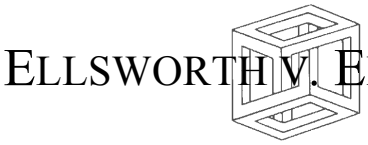

A Brief Outline of the Principal Tax Considerations in Divorce Negotiations

This memorandum is meant to highlight the major federal tax issues that arise upon divorce or separation.[1] It should be viewed only as an introduction to the subject. More detailed exploration of the various issues is not necessary for the purposes of this negotiation. In addition, although some of the more significant reforms of the Tax Reform Act of 1986 (e.g., the repeal of the capital gains preference and the new tax tables) have been incorporated, other changes and complexities have been purposefully omitted. You may supplement the memo as you wish, but additional knowledge or research is neither expected nor required. Consideration of federal gift and estate taxation is to be omitted unless the parties to the negotiation are conversant with the tax law in those areas and wish to address those issues.

The most important tax issues are the possibility of shifting some of the husband's (H) income to the wife (W) (through alimony and property payments as described below)[2] and making the best use of the dependency exemptions available for the children.

I. Basic Tax Principles and Definitions

To determine the amount of federal taxes paid by an individual, it is necessary first to compute the individual's "gross" income (salary, dividends, interest, and other items subject to tax), and then to subtract certain deductions and exemptions to arrive at what is called the individual's "taxable income." The taxable income is then used to discover the person's tax bracket (the percentage rate at which he or she is taxed, which is higher for higher incomes). For each tax bracket there are four filing statuses: "Single," "Married and Filing Jointly,"[3] "Married and Filing Separately," and "Head of Household."[4] The amount of tax owed in each bracket is different, depending upon the filing status of the taxpayer. (See the attached tax table.)

Alimony payments are one example of an expense that can be subtracted, or "deducted," from gross income to reduce one's taxable income. Similarly, every individual is entitled to claim an "exemption" for her/himself and for every "dependent" (as defined by law). This involves subtracting from gross income the amount of exemptions to which a taxpayer is entitled, so that taxes are not paid on that "tax-exempt" amount. For 2007, the exemption for most individuals was $3,400, and you may assume that this applies in the *Ellsworth* case. (Disregard the phase out for higher-income taxpayers.)

This memorandum was prepared by the Harvard Law School Negotiation Workshop by Professor Frank Sander and updated by Gillien Todd and Robert Bordone with the assistance of Mike Loquercio in 2008. Copies are available at www.pon.org, telephone: 800-258-4406 (within U.S.) or 781-966-2751 (outside U.S.); or by fax: 617-495-7818.

People with many significant deductible expenses "itemize" these deductions, keeping careful records and receipts. Others take the "standard deduction," a fixed amount that does not have to be documented. Exemptions (for yourself and dependents) are available whether or not deductions are itemized. So is the alimony deduction. But most personal expenses (e.g., medical expenses) can only be deducted if the taxpayer does *not* elect the standard deduction.[5]

1. Amount of Standard Deduction

A) $10,300 in the case of a couple who is Married Filing Jointly
B) $7,550 in the case of a Head of Household (i.e., cares for a dependent);
C) $5,150 in the case of a Single individual who is not married and who is not a Surviving Spouse or Head of Household;
D) $5,150 in the case of someone who is Married Filing Separately.

Example. If a single, divorced man (like H) earned $75,000 one year (total of salary, interest, dividends, etc.), paid $10,000 in alimony, took the standard deduction for single persons of $5,150, and was entitled to one personal exemption of $3,400, his taxable income would be $56,450. The taxable income amount determines the individual's tax bracket and the rate of tax to be paid (see the attached 2007 income tax table for current tax brackets and rates).

II. Tax Issues Involved in a Divorce Case like *Ellsworth v. Ellsworth*

1. Alimony Payments. The main question is whether alimony payments should be made deductible to H and taxable to W (as income), or left taxable as H's income and not taxable to W. If the parties do not want the deductibility/taxability treatment, they can specify this in their divorce agreement.

A. Advantages to Making Alimony Deductible. If H is in a higher tax bracket than W, it may be beneficial to put the alimony payments into "deductible form" (i.e., deductible to H and taxable to W), because the tax savings to H may well be greater than the tax liability incurred by W. In such a case it may be desirable to have H reimburse W for part or all of her higher tax burden as a result of the taxable alimony payments. However, keep in mind that such reimbursement payments are also considered to be alimony and hence are taxable to W. Accordingly, to avoid repeated reimbursements and tax thereon, it is advisable to give W enough so that after paying the appropriate tax she has the desired amount left.

B. How and When Alimony Payments May Be Deductible. In order for payments to qualify as deductions for H and taxable gross income to W, they must be made or received pursuant to a divorce or separation instrument, defined as:

i. A decree of divorce or separate maintenance, or a written agreement incident to such a decree.
ii. A written separation agreement.
iii. A judicial decree requiring H to make payments for the support or maintenance of W.

Purely voluntary payments that do not fall into any of the above categories are not eligible for this treatment. Besides being pursuant to a divorce or separation instrument, payments must also meet the following criteria to earn alimony tax treatment:

a. They must be made in cash; and
b. There must be no liability to make any such payment or any substitute therefore after the death of W; and
c. There must not be "excess front-loading" of alimony payments.

The computation of what constitutes "excess front-loading" under the statute is somewhat complicated. It is helpful to keep in mind that the most likely theory behind the restrictions lies in an effort to prevent taxpayers from dividing their marital property upon divorce, labeling it as alimony to secure the benefits of this treatment, yet paying it out almost in lump-sum form during the first two years. As a result, the Internal Revenue Code attempts to ensure a relatively level amount of alimony payments over the first three years after a divorce (generally taxing differentials larger than $15,000 between any two years). Any "excess" front-loading as determined under this formula will be taxed to H in the third post-separation year; W will receive a corresponding deduction at that time. The precise formulas are given below:

Variables: A1 = alimony paid in the first year
A2 = alimony paid in the second year
A3 = alimony paid in the third year
E1 = excess front-loading in the first year
E2 = excess front-loading in the second year

Formulas: $E2 = A2 - (A3 + \$15{,}000)$

In words, the excess paid in the second year equals any amount of alimony paid in the second year that exceeds by more than $15,000 the amount of alimony paid in the third year.

$$E1 = A1 - \{[\underline{(A2 - E2) + A3}] + \$15{,}000\}$$
$$2$$

In words, the excess paid in the first year equals the amount by which the alimony paid in the first year exceeds by more than $15,000 the average of the alimony paid in the second and third years. (In the formula, the second-year alimony amount is decreased by E2 because that excess has already been taxed as attributed to the second year).

Example: A divorce agreement provides for the payment of $40,000 in the first and second years and $10,000 in the third and following years.

A1 = $40,000; A2 = $40,000; A3 = $10,000

E2 = $40,000 - ($10,000 + $15,000) = $15,000

$$E1 = \$40{,}000 - \{\$\underline{25{,}000 + \$10{,}000}_{2} + \$15{,}000\} = \$40{,}000 - \{\$32{,}500\} = \$7{,}500$$

Therefore, on their tax returns for the third post-separation year, H would have to include $22,500 extra in income (E1 + E2) and W would get a corresponding deduction for $22,500. Note that although W gets a deduction in the third year, they as a couple are still worse off because the rationale for the structure was H's higher tax bracket. Moreover, if the alimony ($10,000) represents W's entire taxable income in the third year, she will only recover an actual deduction of $10,000 (instead of $22,500), because the Code generally does not allow credit for deductions that reduce your taxable income below zero.

Exceptions to the excess provisions:

1. These excess provisions do not apply if the alimony payments were designated to cease upon W's remarriage or either spouse's death *and* such a contingency occurs, thus reducing the payments to zero.
2. They also do not apply to payments to the extent they are made pursuant to a continuing liability (over a period of at least three years) to pay fixed portions of income from a business or property or from compensation for employment.

C. Payment for Property Rights. The tax law also allows payments made by H to obtain W's rights or interests in property (such as joint property rights and rights in equitable distribution under Mass. Gen. Laws ch. 208, sec. 34) to be treated as alimony, provided all of the above requirements for alimony are met. Thus, if H paid to W payments meeting the alimony requirements in order to obtain sole ownership of a previously jointly owned residence, these payments could be deductible to H and taxable to W unless the parties opted out of this treatment. One problem with this arrangement is that these payments, as pointed out above, must remain relatively level over the first few years and also must terminate upon the death of W. Therefore, if W dies before H's "alimony" payments have amounted to a sum equal to her interest, W's estate is deprived of this unpaid amount. To avoid such an unfair result, the law permits H to take out a "declining" life insurance policy on W, meaning that upon W's death, her estate will receive the sum (for W's interest in H's property) still owing to W under the arrangement.

2. Child Support Payments. Unlike alimony, the Code provides that child support payments are not eligible for the taxable/deductible treatment. In other words, child support is not taxable to W and not deductible by H. Child support payments include those so termed by the agreement and also those that are reduced "on the happening of a contingency specified in the instrument relating to the child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or . . . at a time that can be clearly associated with" such a contingency. In addition, in the event a payment is received that is less than the total child support and alimony obligation owed, such payment will be attributed first to nondeductible child support.

3. Property Transfers (e.g., stocks, bonds, and real estate). Where property is transferred from H to W or vice versa in connection with a divorce, neither party is generally taxed on any appreciation that has occurred since the property was purchased (i.e., gains or losses are not recognized at the moment of transfer between spouses). This means that if, in the

course of a divorce, H transfers to W stock that cost him $100 and that is now worth $300, then although the value of the stock has increased, H has obtained no taxable gain from the stock, because he has not sold it. Therefore, neither party will be taxed on the $200 appreciation. If the wife later sells the stock, however, she will be taxed on the full difference between the market value at that time and the $100 cost.

Similarly, if H transfers to W his interest in the family residence, he will not be taxed on any gain (in terms of increased property value), and W will be liable for the tax if she later sells the property.

The taxation of capital gains has recently been made much more complex. For present purposes it will suffice to assume that the rate is 15% of the gain, unless the taxpayer's normal marginal tax rate is 10% or 15%, in which case the capital gains rate is 5%. Therefore it is useful to keep in mind that to the extent that W's tax bracket is significantly below H's, it may be advisable for her to receive assets in the property settlement and sell them on her own, rather than have H sell them and merely transfer the money. In that case, however, the assets transferred may not qualify as alimony, as they are not paid in cash.

4. Medical Expenses.

A. Of W: If these are paid by H, they are deductible *as alimony* and taxable to W upon the same grounds. They may also remain deductible by W *as medical expenses* but only if they exceed 7.5% of her taxable income — an unlikely event.

B. Of children: Not deductible as alimony or child support, but either parent (who pays them) may deduct such expenses to the extent they exceed 7.5% of his or her taxable income.

5. Attorneys' Fees. H cannot deduct his own attorneys' fees or court costs as a business expense, even when they are incurred in part to protect his income-producing property (such as controlling stock interests) against W's claims. However, H can deduct that portion of his expenses allocable to obtaining tax advice and tax-related issues. This suggests having the attorneys allocate their fee between tax- and non-tax-related matters.

W can deduct her attorneys' fees to the extent that it is related to the collection of amounts includable in her gross income (such as alimony). W can also deduct attorneys' fees related to obtaining tax advice and tax-related issues. If H pays W's attorneys' fees, he cannot deduct them. It may therefore be desirable in appropriate cases to give W more deductible alimony and let her pay her own attorneys' fees and also claim them as a deduction.

6. Tax Exemption For a Child. The parent who has legal custody of a child for the greater part of the year is entitled to the dependency exemption (equal to the personal exemption amount mentioned above) for the child, unless he or she expressly waives this right in favor of the other parent. Such a waiver must be in writing and may be executed annually or for the indefinite future.

7. Insurance. If H pays premiums on a life insurance policy for himself and W is the beneficiary, the premiums are not deductible as alimony unless:

A. The policies are irrevocably assigned to W,
B. W has all the incidents of ownership, and
C. The premium payments also meet all of the requirements for deductible alimony.

8. Housing Expenses. As with insurance premiums, H can treat as alimony only those housing expenses attributable to property owned outright by W. Thus where H and W own the residence as joint tenants, H can deduct one half of the payments for principal, interest, insurance, and taxes as alimony, and W must similarly pay taxes on one half of such payments. Furthermore, provided they are itemizing deductions, real estate taxes are deductible *as such* by whoever pays them, and mortgage interest paid by H on his share of property that is not his primary residence is deductible as interest on a "qualified residence" if it is the primary residence of H's children. Of course, if H deducts one half of all housing expenses as alimony and hence W is taxed upon that amount, she is entitled to the deduction for those payments attributable to interest and taxes.

ENDNOTES

1 For purposes of this case you may disregard Massachusetts state taxes.

2 For the purposes of this discussion the husband will be referred to as the alimony payer and the wife as the payee. This assignment of roles is clearly a sexist stereotype; it is used in this memo for consistency with the *Ellsworth* situation. It should be noted that courts are becoming increasingly reluctant to award alimony to dependent spouses when a divorce agreement as to alimony has not been reached by the parties. More and more courts are requiring "rehabilitation payments" that last only as long as it takes for a spouse to become an income producer.

3 In a divorce context, parties can file a joint return unless at the end of the year there has been a final decree of divorce or separate maintenance.

4 The spouse with whom a child lives will be able to use the favorable Head of Household (HH) rates if the parents are divorced or legally separated, even if the child is not his or her dependent, provided he or she pays over half the expenses of keeping up the home where he or she, and the child, have lived for more than half of the tax year.

5 This brief discussion does not take into account certain limitations on itemized deductions and personal exemptions for very high-income taxpayers. These may be disregarded for the purposes of the *Ellsworth* case.

LEGAL MEMORANDUM

To: Associates Assigned to the Ellsworth Case

From: Senior Partner

RE: Summary of Legal Issues

The following is a brief memorandum highlighting the relevant legal issues in the Ellsworth case. It is not a comprehensive survey of the law, but it should provide sufficient guidance and direction as you prepare for the upcoming negotiations. The memo summarizes the key considerations relating to the grounds for divorce, alimony, property division, child custody, visitation, child support, survival of agreement, and tax issues. I have enclosed the following documents for your review: Chapter 208 of the Massachusetts General Laws; Child Support Guidelines; and a sample divorce settlement agreement.

Summary of Law

1. Grounds for Divorce

Mrs. Ellsworth has alleged that her husband was guilty of cruel and abusive treatment. This is a broadly construed ground for divorce, encompassing words or psychological cruelty with demonstrable physical effects such as weight loss, inability to sleep, anxiety, or depression, as well as physical violence. One necessary element of this cause for divorce is a proven relative change in the plaintiff's condition from the time of marriage to the time of separation. It must also be demonstrated that the plaintiff's condition has improved since living apart from the defendant. A divorce on the grounds of cruel and abusive treatment may be granted for an ongoing pattern of such conduct or for a single act of cruelty.

Mr. Ellsworth believes that his wife is guilty of adultery and has filed a cross complaint for divorce on that ground. Both cruel and abusive treatment, as well as adultery, are legal grounds for divorce under Mass. Gen. Laws ch. 208, sec. 1. Also, adultery is still considered a crime in the Commonwealth of Massachusetts.

Like many states, Massachusetts also has a no-fault ground for divorce (Mass. Gen. Laws ch. 208, sec. 1A) that is set forth in the attached statutory compilation. Parties often prefer this less adversarial approach.

This memorandum was prepared for the Harvard Law School Negotiation Workshop by Professor Frank Sander and updated by Gillien Todd and Robert Bordone with the assistance of Mike Loquercio in 2008. This case is based on a problem in Chapter 7 of Foote, Levy, and Sander, *Cases and Materials on Family Law* (2d ed., 1976). It was subsequently adapted by Professor Michael Wheeler, and then further adapted for use by the Harvard Negotiation Project by Professor Frank Sander, Mike Loquercio, William Ury, Kenny Chin, Valerie Sanchez, Wayne Davis, Jenifer Curhan, Chris Thorne, and Sheila Heen. Copies are available online at www.pon.org, telephone: 800-258-4406 (within U.S.) or 781-966-2751 (outside U.S.); or by fax: 617-495-7818.

2. Alimony

Since 1986, the probate and family court department of the trial court have been given exclusive jurisdiction over alimony awards incident to divorce. See Mass. Gen. Laws ch. 215, sec. 3. A judge may award alimony to either party to a divorce according to Mass. Gen. Laws ch. 208, sec. 34. Massachusetts courts have recognized that the right to alimony is entirely statutory, and that the statutes governing alimony are intended to cover all alimony issues. Orlandella v. ella, 347 N.E.2d 665, 666 (Mass. 1976), quoting Gediman v. Cameron, 27 N.E.2d 696, 697 (Mass. 1940). Thus, appellate courts have read Section 34 to give probate and family court judges broad discretion to determine the amount, timing, and duration of the alimony award payments. Id. The factors to be considered by the probate judge in determining the amount of alimony include: length of marriage, conduct of the parties during the marriage, age, health, occupation, amount and sources of income, employability, vocational skills, needs, liabilities, and future prospects of both parties in acquiring assets and income. 208 M.G.L. § 34. These factors are evaluated to assess the level of one spouse's need for financial support and the other spouse's ability to provide it. These broad concepts have become the basis of alimony under the statute.

Recently, in *DeCastro v. DeCastro,* 616 N.E.2d 52, 55 (Mass. 1993), the court outlined a two-pronged test for reviewing a probate judge's decision. First, the court reviewed whether the probate judge considered all of the section 34 factors, and no other factors, in making the determination. Second, the court evaluated whether the probate judge's conclusions followed from explicit findings and rulings. The probate judge's conclusions regarding alimony must make clear the reasons behind them. However, the judge had broad discretion and her conclusions will be reversed only if they are "plainly wrong and excessive." See *Williams v. Massachusetts*, 728 N.E.2d 932, 942 (Mass. 2000); *DeCastro v. DeCastro,* 616 N.E.2d 52, 55 (Mass. 1993); *Bowring v. Reid,* 503 N.E.2d 966, 968 (Mass. 1987); *Redding v. Redding,* 495 N.E.2d 297, 300 (Mass. 1986).

Though there is no presumption of a right to alimony under Massachusetts divorce law. *Brown v. Brown*, 111 N.E. 42, 43 (Mass. 1916), it has traditionally been supported by reference to a husband's common law duty to support his wife. *Gosselin v. Gosselin,* 294 N.E.2d 555, 556 (Mass. App. 1973). However, the presence of many women in the workforce today undermines this view. The present version of the statute eliminates all distinctions based on gender, and modern courts recognize that the fundamental purpose behind alimony is to provide economic support to a dependent spouse, either husband or wife, in or after a divorce. See *Keller v. O'Brien*, 652 N.E.2d 589 (Mass. 1995), *aff'd*, 683 N.E.2d 1026 (Mass. 1997). The statute's list of factors to be considered focuses the probate judge's attention on the dependent spouse's "need" for support and maintenance. Need is determined by what is required to maintain a standard of living comparable to that enjoyed during marriage. *Grubert v. Grubert,* 483 N.E.2d 100, 105 (Mass. App. 1985). The financial dependency of the children on the custodial spouse is not an appropriate consideration when determining that spouse's need for alimony. See *Saia v. Saia*, 788 N.E.2d 577, 579-80 (Mass. App. 2003). Increasingly, probate judges in this jurisdiction are giving consideration to the parties' separate assets and earning potential when determining an appropriate level of alimony, rather than strictly their annual income. A party's conduct during the marriage may also be relevant to the judge's determination of alimony, but proof of fault does not preclude a "guilty spouse" from obtaining alimony.

The court is empowered to deal broadly with the assigning of alimony. For example, the probate judge has the discretionary power to assign a fixed amount to be paid weekly by one spouse to the other spouse as alimony, to award one lump sum as alimony, to award alimony as a percentage of the other party's income, or to award property in lieu of or in addition to alimony. See *Davidson v. Davidson,* 474 N.E.2d 1137, 1141 (Mass. App. 1985).

In recent decades, there has been a gradual departure from permanent alimony awards. One reason is that the introduction of child support guidelines may have had the effect of reducing the amount of support available for alimony. Another factor is Section 34's emphasis on the concept of marriage as a partnership, which focuses attention on the equitable division of property, not permanent alimony. When property division is adequate to meet the needs of both spouses, alimony may not be necessary. See *Bianco v. Bianco,* 358 N.E.2d 243, 245 (Mass. 1976). A third factor is the entry of married and divorced women into the workforce, which may reduce the need for alimony in certain cases. A summary of the Massachusetts courts' recent alimony jurisprudence can be found in *Keller v. O'Brien,* 652 N.E.2d 589 (Mass. 1995), *aff'd after remand*, 683 N.E.2d 1026 (Mass. 1997).

Nonetheless, there remain many cases in which a spouse needs support beyond what the property division or his/her income after the divorce provides, and the other spouse still has the ability to meet those needs after paying child support. In these cases, alimony continues to be an important source of support for a spouse. In particular, Massachusetts courts have commonly recognized the need for alimony awards when a spouse comes out of a long-term marriage after devoting many years to serving as a homemaker and primary parent of the children, instead of being employed outside the home.

The courts interpret financial inequality and reduced earning capacity after a long marriage as a strong justification for an award. See *Grubert v. Grubert,* 483 N.E.2d 100,106 (Mass. App. 1985). Generally, if all other factors are equal, the shorter a marriage, the less justification for alimony after divorce; and the longer the marriage, the more justification. However, the statute does not clearly define what constitutes a "long" marriage. Courts have used the term "long" to refer to marriages of more than 20 years. See *DeLuca v. DeLuca*, 525 N.E.2d 435, 436 (Mass. App. 1988). Mid-length marriages of seven to 12 years have also justified alimony when other factors exist, such as one party's contribution to the other party's financial potential by supporting the other party through school. See *Drapek v. Drapek*, 503 N.E.2d 946, 947 (Mass. 1987) (the court considered the wife's support of the husband through medical school during their eight years of marriage when assigning alimony and dividing property).

Age is also considered in relation to other factors, such as health and employability, since generally, an older spouse will have a more difficult time starting or resuming a career and being self-sufficient. While courts generally view alimony as rehabilitative and tend to avoid an extended duration of alimony when appropriate, courts have resisted the concept of limited rehabilitative alimony in cases involving older parties coming out of long-term marriages. See *Zildjian v. Zildjian*, 391 N.E.2d 697, 705-06 (Mass. App. 1979).

Every case is unique, and the process of assigning alimony requires great care in evaluating each of the factors listed in the statute. Because it is dangerous to use illustrative examples of alimony

awards from other cases without describing the analysis that led to the assignment, it is wiser to focus attention on the specific factors in the present case. In order to determine what amount of alimony should be paid to Mrs. Ellsworth in the current case (if any), one should address some fundamental questions:

(i) What standard of living did Mrs. Ellsworth enjoy during her marriage?
(ii) Does she have sufficient resources to maintain a comparable standard of living?
(iii) If she lacks sufficient resources, how much financial support would she need to maintain a comparable standard of living?
(iv) What is Mr. Ellsworth's financial condition?
(v) Does he have the ability to pay the amount of support needed by Mrs. Ellsworth?

3. Property Division

Property division, like alimony, is also governed by Mass. Gen. Laws ch.208, sec. 34, and property may be assigned in lieu of or in addition to alimony, as mentioned above. In this way, the two issues are simultaneously distinct from one another and interrelated. The focus of the alimony issue is on the questions of standard of living, need, and ability to support, based on the factors outlined above. While these same factors are considered for the equitable division of marital property, the central purpose behind property division is not to provide needed support to a dependent spouse, but to recognize and equitably recompense parties' respective contributions to the marital partnership. See *Hay v. Cloutier*, 449 N.E.2d 361, 364 (Mass. 1983) (indicating that this differentiation is implied by the revised § 34 passed in 1974). Another distinction between alimony and property division is their tax treatment. Alimony payments receive more favorable tax treatment than property division payments, and parties in the past have sought to gain favorable tax treatment by front-loading alimony, or disguising what are actually property division payments as part of alimony. See the enclosed tax memo for a summary of the relevant tax issues.

The court begins its analysis of this issue from a presumption of equal distribution of marital property. If all of the relevant factors are neutral, then the real estate held by the parties may be sold with the net proceeds divided equally by the husband and wife, or one party may convey their rights and interests in the real estate to the other party in exchange for 50 percent of the net equity in the real estate. In 1990, the statute was amended to require the court to consider the present and future needs of the dependent children of the marriage in fixing and assigning property of the parties. If the presumption of equal division prevails, personal property may be divided such that each party is awarded the automobile registered to him or her; the personal property presently in each party’s physical possession, half of the cookware, kitchen utensils, food containers, pots and pans, photos, and books acquired during the marriage; an IRA standing in his or her name; bank accounts standing in his or her name; and 50 percent of the amount deposited in any joint bank account. If an item is indivisible, it may be conveyed by one party to the other in exchange for compensation, or sold on the market with net proceeds divided equally between the parties.

The fundamental question in considering how property ought to be divided is the relative contribution of each party to the marriage partnership. In determining the property distribution, the court is required to consider each and every one of the primary factors named in Section 34,

including length of marriage, age, health, occupation, amount and sources of income, employability, needs, liabilities, and future prospects of both parties. For example, when a spouse makes a career sacrifice by forgoing potential opportunities for career advancement by moving with the family to another location, or by making a substantial contribution to child care, these kinds of sacrifices relate to the factors of occupation, employability, and future prospects, and must be considered when evaluating a party's relative contribution to the marriage partnership. In *DeCastro v. DeCastro*, 616 N.E.2d 52 (Mass. 1993), the court ordered the husband to transfer to the wife 50 percent of his 1,113,666 shares of Data General Corporation stock. In that case, the wife worked as a schoolteacher and the husband worked at Digital Equipment Corporation. For the first part of their marriage, the parties pooled their savings in a joint account. In 1967, the wife discontinued work to care for their daughter. In 1968, the husband used $15,000 from the joint savings account to start his own business, Data General. While the husband grew his new company, two more children were born and the wife remained the primary and practically sole caretaker of the children and household. Data General became an enormously successful venture, as it was one of the earliest entrants in the high-tech industry. When the husband and wife divorced, the probate judge equated the parties' contributions to the martial estate and divided the assets accordingly, rejecting the husband's argument that his "super-contribution" of assets to the marriage via the success of his company overcame the presumption of equal distribution. The probate judge's findings and division of assets were affirmed by the Supreme Judicial Court.

Conversely, a judge is free to find that there has not been an equal contribution by the parties, and has the discretion to award more property to the primary contributor. See *Williams v. Massachusetts*, 728 N.E.2d 932 (Mass. 2000) (finding that the trial judge did not abuse his discretion in excluding the husband's gifted and inherited assets from equitable distribution, where the husband was the primary breadwinner and managed the majority of the household and familial duties).

4. Child Custody

A central focus of the Ellsworth divorce is the issue of child custody. Under Mass. Gen. Laws ch. 208, sec. 31, both parents are presumed to have equal rights to the custody of their children. In Massachusetts, custody is awarded based on the "best interests of the child" standard, which is applied at the discretion of the probate judge. See *Vilakazi v. Maxie*, 357 N.E.2d 765, 765 (Mass. 1976) ("While the feelings and the wishes of the parents should not be disregarded, the happiness and the welfare of the child should be the controlling consideration."); *Zatsky v. Zatsky*, 627 N.E.2d 474, 477 (Mass. App. 1994). The best interests of the child can overcome the presumption of equal custody rights.

There are two dimensions of custody: physical and legal. Probate judges may award either type of custody to a single parent or split it jointly between the two. Thus, physical custody might be granted to the wife, while legal custody is awarded to both parents, or the parents may share both physical and legal custody. Although physical custody may be granted to either parent, the Massachusetts courts have given the wife physical custody in the vast majority of the cases.

In making custody decisions, courts consider the parents' personal habits, relationships with the child or the children of the marriage, and grievances. Because judges determine what custodial arrangements are in the best interests of children on a case-by-case basis, custody awards are not completely predictable. In difficult cases, custody awards can depend on the viewpoint of the individual judge involved. For example, in *Zatsky v. Zatsky*, 627 N.E.2d 474 (Mass. App. 1994), there was evidence that, after the marriage breakup and the departure of the husband from the marital home, but before legal divorce, the wife developed a relationship with a man, took vacations with him, allowed him to share her bedroom. Nevertheless, the judge awarded custody to the wife based on evidence that the wife had been a nurturing mother who subordinated her own emotional needs to those of her children, and that the husband had made no plans for child care or suitable living arrangements for the children. Id. at 477.

When divorcing parents dispute custody, their lawyers often send the case to a child psychologist for evaluation. As custody was contested, the lawyers in this case arranged an evaluation of the Ellsworths' two children with a psychiatrist, whose report is enclosed.

In 1998, the Massachusetts legislature passed a law curtailing or limiting visitation rights of a parent who has committed domestic violence against a spouse or child (Mass. Gen. Laws ch. 208, sec. 31A). Once abuse has been shown by a preponderance of the evidence, there is "'a rebuttable presumption that it is not in the best interests of the child to be placed in the sole custody, shared legal custody, or shared physical custody with the abusive parent.'" *Mallouf v. Saliba*, 766 N.E.2d 552, 553-54 (Mass. App. 2002), citing 208 M.G.L. § 31A. If visitation is awarded to the abusive parent, sec. 31A mandates that the judge focus on and provide for the safety and well being of the child and abused spouse. See *In re Georgette*, 768 N.E.2d 549 (Mass. App. 2002) *aff'd* 785 N.E.2d 356 (Mass. 2003) (finding that the trial judge had broad discretion to impose any condition that is deemed necessary for the safety and well-being of the children).

5. Child Support

Pursuant to Mass. Gen. Laws ch. 208, sec. 28, a court may provide for the care, custody and maintenance of the parties' minor children as part of a judgment for divorce. See *Pare v. Pare*, 565 N.E.2d 1195, 1199 (Mass. 1991). In awarding child support, courts apply the Massachusetts Child Support Guidelines (the "Guidelines"), promulgated pursuant to Chapter 310 of the Acts of 1986.

Adherence to the Guidelines is mandatory in establishing or modifying child support orders, subject to a judge's specific, written finding that the provisions of the Guidelines would be unjust or inappropriate in a particular case. See Mass. Gen. Laws ch. 208, sec. 28. Massachusetts courts have departed from the Guidelines due to parents' needs to pay extraordinary travel expenses, and upon parents' remarriages and subsequent new family obligations. See *Canning v. Juskalian*, 597 N.E.2d 1074, 1075-76 (Mass. App. 1992) (court reduced non-custodial father's child support obligation under Guidelines by $20 per week to offset father's further duty to pay child's airfare from California to Massachusetts each summer and every other Christmas); *Camillo v. Camillo*, 577 N.E.2d 310, 313 (Mass. App. 1991) (noting that courts may depart from

Guidelines in light of one or both parties' subsequent family obligations), *review denied* 583 N.E.2d 25 (Mass. 1991).

The Guidelines do not apply if the parties agree to different payments, if the combined gross income of the parents exceeds $135,000, or if the gross income of the non-custodial parent exceeds $100,000. Where gross income levels exceed these amounts, the court should consider the award of support at the $100,000-$135,000 level as a minimum presumptive level of support to be awarded. Additional amounts of child support may be awarded at the judge's discretion. See *J.C. v. E.M.*, 632 N.E. 2d 429, 450 (Mass. App. 1994) (upholding the trial court's award of $400 per month in child support which was in excess of the amount required by the Guidelines for a $75,000 income).

In determining child support, Massachusetts courts look to both parents' assets and income. See *Silvia v. Silvia*, 400 N.E.2d 1330 (Mass. App. 1980). Although child support is determined pursuant to a strict formula set forth in the Guidelines, this does not mean that the parties or the judge will come out with the same figure. There is much leeway in determining what each parent must contribute. See *Richards v. Mason*, 767 N.E.2d 84 (Mass. App. 2002), *review denied*, 772 N.E.2d 590 (Mass. 2002) (giving discretion to the trial judge to uphold a range of child support awards, provided there is a sound basis).

Massachusetts courts have considered the earnings capacity rather than the actual earnings of parents where appropriate. See *Canning v. Juskalian*, 597 N.E.2d 1074, 1077 (Mass. App. 1992), *Schuler v. Schuler*, 416 N.E.2d 197 (Mass. 1981), *Diver v. Diver*, 524 N.E.2d 378 (Mass. 1988). Indeed, Section II-H of the Guidelines provides that, "If the court makes a determination that either or both parties is earning substantially less than he or she could through reasonable effort, the court may consider potential earning capacity rather than actual earnings." See e.g., *Crowe v. Fong*, 701 N.E.2d 359 (Mass. App. 1998) (upholding a trial court judge's finding of intentional underemployment). Although the Guidelines state that a custodial parent with a child under the age of six cannot be expected to work, this limitation only applies to children of the divorce, and not of subsequent marriages. See *Canning*, 597 N.E.2d at 1078. In *Canning v. Juskalian*, the court not only considered both parents' incomes when modifying child support, but also reduced the father's child support obligation by an additional $30 per week in light of the fact that, prior to having a baby with her new husband, the custodial wife had earned between $11,000 and $15,600 per year as a real estate agent, and that the wife derived income and tax benefits from two pieces of real estate she co-owned with her new husband. The fact that the wife had decided to stay home with her newborn child did not mitigate this result. Id. at 1075-76.

While child support generally takes the form of monetary payments, the Appeals Court of Massachusetts has held that use and occupancy of the marital home by the custodial parent and children of the marriage is a form of child support. See *Lostracco v. Lostracco*, 584 N.E.2d 633, 634 (Mass. App. 1992); *Tatar v. Schuker*, 580 N.E.2d 1050 (Mass. App. 1991); *Hartog v. Hartog*, 535 N.E.2d 239 (Mass. App. 1989). In *Lostracco*, the court justified this result on the psychological and emotional well being of the children. See *Lostracco*, 584 N.E.2d at 634. If the marital home is considered part of the child support award, it is unclear whether further provision for the home can be made upon the happening of a future event. While in *Lostracco*

the court denied the husband's request to honor a divorce agreement which provided for the sale of the home upon the wife's remarriage, in *Tatar v. Schuker* the court permitted the parties to condition the wife's maintaining the home upon (1) the sale of the house, (2) the remarriage of the wife, or (3) the emancipation of the two children of the marriage. See *Lostracco*, 584 NE.2d at 634; *Tatar v. Schuker*, 580 N.E.2d 1051, 1053.

A court may award child support beyond the age of 18. Under Mass. Gen. Laws ch. 208, sec. 28, a probate court may "make appropriate orders of maintenance, support and education of any child who has attained age 18 but who has not attained age 21 and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance." A probate court may additionally make such orders for a child ages 21 to 23, who, in addition to being domiciled in the home of the parent, is principally dependent upon that parent for "maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree." In *Kirwood v. Kirwood*, the court held that in determining dependency, "a judge should not limit inquiry solely to the direct financial contributions made by the parties… [T]he judge should take into account the parties' resources, indirect financial obligations incurred by the custodial parent,… as well as relevant noneconomic factors, such as the parents' respective involvement with the child's care and well-being." *Kirwood v. Kirwood*, 539 N.E.2d 79, 80 (Mass. App. 1989).

Child support awards for children ages 18 to 23 may additionally require the non-custodial parent to pay for the children's education. See *Stolk v. Stolk*, 574 N.E.2d 429, 431 (Mass. App. 1991) (requiring non-custodial father to provide for his 18-year-old daughter by paying $350, and then $250 per month over specified periods, and financing the net costs of her college education); *McCarthy v. McCarthy*, 633 N.E.2d 405, 407 (Mass. App. 1994); *Passemato v. Passemato*, 691 N.E.2d 549 (Mass. 1998). However, the term "educational expenses" is ambiguous, and it should be carefully defined. See *Krock v. Krock,* 707 N.E.2d 839 (Mass. App. 1999) *review denied*, 712 N.E.2d 98 (Mass. 1999). Although the statute does not provide for child support beyond this age, the parties may agree to support for children over age twenty-three. See *Larson v. Larson*, 569 N.E.2d 406, 411 (Mass. App. 1991) (based on the pre-1991 amendment to Mass. Gen. Laws ch.208, sec. 28, extending support from ages eighteen to twenty-one). Many divorce experts believe that the key is to agree on the percentage of the educational expenses that each parent will pay. Problems arise when agreements are based on parents' salaries at the time of divorce.

As discussed more fully below, child support awards can be modified if there is a change in the circumstances of the parents. See Mass. Gen. Laws ch. 208, sec. 28; *Boulter-Hedley v. Boulter*, 711 N.E.2d 596 (Mass. 1999).

6. Survival of a Settlement Agreement

The parties may elect to have the settlement agreement either merge with or survive the divorce decree issued by the court. The primary difference is the standard that must be met to convince a judge to modify the agreement. If the agreement merges, it loses independent legal significance and is modified through the same process as the decree itself: a petition by either party based on a showing of "a material change in circumstances." *DeChristofaro v. DeChristofaro,* 508 N.E.2d

104, 108 (Mass. App. 1987) *review denied*, 511 N.E.2d 620 (Mass. 1987); see *also Knox v. Remick*, 358 N.E.2d 432, 434-35 (Mass. 1976). If the agreement survives, it maintains independent legal significance and can only be modified as a contract. Thus, it is "specifically enforced absent countervailing equities." *Knox*, 358 N.E.2d at 436, meaning that absent fraud or coercion, something "more than a 'material change in circumstances'" must be shown to warrant changing it. *DeChristofaro*, 508 N.E.2d at 108, quoting *Knox*, 358 N.E.2d at 436-37.

The distinction doesn't apply to child support provisions. Legislation enacted in 1993 provides that "A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance." Mass. Gen. Laws ch. 209, sec. 37, also incorporated into Mass. Gen. Laws ch. 208, sec. 28.

A concise description of the distinction between merged and surviving agreements can be found in *Bercume v. Bercume*, 704 N.E.2d 177, 181-82 (Mass. 1999) and *Huddleston v. Huddleston*, 747 N.E.2d 195 (Mass. App. 2001) *review denied* 752 N.E.2d 251 (Mass. 2001) (applying Bercume to a request for the modification of a marriage settlement).

7. Tax Issues

Tax issues arising due to divorce can be complex. For the purposes of this exercise, you should focus on the issues outlined in the enclosed tax memo.

THE GENERAL LAWS OF MASSACHUSETTS

CHAPTER 208. DIVORCE

CAUSES FOR DIVORCE

Chapter 208: Section 1. General provisions

Section 1. A divorce from the bond of matrimony may be adjudged for adultery, impotency, utter desertion continued for one year next prior to the filing of the complaint, gross and confirmed habits of intoxication caused by voluntary and excessive use of intoxicating liquor, opium, or other drugs, cruel and abusive treatment, or, if a spouse being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable support and maintenance for the other spouse, or for an irretrievable breakdown of the marriage as provided in sections one A and B; provided, however, that a divorce shall be adjudged although both parties have cause, and no defense upon recrimination shall be entertained by the court.

Chapter 208: Section 1A. Irretrievable breakdown of marriage; commencement of action; complaint accompanied by statement and dissolution agreement; procedure

Section 1A. An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced with the filing of: (a) a petition signed by both joint petitioners or their attorneys; (b) a sworn affidavit that is either jointly or separately executed by the petitioners that an irretrievable breakdown of the marriage exists; and (c) a notarized separation agreement executed by the parties except as hereinafter set forth and no summons or answer shall be required. After a hearing on a separation agreement which has been presented to the court, the court shall, within thirty days of said hearing, make a finding as to whether or not an irretrievable breakdown of the marriage exists and whether or not the agreement has made proper provisions for custody, for support and maintenance, for alimony and for the disposition of marital property, where applicable. In making its finding, the court shall apply the provisions of section thirty-four, except that the court shall make no inquiry into, nor consider any evidence of the individual marital fault of the parties. In the event the notarized separation agreement has not been filed at the time of the commencement of the action, it shall in any event be filed with the court within ninety days following the commencement of said action.

If the finding is in the affirmative, the court shall approve the agreement and enter a judgment of divorce nisi. The agreement either shall be incorporated and merged into said judgment or by agreement of the parties, it shall be incorporated and not merged, but shall survive and remain as an independent contract. In the event that the court does not approve the agreement as executed, or modified by agreement of the parties, said agreement shall become null and void and of no further effect between the parties; and the action shall be treated as dismissed, but without prejudice. Following approval of an

agreement by the court but prior to the entry of judgment nisi, said agreement may be modified in accordance with the foregoing provisions at any time by agreement of the parties and with the approval of the court, or by the court upon the petition of one of the parties after a showing of a substantial change of circumstances; and the agreement, as modified, shall continue as the order of the court.

Thirty days from the time that the court has given its initial approval to a dissolution agreement of the parties which makes proper provisions for custody, support and maintenance, alimony, and for the disposition of marital property, where applicable, notwithstanding subsequent modification of said agreement, a judgment of divorce nisi shall be entered without further action by the parties.

Nothing in the foregoing shall prevent the court, at any time prior to the approval of the agreement by the court, from making temporary orders for custody, support and maintenance, or such other temporary orders as it deems appropriate, including referral of the parties and the children, if any, for marriage or family counseling.

Prior to the entry of judgment under this section, the petition may be withdrawn by mutual agreement of the parties.

An action commenced under this section shall be placed by the register of probate for the county in which the action is so commenced on a hearing list separate from that for all other actions for divorce brought under this chapter, and shall be given a speedy hearing on the dissolution agreement insofar as that is consistent with the wishes of the parties.

Chapter 208: Section 1B. Irretrievable breakdown of marriage; commencement of action; waiting period; unaccompanied complaint; procedure

Section 1B. An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced by the filing of the complaint unaccompanied by the signed statement and dissolution agreement of the parties required in section one A.

No earlier than six months after the filing of the complaint, there shall be a hearing and the court may enter a judgment of divorce nisi if the court finds that there has existed, for the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage.

Notwithstanding the foregoing, at the election of the court hereunder, the aforesaid six month period may be waived to allow the consolidation for the purposes of hearing a complaint commenced under this section with a complaint for divorce commenced by the opposing party under section one.

The filing of a complaint for divorce under this section shall not affect the ability of the defendant to obtain a hearing on a complaint for divorce filed under section one, even if the aforesaid six month period has not yet expired.

Said six month period shall be determined from the filing of a complaint for divorce. In the event that a complaint for divorce is commenced in accordance with the provisions of section one A or is for a cause set forth under section one, and said complaint is later amended to set forth the ground established in this section, the six month period herein set forth shall be computed from the date of the filing of said complaint.

As part of the entry of the judgment of divorce nisi, appropriate orders shall be made by the court with respect to custody, support and maintenance of children, and, in accordance with the provisions of section thirty-four, for alimony and for the disposition of marital property.

Nothing in the foregoing shall prevent the court, at any time prior to judgment, from making temporary orders for custody, support and maintenance or such other temporary orders as it deems appropriate, including referral of the parties and the children, if any, for marriage or family counseling.

Prior to the entry of judgment under this section, in the event that the parties file the statement and dissolution agreement as required under section one A hereinabove, then said action for divorce shall proceed under said section one A.

Chapter 208: Section 2 Confinement for crime

Section 2. A divorce may also be adjudged if either party has been sentenced to confinement for life or for five years or more in a federal penal institution or in a penal or reformatory institution in this or any other state; and, after a divorce for such cause, no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.

Chapter 208: Section 3 Absence; presumption of death

Section 3. A divorce may be adjudged for any of the causes allowed by sections one, one B, or two although the defendant has been continuously absent for such time and under such circumstances as would raise a presumption of death.

Chapter 208: Section 4 Domicile of parties

Section 4. A divorce shall not, except as provided in the following section, be adjudged if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another jurisdiction, unless before such cause occurred the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.

Chapter 208: Section 5 Exceptions

Section 5. If the plaintiff has lived in this commonwealth for one year last preceding the commencement of the action if the cause occurred without the commonwealth, or if the

plaintiff is domiciled within the commonwealth at the time of the commencement of the action and the cause occurred within the commonwealth, a divorce may be adjudged for any cause allowed by law, unless it appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce.

LIBELS FOR DIVORCE

Chapter 208: Section 6 Venue

Section 6. Actions for divorce shall be filed, heard and determined in the probate court, held for the county where one of the parties lives, except that if either party still resides in the county where the parties last lived together, the action shall be heard and determined in a court for that county. In the event of hardship or inconvenience to either party, the court having jurisdiction may transfer such action for hearing to a court in a county in which such party resides.

Chapter 208: Section 6A Repealed, 1931, 426, Sec. 88

Chapter 208: Section 6B Filing of action; statistical report

Section 6B. An action for divorce shall be commenced in probate court by the filing of a complaint. Said complaint shall be accompanied by a statistical report, upon a form prepared by the commissioner of public health and made available through the office of the register of probate, to include the name, residence, date of birth and social security number of each of the parties, the name of the plaintiff, the number of times each of the parties had been married before, if any, the date of the marriage being dissolved, the number of children born of such marriage, if any, the name and date of birth of each such child, the number of minor children in the care and custody of the parties, if any, and such additional information as the commissioner of public health deems useful for statistical and research purposes. The state registrar may make such information available to the IV-D agency as set forth in chapter 119A and such other state or federal agencies as may be required by law.

Chapter 208: Section 7 Repealed, 1975, 400, Sec. 13

Chapter 208: Section 8 Commencement of actions

Section 8. Actions for divorce in the probate courts shall be commenced in accordance with the Massachusetts Rules of Civil Procedure applicable to domestic relations procedure.

Chapter 208: Section 8A Repealed, 1975, 400, Sec. 15

Chapter 208: Section 9 Repealed, 1975, 400, Sec. 16

Chapter 208: Section 9A Repealed, 1922, 542, Sec. 3

Chapter 208: Section 10 Repealed, 1975, 400, Sec. 17

Chapter 208: Section 11 Ex parte hearing; allowance or denial of motion to insert name of third person

Section 11. The evidence produced at such ex parte hearing shall not be reported or made a part of the record in the case and the motion for said amendment shall not be read in open court during the proceedings, but the register of probate shall make an entry in the docket of ""Motion to insert name of third person allowed" or ""Motion to insert name of third person denied", as the case may be. If the amendment is allowed upon affidavits, they shall be retained in the court and placed in the custody of the register, and shall be open for the purposes of inspection, and taking copies thereof, to counsel of record, the parties or the third person named in the amendment

Chapter 208: Section 12 Spouse's property; attachment

Section 12. Upon an action for divorce by either spouse for a cause accruing after marriage, the real and personal property of the other spouse may be attached to secure suitable support and maintenance to the plaintiff and to such children as may be committed to his care and custody.

Chapter 208: Section 13 Attachment; manner

Section 13. The attachment may be made upon the summons issued upon the action, in the same manner as attachments are made upon writs in actions at law, for an amount which shall be expressed in the summons or order of notice. The attachment may be made by trustee process, in which case there shall be inserted in the summons or order of notice a direction to attach the goods, effects and credits of the defendant in the hands of the alleged trustee, and service shall be made upon the trustee by copy. If attachment is made by trustee process, the action shall be filed as provided in section six notwithstanding the provisions of section two of chapter two hundred and forty-six. The court may in such cases make all necessary orders to secure to the trustee his costs. The attachment may be made by injunction, as in suits in equity, to reach shares of stock or other property which cannot be reached to be attached as in an action at law, and the property so attached may thereafter, by appropriate order, be applied to the satisfaction of any order or decree for the payment of money by one spouse to the other for his support and maintenance or that of the children.

Chapter 208: Section 14 Attachments; laws applicable

Section 14. The laws relative to attachments of real or personal property shall apply to attachments herein provided for, so far as they are consistent with the two preceding sections.

Chapter 208: Section 15 Mentally ill defendant; appointment and compensation of guardian

Section 15. If during the pendency of an action for divorce the defendant is incapacitated by reason of mental illness, the court shall appoint a suitable guardian to appear and answer in like manner as a guardian for an infant defendant in any civil action may be appointed. The compensation of such guardian shall be determined by the court, and, together with his necessary expenses, shall be paid by the plaintiff if the court so orders.

Chapter 208: Section 16 Investigation of divorce case

Section 16. Any judge of a probate court wherein any action for divorce is pending may appoint an attorney to investigate and report to the court in relation thereto and may direct such attorney, or any other attorney, to defend the action. The attorney may be appointed either before or after a judgment of divorce nisi has been granted, and may enter objections to such judgment nisi becoming absolute in the same manner as the defendant. His compensation shall be fixed by the court, and shall be paid by the commonwealth, together with any expenses approved by the court, upon certificate by a justice to the state treasurer. The state police, local police and probation officers shall assist the attorneys so appointed, upon his request.

Chapter 208: Section 17 Pendency of action; allowance; alimony

Section 17. The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action. When the court makes an order for alimony on behalf of a party, and such party is not a member of a private group health insurance plan, the court shall include in such order for alimony a provision relating to health insurance, which provision shall be in accordance with section thirty-four.

Chapter 208: Section 18 Pendency of action for divorce; protection of personal liberty of spouse; restraint orders authorized

Section 18. The probate court in which the action for divorce is pending may, upon petition of the wife, prohibit the husband, or upon petition of the husband, prohibit the wife from imposing any restraint upon her or his personal liberty during the pendency of the action for divorce. Upon the petition of the husband or wife or the guardian of either, the court may make such further order as it deems necessary to protect either party or their children, to preserve the peace or to carry out the purposes of this section relative to restraint on personal liberty.

Chapter 208: Section 19 Pendency of action for divorce; custody of children

Section 19. The court may in like manner, upon application of either party or of a next friend in behalf of the minor children of the parties, make such order relative to the care

and custody of such children during the pendency of the action for divorce as it may consider expedient and for their benefit.

Chapter 208: Section 20 Continuance of action; temporary separation

Section 20. The court may, without entering a judgment of divorce, order the action continued upon the docket from time to time, and during such continuance may make orders relative to a temporary separation of the parties, the separate maintenance of either spouse and the custody and support of minor children. Such orders may be changed or annulled as the court may determine, and shall, while they are in force, supersede any order of the probate court under section thirty-two of chapter two hundred and nine and may suspend the right of said court to act under said section. When the court makes an order for maintenance of a spouse or support of a minor child, and such spouse or child is not a member of a private group health insurance plan, the court shall include in such order a provision relating to health insurance, which provision shall be in accordance with section thirty-four.

Chapter 208: Section 20A Judgment denying divorce; living apart for justifiable cause; authorization

Section 20A. If, after a hearing, the allegations of an action for divorce are not sustained, the court may, if the facts warrant, enter a judgment denying the divorce and making a finding that the plaintiff is living apart from the defendant for justifiable cause, and may make such order relative to the support of either spouse and the care, custody of and maintenance of the minor children of the parties as the circumstances require. The various provisions of chapter two hundred and nine which relate to proceedings commenced under section thirty-two thereof shall be applicable to this section.

Chapter 208: Section 21 Divorce judgments; entry

Section 21. Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of ninety days from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party to the action, otherwise orders. After the entry of a judgment nisi, the action shall not be dismissed or discontinued on motion of either party except upon such terms, if any, as the court may order after notice to the other party and a hearing, unless there has been filed with the court a memorandum signed by both parties, wherein they agree to such disposition of the action.

Chapter 208: Section 22 Desertion; proof

Section 22. In order to establish grounds for divorce for desertion, the plaintiff shall establish that the defendant left voluntarily and without justification and with intent not to return, that at the time such defendant left, the plaintiff did not consent thereto, and that the defendant failed to cohabit with the plaintiff for at least one year next prior to the date of the filing of the action. An action for divorce for desertion shall not be defeated by a

temporary return or other act of the defendant if the court finds that such return or other act was not made or done in good faith, but with intent to defeat such action. The prior filing of an action for divorce or separate support shall not be deemed to raise a conclusive presumption to defeat an action for divorce for desertion.

GENERAL PROVISIONS

Chapter 208: Section 23 Resumption of former name by woman

Section 23. The court granting a divorce may allow a woman to resume her maiden name or that of a former husband.

Chapter 208: Section 24 Divorced parties; remarriage

Section 24. After a judgment of divorce has become absolute, either party may marry again as if the other were dead.

Chapter 208: Section 24A Certificate of divorce; contents

Section 24A. The court, in issuing a copy of, or a certificate relating to, a decree of divorce entered by it, shall cause to be printed or written thereon the provisions of sections twenty-one and twenty-four.

Chapter 208: Section 25 Divorce for adultery of wife; legitimacy of issue

Section 25. A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law.

Chapter 208: Section 26 Repealed, 1949, 76, Sec. 1

Chapter 208: Section 27 Curtesy or dower after divorce

Section 27. After a divorce, a husband or wife shall not be entitled to curtesy or dower in the land of the other spouse.

Chapter 208: Section 28 Children; care, custody and maintenance; child support obligations; provisions for education and health insurance; parents convicted of first degree murder

Section 28. Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the

benefit of the children. In determining the amount of the child support obligation or in approving the agreement of the parties, the court shall apply the child support guidelines promulgated by the chief justice for administration and management, and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children. In furtherance of the public policy that dependent children shall be maintained as completely as possible from the resources of their parents and upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines promulgated by the chief justice for administration and management or if there is a need to provide for the health care coverage of the child. A modification to provide for the health care coverage of the child shall be entered whether or not a modification in the amount of child support is necessary. There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. The order shall be modified accordingly unless the inconsistency between the amount of the existing order and the amount of the order that would result from application of the guidelines is due to the fact that the amount of the existing order resulted from a rebuttal of the guidelines and that there has been no change in the circumstances which resulted in such rebuttal; provided, however, that even if the specific facts that justified departure from the guidelines upon entry of the existing order remain in effect, the order shall be modified in accordance with the guidelines unless the court finds that the guidelines amount would be unjust or inappropriate under the circumstances and that the existing order is consistent with the best interests of the child. A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance. If the IV-D agency as set forth in chapter 119A is responsible for enforcing a case, an order may also be modified in accordance with the procedures set out in section 3B of said chapter 119A. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not

attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

When a court makes an order for maintenance or support, the court shall determine whether the obligor under such order is responsible for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children from a previous marriage, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children born out of wedlock. If the court determines that such responsibility does, in fact, exist and that such obligor is fulfilling such responsibility such court shall take into consideration such responsibility in setting the amount to paid under the current order for maintenance or support.

No court shall make an order providing visitation rights to a parent who has been convicted of murder in the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.

Chapter 208: Section 28A Temporary care; custody and maintenance of minor children

Section 28A. During the pendency of an action seeking a modification of a judgment for divorce, upon motion of either party or of a next friend on behalf of the minor children of the parties and notice to the other party or parties, the court may make temporary orders relative to the care, custody and maintenance of such children. Every order entered relative to care and custody shall include specific findings of fact made by the court which clearly demonstrate the injury, harm or damage that might reasonably be expected to occur if relief pending a judgment of modification is not granted. An order entered relative to care and custody, pursuant to this section, may only be entered without advance notice if the court finds that an emergency exists, the nature of which requires

the court to act before the opposing party or parties can be heard in opposition. In all such cases, such order shall be for a period not to exceed five days and written notice of the issuance of any such order and the reasons therefor shall be given to the opposing party or parties together with notice of the date, time and place that a hearing on the continuation of such order will be held.

Chapter 208: Section 29 Minor children; foreign divorces, care and custody

Section 29. If, after a divorce has been adjudged in another jurisdiction, minor children of the marriage are inhabitants of, or residents in this commonwealth, the probate court for the county in which said minors or any of them are inhabitants or residents, upon an action of either parent or of a next friend in behalf of the children, after notice to both parents, shall have the same power to make judgments relative to their care, custody, education and maintenance, and to revise and alter such judgments or make new judgments, as if the divorce had been adjudged in this commonwealth.

Chapter 208: Section 30 Minor children; removal from commonwealth; prohibition

Section 30. A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security and issue writs and processes to effect the purposes of this and the two preceding sections.

Chapter 208: Section 31 Custody of children; shared custody plans

Section 31. For the purposes of this section, the following words shall have the following meaning unless the context requires otherwise:

""Sole legal custody", one parent shall have the right and responsibility to make major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

""Shared legal custody", continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

""Sole physical custody", a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child.

""Shared physical custody", a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared

by the parents in such a way as to assure a child frequent and continued contact with both parents.

In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his physical, mental, moral or emotional health.

Upon the filing of an action in accordance with the provisions of this section, section twenty-eight of this chapter, or section thirty-two of chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child. Nothing herein shall be construed to create any presumption of temporary shared physical custody.

In determining whether temporary shared legal custody would not be in the best interest of the child, the court shall consider all relevant facts including, but not limited to, whether any member of the family abuses alcohol or other drugs or has deserted the child and whether the parties have a history of being able and willing to cooperate in matters concerning the child.

If, despite the prior or current issuance of a restraining order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

There shall be no presumption either in favor of or against shared legal or physical custody at the time of the trial on the merits, except as provided for in section 31A.

At the trial on the merits, if the issue of custody is contested and either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit to the court at the trial a shared custody implementation plan setting forth the details of shared custody including, but not limited to, the child's education; the child's health care; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside or visit with him, including holidays and vacations, or the procedure by which such periods of time shall be determined.

At the trial on the merits, the court shall consider the shared custody implementation plans submitted by the parties. The court may issue a shared legal and physical custody order and, in conjunction therewith, may accept the shared custody implementation plan submitted by either party or by the parties jointly or may issue a plan modifying the plan or plans submitted by the parties. The court may also reject the plan and issue a sole legal

and physical custody award to either parent. A shared custody implementation plan issued or accepted by the court shall become part of the judgment in the action, together with any other appropriate custody orders and orders regarding the responsibility of the parties for the support of the child.

Provisions regarding shared custody contained in an agreement executed by the parties and submitted to the court for its approval that addresses the details of shared custody shall be deemed to constitute a shared custody implementation plan for purposes of this section.

An award of shared legal or physical custody shall not affect a parent's responsibility for child support. An order of shared custody shall not constitute grounds for modifying a support order absent demonstrated economic impact that is an otherwise sufficient basis warranting modification.

The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the non-custodial parent to have access to the academic, medical, hospital or other health records of the child, as he would have had if the custody order or judgment had not been entered; provided, however, that if a court has issued an order to vacate against the non-custodial parent or an order prohibiting the non-custodial parent from imposing any restraint upon the personal liberty of the other parent or if nondisclosure of the present or prior address of the child or a party is necessary to ensure the health, safety or welfare of such child or party, the court may order that any part of such record pertaining to such address shall not be disclosed to such non-custodial parent.

Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interests of the children.

Chapter 208: Section 31A Visitation and custody orders; consideration of abuse toward parent or child; best interest of child

Section 31A. In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, ""abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. ""Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, ""bodily injury" and ""serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, ""an abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearings.

Chapter 208: Section 32 Child; bringing before court; writ of habeas corpus

Section 32. Any court having jurisdiction of actions for divorce or nullity of marriage, separate support, or maintenance, or of any other proceeding in which the care and custody of any child is drawn in question, may issue a writ of habeas corpus to bring before it such child. The writ may be made returnable forthwith before the court by which it is issued, and, upon its return, said court may make any appropriate order or judgment relative to the child who may thus be brought before it.

Chapter 208: Section 33 Jurisdiction; procedure

Section 33. The court may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter according to the course of proceedings in ecclesiastical courts or in courts of equity, and may issue process of attachment and execution and all other proper and necessary processes. In such proceedings the court shall have jurisdiction in equity of all causes cognizable under the general principles of equity jurisprudence, arising between husband and wife, such jurisdiction to be exercised in accordance with the usual course of practice in equity proceedings.

Chapter 208: Section 34 Alimony or assignment of estate; determination of amount; health insurance

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, 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. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

Chapter 208: Section 34A Alimony judgment ordering conveyance; effect

Section 34A. Whenever a judgment for alimony shall be made in a proceeding for divorce directing that a deed, conveyance or release of any real estate or interest therein shall be made such judgment shall create an equitable right to its enforcement, subject to the provisions for recording of notice in section fifteen of chapter one hundred and eighty-four, in the party entitled thereto by the judgment, and if the judgment has not been complied with at the time the judgment of divorce becomes absolute, and is thereafter recorded in the manner provided by section forty-four of chapter one hundred and eighty-three, then the judgment itself shall operate to vest title to the real estate or interest therein in the party entitled thereto by the judgment as fully and completely as if such deed, conveyance or release had been duly executed by the party directed to make it.

No assignment, transfer or conveyance, from one spouse to the other, under this section or under a separation agreement, of real estate which is encumbered by a mortgage shall be deemed a transfer or divestment of said mortgage under the provisions of mortgage covenants, which provide that the debt secured by said mortgage becomes due and payable on demand upon transfer or divestment to anyone other than the mortgagor.

Chapter 208: Section 34B Order to vacate marital home

Section 34B. Any court having jurisdiction of actions for divorce, or for nullity of marriage or of separate support or maintenance, may, upon commencement of such action and during the pendency thereof, order the husband or wife to vacate forthwith the marital home for a period of time not exceeding ninety days, and upon further motion for such additional certain period of time, as the court deems necessary or appropriate if the court finds, after a hearing, that the health, safety or welfare of the moving party or any minor children residing with the parties would be endangered or substantially impaired

by a failure to enter such an order. The opposing party shall be given at least three days' notice of such hearing and may appear and be heard either in person or by his attorney. If the moving party demonstrates a substantial likelihood of immediate danger to his or her health, safety or welfare or to that of such minor children from the opposing party, the court may enter a temporary order without notice, and shall immediately thereafter notify said opposing party and give him or her an opportunity to be heard as soon as possible but not later than five days after such order is entered on the question of continuing such temporary order. The court may issue an order to vacate although the opposing party does not reside in the marital home at the time of its issuance, or if the moving party has left such home and has not returned there because of fear for his or her safety or for that of any minor children.

Chapter 208: Section 34C Orders to vacate marital home and orders of restraint; notice to law enforcement agencies; procedures; violations

Section 34C. Whenever a division of the probate and family court department issues an order to vacate under the provisions of section thirty-four B, or an order prohibiting a person from imposing any restraint on the personal liberty of another person under section eighteen or under the provisions of section thirty-two of chapter two hundred and nine or section three, four or five of chapter two hundred and nine A or section fifteen or twenty of chapter two hundred and nine C or an order for custody pursuant to any abuse prevention action, the register shall transmit two certified copies of each order forthwith to the appropriate law enforcement agency which shall serve one copy of each such order upon the defendant. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement officers shall use every reasonable means to enforce such order. Law enforcement agencies shall establish procedures adequate to insure that an officer at the scene of an alleged violation of such order may be informed of the existence and terms of such order.

The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated by the court and shall direct the agency to destroy all records of such vacated order and such agency shall comply with such directive.

Any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in the house of correction, or both such fine and imprisonment. Each such order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any such violation may be enforced in the superior or district or Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal court departments may each enforce by civil contempt procedure a violation of its own court order.

Chapter 208: Section 34D Request for restraining order or order to vacate marital home; information provided to petitioner upon filing; domestic violence record search; outstanding warrants

Section 34D. Upon the filing of a request for a restraining order pursuant to section eighteen or for an order for a spouse to vacate the marital home pursuant to section thirty-four B, a petitioner shall be informed that the proceedings hereunder are civil in nature and that violations of orders issued hereunder are criminal in nature. Further, a petitioner shall be given information prepared by the appropriate district attorney's office that other criminal proceedings may be available and such petitioner shall be instructed by such district attorney's office relative to the procedures required to initiate such criminal proceedings including, but not limited to, the filing of a complaint for a violation of section forty-three of chapter two hundred and sixty-five. Whenever possible, a petitioner shall be provided with such information in the petitioner's native language.

When considering a request for a restraining order pursuant to section eighteen or for an order for a spouse to vacate the marital home pursuant to section thirty-four B, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances where an outstanding warrant exists, a judge shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Chapter 208: Section 35 Alimony; enforcement

Section 35. The court may enforce judgments, including foreign decrees, for allowance, alimony or allowance in the nature of alimony, in the same manner as it may enforce judgments in equity.

Chapter 208: Section 36 Security for payment of alimony or support; enforcement of judgments or orders

Section 36. When alimony or support is adjudged for the spouse or children, the court may require sufficient security for its payment according to the judgment. Each judgment or order of support which is issued, reviewed or modified pursuant to this chapter shall conform to and shall be enforced in accordance with the provisions of section twelve of chapter one hundred and nineteen A.

Chapter 208: Section 36A Continuing jurisdiction to enforce alimony, support and maintenance or child support; order for trustee process

Section 36A.

(1) In any case in which an obligor is under court order to pay alimony or support and maintenance or child support in an action or judgment for divorce under this chapter or in an action or judgment for separate support under chapter two hundred and nine, the court which entered the support order shall retain continuing jurisdiction over the parties to the order and may enter an order of trustee process against the disposable earnings of the obligor, both those presently due and owing and those which will be due and owing at a future time, up to an amount permitted by federal law. Before the court may enter such an order, it shall find that all other domestic remedies available to collect support have been exhausted or would be ineffective.

For the purpose of this section, the words ""disposable earnings" shall mean that part of the compensation paid or payable to the obligor for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension or retirement program, which remains after the deduction of any amounts required by law to be withheld; and the word ""trustee" shall mean the person, firm, association, or corporation by whom the obligor is employed.

(2) A complaint seeking an order of trustee process may be sought by the spouse or parent, custodian or guardian of the child, a family service officer or probation officer, or in the case of persons receiving public assistance, the department of public welfare. The complaint will be filed in the court which issued the judgment of divorce or separate support or in which the action for divorce or separate support is pending under the docket number of the action for divorce or separate support and shall state that the obligor is under a court order to provide support, the amount of the order, the amount of the arrearage, if any; that all other domestic remedies available to collect support have been exhausted or would be ineffective; the name and address of the employer of the obligor; the obligor's monthly disposable earnings from said employer, which may be based upon information and belief, and the amount sought to be trusteed. The complaint shall be served on both the obligor and his employer in accordance with applicable law and rules for service of process; provided, however, that where the court had personal jurisdiction over the obligor in the original action for divorce or separate support, personal service on such obligor shall not be required as long as the obligor receives adequate and reasonable notice of the proceeding.

(3) After a hearing on the merits, the court may enter an order of trustee process against the obligor's disposable earnings. The order shall set forth sufficient findings of fact to support the action by the court and the amount to be trusteed for each pay period. The order shall be subject to review by the court for

modification and dissolution upon the filing of a motion, with a sworn affidavit supporting same.

(4) Upon receipt of an order for trustee process, the trustee shall transmit each pay period without delay to the clerk of the court, or to the family service office of the court or any other party designated by the court, the amount ordered by the court to be trusteed for each such period. These funds shall be disbursed to the party designated by the court. If the person entitled to receive said support is a recipient of public assistance, such funds shall be disbursed directly to the department of public welfare up to the amount of aid being paid to the recipient by the department.

(5) No employer may discharge, suspend, or discipline an employee by reason of his having been trusteed pursuant to this section. Any employer who violates this clause shall be liable to the employee for compensation and employment benefits lost, if any, during the time of the unlawful discharge, suspension, or discipline.

(6) The commonwealth and any of its political sub-divisions shall be subject to trustee process under this section as if they were private parties.

(7) Any remedy provided pursuant to this section shall be in addition to, and not in lieu of, any other remedy available for the enforcement of support obligations.

Chapter 208: Section 37 Alimony; revision of judgment

Section 37. After a judgment for alimony or an annual allowance for the spouse or children, the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action.

The court, provided there is personal jurisdiction over both parties, may modify and alter a foreign judgment, decree, or order of divorce or separate support where the foreign court did not have personal jurisdiction over both parties upon the entry of such judgment, decree or order.

The court, provided there is personal jurisdiction over both parties to a foreign judgment, decree, or order of divorce for support, where such foreign court had personal jurisdiction over both parties, may modify and alter such foreign judgment, decree, or order only to the extent it is modifiable or alterable under the laws of such foreign jurisdiction; provided, however, that if both parties are domiciliaries of the commonwealth, then the court may modify and alter the foreign judgment in the same manner as it could have had the judgment, order, or decree been issued by the court; and provided further, that the court may not modify or alter the judgment, order or decree of a foreign jurisdiction which had personal jurisdiction over both parties concerning the division or assignment of marital assets or property.

Chapter 208: Section 38 Costs

Section 38. In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

Chapter 208: Section 39 Foreign divorces; validity

Section 39. A divorce adjudged in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth

CRIMINAL PROVISIONS

Chapter 208: Section 40 Cohabitation after divorce

Section 40. Persons divorced from each other cohabiting as husband and wife or living together in the same house shall be held to be guilty of adultery.

Chapter 208: Section 41 Personation

Section 41. Whoever falsely personates another or wilfully and fraudulently procures a person so to do, or fraudulently procures false testimony to be given, or makes a false or fraudulent return of service of process in an action for divorce or in any proceeding connected therewith, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than two years.

Chapter 208: Section 42 Procurement of unlawful divorce

Section 42. Whoever knowingly procures or obtains or assists another to procure or obtain any false, counterfeit or fraudulent divorce or judgment of divorce, or any divorce or judgment of divorce from a court of another state for or in favor of a person who at the time of making application therefor was a resident of this commonwealth, such court not having jurisdiction to grant such judgment, shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months.

Chapter 208: Section 43 Advertisement to procure divorce

Section 43. Whoever writes, prints or publishes, or solicits another to write, print or publish, any notice, circular or advertisement soliciting employment in the business of procuring divorces or offering inducements for the purpose of procuring such employment shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months.

Chapter 208: Section 44 Certificate of divorce; unlawful issuance

Section 44. Whoever, except in compliance with an order of a court of competent jurisdiction, gives, signs or issues any writing purporting to grant a divorce to persons who are husband and wife according to the laws of the commonwealth, or purporting to be a certificate that a divorce has been granted to such persons, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than three years, or both.

Chapter 208: Section 45 Criminal offenses; notice to district attorney

Section 45. If a divorce is granted for a cause constituting a crime, committed within the commonwealth and within the time provided by law for making complaints and finding indictments therefor, the court granting the divorce may, in its discretion, cause notice of such facts to be given by the clerk of the court or register of probate to the district attorney for the district where such crime was committed, with a list of the witnesses proving such crime and any other information which it considers proper and thereupon the district attorney may cause complaint therefor to be made before a magistrate having jurisdiction thereof, or may present the evidence thereof to the grand jury.

STATISTICS OF DIVORCE

Chapter 208: Section 46 Statistical reports; additional information

Section 46. The registers of probate shall receive the statistical reports filed pursuant to section six B; and shall, upon a divorce becoming absolute, add to the information contained therein the date and number of the judgment, the cause for which the divorce was granted, and such additional information as the commissioner of public health deems useful for statistical and research purposes and shall further, on the tenth day of the month following every month in which divorces become absolute, transmit such reports to the commissioner of public health. Any such information forwarded to the commissioner of public health shall not constitute a public record nor be available except as may be necessary for the purposes stated in section two of chapter one hundred and eleven.

Chapter 208: Section 47 Repealed, 1976, 488, Sec. 23

CHAPTER 175: INSURANCE

ACCIDENT AND HEALTH INSURANCE

Chapter 175: Section 110H Policies cancellable at age 65; notice to insured

Section 110H. Every company which issues a policy of insurance under the provisions of section one hundred and eight which is cancellable when the insured reaches age sixty-five shall, sixty days prior to the date of intended cancellation, notify the insured that such policy will be cancelled and the date thereof. If such company fails to so notify the insured, such policy shall remain in effect until such notification or until ninety days after the insured reaches age sixty-five, whichever shall first occur.

Chapter 175: Section 110I Divorced or separated spouses; continued health insurance coverage

Section 110*I*.

(a) In the event of the granting of a judgment absolute of divorce or of separate support to which a member of a group hospital, surgical, medical, or dental insurance plan provided for in section one hundred and ten is a party, the person who was the spouse of said member prior to the issuance of such judgment shall be and remain eligible for benefits under said plan, whether or not said judgment was entered prior to the effective date of said plan, without additional premium or examination therefor, as if said judgment had not been entered; provided, however, that such eligibility shall not be required if said judgment so provides. Such eligibility shall continue through the member's participation in the plan until the remarriage of either the member or such spouse, or until such time as provided by said judgment, whichever is earlier. The provision of this section shall apply to any policy issued or renewed within or without the commonwealth and which covers residents of the commonwealth.

(b) In the event of the remarriage of the group plan member referred to in subsection (a), the former spouse thereafter shall have the right, if so provided in said judgment, to continue to receive benefits as are available to the member, by means of the addition of a rider to the family plan or the issuance of an individual plan, either of which may be at additional premium rates determined by the commissioner of insurance to be just and reasonable in accordance with the additional insuring risks involved.

(c) The name, address, and policy number of a person eligible for health insurance coverage pursuant to subsections (a) or (b) if available shall be forwarded by such insurance company to the department of public welfare within thirty days of the date when coverage of said person under said subsections is commenced.

(d) Notice of cancellation of coverage of the divorced or separated spouse of a member shall be mailed to such divorced or separated spouse at such person's last

known address, together with notice of the right to reinstate coverage retroactively to the date of cancellation.

(e) Claims paid on behalf of a divorced or separated spouse or on behalf of a dependent who is not residing with the member shall be paid to the physician, hospital or other provider of covered services or to the person on whose behalf such services were performed, unless the person is a minor child. In the event the person on whose behalf such services were performed is a minor, payment shall be made to the physician, hospital or other provider of such services or to the parent or custodian with whom the child resides.

[Subsection (f) added by 2003, 9, Sec. 36 effective April 1, 2003. See 2003, 9, Sec. 36.]

(f) If a judgment or order for child support provides that a member of a group hospital, surgical, medical or dental insurance plan provided for in section 110 is required to provide health care coverage for his child, the insurance company administering the plan shall:

(1) comply with the terms of the national medical support notice sent pursuant to section 12 of chapter 119A;

(2) provide notice of cancellation or adjustment of coverage to the child's custodial parent or legal guardian concurrent with notice to the member; and

(3) accept the designation of the state secretary as agent for the child or the child's custodial parent or legal guardian for service of process and for receipt of first class mail, pursuant to the address confidentiality program established pursuant to chapter 9A.

Chapter 175: Section 110J Group policies issued to trustees of fund appointed by council on aging

Section 110J. Nothing in section one hundred and eight, one hundred and ten, one hundred and thirty-three or one hundred and thirty-four shall be construed to apply to or affect or prohibit the issue of (i) any general or blanket or group policy of accident and health insurance, or (ii) any group policy of life insurance, or (iii) any policy of group life and accident and health insurance, to the trustee or trustees of a fund then existing or a fund to be established where the trustee or trustees of such fund are appointed by a council on aging authorized by section eight B of chapter forty. The policy shall specify the persons who are eligible for insurance and the conditions applicable to such insurance. The premiums for the policy shall be entirely paid for by the persons insured under the policy. Any return of premium or other monies by the insurance company to the trustee or trustees shall be applied or used by the trustee or trustees as specified in the trust instrument.

Said council shall be a duly licensed private nonprofit organization under the laws of the commonwealth in order to be eligible under this section. The council and its trustees shall be responsible for the negotiation, implementation, administration and all obligations and liabilities arising out of the contract; provided, however, that said contract shall be subject to the review and approval of the commissioner of insurance.

COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE OFFICE
OF THE
TRIAL COURT
BOSTON 02108

CHILD SUPPORT GUIDELINES

The attached CHILD SUPPORT GUIDELINES supersede any previous Guidelines and are effective February 15, 2006.

Robert A. Mulligan
Chief Justice for Administration and Management

COMMONWEALTH OF MASSACHUSETTS

ADMINISTRATIVE OFFICE
OF THE TRIAL COURT

CHILD SUPPORT GUIDELINES

THERE SHALL BE A PRESUMPTION THAT THESE GUIDELINES APPLY IN ALL CASES SEEKING THE ESTABLISHMENT OR MODIFICATION OF A CHILD SUPPORT ORDER. A SPECIFIC, WRITTEN FINDING THAT THE GUIDELINES WOULD BE UNJUST OR INAPPROPRIATE AND THAT THE BEST INTERESTS OF THE CHILD HAVE BEEN CONSIDERED IN A PARTICULAR CASE SHALL BE SUFFICIENT TO REBUT THE PRESUMPTION IN THAT CASE. THESE GUIDELINES APPLY TO CURRENT CHILD SUPPORT ONLY. THEY DO NOT APPLY TO ALIMONY, THE DIVISION OF MARITAL PROPERTY, THE PAYMENT OF ARREARS, RESTITUTION, OR REIMBURSEMENT.

THESE REVISED GUIDELINES, IN AND OF THEMSELVES, DO NOT CONSTITUTE A SUFFICIENT CHANGE OF CIRCUMSTANCES TO WARRANT A MODIFICATION OF THE CHILD SUPPORT ORDER.

The child support guidelines are formulated to be used by the justices of the Trial Court, whether the parents of the children are married or unmarried, in setting temporary, permanent or final orders for current child support, in deciding whether to approve agreements for child support, and in deciding cases that are before the court to modify existing orders. A modification may be allowed upon showing a discrepancy of 20% or more between an established order and a proposed new order calculated under these guidelines. The presumption establishing a proposed new order may be rebutted in cases where the amount of support required under the guidelines is due to the fact that the amount of the current support order resulted from a rebuttal of the guideline amount and there has not been a change in the circumstances which resulted in a rebuttal of the guideline amount. The guidelines are intended to be of assistance to members of the bar and to litigants in determining what level of payment would be expected of them given the relative income levels of the parties. In all orders where an order for child support is requested, a guideline worksheet must be filled out, regardless of the income of the parties.

In establishing these guidelines, due consideration has been given to the following principles:

1) To minimize the economic impact on the child of family breakup;
2) To encourage joint parental responsibility for child support in proportion to, or as a percentage of income;
3) To provide the standard of living the child would have enjoyed had the family been intact;
4) To meet the child's survival needs in the first instance, but to the extent either parent enjoys a higher standard of living to entitle the child to enjoy that higher standard;
5) To protect a subsistence level of income of parents at the low end of the income range whether or not they are on public assistance;
6) To take into account the non-monetary contributions of both the custodial and non-custodial parents;
7) To minimize problems of proof for the parties and of administration for the courts; and
8) To allow for orders and wage assignments that can be adjusted as income increases or decreases.

I. INCOME DEFINITION

A. For purposes of these guidelines income is defined as gross income from whatever source. Those sources include, but are not limited to, the following:

1) salaries and wages, including overtime and tips, and income from self-employment, except in certain instances, see B below;
2) commissions;
3) severance pay;
4) royalties;
5) bonuses;
6) interest and dividends;
7) income derived from business/partnerships;
8) social security;
9) veterans' benefits;
10) insurance benefits, including those received for disability and personal injury;
11) workers' compensation;
12) unemployment compensation;
13) pensions;
14) annuities;
15) income from trusts;
16) capital gains in real and personal property transactions to the extent that they represent a regular source of income;
17) spousal support received from a person not a party to the order;
18) contractual agreements;
19) perquisites or in kind compensation to the extent that they represent a regular source of income;
20) unearned income of children, in the court's discretion;
21) income from life insurance or endowment contracts;
22) income from interest in an estate, either directly or through a trust;
23) lottery or gambling winnings received either in a lump sum or in the form of an annuity;
24) prizes or awards;
25) net rental income; and
26) funds received from earned income credit.

B. In individual cases, the court may choose to disregard overtime income or income derived from a second job. However, consideration of such income may be appropriate in certain instances such as those where such income constituted a regular source of income when the family was intact.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER

A. RELATIONSHIP TO ALIMONY OR SEPARATE MAINTENANCE PAYMENTS

So long as the standard of living of the children is not diminished, these guidelines do not preclude the court from deciding that any order be denominated in whole or in part as alimony or as a separate maintenance payment. It is the responsibility of counsel representing the parties to present the tax consequences of proposed orders to the court.

B. CLAIMS OF PERSONAL EXEMPTIONS FOR CHILD DEPENDENTS

In setting a support order, the court may make an order regarding the claims of personal exemptions for child dependents between the parties to the extent permitted by law.

C. MINIMUM AND MAXIMUM LEVELS

The guidelines recognize the principle that, in many instances, to maintain a domicile and a reasonable standard of living for the minor children, the custodial parent will choose to work. In those cases, a disregard of gross income of the custodial parent is to be applied up to a maximum of $20,000. The formula in these guidelines is intended to be adjusted where the income of the custodial parent exceeds the $20,000 disregard after consideration of day care expenses.

These guidelines are also intended to ensure a minimum subsistence level for those non-custodial parents whose income is less than $100 per week. However, it is the obligation of all parents to contribute to the support of their children. To that end, in all cases, a minimum order of $80.00 per month ($18.46 per week) should enter. This minimum should not be construed as limiting the court's ability to set a higher order, should circumstances permit.

Where the court makes a determination that either or both of the parties is either purposely unemployed or underemployed, the section of these guidelines entitled ATTRIBUTION OF INCOME should be consulted.

These guidelines are not meant to apply where the combined gross income of the parties exceeds $135,000 or where the gross income of the non-custodial parent exceeds $100,000. In cases where income exceeds these limits, the court should consider the award of support at the $100,000/$135,000 level as a minimum presumptive level of support to be awarded. Additional amounts of child support may be awarded at the judge's discretion.

D. CUSTODY AND VISITATION

1) Custody

These guidelines are based upon traditional custody and visitation arrangements. Where the parties agree to shared physical custody or the court determines that shared physical custody is in the best interests of the children, these guidelines are not applicable. The guidelines also are not meant to apply to cases in which there is split physical custody, i.e., each parent has physical custody of one or more children.

2) Visitation

These guidelines recognize that children must be allowed to enjoy the society and companionship of both parents to the greatest extent possible. The court may adjust the amount of child support beyond the 2 percent range (see SECTION III (A), BASIC ORDER) after taking into consideration the parties' actual time sharing with the children and the relative resources, expenses, and living standards of the two households.

In some instances the non-custodial parent may incur extraordinary travel related expenses in order to exercise court ordered visitation rights. To foster parental involvement with the children, the court may wish to consider such extraordinary expenses in determining the support order.

E. CHILD CARE CREDIT

The basic child support obligation set out in the guidelines includes the non-custodial parent's share of child care expenses. Child care expenses are not seen as a separate support item and responsibility for them resides with the custodial parent.

The reasonable cost of child care (costs as defined by 26 U.S.C. § 21, I.R.C. § 21*)* actually paid is to be subtracted from the custodial parent's gross income before the disregard formula is applied.

F. AGE OF THE CHILDREN

To reflect the costs of raising children, age has been broken down into three groups: 0-12, 13-18, and over 18. A single adjustment to the basic order should be made based on the age of the oldest child for whom support is to be ordered. The support order where the oldest child is 12 or under should be the basic support order according to the schedule. Where the oldest child is between the ages of 13 and 18, the order should be increased by 10 percent of the basic order amount. For cases involving children over the age of 18, to the extent permitted by the General Laws, the amount of the order, if any, will be left to the court's discretion.

Where the parties file an agreement with the court that allows for private payment between the parties, it is suggested that the incremental age issue be addressed in the agreement.

G. HEALTH INSURANCE, UNINSURED, AND EXTRAORDINARY MEDICAL EXPENSES

1) Health Insurance

When the court makes an order for child support, the court shall determine whether the obligor under the order has health insurance on a group plan available to him/her through an employer or organization or has health insurance or other health coverage available to him/her at a reasonable cost that may be extended to cover the child for whom support is ordered. When the court makes a determination that the obligor has such coverage, the court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such child, unless the obligee already has provided such coverage for the child at a lesser cost (except for health insurance funded under public assistance programs), or has and prefers to continue such coverage irrespective of cost.

If family health coverage is to be provided by the obligor, the support order should be reduced by one half the cost of family coverage. It is the responsibility of the obligor under the support order who is seeking such a reduction in the order to produce proof satisfactory to the court of the existence of such family coverage under the plan, or no such reduction shall be allowed. However, there shall be no reduction if the obligor has a preexisting family health insurance policy which could be amended to name the additional dependents to the policy at no cost to the obligor. Should health insurance not be provided for any period for which it is ordered, the credit for the premium payment shall be revoked and the order shall be increased by the amount of the credit during the period of noncompliance.

If family health coverage is provided by the obligee, the support order should be increased by one half the cost of the coverage. It is the responsibility of the obligee who is seeking an increase in the order to produce proof satisfactory to the court of the existence of such family coverage under the plan, or no such increase shall be allowed. However, there shall be no increase if the obligee has a preexisting family health insurance policy which could be amended to name the additional dependents at no cost to the obligee. Should health insurance not be provided for any period for which it is ordered, the increase allowed for the premium payment shall be revoked and the order shall be decreased during the period when health insurance is not provided.

2) Routine Uninsured Medical and Dental Expenses

The custodial parent shall be responsible for the payment of the first $100 per child per year for routine uninsured medical and dental expenses. For amounts above that limit, the court shall allocate costs on a case by case basis. No reduction in the child support order should be allowed.

3) Uninsured Extraordinary Medical and Dental Expenses

The payment of uninsured extraordinary medical and dental expenses incurred by the minor children, absent agreement of the parties, shall be treated on a case by case basis. (Example: orthodontia, psychological/psychiatric counseling, etc.) In such cases, where the court makes a determination that such medical and dental services are necessary and are in the best interests of the child, consideration toward a reduction in the child support order should be given.

H. ATTRIBUTION OF INCOME

If the court makes a determination that a party is earning substantially less than he or she could through reasonable effort, the court may consider potential earning capacity rather than actual earnings. In making this determination, the court shall take into consideration the education, training, and past employment history of the party. These standards are intended to be applied where a finding has been made that the party is capable of working and is unemployed, working part-time or is working a job, trade, or profession other than that for which he/she has been trained.

This determination is not intended to apply to a custodial parent with children who are under the age of six living in the home.

I. PRIOR ORDERS FOR SUPPORT

To the extent that prior orders for spousal and child support are **actually** being paid, the court should deduct those payments from the gross income before applying the formula to determine the child support order. This section applies only to orders for child support for children **other than** those who are the subject of the pending action.

J. EXPENSES OF SUBSEQUENT FAMILIES

In instances where the non-custodial parent has remarried and has children by a subsequent marriage, the court should examine such circumstances closely to determine in the allocation of available resources whether consideration beyond Part II, Section I (Prior Orders for Support) should be given when the custodial parent of children borne of the first marriage, or subsequent marriages appears before the court seeking a modification of the existing child support order. Expenses of a subsequent family may be used as a defense to a request to modify an order seeking an increase in the existing order, but such expenses should not be considered a reason to decrease existing prior orders. In actions pursuant to G.L. c. 209C, this paragraph shall be construed to apply equally to children born out of wedlock.

III. CHILD SUPPORT OBLIGATION SCHEDULE

A. BASIC ORDER

The basic child support obligation, based upon the income of the non-custodial parent is as follows:

GROSS WEEKLY INCOME	NUMBER OF CHILDREN		
	1	**2**	**3**
$ 0-$100	Discretion of the court, but not less than $80 per month		
$101-$280	21%	24%	27%
$281-$750	$59 + 23%	$67 + 28%	$76 + 31%
	(% refers to all dollars over $280)		
$751-max	$167 + 25%	$199 + 30%	$222 + 33%
	(% refers to all dollars over $750)		

For children in excess of 3 covered by the order, the support shall be no less than that for 3 children; should a judge order support at the 3 child level, written findings shall describe the circumstances of the particular case which warrant the minimum order.

Within the discretion of the court, and in consideration of the totality of the circumstances of the parties, the Basic Order may be either increased or decreased by 2%. An adjustment of 2% shall not be considered a deviation.

B. AGE DIFFERENTIAL

The above orders are to be increased to reflect the cost of raising older children. The following is intended to be applied to the age of the oldest child in the household for whom support is sought under the pending action.

AGE OF OLDEST CHILD	PERCENTAGE INCREASE
0-12	Basic Order Applies
13-18	Basic Order + 10% of Basic Order
Over 18	Discretion of the court (and if statute permits)

C. CUSTODIAL PARENT INCOME ADJUSTMENT

Where the custodial parent works and earns income in excess of $20,000 after consideration of child care expenses, the support order is to be reduced by the percentage that the excess represents in relation to the combined incomes of both parents minus the custodial parent's disregard.

CHILD SUPPORT GUIDELINES WORKSHEET

Court Docket #:_____ Date Worksheet Completed: _____

All provisions of the Guidelines should be reviewed prior to the completion of the worksheet. These Guidelines will apply in cases where combined gross income of both parties does not exceed $135,000 and where the gross income of the non-custodial parent does not exceed $100,000. **Worksheets shall be completed for all cases.**

1. BASIC ORDER
   a. Non custodial gross weekly income (less prior support orders actually paid for child/family other than the family seeking this order) _____
   b. Basic Child Support Order from chart (Attachment A) (A) _____

2. ADJUSTMENT FOR AGE OF CHILDREN
   a. If age of oldest child is 13 - 18, calculate 10% times (A) _____
   b. Adjusted order (A) + (2 a) (B)_____

3. CUSTODIAL PARENT INCOME ADJUSTMENT
   a. Custodial parent gross income (annual) _____
   b. Less $20,000 - $20,000
   c. Less annual child care cost - _____
   d. Custodial adjusted gross _____
   e. Non custodial gross (annual) _____
   f. Total available gross (d) +(e) _____
   g. Line 3(d) _____ Line 3 (f)_____
   h. 3 (d) divided by 3 (f) _____ %
   I. Adjustment for custodial income (Line 3 h %) X (B) (C) _____

4. CALCULATION OF FINAL ORDER
   a. Adjusted order, (B) above (B)_____
   b. Less adjustment for (C) above (C) - _____
   c. Less 50% weekly cost to obligor of family group health insurance [Section G. 1] - _____
      Or
      Plus 50% weekly cost of obligee's family group health insurance [Section G. 1] + _____

5. WEEKLY SUPPORT ORDER (B) - (C) ± 4 (c) **$** _____

SAMPLE WORKSHEET

Court Docket #: 02D0109 Date Worksheet Completed: May 3, 2002

Non custodial parent gross annual income	$40,000 ($769/week)
Weekly support paid - child of prior marriage	$40
Custodial parent gross annual income	$28,000
2 Children covered by order, ages 6 and 8	
Annualized day care cost	$4,160
Non custodial weekly cost family group health insur.	$24

1. BASIC ORDER
   a. Non custodial gross weekly income (less prior support orders actually paid for child/family other than the family seeking this order) 729
   b. Basic Child Support Order from chart (Attachment A) (A) 193

2. ADJUSTMENT FOR AGE OF CHILDREN
   a. If age of oldest child is 13 - 18, calculate 10% times (A) 0
   b. Adjusted order (A) + (2 a) (B) 193

3. CUSTODIAL PARENT INCOME ADJUSTMENT
   a. Custodial parent gross income (annual) 28,000
   b. Less $20,000 - $20,000
   c. Less annual child care cost - 4,160
   d. Custodial adjusted gross 3,840
   e. Non custodial gross (annual) 40,000
   f. Total available gross (d) +(e) 43,840
   g. Line 3(d) 3840 Line 3 (f) 43840
   h. 3 (d) divided by 3 (f) . 09 %
   I. Adjustment for custodial income (Line 3 h %) X (B) (C) 17

4. CALCULATION OF FINAL ORDER
   a. Adjusted order, (B) above (B) 193
   b. Less adjustment for (C) above (C) - 17
   c. Less 50% weekly cost to obligor of family group health insurance [Section G. 1] - 12
      Or
      Plus 50% weekly cost of obligee's family group health insurance [Section G. 1] +

5. WEEKLY SUPPORT ORDER (B) - (c) + 4 (c) **$ 164**

Attachment A

BASIC CHILD SUPPORT ORDER

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
0-100	Not less than 18.46		
101	**21**	**24**	**27**
105	22	25	28
110	**23**	**26**	**30**
115	24	28	31
120	**25**	**29**	**32**
125	26	30	34
130	**27**	**31**	**35**
135	28	32	36
140	**29**	**34**	**38**
145	30	35	39
150	**32**	**36**	**40**
155	33	37	42
160	**34**	**38**	**43**
165	35	40	45
170	**36**	**41**	**46**
175	37	42	47
180	**38**	**43**	**49**
185	39	44	50
190	**40**	**46**	**51**
195	41	47	53
200	**42**	**48**	**54**
205	43	49	55
210	**44**	**50**	**57**
215	45	52	58
220	**46**	**53**	**59**
225	47	54	61
230	**48**	**55**	**62**
235	49	56	63
240	**50**	**58**	**65**
245	51	59	66
250	**52**	**60**	**68**
255	54	61	69
260	**55**	**62**	**70**
265	56	64	72
270	**57**	**65**	**73**
275	58	66	74
280	**59**	**67**	**76**
281	59	67	76
285	**60**	**68**	**78**
290	61	70	79
295	**62**	**71**	**81**
300	64	73	82
305	**65**	**74**	**84**
310	66	75	85
315	**67**	**77**	**87**
320	68	78	88

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
325	**69**	**80**	**90**
330	70	81	92
335	**72**	**82**	**93**
340	73	84	95
345	**74**	**85**	**96**
350	75	87	98
355	**76**	**88**	**99**
360	77	89	101
365	**79**	**91**	**102**
370	80	92	104
375	**81**	**94**	**105**
380	82	95	107
385	**83**	**96**	**109**
390	84	98	110
395	**85**	**99**	**112**
400	87	101	113
405	**88**	**102**	**115**
410	89	103	116
415	**90**	**105**	**118**
420	91	106	119
425	**92**	**108**	**121**
430	94	109	122
435	**95**	**110**	**124**
440	96	112	126
445	**97**	**113**	**127**
450	98	115	129
455	**99**	**116**	**130**
460	100	117	132
465	**102**	**119**	**133**
470	103	120	135
475	**104**	**122**	**136**
480	105	123	138
485	**106**	**124**	**140**
490	107	126	141
495	**108**	**127**	**143**
500	110	129	144
505	**111**	**130**	**146**
510	112	131	147
515	**113**	**133**	**149**
520	114	134	150
525	**115**	**136**	**152**
530	116	137	154
535	**118**	**138**	**155**
540	119	140	157
545	**120**	**141**	**158**
550	121	143	160

Attachment A

BASIC CHILD SUPPORT ORDER

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
555	**122**	**144**	**161**
560	123	145	163
565	**125**	**147**	**164**
570	126	148	166
575	**127**	**150**	**167**
580	128	151	169
585	**129**	**152**	**171**
590	130	154	172
595	**131**	**155**	**174**
600	133	157	175
605	**134**	**158**	**177**
610	135	159	178
615	**136**	**161**	**180**
620	137	162	181
625	**138**	**164**	**183**
630	140	165	184
635	**141**	**166**	**186**
640	142	168	188
645	**143**	**169**	**189**
650	144	171	191
655	**145**	**172**	**192**
660	146	173	194
665	**148**	**175**	**195**
670	149	176	197
675	**150**	**178**	**198**
680	151	179	200
685	**152**	**180**	**202**
690	153	182	203
695	**154**	**183**	**205**
700	156	185	206
705	**157**	**186**	**208**
710	158	187	209
715	**159**	**189**	**211**
720	160	190	212
725	**161**	**192**	**214**
730	162	193	216
735	**164**	**194**	**217**
740	165	196	219
745	**166**	**197**	**220**
750	167	199	222
751	**167**	**199**	**222**
755	168	200	224
760	**170**	**202**	**225**
765	171	204	227
770	**172**	**205**	**229**
775	173	206	230
780	**174**	**208**	**232**

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
785	**176**	**210**	**234**
790	177	211	235
795	**178**	**212**	**237**
800	180	214	238
805	**181**	**216**	**240**
810	182	217	242
815	**183**	**218**	**243**
820	184	220	245
825	**186**	**222**	**247**
830	187	223	248
835	**188**	**224**	**250**
840	190	226	252
845	**191**	**228**	**253**
850	192	229	255
855	**193**	**230**	**257**
860	194	232	258
865	**196**	**234**	**260**
870	197	235	262
875	**198**	**236**	**263**
880	200	238	265
885	**201**	**240**	**267**
890	202	241	268
895	**203**	**242**	**270**
900	204	244	272
905	**206**	**246**	**273**
910	207	247	275
915	**208**	**248**	**276**
920	210	250	278
925	**211**	**252**	**280**
930	212	253	281
935	**213**	**254**	**283**
940	214	256	285
945	**216**	**258**	**286**
950	217	259	288
955	**218**	**260**	**290**
960	220	262	291
965	**221**	**264**	**293**
970	222	265	295
975	**223**	**266**	**296**
980	224	268	298
985	**226**	**270**	**300**
990	227	271	301
995	**228**	**272**	**303**
1000	230	274	304
1005	**231**	**276**	**306**
1010	232	277	308
1015	**233**	**278**	**309**

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BASIC CHILD SUPPORT ORDER

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
1020	234	280	311
1025	**236**	**282**	**313**
1030	237	283	314
1035	**238**	**284**	**316**
1040	240	286	318
1045	**241**	**288**	**319**
1050	242	289	321
1055	**243**	**290**	**323**
1060	244	292	324
1065	**246**	**294**	**326**
1070	247	295	328
1075	**248**	**296**	**329**
1080	250	298	331
1085	**251**	**300**	**333**
1090	252	301	334
1095	**253**	**302**	**336**
1100	254	304	338
1105	**256**	**306**	**339**
1110	257	307	341
1115	**258**	**308**	**342**
1120	260	310	344
1125	**261**	**312**	**346**
1130	262	313	347
1135	**263**	**314**	**349**
1140	264	316	351
1145	**266**	**318**	**352**
1150	267	319	354
1155	**268**	**320**	**356**
1160	270	322	357
1165	**271**	**324**	**359**
1170	272	325	361
1175	**273**	**326**	**362**
1180	274	328	364
1185	**276**	**330**	**366**
1190	277	331	367
1195	**278**	**332**	**369**
1200	280	334	370
1205	**281**	**336**	**372**
1210	282	337	374
1215	**283**	**338**	**375**
1220	284	340	377
1225	**286**	**342**	**379**
1230	287	343	380
1235	**288**	**344**	**382**
1240	290	346	384
1245	**291**	**348**	**385**
1250	292	349	387

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
1255	293	350	389
1260	**294**	**352**	**390**
1265	296	354	392
1270	**297**	**355**	**394**
1275	298	356	395
1280	**300**	**358**	**397**
1285	301	360	399
1290	**302**	**361**	**400**
1295	303	362	402
1300	**304**	**364**	**404**
1305	306	366	405
1310	**307**	**367**	**407**
1315	308	368	408
1320	**310**	**370**	**410**
1325	311	372	412
1330	**312**	**373**	**413**
1335	313	374	415
1340	**314**	**376**	**417**
1345	316	378	418
1350	**317**	**379**	**420**
1355	318	380	422
1360	**320**	**382**	**423**
1365	321	384	425
1370	**322**	**385**	**427**
1375	323	386	428
1380	**324**	**388**	**430**
1385	326	390	432
1390	**327**	**391**	**433**
1395	328	392	435
1400	**330**	**394**	**436**
1405	331	396	438
1410	**332**	**397**	**440**
1415	333	398	441
1420	**334**	**400**	**443**
1425	336	402	445
1430	**337**	**403**	**446**
1435	338	404	448
1440	**340**	**406**	**450**
1445	341	408	451
1450	**342**	**409**	**453**
1455	343	410	455
1460	**344**	**412**	**456**
1465	346	414	458
1470	**347**	**415**	**460**
1475	348	416	461
1480	**350**	**418**	**463**
1485	351	420	465

Attachment A

BASIC CHILD SUPPORT ORDER

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
1490	**352**	**421**	**466**
1495	353	422	468
1500	**354**	**424**	**470**
1505	356	426	471
1510	**357**	**427**	**473**
1515	358	428	474
1520	**360**	**430**	**476**
1525	361	432	478
1530	**362**	**433**	**479**
1535	363	434	481
1540	**364**	**436**	**483**
1545	366	438	484
1550	**367**	**439**	**486**
1555	368	440	488
1560	**370**	**442**	**489**
1565	371	444	491
1570	**372**	**445**	**493**
1575	373	446	494
1580	**374**	**448**	**496**
1585	376	450	498
1590	**377**	**451**	**499**
1595	378	452	501
1600	**380**	**454**	**502**
1605	381	456	504
1610	**382**	**457**	**506**
1615	383	458	507
1620	**384**	**460**	**509**
1625	386	462	511
1630	**387**	**463**	**512**
1635	388	464	514
1640	**390**	**466**	**516**
1645	391	468	517
1650	**392**	**469**	**519**
1655	393	470	521
1660	**394**	**472**	**522**
1665	396	474	524
1670	**397**	**475**	**526**
1675	398	476	527
1680	**400**	**478**	**529**
1685	401	480	531
1690	**402**	**481**	**532**
1695	403	482	534
1700	**404**	**484**	**536**
1705	406	486	537

Non-Custodial Gross Weekly Income	Number of Children		
	1	2	3
1710	**407**	**487**	**539**
1715	408	488	540
1720	**410**	**490**	**542**
1725	411	492	544
1730	**412**	**493**	**545**
1735	413	494	547
1740	**414**	**496**	**549**
1745	416	498	550
1750	**417**	**499**	**552**
1755	418	500	554
1760	**420**	**502**	**555**
1765	421	504	557
1770	**422**	**505**	**559**
1775	423	506	560
1780	**424**	**508**	**562**
1785	426	510	564
1790	**427**	**511**	**565**
1795	428	512	567
1800	**430**	**514**	**568**
1805	431	516	570
1810	**432**	**517**	**572**
1815	433	518	573
1820	**434**	**520**	**575**
1825	436	522	577
1830	**437**	**523**	**578**
1835	438	524	580
1840	**440**	**526**	**582**
1845	441	528	583
1850	**442**	**529**	**585**
1855	443	530	587
1860	**444**	**532**	**588**
1865	446	534	590
1870	**447**	**535**	**592**
1875	448	536	593
1880	**450**	**538**	**595**
1885	451	540	597
1890	**452**	**541**	**598**
1895	453	542	600
1900	**454**	**544**	**602**
1905	456	546	603
1910	**457**	**547**	**605**
1915	458	548	606
1920	**460**	**550**	**608**
1923	460	551	609