that ordered the husband, who was a partner in a large law firm, to pay alimony in the amount of one-third of his gross employment income because he "was about to undergo a serious operation, and it was uncertain how much he would be able to work," and because his compensation from his law firm "had considerable fluctuations." The court found that these circumstances "presented a special case" that suggested the use of a "self-executing formula."

Translation: Cases involving medical issues for either party often create special concerns that justify unusual orders. Other examples include parties being forced to move overseas for work or when a business owner is forced to close his or her business. In short, unique facts can justify a self-adjusting order.

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