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Attorney Nicole K. Levy explains how Covid-19 has complicated modifying child support and alimony cases involving self-employed parents and former spouses.



In Massachusetts, the amount of [child support](#) and [alimony](#) payments are largely based on the gross income of the parent and/or former spouse who is court ordered to pay support. Accordingly, calculating child support and alimony is more complicated when the [support obligor is self-employed](#) or generates streams of income from unconventional or inconsistent sources, such as real estate sales, [RSUs or stock options](#), or [capital investments](#). This analysis becomes even more challenging if the non-salaried party experiences a decrease in income and seeks to reduce his or her support obligation through a [Complaint for Modification](#).

As if these questions were not already complicated enough, analyzing support modifications for self-employed and non-traditional earners now includes an additional level of extraordinary ambiguity due to the [coronavirus pandemic](#). Although it varies from industry to industry, the pandemic has generated [dramatic decreases in business activity](#) that have drastically decreased gross revenue for individuals including self-employed business owners, commission-earning professionals and individuals whose annual income include significant bonuses or stock compensation such as stock options or RSUs.

For unconventional earnings who have been impacted by the pandemic, the question focuses not only on their immediate loss of income since mid-March 2020, but also on short, medium and long-term forecasts of their future earnings amid during a highly disrupted and unpredictable business landscape moving forward. These unique challenges are having significant impacts on both support-paying parents and former spouses who are seeking a reduction in child support and alimony obligations, but also [support recipients who are struggling](#) to determine what constitutes a fair order moving forward amid a historic disruption of the business cycle.

Support Calculations for Non-Salaried Workers are Tricky in the Best of Times

There are two types of financial support that are affected by income of the parties: Child support and alimony. These support orders arise out of divorce and/or child custody case.

Determining child support depends on several factors:

- The gross weekly income for each parent;
- The amount of parenting time that each parent has;
- The number of children;
- The ages of the children; and
- Healthcare and childcare expenses.
- Meanwhile, the amount and duration of [alimony is calculated](#) based on the following factors:
 - The length (or duration) of the marriage;
 - The difference in the income levels;
 - Post-divorce circumstances such as the re-marriage of the recipient;
 - The age of the alimony payor; and
 - When the divorce occurred.

For both child support and for alimony, gross income is the driving force. For salaried “W2 employees”, this it is often straightforward to calculate income based on the individual’s taxable income in recent years. However, calculating income is significantly more complex for self-employed individuals, independent contractors, investors, and commissioned employees whose compensation fluctuates widely from year to year based on economic factors that may be beyond the individual’s control.

In Massachusetts, self-employed parents and spouses must file a “[Schedule A](#)” disclosure as part of their [Financial Statement](#). The Schedule A requires the self-employed person to report his or her monthly gross receipts and business expenses. The [Massachusetts Child Support Guidelines](#) make clear that taxable self-employment income is not necessarily the same as income for child support purposes. (Note: The [Massachusetts alimony statute](#) borrows its definition for self-employment income from the Child Support Guidelines, meaning that self-employment income is calculated based on identical methods and standards for both forms of support.)

Because self-employed individuals have tremendous control over how their business reports income and expenses, these support cases are among the most challenging faced by [family law attorneys](#). Modifications of support based on self-employment income often include a [complex analysis](#) of tax returns, bank records, QuickBooks and bookkeeping records and [forensic accounting](#). The same is true for real estate developers and other investors who exert a great deal of control over what assets they choose to buy, sell, or improve in a given year, often resulting in dramatic variations in income from year to year.

Unlike salaried employees who face layoffs and pay cuts, many small businesses have gone into a kind of hibernation during the pandemic. As business owners struggle to hold on, decreased revenue often continues to trickle in, as the business attempts to weather the storm of the pandemic. Against this slow-but-not-stopped backdrop, calculating a reduction in child support or alimony for the business owner is difficult. Even if business has slowed to a crawl for the time being, will it pick back up upon re-opening? Should self-employed individuals receive a [temporary order reducing support](#) based on the temporary reduction business? In Massachusetts, where courts have [not been hearing non-emergency modification cases](#) since the pandemic began, these questions are anything but clear.

The analysis required for commission-earning parents and former spouses is generally somewhat less complex. However, in the context of the coronavirus pandemic, the larger instability plaguing the economic system has made commission-based income far more difficult to evaluate than usual. Some segments of the economy – such as commercial real estate and travel and tourism – have been so decimated by the pandemic that it is nearly impossible to say when commissioned employees within that sector will see a rebound in their earnings. Again, against this backdrop, attempting to determine what a fair and appropriate child support or alimony order should be in the meantime is very challenging indeed.

The Pandemic Has Created Economic Turmoil and Income Fluctuations

The economic impact of COVID-19 has not been limited to employees and business owners. While the unemployment rate skyrocketed to an [estimated to hit 20%](#), independent contractors, the self-employed, and other non-traditional earners are suffering as well, though underneath the radar. According to a survey by the Freelancers Union, [76% of independent contractors have had contracts cancelled](#) because of the coronavirus pandemic, while another 65% reported

increased difficulty finding new clients. And this survey was published on April 2, when the shutdown was only just beginning.

While non-salaried workers are used to some fluctuations in their income, the pandemic has created droughts of unprecedented depth and duration, making it incredibly difficult for them to know how to plan for their financial future. The economic impact of the pandemic will have longer term impacts as people continue to struggle to find work or maintain a consistent income.

The result of this, in terms of litigation, means more modification filings. Support obligations become burdensome, and in some cases, impossible, when someone's income has decreased dramatically without an end in sight. However, merely filing a Complaint for Modification is only the beginning for unconventional earners. Even if a judge is likely to agree that [reduction in child support](#) or [alimony](#) is warranted, determining the exact *amount* of the decrease is just as difficult as determining the self-employed person's income in the middle of unprecedented economic instability. Will a business that was earning like gangbusters in 2019 return to form in 2021? Or has the pandemic so altered the economic landscape that past performance is no longer a useful indication for future earnings?

Some Income Reductions Fall Short of Unemployment

To add to the complexity of modifying support obligations for non-traditional income earners, courts have long struggled with reductions in income, if it was not a complete loss of income.

When a worker is laid off or loses their job, there is a set structure of unemployment benefits to provide financial supports that courts can rely on when they modify child support and alimony obligations. The worker files for unemployment and receives financial benefits for a set amount of time, if available. In Massachusetts, those benefits are [around half of the worker's lost income](#) – plus any [temporary CARES Act benefits](#), for the time being – making it relatively easy for a court to set a temporary order for reduced child support or alimony while the worker looks for a new job.

But independent contractors and the self-employed often may not get “laid off” in the traditional senses. Instead, these individuals tend to lose clients and/or business, and then lose income on a kind of sliding scale. From a personal financial perspective, the form of one's income is less important – you either have enough to pay the mortgage or you don't in a given month – but from a

legal perspective the distinction is significant. For the self-employed, there is no set unemployment structure that can be used to generate a predictable (albeit reduced) share of income for a fixed amount of time.

This lack of predictability lies at the heart of the challenge for judges and litigants in self-employment cases, where the party's self-employed status (1) already made it difficult to ascertain income, (2) there has been a substantial decrease in income, but (3) it is nearly impossible to forecast what the self-employed person's income will be even over the very short term of the next couple of months. Thus, attorneys and judge are left asking: Even if we agree there should be a reduction in support, how much should the reduction be and for how long should it last?

Attorneys Struggle for Temporary Solutions While the Pandemic's Economic Chaos Plays Out

The reality for attorneys, judges and litigators alike is that there is no clear playbook for addressing the unprecedented economic turmoil we face in the context of child support and alimony reductions. Lacking an ordinary approach for how to handle such cases – often with little or no direct access to courts – attorneys have been devising creative ways to attempt to answer the unanswerable. Some of these ideas include:

Use Gross Receipts and a Hypothetical Profit Margin to Calculate Support –

Part of what makes calculating self-employment income so challenging is the need to perform the complex analysis of deducting ordinary and necessary business expenses from gross receipts to generate taxable business income. Needless to say, there is a reason that CPAs and accountants get paid a great deal of money to prepare tax returns for business entities. One approach that attorneys have used to survive the pandemic is to drastically simplify the self-employment analysis by focusing on one key metric: gross receipts. (For an independent contractor, the corresponding metric could be 1099 income.) From there, attorneys and litigants must agree on a reasonable short-term “profit margin” – i.e. a reasonable percentage of gross receipts that can be treated as income for the self-employed person.

Thus, if 30% represents a reasonable profit margin for the business, then 30% of the total gross receipts would count as income as self-employment income. From there, the parties can use the Child Support Guidelines to estimate how the self-employment income can be apportioned for child support or alimony. The advantage of this approach is that it greatly simplifies the need to exchange and analyze records. The business owner can simply provide his or her monthly

gross receipts and adjust his or her support payment based on the agreed-upon margin. As a short-term solution for parties who are seeking to share limited resources in a fair way, it is a solution.

Calculate Temporary Support Based on Hypothetical Unemployment Benefits

For self-employed individuals whose income has dropped to near zero, another approach is to base support on the hypothetical unemployment income that would be available to the worker if he or she abandoned the business and sought whatever unemployment benefits would be hypothetically available to an individual with the worker's earning history. This approach ensures that support recipients are not harmed by a self-employed party's desire to maintain their business, even if it means a temporary loss of all income. This solution is probably best suited for self-employed individuals whose taxable income did not exceed \$100,000 per year prior to the pandemic.

Use the Payor's Assets to Calculate Temporary Support

It is a truism that child support and alimony are generally based on the gross income of the parties. However, Massachusetts case law supports the notion that a support paying party who is able to maintain his or her lifestyle by spending assets may be deemed able to pay support, despite a loss of income. For parties struggling to generate a temporary support order during the downturn, it may make sense to calculate support as a percentage of the assets owned by the support paying parent. For example, if a support paying parent holds assets of \$3 million, it might be reasonable to assume that the party generates annual investment income equal to 3%, or \$90,000 per year, that can be used as a substitute for gross income in lieu of actual earnings. For especially wealthy parties, the individual's net worth may form a basis for maintaining the full support order, even if the payor's gross income has been lost for the year.

While it is true that many wealthy individuals may see a decrease in their investment values amid the economic turmoil of the pandemic, the asset approach can nevertheless provide a reasonable and objective way of ensuring that support continues despite the downturn.

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A final approach for parties struggling with these issues is to [mediate a child support or alimony reduction](#). Although mediation includes some limitation, it is also possible to include [forensic financial experts in the mediation process](#) for cases that include complex finances. Moreover, mediation provides a cooperative way for parties to manage the difficult economic circumstances [created by the pandemic](#) without adding to their stress through litigation and discovery. Finally, mediation has the added advantage of reaching a solution quickly, and having it [filed with the appropriate court](#) seamlessly.

None of the solutions above resolve the core ambiguity that lives at the heart of modifications of support involving self-employed person. However, each approach imposes a structure over the pandemic's chaos to enable parties to measure their circumstances and achieve resolution despite the lack of clarity we all face due to Covid-19.

About the Author: [Nicole K. Levy](#) is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in [Hingham](#), Massachusetts and [East Sandwich](#), Massachusetts. She is also a mediator for [South Shore Divorce Mediation](#).

Schedule a consultation with [Nicole K. Levy](#) today at (781) 253-2049 or send [her an email](#).

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