The Risks and Benefits of Self-Adjusting Alimony Orders in Massachusetts

February 11, 2025 | By Moriah J. King

Self-adjusting alimony orders have their place, but it is important to understand the risks and tradeoffs.

In Massachusetts, alimony and child support orders generally consist of fixed weekly payments. Depending on how a payor is compensated, the payor may make his or her alimony payments on a biweekly or monthly basis, but the law generally calls for such support payments to be made in a fixed, repeating amount.

In cases involving support payors with variable income – including individuals whose compensation varies due to commissions, bonuses, self-employment income or other triggers causing year-to-year variations – parties sometimes agree to so-called "self-adjusting" support orders, which involve alimony or child support payments that rise and fall based on the fluctuations in payor's income (with some self-adjusting formulas also taking into account a recipient's income). Examples of occupations characterized by variable income typically include high-earning professionals such as sales executives, corporate executives, consultants, independent contractors, financial advisors, tech professionals, as well as real estate agents and brokers. Most self-adjusting support orders calculate support as a percentage of the payor's income on an ongoing basis. (For example, a simple self-adjusting support order might call for the payor to pay 20% of his or her weekly or monthly gross income to the recipient on an ongoing basis.)

Although Massachusetts judges have the authority to enter self-adjusting *child support* orders in their discretion, the current law strongly disfavors Massachusetts judges entering self-adjusting *alimony* orders after trial. As Attorney Levy discussed in her 2017 blog on the landmark SJC case, Young v. Young (2017), such self-adjusting alimony orders have long been disfavored in most cases by Massachusetts appellate courts:

This is not the first time that the SJC and/or Appeals Court has rejected an automatically-adjusting alimony order entered by a lower court judge. Indeed, the reason these cases continue to arise is because the SJC and Appeals Court have consistently held that even while self-modifying alimony orders are “disfavored”, they may be appropriate in special cases. By leaving the door open in this way, the appellate cases have essentially invited lower court judges to try their hand at self-adjusting orders in cases the judge deems “special”.

However, the prohibition on judges entering self-adjusted alimony orders after trial does not prevent parties from ***agreeing*** to self-adjusting alimony orders. As discussed below, a recent unpublished opinion of the Massachusetts Appeals Court highlights some of the potential pitfalls of agreeing to a self-adjusting alimony order, as the parties did in Talvitie v. Talvitie (2024).

The Pros and Cons of Self-Adjusting Alimony Orders

In contrast to the fixed nature of traditional alimony, self-adjusting alimony orders offer a dynamic approach to spousal support. These orders automatically adjust the amount of alimony owed based on changes in the parties’ (or more often the payor’s) income. These provisions typically use a formula that based on the payor’s income, although a wide range of factors can affect the for the formula the parties negotiate, including the recipient’s income, the cost of living, inflation, whether the parties have unemancipated children, and the history of fluctuations in the payor’s income.

One of the most significant advantages of self-adjusting alimony orders is their ability to maintain fairness over time. If the paying spouse's income increases, the alimony order will usually automatically adjust to reflect these changes. This dynamic adjustment mechanism can help prevent situations where the original order becomes outdated and inequitable due to shifting financial circumstances. By ensuring that the alimony amount remains aligned with the parties' current financial realities, self-adjusting orders can reduce the need for future modifications and the associated legal costs and emotional stress.

However, self-adjusting alimony orders also have potential drawbacks. Under the Young case, self-adjusting alimony orders present a very specific issue for payors. In Young, the SJC suggested that alimony recipients should not be entitled to increased alimony based on a substantial increase in the payor’s earnings that occurs after the divorce. By agreeing to a self-adjusting order, a payor potentially agrees to give a former spouse a share of his or her post-divorce increase in earnings that the former spouse may not be entitled if seeking a modification of a fixed order. (However, I explored some potential exceptions to this in my recent blog, Increasing Massachusetts Alimony Through a Complaint for Modification.)

For recipients, the main risk of a self-adjusting order is a lack of recourse if the payor suddenly loses a job or takes a substantial pay cut. Although alimony payors have the right to seek a modification of alimony if their income decreases (at least with respect to merged alimony orders), the path to reducing alimony through a complaint for modification is often fraught with challenges, including the difficulty of obtaining a temporary order for reduced alimony. With a self-adjusting alimony order, the amount of alimony reduces immediately based on the payor’s income at the time. For alimony recipients, a fixed order is generally preferable if the payor’s income declines sharply.

Additionally, self-adjusting orders may discourage the paying spouse from seeking a higher-paying job or increasing their income. Unlike traditional alimony orders, where a rise in income may not lead to an increase in alimony obligations, self-adjusting orders generally result in higher payments as the payer's earnings grow. In contrast, a fixed alimony arrangement can promote financial independence and motivation for the paying spouse, as they are able to pursue career advancement without the concern of significantly higher alimony payments. This ability to grow financially without a self-adjusting financial burden can have beneficial psychological effects, aiding in a more seamless post-divorce transition.

Finally, a concern about self-adjusting orders can be their complexity. The formulas used to calculate alimony in these orders can be intricate and challenging to understand, making it difficult for the parties to predict how much alimony they will owe or receive in the future, particularly for formulas that deviate from a straight-forward percentage of the payor's taxable income. This lack of predictability can create uncertainty and make financial planning more challenging. Moreover, disagreements over what constitutes "income" under a self-adjusting alimony order can lead to major showdowns in court, resulting in unpredictable "winners" and "losers" based on a judge's interpretation of the language.

Talvitie v. Talvitie: Self-Adjusting Confusion Leads to Hefty Alimony Payment

In Talvitie v. Talvitie (2024), one of the main pitfalls involving self-adjusting alimony orders reared its head. In Talvitie, the dispute arose out of a disagreement between the parties over the interpretation of their separation agreement, specifically the definition of "earned income" used to calculate alimony payments. Under the terms of the agreement, the husband agreed to alimony that was equal to a percentage of his gross income, which was defined by the agreement in somewhat complex terms as follows:

[G]ross (i.e., pre-tax) income from . . . equity based compensation (when income is actually realized or deferred on a cash basis as opposed to merely a taxable event), including gross pre-tax proceeds as a result of the release of restricted stock (but only when cash is realized from the event), the gross pre-tax proceeds from the exercise of stock options which shall be assumed to take place upon the vesting of same and following sales of resulting stock shares, and the gross pre-tax proceeds of all other forms of company ownership-based incentives from the employer, exercised qualified and non-qualified stock options and stock grants in the year income is recognized, deferred compensation (qualified or non-qualified) when said income is deferred.

At the time of the divorce, a substantial share of the husband's income was earned through Restricted Stock Units (RSUs) that only had value if there was a "liquidity event" involving his employer (e.g. if the employer's business was sold). As a result, the practical impact of the husband's RSUs on alimony were limited – at least immediately after the divorce. However, following the divorce, the husband took a new job where he received RSUs and Performance Stock Units (PSUs) that vested more quickly, with the RSUs and PSUs appearing as taxable income on the husband's W2, even if he did not specifically sell the RSUs or PSUs for cash. Meanwhile, the agreement included language that husband would only pay alimony on "earned income" generated by RSUs or PSUs. (Attorney Owens gives discusses how vested and unvested RSUs are typically divided using the Baccanti method in his blog.)

Based on the language of the agreement, the husband took the position that the gross income that appeared on his W2 statement for vested RSUs or PSUs did not count as gross income for alimony purposes. The Appeals Court held that the agreement was ambiguous as to the meaning of "earned income", and that the husband therefore could not be found in contempt for failing to pay the additional alimony. However, after considering the circumstances surrounding the agreement's drafting and the parties' conduct after its execution, the Court concluded that the parties *intended* for the RSUs and PSUs to be considered as income when reported on his W-2, even with restrictions on their immediate sale. On this basis, the Appeals Court upheld the lower court's decision, affirming that the husband owed the wife $573,052 in alimony for his RSUs and PSUs from 2019-2021.

The Talvitie case highlights the importance of clear and unambiguous language in separation agreements, especially concerning complex financial instruments like stock options and restricted stock. It also demonstrates how courts may look beyond the literal wording of a contract to determine the parties' true intentions. Most of all, the case reflects the risks associated with self-adjusting orders based on variable income and complex formulas and definitions.

Should You Agree to a Self-Adjusting Alimony Order in Your Case?

The decision of whether to pursue a self-adjusting alimony order or a traditional alimony order is a complex one that depends on the specific circumstances of the parties involved. Self-adjusting orders offer the advantage of fairness over time and can potentially reduce the need for future modifications and litigation. However, they can are more complex and can be more difficult to enforce than traditional fixed alimony orders. In contrast, traditional orders provide certainty and predictability. Meanwhile, both traditional and self-adjusting orders may appear unfair to one party if there is a significant change in either party's circumstances, such as a dramatic increase or decrease in the payor's gross income.

As illustrated in Talvitie, special caution is required in cases in which parties rely on complex formulas or definitions for income – particularly when those definitions are clearly tailored to a payor's current earnings, without taking into account how the payor may be compensated by future employers.

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