

# SILENT PARTNER

## Explaining Alimony

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

**ALIMONY.** Sometimes a client will ask about alimony (also known as separate maintenance or spousal support). Alimony is money paid by one spouse to the other to help with food, shelter, transportation, clothing and other living expenses, regardless of the existence of children of the marriage. All states recognize alimony claims, and the best overview of alimony among the states is to go to the *Divorce Litigation* article posted at JAGCNET, “Rehabilitative Alimony Reconsidered: The “Second Wave” of Spousal Support Reform” (search JAGCNET for “spousal support”).

The usual context of the alimony inquiry is regarding a separation agreement. When the parties have agreed on some measure of temporary or permanent support, you should definitely put that in the separation agreement. Such a provision might state, for example, that the husband shall pay the wife alimony of \$500 per month until he or she dies or until she remarries. Or it could state that the wife shall pay the husband alimony of \$100 per month for a total of four years, at which time it will terminate forever, but it would terminate earlier upon the wife’s remarriage or upon the death of wife or husband.

**BASIC FACTS AND LAW.** Here are some important alimony tips:

1. For alimony to be deductible for the payor, it must be taxable to the recipient. I.R.S. Code §§ 71 and 215. For this tax treatment, however, the alimony payments must end no later than the recipient's death. Temporary Reg. §1.71-1T, Q-10. It is also acceptable to make the alimony nontaxable to the recipient if it is nondeductible for the payor. This is a particularly important term, and the agreement should clearly indicate how alimony payments shall be treated for tax purposes. In addition, the payments must be in cash or the equivalent, they must be paid under a written, qualifying instrument, they must not be for child support, and they are not deductible/taxable if the parties file jointly. See “Tax Aspects of Divorce,” JA 269, for more detail on this.

2. Alimony usually ends at the death of either party or the remarriage of the recipient (usually the wife). Sometimes a separation agreement states that alimony will also end at such time as the

recipient starts living with an unrelated person of the opposite sex on a regular basis as if they were husband and wife. With today's societal changes, it would not be a bad idea to say that payments stop upon the recipient's romantic cohabitation with any person, whether of the opposite sex or not.

3. Alimony can be waived. It is always best to set out such a term clearly in the agreement. Don't just leave it out or let the agreement be silent on this issue. A waiver of alimony is such an important term that it should be clearly spelled out in the agreement so that there is no misunderstanding. If the agreement is silent on this issue, the general release clause will operate to waive alimony.

**HOW ALIMONY IS SOMETIMES DONE IN LEGAL ASSISTANCE.** In the legal assistance office, the issue of alimony is usually handled by a permanent waiver (either explicitly stated or else covered under the “general release clause” in a separation agreement) or my stating how much is to be paid till divorce. Does either of these make sense? Is the wife any less dependent one day after the divorce than one day before it? Is there another approach?

A good template to follow in analyzing a possible alimony claim is as follows:

1. First of all, explain to Mrs. Jones the difference between statutory and contractual alimony. The first is what the court can award. The law controls what will happen, and the judge decides what will be paid (or what won't). You have to have a trial before the court can decide this. The second is what you can agree upon in the separation agreement – but both parties must be in agreement! Regardless of the court's power to award support, the agreement controls what the support obligation is.
2. Is there true dependency? That is, is Mrs. Jones actually dependent on her husband for daily living expenses, reasonable support at their accustomed standard of living? And is her husband really the supporting spouse? Is he capable of providing all or most of the support she needs?
3. Next is the “strong point-weak point analysis.” Is there a “weak point”? that is, is there something that'll get the husband to agree to sign a separation agreement with an alimony clause for “real alimony” (not just for the next six months!). Sometimes there is – it might be domestic violence which makes him decide to agree to alimony, it might be discovered adultery, and it might be the physical or mental health of Mrs. Jones. Whatever it is, it may lead to an agreement. If it's not there, then is there a “strong point”? That is, can we contact a civilian lawyer to “make it stick” with a lawsuit?
4. Once you have accomplished this analysis, then the final point for either is... get a civilian lawyer – either to review the alimony clause (or the entire separation agreement) or to file suit against the husband for alimony.

**ADVISING ABOUT ALIMONY.** What if Mrs. Jones asks, "Am I entitled to alimony?" Be careful – you can't answer that question. How can you say what she's entitled to? Non-consensual alimony is only granted by the court. While you can't predict what the court will do,

you can tell Mrs. Jones that the court would probably grant her alimony if you do your homework. You may be able to give some general advice (with some research) as follows:

- You cannot demand alimony from the court unless you file a lawsuit requesting it, and this should be done before you get divorced!
- You will probably have to prove that you are the **dependent spouse** -- you are financially dependent on the other party or in need of support from him or her;
- Likewise you'll probably have to prove that your spouse is the **supporting spouse**; and
- In some states, you may have to prove some sort of fault on the part of your spouse (abandonment, adultery, domestic violence, etc.) although this is becoming less and less important as a part of alimony in many states.
- An absolute defense to alimony may exist when the parties have waived alimony in a separation agreement or premarital agreement, when a divorce has been granted before an alimony claim is filed, or when only the dependent spouse has committed adultery or some other form of marital fault. Please be sure to see your legal assistance attorney for more information on alimony in your particular case.

The research you do will tell you whether, for example, fault is necessary for alimony, alimony is only granted for rehabilitative purposes, alimony depends solely on her need for support, and other issues. If she is returning to Ohio, for example, you'll need to research Ohio law, which is where she may be able to bring her claim in court. Some states even have guidelines for alimony, maintenance or spousal support. Such research in North Carolina law, for example, would show you that she'll likely receive spousal support if:

- a. She files a lawsuit requesting alimony;
- b. She is the dependent spouse – she is financially dependent on her husband or in need of support from him or her;
- c. Her husband is the supporting spouse; and
- d. An award of alimony is equitable under the circumstances after considering numerous factors set out in the statute.

**HOW MUCH ALIMONY?** In the absence of alimony guidelines, the best way to figure how much alimony a client needs is to calculate the difference between her reasonable monthly needs and her current net income. To do this, follow these steps:

>First of all, figure out the total monthly needs of Mrs. Jones. Make sure you have deducted any monthly expenses that are attributable to Major Jones or that he'll be paying.

>Next, figure out which ones are "reasonable" and discard the rest. This is difficult but necessary. A monthly budget that includes huge car payments or expensive weekly trips to the beauty salon and clothing stores may be frowned upon by the judge.

>Then subtract the net income of Mrs. Jones – the result is "her gap" between reasonable monthly expenses and net income. This is her unmet needs, the net amount she needs each month.

>Next compare this figure to the difference between the supporting spouse's income and his reasonable monthly expenses.

Her gap should be equivalent (under ideal circumstances) of the "extra" money he has left over from his paycheck after he pays for his own reasonable monthly expenses. Since these "gaps" seldom exist in reality and everyone is usually spending a lot more than he or she is making, it is often a question of haggling, discussion, bargaining and horse-trading as to how much alimony should be paid in any individual case.

The next step is to take the "gap amount" for Mrs. Jones and "gross it up" to the pre-tax equivalent. This means imputing the amount that, after taxes are taken out, will yield the "gap amount" for her. The way to do this is as follows:

1. Find out Mrs. Jones' federal tax bracket (look at the IRS tax tables). [For illustration purposes, let's assume this is 25%.]
2. Add in the percentage of her state tax bracket (if any). [Let's assume this is 7%.]
3. Add the two together. [ $25\% + 7\% = 32\%$ ]
4. Subtract the sum from 100%. [ $100\% - 32\% = 68\%$ ]
5. Divide this into the "gap amount" to get the pre-tax amount that will be needed. [If the gap amount is \$1000 a month, then the taxable alimony needed is  $\$1000/.68$ , or about \$1470.]
6. You can double-check this calculation by multiplying the federal and state tax bracket percentages by the taxable alimony to get the taxes to be paid. Then subtract the taxes from the alimony and you should arrive back at the "gap amount." [Let's check:  $\$1470 \times 32\%$  in taxes = \$470. And  $\$1470 - \$470 = \$1000$  as the gap amount. Voila!]

**WHEN DOES ALIMONY END?** The parties need to decide when alimony terminates. Usual clauses for this will terminate alimony on the death of either spouse, or the remarriage or cohabitation of the recipient. Here is a sample clause terminating alimony upon cohabitation (as well as other standard conditions):

"Martha's right to receive [alimony][spousal support][maintenance] shall terminate upon the earliest occurrence of the following events: John's death; Martha's death; or Martha's remarriage. The term remarriage includes any marriage, whether void or voidable or terminated by divorce, annulment, death, or otherwise, and shall also include Martha's habitual cohabitation with an unrelated male [for a continuous period of \_\_\_\_\_ days] [for various periods of time totaling \_\_\_\_\_ days in any \_\_\_\_\_ consecutive months]."

**WAIVER OF ALIMONY.** If no alimony is to be paid, say so! Consider using the following clause or its equivalent:

"Neither party shall now or in the future be obligated to pay to the other any amount or form of maintenance, alimony, or spousal support. They agree that neither of them shall petition any court for any form of such support and they each release the other from any obligation for support. This clause may be pleaded in bar of such a petition."

**CONDITIONAL PAYMENT OF ALIMONY.** If alimony is to be paid, counsel for payor should consider a provision conditioning payment upon the payee's nonbreach of other terms in the agreement. Such a clause might read:

"John may abate payment of spousal support for any period of time that Martha is in breach of any provision of this agreement, and Martha shall have no right to recoup such abated payments after the breach is remedied." Similarly, counsel for payee should consider a provision conditioning her compliance with other terms (such as current house payments on jointly titled residence) on the payor's nonbreach of alimony terms (e.g., "Martha's duty to make mortgage payments on the marital residence at [address] is specifically conditioned on the alimony payments John shall make under Paragraph \_\_\_ herein; should he fail to comply with that provision, she shall be relieved of her duty to hold him harmless on the mortgage payments, and she shall be entitled to any other remedies at law or in equity that may be available."

**HOW TO RESERVE ALIMONY.** When the parties cannot agree on pension division, alimony or some other item, don't just leave it out! In this area, it's not "Silence is golden" -- it's "Silence is dangerous!" Omitting an item for which there is no agreement means that it's waived. The reason? Every good separation agreement contains a general release clause. This states that any rights or claims not set out in the agreement are waived. And that kills pension division (or alimony or whatever item is still in dispute). A good legal assistance attorney will always include a reservation clause such as: *"The parties cannot agree on military pension division. This issue is reserved for later agreement between them or for court decision."*

However, that may not solve the problem. What if Mrs. Jones doesn't know what "reservation" means? What if she thinks it means that "she's got it" and she needs to do nothing more? Such a view, for a non-lawyer, isn't too unrealistic. If this is her interpretation, then you can just bet that, when the divorce complaint and summons arrive several weeks or months from now, she'll just ignore them instead of getting an attorney to draft a counterclaim for pension division and alimony (which is what she should do to keep these alive after the divorce). If there's no claim pending for alimony or equitable distribution (including pension division) at the time of divorce, then these may be lost under state law. And that's an expensive mistake for Mrs. Jones to make--  
and one that can be prevented.

When faced with this situation, you should do two things for your client, Mrs. Jones:

➤First, include a statement in the separation agreement that informs her of what she needs to do, such as, *"The reservation of alimony in this agreement does not mean that it has been decided. Wife must file a claim for this with the court when a divorce is requested by either party. If Husband serves her with divorce papers, she must file this at court in a timely response to the divorce papers for [alimony, pension division]. If she files for divorce herself, she must request*

*this in her complaint filed with the court. If she does not do this, then she may lose these rights."*

➤Secondly, put it in a follow-up letter to her. Make it as plain and forceful as you can. Be sure she knows that her rights could be lost if she doesn't ask for them at the time that the divorce petition or complaint is filed. You should send it certified mail to be sure she gets it, and keep a copy of your letter and the receipt!

➤Or you can have her sign an acknowledgment in your office that she understand what she needs to do. Then keep the document in a SAFE place!

**COURT ORDERS FOR ALIMONY.** If you represent the recipient, see if you can get a court order. In some states you can use a voluntary support agreement, a confession of judgment or some other form of court order, even if it means hiring civilian counsel for your client -- so that you'll have the remedies of contempt or garnishment if there's no payment. And don't let the alimony stop at divorce – unless that's clearly in your client's best interest. Merely being divorced may not mean that she's suddenly independent financially.

**BE CAREFUL OF MERGER OR INCORPORATION.** Merger or incorporation of the agreement into a court decree (or a clause permitting this) can cancel the effectiveness of such protections, since it usually gives the court modification powers and allows the court to redetermine such terms as time limit and amount -- unless state law allows these issues to be defined as nonmodifiable, such as in an integrated property and support settlement. See section on merger and incorporation in this outline. When in doubt, ASK! Contact counsel in the appropriate jurisdiction to get the correct answers.

### **DIVORCE AND ALIMONY POINTERS – STATE LAW.**

- There are two different approaches to divorce in the states. In places like New York, Wisconsin and Washington, the law requires the parties to resolve all the other marital issues at the divorce hearing (or before). In states such as South Carolina, North Carolina and Delaware, that's not the case – the other claims can precede or follow the divorce, but a divorce hearing is only a chance to change your marital status [and possibly get back your maiden name]. Know the difference!
- In some states, the divorce filing brings ALL marital issues before the court automatically, whether they're pleaded or not. In others, the alimony claim must be specifically asserted in the pleadings (such as a counterclaim to the other party's divorce complaint) in order to be preserved for after the divorce. Make sure you get a good lawyer for Mrs. Jones if she's a dependent spouse and the issue isn't completely resolved in the separation agreement. This is an important issue for many military spouses who are mainly homemakers or "Army wives."

**KNOW HOW TO REFER A CLIENT TO A GOOD CIVILIAN ATTORNEY.** Contact the state bar or bar association in the city or county where the lawsuit should be filed (or has been filed already). Use the Special [Legal Assistance Directory](#) for the names of Reserve attorneys in the area. Call the bar association and ask for the staffer who works with the Family Law Section,

so you can ask who might handle a "military case" in that state. See the Silent Partner at JAGCNET Databases on "[Lawyer Resources and Referral](#)" for a complete how-to guide in this area. Call the state bar or bar association to see if they have a lawyer referral service. Check with them to see if there's a list of certified specialists in family law – over half the states have licensed specialists for specific areas of the law. For family law cases, use "[Operation Stand-By](#)" at JAGCNET Databases; it's a list of over 100 domestic lawyers in almost every state who've agreed to accept calls, answer e-mails, respond to questions and take referrals from JAGs with family law cases. Or, to get a specific family law attorney in the city and state of your choice, why not use the ABA Family Law Section's membership list? It's found easily by typing "family law section directory" at the Search JAGCNET link, and it contains over 8,000 attorneys in every state.

**"FLYING BLIND" IS DEFINITELY NOT A GOOD IDEA.** If you don't know what you're doing, STOP. You cannot ethically practice law or advise clients if you don't know the law. Either decline the case or associate competent co-counsel -- these are ethical requirements for all JAGs and civilian attorneys. [see Sullivan, "When to Say NO," ABA Legal Assistance Newsletter, April 1984]

**WHEN IN DOUBT, ASK!** Know your resources – SJA, deputy, section chief, head of the law center, civilian attorneys or Reservists. When you've got a tough nut to crack, be smart enough to ask around. The only dumb question is one you never ask!

[rev. 1/24/08]

\* \* \*

**SILENT PARTNER** IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 2626 GLENWOOD AVENUE, STE. 195, RALEIGH, N.C. 27608 [919-832-8507]; E-MAIL – MARK.SULLIVAN@NCFAMILYLAW.COM.