

TESTIMONY OF C. IAN McLACHLAN

In Favor of Raised Committee Bill 1155

And

Raised Bill 6688

To: Senator Coleman and Representative Fox, Co-Chairs of the Joint Committee on Judiciary

Prior to my judicial career, I spent approximately 26 years practicing primarily in the area of matrimonial law. I was active in and, at times, an officer of the state and national bar organizations devoted to family law. My initial involvement in bar activities related to family law at the time of the divorce reforms adopted in Connecticut in 1973. As a trial judge, I presided over family dockets, including the statewide regional family docket.

In the 40 years since the adoption of Connecticut's no fault dissolution marriage system, society and the needs of the public have changed. While the law is very flexible and adaptable, over time it has become clear that because of societal changes and intervening court decisions some changes and/or clarifications are necessary. With that in mind, I agreed to work with Attorneys Livia Barndollar, Arthur Balbirer and Gaetano Ferro to form a "lawyers' group" to look at Title 46(b) as it pertains to dissolution of marriage. The product of that collaboration is set forth in Raised Bill 1155. I also had the honor and pleasure of serving on a "working group," which consisted of two legislators and three judges. The working group was tasked to look at Connecticut's alimony scheme to see if changes were needed and what, if any, consensus could be developed with respect to those changes.

The work of the lawyers' group was, therefore, broader than the task of the working group. Nevertheless, the working group had available and considered language developed by the lawyers' group. The product of the working groups' efforts was Raised Bill 6688, which contains a number of provisions suggested by the lawyers' group not related directly to alimony changes. I support all of the legislation changes contained in Raised Bill 6688.

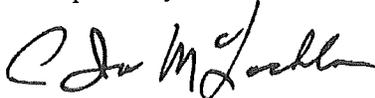
It is my personal opinion that the provisions of Raised Bill 1155 are broader and address issues not addressed by the working group. For the most part, these are changes in the law that are non-controversial and indeed most family lawyers support. I obviously support the adoption of Raised Bill 1155. To the extent that provisions of both of these Bills deal with the same topics with differing languages, I believe that the language of either would work and suggest that the Committee choose whichever it believes most clearly manifests its intention. For further information to aid the Committee, I am attaching to this testimony Executive Summary of the lawyers group proposal as well as comments explaining in more detail the reasoning supporting the proposed changes.

I honestly believe the only portion of the lawyers' group proposal that is controversial is the amendment to 46(b)-82 dealing with alimony, which suggests a permissible formula to be used in determining alimony. This is set forth at Section 5(c) of the Bill and a related subparagraph is set forth at 5(d). I first want to emphasize that both Sections 5(c) and 5(d) these provisions are free-standing from the rest of the proposal and that the Bill as a whole works without either of them. Furthermore, Section 5(d) is independent of Section 5(c), that is to say that 5(c) could be enacted and 5(d) not enacted.

While a vehement opponent of the proposal that the Committee considered last year with respect to alimony and related reforms, I became convinced that the guidance provided by the permissible calculation as a starting place for the determination of the amount of alimony as set forth in Section 5(c) is more than appropriate. Notwithstanding the substantial efforts made by the judicial branch in training of its personnel, the addition of new and inexperienced personnel coupled with the virtual avalanche of pro se litigants, has made it difficult for the system to keep pace. This approach will allow pro se litigants, those assisting pro se litigants, and less-experienced personnel to have a starting place in making alimony determinations. The language is very explicit that the calculations are a suggestion and not mandatory and, furthermore, that this suggestion is intended as a supplement to and NOT IN ANY WAY to supersede the statutory criteria. It seems clear to me that all matrimonial practitioners, the experienced judges and family relations personnel have some rules of thumb or parameters in their mind when they approach this subject. It seems wrong to me that alimony calculations should be limited to those who are "in the know." However, I still remain opposed to any approach to have formula or guidelines with respect to the duration of alimony. There are simply too many variables to come up with a workable formula.

I thank the Committee for the consideration of these Bills and I urge the adoption of the most comprehensive reform consistent with good public policy. For your assistance and convenience, I respectfully attach an Executive Summary which summarizes the provisions of Bill 1155 and a commentary sheet which explains in more detail the considerations that give rise to these proposals.

Respectfully submitted,



C. Ian McLachlan

Section 46b-8

COMMENT:

Section 46b-8, which provides that the court must hear a motion for contempt simultaneously with a motion for modification, conflicts with Practice Book Section 25-26(a) which states that:

(a) Upon an application for a modification of an award of alimony pendente lite, alimony or support of minor children, filed by a person who is then in arrears under the terms of such award, the judicial authority shall, upon hearing, ascertain whether such arrearage has accrued without sufficient excuse so as to constitute a contempt of court, and, in its discretion, may determine whether any modification of current alimony and support shall be ordered prior to the payment, in whole or in part as the judicial authority may order, of any arrearage found to exist.

The manner of the hearing of motions should be determined by the courts, not by the legislature. Moreover, the Practice Book rule is the better rule as the statute does not allow the court to address whether the motion for modification was filed for delay and whether the alimony or support recipient should be made to wait weeks or months for payment until discovery incident to modification is completed. The proposed revision would repeal Section 46b-8.

Section 46b-36

COMMENT:

The proposed revision employs the term “spouse” where “husband” or “wife” had previously been employed. This is necessary for two reasons. The current statutory

language is a vestige of an era when it was necessary to specify a woman's right to separate property and power to make contracts. Moreover, *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008), in which the Connecticut Supreme Court held that equal protection requires that same sex couples be allowed to marry, requires rewording of the statute.

Section 46b-65

COMMENT:

The Appellate Court has construed *Mitchell v. Mitchell*, 194 Conn. 312 (1984), to require a new inquiry into the financial circumstances of the parties at the time a decree of legal separation is converted to a decree of dissolution of marriage. *Mignosa v. Mignosa*, 25 Conn.App 210 (1991). Other courts, however, have limited *Mignosa* and held that at the time of conversion of a legal separation to a dissolution where there has been no resumption of marital relations, the court is precluded from changing the prior financial orders. See, e.g., *Gilbert v. Gilbert*, 2008 WL 2313381 (Swienton, J., May 13, 2008). The proposed revision provides that the court is precluded from changing the prior financial orders at the time it converts a decree of legal separation to a decree of dissolution, except incident to a modification proceeding.

Section 46b-66

COMMENT:

In 2005, the legislature approved of arbitration in family law matters. 2005 Conn. Legis. Serv. P.A. No. 05-258 (S.S.B. No. 1194). The Connecticut Supreme Court had previously said that the trial court may not delegate issues concerning custody of minor children. *Masters v. Masters*, 201 Conn. 50, 65-66 (1986). Nonetheless, when the legislature approved of family law arbitration, it precluded arbitration of issues related to child support, visitation and custody. As a result many dissolution cases involving minor children cannot be arbitrated. The proposed change would allow the parties to agree to arbitrate financial issues relating to children, while preserving the rule that child custody and visitation may not be arbitrated.

Section 46b-81

COMMENT:

The proposed change to subparagraph (a) is consistent with the proposed change to Section 46b-65, discussed *supra*.

Proposed subparagraph (b) provides that if the court did not have personal jurisdiction over a party at the time of the entry of a decree of annulment, legal separation or dissolution of marriage and was unable to make equitable distribution orders it can do so if it later has personal jurisdiction over both parties and reserved the right to do so when the initial decree entered. Many states have so-called “divisible divorce” where the marriage can be dissolved and the financial orders determined at a later date. Connecticut does not, except in limited circumstances. See *Ross v. Ross*, 172 Conn. 269 (1997). Section 46b-46 provides for the exercise of personal jurisdiction over nonresidents upon notice in

order to make alimony and child support orders. There is no similar provision to enter equitable distribution orders. The proposed change, while not authorizing divisible divorce where the court has jurisdiction over both parties, would let a Connecticut court reserve jurisdiction to make such orders at a later time if it later has personal jurisdiction.

The proposed change to subsection (d) makes it clear that the court is to consider the tax consequences of its property orders and the tax attributes of the parties' assets. While under current law the trial court may consider the tax consequences of its orders, *Powers. v. Powers*, 186 Conn. 8, 10 (1982), it is not required to do so. See, e.g., *Maturo v. Maturo*, 296 Conn. 122 (2010); *Hawkins v. Hawkins*, 11 Conn.App. 195 (1987). The importance of considering tax consequences and the tax attributes of assets cannot be overstated. See, e.g., Frumkes, *DIVORCE TAXATION*, 9th Ed. (James Publishing, 2012).

Section 46b-82

COMMENT:

The proposed change to subparagraph (a) is consistent with the proposed change to Section 46b-65, discussed *supra*. In addition, earning capacity and education have been added to make the statute consistent with case law. Courts often base orders upon earning capacity. See, e.g., *Langley v. Langley*, 137 Conn.App. 588 (2012); *Boyne v. Boyne*, 112 Conn.App. 279 (2009). They also consider the parties' educations. See, e.g., *Langley v. Langley*, 137 Conn.App. 588 (2012). Another proposed change to (a) adds the tax consequences of the court's orders as a factor to be considered. See Comment to proposed revisions to Section 46b-81, *supra*. Current law suggests that a trial court should provide a

rationale for time-limited alimony. See, e.g., *Markarian v. Markarian*, 2 Conn. App. 14 (1984) (remanding with directions to articulate the basis upon which the wife's award of alimony was time limited to two years); *Ippolito v. Ippolito*, 28 Conn. App. 745 (1992) (reversing where the court's factual findings did not provide a rationale for the trial court's having limited its award of alimony to ten years). Case law, however, does not address whether the court should provide a rationale for lifetime alimony. The final proposed change to subparagraph (a), i.e., the addition of the last sentence, would require that the court specify which of the statutory factors caused it to enter an award of "lifetime alimony," i.e. an award which will not automatically terminate upon a specified date.

Proposed subsection (b) seeks to give judges and practitioners guidance about the amount of alimony to be awarded. Review of Connecticut cases and discussions with family law practitioners compel the conclusion that awards of alimony are unpredictable. Predictability will enhance the likelihood of out-of-court settlements. It will reduce the number of contested cases. It will make dissolution less financially devastating by reducing the amount of legal fees to both parties. There is a growing movement for alimony guidelines in other jurisdictions. They exist for determinations of temporary alimony in Pennsylvania, 23 PA CONS. Sec. 4322 (2002), Arkansas, In re: Administrative Order Number 10: Arkansas Child Support Guidelines, Supreme Court of Arkansas (2002), and New Mexico. They exist for determinations of permanent alimony in Massachusetts, Maine, and Texas. Many counties, including Santa Clara, California, Washtenaw County, Michigan, Maricopa County, Arizona, and Johnson County, Kansas use alimony guidelines. See, generally, L. W. Morgan, *Current Trends in Alimony Law: Where Are We*

Now?, GP Solo Report, American Bar Association (April 2002). The American Academy of Matrimonial Lawyers approved a *Report on Considerations when Determining Alimony, Support or Maintenance* on March 9, 2007. That report included specific alimony guidelines. Proposed subsection (b), however, does not mandate that the court make the suggested alimony calculation. Nor is the calculation intended to replace consideration of the factors that are set forth in the alimony statute. Instead, it provides judges and practitioners with a suggestion which may assist in the determination of alimony.

Proposed subsection (b) does not include a guideline for determining the length of alimony awards. Because the amount of alimony award is affected most significantly by the income and earning capacities of the parties it is more easily susceptible to a guidelines-type calculation. The length of an alimony award is not as significantly affected by one or two factors and, as a result, is not so easily susceptible to a guidelines-type calculation.

Section 46b-86

COMMENT:

Considerable uncertainty exists about whether a court can or should make child support nonmodifiable. See *Tomlinson v. Tomlinson*, 305 Conn. 539 (2012)(holding that Conn. Gen. Stat. Sec. 46b-224, allowed the court to modify child support after a transfer of custody even where the decree of dissolution provided that unallocated alimony and child support was to be non-modifiable); *Amodio v. Amodio*, 247 Conn. 724 (1999)(stating that Section 46b-86(a) clearly contemplates that the parties can by agreement restrict the trial

court's power to modify child support). See also *Guille v. Guille*, 196 Conn. 260 (1985). The first proposed change to subsection (a) makes it clear that child support is always modifiable and that the parties and the court cannot make it nonmodifiable. The best interest of the children means that child support should reflect the changed economic realities of their parents and should prevail over the parties' wish to preclude modification for whatever reason.

The last sentence has been added to proposed subsection (a) to make it clear that modification involves two inquiries: (1) Has there been a substantial change in circumstance?; and (2) If so, what amount of alimony, if any, is appropriate in light of the statutory criteria. See *Borkowski v. Borkowski*, 228 Conn. 729, 749 (1999) (Borden, J., dissenting).

Considerable confusion exists about the operation of subsection (b), often incorrectly called "the cohabitation statute." While it has always been clear that the statute is concerned with financial and not meretricious circumstances, case law suggests that where a judgment references cohabitation as a circumstance warranting modification or termination, both financial and meretricious circumstances are to be considered. See *DeMaria v. DeMaria*, 247 Conn. 715 (1999). The proposed change provides that if the parties agree to change the terms and conditions for modification due to an alimony recipient's living circumstances, the court shall apply those terms and conditions in determining whether to modify. The court is not, however, permitted to take a hybrid approach and consider both financial circumstances and meretricious circumstances unless

the parties' agreement, incorporated into the judgment, so provides.

EXECUTIVE SUMMARY
REVISIONS TO UPDATE DISSOLUTION OF MARRIAGE STATUTES
(CHAPTER 815 CONNECTICUT GENERAL STATUTES)

Forty years ago, the General Assembly considered and adopted An Act Concerning Dissolution of Marriage (Public Act 73-373). That statutory scheme has worked well, but with its passage of time, changes have occurred in society and other statutes making it desirable to update this statutory scheme. Set forth below is a summary of the recommendations. After each suggested revision, there is a more complete explanation of the suggested change. The revisions follow the same numbering scheme as the chapter itself.

1. Section 46b-8 should be deleted. The statute provides that the court hear motions for contempt and motions for modifications simultaneously. It is in conflict with Connecticut Practice Book Section 25-26(a). Because this conflict involves a procedural matter and the Practice Book provision is more flexible, 46b-8 should be repealed. (p.1)
2. Section 46b-36 should be revised. This statute deals with “husband and wife property rights.” The recommendation is that the terms “husband and wife” be deleted and substituted with the word “spouse” because of the other statutory revisions made after the Supreme Court decided *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008). (p. 1)
3. Section 46b-65 should be revised to make clear the effect of a decree of legal separation. (p. 3) Changes in Section 46b-81 and 82 also are intended to clarify that the parties’ marital rights regarding alimony and property are to be determined at the first to occur of an action for legal separation or dissolution of marriage or annulment. The statute also makes it clear that cohabitation after a legal separation does not obviate the legal separation, which only occurs by filing of a written declaration that the parties have resumed cohabitation as now set forth in the statute.
4. Section 46b-66 should be amended to broaden and clarify the matters that may be submitted to arbitration under this chapter. In 2005, the legislature authorized arbitration in certain family law matters. This proposal extends the provision to financial issues related to children consistent with the child support guidelines. It continues to preclude custody and access issues from being arbitrated. (p.5)
5. Section 46b-81 (Assignment of Property) should be revised, in addition to the manner referred to Paragraph 3 above, to grant the court continuing authority to adjudicate property rights of parties to a marriage after a dissolution where it could not divide property because it lacked personal jurisdiction over a party, if it reserves the right to do so and later acquires personal jurisdiction. The statute also specifically authorizes the court to consider the tax consequences of its orders, which presently exists only in decisional law. (pp. 6-7).

6. Section 46b-82 (Alimony) (p. 8). In addition to the revisions referred to under Paragraph 3 above, there are language clarifications and the addition of factors to be considered by the court in making awards *i.e.*, earning capacity, education, and tax consequences, which heretofore exist only in decisional law. The most substantial revisions in the whole package are in this paragraph. The first is the addition at subparagraph (b) of **suggested** calculation for the determination of alimony. (p. 9) This is a free-standing provision and the rest of the changes could be adopted without it. The panel believed it would be very helpful to *pro se* parties and others who are involved in the court process, but unfamiliar with it. Because of the number of variables having different importance in different cases, there are no suggested guidelines for the duration of alimony. The second significant change is a provision that if the court enters an indefinite term of alimony that the court should specify which of the statutory factors it relied upon in making such an award. (p. 9)
7. Section 46b-86 (Modification of Alimony) has been revised to make clear that child support cannot be non-modifiable (p. 13) and also to confirm the two-step process now existing in case law that the court first determine whether a substantial change in circumstances has occurred and; if so, make a determination as to the appropriate amount of alimony. (p. 13) The statute clarifies the fact that the parties may by agreement set forth the provisions for modification of alimony awards based upon the living arrangements of the recipient. Case law leaves some uncertainty and it is desirable to allow the parties to negotiate a clear standard should they choose to do so. (pp. 13-14)