

November 2015

Alimony's Job Lock

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Recommended Citation

Ryznar, Margaret (2015) "Alimony's Job Lock," *Akron Law Review*: Vol. 49 : Iss. 1 , Article 3.

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ALIMONY'S JOB LOCK

*Margaret Ryznar**

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I. INTRODUCTION

Alimony has been under attack in many states. Alimony state laws used to be generous, to the tune of lifelong spousal support. These days, very few states continue to allow lifelong, permanent alimony, and instead, alimony is limited by time or circumstances.¹

Perhaps the decline of alimony is partially due to the diminishing view of marriage as entailing a lifetime commitment.² Or, perhaps it is due to the increasingly negative view people take of this frequently inflexible financial obligation that did not allow consideration of more nuanced factors. Whichever the reason, alimony laws have been pruned

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1. Joanna L. Grossman, Book Review, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 685 (2015).

2. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 188 (2015).

by reform.³

Interestingly, there is one aspect of alimony that has received less attention—its job lock nature. If a job change is accompanied by a salary decrease, the courts will not often readjust the alimony obligation and will instead impute the higher income to the obligor. This potentially prevents alimony obligors from changing jobs, also becoming an issue when an obligor becomes unemployed, underemployed, or retired.

This Article introduces the term “job lock” to describe this situation, borrowing it from the health care context where job immobility due to health insurance concerns has received significant scrutiny and, ultimately, resolution. Such resolution has not yet been achieved in the alimony context—in some states known as maintenance—wherein one spouse pays for the support and maintenance of the other spouse after divorce, either by a lump sum or on a continuing basis. It is often awarded in addition to the property division between the spouses and child support.

This Article draws attention to job lock in the alimony context, proposing a balancing test to assist courts interested in alleviating job lock under certain circumstances. Accordingly, Part II of this Article describes the history of job lock due to health insurance concerns. Part III considers job lock in family law—Part III.A examines the background, trend, calculation, and modification of alimony, while Part III.B considers other property distribution between the spouses as well as child support for any children of the marriage. Part IV introduces various factors for a proposed balancing test for alimony obligations under certain circumstances. Finally, Part V concludes by exploring the benefits of a balancing test in the landscape of alimony law.

II. JOB LOCK IN HEALTH CARE

The term “job lock” initially appeared in the health care context in the 1990’s to describe a scenario created by the framework that linked

3. “[T]he Massachusetts Alimony Reform Act (Alimony Reform Act of 2011) is the latest and the most comprehensive of such legislation.” Charles Kindregan, *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK U. L. REV. 13, 14-15 (2013). “The last ten years or so has seen a tide of efforts in various states usually titled as alimony ‘reform’ initiatives, but really aimed more at eliminating permanent alimony or limiting it to the greatest possible degree.” Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MATRIM. LAW 153, 160 (2014-2015). However, “[m]any legal scholars and practitioners remain in favor of alimony even though it lacks a dominant, accepted theoretical framework.” Emily M. May, Comment, *Should Moving In Mean Losing Out? Making A Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 DUKE L.J. 403, 411 (2012).

employment with health insurance.⁴ Under this framework, people with pre-existing health care issues, or with such family members, were discouraged from seeking new jobs that would require them to switch insurance plans. This was because employees may not have necessarily received identical coverage when changing jobs, and pre-existing conditions were not necessarily covered under the new policy.⁵ Simply put, job lock was the “lack of mobility out of jobs that offer[ed] health insurance.”⁶

This concept of job lock in the health care context received much attention and was subject to relatively extensive empirical work. In the 1990's, several studies analyzed whether job lock actually existed and its exact extent. One such study estimated that job lock reduced the voluntary turnover rate of those with employer-provided health insurance by 25%.⁷ In a less academic poll by CBS/New York Times, 30% of respondents said that they, or someone in their household, maintained a job that they wanted to leave mainly because they did not want to lose their health coverage.⁸ Another academic study found that “‘continuation of coverage’ mandates, which grant people the right to continue purchasing health insurance through their former employers for a specified period of time after leaving their jobs, are associated with a significant increase in the job mobility of prime age male workers.”⁹ Another study determined that chronic illness decreased job mobility by approximately 40% versus similar workers who did not rely on their employer for health insurance coverage.¹⁰ Economists also speculated

4. Jonathan Gruber, *A Shot in the Arm, How Today's Health Care Reform Can Create Tomorrow's Entrepreneurs*, WASHINGTON MONTHLY, May/June 2009, available at <http://www.washingtonmonthly.com/features/2009/0905.gruber.html>.

5. In one 1990's study, 57% of employers excluded pre-existing conditions, typically for six months to two years, in their health plans. Paul Cotton, *Preexisting Conditions “Hold Americans Hostage” to Employers and Insurance*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, CCLXV (1991), 2451-53. In the 1990's, more than 64% of non-elderly insured people in the United States had health insurance through an employer. Paul Fronstin, *64.2 Percent of Nonelderly Americans Have Employment-Based Health Insurance, 18.3 Percent are Uninsured*, 19 EBRI NOTES, no. 11 (1998) at 1.

6. Jonathan Gruber & Brigitte C. Madrian, *Health Insurance and Job Mobility: The Effects of Public Policy on Job-Lock*, 48 INDUS. & LAB. REL. REV. 86, 86 (1994).

7. Brigitte Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 QUARTERLY J. ECON. 27, 28 (Feb. 1994).

8. *Id.* (citing NEW YORK TIMES, September 6, 1991).

9. Gruber & Madrian, *supra* note 6, at 86. “This finding suggests that ‘job-lock’—lack of mobility out of jobs that offer health insurance—arises in large part from short-run concerns over portability rather than from long-run problems.” *Id.*

10. Kevin Stroupe, et al., *Chronic Illness and Health Insurance*, POL'Y ANALYSIS & MNGT. 525, 525 (2001).

- ~~Related~~ Job Lock

that the connection between employment and health insurance discouraged the would-be self-employed from becoming entrepreneurs.¹¹ However, some studies found less job lock than generally reported but found that the phenomenon did exist.¹²

Federal legislation has taken aim at job lock in the health care context. For example, the Health Insurance Portability and Accountability Act addressed portability of health insurance, especially for individuals with pre-existing medical conditions.¹³ More recently, Nancy Pelosi partially justified the Affordable Health Care Act as eliminating job lock:

[The ACA] will unleash tremendous entrepreneurial power into our economy. Imagine a society and an economy where a person could change jobs without losing health insurance. Where they could be self-employed or start . . . a small business. Imagine an economy where people could follow their passions and their talent without having to worry that their children would not have health insurance, that if they had a child with diabetes who was bipolar or a pre-existing medical condition in their family, that they would be job-locked. Under this bill, their entrepreneurial spirit will be unleashed.¹⁴

The Health Care Act was even described as easing the calculation of alimony, which in its own way creates job lock, considered next.¹⁵

III. JOB LOCK IN FAMILY LAW

Although job lock also arises in family law, it has not received the

11. Robert W. Fairlie, Kanika Kapur, & Susan Gates, *Is Employer-Based Health Insurance a Barrier to Entrepreneurship?*, 30 J. OF HEALTH ECON. 146 (2011).

12. See, e.g., Mark Berger, et al., *Is There Job Lock? Evidence from the Pre-HIPAA Era*, 70 SOUTHERN ECON. J. 953, 974 (2004) (finding that job lock is not a pervasive problem in the United States); Kanika Kapur, *Impact of Health on Job Mobility: A Measure of Job Lock*, 51 INDUS. & LAB. REL. REV. 282 (1997) (concluding that by using different statistical computations, health insurance does not have a significant impact on job mobility); Alan C. Monheit & Philip F. Copper, *Health Insurance and Job Mobility: Theory and Evidence*, 48 INDUS. & LAB. REL. REV. 68, 68 (1994).

13. Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

14. Transcript, Awaiting Critical Vote on Health Care; Boehner, Pelosi Make Final Appeal on Health Care; House Passes Health Care Reform, (March 21, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1003/21/se.10.html>.

15. In fact, the Affordable Care Act directly impacts alimony. "Health care costs for dependent spouses can prevent cases from settling or can often cause the divorce process to last much longer than would otherwise be necessary. With greater availability of health insurance at a more predictable, lower cost, the ACA should make it easier to calculate these costs when determining alimony payments." Christian Badali, *The Affordable Care Act's Top Five Impacts on Divorcing Couples*, 36-JUN PA. LAW. 38, 42 (2014).

same attention as the job lock in health care law. Job lock in family law is not surprising, and, in many circumstances, is necessary given that the family serves as the most important source of financial support for many people.

Much of family law therefore concerns itself with property division and child support, which both attempt to deal with the distribution of property among family members. This has provided family members certain rights and privileges, such as financial support. Although family law is in the domain of the states and therefore generalizations are difficult,¹⁶ family law has basic mechanisms to ensure that the family's resources are used to support the family members, and alimony is one of those methods. While many financial obligations limit people's career choices, alimony does so particularly because of its ongoing nature.¹⁷

In family law, there is a duty of support of family members.¹⁸ Indeed, the traditional view of families is as economic support for its members,¹⁹ but this is limited by the nonintervention doctrine, which

16. *But see* Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 255 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain). Justice Antonin Scalia has expressed concern about the increasing federalization of family law: "I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people." *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

17. Another example of how divorce limits adults' lives and careers are the state relocation statutes. J. Thomas Oldham, *Limitations Imposed by Family Law on a Separated Parent's Ability to Make Significant Life Decisions: A Comparison of Relocation and Income Imputation*, 8 DUKE J. GENDER L. & POL'Y 333, 339-40 (2001).

For an example of a relocation notice statute, see IND. CODE § 31-17-2.2-1 (West, Westlaw through First Reg. Sess. 2015):

"(a) A relocating individual must file a notice of the intent to move with the clerk of the court that:

- (1) issued the custody order or parenting time order; or
- (2) if subdivision (1) does not apply, has jurisdiction over the legal proceedings concerning the custody of or parenting time with a child;

and send a copy of the notice to any nonrelocating individual."

18. This is one of most notable differences between marriage and cohabitation. Financial division and support upon the break-up of cohabitants is relegated to contract law and equitable remedies. *See, e.g.*, Anna Stepien-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. REV. 373, 393 (2010).

19. *See, e.g.*, Shelley A.M. Gavigan, *Something Old, Something New? Re-Theorizing Patriarchal Relations and Privatization from the Outskirts of Family Law*, 13 THEORETICAL INQUIRIES L. 271, 289 (2012) ("It is important to remember here that the primary responsibility for economic support of family members has always rested with the family, in particular, with the male breadwinner."); Alicia Brokars, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 34 (2012) ("With different background principles in place, many men constitute themselves distinctly as breadwinners, taking pride in providing the primary economic support to the family as a way of caring for and connecting with their partner and their children . . ."). *See*

prevents courts from adjudicating issues arising in ongoing marriages.²⁰ Therefore, it is only in the marriage breakdown that a court becomes involved. Often, the court will impose a financial commitment at the time of the divorce—such as a financial transfer from one spouse to the other as in alimony—which never previously existed. Thus, the duty of support is enforced during a divorce case when the couple brings the issue to a court’s doorstep.²¹ The increasing number of divorces, approaching a rate of 50%, has resulted in judicial intervention for more people.²²

An exception to the lack of judicial intervention in marriage is the doctrine of necessities, wherein courts intervene to ensure that the earning spouse is responsible for the payment of expenses incurred by the non-earning spouse for those things that are necessary for the family.²³ Necessity is determined by examining factors such as the spouses’ means, social position, and circumstances.²⁴

In sum, courts usually impose property transfers on spouses during their divorce, not their marriage. Nonetheless, there often remains inequality in the economic situations of the spouses after divorce, which alimony seeks to address.²⁵

also Dan Huitink, Note, *Forced Financial Aid: Two Arguments as to Why Iowa’s Law Authorizing Courts to Order Divorced Parents to Pay Postsecondary-Education Subsidies Is Unconstitutional*, 93 IOWA L. REV. 1423, 1426 (2008) (“Fortunately, many students receive financial aid in the form of loans, grants, and scholarships from the government and academic institutions themselves. Nevertheless, this aid remains limited because the federal government, colleges, and universities still ‘consider it primarily the family’s responsibility to pay for school.’ Therefore, they limit students’ financial-aid packages to the amount their families—not the students themselves—are unable to pay. Importantly, this limit applies regardless of whether the students’ families actually contribute to their college expenses.”) (citation omitted).

20. One married couple could not agree on the education of the child and brought the case to court, but the Alabama Supreme Court held that it lacked jurisdiction in “the settlement of a difference of opinion between parents as to what is best for their minor child when the parents and child are all living together as a family group.” *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888-89 (Ala. 1958).

21. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 236 (2013).

22. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 52 NATIONAL VITAL STATISTICS REPORTS: BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2003 1 (2004), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf (reporting that there were 3.8 divorces per every 7.5 marriages in 2003); Margaret Berger Strickland, Comment, *What’s Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989, 990 (2005) (“[I]n 2003, for every two marriages, there was a divorce.”).

23. Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn*, 58 LA. L. REV. 73, 94 (1997).

24. *Id.*

25. In 1993, for example, the mean income for divorced American mothers was \$17,859,

A. *Alimony*

Alimony, in some states known as maintenance, is the payment by one spouse for the support and maintenance of the other spouse after divorce, either by a lump sum or on a continuing basis. It is often awarded in addition to the property division between the spouses and child support.

1. Background on Alimony

The concept of alimony arrived to the colonies from England, where it was available in a divorce from bed and board, a legal separation wherein the husband was still held accountable for financially providing for the wife.²⁶ Alimony eventually became available in absolute divorces that severed the legal ties between spouses. Justifications for alimony included the need for damages for breach of the marriage contract, compensation, unpopularity of using taxpayer support for the lower-income spouse, and division of the economic benefits the marriage reaped.²⁷

Alimony, like all post-divorce property distributions, was a direct result of the common law duty to support a spouse.²⁸ However, alimony today is often a statutory creature, with state statutes dictating the circumstances for alimony.²⁹

A similar concept of support, called palimony, applies to cohabiting couples. The first court to recognize palimony in the United States did so in 1976 when Michelle Triola Marvin sued actor Lee Marvin after seven years of cohabitation.³⁰ At the time of the case, courts denied financial relief to cohabitants for public policy reasons. However, the *Marvin* court noted that social norms were changing, and in a watershed decision, decided to assign property consequences to cohabitations. Upon remand of the case, the trial court judge awarded Michelle

although for divorced fathers it was \$31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1996). *But see* Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 J. HUM. RESOURCES 411 (2004) (suggesting that divorced women live in households with more income per person than never-divorced women).

26. *Mani v. Mani*, 869 A.2d 904, 908-09 (N.J. 2005).

27. *Id.* at 910-11.

28. "Although an absolute right to alimony never existed in Massachusetts law, for many years in actual practice, courts tended to view alimony as a method of enforcing a husband's marital obligation to support his wife." *See* Kindregan, *supra* note 3, at 15.

29. *Id.* at 18.

30. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

\$104,000 in rehabilitative alimony given the California Supreme Court's allowance of equitable remedies in such cases, but the appellate court overturned the award.³¹ Most courts across the country now follow *Marvin's* approach, although some states continue to refuse compensation to cohabitants on public policy grounds.³²

Unlike the areas of property division and child support, there have not been universal methods for calculating alimony.³³ For example, in property division, many community states employ a presumption of equal division of property between divorcing spouses, while certain equitable distribution states have replaced judicial discretion in property division with such presumptions as well.³⁴ Child support award amounts are even less discretionary, with each state instituting child support guidelines that are presumptively correct.³⁵

Upon determining alimony in divorce,³⁶ there is often discussion of

31. *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

32. "Not all states have been eager to expand dissolution rights to cohabiting intimate partners who neither marry nor contract for marriage-like benefits. A few states reject the theories described above as disingenuous attempts to create contracts where none really exist in order to avoid their state laws prohibiting the recognition of common law marriages." Adrienne Hunter Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMP. L. 151, 158 (2014). See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979) ("The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State."). A subsequent Illinois Court of Appeals case questioned this position. *Blumenthal v. Brewer*, 24 N.E.3d 168 (Ill. App. Ct. 2014). This decision is currently being appealed to the Illinois Supreme Court.

33. *But see* Mary Kay Kisthardt, Re-thinking Alimony: The AAMLs Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 J. AM. ACAD. MATRIM. LAW 61, 73 (2008) (noting that ALI recommends a formula based on a specified percentage of the difference in the spouses' post-divorce incomes for a period of time that depends on the length of the marriage). See also Twila Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 38-51 (2004) (describing many of the existing guidelines); Willick, *supra* note 3, at 181.

34. "The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence." IND. CODE § 31-15-7-5 (West, Westlaw through First Reg. Sess. 2015).

35. The Child Support Enforcement Amendments of 1984, 42 U.S.C. §§ 651 et seq. (2000 & Supp. 2005) required states to establish numerical formulas to help judges set child support awards. Family Support Act of 1988, 42 U.S.C. § 667(a), (b)(2) (Westlaw through P.L. 114-61 (excluding P.L. 114-52, 114-54, 114-59, and 114-60)). If the states did not have the guidelines instated by 1987, they would lose a percentage of federal welfare funds. The Family Support Act of 1988, 42 U.S.C. § 667 also required states to use the guidelines as a rebuttable presumption for child support awards. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 195 (2009). In other words, now these child support guidelines are presumptively correct. State guidelines often do not exist in low- and high-income ranges, and judges thus have discretion in such cases. Margaret Ryznar, *The Child Support Obligations of High-Income Parents*, 43 HOFSTRA L. REV. 481 (2014).

36. During marriage, the courts do not intervene. But in the limited exceptions when they do, such as under the doctrine of necessities, the courts may look to the standard of living as well. See *supra* note 24.

the family's standard of living before and after the marriage.³⁷ This is also seen as true for children, who are entitled to have their reasonable needs provided by the noncustodial parent until the age of majority unless there is a postsecondary educational support order in a divorce or paternity case.³⁸

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Marriage and Divorce Act (UMDA) in 1970. This is a uniform act on which many state alimony statutes are based. The UMDA recommends that courts consider the following factors in making decisions about alimony awards without considering fault: (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet her own needs while meeting those of the spouse seeking maintenance.³⁹

However, under the UMDA, a court may award alimony in the first

37. Despite these protections, many households headed by divorced women are at a major financial disadvantage. In 1993, the mean income for divorced American mothers was \$17,859, while for divorced fathers it was \$31,034. LaFrance, *supra* note 25, at 5-6; *but see* Bedard & Deschênes, *supra* note 25, at 413 (arguing that divorced women live in households with more income per person than never-divorced women). *See also* Margaret F. Brinig, *Contracting Around No-Fault Divorce*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 275, 277 (F.H. Buckley ed., 1999) ("A great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . ."). Furthermore, at least one study has supported the view that divorced parents contribute less to their children's education. Huitink, *supra* note 19, at 1426-27 (citing *What Can You Do If Your Parents Refuse to Help?*, FINAID, <http://www.finaid.org/otheraid/parentsrefuse.phtml> (last visited Oct. 1, 2015)) (highlighting a study that showed that 29% of children with divorced parents received parental support for college expenses versus 88% of children from intact families).

38. *See, e.g.,* White v. Marciano, 190 Cal. App. 3d 1026, 1031 (1987) ("Generally, children are entitled to be supported in a style and condition consonant with the position in society of their parents. A parent's duty of support does not end with the furnishing of mere necessities if the parent is able to afford more. Support must be reasonable under the circumstances. How much 'more,' i.e. what amount is 'reasonable' is defined in relation to a child's 'needs' and varies with the circumstances of the parties.") (internal citations omitted). *See also infra* Part III.B.2.

39. Uniform Marriage and Divorce Act, 1970. The United States Supreme Court has held that gender-based alimony statutes violate the Equal Protection Clause of the United States Constitution. Orr v. Orr, 440 U.S. 268 (1979).

place only if the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. The Act breaks away from the traditional reliance upon maintenance as a primary means of support for divorced spouses.

Alimony has become unpopular in many states, with limits being placed on its availability. For example, in Indiana, alimony is available only in three circumstances: (1) for as long as a spouse cannot support herself due to a physical or mental incapacity; (2) when a spouse cannot support herself due to a physically or mentally incapacitated child; or (3) up to three years of “rehabilitative maintenance” based on (a) the educational level of each spouse, (b) interruptions in a spouse’s education, training, or employment based on homemaking or caregiving responsibilities, (c) the earning capacity of each spouse, and (d) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment.⁴⁰ In other states, legislatures have entirely eliminated permanent alimony. This represents the trend of limits placed on alimony by the states in recent years.

2. Modification of Alimony

While it is not always easy to receive an alimony award, modification of the award by the obligor is often difficult.⁴¹ Many states take the view that alimony terminates when the recipient remarries,

40. IND. CODE § 31-15-7-2 (West, Westlaw through First Reg. Sess. 2015). However, these limits and clear guidelines have not eliminated litigation on alimony. In the time period of October 1, 2012 to September 30, 2013, litigants brought several cases on alimony in the Indiana courts. *See, e.g., Banks v. Banks*, 980 N.E.2d 423 (Ind. App. 2012); *Alexander v. Alexander*, 980 N.E.2d 878 (Ind. App. 2012).

41. *See, e.g., IND. CODE § 31-15-7-3* (West, Westlaw through First Reg. Sess. 2015): “Provisions of an order with respect to maintenance ordered under section 1 of this chapter (or IC § 31-1-11.5-9(c) before its repeal) may be modified or revoked. Except as provided in IC § 31-16-8-2, modification may be made only:

- (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
- (2) upon a showing that:
 - (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
 - (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.”

presumably because a new spouse takes on the duty of support.⁴² It is more controversial whether alimony ends when a former spouse cohabits with another.⁴³

There are several consequences that frequently arise in alimony cases that challenge judges to determine whether a resulting modification of alimony is appropriate. These consequences all relate to a decrease in an alimony obligor's income.

The first is unemployment, which has been a common factor in many cases, especially during the recent recession and in the subsequent recovery. The unemployment rate for the general American population hovered at approximately 9% after the economic crisis began in 2007.⁴⁴ Meanwhile, unemployment among young people and college students surged to almost 20% in 2010.⁴⁵ A resulting decrease in the income of an alimony obligor prompts the question of whether the alimony award should be modified or terminated.

In cases of unemployment, courts are sensitive to whether the unemployment is voluntary in order to avoid alimony payments.⁴⁶ For example, one Utah court noted that "a spouse is voluntarily unemployed or underemployed when he or she intentionally chooses of his or her own free will to become unemployed or underemployed."⁴⁷ In this case, while the husband's unemployment was involuntary, the court looked to the payor's efforts to find new employment to determine whether the spouse's continued unemployment was voluntary. Ultimately, the court remanded for more detailed findings.⁴⁸ In *Banks v. Banks*, the Indiana

42. Kindregan, *supra* note 3, at 29-30. *But see* Roberts v. Roberts, 644 N.E.2d 173, 179 (Ind. App. 1994) (noting that remarriage, standing alone, is insufficient to modify alimony because "[t]he extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration [of maintenance] as well as its amount."). *Id.* (quoting Myers v. Myers, 560 N.E.2d 39 (Ind. 1990)).

43. *See, e.g.*, Myers v. Myers, 560 N.E.2d at 43 ("[M]ere cohabitation, standing alone, is not so substantial a change of circumstances as to warrant modification of the maintenance provisions of a separation agreement incorporated into a dissolution decree" even though ex-wife was cohabiting with a doctor with a six-figure income.)

44. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, Employment Situation Summary (Feb. 3, 2011), available at <http://www.bls.gov/news.release/empsit.nr0.htm>.

45. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, Employment and Unemployment Among Youth—Summer 2010 (Aug. 24, 2011), available at <http://www.bls.gov/news.release/youth.nr0.htm>. In July 2010, the share of young people employed was the lowest July rate on record, which began in 1948. *Id.*

46. "A threshold inquiry into whether the spouse is voluntarily unemployed or underemployed should be concluded before imputing income to the paying spouse." 24A Am. Jur. 2d Divorce and Separation § 695 (2015).

47. Rayner v. Rayner, 316 P.3d 455, 458 (Utah Ct. App. 2013).

48. *Id.* at 463.

Court of Appeals affirmed the lower court's reduction in spousal maintenance due to the incapacitation of the obligor, determining that the reduction was justified by the former husband's deteriorating health that resulted in unemployment and bankruptcy.⁴⁹

Somewhat linked to unemployment, and also common during the recent recession and following years, is underemployment. This occurs when people work for pay below their maximum earning capacity. Again, the task for the courts is to determine whether the underemployment is voluntary in order to reduce alimony payments, or whether it is involuntary and therefore not the fault of the obligor. In one Louisiana case, the court listed factors for determining spousal support, including earning capacity.⁵⁰ The court also stated that "difficulty in finding employment suitable for the spouse's age, training, and ability is a proper consideration in determining whether a claimant is voluntarily underemployed" for spousal support purposes.⁵¹

If a career change reduces an obligor's income, the question arises whether the alimony obligation should be reduced as well. In one California case, the court concluded that when the former husband chose to attend medical school instead of maintaining his employment as a pharmacist, he "did not have [the] right to divest himself of earning ability at [the] expense of [his] former wife and two minor children."⁵²

There are also cases of voluntary impoverishment.⁵³ In a Maryland case, when a former spouse purposely retired from a high paying position and transferred stock to relatives immediately following the separation from his wife, the court found him to have voluntarily impoverished himself to fraudulently deprive his ex-wife of alimony.⁵⁴

In other cases, however, people retire in good faith and experience income decreases. In Colorado, a court offered several factors to consider in evaluating a situation of early retirement. Specifically, a court should consider whether the decision to retire was made in good

49. Banks v. Banks, 980 N.E.2d 423, 428 (Ind. App. 2012).

50. Shirley v. Shirley, 127 So. 3d 935, 941-42 (La. Ct. App. 2013).

51. *Id.* at 942.

52. In re Marriage of Ilas, 16 Cal. Rptr. 2d 345, 347 (Cal. Ct. App. 1993). Many of these reductions in income are also seen in cases to reduce child support. For example, in *Goldberger v. Goldberger*, 96 Md. App. 313 (Md. Ct. Spec. App. 1993), the court applies a clearly defined set of factors to determine whether a parent is voluntarily impoverished. *Goldberger*, 96 Md. App. at 327-28. Once it has been determined that the parent is voluntarily impoverished, a second set of factors is used to determine the amount of potential income. This information is used to determine child support. *Id.*

53. See, e.g., Colleen Marian Halloran, Comment, *Petitioning a Court to Modify Alimony When a Client Retires*, 28 U. BALT. L. REV. 193, 226-27 (1998).

54. Colburn v. Colburn, 15 Md. App. 503, 515-16 (Md. Act. Spec. App. 1972).

faith, as well as the obligor's age, health, and the practice of the industry in which the obligor was employed.⁵⁵

Across the United States, courts have considered whether the obligor's retirement, regardless of whether it was foreseeable or voluntary, constitutes a substantial and material change in circumstances to justify modification of an alimony award.⁵⁶ If a court determines that a modification of alimony is not appropriate despite an obligor's decreased income, job lock is created because the court expects the obligor to continue producing a certain amount of income, even if it exceeds current actual income.

It is possible for courts to award orders exceeding a person's income due to the ability to impute income. For example, a court can examine a person's income from previous years, or impute income according to what that person could earn in employment equal to his or her capabilities.⁵⁷ Further, courts have imputed income from a second job or secondary source when that income was previously earned on a recurrent or steady basis.⁵⁸ Imputation also occurs in the child support context, such as when a party is voluntarily unemployed or underemployed.⁵⁹ Therefore, although factors such as unemployment and retirement decrease the income of an alimony obligor, the courts may continue to expect a certain amount of income earned by the alimony obligor by imputing it, thereby creating job lock. The question is whether this job lock can be eased under certain circumstances.

B. Other Property Distributions

Alimony is only one method to distribute property within a family after a divorce. It is rarely awarded in a vacuum and is instead one piece to the property distribution puzzle. Often today, the more significant property distributions among divorcing spouses are property division and child support.

1. To Protect the Spouse

There are several property distributions that protect a lower-income

55. *In re Marriage of Swing*, 194 P.3d 498, 501 (Colo. App. 2008).

56. *Bogan v. Bogan*, 60 S.W.3d 721, 725 (Tenn. 2001).

57. *Hayden v. Hayden*, 662 So. 2d 713, 716 (Fla. Dist. Ct. App. 4th Dist. 1995), as clarified, (Nov. 15, 1995); *In re Marriage of Elies*, 618 N.E.2d 934, 941 (Ill. App. 1st Dist. 1993).

58. *Blackmon v. Blackmon*, 969 So. 2d 426, 429 (Fla. Dist. Ct. App. 1st Dist. 2007).

59. Laura W. Morgan, *CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION*, § 5.05 *Voluntary vs. Involuntary Act* (2015).

spouse, alimony being only one. The more substantial distribution is the property division, which often proceeds in two stages. The first is determining the assets to be divided. This is governed by state statutory law or laid out in the case law.⁶⁰ The second stage is the division of assets, which is also typically defined by statute or case law.⁶¹ In the majority of states, the principle that governs this second stage is equitable distribution, which seeks an equitable, but not necessarily equal, division between the spouses.⁶² A minority of states utilize community property, which favors a more equal property division between the spouses.⁶³

Property distributions have trended toward equal division due to the increasingly predominant view of marriage as a partnership. This is true even in common law states using equitable distribution. For example, Indiana requires the starting point for property divisions to be equal between the two spouses, despite being an equitable distribution state.⁶⁴ This presumption can be rebutted by several factors, such as whether the property was acquired before marriage and the economic circumstances of each spouse.⁶⁵

Courts may prefer property divisions over alimony because they provide a clean break.⁶⁶ Unlike an alimony award, a property award is

60. The details of these statutes vary among the states. For example, the relevant Illinois statute subjects only marital property to division. 750 ILL. COMP. STAT. 5/503(a)-(b) (West, Westlaw through P.A. 99-224 2015). Furthermore, there is a rebuttable presumption that property acquired during the marriage is marital property that is divisible upon divorce. *Id.* Finally, property gained before marriage or by gift does not qualify as marital property in Illinois. *Id.*

61. The relevant Illinois statute is typical in providing a list of factors that courts should consider when dividing marital property, which is to be equitably divided regardless of who holds title to the property. 750 ILL. COMP. STAT. 5/503(a)-(b) (West, Westlaw through P.A. 99-224 2015).

62. Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 921-22 (1995).

63. See Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. L. REV. 359, 370 (2005-2006). See also, e.g., CAL. FAM. CODE § 2550-56 (West, Westlaw through Ch. 807 of 2015 Reg. Sess. and Ch. 1 of 2015-2016 2nd Ex. Sess.). In the community property system, each spouse has an interest in the community property, as opposed to separate spousal property holdings. Ira Mark Ellman, *O'Brien v. O'Brien: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949, 951 (2007).

64. See, e.g., IND. CODE § 31-15-7-5 (West, Westlaw through First Reg. Sess. 2015) (“The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence.”).

65. *Id.*

66. See, e.g., Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 105-06 (2007) (“[T]he economic clean break model . . . [is a model] under which divorced persons and cohabitants who part ways are entirely separate individuals, unencumbered by ongoing legal or financial relationships, free to build new lives and make a fresh start. Under this view, alimony after divorce is disfavored, and new economic

not ongoing. The division of assets made between the spouses is final, and modification of a court's property award is difficult. Usually, only a significant reason, like fraud, compels a court to set aside a property award.⁶⁷

Premarital and postmarital agreements permit people to circumvent their jurisdiction's judicial and statutory defaults on both property division and alimony questions.⁶⁸ The premarital agreement has particularly undergone significant development over the course of the past few decades, and American couples now enjoy significant freedom of contract.⁶⁹ While the contours of the enforceability of premarital agreements are developing with regard to children,⁷⁰ they are far firmer when it comes to property division. Barring duress, involuntariness, or unconscionability, the courts will enforce a couple's decisions about its property arrangements.⁷¹ However, the courts will not enforce any property agreement that leaves a spouse impoverished,⁷² which highlights the preference for family resources to be used for the support of family members before any taxpayer resources.

2. To Protect the Children

A divorce often negatively impacts the support of children, as well.⁷³ In a divorce involving children, there is an additional property

disadvantages that arise from events that occur post-divorce are legally irrelevant."); Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1209-10 (1999) ("[T]he law currently expresses a preference for a 'clean break' at divorce. At most, the wife is entitled to short-term rehabilitative maintenance; judges disfavor permanent maintenance because the wife's continued dependence on her husband interferes with the clean break between spouses. Wives, or their attorneys, cannot successfully negotiate for maintenance that judges will not award.").

67. See, e.g., IND. CODE 31-15-7-9.1 (West, Westlaw through First Reg. Sess. 2015) ("(a) The orders concerning property disposition entered under this chapter (or IC 31-1-11.5-9 before its repeal) may not be revoked or modified, except in case of fraud. (b) If fraud is alleged, the fraud must be asserted not later than six (6) years after the order is entered.").

68. Margaret Ryznar & Anna Stepień-Sporek, *To Have and To Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 42 (2009).

69. *Id.*

70. For a background on contracting related to children's issues, see Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 369 (2015).

71. See, e.g., Sherman, *supra* note 62, at 381.

72. See, e.g., IND. CODE § 31-11-3-8(b) (West, Westlaw through First Reg. Sess. 2015) ("If: (1) a provision of a premarital agreement modifies or eliminates spousal maintenance; and (2) the modification or elimination causes one (1) party to the agreement extreme hardship under circumstances not reasonably foreseeable at the time of the execution of the agreement; a court, notwithstanding the terms of the agreement, may require the other party to provide spousal maintenance to the extent necessary to avoid extreme hardship.").

73. For example, in *Childers v. Childers*, the court, using a rational basis review, upheld the

transfer among family members known as child support, which protects children from parents who might otherwise not financially provide for them. This is an important protection because the cost of raising a child to the age of eighteen continues to rise, recently estimated at \$221,190.⁷⁴

Child support in the United States “[has] progressed from private, to state, then to federal remedies.”⁷⁵ The primary reason for this progression has been the changing demographics that have seen increasing numbers of children born out of wedlock—over 40% of children are now born to unmarried parents⁷⁶—and increasing numbers of divorces, resulting in many children who are unsupported by their noncustodial parents.⁷⁷ In fact, well over half of the children born in the next generation will be born to unmarried or eventually-divorced couples.⁷⁸ Nonmarital couples particularly have a significant chance of separating if they do not marry within five years.⁷⁹ This contributes to

duty to pay a post-majority child’s college education based on the state’s strong legitimate interest in ensuring education. The court underscored that children of divorced parents face more economic disadvantages than children from intact homes. *Childers v. Childers*, 575 P.2d 201, 207-08 (Wash. 1978).

74. MARK LINO & ANDREA CARLSON, U.S. DEP’T OF AGRIC., MISC. PUBL’N NO. 1528-2008, EXPENDITURE ON CHILDREN BY FAMILIES, 2008 23 (2009), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2008.pdf>. In 1960, it was \$183,509 (in 2008 dollars). *Id.* In comparison, the cost of upbringing per child in Poland is 190,000 PLN (about \$65,000), according to experts from the Adam Smith Center. Anna Stępień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 361 n.10 (2012).

75. WALTER WADLINGTON & RAYMOND C. O’BRIEN, FAMILY LAW IN PERSPECTIVE 129 (3d ed. 2012).

76. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 61 NATIONAL VITAL STATISTICS REPORTS: BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: FINAL DATA FOR 2010 10 (2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf. This figure marked a decrease in children born out of wedlock for the second consecutive year; the number of births to unmarried parents peaked at 1,726,566 in 2008. *Id.*

77. Divorce breaks the private safety net provided by the family. *See, e.g., Brinig, supra* note 37, at 277 (“A great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . .”). Women and children are often disproportionately impacted by this. For example, in 1993, the mean income for divorced American mothers was \$17,859, while for divorced fathers it was \$31,034. LaFrance, *supra* note 25, at 5-6.

78. “[M]any of the legal distinctions between marital and nonmarital children have been eliminated.” Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1490 (2013).

79. *See, e.g.,* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 322 (2008) (noting that, after five years, only 10% of unmarried, cohabiting couples remain together and that the median duration of a cohabitation in the United States appears to be less than 1.5 years). In another study, the percentage of unmarried couples with children living together declined to 38% by the five-year mark. Huntington, *supra* note 2, at 89. *See also* Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 409 (2004) (explaining that cohabiting couples report feeling less committed to their relationships and, further, that cohabitation before marriage reduces the

the fact that the majority of single parents are women over the age of twenty.⁸⁰

As public assistance began to serve as a substitute for child support in some cases,⁸¹ the federal government began to legislate in family law—an area of law traditionally in the state domain—to ensure that reimbursement is sought from the obligor parent.⁸² For example, Congress amended the Aid to Families with Dependent Children (AFDC) program in 1950 to require state welfare agencies to notify enforcement officials if a child continued to receive benefits under the program after being abandoned by his or her parents.⁸³ The Act then empowered state officials to search for the child's parents and require them to fulfill their child support obligations.⁸⁴ Currently, custodial parents receiving public assistance must often assign their child support right to the state in exchange for the assistance, allowing the state to seek reimbursement from a non-paying parent.⁸⁵

Furthermore, it is the state prosecutors who enforce child support orders, exemplifying public enforcement of the private support system provided by families. States have been more aggressive these days in

couple's chances of future marital success); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005-13 (2003) (arguing that cohabiting partners are less faithful to each other, less happy, less wealthy, and less stable than married couples).

80. See Margaret Ryznar, *Two Direct Rights of Action*, 62 CATH. U. L. REV. 1007, at 1026 n.145 (2013). "Most unmarried mothers have reached adulthood." *Id.* See also Gretchen Livingston & D'Vera Cohn, *The New Demography of American Motherhood*, PEW RESEARCH CENTER (May 6, 2010), available at <http://www.pewsocialtrends.org/2010/05/06/the-new-demography-of-american-motherhood/>.

81. Laura W. Morgan, *The Federalization of Child Support a Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law,"* 16 J. AM. ACAD. MATRIMONIAL L. 195, 216 (1999).

82. Family law subsequently experienced increasing federalization, particularly in the United States Supreme Court's jurisprudence on the constitutional right to privacy. See *supra* note 16. But see Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005) (noting that family law is currently in the domain of the states, but that, historically, the federal government was not limited in this way); Adler, *supra* note 16, at 255 (arguing that there is no foundation for the view that family law belongs in the state domain).

83. House Comm. Ways & Means, Section 8: Child Support Enforcement Program, in 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 8-5 (2004).

84. *Id.*

85. See Ryznar, *supra* note 79, at 1031. A man's duty to financially provide for nonmarital children traces back to the British Poor Laws in 1576, but this obligation arose only if the mother of the child was on public support in order to avoid using public funds for these purposes. See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 6 (2004).

their enforcement methods,⁸⁶ which range from lighter penalties, such as the suspension of recreational licenses or the loss of a work permit, to severe sanctions, such as criminal prosecution and incarceration.⁸⁷ Imprisonment is the most serious penalty a state can impose on parents who fail to pay child support. In *Turner v. Rogers*, the United States Supreme Court considered whether indigent parents are entitled to state-appointed counsel when they face incarceration for failing to pay child support.⁸⁸ While the Court determined that due process does not require a state to provide counsel to a debtor parent, the state is obligated to ensure a fundamentally fair proceeding.⁸⁹

There are recognizable limits to family law's protection of children, such as the child's attainment of the age of majority. Yet, the importance of the private support system has blurred even this limit, as illustrated by the minority of states that enforce postsecondary obligations. These states have post-majority educational support laws that aim to provide college tuition support for adult children of divorced or unmarried parents.⁹⁰

In these states, post-majority support may be ordered in a proceeding for the dissolution of marriage, just as regular child support can be ordered for a minor child. The laws differ by state: some take into account the parent's financial capacity and the child's academic ability (although a college admissions letter may suffice to prove ability), some ignore a parent's role (or lack thereof) in choosing the college, and some provide parents access to the child's college transcripts.⁹¹ Some states have statutes permitting such support, while others have judicial precedent allowing it.⁹² However, all of these postsecondary education

86. See, e.g., Jennifer Goulah, Comment, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 486 (2006); Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV. 713, 828 (1996).

87. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000 (2006); see also Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 89 (2000) (explaining Delaware's ability to suspend recreation, driving, and professional licenses); Elizabeth Warren, *The New Economy and the Unraveling Social Safety Net: The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 & n.27 (2004) (noting that parents behind on child support payments may lose their driver's licenses or work permits).

88. *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

89. *Id.*

90. See, e.g., IND. CODE § 31-16-6-2 (West, Westlaw through First Reg. Sess. 2015).

91. Stepień-Sporek & Ryznar, *supra* note 73, at 364-65.

92. In Missouri, for example, child support is terminated when the child dies, marries, enters active duty in the military, is self-supporting, or turns eighteen. MO. REV. STAT. § 452.340, 452.416 (West, Westlaw through First Reg. Sess. 2015). However, the Missouri legislation includes a lengthy description of child support potentially owed to college students, but the support is capped

laws require parents to financially support their adult children, further extending the private support system created by family law.

One articulated reason for these postsecondary education awards is the perception that the private support system erodes for children of divorced parents. Thus, according to one court, a postsecondary educational statute simply remedies the economic disadvantages facing children of divorced parents, who likely would have received greater financial support if their parents had remained married.⁹³ There are no analogous postsecondary education laws for children of intact families partially because of the assumption that the private support system is secure in those families.

The modification of child support is difficult because child support is driven by uniform child support guidelines.⁹⁴ Additionally, to protect children, courts have taken a strict approach when the aim is to modify a child support order.⁹⁵

Thus, many property distributions occur outside of alimony, which

once the child reaches the age of twenty-one or finishes the program, whichever occurs first. *Id.* § 432.340. *See also* COLO. REV. STAT. § 14-10-115 (West, Westlaw through First Reg. Sess. 2015); IOWA CODE § 598.21(f) (West, Westlaw through Reg. Sess. 2015). For an analysis of parental support of children's college costs in the states of Alabama, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Washington, see Madeline Marzano-Lesnevich & Scott Adam Laterra, *Child Support and College: What Is the Correct Result?*, 22 J. AM. ACAD. MATRIMONIAL L. 335, 339-73 (2009).

93. *Childers v. Childers*, 575 P.2d 201, 206 (Wash. 1978).

94. *See, e.g.*, IND. CODE § 31-16-8-1 (West, Westlaw through First Reg. Sess. 2015) (“[M]odification may be made only: (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.”)

95. “Courts have been concerned about the voluntariness of the decision that led to the change in the obligor’s financial circumstances. This rule has been applied even if the obligor’s job posed significant health risks, or required him to live on a ship for most of the year, thereby making it difficult to have a normal life.” Oldham, *supra* note 17, at 340. “A number of other courts have held that child support should not be reduced when the obligor quits a job to go to school, unless the schooling will increase the obligor’s earning capacity and the children will benefit from that increase. In other words, when the children are young enough, and the obligor will graduate soon enough, it is more likely child support would be reduced while the obligor attends school.” Oldham, *supra* note 17, at 338 (citing *In re Marriage of Ehlert*, 868 P.2d 1168 (Colo. Ct. App. 1994); *Johnson v. Johnson*, 597 So.2d 699 (Ala. Civ. App. 1992); *Little v. Little*, 975 P.2d 108 (Ariz. 1999); *In re Marriage of Mizer*, 683 P.2d 382 (Colo. Ct. App. 1984); *Overbey v. Overbey*, 698 So. 2d 811 (Fla. 1997); *In re Marriage of Clyatt*, 882 P.2d 503 (Mont. 1994); *Sabatka v. Sabatka*, 511 N.W.2d 107 (Neb. 1994); *Wolcott v. Wolcott*, 735 P.2d 326 (N.M. Ct. App. 1997); *Baker v. Grathwohl*, 646 N.E.2d 253 (Ohio Ct. App. 1994); *Commonwealth, Dep’t of Social Servs. ex rel. Ewing v. Ewing*, 470 S.E.2d 608 (Va. Ct. App. 1996)).

is only one piece to the property puzzle when couples divorce. Occasionally, these property distributions blur with alimony, which is a problem under the federal tax code that treats alimony, property division, and child support differently.⁹⁶ In theory, alimony is deductible to the payor and taxable to the recipient. In practice, however, payors request a deduction while recipients do not report the taxable income, resulting in a mismatch on 47% of analyzed tax returns. In total, \$2.3 billion was deducted without the taxation of the corresponding recipients, costing taxpayers millions of dollars.⁹⁷ Meanwhile, child support and property distributions have no tax consequences, reinforcing that alimony is intended to be a separate property distribution upon divorce.

IV. A PROPOSED BALANCING TEST

There is no doubt that the adoption of an approach to alimony modification is fraught with difficult public policy choices. Ultimately, how legislators decide to treat alimony depends on their views of fairness, as well as their views on the nature of marriage and its responsibilities—and on alimony's fit within the property distribution puzzle.

Despite the difficulty of these questions, or perhaps because of it, job lock created by alimony has not received nearly the amount of attention as job lock in health care law. The point may be made that once a person marries, that person loses autonomy to make decisions. In other words, marriage is a partnership wherein a spouse must make decisions with the other spouse—this is the meaning of marriage to which people voluntarily commit when they marry. However, this may be undermined by people's lack of knowledge regarding the implications of family law before they marry⁹⁸ and their optimism regarding the relationship's chances of success.⁹⁹

96. J. MARTIN BURKE & MICHAEL K. FRIEL, *TAXATION OF INDIVIDUAL INCOME* 871 (2012).

97. Treasury Inspector General for Tax Administration, *Significant Discrepancies Exist Between Alimony Deductions Claimed by Payers and Income Reported by Recipients*, (2014) available at <http://www.treasury.gov/tigta/auditreports/2014reports/201440022fr.pdf>.

98. In several British surveys, the majority of people thought that cohabitants had the same legal status as married couples. SONIA HARRIS-SHORT & JOANNA MILES *FAMILY LAW: TEXT, CASES, AND MATERIALS* 109 (2d ed. 2011).

99. Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757-61 (2009). In a survey of couples applying for a marriage license, more than half believed their own chances of divorce were 0%, despite knowing that the divorce rate was close to 50%. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993).

To some extent, job lock in child support cases is unavoidable because parents are legally obligated to financially support their minor children who cannot support themselves. Furthermore, the child's best interests dictate support from both parents.¹⁰⁰ However, lawmakers and courts might prefer more flexibility regarding the support of another adult who is able to be employed.

One way to achieve such flexibility is by introducing a balancing test that balances the interests of the alimony recipient with those of the payor. It is up to each state to determine which balancing factors to apply, but they can include a list of factors applying to each former spouse to determine whether one should continue to support the other in the event of an income decrease.

Regarding the obligor spouse, factors can include the reasons for the decreased income, such as whether it is an investment for the future (which can be reallocated to the spouse when it comes into fruition), whether it is for a lifestyle change, or due to a change in the payor's circumstances (such as new family responsibilities). Also important can be the reasons for the job change. For example, if a partner at a large law firm takes a pay cut in order to join the federal judiciary, such a career change should not be prevented due to an inflexibly high alimony obligation that may exceed the recipient's need.

However, before applying the balancing test, the threshold question should be whether the reason for the change of career, retirement, or underemployment is due to the willful avoidance of alimony payments. A string of Connecticut cases shows the importance that should be placed on willfulness. In determining support obligations, the court in Connecticut may consider whether the person has willfully restricted his or her earning capacity to avoid support obligations.¹⁰¹ For example, in a 2014 case, the court endeavored to determine whether a husband's decreased income resulted from culpable behavior. However, despite a change in circumstances and the lack of a wrongful purpose, an alimony payment decrease was not ordered.¹⁰²

100. See, e.g., Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1032 (2007).

101. Schade v. Schade, 954 A.2d 846, 854 (Conn. App. Ct. 2008).

102. Roth v. Roth, 2014 WL 1193352 (Conn. Super. Ct. 2014) (citing Sanchione v. Sanchione, 378 A.2d 522 (Conn. 1977)). In another case, a former husband started a new business, which required a reduced current income in the hope of future gains as the company developed. Former wife alleged that the reduced income was a violation of their Separation Agreement. The relevant provision of the Agreement stated, "The Husband shall take no action which has as its purpose the defeating of the Wife's right to receive alimony." The court found that the former husband's actions

Of course, not every reason for an income reduction should be accepted as justifiable. There still remains an important role of imputing income to the obligor. However, if a consideration under certain circumstances is job lock, the current approach could become more flexible through a balancing test.

Regarding the payee spouse, factors regarding modification of alimony can include the duration of marriage, whether the recipient is capable of working, and the property division that may have accompanied the alimony award. The reason for the alimony award is also essential, similar to the importance of the reason for the modification. Specifically, it is important to determine whether the alimony is requested for lifestyle reasons or need. If the alimony is for need, then its modification should be more difficult. Furthermore, it is important to determine whether the alimony is on account of the recipient's incapacity or whether on account of the recipient's caregiving role for incapacitated children—in which case modification should also be difficult, with the balancing test favoring the recipient. Finally, there is less need for modification of a short-term alimony award that expires within a few years because there is less opportunity for circumstances to have changed since the divorce.

In considering the legal approach to alimony, it is important to protect the partnership quality of marriage, but the question arises whether job lock should be addressed. During marriage, a spouse can quit, retire, or change careers without the court's intervention. Meanwhile, after divorce, such choices are often blocked by judicial oversight. Thus, in fact, a deeper level of partnership is created after the divorce that can deprive one spouse of autonomy, and the result can be job lock.

A balancing test would balance the interests of the alimony recipient against the interests of the payor spouse. While there may be potential administrative costs, this has not stopped the discretion afforded to family law judges on other issues, such as whether to award alimony in the first place. Meanwhile, the benefit is that the balancing test may ease the inflexibility of alimony and the attendant job lock under certain circumstances.

V. CONCLUSION

There is no doubt that the adoption of an approach to alimony

were not in violation of this provision of the Agreement. *Fox v. Fox*, 2011 WL 1565888 (Conn. Super. Ct. 2011).

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modification is fraught with difficult public policy choices. Ultimately, how legislators choose to treat alimony depends on their views of fairness, as well as on their views of the nature of marriage and its responsibilities.

Currently, the modification of alimony is relatively inflexible, even in cases where the obligor's income is lowered by unemployment, underemployment, retirement, or a career change. In these circumstances, introducing a balancing test that balances the interests of the recipient with those of the payor may ease job lock.

State courts and legislators have not treated alimony charitably in recent years, perhaps because of this historical inflexibility. This may change if certain characteristics of alimony, such as job lock, are alleviated under certain circumstances. Thus, if state courts and decision makers are concerned about job lock, a balancing test may provide a more nuanced approach.