
Removing the Parachute: Recent Trends in Alimony Modification (Part II of II)

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This two-part article reviews recent legislative changes in alimony modification and how courts have interpreted these changes. Part I, which appeared in the last issue of the *American Journal of Family Law*, focused on the legislative changes and court interpretations. Part II discusses practical drafting tips and clauses to be used in settlement agreements both for the economically disadvantaged spouse (assumed to be the wife for purposes of this article) and for the payor spouse (assumed to be the husband for purposes of this article). All references to Tennessee law, where I practice, are for illustration only. Practitioners in other jurisdictions should insert the relevant provisions of their applicable statute.

REPRESENTATION OF THE ECONOMICALLY DISADVANTAGED SPOUSE (PAYEE)

The following are suggested clauses to use when representing the economically disadvantaged spouse.

Make Property Distribution, Child Support, and Spousal Support Interrelated

The parties understand and agree that the provisions of this Agreement relating to the equitable distribution of the marital estate are accepted by each party as a final settlement of the division of the assets and liabilities. Both parties represent that the assets set forth in this Agreement are all of the assets subject to the equitable distribution and that there are no such other assets in the name of either party or held by any other person for the benefit of either party. As

also set forth in the child support and alimony provisions above, the parties acknowledge that the equitable distribution, and the amount of child support and

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alimony provisions of this Agreement are directly related to each other and that Wife only agreed to the limited duration alimony payments herein provided in connection with and in reliance upon the equitable distribution provisions herein provided and child support provided. Wife has relied upon the equitable distribution portion of this Agreement in entering into the limited duration portion of this Agreement. Husband has relied upon Wife's waiver of permanent alimony in entering into the equitable distribution portion of this Agreement. Should the child support be reduced or terminated, then Wife may petition the court to increase the amount of alimony to enable the Wife to enjoy the standard of living as contemplated by statute and case law.

List Factors for Award and Provide Court Facts that Would Have Been Proven, If Modification Petition Filed in Future

Husband shall pay to Wife as alimony *in futuro* the sum of \$ _____ to be paid upon the entry of the Final Decree of Divorce. Husband shall pay the first payment to Wife and continue thereafter until the Wage Assignment is implemented.

Wife has supplied a letter from her psychologist that she is mentally competent.

The alimony shall terminate upon the *earlier* of Wife's death or remarriage, but not upon Husband's death or remarriage. Therefore, Husband shall insure on his life with Wife as owner and irrevocable beneficiary, life insurance policies in the amount of at least \$ _____ million dollars.

The parties agree that Husband will pay his first alimony payment no later than _____, and will pay the monthly alimony amount as follows: one-half of the monthly amount on the first (1st) day of each month and one-half of the monthly amount on the fifteenth (15th) day of each month, until Wife's death or remarriage, whichever occurs first.

The parties agree that Wife is not a candidate for rehabilitation and that it is unlikely that she would be able to achieve a standard of living by her own efforts reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the Husband. Said alimony payments are necessary for wife's support and maintenance and based upon the factors of Tenn. Code Ann. (T.C.A.)

§ 36-5-121(i)(1-12). Had this case gone to court, the husband agrees that the proof would be

- (1) Husband has a high earning capacity, rising to the ranks of Commander in the _____ and now as Test Captain Pilot for _____ earning in excess of \$ _____ per year, and having benefits of retirement plans, profit sharing, stocks, health savings accounts, life insurance policies, wellness programs, and other personal benefits at his employer. Wife is without employment as she has been a homemaker throughout their lives, raising their two children and providing a nurturing environment for husband and children.
- (2) Although both parties have a college degree, Wife has not worked in the work force for over _____ years. Even with educational training, Wife will not achieve an earning capacity that would match or be equal to that of her husband's after the divorce. Husband has _____ years of a military career and continues to be employed at _____, having the ability to earn in excess of \$ _____ per year.
- (3) The duration of the marriage is _____ years.
- (4) Wife is _____ years of age and has seen psychologists to assist her with the breakup of the long-term marriage. Husband is _____ years of age and is in excellent mental health.
- (5) Wife has medical issues and is taking medication for high blood pressure and high cholesterol and is being monitored. Husband's physical condition is excellent.
- (6) Due to the lack of liquid assets, Wife is in need of spousal support to pay her living expenses.
- (7) The parties have had a high standard of living established during the marriage, and Husband continues to have a high standard of living going to trips, staying at nice hotels, and eating at high-end restaurants.
- (8) Wife has made both tangible and intangible contributions to the marriage as initially a wage earner and then when the children were born, as mother and homemaker, which increased Husband's earning power.

- (9) Husband is at fault for the demise of the marriage and has excessively dissipated the marital estate for the last two years.
- (10) This alimony *in futuro* would be taxable to Wife and deductible by Husband.

Secure Alimony and Other Debts Husband Is Responsible for, to Avoid Discharge in Bankruptcy

The parties agree that the alimony *in futuro* is non-dischargeable in bankruptcy as it is a domestic support obligation and the alimony is necessary for the support and maintenance of Wife. In the event the Bankruptcy Court discharges the alimony obligation from Husband to Wife, the parties agree that such a decision by the Bankruptcy Court adversely affects the Wife and as such, Wife shall be entitled to apply to any court of competent jurisdiction for a modification of the support provisions of this Agreement, regardless of the waivers and/or limitations stated in this Agreement. Thus, this Court shall reserve jurisdiction to award alimony in the future to the Wife, as needed.

With respect to each party's responsibility for payment of certain debts and liabilities, and Husband shall hold Wife harmless for the payment thereof, and Husband understands and agrees that his obligation is a nondischargeable support and/or domestic support obligation pursuant to 11 USC 523 (a) (5) and (15) under the Bankruptcy Code, this obligation being part of the final financial agreement. These provisions for alimony and support necessarily include the receipt of those assets and payments of debts. Failure to receive said assets and benefit from said debt payments will gravely impact upon Wife's standard of living and the alimony and support provisions would have been significantly higher but for Wife's reliance on said provisions. Husband stipulates for any subsequent proceeding that said provisions are nondeductible, nondischargeable, nonmodifiable alimony and support necessary for the maintenance of wife.

Make Exceptions to Prohibit under Certain Circumstances Modification, If the Awarded Is the Modifiable Type

Alimony *in futuro* is modifiable upon request of either party pursuant to TCA 36-5-121 (f)(2). However, the parties agree that these facts will not

justify a material and substantial change in circumstances to support a petition to modify the amount of alimony:

- (1) sale of the home,
- (2) a part-time job of Wife,
- (3) the remarriage of Husband, or
- (4) Wife's mother or adult children residing with Wife.

Provide Stipulations of Future Events That Will Justify Increase in Alimony

The parties agree that said alimony shall be increased in the future, when 1) Husband's income reaches \$_____ per year, 2) child support is reduced or eliminated due to the child reaching majority, etc. (these are not limiting facts).

Reserve Alimony Award if Facts Warrant

In light of [cite case and statute], an award of alimony *in futuro* is warranted and because of these reasons [cite reasons], alimony *in futuro* cannot be awarded at this time.

The parties agree that Husband lost his job through no fault of his own, and is without employment. Wife has needs and is a candidate for alimony *in futuro*. The parties agree that Wife should be awarded alimony *in futuro* of \$100 per month until Husband obtains employment, and then the alimony *in futuro* will be increased to the level of Husband's ability to pay.

Secure Alimony with Life Insurance and Make Recipient of Alimony Owner of Policy

Alimony *in futuro* shall terminate upon Husband's death, and Wife shall receive all of the proceeds from the life insurance policy. Husband shall obtain a life insurance policy on himself, naming Wife as owner and irrevocable sole and primary beneficiary of said policy in the amount of no less than \$_____ Million (_____ million dollars) to provide to Wife. Husband shall immediately transfer ownership of said policy to Wife and shall furnish her proof of compliance of this section within thirty (30) days from the date of the request. Should Husband fail to make payments on said life

insurance, Wife shall have an option to continue making payments and to assess the cost of said premium against Husband. Husband shall not have the right to borrow against the life insurance without written permission of Wife.

Upon Husband's death, the life insurance proceeds from Husband's policy shall not be taxable to Wife, as the parties agree that these proceeds are to cover Wife's support and maintenance until her death, and the parties agreed that the alimony would not be taxable to her nor deductible by him.

Should there be any obligation, alimony, child support, life insurance, or other outstanding debt upon the death of Husband, which obligation is not satisfied by the life insurance policy or by Will or Trust, then it will be a claim against the estate of Husband for monies or things due or to become due in the future under this Agreement by the persons entitled to receive those monies or things.

Ensure Husband Has Insurance Policy to Cover the Alimony in Case of Disability

Husband shall cause to be maintained and shall obtain additional disability insurance on himself in the amount of \$_____ ([amount] dollars) per month as nondeductible, nondischargeable alimony necessary for the support and maintenance of Wife. Wife shall have a lien on said proceeds and be named as a beneficiary outlined herein. Husband agrees that said proceeds will not be less than Husband's monthly obligations to Wife. Husband agrees that said proceeds shall be applied first to the obligation to pay alimony and paid to Wife directly by the insurer in the amount of alimony obligations due to Wife.

Upon written request of said Wife or her agent, Husband shall furnish, without charge, proof of compliance with this paragraph within thirty (30) days from the date of such request. In addition, said Wife or her agent is hereby authorized to obtain said documentation of compliance with this paragraph directly from employer or any insurance carrier insuring Husband.

Should Husband fail to make payments on said insurance, Wife has the option to continue making payments on said insurance and to assess the cost of said premiums against Husband. Husband agrees that a judgment shall be awarded against him for the cost of said premiums paid by Wife. Wife shall be the owner of said policy.

A copy of the policies covered or involved in these provisions will be delivered to Wife within

thirty (30) days of the signing of this Agreement. Any failure to provide insurance as outlined above shall also be a claim against the estate of Husband.

EQUALIZE SOCIAL SECURITY PAYMENTS

Beginning when Husband elects to receive Social Security payments, Husband agrees and shall pay to Wife as alimony *in solido* the sum of \$_____ per month on the first day of each month and continuing thereafter on the first day of each month, until his death. Said money represents an equalization of the parties' expected Social Security benefits so that they each receive the same amount of money from the Social Security Administration at their expected retirement age of sixty-six (66) years and six (6) months.

Husband agrees that the sum of \$_____ per month paid to Wife is alimony *in solido* and necessary for the support and maintenance of Wife and is a domestic support obligation. The parties agree, understand, and intend this alimony *in solido* is *nonmodifiable* and is *nondeductible* by the payor and excludable from income of the payee.

Provide Protection for Recipient If Arrearages Exist and Wife Lives with a Third Party

In the event that Wife lives with a third party, the parties agree that the alimony will be suspended until that third party vacates the home. Upon that person's departure, the alimony award will be reinstated at the same level and duration of the initial award.

In the event that Husband is in arrears at the time that Wife remarries, then alimony shall continue at the same level until the arrearages are paid in full before the alimony is terminated.

REPRESENTATION OF THE ECONOMICALLY ADVANTAGED SPOUSE (PAYOR)

The following are suggested clauses when representing the economically disadvantaged spouse (payor).

Outline Rehabilitative Plan in Settlement Agreement

The parties acknowledge that Wife has a college degree in _____ and is rehabilitated; however,

Husband agrees to pay for Wife to further her education and attend and complete law school within the next five (5) years. Wife agrees that she shall only receive the law school tuition costs at the University of _____ beginning Fall of _____ and continuing thereafter until she graduates but no longer than four and one-half years from August, _____. Husband agrees to pay this alimony and pay up to \$_____ per year for books until she graduates or December ____, whichever occurs first. Said payments shall be deductible by Husband and includable as income to Wife. Said payments shall terminate upon Wife's death. Said payments shall not be modified nor extended if Wife has any illness or for any other reason.

Wife shall provide to Husband her grades and the invoice from the school before Husband is obligated to pay Wife for the tuition costs. Should Wife not receive a B or better grade point average, then Husband does not have any financial responsibility to pay for Wife's law school tuition or books.

Provide Tax Deduction for Payor

The parties agree that said alimony *in futuro* shall be deductible from income for the payor, and the alimony shall be includable as income for Wife pursuant to Internal Revenue Code Section 71(b). If the Internal Revenue Service or any other taxing authority finds that the alimony payments are not deductible by the payor, then the parties agree to modify the alimony amount so that the net economic effect to the payor will be as though the alimony payments were fully deductible to the payor.

Provide for Modifiability of Alimony Awards

The monthly payment of \$_____ shall begin on _____ and continue thereafter on the first day of each month through _____, when Husband turns 65 years of age. The parties agree that upon a court order, the alimony *may* be reduced to an alimony *in futuro* amount that is equivalent to one-quarter of Husband's gross income from all sources not to exceed Two Hundred Thousand Dollars (\$200,000) per year, until Wife's death or remarriage or Husband reaches the age of 65 years. Gross income is defined as income, earned or unearned, from all sources as defined by the Tennessee Child Support Guidelines.

The parties agree that one of the following conditions would be a material and substantial change

of circumstances that *may* cause a reduction in alimony *in futuro*:

- (1) Husband begins receiving Social Security income or turns 65 years of age and retires from the practice of medicine, whichever occurs first;
- (2) Husband suffers from a massive heart attack and his income is significantly impacted, though Husband agrees to carry disability insurance as outlined above;
- (3) Husband changes employment that results in a sale of his practice and working for a professional group outside of _____.

In such an event as outlined above, the parties agree that Husband may file a Petition to modify alimony and show that one of these conditions exist. The court would then consider all of the factors of T.C.A. Section 36-5-121 to determine whether to modify the amount of alimony. If the court deems it appropriate to modify the alimony, the parties have already agreed that the amount Wife would receive is 25 percent of Husband's gross income from all sources but no less than \$_____ per month or \$_____ per year in alimony *in futuro*. Gross income would be defined as income is defined under the Tennessee Child Support Guidelines.

Define When Alimony Payments Terminate—What 'Remarriage' or 'Living Together' Means

Alimony payments shall terminate upon the remarriage of Wife. Wife shall immediately upon remarriage notify Husband. Failure of Wife to timely give notice of remarriage shall allow the Husband (obligor) to recover all amounts paid as alimony to Wife after the date of marriage. Remarriage includes both the ceremonial marriage and cohabitation with an unrelated person for a period of more than thirty (30) days. Subsequent divorce, annulment, or separation shall be immaterial in this determination, as once the court terminates alimony, the parties agree the court shall lose subject matter jurisdiction to award any further alimony payments to Wife.

Wife shall immediately notify Husband if she is cohabitating with a third party for a period of more than thirty (30) days. Failure of Wife to

timely give notice of cohabitation shall allow the Husband (obligor) to recover all amounts paid as alimony to Wife after the date of cohabitation and all of his reasonable and necessary litigation costs and attorney fees in having to prove that Wife is cohabitating with a third person. Subsequent removal of the third party from the home of the recipient or separation of the parties shall be immaterial in this determination that alimony terminates.

Provide for Award of Attorney Fees and Expenses If Party Seeks to Modify Alimony Which Is Not Modifiable, or to Obtain Alimony Waived in Agreement

The parties waive alimony, including but not limited to alimony *in futuro*, alimony *in solido*, rehabilitative alimony, and transitional alimony. If either party files a petition for alimony, then the other party shall be awarded all of his or her reasonable and necessary attorney fees and suit expenses for having to defend the lawsuit.

OR

The parties agree that the alimony is not modifiable. If either party files a petition to modify alimony, then the other party shall be awarded all of his or her reasonable and necessary attorney fees and suit expenses for having to defend the lawsuit.

Provide for End Date of Alimony or Review Date by Court

The parties agree that the alimony shall terminate upon the Husband's reaching the age of full retirement as defined by his then-current employer. If Husband receives a severance package, said money is not to be used for alimony purposes, but will be Husband's income to live on in the future.

Ensure Recipient Understood and Was Competent to Enter Agreement

Neither party at the time of this Agreement is under the influence of any intoxicant or drug, legal or illegal, nor is either party experiencing any mental problems or conditions that would affect his/her judgment other than the stress normally to be expected in a divorce. Wife has supplied to Husband a letter from her psychologist that stated that Wife is mentally competent to enter into this Agreement. Both parties warrant and acknowledge that they are competent to enter into a legally binding contract, and they know the nature, extent, and character of their estate and know the consequences of their actions.

Deduct Mortgage Payments and Insurance from Alimony Payments, If Not Paid by Recipient

Wife shall pay the mortgage payments and the homeowners' insurance premiums as they become due until the home sells or is refinanced, removing Husband's name from the mortgage. In the event that Wife fails to timely pay the mortgage and insurance premiums, Husband may pay the creditors and then deduct that amount from the monthly alimony payments he pays to Wife.

Seek Injunction from Court, If Statute Does Not Allow Retroactive Modification from Date of Event

The parties agree that if any of these future events would occur, the parties agree that the court may retroactively award alimony to the date of the occurrence of the event rather than the date of its ruling on modification. The parties further agree that the payor may seek injunctive relief from the court and pay the alimony obligations into the court clerk's office, pending the court's determination on the petition to modify alimony.