

**Testimony of Cary Brown, Executive Director, Vermont Commission on Women  
Senate Committee on the Judiciary  
March 22, 2019**

**RE: S.99, An act relating to spousal support and maintenance reform**

Good morning. My name is Cary Brown and I am the Executive Director of the Vermont Commission on Women. The Vermont Commission on Women has been working in the interests of women's economic security since its inception, and has long recognized the need for equitable alimony practices that protect families' financial well-being. Our most recently updated policy statement regarding family law proceedings is as follows:

*The Vermont Commission on Women supports legislation, policies, programs, and initiatives that facilitate equitable treatment of all parties, the protection of children, and the economic interests of single parents in family law matters.*

I represented the Vermont Commission on Women as a member of the 2017 Spousal Support and Maintenance Task Force created by the Vermont Legislature, which was charged with making legislative recommendations to Vermont's spousal support and maintenance laws.

**DISPROPORTIONATE IMPACT ON WOMEN**

Women are 97% of the recipients of maintenance after divorce, and experience disproportional impacts of both marriage and divorce. After divorce, they see disproportionate declines in household income (de Vaus et al. [2015](#); Smock [1994](#)) and standard of living (Bianchi et al. [1999](#); Peterson [1996](#)) as well as significant increases in the risk of poverty (Smock and Manning [1999](#)) and a higher risk of losing homeownership (Dewilde [2008](#)).<sup>1</sup>

In contrast, men, on average, improve their standard of living after divorce. One study calculated a 27% drop in standard of living for women and a 10% increase for men, while other estimates are even larger (Bianchi et al. [1999](#)).<sup>2</sup>

Women are still much more likely to take time out of the workforce to care for children than men are, and while being a stay-at-home mom is less common than when the Commission on Women started in 1964, the numbers have actually stabilized in recent decades – currently about 27% of mothers are home, compared to 26% 30 years ago.<sup>3</sup> And in fact, we're seeing a generational increase in stay-at-home mothers – 30% of Millennial mothers ages 20 to 35 are at home with their children, compared with 25% of Gen X mothers a generation earlier.<sup>4</sup>

<sup>1</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5992251/>

<sup>2</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5992251/>

<sup>3</sup> <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/>

<sup>4</sup> [https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents](https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/)

## GENERAL TERM AND REIMBURSEMENT MAINTENANCE

The current bill defines maintenance as either general term or reimbursement. This reflects a partial response to the 2017 Spousal Support and Maintenance Task Force recommendation number 5, that the reference to “permanent” maintenance be replaced with “long-term.”<sup>5</sup>

The new language of “reimbursement” may reflect the understanding of compensatory maintenance that exists in case law, but the way it is implemented in the bill does not. Compensatory maintenance recognizes that in many marriages, one spouse makes sacrifices in employment, career, or otherwise that contribute to the other spouse’s lifelong earning potential while creating deficiencies in their own. Compensatory maintenance is directly tied to this contribution, and as such has been held by the courts to be unmodifiable outside of the most extreme circumstances.

The notion of compensatory maintenance is particularly important to women because it is much more often women who make sacrifices in marriages that negatively impact their lifetime earning capacity, while positively impacting their spouses’. In order to care for children or family members, mothers are 14% more likely than fathers to reduce their work hours, 15% more likely to report taking a significant amount of time off, and 17% more likely to have quit their job.<sup>6</sup> Women taking time off for parenthood suffer an 18% wage penalty,<sup>7</sup> while fathers whose partners are stay-at-home mothers earn on average of 30% more than those in two-career partnerships.<sup>8</sup>

## REMOVAL OF FACTORS and CAPS ON AMOUNT AND DURATION OF MAINTENANCE

The bill removes the list of factors that judges must consider when making a maintenance decision and replaces them with a formula to calculate the amount and duration of payments. This is contrary to the recommendations of the Task Force.<sup>9</sup> This also risks failing to account for the myriad of individual circumstances that are present in marriages and divorces, most of which cannot be reduced to a simple math problem.

Additional clarity, predictability, and ease of understanding of the process, particularly for low-income parties, those without legal representation, or others for whom the court system is inaccessible, is extremely important. The temporary alimony guidelines that the Legislature added in 2017 to the list of factors to consider in judgments reflected a step towards that goal.

The Task Force’s first recommendation was to extend those alimony guidelines.<sup>10</sup> They had been slated to sunset in 2019, and the recommendation was to extend them to 2021 in order to give them more time to be used and to assess their impact. This recommendation was implemented in 2018. The Task Force’s second recommendation was to undertake a survey of judges, lawyers, case managers,

<sup>5</sup><https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>

<sup>6</sup> From Pew Research at: <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life>

<sup>7</sup> KARINE MOE & DIANNA SHANDY, GLASS CEILINGS AND 100-HOUR COUPLES: WHAT THE OPT-OUT PHENOMENON CAN TEACH US ABOUT WORK AND FAMILY 52-55 (Univ. of Ga. Press 2010)

<sup>8</sup> Tamar Lewin, Men Whose Wives Work Earn Less, Studies Show, N.Y. TIMES (Oct. 12, 1994), <http://www.nytimes.com/1994/10/12/us/men-whose-wives-work-earn-less-studies-show.html?pagewanted=all&src=pm>

<sup>9</sup><https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>

<sup>10</sup><https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>

mediators, and parties as to the application and usefulness of the alimony guidelines.<sup>11</sup> This has not happened, to my knowledge.

The removal of specific factors that judges must consider may have the unintended effect of increasing judicial discretion in some cases, while reducing transparency and accountability.

#### END OF MAINTENANCE AT REMARRIAGE OR COHABITATION OF RECIPIENT SPOUSE

Under current Vermont law, the remarriage of a recipient spouse that results in decreased expenses may constitute a real, substantial, and unanticipated change of circumstances that warrants a modification in the amount of maintenance.<sup>12</sup> Similarly, when an obligor spouse remarries, the court may consider the effect that the new spouse's income has on the needs and expenses of the obligor for the purpose of determining the obligor's ability to meet his or her reasonable needs while meeting those of the recipient spouse, so long as the court doesn't impute the new spouse's salary to the obligor.<sup>13</sup>

Automatic termination of maintenance upon remarriage of a recipient spouse may not consider the actual impact of the remarriage on the recipient's financial situation. Not all remarriages result in improved finances or reduced living expenses, even if many do. Similarly, specifying an automatic action in response to only a recipient spouse's remarriage does not consider any impact that an obligor spouse's remarriage may have on his or her financial situation.

Including cohabitation with remarriage recognizes the reality that many cohabitation arrangements are partnerships that are equivalent to marriage in terms of factors such as intertwined finances, shared legal responsibility for living expenses, and recognition of the relationship in the couple's social and family circle. However, simply living together may not entail any of the other factors that come along with marriage, and therefore other states have sought to define cohabitation in their laws.<sup>14</sup>

As noted previously, this bill does not make a distinction between general term maintenance and reimbursement maintenance in this requirement of termination upon remarriage or cohabitation, and therefore does not recognize the particular nature of compensatory maintenance as being unrelated to conditions that change in the future.

#### END OF MAINTENANCE AT RETIREMENT AGE OF OBLIGOR SPOUSE

The 2017 Spousal Support and Maintenance Task Force's fourth recommendation was that the legislature should consider adding the impact of retirement of either the obligor or recipient spouse as a factor in determining the duration or amount of an award.<sup>15</sup> This reflected the notion that both parties, both obligors and recipients, should have an opportunity to retire and to plan for retirement.

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<sup>11</sup><https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>

<sup>12</sup> 15 V.S.A. § 758

<sup>13</sup> Vermont Supreme Court, *Weaver v. Weaver*, 2017

<https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Brynn%20Hare~Weaver%20v.%20Weaver~9-20-2017.pdf>

<sup>14</sup> "REMOVING THE PARACHUTE: RECENT TRENDS IN ALIMONY MODIFICATION", *American Journal of Family Law*, Vol. 29, No. 3, Summer and Fall 2015.

<sup>15</sup><https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>

Automatic termination of payments upon the obligor spouse's attainment of retirement age does not take into account numerous factors that may impact the financial situation of both parties. Such factors may include whether the obligor has actually retired or not, the age of the parties at the time of divorce, the duration of payments up to that point, the likely future earnings of both parties, the retirement status of the recipient, or any others that affect the financial situation of either party.

Additionally, automatic termination of all maintenance at a certain point does not recognize the particular nature of compensatory maintenance, which is unrelated to the age of the obligor spouse.

Other states that have considered the question of maintenance payments after retirement have tended to focus on the question of actual retirement, rather than attainment of retirement age.<sup>16</sup>

Massachusetts requires termination but includes statutorily specified exceptions, and South Carolina does not result in automatic termination but instead provides an opportunity for a hearing to determine whether there has been a change in circumstances, and the law specifies factors that must be considered in making that determination.<sup>17</sup> The factors include whether retirement was contemplated when the award was made, the age of the obligor spouse, the health of the obligor spouse, whether the retirement is voluntary or mandatory, whether retirement would result in a decrease in the obligor spouse's income, and any other factors the court sees fit.<sup>18</sup>

Ensuring that the question of retirement is contemplated in the original award could bring more clarity and stability to both parties in their ability to retire.

#### MODIFICATION

The Task Force's final recommendation was that the Legislature should clarify that the application of the alimony guidelines, standing alone, is not a basis for modification of an existing maintenance order in the absence of a real, substantial, and unanticipated change in circumstances.<sup>19</sup> This standard of "real, substantial, and unanticipated change in circumstances" allows for a recognition of the incredibly wide variations that there are in marriages and divorces, and in both parties' situations. A fixed threshold of a 10% change in income of either party, as contemplated in the bill, may not. Similarly, a threshold of any change in health of either party is vague and runs the risk of not capturing the true impact such a change in health may have.

Requiring the party seeking a revision to show that there is a 10% change in income of the other party before a hearing, without the access to that party's financial information that a hearing would bring, may reduce access to the ability to make modifications for both parties.

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<sup>16</sup> "REMOVING THE PARACHUTE: RECENT TRENDS IN ALIMONY MODIFICATION", American Journal of Family Law, Vol. 29, No. 3, Summer and Fall 2015.

<sup>17</sup> "REMOVING THE PARACHUTE: RECENT TRENDS IN ALIMONY MODIFICATION", American Journal of Family Law, Vol. 29, No. 3, Summer and Fall 2015.

<sup>18</sup> "REMOVING THE PARACHUTE: RECENT TRENDS IN ALIMONY MODIFICATION", American Journal of Family Law, Vol. 29, No. 3, Summer and Fall 2015.

<sup>19</sup> <https://legislature.vermont.gov/Documents/2018/WorkGroups/Spousal%20Support%20Task%20Force/Spousal%20Support%20Work%20Group/W~Judge%20Thomas%20Devine~Spousal%20Support%20and%20Maintenance%20Task%20Force%20Recommendations~11-22-2017.pdf>