

Lump Sum Alimony: the New Default Position, Absent Careful Drafting:

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Clients have a preconceived notion that if they agree to pay “alimony”, such obligation will at least come with the following “beneficial strings”: (1) it will tax deductible to them, (2) it is modifiable upon material change in financial circumstances, and, (3) that it terminates when their spouse remarries after their divorce is granted. These three beneficial strings attaching are a material contemplation for why they agree to pay alimony (or at least pay a specific amount).

However, the case *Rivera v. Rivera*, 283 Ga. 547 illustrates that it is critical for a lawyer to always remember the fact that there are two distinct faces to the term “alimony”: there is periodic alimony, under which these three beneficial strings apply, and there is the lump sum alimony, under which they would not. In settlement discussions and writings, lawyers frequently toss around the word “alimony” as a generic term, without expressly stating whether they intend it to be periodic or lump sum. While many lawyers may believe that the default position for this generic term is periodic (e.g., all three of these beneficial strings attached), the *Rivera* case shows us that, absent specific language in the agreement, the default position may now actually be lump sum alimony.

Pursuant to *Rivera*, in order to effectuate the desire for alimony to be periodic and these three beneficial strings to attach, the agreement must expressly include at least one contingency on the alimony obligation. Chillingly, as held in *Rivera*, such holding would not change even if a lawyer goes to great lengths to expressly label the obligation in the agreement as “Periodic Alimony”. The bottom line is: no express contingency, then no three beneficial strings.

Therefore, it is my advice to be sure and always expressly include a contingency for the alimony obligation. Further, and equally as important, this tip applies not only when drafting final settlement agreements, but also whenever drafting a quick “skinny” settlement agreement that you may enter into at mediation or in the hallways of the courthouse, which are frequently quickly and broadly drafted (many times handwritten and a legal pad) including only the material terms, which are to later be incorporated into a final more complete formal settlement agreement. Further, a prudent lawyer should also caveat same when orally having settlement discussions.

To illustrate how such tip could save a lawyer is the following potential scenario: *On the morning of their client's final divorce trial, Lawyer A and Lawyer B hammer out an agreement in the hallways of GJAC, which avoids an expensive three day trial. They reduce the agreement to writing, which Lawyer A quickly handwrites on a yellow legal pad. Number 5 in the handwritten “skinny” agreement reads as follows: “Husband will pay Wife Alimony equal to \$1,000.00 per month for 48 months”. The clients sign the skinny handwritten agreement, and the lawyers announce to the court they have reached a final agreement, and Lawyer B is going to draft it. Lawyer B returns to his office and drafts the final Settlement Agreement incorporating all of the terms in the skinny agreement. When drafting the alimony obligation, he adds the death contingency.*

Lawyer A opposes this, explaining “we didn't agree to this contingency”. Lawyer B explains “you know my client only agreed to pay that because he thought he could deduct it, and because he knows your client is going to marry her boyfriend in less than a year anyway....”. While this argument between Lawyer A and B may result in some lucrative billable hours, it could have been avoided had Lawyer B simply used his pen to write in the skinny agreement “Said obligation contingent on wife’s survival”.

Lastly, it is notable that by simply placing the alimony obligation contingency on the recipient’s survival, a party may still enjoy all three of the beneficial strings. Therefore, by including such contingency on just survival, the party can take confidence in the fact that it will terminate when his spouse inevitably remarries, without having to tip off the spouse of this fact and worrying about having to negotiate this issue while mediating or making settlement discussions.

Specifically, I recommend that you articulate any and all alimony obligations as follows: “The Husband agrees to pay to the Wife \$1,000.00 per month in alimony, which he will pay for a period of forty-eight (48) months or until the death of the Wife, whichever shall first occur.”