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NEW JERSEY ENACTS ALIMONY REFORM BILL

By Robert A. Epstein and Eric S. Solotoff

After almost three years of legislative debate and public discussion, alimony reform has finally come to New Jersey. On September 10, 2014, Governor Chris Christie signed into law a bill that went into immediate effect and substantially amends various provisions of New Jersey's alimony law, N.J.S.A. 2A:34-23. As a general overview, the bill "establishes durational limits and enumerates certain factors concerning modification and termination of alimony; establishes 'open durational' alimony."

Importantly, the amended law does not apply retroactively, expressly providing that it "shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into: (1) a final judgment of divorce or dissolution; (2) a final order that has concluded post-judgment litigation; or (3) any enforceable written agreement between the parties." Thus, specifically as to alimony awards, the law will apply only to divorces in process and future divorces. The law will, however, apply to applications to modify alimony based upon changes of circumstances and retirement.

Highlights of the law, which include several codified provisions of already existing case law, are as follows:

Duration of Alimony

In what is considered the most significant change to the existing alimony law, the term "permanent" alimony has been replaced by "open durational" alimony. Use of

the word "permanent" sparked controversy and debate for years, culminating in its elimination from the law. Now, for any marriage of less than 20 years in duration, the total duration of alimony shall not exceed the length of the marriage, except in "exceptional circumstances." The length and amount of alimony shall still be determined pursuant to the statutory factors. However, new is the consideration of "the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage . . ." After the *Crews* case was decided by the New Jersey Supreme Court in 2000, marital lifestyle was elevated above the other alimony factors and further, led to the misconception that the supported spouse only is entitled to maintain the marital standard of living. The new law provides that neither party has a greater entitlement to the standard of living (or a reasonably comparable standard of living) established during the marriage.

A non-inclusive list of "exceptional circumstances" is set forth in the proposed law and includes:

- The ages of the parties at the time of the marriage or civil union and at the time of the alimony award;
- The degree and duration of the dependency of one party on the other party during the marriage or civil union;
- Whether a spouse or partner has a chronic illness or unusual health circumstance;

- Whether a spouse or partner has given up a career or a career opportunity or otherwise supported the career of the other spouse or partner;
- Whether a spouse or partner has received a disproportionate share of the marital estate;
- The impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;
- Tax considerations of either party; and
- Any other factors or circumstances that the court deems equitable, relevant and material.

This watershed change to the law gained momentum following *Gnall v. Gnall*, 432 N.J. Super. 129 (App. Div. 2013), last year's Appellate Division decision, in which a marriage of 15 years in duration was considered a long-term marriage meriting a permanent alimony award. While that case is now pending before the Supreme Court of New Jersey, a marriage of less than 20 years would no longer merit such an award under the new law.

Pendente Lite Support Payments

The nature, amount and length of *pendente lite* support, if any, paid during a divorce proceeding is now a codified statutory factor to consider when rendering a final alimony award. Put another way, the court is now required to consider how long interim support has been paid in determining final alimony. The result of this should be to dis-incentivize a payee spouse who may be biding his or her time during a divorce proceeding with the belief that receiving monthly support payments on an interim basis during a proceeding will not impact the overall duration of a final alimony award.

Weight of Alimony Factors

In analyzing the alimony factors, a court is required to "consider and assess evidence with respect to all relevant" factors and specify, with written findings of fact and conclusions of law, if it determined that certain factors are more or less relevant than others. The law provides that no factor shall carry more weight than any other factor unless the court finds otherwise.

Reimbursement Alimony

The law provides that this form of alimony may not be modified for any reason.

Retirement

Perhaps the second most significant change to the alimony law pertains to the ability of a retiring payor to modify or terminate his or her alimony obligation. While extensive case law already exists on this subject, the amended, codified language provides a clearer path for litigants to address this issue, while easing the obligor's burden to procure relief.

"Full Retirement Age"

As a threshold point, "full retirement age" is defined as the age at "which a person is eligible to receive full retirement benefits under the Social Security Act" – presently 67 years of age.

Rebuttable Presumption

There is now a rebuttable presumption that alimony terminates once the obligor spouse reaches full retirement age, which can still be set to a different date based on a showing of "good cause." The rebuttable presumption may be overcome, however, and alimony may continue, based on a consideration of the following factors, and for good cause shown:

- The ages of the parties at the time of the application for retirement;
- The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;
- The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil union;
- Whether the recipient has foregone, relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;
- The duration or amount of alimony already paid;
- The health of the parties at the time of the retirement application;

- Assets of the parties at the time of the retirement application;
- Whether the recipient has reached full retirement age as defined in the law;
- Sources of income, both earned and unearned, of the parties;
- The ability of the recipient to have saved adequately for retirement; and
- Any other factors that the court may deem relevant.

If the rebuttable presumption is overcome based on the enunciated factors, a court is required to apply the standard alimony factors to determine whether a modification or termination of alimony is appropriate. Critically, “if the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.” In other words, it offers a defined path to relief for the payor, perhaps without the need for more litigation.

Retiring Before “Full Retirement Age”

If the obligor seeks to retire before full retirement age, the obligor must prove by a preponderance of the evidence that the prospective or actual retirement is reasonable and made in good faith. A series of factors is then set forth to determine what constitutes “reasonable and made in good faith,” including, but not limited to, the age and health of the parties at the time of the application; the obligor’s field of employment and the generally accepted age of retirement for those in that field; and the age when the obligor becomes eligible for retirement at the obligor’s place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits. Similarly, if the obligor intends to retire, but has not yet done so, the court is required to establish conditions under which the modification or termination of alimony will become effective.

Retiring in Cases Where There Is an Existing Final Alimony Order or Enforceable Written Agreement Established Prior to the Amended Law

Interestingly, while the amended law also applies to prior final alimony orders and enforceable written agreements on the issue of retirement, there is no similar rebuttable presumption as there would be in a situation involving a post-amendment alimony order or agreement. The factors considered are the same as those for a person who, with a final alimony order or enforceable written agreement post-amendment, seeks to retire before “full retirement age.” In addition, the court is required to consider the ability of the obligee to have adequately saved for retirement. That said, getting past the initial showing of a good faith retirement in the prior law has been eliminated.

Assets Distributed at Time of Divorce/Dissolution

The law provides that such assets are not to be considered by a court when determining an obligor’s ability to pay alimony following retirement.

Modification Based on Loss of Income

A major area of post-judgment litigation involves an obligor’s request to modify alimony resulting from a loss of income. With the amended law, both trial judges and litigants will seemingly have a quicker and more defined path to address these situations than that which previously existed.

Non-Self-Employed Obligors

Pursuant to *Lepis v. Lepis*, 81 N.J. 281 (1980), the Supreme Court of New Jersey’s benchmark decision on this topic, a court is required to consider several factors to, in part, determine whether an alleged loss of income constitutes a “substantial and continuing” change in circumstance meriting further analysis and, ultimately, a potential alimony modification. There is no definitive period in the case law, however, for what constitutes “continuing,” as each case was based upon its own facts and circumstances.

The amendment provides that where the changed circumstances arise from a loss of employment, an obligor may seek relief after merely 90 days (but no

sooner) of having been unemployed, or unable to return to or attain employment at prior income levels (or both). Courts are directed to consider several enumerated factors, all of which have been discussed in prior case law. These factors include, but are not limited to, the reasons for any loss of income; the obligor's documented efforts to obtain replacement employment or pursue an alternative occupation in the event of a job loss; whether there has been a good faith effort to find remunerative employment at any level and in any field in the event of a job loss; and the income of the obligor and the obligee's circumstances.

Self-Employed Obligors

For self-employed obligors, the amended law provides that, in the event of an involuntary reduction of income, any request for relief must include an analysis detailing "the economic and non-economic benefits the party receives from the business" and a comparison of such benefits to those existing at the time of the order upon which modification is sought.

Cohabitation

Essentially codifying existing case law, alimony may be suspended or terminated if the obligee spouse cohabits with another person. "Cohabit" is defined as involving a "mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household." A variety of factors are enunciated,

similar to those detailed in existing case law, including but not limited to, intertwined finances (i.e., joint bank accounts and other joint holdings); sharing or joint responsibility for living expenses; recognition of the relationship in the couple's social and family circle; and living together, the frequency of contact, the duration of the relationship and other indicia of a mutually supportive intimate personal relationship. There cannot be an absence of cohabitation "solely on the grounds that the couple does not live together on a full-time basis," which is a significant change as case law was previously inconsistent on this issue.

Conclusion

Many alimony critics say that the changes did not go far enough. On the other side, a proposed alternative bill was so cumbersome that it could have made things worse. Time will tell if this bill is really a watershed moment or "much ado about nothing." Either way, it is imperative that those who are divorcing and those already divorced consider and understand these changes to the alimony law.

For more information regarding the amendments or guidance on other family law issues, please contact Robert A. Epstein at 973.994.7526 or repstein@foxrothschild.com, Eric S. Solotoff at 973.994.7501 or esolotoff@foxrothschild.com or any member of the firm's Family Law Practice.



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