

1. Section 46b-8 shall be deleted.

[NOT ADOPTED]

#Bill 1155
See

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:

7

(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.

2. Section 46b-36 shall be revised as follows:

[SEE, 13-213 SECTION 1]

1155
See 1

§ 46b-36. Wife and husband property rights not affected by marriage

Neither husband nor wife A spouse shall not acquire by the marriage any right to or interest in any property held by the other before or acquired after such marriage, except as to the share of the survivor in the property as provided by sections 45a-436 and 45a-437. The separate earnings of

~~the wife shall be her sole property. She~~ Each spouse shall have power to make contracts with her ~~husband~~ the other or with third persons, to convey to her ~~husband~~ the other or to third persons his or her real and personal estate and to receive conveyances of real and personal estate from her ~~husband~~ the other or from third persons as if unmarried. ~~She or~~ he or she may bring suit in his or her own name upon contracts or for torts and he or she may be sued for a breach of contract or for a tort; and his or her property, except such as is exempt by law, may be taken on attachment and execution, but shall not be taken for the debts of her ~~husband~~ the other spouse, except as provided in section 46b-37. ~~Neither husbandr spouse shall not~~ Neither spouse shall not be liable for her ~~the~~ the ~~debts of the other~~ debts of the other contracted before marriage, nor upon her ~~the other's~~ the other's contracts made after marriage, except as provided in said section.

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.

3. Section 46b-65 shall be revised as follows:

[NOT ADOPTED]

§ 46b-65. Filing of declaration of resumption of marital relations; dissolution of marriage after legal separation decree when no declaration filed

1155
Sec 2

(a) If the parties to a decree of legal separation at any time resume marital relations and file their written declaration of resumption, signed, acknowledged and witnessed, with the clerk of the superior court for the judicial district in which the separation was decreed, the declaration shall be entered upon the docket, under the entries relating to the complaint, and the decree shall be vacated and the complaint shall be deemed dismissed.

(b) If no declaration has been filed under subsection (a) of this section, ~~then~~ the decree of legal separation shall remain in effect regardless of the conduct of the parties. At any time after the entry of a decree of legal separation, if no written declaration has been filed pursuant to subsection (a) hereof, either party may petition the superior court for the judicial district in which the decree of legal separation was entered for a decree dissolving the marriage and the court shall enter the decree dissolving the marriage in the presence of the party seeking the dissolution.

~~§ 46b-66-~~ At the time the decree of legal separation is converted to a decree of dissolution, the court shall not have jurisdiction to award relief pursuant to section 46b-81 different from that awarded at the time of the entry of the decree of legal separation. The court shall enter the same award of alimony as it entered at the time it entered a decree of legal separation except in accordance with section 46b-86.

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.

4. Section 46b-66 shall be revised as follows:

[NOT ADOPTED]

§ 46b-66. Review of agreements; incorporation into decree. ~~Arbitration-~~

(a) In any case under this chapter where the parties have submitted to the court an agreement concerning the custody, care, education, visitation, maintenance or support of any of their children or concerning alimony or the disposition of property, the court shall inquire into the financial resources and actual needs of the spouses and their respective fitness to have physical custody of or rights of visitation with any minor child, in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court. If the court finds the agreement is not fair and equitable, it shall make such orders as to finances and custody as the circumstances require. If the agreement is in writing and provides for the care, education, maintenance or support of a child beyond the age of eighteen, it may also be incorporated or otherwise made a part of any such order and shall be enforceable to the same extent as any other provision of such order or decree, notwithstanding the provisions of section 1-1d.

(b) Agreements providing for the care, education, maintenance or support of a child beyond the age of eighteen entered into on or after July 1, 2001, shall be modifiable to the same extent as

1155
Sec 3

any other provision of any order or decree in accordance with section 46b-86.

(c) The provisions of chapter 909 shall be applicable to any agreement to arbitrate in an action for dissolution of marriage under this chapter, provided (1) an arbitration pursuant to such agreement may proceed only after the court has made a thorough inquiry and is satisfied that (A) each party entered into such agreement voluntarily and without coercion, and (B) such agreement is fair and equitable under the circumstances, and (2) such agreement and an arbitration pursuant to such agreement shall not include issues related to ~~child support, visitation and custody~~custody, visitation or access relating to minor children. Arbitration agreements may include child support and child-related financial issues and if the arbitrator determines such issues such determination shall be consistent with the provisions of § 46b-215 et. seq. and §46b-84, and any education issues which the parties agree to submit to arbitration. An arbitration award in such action shall be confirmed, modified or vacated in accordance with the provisions of chapter 909.

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.

5. Section 46b-81 shall be revised as follows:

[ADOPTED IN PART,
PUBLIC ACT, 13-213
SECTION 2]

1155 Sec

§ 46b-81. Assignment of property and transfer of title

(a) At the time earlier of the entering of a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

(b) Notwithstanding subsection (a), in the event the court did not have personal jurisdiction over a party at the time of the decree of annulment, dissolution or legal separation, and if it subsequently acquires personal jurisdiction over that party, it may assign the property of the parties pursuant to subsection (a) provided that it expressly retained jurisdiction to do so at the time of the entry of the decree of annulment, dissolution or legal separation. [NOT ADOPTED]

(c) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

(ed) In fixing the nature and value of the property, if any, to be assigned, the court, after

~~hearing~~considering the witnesse~~evidence~~, if any, of each party, ~~except as provided in subsection (a) of section 46b-51,~~ shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income, the tax consequences of its orders, and the tax attributes of the assets of the parties. [NOT

ADOPTED (ADDITIONAL FACTORS ADDED: EARNING CAPACITY AND EDUCATION)]. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

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).

6. Section 46b-82 shall be revised as follows: [ADOPTED IN PART, SEE PUBLIC ACT SECTION 3]

1155
Sec 5

§ 46b-82. Alimony

(a) At the time of entering ~~the~~ a decree of annulment, legal separation or dissolution of marriage, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. If the court enters a decree of dissolution of marriage following a decree of legal separation, the alimony award shall be the same as the award entered at the time of the entry of the decree of legal separation except in the event of a modification pursuant to section 46b-86. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. *In determining* whether alimony shall be awarded, and the duration and amount of the award, the

court shall ~~hear~~consider the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties, the tax consequences of its orders and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment.

~~(b) Any postjudgment~~ If the court shall enter an award of indefinite duration, that is one where the recipient is to receive alimony until the death of either party or the recipient's remarriage, the court shall specify which of the foregoing criteria it relied upon in making the award. [SEE SECTION 3(B)]

(b) The following shall be suggested guidelines for the determination of the amount of alimony. The amount may be calculated by taking thirty (30%) percent of the gross income of the party with the higher gross income minus twenty (20%) percent of the gross income of the party with the lower gross income. The amount so calculated shall not result in the party with the lower gross income having in excess of forty (40%) of the combined gross income of the parties. Gross income shall be defined to mean gross income as defined in the State of Connecticut Child Support and Arrearage Guidelines (eff. August 1, 2005) less Social Security taxes, or mandatory retirement in lieu thereof, and Medicare taxes, including self-employment taxes, and court-ordered alimony and support obligations for

former spouses and children not of the marriage. The foregoing calculation is neither mandatory nor presumptive and shall supplement but not supercede consideration of the factors set forth in (a) of this section. The calculation shall not be made in cases where the combined gross income of the parties exceeds one million dollars per year. [NOT

ADOPTED]

(c) The trial court shall state in its memorandum of decision whether it employed the calculation in (b) and, if not, which of the factors in (a) caused it to decline to do so.

[SHOULD BE DELETED]

(d) Any post-judgment procedure afforded by chapter 9061 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony.

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.

7. Section 46b-86 shall be revised as follows:

§ 46b-86. Modification of alimony or support orders and judgments

(a) Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. There shall be a

1155 Seal

rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial. Modification may be made of such support order without regard to whether the order was issued before, on or after May 9, 1991. In determining whether to modify a child support order based on a substantial deviation from such child support guidelines the court shall consider the division of real and personal property between the parties set forth in the final decree and the benefits accruing to the child as the result of such division. ~~After the date of No judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution. for the payment of child support shall be non-modifiable.~~ [NOT ADOPTED]

By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court. This section shall not apply to assignments under section 46b-81 or to any assignment of the estate or a portion thereof of one party to the other party under prior law. No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50. If a court, after hearing, finds that a substantial change in circumstances has occurred, the court shall determine what amount of alimony, if any, is appropriate after considering the criteria set forth in section 46b-82. [SEE SECTION 13-213, 4(a)]

(b) In an action for divorce, dissolution of marriage, legal separation or annulment brought by a husband or wife, in which a final judgment has been entered providing for the payment of periodic alimony by one party to the other, the superior court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements ~~cause such a change of circumstances as to alter the financial needs of that party.~~

~~(c) have changed the financial circumstances of the alimony recipient. [NOT ADOPTED]~~

In the event that any final judgment incorporates the agreement of the parties setting forth a provision for modification, including suspension, reduction, or termination, based upon the living arrangements of the alimony recipient on different terms and conditions than the foregoing, the court shall enforce that judgment and modify, if appropriate, including suspension, reduction or termination, in accordance with the terms and conditions of the judgment. [WILL BE PART OF 4(b)]

(c) When one of the parties, or a child of the parties, is receiving or has received aid or care from the state under its aid to families with dependent children or temporary family assistance program, HUSKY Plan, Part A,¹ or foster care program as provided in Title IV-E of the Social Security Act,² or when one of the parties has applied for child support enforcement services under Title IV-D of the Social Security Act³ as provided in section 17b-179, such motion to modify shall be filed with the Family Support Magistrate Division for determination in

accordance with subsection (m) of section 46b-231.

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.

8. There shall be a new statute, i.e., An Act Defining the Status of the Parties During an Appeal of a Judgment of Dissolution of Marriage, Annulment, or Legal Separation, as follows:

Not in
1155

[NOT ADOPTED]

(a) In the event of an appeal of a judgment dissolving or annulling the marriage or legally separating the spouses, their status as married shall remain until the final judicial determination of all issues, with no further possibility of appeal.

(b) In the event of a retrial after appeal, the factors to be taken into account for the entry of financial orders shall be determined as of the date of the new trial.

(c) The death of a party during the pendency of an appeal of a judgment dissolving or annulling the marriage or legally separating the parties shall terminate the marriage of the parties as of the date of death, provided, however, the appeal shall proceed by or against the personal representative of the deceased and shall be decided by the applicable appellate court. In the event that the appeal results in a new trial, the factors to be taken into account for the entry of financial

orders shall be determined as of the date of death.

COMMENT:

The issue of whether an appeal causes the parties to remain married while the appeal is pending is unsettled. The proposed change to subsection (a) provides that the parties remain married until the final determination of the case, i.e., until the trial judge's decision is affirmed, or, in the event of a remand, until the remand decision decision is affirmed. The curious and complicated circumstance in which a remand results in a new divorce trial involving one of the "spouses" who has already remarried will be avoided. Of perhaps greater importance, estate and succession rights and status for tax and pension purposes will no longer be in doubt.

In *Sunbury v. Sunbury*, 216 Conn. 673 (1990), the Connecticut Supreme Court held that at remand, the court is to consider the circumstances of the parties as of the date of the original decree of dissolution not as of the time of the remand hearing. While "exceptional intervening circumstances" could warrant deviation from the rule, the Court stated that "[a]n increase in the value of the property" is not an exceptional intervening circumstances. In an age of volatile financial and real estate markets, it is difficult to discern how a court could fashion a fair order without knowledge of the parties' current circumstances. The proposed change to subsection (b) provides that upon remand the court consider the then-current financial circumstances in awarding alimony and making an equitable distribution.

In civil actions, the death of a party does not abate the action if a representative is substituted. Conn. Gen. Stat. 52-199. Section 46b-40(a) of the General Statutes provides, however, that a marriage is dissolved by the death of one of the parties. As a result, it has

been held that the death of a party abates an action for dissolution of marriage. See, e.g., *Misheff v. Misheff*, 1995 WL 781428 (Harrigan, J.) Proposed subsection (c) would abrogate that rule during the pendency of an appeal and permit continuation of the appeal until the Appellate or Supreme Court's decision.