The Uncertainties of the Massachusetts Alimony Reform Act of 2011

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Introduction

Laura Morgan correctly notes that, "alimony is, and may always be, a concept in flux, ever-changing to meet the concerns of public policy."[1] Moreover, alimony is a controversial subject. This is evidenced by the differing approaches states take on the matter.[2] While in 2011, Massachusetts passed the Alimony Reform Act just this year Governor of Florida, Ron DeSantis, vetoed the Dissolution of Marriage Bill, which would end permanent alimony.[3] But Massachusetts has led the way in alimony reform. Ultimately, this was in response to pushes by various organizations "seek[ing] legislative solutions to what they perceived as an outdated alimony system."[4] Thus, I will explore the 2011 Massachusetts Alimony Reform Act ("Act"). More specifically, I will explore the divisive provisions concerning termination of alimony upon retirement and cohabitation as well as the addition of durational limits.

The paper will proceed in four parts. First, I will explore the primary theories behind awarding alimony, namely, gain theory, loss theory, and contribution theory. Second, I will explore both the law of alimony in Massachusetts prior to the Act and the modifications the Act made to existing law. In this section, I will demonstrate critical shortcomings or crucial unanswered questions of the reforms. Third, I will argue that these particular new provisions of Act, do not align with gain theory or contribution theory but does align with loss theory. This is important because, as many theorists have noted, since the evolution of societal relationships

[1] Laura W. Morgan, *Current Trends in Alimony: Where Are We Now?*, 34 FAM. ADVOC. 8, 8 (2012) [hereinafter, Morgan, *Current Trends*].
[2] *See generally* Laura W. Morgan, *A Nationwide Review of Alimony Legislation*, 2007-2016, 51 FAM. L. Q. 39 (2017).
[3] Jordan Highsmith, *Gov. Ron DeSantis Vetoes Florida Alimony Payment Bill*, 10 TAMPA BAY (June 24, 2022), https://www.wtsp.com/article/news/politics/desantis-vetoes-alimony-payment-marriage-bill/67-cce67f13-2a77-4027-bf04-28f17f60af58.
[4] Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 WESTERN NEW ENGLAND L. REV. 1, 2 (2014).

there has not been a coherent explanation for the existence of alimony.[5] The criticisms I advance against the Act should not be understood as advancing the cause of either the payor or recipient. Rather, my aim is to demonstrate that while the Act has made successful strides in achieving the purpose for which it was enacted, there are still critical outstanding questions.

I. Theories of Alimony

Cynthia Starnes notes that most alimony reform advocates primarily focus on one of three interests: (1) gain theory; (2) loss theory; and (3) contribution theory. Gain theory tends to focus on "collaboration, teamwork, and partnerships between spouses who join together to produce mutual benefits which they expect to share."[6] If the parties divorce, then the law "must impose an exit price on the spouse who takes the larger share of marital returns."[7] Another aspect of gain theory is that it arguably does not consider relative spousal contributions.[8] The spouses are treated as equals with respect to contribution during the marriage. Lastly, this theory emphasizes the expectation that "each spouse will realize a return on marital investment before the marriage ends."[9]

Loss theory, in contrast, "focuses on the reliance costs of participating in a 'failed' marriage."[10] One proponent of such theory is Ira Ellman. He states that the purpose of alimony is "to reallocate the post-divorce financial consequences of marriage."[11] Furthermore, "alimony law based on this conception would therefore ask whether the wife invested in her marriage and is thereby economically disadvantaged upon divorce."[12] This theory is also reflected in the

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[5] Morgan, *Current Trends*, *supra* note 1, at 8.
[6] Cynthia L. Starnes, *Alimony Theory*, 45 FAM. L. Q. 271, 280 (2011).
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Ira M. Ellman, *The Theory of Alimony*, 77 CALI. L. REV. 1, 50 (1989).
[12] *Id*. at 52.

American Law Institute's ("ALI") model for compensatory spousal payments. Section 5.03 of the ALI's *Principle of Law – Family Dissolution* states that alimony "should allocate equitably between the spouses' certain financial losses that either or both may incur" when separating.[13] The ALI recognizes two types of loss: (1) the loss of the "marital standard" of "sufficient duration"; and (2) the "residual loss in earning capacity" which results for caretaking.[14]

The last theory Starnes identifies is contribution theory. It holds that one party must have "received a benefit at the expense of another, and that as between them it would be unjust for the recipient to retain the benefit without compensation to the other person."[15] This theory suggests that we "must measure the contributions a claimant has made" and then "ask whether that sum must be reimbursed in order to prevent unjust enrichment."[16] The ALI principles recognize contribution theory as a restitution-based rationale only to be applied in short-term marriages.[17] Having established the three primary theories for alimony, I will next survey the evolution of Massachusetts's alimony termination policy.

II. Termination Standards of Alimony

Massachusetts was the first state in the nation to recognize alimony claims.[18] Historically, alimony was used to enforce a husband's marital obligation to support his wife and prevent her from destitution.[19] But shifting societal attitudes as well as women's' newly acquired property

[13] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §5.03 888 (2008).
[14] Starnes, *supra* note 6, at 284 (citing AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.02 cmt. a.)
[15] *Id*. at 286 (citing Joan M. Kraukopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 UNIV. KAN. L. REV. 379, 381 (1980)).
[16] *Id*. at 286.
[17] *Id*.
[18] Charles P. Kindregan, *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK UNIV. L. REV. 13, 15 (2013).
[19] *Id*.

rights[20] and entry into the work force have also influenced the idea of alimony.[21] In 1974, the Massachusetts Legislature passed legislation to include mandatory factors that judges must include in determining alimony. But while the amendment provided factors, it "also deliberately eschewed 'any proscribed formulas' in order to provide flexibility."[22] Thus, the Massachusetts Supreme Judicial Court ("SJC"), in terminating alimony obligations, utilized the "material change in circumstance" standard. This standard was applied by the courts when one party sought to terminate their alimony obligation. The moving party had to demonstrate that "as a result of cohabitation, the recipient spouse's economic circumstances have materially changed."[23] Only then could the court alter or eliminate alimony. However, the 2011 Act modified the termination provision with respect to cohabitability, retirement, and durational limits.

A. Cohabitation

The Act states that alimony must be suspended, reduced, or terminated if "the payor shows that the recipient spouse has maintained a common household . . . for a continuous period of at least 3 months."[24] The Act defines 'maintaining a common household' as "shar[ing] a primary residence together with or without others."[25] The court may consider the following factors in determining whether the recipient is maintaining a common household: (1) oral or written statements or representations made to third parties regarding the relationship of the persons; (2) the economic interdependence of the couple or economic dependence of one person

[20] Monroe L. Inker, Joseph H. Walsh & Paul P. Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 11 FAM. L. Q. 59, 71 (1977).
[21] Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justifications for Alimony*, 82 GEO. L. J. 2423, 2439 n. 73 (1993).
[22] Erin Moody, *The Effect of Cohabitation on Alimony in the United States*, 3 MA FAM. L. J. 91, 95 (2015).
[23] Brumleve v. Ouellette, 54 N.E.3d 606 (2016) (citing Gottsegen v. Gottsegen, 492 N.E.2d 1133 (1986)).
[24] MASS. GEN. LAWS ch. 208 § 49.
[25] *Id*.

on the other; (3) the persons engaging in conduct and collaborative roles in furtherance of their life together; (4) the benefit in the life of either or both of the persons from their relationship; (5) the community reputation of the persons as a couple; or (6) other relevant and material factors.[26]

One important difference between the differing standards is that prior to the Act, the statue provided that "the court *may*," modify or terminate the alimony obligation. This language left considerable discretion to courts in deciding whether to terminate alimony obligations. The Act maintains that "alimony *shall* be suspended, reduced or terminated" upon the respective showing. This means that courts *must* in all circumstances, upon a demonstration of the relevant factors, either suspend, reduce, or terminate alimony. Moreover, the standard for modifying an alimony obligation as set forth in *Gottsegen v. Gottsegen*, a case predating the Act, was relatively broad and subject to great judicial discretion relating to the phrase 'material change.'[27] Courts retained discretion in deciding which facts were relevant and the weight to give them. This stands in stark contrast to the notable disjunctive 'or' adopted by the Act. In other words, if a court finds that even one of the statutory factors in considering modification of alimony has been met, then the court must either suspend, reduce, or terminate alimony. Thus, if the community recognizes the two cohabiting individuals as a couple, without respect to whether the couple 'held themselves out' as a couple, then such determination could result in a modification of the recipient's alimony payments. Thus, the Act can be seen as taking a strict approach to alimony modification by taking away discretion from judges in determining whether a common

[26] *Id*.
[27] Gottsegen v. Gottsegen, 492 N.E.2d 1133, 1138 (1986) (holding that "the court may later modify the original judgment if the petitioner demonstrates a material change of circumstances" but "a judge may not modify a judgment solely on the basis of a finding cohabitation." The court must find that the recipient's "economic circumstances have changed" as a result of cohabitation).

household is maintained. However, one question to such reform might be – what potential consequence might this have?

One consequence of the Act's silence on the "issue of financial contribution of the cohabiting partner" is that it results in an inconsistency of treatment between the recipient and payor. As Erin Moody correctly notes, the Act necessitates a modification "regardless of whether the cohabiting partner is financially contributing to the recipient's support or not."[28] Provided this absence of language, there may be situations where a recipient cohabitates with a partner who does not financially contribute but has their alimony modified. Moreover, if a recipient seeks to have their alimony modified upward for an increase in payment, the Act requires that the "income and assets of the payor's spouse shall not be considered in a redetermination of alimony."[29] If these provisions are read in conjunction, as Moody argues, it "has the effect of treating the cohabiting recipient and their partner as one financial unit" while treating "the payor as financially separate from their new spouse" when calculating income and thus their ability to pay.[30]

Another problem with the Act is that it fails to offer any guidance in determining 'primary residence.' As stated above, the Act requires a 3-month continuous relationship of the cohabiting persons. However, as stated in *Duff-Kareores v. Kareores*, cohabitation includes "the sharing of a primary residence with the other person."[31] Such a standard has two faults. The first is that if primary residence is interpreted as meaning 'a place where one spends a majority of

[28] Moody, *supra* note 22, at 93, 95.
[29] *Id.*
[30] *Id.*; *see* John A. Fiske, *Commentary: Three Implications of the Alimony Reform Act of 2011*, MA. LAW. WKLY. (Sept. 29, 2011), link.gale.com/apps/doc/A268825552/LT?u=nellco_bpll&sid=bookmark-LT&xid=d2aafdbd.
[31] Duff-Kareores v. Kareores, 52 N.E.3d 115, 121 (2016).

their time,' then such interpretation seems to conflict with the purpose of the Act.[32] The Act was passed as a response to disgruntled payors who were obligated to pay alimony "notwithstanding the recipient's cohabitation with a romantic partner." Thus, a failure to define primary residence, allows for recipients to 'cheat' the system by only requiring the alleged "cohabitating" couple to maintain separate residences. In other words, a recipient only needs to maintain a separate residence which they frequent.[33] For example, if a payor wishes to establish that the recipient is cohabitating with a third party, the payor must essentially hire a private investigator or subpoena members of the community to testify.[34] However, if primary residence is construed more broadly, then the court may run into the problem as faced in the first critique. Namely, the cohabiting individuals may only be sharing a residence for economic purposes.[35]

Another related complication may arise if a payor is attempting to demonstrate whether the recipient and a third-party are financially interdependent. Research shows that "cohabitants financially support each other less than married couples."[36] This raises the question – what

[32] This could likely be the future standard of 'cohabitation,' as the Massachusetts Appellate Court defined cohabitation, previous to the Act, as "living together as a married couple customarily do" and "sharing the experiences of living together in a comprehensive way." Palmer v. Palmer, 535 N.E.2d 611, 615 (1989). Furthermore, *Palmer* is cited in the Massachusetts Practice Series concerning cohabitation as to distinguish "dating or having sexual relations with another person," which is not grounds for terminating alimony, from cohabiting. Maureen McBrien & Patricia A. Kindregan, *Divorce Pleading and Practice*, *in* 2 MASS. PRAC., FAM. L. & PRAC. § 53:18 (4th ed. 2022). This is important to note because as explained later, this is a relatively high bar and is likely to preclude cases where alimony was intended to be terminated.

[33] As Kimberly Keyes notes, "a recipient spouse who can prove that he or she and the partner maintain separate homes can often prevail against a claim of cohabitation." Kimberly Keyes, *Proving Cohabitation Under the Massachusetts Alimony Reform Act*, LYNCH & OWEN P.C. (July 20, 2016), https://www.lynchowens.com/blog/2016/july/proving-cohabitation-under-the-massachusetts-ali/.

[34] *See* Lisa von der Pool, *Alimony Reform Pays Dividends for Private Eyes*, BOS. NEWS. J. (March 23, 2012), https://www.bizjournals.com/boston/blog/bottom_line/2012/03/alimony-reform.html; Lisa von der Pool, *Cashing in on Shacking Up: Private Eyes See Boon in New Divorce Law*, BOS. NEWS. J. (March 23, 2012), https://www.bizjournals.com/boston/print-edition/2012/03/23/cashing-in-on-shacking-up-private.html. Moreover, those members the payor wishes to subpoena are likely to be uncooperative as the individuals most likely to know the intimate details such as how the couple 'holds themselves out' are to be friends of the couple.

[35] *See generally* Cynthia L. Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 FAM. L. Q. 261 (2016).

[36] Emily M. May, *Should Moving-In Mean Losing Out? Making a Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 DUKE L. J. 403, 420 (2012).

degree of financial interdependence is sufficient to prevail on a termination of alimony claim? As the SJC recognized in *Duff-Kareores*, "what each of these provisions has in common is a definition of a relationship that resembles but is not equivalent to a legal marriage."[37] Thus, if financial interdependence is akin to but not equivalent to the financial interdependence of a legal marriage, then arguably a payor needs to demonstrate something less than complete or total financial interdependence of the recipient and cohabiting party. This is a relatively low bar provided that a majority of cohabitants "maintain joint finances."[38] In fact, studies show that 53% of cohabitants share a common income, while an additional 24% divide expenses without pooling their income.[39] This brings us back to the start of the inquiry as to the sufficient condition(s) needed to determine if financial interdependence is present. Currently, the SJC has not clarified the conditions needed with respect to financial interdependence but it is obvious that elaborating such conditions will require a rather nuanced rule to ensure the legislative intent of the Act is upheld while also taking into consideration fair and equitable principles on behalf of the recipient.

B. Retirement

Before the Act took effect, judges were able to award alimony indefinitely.[40] In 2009 the Massachusetts Supreme Judicial Court held that a payor's alimony obligation did not cease just because the payor had reached retirement age.[41] Rather, the payor may only be entitled to a downward modification of said payment. As stated by the SJC, "even in the context of a good

[37] *Kareores*, 52 N.E.3d at 121.
[38] Cynthia G. Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 23 (2007).
[39] *Id*.
[40] This was one of the primary reasons in pushing for reform. Individuals like Steve Hitner were obligated to pay indefinite alimony. *See* Steve Hitner, *New Law Stops Injustice of Paying Alimony Forever*, CNN (March 11, 2012), https://www.cnn.com/2012/03/09/opinion/hitner-alimony-overhaul-pro/index.html.
[41] *See* Pierce v. Pierce, 916 N.E.2d 330 (2009).

faith retirement, a judge must search for a fair balance of sacrifice between the parties."[42] Moreover, a judge deciding a payor's complaint to modify alimony "must ask whether the supporting spouse *and* the recipient spouse can afford the supporting spouse's retirement at that time."[43] Such inquiry may include "ensuring that the supporting spouse is willing to assume an appropriate portion of the shared financial burden that will result from his or her decision to retire."[44] Such decision was unpopular among many and can reasonably be attributed as one of the various reasons the Act was passed.[45] The Act establishes that "general term alimony shall terminate upon the payor attaining the full retirement age."[46] Courts may not take into consideration "the payor's ability to work beyond the full retirement age"[47] in extending alimony unless: (1) the courts sets a different alimony termination date in the initial judgement, upon demonstration of good cause; or (2) the court is granting an extension for an existing alimony claim upon demonstration of good cause that shows a "material judgement of circumstance that occurred after the entry of judgement" and the reason for extension is "supported by clear and convincing evidence."[48]

However, there is the outstanding question as to whether these amendments will actually address the concerns of those lobbying for the amendment. The Act's 'safety valve' of allowing courts to extend alimony for 'good cause' softens the hardline payors sought to establish. As the

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[42] *Id*. at 298.
[43] *Id*.
[44] *Id*.
[45] Olivia M. Hebenstreit, *Retiring Alimony at Retirement: A Proposal for Alimony Reform*, 33 QUINNIPIAC L. REV. 781, 787 (2018) (citing see, e.g., Attorney 123, Comment to Forget Retirement, Court Tells Prominent Lawyer, Law.Com (Nov. 16, 2009, 12:06 PM), http://tinyurl.com.ezproxy.bu.edu/ybe2dtc).
[46] MASS. GEN. LAWS ch. 208 § 49(f). "Retirement Age" is not defined by the Act but courts have concluded that retirement age is generally defined as, "'the payor's normal retirement age to be eligible to receive full benefits under the United States Old Age, Survivors, and Disability Program' (Social Security)." Hassey v. Hassey, 11 N.E.3d 661, 670 (2014).
[47] *Id*.
[48] MASS. GEN. LAWS ch. 208 § 49(f)(1) – (f)(2).

SJC has yet to define the 'good cause' exemption, there are potential implications if such provision is narrowly or broadly construed.[49] This then could result in the recipient's alimony being modified. One such example is if the 'good cause' requirement is interpreted narrowly, this places those who have long received alimony at risk for immediate withdrawal of support.[50] It is clear that the Massachusetts legislature intended the Act to apply to merged agreements, that is, agreements that leave the issue of alimony 'open' for future considerations of change in material circumstance.[51] While some may argue that recipients "have time to plan for their financial futures before potential alimony terminates,"[52] it is all too clear that payors may "rush to serve a complaint"[53] upon reaching retirement age to terminate their alimony obligation. However, if the 'good cause' demonstration is broadly construed, then the Act faces the same challenge as before, namely the payor faces an unfair economic burden. As mentioned above, the retirement provision was included primarily because some payors "were ordered to pay lifetime alimony that prevented them from retiring" while others "accumulated so many expenses due to their long-term alimony obligations that retirement was simply an impossibility."[54] Thus, the purpose of this provision was to prevent the recipient's flourishing at the expense of the payor.[55] Any interpretation by the courts which renders such a situation again is diametrically opposed to the purpose of this provision.

C. Duration

[49] Although the SJC has yet to address the standard of "good cause," the Massachusetts Appellate Court upheld a trial court's determination for extension of alimony for good cause because of the Wife's "age, poor health, and lack of employment opportunity." *Green v. Green*, No. 12-P-1430, 2013 WL 4604202 (Mass. App. Ct. Aug. 30, 2013).
[50] Biscardi, *supra* note 4, at 30.
[51] *Id*.
[52] *See* Biscardi, *supra* note 4, at 30.
[53] Fern L. Frolin, *Tips for Handling Cases Under the New Alimony Law*, 56 BOS. BUS. J. 19, 20 (2012).
[54] Jocelyn E. Crowley, *Incomplete Role Exit and the Alimony Reform Movement*, 88 SOC. INQUIRY 32, 41 (2018).
[55] *Id*.

The concern for alimony duration was also addressed by adopting specific guidelines which calculated the payors alimony obligation based on the length of the marriage. The Act defines the length of the marriage as "the number of months from the date of legal marriage to the date of service of service of a complaint or petition."[56] However, as noted by the Massachusetts Court of Appeals, this definition is not "inflexible."[57] Courts may extend the length of the marriage if they find "that the parties economic marital partnership began during their cohabitation period prior to marriage."[58] The Court in ascertaining "whether the parties where engaged in an economic marital partnership must consider various factors," namely, the same factors considered when determining a "common household."[59] This poses an interesting question with regards to the relationship between "maintaining a common household" and "economic marital partnership."

If courts are permitted to extend the length of the marriage on the basis of "maintaining a common household," then it would seem that the newly imposed length cutoffs do not serve advocates of the Act as well as first thought. Otherwise stated, the growing trend is that couples live together before marriage.[60] This in turn may provide a growing basis for courts to deviate from the clear marriage length determinations set forth in the Act. Thus, one could argue that by permitting the courts to extend the length of the marriage, the impact may be an increase in indefinite alimony awards. For example, if the marriage length, as only determined by the date of legal marriage to the service of the complaint, is within a close enough timeframe to the 20-year

[56] MASS. GEN. LAWS ch. 208 § 48.
[57] Sbronga v. Sbronga, 91 N.E.3d 1175, 1177 (2018).
[58] *Id*.
[59] Conor v. Benedict, 118 N.E.3d 96, 102 (2019).
[60] *See* Wendy D. Manning & Lisa Carlson, *Trends in Cohabitation: Over Twenty Years of Change, 1987-2010*, NAT'L CTR. FOR FAM. & MARRIAGE RSCH (2021), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/manning-carlson-trends-cohabitation-marriage-fp-21-04.pdf.

mark, a judge could find that an economic marital partnership occurred and thus increase the length of the marriage. This would result in a termination date of alimony being no longer applicable. But while there is no research that this possible scenario is a trend or even occurring, it does suggest that the duration limits of alimony should not be thought of as strong protections against an increased in duration of alimony obligations.[61]

III. The Theory of The Alimony Reform Act of 2011

As mentioned above, there are three primary theories of alimony. However, courts do not often follow just one of the theoretical models in justifying alimony decisions, if any.[62] But is such a practice wise? In this section I will explore whether the Act can be exclusively grounded in a theoretical framework justifying the existence of alimony. Ultimately, I will conclude that the termination of general alimony should be grounded in the loss theory and thus need-based considerations should be considered during the balancing the interests between recipients and payors.

The language of the general termination of alimony provisions with respect to cohabitation and retirement as well as durational limits do not seem to indicate that the goal is to provide a return on joint investments made during the marriage. For example, if one makes a joint investment with another, then one is entitled to the returns on such investment regardless of whether one has another source of income. In the context of alimony, it would be rather odd to terminate a payor's alimony, which is a product of a joint investment, because the payor is

[61] This scenario also could occur whereby judges find longer marriage lengths and thus payors have moved into a different "bracket" of the statute thus requiring them to pay for longer periods of time. It is not solely concerned with indefinite alimony obligations.

[62] May, *supra* note 36, at 436.
It is probably the case that Massachusetts legislatures did not conform their practical approach to a "theory of alimony." But by situating the Act in a framework, we can better conceptualize the possible ends at which they were aiming when enacting these statutes. Moreover, it provides a means of analysis in determining whether these ends were met.

receiving another stream of income. Otherwise stated, gain theory focuses on work done from the marriage. Thus, this work is already complete, and one is entitled to receive payment for work already done. To terminate a prior revenue stream on the basis of new work hardly seems like a proper theoretical justification for termination provisions and durational limits. Thus, arguably, the Act's termination provisions cannot suitably be justified on gain theory.

Next, and the most straight forward is contribution theory. As Starnes notes, contribution theory "supports only a limited recovery (reimbursement) that may grossly undercompensate a supporting spouse."[63] Otherwise stated, "restitution must measure the contributions a claimant made to her spouse and then ask whether that sum must be reimbursed in order to prevent unjust enrichment."[64] Such theory is explicitly exemplified in the Act, however, under its own provision. The Act defines restitution alimony as "the periodic or one-time payment to a recipient spouse . . . to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse."[65] Thus, the Act specifically deals with issues regarding restitution so it would be redundant for such to be the justification to be the basis for a general alimony termination.

Lastly is the loss theory justification. As previously stated, loss theory focuses "on the reliance costs of participating in a failed marriage."[66] Otherwise understood, the recipient may have experienced "a lost opportunity to marry someone else."[67] Such theory directly parallels the concerns reflected in the termination of general alimony with respect to cohabitation and retirement. In the case of cohabitation, termination would be justified as the lost opportunity to

[63] Starnes, *supra* note 6, at 286.
[64] *Id*.
[65] MASS. GEN. LAWS ch. 208 § 49.
[66] Starnes, *supra* note 6, at 284.
[67] *Id*.

marry someone else has ended. Although it is important to note again the equivalence the Act and the SJC draws between marriage and cohabitation. Alimony can only be terminated if the cohabitation is akin to that of a marriage of which the Act seeks to determine in requiring courts to consider the list of factors.[68]

In the case of retirement, we may draw upon the previously mentioned Ellman theory. Ellman stated that the purpose of alimony is "to reallocate the post-divorce financial consequence of marriage in order to prevent distorting incentives."[69] Such reasoning can arguably be applied to both parties. Alternatively stated, once a payor retires and remains obligated to pay alimony, the financial incentive is distorted. If understood in the loss context Ellman puts forth, the retired payor seems to be incurring a major loss, namely not being able to enjoy retirement. This may only be exacerbated if it is found that the losses the recipient incurred have been satisfied before the payor's retirement. Thus, at such a point, the alimony obligation would arguably be punitive rather than concerned with allocating loss.

In regard to durational limits, again loss theory best justifies their enactment. If loss theory is aimed at reallocating post-divorce financial consequences, then arguably the consequences suffered by the receipt are finite in that the marriage itself was finite. Thus, to prevent unjust enrichment of the recipient, there must be a limit on the monetary gains that the recipient can receive. This would hold true even for indefinite alimony as it can be said that the reliance cost was high in the case of 20+ year marriages and thus the payor must compensate for such a loss.

[68] It is important to note that such an equivalence is still subject to critique as established before. Whether or not such equivocation is rightly drawn is a separate matter from the fact that it has in fact been drawn. The purpose of this section is simply to ground the Act is a theory of alimony. The purpose is not to argue for or against whether one justification is more apt than another.

[69] Ellman, *supra* note 11, at 49.

X. Conclusion

While the passage of the Alimony Reform Act was a monumental step in alimony reform, the public has continued to discuss the "'winners' and 'losers' under the new law."[70] While there will always be those payors that will remain disgruntled with their alimony obligation, there are substantial unanswered questions and critiques of the Act. Namely, with respect to cohabitation, there must be some clarification regarding the "common household" requirement. With respect to retirement, while it is arguably best to introduce judicial discretion in the case of a "good cause" showing, arguably courts may construct factors which undermine one of the very motivations sought in implementing this reform. Lastly, if courts are to extend the marriage length in calculating durational limits for alimony obligation, then it is again arguable that the Act offered the reform that was sought. Thus, while a great feat by the Massachusetts legislature, there must be continued reform to ensure that both parties are treated fairly.

[70] Biscardi, *supra* note 4, at 5.