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Appeals Court: Reducing Alimony Requires Analysis Of Income And Assets In Mass

New Appeals Court decision expands alimony analysis to include a review of assets when support reduction is sought.

Since the enactment of the Alimony Reform Act (ARA) in 2011, [Complaints for Modification](#) seeking to reduce or terminate orders for [alimony](#) have become more common action in Massachusetts Probate and Family Courts. As detailed in our [blog](#), ARA and subsequent case law have provided support for [alimony modifications](#). However, new and unique cases are continuously arising to carve out rules and exceptions to the law surrounding alimony. A recent case Appeals Court case, [Dolan v. Dolan \(2021\)](#) demonstrates how a modification action to reduce alimony can be complicated when the alimony-paying former spouse is self-employed.



In addition to the complications associated with [modifying support obligations for self-employed parties](#), the *Dolan* case touches on how and when courts treat sales of capital assets as a source of income for support, as well as the interplay between the [division of marital assets](#) and a subsequent action to [modify alimony](#).

Self-Employed Former Spouse Sells Business and Seeks Alimony Reduction

In [Dolan](#), the parties were married in 1988 and divorced in 2016. The husband was a self-employed business owner. Under the divorce judgment, the husband's business was assigned to him in the division of assets, with the wife receiving a larger share of the remaining assets in consideration of the value of the business. Ultimately, each party received 50% of the marital estate, which had a total value of \$3.9 million. Under the judgment, the husband also paid \$2,885 per week in alimony to the wife based on the husband's [self-employment income](#) at the time.

Within two years of the divorce being finalized, the husband sold his business and filed a Complaint for Modification seeking a reduction of alimony due to his reduced income. The sale of the husband's business included a series of installment payments over the course of two years from the buyer, which were countable to the husband as capital gains. After these installment payments, the husband would continue working for the company at a substantially lower salary than he earned before.

(Before going further, it should be specifically noted that there was no evidence that the sale of the business [which had struggled recently] was unreasonable or that husband intentionally reduced his income. The judge in the modification action specifically found that the sale was justified based on market conditions and that the reduction in the husband's income following the sale was likewise justified.)

Probate Court Treats Sale of Husband's Business as a Source for Alimony Payments

In December 2018, approximately 15 months after the husband filed his Complaint for Modification, the matter was scheduled for a two-day trial in the [Norfolk Probate & Family Court](#) before Hon. Patricia A. Gorman. In her Judgment of Modification entered after trial, Judge Gorman treated the installment payments as a continuing source of income from which the husband could keep paying the old alimony order. Thus, for the two years that the husband received the installment payments following the sale, his alimony payments would remain unchanged.

The judge further ordered that after the installment payments ended, the husband would begin paying a lower alimony amount based on his reduced income. This would result in the wife's alimony being reduced by about a third, from \$2,885 per week to \$1,680 per week.

Husband Appeals Court's Treatment of Business Sale Proceeds as Income Source

On appeal, the husband argued that the judge erred by treating the installment payments from the sale of the business as a source of income for alimony, where the business had already been divided as an asset during the divorce. As part of his argument on appeal, the husband cited [G. L. c. 208, § 53\(c\)\(1\)](#), which provides in part:

[W]hen issuing an order for alimony, the court shall exclude from its income calculation . . . capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34.

Since the business was divided in the divorce, the husband maintained that the payments he received from the sale of the business could not be used as income in the calculation of alimony payments. He argued that the installment payments were exactly the kind of "capital gains income" derived from a marital asset that should be excluded from an alimony calculation.

Appeals Court: Calculating Alimony is Different for Modification vs. Divorce

The Appeals Court disagreed with the husband's argument on statutory and common law grounds. Under the statute, the Appeals Court held that [Section 53 \(c\) \(1\)](#) only prohibits treating capital gains derived from divisible assets as income when the court sets *an initial alimony order*:

[S]ection § 49 (e) continues to reflect the longstanding rule that "[a] party seeking to modify an existing alimony award 'must demonstrate a material change of circumstances since the entry of the earlier judgment.'" **Section 53 (c) (1), by its own express terms, applies only when "issuing" an alimony order.** There is a clear distinction between ordering a party to pay alimony with income derived from an asset received in the divorce -- which § 53 (c) (1) was designed to prevent -- and determining whether a payor's income and assets together demonstrate an ability to continue paying an existing alimony obligation. Accordingly, in a modification proceeding, § 53 (c) (1) applies when the judge is calculating a modified alimony order, after the judge has made a threshold determination that there has been a material change in circumstances warranting modification. [Citations omitted.] (emphasis added.)

In plain English, the Appeals Court distinguished between how courts should calculate alimony [at the time of a divorce](#) versus reviewing an existing alimony order in a modification action. The Court held that before alimony is decreased through a modification, the judge must examine all of the payor's financial circumstances, including his or her income and assets, to determine whether the party's financial situation is materially changed. Specifically, court should examine whether the party still has

the ability to pay the alimony order. This part of the analysis does not require the court to exclude capital gains or income derived from an asset that was divided during the divorce, but rather, contemplates a holistic, big picture look at whether the party's overall financial circumstances have changed so much that he or she is no longer able to continue paying alimony at the original level. Accordingly, in a modification action, a court is not limited to reviewing income in determining whether a current alimony order should be modified.

In *Dolan*, Judge Gorman found that the husband would continue to have the ability to pay the original alimony order until he stopped receiving installment payments. It was only when the installment payments stopped that the trial judge found a material change would occur, justifying a reduction in alimony at that time. Notably, when it came time to calculate a new alimony after the change occurred, the Probate Court judge did not consider the husband's capital gains from the sale of the business in setting the new order.

Dolan: Installment Payments Allowed Husband to Keep Paying Alimony for Two Years

The Appeals Court also cited a series of longstanding common law principles articulated in prior appellate cases that focused on whether support-paying business owners should be entitled to a decrease in alimony (or [child support](#)) after the business owner chooses to sell the business. For example, the Appeals Court cited the Supreme Judicial Court's decision in [Shuler v. Shuler \(1981\)](#), which provided:

[W]hen an ex-husband voluntarily liquidates his business, a capital asset, and thereby diminishes his future earning capacity, we believe that it would be unjust to hold that he is automatically relieved of future alimony payments, even if it ultimately becomes necessary to pay the ex-wife a portion of the proceeds from the sale.

Similarly, the Court cited its decision in [Katz v. Katz \(2002\)](#), where the Appeals Court held:

Capital assets should be used to evaluate a supporting spouse's ability to pay alimony in a modification proceeding.

Both the *Shuler* and *Katz* decisions stand for the proposition that wealthy, self-employed parties who are subject to an alimony order [should not receive a "rubber stamp" reduction in modification](#) simply because that party chose to shut down the business or voluntarily stopped working. In *Katz*, the Court held that a decrease in income alone may not warrant a reduction in alimony if the paying party retains substantial assets from which he or she can continue to pay the order. In *Shuler*, the SJC held that an alimony obligor should not be able to escape his or her alimony obligation by intentionally selling their business or by ceasing to work voluntarily.



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Voluntary Sales of Business by Self-Employed Parties Scrutinized

In *Dolan*, the Court clearly distinguished husband's decision to sell his business from the husbands' actions in *Shuler* and *Katz*. The footnotes of the *Dolan* opinion make clear that the husband was justified in selling the business, which had struggled in recent years, while indicating that the reduced salary the husband would receive after the sale was reasonable. In other words, there was no evidence that the husband unreasonably sold his business or intentionally reduced his income.

Nevertheless, the Court's citations to *Shuler* and *Katz* cases serve as a reminder that judges must critically examine a support-payor's decision to sell his or her business when the business-owning party seeks a reduction in alimony or child support based on the sale of the business and subsequent reduction in income. For business-owning parties who demonstrate that the sale was justified, the *Dolan* decision suggests that judges may consider the proceeds from the sale of the business when determining whether a reduction in alimony is justified – even if the business being sold was assigned as part of the division of assets in the original divorce.

An interesting question is whether the husband could have avoided by this situation by accepting a single lump sum payment for the sale of the business, rather than 24 monthly installment payments over two years. The judge appeared to regard the installment payments as analogous to wages – particularly where the husband continued working for the company while receiving the payments – from which he could continue to pay alimony.

What Are the Implications of the Dolan Decision?

One of the most critical components of the Alimony Reform Act was the imposition of a so called "[alimony formula](#)", under which Massachusetts [alimony is "capped" at 35%](#) of the difference between the parties' respective incomes. The so-called alimony cap has received additional scrutiny since 2017, when [federal tax law changed](#) to prohibit tax deductions for alimony payments in new divorces. Despite the tax adjustment, Massachusetts courts continue to rely on the formula set out in the ARA when calculating alimony orders.

The *Dolan* decision suggests that Massachusetts Probate & Family Court judges may set aside some of the provisions of the ARA – i.e. those define "income" as a source for alimony – when initially reviewing a Complaint for Modification that seeks a reduction in alimony. *Dolan* suggests that courts must first look at paying party's overall financial circumstances – including the party's *assets* – to determine whether the party has the ability to continue paying alimony. This holistic "first look" includes an examination of *all* of the party's assets, including those assigned to the party in the divorce.

Dolan suggests that a court must first determine whether a party's overall financial circumstances have materially changed to the point where he or she is no longer able to reasonably pay the original alimony order. Arguably, it is only after such a material change is detected by the judge that the ARA's stricter rules on income sources available to calculate alimony become applicable. In the context of an alimony order that was originally calculated based on 35% difference between the parties' gross incomes, *Dolan* suggest that a change in one or both parties' incomes may not be sufficient to warrant a reduction in alimony. Instead, *Dolan* suggests that a court should look at both *assets and income* before reducing alimony.

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