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Chair's Column

Pope Francis, Saudi Arabia and Adjusting Our Expectations

by Amanda S. Trigg

By the time you read this column, Pope Francis's "Amoris Laetitia," issued on April 6, will be old news. Called "On Love in the Family" in English, the statement called for the Roman Catholic Church to be more loving and accepting toward divorced Catholics, gays and lesbians (*i.e.*, those the Church categorizes as living in "irregular situations"). Catholics should be more easily able to obtain annulments, and then be able to take communion and to remarry, which they cannot otherwise do. This directive on how Catholics should live their lives grabbed the headlines as a groundbreaking statement that pleased and displeased liberals and conservatives alike. The ecclesiastical bases lie beyond my scope, but "Amoris Laetitia" nonetheless struck me as highly relevant on the issue, specifically because it got so much attention in the press. It hit hard because for those of us who discuss divorce daily it can be easy to forget that not everyone accepts the right to terminate a marriage.

I have known divorced families since my childhood, among neighbors and close family friends. It used to be a bit of a scandal, a bit of a shame, and even the kids bore the brunt of stigma. Now, aside from any statistics about the prevalence of divorce in the United States, it seems generally reasonable to state that our American, and more specifically our northeastern, current social climate accepts divorce as, well, acceptable. We too easily and erroneously accept our current standards as the norm, losing sight of the larger world picture until something else reminds us to look up and think again.

Such a moment again struck in May 2016, when in Saudi Arabia women finally received the legal right to sign and receive copies of their prenuptial contracts. Until then, only men in the Sunni Muslim kingdom had this right. Without that contract, women encounter diffi-

culty providing the validity of their marriage in court, and claiming inheritances upon their husbands' deaths. The contract also could contain various provisions about the conditions of the marriage, none of which a woman could confirm without having a copy of the document. Consider this in the cultural context in which women may not drive, wear immodest clothing or cosmetics or leave home without a male chaperone. To me, these circumstances appear oppressive, and as a result I immediately jump from reading about one change in women's legal rights to hoping that other standard behaviors of women and men might change too. That hope arises from my personal bias that everyone should be equal in the home, in the family and in the law.

Of course there are women, men and children among us who might not have the freedoms they desire, or the freedoms we could easily assume they should desire. I would not myself be able to adapt to a life without autonomy, as I personally define it, after being raised in the United States and having the parental support to become the first person in my family to graduate from college, regardless of my gender. Yet only one generation behind me my own mother grew up in a girls' boarding school in England under restrictions that are almost unimaginable to me, but which were, there and then, quite normal. Here and now, it would be narrow-minded to assume we are right and other societies are wrong in how they view, value and protect families.

There is a difference between being culturally sensitive and, unthinkably, accepting the systematic abuse of anyone, anywhere, whether in the name of religion, government or any other scheme. However, between the baseline of human rights, which I accept we have a moral and global responsibility to safeguard, and the legitimately different ways of life in other cultures and religions, there lies a grey zone of norms that may be different from ours but are not necessarily better or worse than ours. There, in the zone between cultural preferences and human rights, behaviors that are different are harder to assess without being predisposed by our own preferences. We tend to laud changes that bring any behaviors closer to our own, possibly because we take it for granted that such change reflects improvement. Similar is, after all, more familiar and, therefore, easier to approve, even at the risk of slowly erasing variety diversity that enriches society, and makes the world more interesting.

While the New Jersey State Bar Association advocates, as an organization, for the resurrection and passage of the Equal Rights Amendment in the United States, we must simultaneously guard against the detrimental homogenization of our society or any other. The NJSBA also values and seeks diversity, in its leaders and its policies. None of our actions or attitudes should be diluted to mere lip service to that important idea, including a blind adoption of favoring homogenization over open-mindedness and/or over acceptance of cultures that differ from our own.

It has been a true joy to serve as the chair of the Family Law Section for 2015-16. I thank you all for your confidence and your participation in the good work that we have done. With your help, we have successfully advocated for changes to the Court Rules concerning non-dissolution matters, collaborative cases and arbitration of family law matters. We enjoyed fresh air, networking and camaraderie at our young lawyers' bocce event and running the HoBOOken 5K to benefit a community shelter that feeds and houses those in need. We further helped those in need by raising $10,000 for Lawyers' Feeding New Jersey, thereby 'winning' the friendly competition to donate more than any other team participating in the NJSBA fundraiser.

We continue to have a significant voice toward protecting New Jersey families. The Council of Presiding Family Part Judges welcomed me to one of their monthly meetings and listened to our concerns about the practice of law in the family part. We continue our legislative advocacy on all family law issues, including domestic violence laws, custody and relocation issues, and economic support, with outstanding backing from the NJSBA. We work diligently to educate ourselves, most obviously at the annual Family Law Symposium, where we filled 976 seats and presented 10 hours of intense continuing legal education. We do this all for the mutually beneficial goal of being able to better serve our clients and improve the quality of our practice.

We work hard to develop relationships among ourselves, and with other professionals who support our practice. In addition to meeting at the symposium, we gathered at the Montclair Art Museum for our holiday party.

Every year, the Family Law Section gathers somewhere special for a few days of relaxation and collegiality.

This year, we travelled to Savannah, Georgia. I had a wonderful time sharing this historic city with all who were able to make the journey. Finally, of course, we meet every year at the NJSBA Annual Meeting, for more continuing legal education and camaraderie. At the conclusion of my year as chair, I hope to be passing new bylaws for the section to improve its operations in the future.

Tim McGoughran stands ready to lead us next. Join us in 2016-17 as we support the NJSBA in its efforts to promote women's rights and diversity, and to value both priorities as valid and consistent with the multi-faceted ways in which we can protect families and continue to do the core work of the Family Law Section. ■

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Executive Editor's Column:
Timing of Law Clauses—A Stitch in Time Saving Nine?

by Ronald G. Lieberman

Recently, this author was confronted with an issue while negotiating a marital settlement agreement that dealt with the timing of the law that would apply to provisions of the agreement. The urgency of this issue was clear because with the potential for new legislation, this author felt it imperative to reach a resolution with the adversary about whether the law in effect at the time an issue arose should apply or whether the law in effect at the time the agreement was signed should apply. This issue is one that this author does not see frequently when negotiating settlement agreements, even though as practitioners we know from changes to the palimony statute, the pre-nuptial statute, the alimony statute, and recent legislation addressing a termination of child support at age 19 in a presumptive fashion that the laws can change.[1]

Practitioners may be able to foresee changes in the law by following the developments in Trenton, but frequently there are changes in the law that cannot be anticipated. Often, change is inevitable. "Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society."[2]

New law might prevent the terms of an agreement from being followed, or may change what the parties thought the outcomes would be. Legal changes can hamper contracts and the follow-up arising out of them.

If there is a change in the law, parties have few retroactive remedies because retroactive relief under a new statute has been held to be unconstitutional in most cases.[3] Parties will likely not be able to stop the implementation of a new law on constitutional grounds under the contract clause.[4] So, the entry into a timing of law or freeze clause is apparent. Unanticipated changes in the law can render performance of an agreement impractical or impossible.

Practitioners need to be aware that the U.S. Supreme Court has interpreted the contract clause to mean it does not prohibit a state from enacting legislation with retroactive effects.[5] There are even instances when legislation expressly states that it will be retroactive, but if there is no legislative intent for retroactive relief the courts are generally inclined not to do so.[6]

There is a need for practitioners to think of ways to overcome unanticipated changes in the law. Even with existing laws there could be unforeseen problems in following through with contracts, but the parties should be able to choose the timing of the law that would apply to their agreements. Such clauses can include a provision that establishes that the laws of the state of New Jersey existing as of the entry of the agreement will apply, or a clause that limits the interpretation of the agreement to laws that are in effect at the time the issue arose. The purpose of a freeze clause is to allow the parties to understand which laws will apply, such as the laws in effect at the time the agreement was entered into, which are the laws their attorneys were familiar with, or future laws that may not have been anticipated or predicted.

This timing of the law clause is different than a choice in law clause because in a choice of law clause the parties are selecting which law would apply, but in a choice of timing clause the parties are discussing when to deal with the law that would apply to particular issues.

This author believes that parties should include a clause in their agreements to choose the timing of the applicable law to either limit the interpretation and execution of the agreement to the law existing as of the date of the execution of the agreement, or allow future law that is unknown and unpredictable to apply. If the parties cannot agree on a freeze clause, it is highly doubtful a judge would render what would be an advisory opinion and determine the choice of timing of the law to apply. So, choosing the timing of the application of laws is one of those rare instances when a judge could not intervene or render a decision to resolve a dispute.

The desire to select the timing of the law to apply to the agreement does not appear to be an issue that has resulted in any published decisions in the state. Given that parties and their attorneys are presumed to be aware of the existing statutes and intend to incorporate them, freezing the timing of the law would appear to be an

enforceable provision. It would also meet the parties' expectations of being able to predict the outcome of their agreement with accuracy by knowing the law that would apply at the time that there were any disputes regarding any provisions in the agreement.

As practitioners discuss the issue of timing of the law with their clients, there is one counterpoint that would potentially stand out among others as to why a freezing clause should not be agreed upon. Provisions that at one stage of a case may seem to be appropriate may, as public policy changes, conflict with the shifting public policy. All a practitioner needs to do is to look back at the *Dolce v. Dolce*[7] case to realize the potential pitfalls of freezing provisions in place that may actually conflict with how outcomes would otherwise be resolved under the law.

Practically speaking, a clause discussing the timing of law can be a useful tool to provide the parties with the ability to gain certainty and knowledge regarding how their agreements would be interpreted in the future by looking at the law in effect at the time of the agreement or the law in effect in the future. Parties should be able to enforce the timing of the law in their agreements because there would appear to be few reasons or obstacles not to do so. A skillful practitioner needs to give great thought to setting a freezing or timing of law clause, recognizing that future law may be more beneficial to a client than the current law. ■

Endnotes

1. P.L. 2015 (c) 223.
2. *Richardson v. Ramirez*, 418 U.S. 24, 82 (1974).
3. *Maeker v. Ross*, 219 N.J. 565, 581 (2014).
4. *Energy Reserves Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400, 416 (1983).
5. *United States Trust Company of New York v. New Jersey*, 431 U.S. 117 (1977).
6. *Spangenberg v. Kolawalski*, 442 N.J. Super. 529 (App. Div. 2015).
7. 383 N.J. Super. 11 (App. Div. 2006).

Mallamo v. Mallamo: Where Do We Stand 20 Years Later?

by Thomas P. Zampino and Robert A. Epstein

(Editor's Note: The following introduction was provided by the Honorable Thomas P. Zampino, J.S.C. (Ret.).)

In the late 1960s, there was a television show called "To Tell the Truth" with Garry Moore and Derwood Kirby. Panelists were asked to guess the occupation of one of the three contestants and choose which one of the three was telling the truth.

As a judge, one is tasked to engage in a game of "To Tell the Truth" when assessing the facts of a case and arguments made by the parties to reach a decision. A judge believes it is the right decision at the time. When additional facts become known, those facts may become the basis to alter a previous decision. Such was the case 20 years ago, when I was the trial judge in *Mallamo v. Mallamo,*[1] where I held a full trial, reduced—during the trial—the child support award previously made, and confirmed that reduction in my final decision. I determined that my initial choice was not the correct choice. In addition, that modification was made retroactive to the date of the initial child support award. An appeal ensued and the final judgment was affirmed in all respects. Justice (then Judge) Mary Catherine Cuff, who now sits on the Supreme Court of New Jersey, wrote the opinion for the court and was very kind in her references to the trial judge. This was not always the case when the appellate court reviewed my work below, so the 'mitzvah' from Justice Cuff was appreciated.

The purpose of this article is to explore the application of claims for retroactive modifications. First, the *Mallamo* decision centered around child support arrears, and the wife's attorney argued that my decision violated the statutory prohibition of retroactive modification of child support. The appellate court recognized the *pendente lite* orders are deemed to be temporary and are entered without testimony. The trial was not a modification proceeding, and changed circumstances were not required to be shown. The entry of the final order replaced the prior entry of the temporary order.

Today, however, many attorneys are making a *Mallamo* claim in various fact settings. The first setting involves the *pendente lite* consent order, which usually acknowledges that a *status quo* will be maintained. Then, at the time of trial or at an arbitration, attorneys will seek to retroactively apply any difference from the agreed upon terms from a final decision entered.

The next setting centers around an entry of an initial *pendente lite* order. At the time parties enter into a settlement agreement, one party seeks credits pursuant to a *Mallamo* claim.

Both of these examples are outside of the *Mallamo* facts where a final judgment ordered by the court modifies a *pendente lite* order. We should also recognize the general rule is that provisions of a *pendente lite* order do not survive the entry of the judgment of divorce unless expressly preserved therein.

In order to expand *Mallamo* to allow an attorney to make a claim for past credits when one of the orders is entered into through consent or settlement, certain other requirements need to be met. If retroactivity is sought, then drafting language at the time of the initial order becomes extremely important.

This is where I hand off to my writing partner, Robert Epstein, to outline for the reader what attorneys should consider in those settings.

Since the Appellate Division's decision more than 20 years ago in *Mallamo v. Mallamo*[2] transformed *pendente lite* divorce litigation, few decisions have raised more questions. This article will analyze the *Mallamo* decision, the circumstances under which a *Mallamo* claim arises, and how family judges and practitioners are tasked with handling such a claim. Special attention will be paid to the mandates of the amended alimony law and how support payments made during the *pendente lite* period are considered in the alimony calculus.

General Legal Principles

The starting point for the potential need for *pendente lite* support during a litigation is N.J.S.A. 2A:34-23, which provides:

> Pending any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere...the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just....[3]

The Appellate Division in *Mallamo* restated the overarching legal concept that *pendente lite* support is designed to preserve the marital "*status quo*," maintaining the parties (to the extent possible) in the positions they were in prior to the litigation.[4] As succinctly stated in *Rose v. Csapo*: "Maintenance of the *status quo* involves payment of the marital bills and expenses necessary to maintain the dependent spouse at the standard of living enjoyed during the course of the marriage."[5]

To that end, the Supreme Court of New Jersey, in *Crews v. Crews,* provided, "Courts have the equitable power to establish alimony and support orders in connection with a pending matrimonial action, or after a judgment of divorce or maintenance, and to revise such orders as circumstances may require."[6] After the *Crews* decision, however, the marital lifestyle was—perhaps unintentionally—elevated above the other alimony factors and further led to the misconception that only the supported spouse in divorce was entitled to maintain the marital standard of living.

As is now known from the express language of the amended alimony law, neither party has a greater entitlement to the standard of living (or a reasonably comparable standard of living) established during the marriage.[7] Often, the facts and circumstances during a divorce proceeding dictate an alteration of the marital *status quo* that may no longer be sustainable, such as when the parties reside in two separate households and the collective income becomes insufficient to cover all expenses as it once did. Alternatively, courts are often presented, *pendente lite*, with diametrically opposed portraits of the existing financial picture and whether maintenance of the *status quo* can continue. While a trial judge is compelled to make preliminary decisions largely based on the parties' certified 'he said, she said' assertions, it is at the end of a matter when the truth can finally, hopefully, be found.[8]

The Trial Court Decision

The primary issue on appeal in *Mallamo* was whether an oral modification of the subject child support award made after the second day of trial, subsequently confirmed by Judge Thomas Zampino in his final decision, constituted a retroactive modification of child support contrary to N.J.S.A. 2A:17-56.23a.[9] The subject statute provides:

> Any payment or installment of an order for child support, or those portions of an order which are allocated for child support, whether ordered in this State or in another state, shall be fully enforceable and entitled to full faith and credit and shall be a judgment by operation of law on and after the date it is due. No payment or installment of an order for child support, or those portions of an order which are allocated for child support established prior to or subsequent to the effective date of P.L. 1993, c. 45 (C. 2A:17-56.23a), shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed either directly or through the appropriate agent. The written notice will state that a change of circumstances has occurred and a motion for modification of the order will be filed within 45 days. In the event a motion is not filed within the 45 day period, modification shall be permitted only from the date the motion is filed with the court.[10]

The *pendente lite* orders at issue required the husband to pay $175 in weekly child support and $50 in weekly alimony during the litigation. The first such order—entered almost two years prior to the final judgment—provided, "Either party may seek reconsideration of the $225 per week but the motion seeking reconsideration must be filed within 30 days of July 3, 1991."[11]

The husband's support arrears accrued, but Judge Zampino denied the husband's motion to decrease his *pendente lite* support obligation and set a date certain for an arrears payment. Subsequent orders also denied the

husband's requests to reduce support and fixed arrears, but allowed him to pay a reduced amount per week to preclude further enforcement proceedings. After the second day of trial, Judge Zampino orally instructed the husband to pay $100 in weekly child support.[12]

In his Feb. 5, 1993, letter opinion, Judge Zampino made findings regarding the husband's income dating back to 1990. Based upon the findings, Judge Zampino concluded: 1) there would be no alimony obligation; and 2) child support would continue at $100 per week until July 1, 1993, at which time it would increase to $175.[13]

In reducing the outstanding arrears, Judge Zampino held that N.J.S.A. 2A:17-56.23a does not prohibit the modification of arrears under a *pendente lite* order because, at the time of final judgment, a court can enter orders retroactive to the date upon which interim relief was granted based on proofs presented at trial. Specifically, the judge held, "Only at the end of the trial can the court verify the incomes alleged, at the time the temporary order was entered. This reduction is based upon the period of employment and reduced earnings of the husband." [14] The wife's appeal followed.

The Appeal

On appeal, the wife argued that Judge Zampino's oral modification of child support at trial—without a pending motion for modification—violated the prohibition on retroactive child support modifications provided in N.J.S.A. 2A:17-56.23a.

The Appellate Division reaffirmed that awards of temporary financial support pending resolution of a matter are expressly permitted by N.J.S.A. 2A:34-23, and almost always determined without the benefit of a plenary hearing. Such initial determinations are based on affidavits or certifications, case information statements, and, typically, oral argument in support of the submissions. Notably, the court held that *pendente lite* support awards do not survive a final judgment of divorce unless "expressly preserved in it or reduced to judgment prior to entry of final judgment."[15]

As family lawyers well know, interim support orders can be modified at any time prior to and at the time of final judgment. Retroactive modification, however, was another issue entirely. The Appellate Division noted that the case presented an issue of first impression in New Jersey (and addressed in only six other states at the time, none of which were deemed particularly helpful by the Appellate Division in reaching its decision); namely, whether a *pendente lite* award of child support could be retroactively modified after a full trial.

In affirming the entirety of Judge Zampino's trial court decision, Judge Mary Catherine Cuff, cogently analyzed and thoughtfully commented on the nature of *pendente lite* family law practice:

> The interpretation and application of N.J.S.A. 2A:17-56.23a must account for the vagaries of *pendente lite* matrimonial practice. In many instances the motion judge is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants. The orders are entered largely based upon a review of the submitted papers supplemented by oral argument. Absent agreement between the parties, however, a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted. Only then can the judge evaluate the evidence, oral and documentary, and weigh the credibility of the parties. Only then can the judge determine whether the supporting spouse has the economic means represented by the other spouse or in the case of declining income has suffered legitimate economic reversal or has been afflicted with a temporary case of diminished resources occasioned by a divorce.[16]

In so holding, the Appellate Division provided trial judges with the ability to right a wrong—namely, an inequitable interim support arrangement—by crediting the wronged party as deemed appropriate based on evidence and testimony presented at trial.[17]

Mallamo's Progeny

Since it was decided more than two decades ago, *Mallamo* claims (regarding both spousal and child support) have become a common part of family law practice, likely in a manner not originally envisioned. Interestingly, there are not many decisions (published or unpublished) that analyze *Mallamo*'s holding with any real depth. Consequently, practitioners have attempted to expand *Mallamo*'s meaning, perhaps beyond the scope of its original intended scope. As a result, several questions have arisen through subsequent jurisprudence.

Is a Prior Order for Interim Support a Prerequisite to Seeking a *Mallamo* Credit?

The case law says no. In *Bright v. Bright*,[18] the trial court granted an alimony award retroactive to the date of the complaint for divorce despite the payee wife failing to request *pendente lite* support prior to trial. In holding there was no authority to limit a trial court's discretion to grant such relief, the court noted that the wife, who was mentally disabled, was unable to meet her monthly expenses without resorting to her share of equitable distribution proceeds.[19] The Appellate Division noted the trial court's finding that the wife's "failure to move for *pendente lite* spousal support [was due] to her depression and bipolar disorder, a condition that did not allow her to make appropriate decisions," and that, "even if not legally incompetent, a litigant's psychiatric history may present circumstances that call upon the chancery court's 'historic flexibility...to devise practical means of rendering justice in the face of problems created by a litigant intentionally or unintentionally.'"[20]

The question then begs whether a litigant's failure to file for *pendente lite* support must be due to certain exceptional circumstances, such as a disability, for the court to flex its equitable muscles. New Jersey case law dictates that the answer depends on the given set of facts and circumstances at issue. Last year, in the decision of *Kakstys v. Stevens*,[21] the Honorable Lawrence Jones, J.S.C., held where a complaint for divorce is filed and the party seeks an ultimate resolution of support, the court may, either on a motion or at the time of the judgment of divorce, enter a support award retroactive to the complaint filing date. The court noted, "[N]ew Jersey law makes clear that when parties divorce, certain financial issues, such as eligibility of assets and debts for equitable distribution, are determined by the filing date of the complaint, not by the filing date of any subsequent interim application."[22]

Judge Jones further reasoned, "[s]ince other financial claims are determined and adjudicated retroactive to the filing date of the complaint, logic and reason support the concept that a child support claim, initially set forth in a divorce complaint, may be equitably preserved for trial as well. This point is material given the paramount importance of child support, which is a right of a minor child that generally cannot be waived."[23] While the analysis may differ somewhat in a matter involving spousal support, the holding in *Kakstys* should similarly apply.

Does a *Pendente Lite* Support Agreement/ Consent Order Bar a Subsequent *Mallamo* Credit?

The answer is: not necessarily. A trial judge will most likely, and appropriately, provide great weight to what the interim agreement provides.[24] For instance, if a *pendente lite* consent order generally acknowledges that the status *quo* will or will not be maintained with the agreed upon financial arrangement, then an argument exists that neither party should be able to raise a *Mallamo* claim. Such language in an interim support agreement is unusual, especially because the issue is typically addressed at or near a matter's commencement, before case information statements are filed and financial discovery is exchanged.

By contrast, a valid argument exists that each party preserves the claim if the interim agreement provides that the parties do not agree on the marital lifestyle, or whether the interim support agreement maintains the *status quo*. As with an adjudicated *pendente lite* order, the trial judge may ultimately be called upon to make a final lifestyle determination and decide whether the subject financial circumstances enable maintenance of the *status quo* on a retroactive and prospective basis.[25] Similarly, the parties may agree on the lifestyle, but may have different positions on the subject financial circumstances. Perhaps the payor spouse argues that he or she cannot afford to maintain the lifestyle because of a change in circumstances, while the payee spouse argues that the alleged change is really no change at all. Only a trier of fact can determine the truth and, in such posture, implement an appropriate retroactive credit.

For better or for worse, many interim agreements are silent regarding the *status quo* and the ability to make a future *Mallamo* claim. Such ambiguity lends credence to either party's ability to argue in favor for or against the court's consideration of a retroactive credit.

Calculating the *Mallamo* Credit

Since the decision whether to award a *Mallamo* credit, and in what amount, rests in the trial court's discretion based on the particular facts and circumstances at issue, the ultimate credit calculation will differ in each case.[26] For example, a credit may be calculated based simply on the difference between an interim support award and a final support award, while in another case it may be calculated retroactively to a determined point in time. In other cases an even broader and more equitable approach may be appropriate.

The latter analysis occurred in *Means v. Snipes*,[27] (notably, Judge Zampino was also the trial court judge presiding over the matter) where the Appellate Division noted that downward modification of a fee award to be paid by the husband on his request for reconsideration could result in it revisiting its prior decision to leave untouched a modest *pendente lite* award because it would then have to create "[r]etroactively the funds that should have been available to [the] wife, under [*Mallamo*] to pay these fees."[28]

What impact, if any, does a settlement on final support have on a *Mallamo* analysis? If the parties agree to an alimony and/or child support award different from that which a court would award at trial, whether in amount or structure (perhaps, for instance, the parties agree to use a percentage of income formula rather than a flat payment due to the payor's fluctuating income), but leave for trial a disputed *Mallamo* claim, an argument exists that the trial judge should still, regardless of the agreed upon award, make a lifestyle finding and determine whether a credit should issue. On the other hand, an agreement on support arguably brings finality to all support issues and, as a result, the resolved amount should serve as the benchmark by which a *Mallamo* claim will be measured.

Ultimately, each case will stand on its own facts. It is incumbent upon the trial judge to engage in a full and complete analysis, and to create a detailed record with requisite factual findings in concluding, to what extent, the 'genie' can be put back in the bottle.[29]

Consideration of *Pendente Lite* Payments in a Final Alimony Award

With the enactment of New Jersey's amended alimony law on Sept. 10, 2014, consideration of interim support payments made during the proceeding became a statutorily required consideration in rendering an alimony award.[30] What impact, if any, should this new statutory factor have on a trial court's determination of a *Mallamo* claim? As of the date of this article, no case law exists interpreting this factor to ascertain whether or how it may be applied to the overall alimony analysis (including, but not limited to, application in a *Mallamo* analysis).

Should a final alimony award be reduced to account for the precise amount of time a payor spouse has been making *pendente lite* payments, or should the consideration take a broader and more equitable approach? Regardless of the specific facts and circumstances at issue, the answer will likely be the latter, involving the complete pre-judgment and post-judgment financial picture. The impact of the alimony law amendment upon the state's *Mallamo* jurisprudence remains unknown. The issues, however, are largely intertwined, and should be considered together when rendering both a *Mallamo* determination and a final support award.

Conclusion

After more than two decades since *Mallamo* was decided, in some ways the surface has yet to be scratched regarding its meaning and application. As Judge Zampino expressed in his accompanying message, *Mallamo*'s impact and reach has been far greater than Judge Cuff ever anticipated. With each case resting on its own facts and circumstances, few cases analyzing *Mallamo* in depth, and the amended statute's required consideration of *pendente lite* support payments, however, it seems that its reach will only continue to develop and expand. ■

The Honorable Thomas P. Zampino, J.S.C. (ret.) is of counsel at Snyder & Sarno, LLC after having served as a judge in the New Jersey Superior Court, family part, for over two decades. Robert A. Epstein is a partner with Fox Rothschild LLP.

Endnotes

1. *Mallamo v. Mallamo,* 280 N.J. Super. 8, 11-13 (App. Div. 1995).
2. 280 N.J. Super. 8, 11-13 (App. Div. 1995).
3. N.J.S.A. 2A:34-23 (2016).
4. 280 N.J. Super. at 11-13.
5. 359 N.J. Super. 53, 60-61 (Ch. Div. 2002).
6. 164 N.J. 11 (2001).
7. N.J.S.A. 2A:34-23 (2016).

8. 280 N.J. Super. at 11-13.
9. *See id.*
10 N.J.S.A. 2A:17-56.23a.
11. 280 N.J. Super. at 11-13.
12. *See id.*
13. *See id.*
14. *See id.* at 11.
15. *See id.*
16. *See id.*
17. *See id.*
18. *Bright v. Bright*, Docket No. A-5714-07T3 (App. Div. July 9, 2009).
19. *See id.*
20. *Id.*
21. *Kakstys v. Stevens*, 442 N.J. Super. 501 (Ch. Div. 2015).
22. *Id.* at 512.
23. *Id.* at 507-08 (*citing, Martinetti v. Hickman*, 261 N.J. Super. 508, 512 (App. Div. 1993).
24. *Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App. Div. 1995); *Petersen v. Petersen*, 85 N.J. 638, 642 (1981).
25. *Mallamo, supra*, 280 N.J. Super. at 11-13.
26. *See id.*
27. 2012 WL 5356716 (App. Div. Dec. 13, 2011).
28. *Id.*
29. *Mallamo*, *supra*, 280 N.J. Super. at 11-13.
30. N.J.S.A. 2A:34-23 (2016).

Cohabitation and the Amended Alimony Statute: Has the Economic Needs Standard Been Replaced?

by Cassie Murphy

On Sept. 10, 2014, New Jersey Governor Chris Christie signed into law P.L.2014, c.42, which modified New Jersey's alimony statute. These changes to the alimony statute included a codification of a new legal standard for cohabitation—a standard that had previously been defined and shaped by case law only. The text of the amended alimony statute as it pertains to cohabitation reads as follows:

> Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves 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.
>
> When assessing whether cohabitation is occurring, the court shall consider the following:
>
> 1. Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
> 2. Sharing or joint responsibility for living expenses;
> 3. Recognition of the relationship in the couple's social and family circle;
> 4. Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
> 5. Sharing household chores;
> 6. Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and
> 7. All other relevant evidence.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.[1]

How does the standard set forth in this amended alimony statute differ from the standard established in the cohabitation case law preceding the amendment? Although the factors identified in the statute may seem familiar to many practitioners, a closer look at the underlying case law makes clear that the amendment represents a paradigm shift in the policy behind cohabitation claims.

New Jersey's cohabitation case law developed over a period in excess of 40 years prior to the alimony statute's amendment. A series of cases in the 1970s quickly established the underlying principle behind a claim of cohabitation: A payor is entitled to terminate or modify his or her alimony obligation to the payee in the event cohabitation impacts the payee's need for alimony.[2] These cases consistently recognized that, although a former spouse's cohabitation may constitute "unchastity,"[3] or may be "unvirtuous" and "immoral,"[4] the conduct alone, without a corresponding financial impact, was insufficient to entitle a payor spouse to relief.

For example, in the 1973 Chancery Division case of *Edelman v. Edelman*, a former husband sought to modify his alimony obligation to his former wife due to her cohabitation with another man, based upon the premise that enforcement of his obligation would otherwise be "unconscionable."[5] The court reduced the former husband's alimony obligation, but also specifically noted in its decision the facts that the former husband's income had decreased, while the former wife's income had increased, post-divorce.[6] In so holding, the court implicitly recognized that cohabitation, in and of itself, did not constitute a basis for relief.

Shortly thereafter, in 1974, another Chancery Division case began to define the factors applicable to a cohabitation claim.[7] In *Grossman v. Grossman*, the former husband's "sole

ground for relief" in seeking to modify his alimony obligation was his former wife's relationship with a different man.[8] In advancing this claim, the former husband argued that the court must consider the "interests of the State" in morality when presented with a cohabitation claim.[9] The court rejected such a premise, stating that a former wife's "unchastity" is "at most a factor" to be considered in the case, as a "wife is not responsible to her former husband for her conduct."[10] Accordingly, the husband's request that the court essentially punish the former wife for her new relationship was "not well based."[11]

The court articulated the standard it found to be applicable instead: "if [the former wife] is receiving financial assistance from another man with whom she has commenced living since the alimony award was made, this may well constitute a change of circumstances calling for a modification of the alimony award," although no precise formula could be articulated.[12] The court held that a former husband is entitled to a rebuttable presumption that "a new adult member of his former wife's household is contributing to the expenses of that household, thus reducing her needs."[13] Thus, the *Grossman* court focused on the financial impact to the former wife's needs by virtue of her cohabitation—the beginnings of the 'economic need' or 'economic benefit' standard.

The first New Jersey Appellate Division case to address the issue of cohabitation expressly rejected the premise that cohabitation, standing alone, was a sufficient basis to terminate or modify alimony.[14] In *Garlinger v. Garlinger*, the trial court had suspended a former husband's alimony obligation to his former wife due to cohabitation, stating that it was "unconscionable to compel a husband by his daily labor to support the divorced wife in idleness and immorality."[15]

The Appellate Division disagreed, and held:

> If it is shown that the wife is being supported in whole or in part by the paramour, the former husband may come into court for a determination of whether the alimony should be terminated or reduced. Similarly, if the paramour resides in the wife's home without contributing anything toward the purchase of food or the payment of normal household bills, then there may be a reasonable inference that the wife's alimony is being used, at least in part, for the benefit of the paramour, in which case it could be argued with force that the amount thereof should be modified accordingly. In short, the inquiry is whether the former wife's illicit relationship with another man, apart from misconduct Per se, has produced a change of circumstances sufficient to entitle the former husband to relief.[16]

The Appellate Division further opined that a contrary view, which would require a wife to live a "chaste" life after divorce, would be "distinct[ly] punitive," and reflected a "double standard of morality."[17]

Following the *Garlinger* decision, similar results were reached in *Wertlake v. Wertlake* and *Eames v. Eames*, advancing the economic need standard.[18] In the former case, the Appellate Division remanded to the trial court the issue of the impact of a former wife's cohabitation on her former husband's alimony obligation, as the trial court had improperly modified the alimony based solely on the existence of the former wife's new relationship, without any determination of what effect that relationship actually had on the former wife's need for alimony.[19] And again, in *Eames*, the Chancery Division reiterated that "the determinative issue is whether the alleged cohabitation of [the supported spouse] has affected her need for the support money, either because of receiving support from her paramour or the probability of her utilizing the amount sought, or a portion thereof, to support a paramour."[20]

Thereafter, in 1983, the New Jersey Supreme Court decided the seminal case of *Gayet v. Gayet*—the first time the Supreme Court considered and determined the legal standard applicable in cohabitation cases.[21] In that case, the former husband moved to terminate alimony, alleging that the former wife was cohabiting with another man "as husband and wife."[22] After a plenary hearing, the trial court retroactively reduced the former wife's alimony, and terminated it prospectively.[23] The Supreme Court noted the two competing policy considerations at issue: first, the concept that alimony is no longer justified "when the supported spouse forms a new bond that eliminates the prior dependency;" and second, the concept of the right to privacy, autonomy, and the freedom to develop personal relationships without government interference.[24]

In rejecting the viewpoint of a minority of jurisdictions that post-divorce cohabitation was a *per se* basis to terminate alimony, the Supreme Court held that "[t]he

extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount."[25] Thus, the New Jersey Supreme Court adopted the economic need test set forth in *Garlinger v. Garlinger*, whereby a court must examine whether one cohabitant financially supports the other, such that the relationship has reduced the financial needs of the payee.[26]

In *dicta*, the Supreme Court stated that the test to be employed was not dissimilar to an examination of whether "a group bears the generic character of a family unit as a relatively permanent household."[27] In so stating, the Supreme Court for the first time attempted to define the characteristics of a relationship that would qualify as cohabitation.

Two important decisions following *Gayet* clarified the burden of proof applicable in cohabitation cases, while simultaneously reaffirming the economic need test established in cohabitation precedent. In the 1992 Chancery Division decision of *Frantz v. Frantz*, the court suggested that the burden of proof to address the economic effect of cohabitation must fall upon the supported spouse after the supporting spouse has made a *prima facie* showing of changed circumstances, as the supported spouse is the party with access to the evidence necessary to support the burden of proof.[28] This holding, as well as the 1974 Chancery Division holding in *Grossman, supra*, was ultimately adopted by the Appellate Division in the 1998 case of *Ozolins v. Ozolins*, which found that a showing of cohabitation "creates a rebuttable presumption of changed circumstances shifting the burden to the dependent spouse to show that there is no actual economic benefit to the spouse or the cohabitant."[29]

Again in *Boardman v. Boardman*, the Appellate Division reiterated the economic need test, thus rejecting a provision in a divorce judgment entered by a trial judge whereby alimony would automatically terminate upon the supporting spouse's cohabitation.[30]

A similar analysis was undertaken in *Conlon v. Conlon*.[31] In that case, the supporting spouse alleged that the holdings of two recent cohabitation decisions rendered unnecessary any examination of the economic impact of the relationship on the payee spouse in a cohabitation claim.[32] The trial court rejected this argument, emphasizing that "[t]he infusion of the economic qualification into the calculus of this determination distinguishes the inquiry from an impermissible attempt to control the private conduct of an individual in violation of a frequently stated public policy."[33]

Thus, the case law was unequivocal that the relationship between a supported spouse and a third party, in and of itself, did not qualify as changed circumstances—but what exactly is cohabitation?

In 1999, the New Jersey Supreme Court decided the case of *Konzelman v. Konzelman*, which addressed the enforceability of a clause in a property settlement agreement that authorized the automatic termination of alimony upon cohabitation, "without regard to the economic consequences of the relationship."[34] The Supreme Court reaffirmed that, absent such a provision in a property settlement agreement, the economic need test mandates a reduction in alimony "in proportion to the contribution of the cohabitor to the dependent spouse's needs."[35]

Relevant to the subject matter of this article, however, was the Supreme Court's discussion of what conduct constitutes cohabitation. The Supreme Court stated that cohabitation is not "[a] mere romantic, casual or social relationship;" it must have the "stability, permanency and mutual interdependence" whereby an unmarried couple essentially lives as husband and wife.[36] In *dicta*, the Supreme Court opined that the "duties and privileges" undertaken by unmarried couples living in a relationship akin to marriage include: living together; intertwining finances; sharing living expenses; sharing household chores; and recognizing the relationship in social and family circles.[37] Many of these factors now appear in the modified alimony statute.

Finally, in 2013, the case of *Reese v. Weis* refined the definition of economic benefit to the supported spouse.[38] The Appellate Division held that the trial court must not only consider "direct economic benefits" to the supported spouse resulting from the cohabitation, such as direct payments by the cohabitant toward the supported spouse's shelter, transportation, food, and clothing; the trial court must also consider "indirect economic benefits" to the supported spouse resulting from the cohabitation, such as the cohabitant continuing to pay his or her own shelter expenses after the supporting spouse has moved into his or her home, and provisions of emoluments or "lifestyle enhancements" by the cohabitant to the supported spouse, including vacations and other gifts.[39] The Appellate Division also found that a simple calculation of the money paid to the supported spouse by the cohabitant does not end the inquiry.[40] Instead, the trial court must also consider the characteristics of the new relationship, to determine if it exhibits those traits commonly associated with marriage.[41]

Now enter the 2014 amendments to the alimony statute. Although at first blush the statute appears to codify those factors relative to a cohabitation analysis previously suggested by the *Konzelman* court, a closer examination of the statute indicates otherwise. Over 40 years of cohabitation case law have affirmed, again and again, that the inquiry in a cohabitation case must first and foremost be on the economic impact of the relationship on the supported spouse. If, and only if, the relationship impacts the supported spouse's financial need, can there be a finding of changed circumstances that could justify a review of alimony. Again and again, the concept of the existence of a new relationship, in and of itself, being a sufficient basis to terminate or modify alimony has been rejected.

And yet, the statute places the three economic factors attendant to a cohabitation analysis *on equal footing* to the three non-economic factors (excluding the seventh catch-all provision). Moreover, the statute states that a court shall "consider" each of the factors. *There is no requirement that the economic factors be established before a court could terminate alimony.*

Pursuant to *Konzelman* and *Reese, supra*, the non-economic factors were previously relevant to inform the inquiry of whether the relationship provided an economic benefit to the supported spouse. This standard makes perfect sense, as cohabitation, at its core, is simply a changed circumstances argument—and changed circumstances always focuses on the impact the change has had on the finances of one or both of the spouses.

However, under the new statute, would the existence of these non-economic factors alone be a sufficient basis to terminate alimony, even if it was conceded there was no economic benefit to the supported spouse as a result of the new relationship? If so, does that not codify the terms of the type of agreement addressed in *Konzelman, supra*? How many factors must be met before a court has a sufficient basis to terminate alimony, and which are the most important to establish? Also unknown is whether the statute modifies the burden of proof standard established in *Ozolins, supra*. Finally, the statute appears to identify only two consequences to cohabitation—termination or suspension of alimony—instead of the fact-sensitive analysis set forth in the prior case law, in which alimony may be modified or terminated depending upon the degree of the economic support provided by or to the cohabitant.

The language of the statute appears to place on its head the careful development of case law over the years, emphasizing the preeminent importance of the financial import of the new relationship over conduct. To date, no decision, reported or unreported, has analyzed the statute.

A case pending in the Morris County Superior Court, *Kloehn v. Kloehn*, has engendered interest, as it may be the first cohabitation case to be decided under the statute. In that case, the husband payor has argued that he is entitled to terminate alimony to his ex-wife because she has a boyfriend, harkening back to the arguments made 40 years ago, in the very first cohabitation cases.[42]

Even more recent was the Supreme Court decision of *Quinn v. Quinn*, which held that a trial court may not fashion its own remedy of suspension of alimony upon a finding of cohabitation, when a settlement agreement provided that alimony shall terminate upon cohabitation—even if the cohabitation relationship subsequently ended.[43] However, this case did not involve an application or interpretation of the revised alimony statute. How the terms of this statute will be applied, and the impact it will have on legal practice, remains to be seen. ■

Cassie Murphy is an attorney at the Law Offices of Paone, Zaleski, Brown & Murray, with offices in Red Bank and Woodbridge.

Endnotes

1. N.J.S.A. 2A:34-23(n).
2. *See, e.g. Edelman v. Edelman*, 124 N.J. Super. 198 (Ch. Div. 1973); *Grossman v. Grossman*, 128 N.J. Super. 193 (Ch. Div. 1974); *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975); *Wertlake v. Wert*lake, 137 N.J. Super. 476 (App. Div. 1975); *Eames v. Eames*, 153 N.J. Super. 99 (Ch. Div. 1976).
3. *See, e.g. Grossman, supra* note 2, at 195 (*citing Suozzo v. Suozzo*, 16 N.J. Misc. 475 (Ch. Div. 1938)).
4. *Garlinger, supra* note 2, at 62 (*citing Suozzo, supra* note 3, at 478).
5. *Edelman*, *supra* note 2, at 200.
6. *Id.*

7. *Grossman v. Grossman*, 128 N.J. Super. 193 (Ch. Div. 1974).
8. *Id.* at 195.
9. *Id.* at 194.
10. *Id.* at 195-96 (*citing Suozzo v. Suozzo*, 16 N.J. Misc. 475 (Ch. Div. 1938)).
11. *Id.* at 196.
12. *Id.* at 196-97.
13. *Id.* at 197.
14. *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975).
15. *Garlinger v. Garlinger*, 129 N.J. Super. 37, 40 (Ch. Div. 1974).
16. *Garlinger, supra* note 14, at 64.
17. *Id.* at 61-62.
18. *Wertlake v. Wertlake*, 137 N.J. Super. 476 (App. Div. 1975); *Eames v. Eames*, 153 N.J. Super. 99 (Ch. Div. 1976).
19. *Wertlake, supra* note 18, at 486-87.
20. *Eames, supra* note 18, at 107.
21. 92 N.J. 149 (1983).
22. *Id.* at 150.
23. *Id.*
24. *Id.* at 151.
25. *Id.* at 154.
26. *Id.* at 150, 153-54.
27. *Id.* at 155 (*citing State v. Baker*, 81 N.J. 99, 108 (1979)).
28. *Frantz v. Frantz*, 256 N.J. Super. 90, 92-93 (Ch. Div. 1992).
29. *Ozolins v. Ozolins*, 308 N.J. Super. 243, 245 (App. Div. 1998).
30. *Boardman v. Boardman*, 314 N.J. Super. 340, 347 (App. Div. 1998).
31. 335 N.J. Super. 638 (Ch. Div. 2000).
32. *Id.* at 641-42.
33. *Id.* at 646.
34. *Konzelman v. Konzelman*, 158 N.J. 185, 191, 196 (1999). More specifically, the Supreme Court held:

> Where the court considers a motion for reduction of alimony based on a change of circumstances, the dependent spouse's finances and economic resources are ordinarily the court's only consideration. Nevertheless, a specific consensual agreement between the parties to terminate or reduce alimony based on a predetermined change of circumstances does not require an inquiry into the financial circumstances or economic status of the dependent spouse so long as the provision itself is fair. Thus, where the parties have agreed that cohabitation will constitute a material changed circumstance, and that agreement has been judged fair and equitable, the court should defer to the arrangements undertaken by the parties. In that situation where the dependent spouse has entered into a new marriage-like relationship, the court need not delve into the economic needs of the dependent former spouse.

Id. at 197 (internal citations omitted).

35. *Id.* at 196.
36. *Id.* at 202.
37. *Id.*
38. 430 N.J. Super. 552 (App. Div. 2013).
39. *Id.* at 576-77.
40. *Id.* at 581.
41. *Id.* at 582.

42. Ben Horowitz, "*When can ex-husband cut off alimony to former wife who has boyfriend?*", nj.com, Jan. 27, 2016, http://www.nj.com/morris/index.ssf/2016/01/ex-husband_seeks_to_terminate_alimony_to_ex-wife_w.html.
43. *Quinn v. Quinn*, ___ N.J. ___ (2016). Notable is Justice Albin's dissent, which states,

> An ex-husband should not be empowered through a property settlement agreement to threaten his ex-wife with the termination of her alimony if she cohabits with another person, when the living arrangement does not change her financial circumstances. Anti-cohabitation clauses unrelated to the economic standing of an ex-spouse should be contrary to public policy because they serve no purpose other than as instruments of oppression.
>
> *Id.* at 30 (Albin, J., dissenting).

The Unauthorized, Unofficial Legislative History of New Jersey Alimony Reform 2014

by Brian Schwartz

On Sept. 10, 2014, Governor Chris Christie signed into law Assembly bills 845, 971 and 1649, bringing 'alimony reform' to New Jersey, a process which began in 2011. The long and winding road to a substantive revision of New Jersey's alimony laws, which began as a proposal for the creation of a commission, hit many potholes along the way, and required overwhelming efforts on the part of many to arrive at revisions that were fair and equitable to both payor and payee. This article will seek to provide some background into how the new law came to be; it will also provide the author's view of the 'legislative history' of the new law—that is, an attempt to decipher the intention of the new provisions of and the changes to alimony law.

Caveat: *Although the author actively participated in both the drafting and negotiation of the bill that became the new law, the views cited in this article regarding the 'intent' and 'legislative history' are purely his own, based upon the author's participation. These views are intended to provide insight into the process and guidance into intended application. However, they cannot be, and are certainly not, a substitute for a true legislative history (which, unfortunately, does not exist).*

How the Bill Came to be

The discussion concerning alimony reform must begin in Massachusetts. In or about Oct. 2009, the chairs of the Joint Committee on the Judiciary in Massachusetts created an Alimony Reform Task Force.[1] The task force was created because, at that time, the alimony statute in Massachusetts had not been reviewed or revised for many years. The prior statute did not provide a terminal date, other than remarriage or death. Unlike New Jersey, the statute did not provide for rehabilitative alimony or limited duration alimony. There was no provision for modification or termination due to retirement or cohabitation. Consequently, what began as a grassroots movement—Massachussetts alimony reform—became a statewide campaign to overhaul alimony in Massachusetts.

By Dec. 2010, the task force had prepared its report for a comprehensive overhaul of the alimony law in the state, and on Sept. 26, 2011, the new law (the Massachusetts Alimony Reform Act) was approved, effective March 1, 2012.[2] The first major change was the incorporation of alimony guidelines. More specifically, Section 49(b) of the Massachusetts Alimony Reform Act provided a formula for determining the maximum length of the term of alimony[3] (emphasis added):

> Marriage of *five years or less*, term of alimony *not greater than 50%* of months of marriage
>
> *5-10 years*, alimony *not greater than 60%* of months of marriage
>
> *10-15 years*, alimony *not greater than 70%* of months of marriage
>
> *15-20 years*, alimony *not greater than 80%* of months of marriage
>
> *20+ years, discretion* to award for *indefinite period*

Moreover, although Section 53(a) provides a list of factors a court must consider in determining the amount and duration of alimony, Section 53(b) of the Massachusetts Alimony Reform Act provides a formula for determining the maximum amount of alimony: "the amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued."[4]

The Massachusetts Alimony Reform Act also set forth the factors for deviation and modification. To wit, Section 53(e) states:

> (e) In setting an initial alimony order, or in modifying an existing order, the court may deviate from duration and amount limits for general term alimony and rehabilitative alimony

upon written findings that deviation is necessary. Grounds for deviation may include:

- advanced age; chronic illness or unusual health circumstances of either party
- tax considerations applicable to the parties
- whether the payor spouse is providing health insurance and the cost of health insurance for the recipient spouse
- whether the payor spouse has been ordered to secure life insurance for the benefit of the recipient spouse and the cost of such insurance
- sources and amounts of unearned income, including capital gains, interest and dividends, annuity and investment income from the assets that were not allocated in the parties' divorce
- significant premarital cohabitation that included economic partnership or marital separation of significant duration, each of which the court may consider in determining the length of marriage
- a party's inability to provide for that party's own support by reason of physical or mental abuse by the payer
- a party's inability to provide for that party's own support by reason of that party's deficiency of property, maintenance or employment opportunity
- upon written findings, any other factor that the court deems relevant and material

The new act also added provisions concerning modification based upon retirement or cohabitation. With regard to retirement, Section 49(f) states that "general term alimony orders shall terminate upon the payor attaining the full retirement age." In Section 48, "full retirement age" is defined as "the payor's normal retirement age to be eligible to receive full retirement benefits under the United States Old Age, Survivors, and Disability Insurance Program; but shall not mean 'early retirement age' as defined under 42 U.S.C. 416, if early retirement is available to the payor or maximum benefit age if additional benefits are available as a result of delayed retirement."

Regarding cohabitation, Section 49(d) states, "General term alimony shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household, as defined in this subsection, with another person for a continuous period of at least 3 months." This section provides a detailed definition for a common household. This section also provides that alimony that has been suspended, reduced or terminated due to cohabitation can be reinstated upon termination of the cohabitation; however, if reinstated, alimony shall not extend beyond the termination date in the original order.

Importantly, the Massachusetts Alimony Reform Act provides, "existing alimony judgments that exceed the durational limits under Section 49 of said chapter 208 shall be deemed a material change of circumstances that warrant modification." It further states, "Existing alimony awards which exceed the durational limits established in said section 49 of said chapter 208 shall be modified upon a complaint for modification without additional material change of circumstances, unless the court finds that deviation from the durational limits is warranted."[5] Section 5 of the Massachusetts Alimony Reform Act then provided a schedule for the filing of such modification applications. In other words, the passage of the new alimony law was, in and of itself, a change in circumstances warranting review and modification.

On the heels of its success in Massachusetts, the grassroots movement took its show on the road. The group provided the framework and rhetoric for other states to follow—and follow some states did. Suddenly, alimony reform groups were forming in Colorado, Oregon, Florida, and, in the summer of 2011, New Jersey.

The first legislative action came on Jan. 10, 2012, with the introduction of a proposed Assembly resolution—AJR 32.[6] The resolution called for the creation of a study commission on alimony. The nine members of the commission would include: the attorney general, or his designee; one member of the Senate appointed by the Senate president; one member of the Senate appointed by the Senate minority leader; one member of the General Assembly appointed by the speaker of the General Assembly; one member of the General Assembly appointed by the Assembly minority leader; and four public members to be appointed by the governor. The public members appointed by the governor shall include at least two people licensed to practice law in the state with a specialization in marital law and at least one retired judge with experience in the Superior Court, Chancery Division, Family Part.[7]

Section 4 of AJR 32 stated:

a. The commission shall study all aspects of

alimony law in the State, including but not limited to:

1. studying any Statewide trends in court-ordered alimony awards over time, including determining what percentage of court-ordered alimony awards consist of permanent alimony and how often State courts grant a request for modification of an alimony award;
2. studying whether contemporary financial circumstances have affected any Statewide trends in court-ordered alimony awards and, if so, how the Statewide trends have been affected;
3. comparing State alimony law with alimony laws in other states, including whether any other state has a requirement that the amount of alimony should be proportional to the duration of the marriage or civil union;
4. comparing State data and trends pertaining to alimony law with data from other states; and
5. considering any other such issues as the commission may identify as necessary to understanding and improving State alimony law.

b. The commission shall propose new legislation, if it deems appropriate.

The commission would then report its finding to the governor within 12 months.[8]

On Jan. 30, 2012, a similar resolution was introduced in the Assembly—AJR 36.[9] This called for the creation of a Blue Ribbon Commission to Study Alimony Reform.[10] There were a few differences in the resolution:

AJR 36 provided for 11 members—adding the chief justice of the Supreme Court (or his designee) and a fifth public member appointed by the governor—but the omission of a retired family part judge as one of the five appointees[11]

Section 4 of AJR 36 provided:

The commission shall study all aspects of State alimony law and avenues of potential reform, including but not limited to:

1. the scope of State alimony laws as compared with those in other states;
2. Statewide trends in alimony awards, including an analysis of how those trends compare with alimony award trends in other states;
3. whether current economic conditions have affected trends in State alimony awards; and
4. any other such issues as the commission may identify as necessary to understanding and reforming State alimony law.

Last, the Blue Ribbon Commission would report its findings within nine months.[12] There were other bills introduced as well, seeking to reform other provisions within the alimony laws of New Jersey.

At its Feb. 13, 2012, meeting, the Family Law Section Executive Committee discussed AJR 32, seeking input on whether to support the formation of a commission. The matter was greatly debated, with strong opinions on whether to support the creation of a commission, to support the creation of a commission with amendments to the resolution (for example, to provide for experienced matrimonial attorneys to be placed on the commission) or to oppose the creation of the commission entirely. Ultimately, by a very narrow vote, the Family Law Section Executive Committee voted to support AJR 32 with high priority, but with a request that more matrimonial attorneys be appointed to the commission. Thus began the state bar association's foray into the alimony reform fray.

The following month, at its quarterly meeting, the Matrimonial Lawyers Alliance (MLA) also discussed AJR 32, and the larger issue of alimony reform. At its March 2012 meeting, a subcommittee was created to determine the position (if any) the MLA should take regarding the various bills pending in the New Jersey Legislature, including AJR 32. After several meetings of that committee, in a May 3, 2012, memorandum, the subcommittee recommended supporting the creation of a commission, as the alimony laws, including *pendente lite* awards, should be reviewed and modified as appropriate. Similar to the NJSBA, the subcommittee also recommended that the commission "include a significant number of matrimonial attorneys and retired judges (and, perhaps, even active judges). Further, the matrimonial bar should be given an opportunity to have input into the final report."

The first significant bump in the road occurred late Friday, June 15, 2012. At that time, a revised version of AJR 32 and 36 (now combined) was posted. This revised version reconstituted the commission of 11 members,

such that, "The public members appointed by the Governor would include at least two persons licensed to practice law in the State with a specialization in matrimonial law, two persons who advocate for reform of the alimony laws, one national expert on matrimonial law from outside New Jersey, and at least one retired judge with experience in the Superior Court, Chancery Division, Family Part."[13] On June 18, 2012, the revised commission bill was voted favorably out of committee.

On June 21, 2012, officers of the Family Law Section descended upon Trenton during the party caucuses. While there, the officers lobbied vociferously with the resolution's sponsors, seeking to amend the revised commission bill in order to remove the inclusion of two persons who advocate for reform and one national expert. These efforts were successful. As a result, on June 21, 2012, AJR 32 and 36 was amended on the floor as follows:

> 5. eliminate the requirement that the public members include two persons who advocate for reform of the alimony laws and one national expert on matrimonial law; and
> 6. provide that three of the public members would be men and three would be women.
>
> As amended, the joint resolution provides that the six public members would include at least two persons licensed to practice law in the State with a specialization in matrimonial law and at least one retired judge with experience in the Superior Court, Chancery Division, Family Part.[14]

Although this resolution passed the full Assembly 79-0 on June 25, 2012, the Senate would never address the issue of a resolution.

For the next several months, the lobbying efforts of the New Jersey State Bar Association and other groups continued, advocating for passage of the commission and otherwise explaining those areas of the alimony statute that could benefit from review and reform. The lobbying came in the form of face-to-face meetings, op-eds, meetings with members of the press and editorial boards, and anyone else of influence who would listen. Concurrently, the reform groups were likewise lobbying the Legislature, and their efforts were increasing. Yet, the commission resolution was not moving and the reform movement seemed to have stalled.

Then, on March 7, 2013, the movement was reignited when Assembly Bill 3909 was introduced. No longer satisfied with the creation of a commission, the reform groups lobbied for changing the law without a commission. The synopsis to the bill said it all, "Revises alimony laws, including eliminating permanent alimony and establishing guidelines for amount and duration of alimony awards."[15] This bill was nearly identical to the Massachusetts law, including guidelines for the amount and term of alimony, providing for retroactive application of these guidelines to existing alimony obligations, eliminating permanent alimony, and establishing a terminal date for alimony upon the payor reaching full retirement age (defined as "the date when the payor is eligible for the old-age retirement benefit under the federal Social Security Act").[16]

With the introduction of this bill came a new and revitalized wave of lobbying and press for the passage of the new bill.[17] The reform group publicized its position through the newspaper, the Internet (including a website and Facebook pages) and television. In addition, New Jersey Alimony Reform and New Jersey Women for Alimony Reform commissioned a poll through Rutgers Eagleton Center for Public Interest Polling, which was issued on Oct. 8, 2013. Suddenly, the wave for reform seemed to be increasing in intensity. The pressure for action in Trenton on A-3909 was likewise increasing in intensity.

In response to A-3909, the MLA and NJSBA shifted their focus, especially as it became clearer that the creation of a commission would not occur. The result was the creation of a proposed bill that addressed areas of the alimony law that, in their view, required review, revision and clarification. Those substantive areas of the law included changes in circumstances, retirement and cohabitation. Also importantly, any changes to the law would not alter the terms of existing agreements between parties. Once the proposed bill received the support of the NJSBA, MLA and New Jersey Association for Justice (NJAJ), as well as the other members of an ever-expanding coalition, it was necessary to find sponsors for this new proposed legislation.

In the interim, the pressure from the reform groups, and the sponsors of A-3909, resulted in A-3909 being posted on the agenda for the Assembly Judiciary Committee on Nov. 25, 2013. Through lobbying efforts, the bill was posted for discussion only; that is, there would not be a vote in the committee on that day. Also, just before the committee hearing, two sponsors were

found for the bill drafted and supported by the various family bar groups. On Nov. 25, 2013, Assembly Bill 4525 was formally introduced and assigned to the Assembly Judiciary Committee.

On Nov. 25, 2013, leaders from the state bar, from the MLA, from NJAJ, from local bar associations, and from individuals representing themselves or various groups that opposed A-3909 (as just one example, NJNOW), all appeared to speak against passage of A-3909, and again encourage either the creation of the commission or, in the alternative, to support A-4525. But they were far outnumbered by well over 200 people in support of A-3909; for hours, these supporters told 'horror story' after 'horror story.' In fact, these stories were compiled in a large binder for each member of the committee. The hearing lasted hours, influencing many of the members of the committee to demand action on the issue of alimony reform. Notwithstanding this hearing, A-3909 was not posted for a vote.

But the pressure did not subside; rather, it increased. After all, the legislative session ended in early Jan. 2014, and the strong desire of the legislators to resolve alimony reform before the end of the session only increased the pressure on all sides. There were numerous articles, op-eds and television stories about the 'competing' bills for alimony reform. Legislators within the Assembly on both sides of the issue were calling upon the leaders of the bar and the reformers to reach consensus.

Then, suddenly, the Senate decided to take action. Upset that the bill was not moving in the Assembly, and frustrated by the lack of compromise, with very little notice, the Senate Judiciary Committee posted S-2750 (the Senate companion to A-3909) for a hearing and vote on the afternoon of Dec. 16, 2013. A frenzy of lobbying on both sides of the issue ensued, right through the Dec. 16 hearing date. Ultimately, with both sides fully represented by their leaders and constituents in Trenton, minutes before the hearing, S-2750 was pulled from the Senate Judiciary Committee agenda and, once again, no action was taken.

In fact, the legislative session ended in Jan. 2014, and no action was taken on any of the alimony bills/resolutions. But with the new session, all of the bills/resolutions were reintroduced:

- A-3909 was reintroduced as A-845
- S-2750 was reintroduced as S-488
- A-4525 was reintroduced as A-1649

The lobbying continued on both sides for the next several months. However, with no real movement toward resolution occurring, the legislative leadership made it clear that the issue of alimony reform needed to be resolved. If the interested parties were not going to reach resolution, the legislators would force a resolution.

The first true breakthrough occurred in early April 2014, when the author met with Assemblyman John McKeon, the chair of the Assembly Judiciary Committee (the committee in which any bill concerning reform would be introduced). Assemblyman McKeon spent significant time discussing alimony reform, the implications of the competing bills, and the political climate regarding the issue. Based on this interaction, he took an active role on this issue. He contacted the representatives from the reform group and listened to their points of view as well.

But, most importantly, in mid-May 2014, he scheduled a meeting between two officers from the Family Law Section and a group from New Jersey Alimony Reform. On May 9, 2014, after several hours of negotiations between the groups, with Assemblyman McKeon and members of the legislative staff moving back and forth between the two camps, it appeared there was an agreement. A draft of the proposed compromise bill was given to each of the groups in order to obtain support from their respective memberships at large, with the intention that the compromise bill would be posted for a vote the following week. The ultimate goal was to have a new alimony bill in place before the Legislature retired for the summer.

The Family Law Section, by email distribution and vote, agreed to support introduction and passage of the compromise bill, with only a couple of minor, non-substantive changes requested. The reform group was unable to garner the same support. By the following week, New Jersey Alimony Reform had submitted numerous substantive changes and, essentially, backed out of the tentative agreement. It appeared the proposed compromise bill was not garnering political support either.

A few weeks later, though, there was a second breakthrough. The legislators who had been actively involved in the sponsorship of the competing alimony reform bills organized another meeting of the differing groups and their lobbyists. This meeting came to fruition through the efforts of the Family Law Section officers and their continued communications with the various interested legislators. Once again, the hope was to reach resolution on a compromise bill before the end of June 2014, before the Legislature acted on its own.

On June 25, 2014, legislators, legislative staff, lawyers, lobbyists and members of the opposing sides met to resurrect the prior negotiations. After several hours of intense negotiation, another compromise bill was drafted. Unlike the compromise bill from May 2014, this new package of bills—A-845, A-971 and A-1649—received the immediate support of all sides. The following day, June 26, 2014, with the officers of the Family Law Section and the state bar, as well as the president of NJAJ, all present, the bill was voted out of committee and, via an emergency resolution, was introduced into the full Assembly. The vote to support the bill was nearly unanimous. The bill was then sent to the Senate Judiciary Committee.

The momentum for passage would come to a startling and surprising halt. The Senate was seeking a material change to the Assembly version, and without the change the Senate Judiciary Committee would not vote on the Assembly bill. Notwithstanding continued negotiations, the Senate refused to advance the bill on that date.

Over the next 72 hours, there was continued lobbying. Legislators, lobbyists, and members of the various groups sought assistance in moving the Assembly bill through the Senate. Those efforts were ultimately successful, and on June 30, 2014, the last day of the legislative session before the summer recess, the compromise bill was voted out of the Senate Judiciary Committee and, via an emergency resolution, was introduced into the full Senate. The bill passed the Senate on June 30, 2014. It was then sent to the governor.

Once again, the bill stalled, as the governor was not required to take action on it until the Legislature reconvened. During the summer, the state bar and NJAJ continued lobbying efforts with the governor's staff. At the same time, a fringe group from the reform movement commenced a campaign demanding the governor *not* sign the proposed legislation. This opposition, and the governor's inaction, caused tense moments. But on Sept. 10, 2014, Governor Christie signed the compromise alimony reform bill into law.

The New Alimony Law

Caveat: *For those who missed the caveat above, although the author actively participated in both the drafting and negotiation of the bill that became the new law, the views cited in this article regarding the 'intent' and 'legislative history' are purely his own, based upon the author's participation. These views are intended to provide insight into the process and guidance into intended application; however, they cannot be, and are certainly not, a substitute for a true legislative history (which, unfortunately, does not exist).*

The first change to N.J.S.A. 2A:34-23b is found in the first sentence—"permanent" alimony has been deleted. It is replaced with "open durational" alimony. From the start, the alimony reform movement's stated goal was to eliminate permanent alimony. In fact, nearly all of the rhetoric regarding alimony reform throughout the country has at its focus the end of permanent, or lifetime, alimony. The first step, in their eyes, was to remove the word from the bill entirely. Yet, as will be explained below, notwithstanding significant resistance, the concept of alimony without a terminal date would survive.

In an attempt to ameliorate the concerns of the reformers, in the initial drafts of the bill permanent alimony was replaced with "alimony of indefinite term," which the author believes, quite frankly, was always a more precise phrase to describe the permanent alimony that existed in New Jersey. The intent was that, in appropriate circumstances, alimony could be ordered for an undefined term; the termination of alimony would thereafter be based upon changed circumstances in the future.

However, the term "alimony of indefinite term" was unacceptable to the legislators or the reformers, as, in their view, this was not any different than permanent alimony. Consequently, dozens of words and phrases were bandied about, trying to find the word or phrase that did not imply permanency but at the same time did not foreclose alimony for an indefinite term. The focus kept returning to a qualifier with the word "duration" in order to describe the 'new' concept for alimony. Ultimately, the newly created term "open durational" alimony was selected. What does it mean? In the author's view, open durational alimony is the same as alimony for an indefinite term, but without the clarity alimony for an indefinite term would have provided.

The next important change is found in factor 4 of N.J.S.A. 2A:34-23b. One perception that all sides of the argument sought to alter was the belief that only the supported spouse was entitled to enjoy a "reasonably comparable standard of living" after the marriage is dissolved. The origin of this perception is found in *Crews v. Crews*.[18] Although a case concerning modification of alimony, the Supreme Court stated the following:

> It is clear from *Lepis* and its progeny that motion courts have found that the marital standard of living is an essential component in the changed-circumstances analysis when reviewing an application for modification of alimony. *Id.*, at 152-53; *see also Innes v. Innes,* 117 *N.J.* 496, 504 (1990) (suggesting that when motion court reviews alimony award, reference to a number of factors assists in determination of whether former marital standard of living is being maintained); *Carter v. Carter,* 318 *N.J.Super.* 34, 43 (App.Div.1999) (finding that motion court is at disadvantage when reviewing modification motion because trial court failed to "relate [the supporting spouse's] rehabilitative alimony obligation to the standard of living of the parties or, more particularly, [the dependent spouse's] standard of living during the marriage"); *Guglielmo v. Guglielmo,* 253 *N.J.Super.* 531, 542-44 (App. Div.1992) (finding that supporting spouse has not fulfilled his continuing obligation to support dependent spouse at former standard of living).[19]

This view would be reinforced—and even strengthened—a few years later, with *Weishaus v. Weishaus*.[20] In *Weishaus*, the Supreme Court announced:

> In *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980), we established the principle, reaffirmed in *Crews*, *supra* that the "goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."[21]

A review of these two opinions leads the reader to two conclusions: 1) somehow, factor four seems to have been given greater weight than the other alimony factors; and 2) only the supported spouse's standard of living was relevant, not the standard of living of the supporting spouse.

In creating the new alimony bill, there was a specific intention to emphasize that, in establishing an appropriate alimony award, the ability of *both* parties to enjoy a reasonably comparable standard of living must be considered. This is clear not only from the specific change to factor 4—in which the clause, "with neither party having a greater entitlement to that standard of living than the other" was added—but also with the addition of the following three provisions to the statute:

> "In each case where the court is asked to make an award of alimony, the court shall consider and assess evidence with respect to all relevant statutory factors. *If the court determines that certain factors are more or less relevant than others, the court shall make specific writing findings of fact and conclusions of law on the reasons why the court reached that conclusion. No factor shall be elevated in importance over any other factor unless the court finds otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard.*"[22] (emphasis added)
>
> "In any case in which there is a request for an award of alimony, the court shall consider and make specific findings on the evidence about *all of the statutory factors set forth in subsection b. of this section.*"[23] (emphasis added)
>
> "…In addition to those factors, the court *shall also consider 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 or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto.*[24] (emphasis added)

Another important change to the factors was the addition of a new factor 13. There had never been a clear determination of whether the length of time a supporting spouse paid support *pendente lite* should or should not be considered in making a final alimony award. In some counties, where a matter could be pending for years, the term of *pendente lite* support could be lengthy. Consequently, a new factor was added, specifically stating that a court should consider the "nature, amount, and length of *pendente lite* support paid, if any;" when establishing the appropriate length of alimony.

Section c of N.J.S.A. 2A:34-23 has a number of momentous changes to the statute.

At the outset, the prior statute had provided, in essence, a presumption in favor of permanent alimony. More specifically, the prior statute had provided that

a court must first find that permanent alimony was not warranted before it could determine whether the other forms of alimony were appropriate. In the new statute, in addition to the removal of the term "permanent" from the statute, the presumption was likewise removed. This is one of many changes to the statute that suggests an intentional move away from alimony of indefinite duration, and a move toward having a demarcated end to alimony.

Further evidence of this is found in the second paragraph of section c. The first sentence of that paragraph states, "For any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union." As noted earlier, the goal of the reform movement was to establish firm guidelines for determining the length of alimony, similar to those established in the Massachusetts alimony law referenced above. These firm guidelines were met with staunch opposition. Quite frankly, this conflict between certainty/consistency in alimony awards and judicial discretion was the heart of the divergence between the parties and the most difficult issue to navigate in the negotiations.

During negotiations, the reformers' refrain was 'how can the term of alimony exceed the length of the marriage.' The response was that, at times, the facts and circumstances of a particular case may dictate such a result and, therefore, the discretion of a court cannot be restricted. As the negotiations continued, it became clear that the so-called 'mid-length' marriages were the greatest concern. Just as the presumption for permanent alimony was eliminated, the reformers sought to strictly limit the ability of, for example, a 12-year marriage from resulting in an indefinite term of alimony.

It became clear that an appropriate compromise would have to take both sides of the argument into consideration—a specific limitation on the length of alimony, but a set of factors for a court to consider, in certain circumstances, a deviation from that limitation.

Initially, there was a great deal of discussion concerning the appropriate limitation. There was discussion about marriages of 10 years, then 15 years. Ultimately, the new bill would provide that marriages and civil unions less than 20 years in duration would be subject to the potential limitation on alimony—alimony not to exceed the length of the marriage or civil unions except in exceptional circumstances; for marriages and civil unions of 20 years or more, open durational alimony is appropriate.

A note is necessary here. For many years, there had allegedly been an unwritten 'rule of thumb' concerning the relationship between the length of the marriage and the length of alimony. Although the author has never subscribed to such a rule of thumb (and, in fact, any formulaic calculation has been specifically rejected by the courts[25]), the new statute has not created a new rule of thumb. That is, the second paragraph of section c has not and never was intended to create any mathematical or formulaic calculation correlating the term of the marriage to the term of alimony. In all cases, the statutory factors are to be applied. Rather, the courts are merely cautioned that, when applying those factors, barring exceptional circumstances as defined within the statute, the term of alimony should not exceed the length of the marriage.

Regarding the exceptional circumstances, there are seven distinct factors, as well as an eighth 'catch-all,' for a court to consider. While these factors are self-explanatory, the focus of the exceptions is clearly on the *economic impact* of the marriage, and decisions made during the marriage, upon the parties. Did one spouse forego career opportunities for the sake of the marriage? Did decisions made during the marriage, for example the decision to bear children and a further decision for one of the parties to adjust his or her career to be the primary caretaker for the children, have a financial impact on a party? It is apparent, then, specifically from factors two, four and six, that the intention was that if one of the parties has been economically disadvantaged by the marriage, it may be appropriate to deviate from the term limitation within this section.

To this point, the discussion has detailed changes to the then-existing statute. However, the new statute has been expanded to address three areas of the law that had previously not been a part of the statute—modification based upon changes in circumstances due to 1) retirement, 2) change in financial circumstances and 3) cohabitation.

Section j. of the new statute addresses retirement. Previously, issues concerning modification based upon retirement were based upon decades-old case law. Once again, on this issue both sides of the table sought modification to the current law concerning retirement. However, the reform groups were seeking an absolute termination age for alimony, whether or not the supporting spouse was actually retired, which would not allow for any discretion based upon circumstances.

To understand the new provisions, some history is necessary. Prior to the new statute, the standard to obtain modification based upon retirement was difficult, and,

frankly, placed the potential retiree in a challenging position. If the supporting spouse was not already retired, the application was deemed premature; if the supporting spouse retired first, and then brought the application, there was a risk the modification would be denied, leaving the supporting spouse without employment and with a continuing support obligation.

Moreover, the standards for obtaining modification or termination based upon retirement were weighted in favor of the supported spouse, so much so that the idea of negotiating a fair terminal date for alimony came with a price. Recall that then-Judge Virginia Long made the following pronouncement when discussing an application for modification of alimony based upon voluntary, early retirement:

> It goes without saying that issue of possible voluntary early retirement and the like should be resolved in the first instance at the time of the divorce in a negotiated agreement. No thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject his or her client to lengthy future proceedings such as we have here.[26]

Yet, the standard for modification annunciated by Judge Long in that same case made it nearly impossible for "thoughtful matrimonial lawyers" to resolve this issue without the supporting spouse 'buying out' the back-end of an alimony term:

> We have also concluded that, in the final analysis, even in a case in which the retiring spouse has been shown to have acted in good faith and has advanced entirely rational reasons for his or her actions, the trial judge will be required to decide one pivotal issue: whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse. Only if that answer is affirmative, should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing support obligation.…
>
> Where the interests are in equipoise, the payor spouse's application will fail because he or she is unable to show that the advantage substantially outweighs the disadvantage to the payee.…Where the sole problem is timing, the trial judge may condition approval on a preparatory hiatus during which the movant may retire or not as he or she chooses but during which the financial obligations will continue.[27]

In concluding, Judge Long famously stated:

> This ruling should not be viewed as a limitation on freedom of choice or freedom of action. By it, the payor spouse whose good faith early retirement or other life style change would not deleteriously affect the former spouse is free to follow his or her star. Where a significant disadvantage to the payee spouse is foreseen, the payor spouse is still not precluded from such a change. Any party is free to retire, take a vow of poverty, write poetry or hawk roses in an airport, if he or she sees fit. The only limitation is discontinuance of the financial aid the former spouse requires. The reason for this is that the duty of self-fulfillment must give way to the pre-existing duty which runs between spouses who have been in a marriage which has failed.[28]

On the issue of 'voluntary' retirement, another court made the following observation:

> Absent some tragedy or combination of unfortunate circumstances, retirement from further employment in the workforce is always voluntary and foreseeable because, at some point, every worker will eventually retire. Moreover, taken to its logical extreme, [a bar against modification if the retirement is voluntary] would force an obligor to work until physically incapable of doing so merely to avoid the allegation that he or she was "voluntarily" avoiding spousal obligations.[29]

Similarly, there are a number of careers where the 'normal retirement age' was always irrelevant. Police officers, firefighters, teachers, Wall Streeters, construction workers, none of these fields anticipate or expect to continue working until they reach full age for Social Security.

In response to these and other concerns,[30] the statute was amended to include provisions redefining the law of retirement. One of the primary aims of the new law was

to allow for 'thoughtful matrimonial attorneys' to begin discussing a retirement date at the time of the agreement, rather than 'abiding the event.' This is clear from the opening sentence in section j. and all the provisions that follow.

Initially, the new statute provides that alimony "may be modified or terminated upon *the prospective or actual retirement* of the obligor."[31] (emphasis added) The intent in adding the word "prospective" to the statute is to address the conundrum that existed for the supporting spouse; that is, the supporting spouse could file an application *in anticipation of* retirement without having to actually retire prior to filing that application. For that person who has not retired but intends to, the last paragraph of sections j.(1) and j.(2) notes, "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 practice, this means that the teacher who anticipates retiring at the end of a school year can file the application and, if granted, a court can enter an order that, for example, upon the payor's retirement from teaching, alimony will be modified/terminated. To be clear, it was *not* intended for applications that state, for example, that the payor seeks to retire in 10 years and therefore is seeking an order permitting same. Rather, the intent is for retirement that is imminent, and the payor is seeking court sanction for same in advance of same.

There are really three separate retirement provisions for three separate circumstances. Section j.(1) is for judgments or agreements that arose *after* Sept. 10, 2014. Section j.(2) addresses what the court had previously referred to as 'early retirement,' that is, retirement before age 65. Section j.(3) is for judgments or agreements which arose *before* Sept. 10, 2014.[32]

With regard to sections j.(1) and j.(3), prior to the new statute a good faith retirement age was 65.[33] However, the pronouncement regarding that age resulted from case law that was more than two decades old. Additionally, achieving that age did not result in a termination of alimony; rather, it merely allowed for a review of alimony based upon the parties' then existing circumstances (and, again, only if the payor actually had retired).

Section j.(1) now provides that "there shall be a rebuttable presumption that alimony shall *terminate* upon the obligor spouse or partner attaining full retirement age…." (emphasis added) While there is still a requirement that the payor retire upon achieving full retirement age, and while a court can, in its discretion select a different termination date, and while there are a number of factors a court can consider to overcome the rebuttable presumption, this is a significant change from the prior law. The clear intent is that payors have the right to retire and be relieved of their obligations upon doing so.

As for the factors to overcome the presumption, or for the court setting a different termination date, the focus is primarily upon longer term marriages. This is clear from some of the factors—the ages of the parties at the time of the application (factor a), the degree and duration of economic dependence (factor c), the duration and amount of alimony already paid (factor e), and the ability of the supported spouse to have saved adequately for retirement (factor j). For example, in the case of a 30-year marriage with a payor who is 63, without the ability to rebut the presumption (or, in the alternative, to request that the court apply a different terminal date), the payor would potentially be relieved of the alimony obligation in four years. If, in fact, the presumption is overcome, then the court, in determining whether to modify or terminate alimony, would utilize the alimony factors in section b.[34]

Although there are dozens of other examples to overcome the presumption, it cannot be ignored that the overall intent of j.(1) was to allow for retirement, and termination of an alimony obligation, upon reaching full retirement age.[35]

With regard to N.J.S.A. 2A:34-23j(2), this section addresses the standard for obtaining modification or termination of alimony *prior to* an obligor achieving full retirement age—or what has commonly been referred to as 'early retirement.' As noted above, the preceding standard for doing so was, "whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse,"[36] a nearly impossible standard to meet. This section of the new law gives payors a realistic opportunity to retire prior to achieving full retirement age. Unlike the prior law, the focus is on both the payor's and the payee's circumstances at the time.

Upon the filing of an application, there are eight factors for the court to consider. For the payor, the factors focus on the motivation of the payor (good faith and reasonableness), the realities of certain careers and employers, and the reasonable expectations of the parties during the marriage.[37] As for the reasonable expectations during the marriage, there are a number of considerations. For example, teachers know the '25/55 rule' (that is, when a person has been teaching for 25 years, and

reaches age 55, that person is entitled to full pension benefits). Consequently, when a supported spouse seeks alimony from a teacher, it cannot be ignored that there was very likely no intention that the payor would work beyond achieving age 55. Similarly, when a payee is seeking alimony from a heavy construction worker, or a Wall Street analyst, or a police officer, there was never an expectation during the marriage that the payor would work at that position until reaching the full retirement age. In these cases, it would be prudent for the attorneys to address these 'economic realities' within an agreement, and hopefully agree upon a reasonable retirement age.

For the payee, consideration is given for the level of financial independence and the financial impact of the retirement upon the obligee. However, it is clear it is expected that: 1) the payee will recognize that a retirement will occur; and 2) the payee will make financial adjustments to properly prepare for that day. Moreover, if the payor is 'cutting back' or otherwise continuing to be employed in some capacity, alimony may continue at a reduced amount.

One last important provision in section j.(2): With the filing of the application, *both* the moving party and the responding party must file prior and updated case information statements or other relevant financial documents. Previously, when such an application for modification was being filed, only after the moving party had met the burden of proof did the responding party have to disclose financial information and documentation.

Last, N.J.S.A. 2A:34-23j(3) provides some level of relief to those payors who have judgments or agreements predating the new alimony statute. In essence, j.(3) confirms that achieving full retirement age is deemed a good faith retirement age; in other words, reaching full retirement age (and actually retiring) equates to meeting the first prong of *Lepis v. Lepis*.[38] As such, upon reaching the appropriate age, and with the filing of an application by the payor, both parties must file current and prior case information statements or other relevant financial documents. Based upon the submissions, the court shall apply the factors set forth in section j.(3) in order to determine whether alimony should be modified or terminated.[39]

The next area of alimony law that was addressed by the new statute was changes in the financial circumstances of the parties warranting review and, perhaps, modification, commonly referred to as a *Lepis*[40] application. On this topic, there were a number of concerns:

The law has never really provided any guidance for 'how long' a payor had to be unemployed, or showed a downturn in income, before an application could be filed with the court. Cases such as *Larbig*[41] and *Donnelly*[42] are often cited when rejecting an application as being filed 'too soon'; but there is no case that states when it is not 'too soon.'

The law has lumped together self-employed payors and those who are employees of others when reviewing applications for modification. There is clearly a difference between a self-employed person, who can exert a level of control over income/classification of income, and an employee, who is subject to the whim of an employer. Several legislators recited stories of constituents who had lost jobs due to circumstances beyond their control—the closing of the Ford plant in Middlesex County, for example.

There was an impression that payors were 'regularly' denied financial relief, and 'frequently' being sent to jail for failing to pay alimony, notwithstanding an alleged inability to pay. There were several 'horror stories' in television news stories and in the written press, re-counting the tales of woe of various payors paying alimony to a perpetrator of domestic violence; orders for alimony that allegedly exceeded the payors' income; orders for alimony to payees who earned more than the payors; failure to provide relief to disabled payors (including veterans) and so on. Many of these payors also testified before the Legislature and met with individual legislators, leaving a lasting impression. While the 'backstories' of some of these alleged horror stories would later reveal legitimate explanations for the failure to provide relief or for the incarceration, these stories had a tremendous impact on the legislators.

Another momentous event leading to the need for change was the economic crisis that began in 2008. A number of industries—and as a consequence, careers—were adversely affected by this historical downturn in the economy. Levels of unemployment likewise reached extraordinary lows. Suddenly, more and more payors needed relief from their obligations, and there was just as suddenly a desire to assist in granting their relief.

Consequently, sections k., l. and m. were created to address the various issues concerning financial changes in circumstances.

First, N.J.S.A. 2A:34-23k. addresses those who do not work for themselves—that is, employees of others. In determining whether such a payor is entitled to

relief, there is a list of factors for a court to consider. The considerations include the reason for loss of employment or reduction in income; documented efforts of the payor to obtain replacement income, either in the designated field or another occupation; income and other financial circumstances of the payee; any changes to either/both parties' financial circumstances since the entry of the order from which relief is sought.

Additionally, the court can consider whether a temporary remedy should be considered. In this regard, N.J.S.A.2A:34-23m directs that:

> When assessing a temporary remedy, the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties.

Section k. also provides the answer to the question, 'When can the payor file?' "No application shall be filed until a party has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days." Additionally, section k. gives the court discretion to "make any relief granted retroactive to the date of the loss of employment or reduction in income."

The clear intention of the revisions in sections k. and m. was to provide the court with the tools to craft a remedy that acknowledges the hardship a loss of employment and/or reduction in income has on *both* parties, where the prior law generally focused on the supported spouse. Put another way, the new sections suggest that both parties must make financial adjustments and sacrifices, not just the payor. Moreover, based upon the new statute's apparent goal, the hope is that parties will be more inclined to work together in crafting voluntary resolutions by and between themselves—without court involvement—when a payor has had an involuntary or unanticipated change in financial circumstances.

With regard to section l., although the factors considered are the same, it is apparent that the standard for relief is intentionally higher for a self-employed person. Presumably, a self-employed person has a greater ability to control and define 'income.' Quite often, a tax return does not tell the whole story of the cash flow available to a business owner. As a result, section l. provides that when a self-employed payor seeks relief, the application "must include an analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of entry of the order."[43]

Further, although not specifically stated, it is also likely that a business owner will have to demonstrate a prolonged term of reduced income. It cannot be ignored that the 90-day term is in section k., but not in section l. This is likely in recognition of the fact that the income of many businesses fluctuates each year and, often, the income utilized to establish support is based upon an average income over a period of years.

The final substantive change within the new statute concerns cohabitation. Again, in order to understand the context for the new provisions, some historic perspective is appropriate. In 1983, in *Gayet v. Gayet,*[44] the Supreme Court was asked to address the effect cohabitation would have upon an alimony obligation. Justice Daniel O'Hern, who delivered the opinion, noted the following:

> Two policies of the law intersect in the resolution of this issue. First, the Legislature has directed that alimony shall terminate upon remarriage. N.J.S.A. 2A:34-25; see *Sharpe v. Sharpe*, 109 *N.J. Super.* 410 (Ch.Div. 1970), mod., 57 *N.J.* 468 (1971). This signals a policy to end alimony when the supported spouse forms a new bond that eliminates the prior dependency as a matter of law. That policy, however, can conflict with another state policy that guarantees individual privacy, autonomy, and the right to develop personal relationships free from governmental sanctions. See *State v. Saunders*, 75 *N.J.* 200 (1977) (all members of the Court agree that there is a limited state interest in regulating an individual's personal decisions relating to privacy, which have merely incidental effects on others). See also *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982). We must then consider how to balance these competing policies in these circumstances.[45]

Ultimately, the Court adopted an economic needs test to determine whether cohabitation requires modification of an alimony award; that is, once a payor established

that a payee was, in fact, cohabiting with another, alimony would be modified to the extent that the one cohabitant supports or subsidizes the other.[46]

Fast-forwarding to the current day, the reformers regaled the legislators with stories of payees who were 'gaming the system'—that is, obligees who are romantically, financially and socially intertwined with a new partner, but avoiding marriage in order to continue receiving alimony.[47] Moreover, the legislators and reformers alike could not understand why, when the new relationship was proven, alimony should continue. Notwithstanding a full explanation of the balancing of policies cited by Justice O'Hern, they could not escape the inherent unfairness.

As a result, N.J.S.A. 2A:34-23n was inserted in order to revise the law regarding cohabitation. The most substantial change is that the economic needs test has been eliminated; that is, once the cohabitation is proven by the moving party, the court may only either suspend or terminate (but not modify) alimony.

To determine whether there is cohabitation, there is a list of six factors with a catch-all seventh factor. The focus of these factors is on the quality and depth of the relationship: Do they share financial responsibilities? Do they have joint assets and/or liabilities? Do they live together and share household chores? Is there recognition of the relationship in their family and social circles? In addition to the factors, section n. notes that a court is to consider the length of the relationship and that a court may not find an absence of cohabitation solely on the grounds that a couple does not live together on a full-time basis.[48]

In fact, the factors within section n. resemble the characterizations of cohabitation recited by the Supreme Court in *Konzelman v. Konzelman:*[49]

> A mere romantic, casual or social relationship is not sufficient to justify the enforcement of a settlement agreement provision terminating alimony. Such an agreement must be predicated on a relationship of cohabitation that can be shown to have stability, permanency and mutual interdependence. The Appellate Division expressed that standard by defining cohabitation as a domestic relationship whereby two unmarried adults live as husband and wife. 307 *N.J.Super.* at 159. Cohabitation is not defined or measured solely or even essentially by "sex" or even by gender, as implied by the dissent. Post at 205. The ordinary understanding of cohabitation is based on those factors that make the relationship close and enduring and requires more than a common residence, although that is an important factor. Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle.[50]

In the author's view, this change in the law can be summarized as follows: The burden of demonstrating cohabitation placed upon the payor is intentionally more difficult to achieve; however, once the burden is met, the consequence to the payee is more severe.

The final disagreement with the reform groups concerned the 'effective date' of the statute. As previously noted, the reformers sought retroactive application of the statute; that is, like the Massachusetts law the reformers wanted the new statute to apply to existing agreements and judgments. The author believes there were numerous arguments against retroactive application; as a sampling of those arguments:

Article IV, Section VII, Paragraph 3 of the New Jersey Constitution expressly prohibits the Legislature from passing any law, "depriving a party of any remedy for enforcing a contract which existed when the contract was made." *N.J.Const.* Art IV, §VII, Par. 3. In other words, retroactive application of the law would be unconstitutional, as it would deprive payees of their rights under an existing contract.

Quite often, a term and amount of alimony is one part of a negotiated settlement. Take just one example—a payor wants the tax benefit of designating a portion of equitable distribution and, as such, the payor has increased the term of alimony paid. Allowing retroactive modification of the term of alimony, while ignoring the context in which that level was determined and without permitting the payee to concurrently modify the equitable distribution, is inequitable.

The courts are overburdened as it is; now imagine the volume of alimony payors who would file applications to review their obligations based upon the new statute.

Yet, the reformers consisted almost exclusively of payors of support with existing obligations, who had lobbied vigorously for changes for themselves. By prohibiting retroactive application, the new statute would not apply to their agreements or judgments. As noted, *infra*, there were certain concessions made to the reformers to allow for the law to apply to them (see, for example, N.J.S.A 2A:34-23j(3)). However, Section 2 of N.J.S.A. 2A:34-23 made it clear that the new statutory provisions "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:

- A final judgment of divorce or dissolution;
- A final order that has concluded post-judgment litigation; or
- Any enforceable written agreement between the parties."

In other words, unless specifically noted, the new statutory provisions would not be retroactively applied. ■

Brian Schwartz operates his own firm in Summit.

Endnotes

1. Massachusetts Alimony Reform Act of 2011, *Massachusetts Lawyer*, June 6, 2011.
2. MGL c.208, s.48-55.
3. The statute does permit deviation from the durational limits: "Except upon a written finding by the court that deviation beyond the time limits of this section are required in the interest of justice,…" MGL c.208, s.49(b); see also the factors for deviation at s.53(e), discussed *infra*.
4. MGL c.208, s.53(b).
5. MGL c. 208, §4(b). Note, however, §4(c) provides that a judgment that stated that alimony was non-modifiable would remain non-modifiable notwithstanding the passage of the act.
6. The Senate would introduce the same bill in its house, SJR 41, on Feb. 13, 2012.
7. Section 1 of AJR 32, 2012-2103 Session of the Legislature of the state of New Jersey.
8. Section 7 of AJR 32, 2012-2103 Session of the Legislature of the state of New Jersey.
9. On the same day, the Senate would introduce the same bill in its house, SJR 34.
10. Section 1 of AJR 36, 2012-2103 Session of the Legislature of the state of New Jersey.
11. *Id.*
12. Section 7 of AJR 36, 2012-2103 Session of the Legislature of the state of New Jersey.
13. Assembly Substitute for Assembly Joint Resolution 32 and 36, introduced June 18, 2012.
14. Assembly Joint Resolution 32 and 36, with Floor Amendments, adopted June 21, 2012.
15. Assembly Bill 3909, introduced March 7, 2013; on May 13, 2013, the same bill was introduced in the Senate, S-2750.
16. *Id.*
17. For example, *see* The End of Alimony, *Time*, May 27, 2013, pages 44 – 49.
18. 164 N.J. 11 (2000).
19. *Id.* at 25.
20. 180 N.J. 131 (2004).
21. *Id.* at 140.
22. N.J.S.A. 2A:34-23b, second to last paragraph of the section.
23. N.J.S.A. 2A:34-23c, first paragraph of the section.
24. N.J.S.A. 2A:34-23c, second paragraph of the section.
25. *See*, for example, *Gnall v. Gnall*, 432 N.J. Super. 129, 152 (App. Div. 2013) "any attempt to reduce the shared marital experience to a formulaic calculation of compensation based on the number of years 'in the marriage,' completely disregards the public policy considerations supporting continuation of economic support beyond the spouses' joined personal lives."

26. *Deegan v. Deegan*, 254 N.J. Super. 350, 359 (App. Div. 1992).
27. *Id*. at 358.
28. *Id*. at 358-9.
29. *Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001).
30. For a more detailed discussion of the law of and issues related to retirement in New Jersey prior to the new statute, *see* Brian Schwartz, Retirement: Is There Light at the End of the Tunnel for the Payor, Family Law Symposium, New Jersey Institute for Continuing Legal Education, Jan. 2008.
31. N.J.S.A. 2A:34-23j.
32. This last section was of great import to the reform groups, as they had aggressively lobbied for the entire new alimony statute to apply not only to future judgments and agreements, but to already existing judgments and agreements. Such retroactive application was a "non-starter" for the bar groups and, thankfully, for many of the legislators.
33. See, *Dilger v. Dilger*, 242 N.J. Super. 380, 389 (Ch. Div. 1990) ("While what constitutes the customary retirement age today may be changing, it is still generally accepted to be the age of 65."); and *Silvan v. Sylvan*, 267 N.J. Super. 578, 580 (App. Div. 1993) (We are satisfied that in certain circumstances, good faith retirement at age sixty-five may constitute changed circumstances for purposes of modification of alimony and that a hearing should be held to determine whether a reduction in alimony is called for.).
34. N.J.S.A. 2A:34-23j(1), final paragraph of the section.
35. In the last paragraph of N.J.S.A. 2A:34-23, "full retirement age" is defined as "the age at which a person is eligible to receive full retirement benefits under section 216 of the federal Social Security Act (42 U.S.C. s.416)." It should be noted that this age requirement applies to payors who are not eligible for social security benefits (*e.g.*, police officers).
36. *Deegan*, at 358.
37. Interestingly, the focus for 'early retirement' seems to be on *employees* or owners/partners of large entities. It remains to be seen how section j(2) will be applied to self-employed obligors, and whether they will be treated differently.
38. *Lepis v. Lepis*, 83 N.J. 139 (1980).
39. The factors are the same as those set forth in j(2).
40. *Lepis v. Lepis*, 83 N.J. 139 (1980).
41. 384 N.J. Super. 17 (App. Div. 2006).
42. 405 N.J. Super. 117 (App. Div. 2009).
43. N.J.S.A. 2A:34-23l.
44. 92 N.J. 149 (1983).
45. *Id*. at 151.
46. *Id*. at 153-54.
47. *See, for example*, *Reese v. Weis*, 430 N.J. Super. 552 (App. Div. 2013).
48. N.J.S.A. 2A:34-23n, the final paragraph of the section.
49. 158 N.J. 185 (1999).
50. *Id*. at 202.

Is the New Alimony Statute Applicable to Cases in the Pipeline?

by Charles F. Vuotto Jr. and Cheryl E. Connors

The newly revised alimony statute became effective on Sept. 10, 2014. This article addresses the question of whether cases 'in the pipeline' should be resolved in accordance with the new alimony statute, even if a ruling or judgment was entered in that case prior to the enactment of the new statute. One Supreme Court case has addressed "pipeline retroactivity" in criminal matters, noting "application best balances principles of fairness and response."[1] Essentially, pipeline retroactivity renders the new rule "applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal."[2] In descending order of breath of their effect, from the narrowest to the broadest, the shorthand hierarchy of categories is *purely prospective*, *pipeline retroactivity*, or *full retroactivity*.[3] Admittedly, the cases dealing with pipeline retroactively are mostly criminal cases and land use cases. However, as detailed below, certain matrimonial cases have addressed pipeline retroactivity.

In the civil context, pipeline retroactivity of a new rule or law contemplates that three classes of litigants will be beneficiaries: those in all future cases, those in matters that are still pending, and the particular successful litigant in the decided case.[4] The bedrock principles of decisional law retroactivity were spelled out in *State v. Knight*, a case involving criminal procedure:

> This court has four options in any case in which it must determine the retroactive effect of a new rule of criminal procedure. See *State v. Burstein*, 85 *N.J.* 394, 402-03, 427 A. 2d 525 (1981). The court may decide to apply the new rule purely prospectively, applying it only to cases in which the operative facts arise after the new rule has been announced. *Ibid*. Alternatively, the court may apply the new rule in the future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth. *Id*. at 403,427 A. 2nd 525. A third option is to give the new rule "pipeline retroactivity," rendering it applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal. *Ibid*. Finally, the court may give the new rule complete retroactive effect, applying it to all cases, including those in which final judgments have been entered and all other avenues of appeal have been exhausted, *Ibid*.[5]

Applying the above principles to matrimonial cases, the Appellate Division in *Johnson v. Johnson*[6] stated,

> [t]o determine whether a new rule of law should be applied retroactively or prospectively, the court must consider the following factors: '(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice. The inquiry is very fact sensitive.'[7]

The *Johnson* Appellate Division further stated that:

> The general rule in civil cases is that a new rule will apply to all cases that have not reached final judgment. Full retroactivity is not appropriate where it would expose the judicial system to the undue burden of resolving numerous concluded matters. Pipeline retroactivity is appropriate where it will serve the interest of justice by permitting currently litigating parties to resolve their claims on the merits. Pipeline

> retroactivity is further appropriate where the benefit of allowing settled issues to remain undisturbed outweighs the need to do justice.[8]

Decisions from the early days of the equitable distribution statute and its amendments are instructive. For example, the New Jersey Supreme Court in *Gibbons*[9] retroactively applied the amendments to the equitable distribution statute to the parties in that case.[10] In *Gibbons*, the parties were married on Nov. 15, 1952. A complaint for divorce was filed in Aug. 1976. The equitable distribution statute was amended to exclude gifts and inheritances (other than inter-spousal gifts) on Dec. 31, 1980. The trial court included gifts and inheritances in the assets subject to equitable distribution. The husband appealed the trial court's judgment to the Appellate Division.

In a decision dated May 12, 1980, a divided panel affirmed the trial court's modified judgment. Two members of the panel believed the trial court had properly exercised its discretion in dividing the couple's gifts and inheritance assets equally as part of the equitable distribution of marital assets. One member of the panel dissented, expressing the following view:

> Although equitable jurisdiction over inherited and gifted assets is clearly desirable,… it should be exercised only upon a finding that failure to do so will result in grossly disparate and unfair in equality, or some other manifest injustice…further, if distribution of such assets is ordered, it should not be in an amount greater than what is articulably related to what is needed to repair the inequity or relieve the injustice.[11]

The husband appealed as of right pursuant to Rule 2:2-1(a)(2), on June 12, 1980. As previously noted, the equitable distribution statute was amended on Dec. 31, 1980, (presumably while the Supreme Court matter was pending), to provide that: "all property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift, devise or bequest shall not be subject to equitable distribution, except that inter-spousal gifts shall be subject to equitable distribution."[12]

The *Gibbons* Court noted that:

> the amendment contained no indication as to whether it was to be applied to pending cases or only prospectively, and the legislative history offers no clear guidance on this point. This lack of direction lead the Governor to state, at the time he signed the Bill into law, that because of the statute's silence on the question of retroactivity and the absence of a consensus in the Legislature on the point, "I believe the courts are the most appropriate forum to resolve that issue. They will have to decide based on existing principles of law, the extent to which this new law will affect pending cases." We now undertake to resolve the retroactivity issue.[13]

The Supreme Court noted the courts of this state have long followed a general rule of statutory construction that favors prospective application of statutes.[14] The basic rationale includes a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. Essentially, parties require notice or warning of the rules that are to be applied to determine their affairs. The Supreme Court in *Gibbons* quoted the *Rothman* Supreme Court, which stated "the rule favoring prospective application of statutes while 'a sound rule of statutory interpretation…is no more than a rule of statutory interpretation' and is not to be applied mechanistically to every case."[15] The Court then noted that there are well settled rules concerning the circumstances in which the statute should be applied retroactively, where there is no clear expression of intent by the Legislature that the statute is to be prospectively applied only. The *Gibbons* Court again cited *Rothman's* rationale, concluding the equitable distribution statute should be retroactively applied because the Court was:

> unable to believe that the legislature intended its grant of power to undertake an equitable distribution of marital assets to apply solely to property acquired on or after the effective date of the act. Were this construction to be adopted, it would, in each case, become necessary to determine the date of acquisition of each asset acquired during marriage, often a difficult if not impossible task. A further question would arise should the particular property interest under

> consideration, though acquired after the effective date of the act, have been purchased with, or received in exchange for, money or other property owned before that date. Moreover, if [the statute were to be prospectively applied,] it has been estimated, apparently without exaggeration, that the full effect of the statute would not be felt for at least a generation.[16]

Clearly, where the Legislature has expressly stated whether a new statute should be given retroactive or only prospective affect, the Legislature's expressed intent must be followed. Also, there are circumstances where the issue of retroactivity is addressed in the legislative history. There are also circumstances where the issue of retroactivity is implied and retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation.[17] Another category of cases in which the Court has held that statutes may be given retroactive application includes statutes that are ameliorative or curative.[18] The *Gibbons* Court noted, "finally, in the absence of a clear expression of legislative intent that the statute is to be applied prospectively, such considerations as the expectations of the parties may warrant retroactive application of a statute."[19]

If a court concludes that retroactive application is appropriate, the court must make a further inquiry to determine whether the application would result in manifest injustice to a party adversely affected because that party relied, to his or her prejudice, on the law that is now to be changed, as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively.[20]

Applying all of the aforementioned principles, the Supreme Court in *Gibbons* concluded that the amendment to N.J.S.A. 2A:34-23 with regard to the exclusion of gifts and inheritances among assets to be equitably distributed should be retroactively applied. More importantly, the Court stated that, "[c]onsequently, it applies to this case and all other cases presently on direct appeal or in which a final judgment has not be entered. *See Bellinger v. Bellinger*, 177 *N.J. Super* 650 (Ch. Div. 1981) (applying amended version of N.J.S.A. 2A:34-23 to case tried after the effective date of the amendment)."[21]

Admittedly, the Supreme Court in *Gibbons* found no clear expression of legislative intent that the amendatory statute be applied prospectively. Indeed, the Court concluded that it can be "fairly inferred" from the legislative history that the Legislature intended the amendment to apply retroactively.[22]

The Supreme Court in *Gibbons* also concluded that the amendment was "curative" in so far as it reflects the Legislature's attempt to improve a statutory scheme already in existence. Further, the *Gibbons* Court noted that retroactive application would bring the law into harmony with settled expectations of many donors and donees. When examining the expectations of the alimony reformers and the payors of alimony in this state, similar conclusions may equally apply to the application of the amendments to the alimony statute.

Lastly, the Court in *Gibbons* did not find that retroactive application of the statute would result in any manifest injustice to the wife, notwithstanding her claims that it would be inequitable because she relied upon the law as it existed at the time she brought her action for divorce. Particularly, the wife claimed she chose to seek equitable distribution only and not alimony because of what she believed was the broad scope of assets subject to equitable distribution. The New Jersey Supreme Court, however, concluded that no manifest injustice would result from retroactive application of the amendatory statute to the wife's case since "any orders pertaining to alimony or other support, may be revised and altered by the court from time to time as circumstances may require."[23]

The issue of pipeline retroactivity was also discussed in the case of *Edgerton v. Edgerton*.[24] In *Edgerton*, the wife appealed from the denial of her trial court motion brought under Rule 4:50-1(f) in which she had sought to modify that portion of a property settlement agreement (PSA) incorporated into a final judgment of divorce dealing with inherited assets and equitable distribution. The wife's inherited assets had been considered subject to equitable distribution in the agreement. The wife argued that because the equitable distribution statute had been amended to remove inherited property from distribution, and that change had been declared retroactive by the Supreme Court in *Gibbons*, she was entitled to modify the judgment.

The Appellate Division reversed the denial of her motion and remanded to the trial court with instructions to declare those assets included in the property settlement agreement that had been acquired by the wife by way of inheritance to be solely her property and not

subject to equitable distribution under N.J.S.A. 2A:34-23. The Appellate Division further directed that a plenary hearing should be held with respect to the fairness of the agreement as modified by its opinion to exclude the inherited property.[25] Oddly enough, although the parties' property settlement agreement was dated Dec. 21, 1979, they entered into an "amendatory agreement" on July 27, 1981, almost seven months after the equitable distribution statute was amended and 19 days after the Supreme Court's decision in *Gibbons*. After the amendatory agreement, the parties proceeded to an uncontested hearing on July 27, 1981. There was no mention of the amended statute or *Gibbons* decision during the uncontested hearing. Nevertheless, on March 14, 1984, the wife filed a post-judgment motion that sought, among other relief, to vacate the judgment regarding the portion relating to equitable distribution.[26]

In an April 20, 1984, opinion supplementing her oral decision, the judge rejected the wife's arguments that: 1) the judgment should be set aside because the amendment to the statute relating to inherited assets had already been given retroactive effect, and 2) she had not been aware of the change in the law of equitable distribution. The trial judge also concluded that the Supreme Court's holding in *Gibbons* on retroactivity was only applicable to court-ordered distributions and not consensual agreements. The judge held that the status of the law at the time the parties entered into their original agreement was determinative, apparently not taking into account the amendment to the agreement, which was entered into after the effective date of the amendment to the equitable distribution statute. The judge did note in passing that the husband's other factual arguments in opposition to the wife's motion were unpersuasive on the claims of laches, ratification and detrimental reliance.[27]

The Appellate Division's analysis relied heavily on the 1984 trial court decision of *Castiglioni*.[28] The court stated, "as in the instant case, *Castiglioni* considered the retroactive effect of a statutory change in the law of equitable distribution in the context of the previously negotiated and signed settlement agreement which had relied on prior law."[29]

In *Innes v. Innes*,[30] the parties were married for 31 years before the husband filed a complaint for divorce on Oct. 8, 1982. A dual judgment of divorce incorporating a property settlement agreement was entered on March 26, 1984. On June 14, 1985, the husband was unexpectedly fired by his employer. Ultimately, the husband filed an application to modify his alimony due to changed circumstances. The trial court included in the husband's income for purposes of the modification application, pension benefits that had been distributed at the time of the divorce. The husband appealed, contending that in determining alimony, the trial court should not have considered the income he received from his pension and annuity, because the inclusion of that income, he argued, constituted an inequitable form of "double dipping" in as much as it flowed from assets that had already been equitably distributed. The husband relied on *D'Oro v. D'Oro,*[31] which prohibits such consideration.

The Appellate Division reversed and remanded because the trial court made no findings concerning the parties' circumstances in establishing the alimony. However, the Appellate Division rejected the plaintiff's argument that his pension and annuity income should not be considered in determining alimony and specifically rejected application of the *D'Oro* rule. Justice Virginia Long, then Judge Long, issued a dissenting opinion to the Appellate Division majority's decision, which stated in relevant part:

> Plaintiff and defendant divided the pot of marital assets at the time of the divorce. In so doing, defendant took her share of plaintiff's pension in a lump sum. Plaintiff now receives his share of the pension periodically. Periodicity does not change the nature of the transaction or the character of the pension payments as assets and not income. This is not a situation in which a distributed asset generates or throws off income. In that event, the income would clearly be a part of the post-judgment alimony base. Here, the pension payments sought to be tapped by defendant as alimony are plaintiff's equitable share of the marital asset; as such they are not includible in the calculation of available income for an alimony award. It is not the fact that the pension is not income. Simply stated, no asset, however derived, should be considered part of the income available for alimony purposes. [Id. at 248-49, 542 A.2d 39] The recent amendment to N.J.S.A. 2A:34-23, which codifies the holding in D'Oro, had not been enacted when the Appellate Division decided the case. Accordingly,

> neither [569 A.2d 774] Appellate Division opinion discussed the applicability of the amendment to this case…[32]

The issue before the New Jersey Supreme Court in *Innes* was whether the trial court may consider the ex-husband's pension benefits when determining whether his alimony payments should be modified. The New Jersey Supreme Court held that it may not.[33] The Court states that its disposition of the issue was governed by the recent amendment to the equitable distribution statute, pre-existing law and the specific language of the parties' agreement. Therefore, the *Innes* Supreme Court applied the recent amendment to the statute that occurred after the trial level disposition of the post-judgment motion to the parties in that case.

Therefore, litigants who have appealed a final judgment of divorce and are at some stage of the appellate process (whether before the Appellate Division, Supreme Court or trial court after remand) are still in the pipeline.

In the Appellate Division decision *Johnson v. Johnson,*[34] the court concluded that the holding in *Fawzy*[35] had to be given pipeline retroactive effect. The parties in *Johnson* were married on Oct. 26, 1994. They were divorced on Aug. 16, 2005. The final judgment of divorce incorporated an agreement executed on May 24, 2005. In 2007, the parties were experiencing issues regarding the amount of time each parent would spend with the children. As a result, the parties agreed to binding arbitration to "resolve pending differences and parenting time scheduling issues." A referral to arbitration was granted by a family part judge on Oct. 31, 2007, which incorporated the previously executed arbitration agreement.

In the arbitration agreement, the parties agreed to have Mark White, Ph.D. serve as the arbitrator subject to the New Jersey Alternative Procedures for Dispute Resolution Act (APDRA).[36] White delivered his findings and final decision on April 11, 2008. The husband filed a motion for reconsideration on May 16, 2008, in which he requested that White reconsider the entire decision or clarify the husband's vacation time with the children. White issued his response on May 22, 2008. Unhappy with that response, the husband then sent correspondence to the wife and White regarding removal of White from the matter in light of the Appellate Division's June 16, 2008, decision in *Fawzy v. Fawzy.*[37]

The husband filed a motion to confirm White's decision, and the wife filed a cross-motion opposing confirmation and requesting modification of custody and visitation. The motions were argued on Sept. 26, 2008. The wife asserted *Fawzy* invalidated final binding arbitration awards dealing with custody and parenting time issues because the ADPRA does not require full plenary review of the best interest of the children but rather provides for only limited review in accordance with issues identified in N.J.S.A. 2A:23A-13. The husband, on the other hand, argued that *Fawzy* was inapplicable because it pertained to arbitration under the Arbitration Act[38] yet arbitration in *Johnson* was conducted under the APDRA. The family part judge delivered an oral decision on Sept. 29, 2008, in which he confirmed White's decision. The wife appealed.

After appellate briefs were filed in *Johnson*, the Supreme Court decided *Fawzy.*[39] The wife asserted that the trial judge erred in confirming White's decision in light of the holding in *Fawzy.* She argued that the arbitrator made no fact findings or legal conclusions that would enable the judge in his *parens patriae* role, to determine the best interests of the children. Thus, the wife argued that it was not an "appropriate and credible record from which to conclude that the arbitrator's recommendation was in the best interests of the minor children."[40] The wife pointed out that there was no formal record of the proceeding from which the judge can conduct a *de novo* review. She contended the judge was required to conduct a plenary hearing to determine whether the award was in the children's best interest, as required by *Fawzy,* and that the judge erred in affirming the arbitration award.[41] The wife also raised other issues regarding bias and related claims.

The preliminary question entertained by the Appellate Division in *Johnson* was whether the more restrictive requirements detailed in *Fawzy* (*e.g.*, permitting an arbitration award to be overturned upon a showing of harm to the child, requiring that a record of all documentary evidence be kept, requiring that all testimony be recorded verbatim and requiring that the arbitrator state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interest standard) were applicable to the Johnsons. The Appellate Division in *Johnson* acknowledged that the *Fawzy* requirements stated a new rule of law as neither the APDRA nor the Uniform Arbitration Act (UAA) required a record to be made of the proceedings. In determining whether

the new rule should be applied retroactively or prospectively, the Appellate Division in *Johnson* held that it must consider the following factors:

> The purpose of the rule and whether it would be furthered by retroactive application,
>
> The degree of reliance placed on the old rule by those who administered it, and
>
> The effect a retroactive application would have on the administration of justice.[42]

The *Johnson* court found that the aforementioned factors support retroactive application of *Fawzy* to the Johnsons. First, the *Johnson* court explained the purpose of the rule is to provide parents with the option of handling child custody and parenting time issues through arbitration while insuring that arbitration results in no harm to the child. The *Johnson* court stated,

> [c]learly, protection of the best interests of the children will be furthered by application of *Fawzy* to those arbitrations where best-interests review was not available. Second, it was clear after *Faherty* that the availability of arbitration for custody and parenting-time issues had not been decided by the Court. Thus, no degree of reliance could have been placed on the "old rule" as none existed. Third, in considering the effect retroactive application would have on the administration of justice, we consider whether retroactive application would be limited to pipeline retroactivity or full retroactivity.[43]

The *Johnson* court concluded "pipeline retroactivity is appropriate where it will serve the interest of justice by permitting currently litigating parties to resolve their claims on the merits."[44] As such, the Appellate Division found "pipeline retroactivity is appropriate here so that previous awards will not be disturbed but currently litigating parties, including those here, will have the benefit of the court's decision in *Fawzy* to protect the best interest of children."[45] Therefore, the Appellate Division in *Johnson* found the *Fawzy* requirements would be given pipeline retroactivity. Although the matter proceeded to the Supreme Court and the ultimate disposition by the arbitrator was upheld, it was upheld on the basis that the record maintained by White was sufficient. The Supreme Court did not disturb the Appellate Division's conclusion regarding the pipeline retroactivity of *Fawzy's* holding. Later, in *N.H. v. H.H.,* the Appellate Division confirmed that the principles of *Fawzy* should be applied to cases in the pipeline.[46]

In *Maeker v. Ross*,[47] the New Jersey Supreme Court prospectively applied the amendment to the statute of frauds requiring that all palimony agreements be made in writing and with the independent advice of counsel. The Court concluded that the amendment to the statute of frauds "represent[ed] a sea change in the law."[48] The Court analyzed the words in the legislative history of N.J.S.A. 25:1-5(h), which stated: "This act shall take effect immediately."[49] The Court noted that the legislative history was silent on its intent regarding the retroactivity of the bill, and that the Court inferred that the Legislature knows "[t]hat courts generally will enforce newly enacted substantive statutes prospectively, unless it clearly expresses a contrary intent."

The *Maeker* Court further examined that "[h]istorically, the Statute of Frauds has been applied prospectively to avoid interfering with vested rights." The *Maeker* Court recognized the reason for not applying an amendment to the statute of frauds retroactively is that "rendering a previous valid contract unenforceable would impair the obligation of a contract and run counter to" constitutional rights.[50] Because the Legislature did not express a clear intent to retroactively apply the amendment, the Court determined it "did not intend to retroactively void the indeterminate number of oral palimony agreements that predated its enactment."

Conclusion

In order to fully address this issue in the context of the new alimony statute on cases in the pipeline one must look to the alimony statute and related legislative history. Section 2 of L. 2014, c. 42 provides:

> This act shall take effect immediately and 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: a. a final judgment of divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties." Chapter 42, L. 2014, was approved on Sept. 10, 2014.

Therefore, the act is to take effect "immediately." Does this presume prospective application?

The concerns of the Court in *Maeker* are applicable to those cases where the parties have specifically bargained for contractual provisions and, thus, it is clear that retroactive application is not appropriate. Further, the Legislature has provided specific guidance to courts on such cases as well as those cases where a final judgment of divorce or final order in a post-judgment litigation has been entered. The question is what did the Legislature intend with respect to those limited cases that are in the pipeline and whether it intended for those cases to have the benefit of the new statute. It is the authors' opinion that the phrase "[T]his act shall take effect immediately" in the legislative notes to the amended statute should be interpreted as giving the amended statute prospective applicability to all new cases, including post-judgment applications seeking to modify pre-existing final judgments of divorce or marital settlement agreements, except to the extent that the terms of a judgment or agreement provide for a different standard to be applied. (The authors believe that all such new cases include cases that are on appeal.) Regardless, the new statute cannot override terms of an agreement or a prior order or judgment that was not appealed. In *Spangenberg v. Kolakowski*, the Appellate Division declined to apply the amended statute in the context of cohabitation because the post-judgment order became final before the statutory amendment's effective date and the court notes that the post-judgment order was not appealed.[51]

The Supreme Court's recent decision in *Quinn v. Quinn* emphasizes that the language of the settlement agreement will have a significant impact on whether the court will apply the new statute.[52] The *Quinn* property settlement agreement provided that "[a]limony shall terminate upon the wife's death, the husband's death, the wife's remarriage, or the wife's cohabitation, *per case or statutory law*, whichever event shall first occur."[53] The majority's decision in *Quinn* states, "when the parties entered into the PSA, the legislature had not yet spoken on whether cohabitation, like remarriage, could permanently terminate alimony responsibilities."[54] It is important to note that prior to the hearing, the parties agreed that the facts would be evaluated under the definition of cohabitation set forth in *Konzelman v. Konzelman*.[55] The majority added the following footnote:

> On September 10, 2014, the Legislature enacted N.J.S.A. 2A:34-23, which provides that "[a]limony may be suspended or terminated if the payee cohabits with another person." L. 2014, c 421. The Legislature clarified that this law "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: a. a final judgment of divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties." Id. §2. *Because this law was enacted after the PSA was entered, it does not govern this case, and the terms of the PSA apply.*[56]

The majority's decision goes on to state that "*[a]ccording to the case law in effect at the time the parties executed their matrimonial agreement*, a cohabitation was considered a relationship that was 'shown to be serious and lasting.'"[57]

What is curious is that this language implies the *Quinn* majority interpreted the PSA as referring to the law in effect at the time the PSA was executed. They did not seem to consider a possible different interpretation, for example, that the words "per case or statutory law" could refer to the law at the time the issue of cohabitation arises. That may be due to the stipulation reached by the parties that *Konzelman* applies.

Interestingly, Justice Barry Albin in his dissent addresses the new statute and the implications of the new statute. Justice Albin's dissent relies to some degree on the new statute. He points out that the new statute provides that "[a]limony may be suspended or terminated if the payee cohabits with another person."[58] Justice Albin noted "[I]n contrast, when "a former spouse shall marry… permanent and limited duration alimony shall terminate as of the date of remarriage."[59] He concluded the permissive language in N.J.S.A. 2A:34-23(n) unlike the mandatory language in N.J.S.A. 2A:34-25 indicates that the Legislature did not intend alimony to terminate, or even be modified, automatically in the event of cohabitation. Therefore, the permissive language requires family courts to equitably exercise discretion. Putting aside whether one agrees with Justice Albin's interpretation of the impact of the new alimony language, the fact that he

is referring to it would seem to suggest that *he* believes it was relevant to the *Quinn* case.

The bottom line is that the implicit interpretation by the majority in *Quinn* that the phrase "per case or statutory law" refers to the law at the time of the agreement would seem to make the debate moot regarding the applicability of the revised alimony statute. Footnote 3 in *Quinn*, therefore, does not change that conclusion.

Thus, if an application is filed to modify alimony based upon cohabitation and the parties have agreed in their agreement to apply *Gayet*, then the provisions of the amended statute will not apply to that application to the extent contrary to *Gayet*. However, all other aspects of the statute shall apply. In that situation, the reviewing court will be required to defer to the provisions of the previously agreed-upon *Gayet* standard. If the agreement is silent on the standard for cohabitation, then the statute will apply to any post-judgment application filed after Sept. 10, 2014. The New Jersey Supreme Court did not address the issue of pipeline retroactivity in *Gnall v. Gnall*. The New Jersey Supreme Court mentions in footnote 1:

> N.J.S.A. 2A:34–23(c) was amended on September 10, 2014 to specify that '[f]or any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union....' The amendment is not applicable to this case.[60]

Why? The New Jersey Supreme Court does not explain its analysis of the statutory language or legislative history to reach the conclusion that the amendment does not apply. It can only be inferred that the Court concluded the legislative history stating the act should not be construed to "modify the duration of alimony ordered [in] a final judgment of divorce or dissolution" precluded the act's applicability to the issue of duration of alimony addressed in *Gnall*. However, was the judgment 'final' when it was appealed? The question is whether any case started before the amendment became effective, which was on direct appeal at the time the statute became effective, will be entitled to pipeline retroactivity. It is the authors' opinion that cases, which are on direct appeal, should have the benefit of pipeline retroactivity because the Legislature intended the act take effect immediately. If those cases on direct appeal do not receive the benefit of the law, it renders the statutory words meaningless. ■

Charles F. Vuotto Jr. and Cheryl E. Connors are partners at the firm of Tonneman, Vuotto, Enis & White, LLC with offices in Matawan and Cedar Knolls. *The authors wish to thank Brian Paul, John Finnerty and Dale Console for their input in the drafting of this article.*

Endnotes

1. *State v. Natale*, 184 N.J. 458, 494 (2005).
2. *See State v. Dock*, 205 N.J. 237, 256 (2011) (emphasis added).
3. *Id.* at 258.
4. *In the matter of N.H. v. H.H.*, 418 N.J. Super. 262 (App. Div. 2011).
5. *State v. Knight*, 145 N.J. at 249.
6. 411 N.J. Super. 161 (App. Div. 2009).
7. *Id.* at 173 (*quoting Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment,* 154 N.J. 62, 74 (1998)).
8. *Id.* at 174.
9. *Gibbons v. Gibbons*, 86 N.J. 515 (1981).
10. N.J.S.A. 2A:34-23 was amended to exclude from equitable distribution all property "acquired during the marriage" by either party by way of gift, devise or bequest…except…interspousal gifts."

11. *Gibbons v. Gibbons*, 174 N.J. Super. at 123.
12. *Gibbons v. Gibbons*, 86 N.J. at 520.
13. *Id.* at 520-21.
14. *Ibid.* (citations omitted).
15. *Id.* at 522 (*quoting Rothman v. Rothman*, 65 N.J. 219, 224 (1974)).
16. *Id.* at 523 (internal footnote and citations omitted).
17. *See Hohl v. Twp. of Readington*, 37 N.J. 271, 279 (1962).
18. *In re Smigelski*, 307 N.J. 513, 527 (1959); see 2 Sutherland, *Statutory Construction*, *supra* section 41.11.
19. *Cf. Westinghouse Electric Corp. v. United Electric Radio & Machine Workers of America*, 139 N.J. Eq. 97, 106 (E&A 1946).
20. *Gibbons v. Gibbons*, 86 N.J. at 523-24.
21. *Id.* at 524.
22. See footnote 4 from the *Gibbons* decision, which reads as follows:

    As originally introduced and passed by the Assembly, A. 1229 contained the following express disclaimer of retroactivity: "(T)his amendatory act does not apply to any judgment entered and any action for divorce or divorce from bed and board filed prior to the effective date of this act." The Assembly Committee explained that the amendment "is not retroactive and does not apply to any judgment entered or any divorce action filed prior to the effective date of the act." Assembly Judiciary, Law, Public Safety and Defense Committee Statement to Assembly, No. 1229 of 1980. The Senate Judiciary Committee, however, deleted the disclaimer of retroactivity and explained that the effect of the deletion "was to make the provisions of Assembly Bill No. 1229 applicable to pending actions." Senate Judiciary Committee Statement to Assembly, No. 1229 of 1980. The Senate and Assembly passed the Senate Committee's version without further comment.

23. *Gibbons v. Gibbons*, 86 N.J. at 525 (citations omitted).
24. 203 N.J. Super. 160 (App. Div. 1985).
25. *Id.* at 175.
26. *Edgerton v. Edgerton*, 203 N.J. Super. at 166.
27. *Id.*
28. *Castiglioni v. Castiglioni*, 192 N.J. Super. 594 (Ch. Div. 1984).
29. *Edgerton v. Edgerton*, 203 N.J. Super. at 171.
30. 117 N.J. 496 (1990).
31. 187 N.J. Super. 377 (Ch. Div. 1982), *aff'd*, 193 N.J. Super. 385 (App. Div. 1984).
32. *Innes*, 117 N.J. at 503.
33. *Id.* at 505.
34. 411 N.J. Super. 161 (App. Div. 2009).
35. 199 N.J. 456 (2009).
36. N.J.S.A. 2A:23-1 to 30.
37. 400 N.J. Super. 567 (App. Div. 2008), *aff'd on other grounds*, 199 N.J. 456 (2009).
38. N.J.S.A. 2A:23B-1 to 32.
39. 199 N.J. 456.
40. *Johnson*, 411 N.J. Super. at 167.
41. *Ibid.*
42. *Johnson v. Johnson*, 411 N.J. Super. at 173 (internal quotations deleted and citations omitted).
43. *Ibid.*
44. *Id.* at 174.
45. *Ibid.*

46. 418 N.J. Super. 262 (App. Div. 2011). In *N.H.*, the parties agreed in their matrimonial settlement agreement (MSA) that they would be bound by the recommendations of Charles Katz, Ph.D. regarding custody and parenting time. The appellate panel concluded that Katz served in the role as an arbitrator and that the parties were in the pipeline because at the time the family part decided the MSA's enforceability, the parties were still litigating their dispute. *Id.* at 285-88.
47. 219 N.J. 565 (2014).
48. *Id.*
49. *Id*. (*quoting* L. 2009, c. 311, § 2).
50. *Id.*
51. 442 N.J. Super. 529, 539 (App. Div. 2015).
52. *Quinn v. Quinn*, __ N.J. __ (2016).
53. *Id.* (emphasis added).
54. *Id.*
55. 158 N.J. 185 (1999).
56. *Id.* (emphasis added).
57. *Quinn*, *supra, (quoting Konzelman, supra,* 158 N.J. at 203." (emphasis added)).
58. N.J.S.A. 2A:34-23(n) (emphasis added).
59. N.J.S.A. 23:34-25 (emphasis added).
60. *Gnall v. Gnall*, 222 N.J. 414 (2015).