

To: New Jersey Law Revision Commission
From: Arshiya Fyazi, Counsel
Re: Retroactive application of 2014 amendments to the alimony statute - N.J.S. 2A:34-23
Date: September 04, 2020

Memorandum

Executive Summary

In September 2018, the New Jersey Law Revision Commission (NJLRC) Staff proposed a project based on the Appellate Division decision in *Sloan v. Sloan*.¹ In that case, the Court considered what constituted “remarriage” and the effect of “remarriage” on alimony obligations. Staff was authorized to contact practitioners of the matrimonial bar to ascertain whether the issue raised in *Sloan* is a reoccurring issue that requires the Commission’s attention.²

In June of 2020, the NJLRC considered the results of the outreach conducted by Staff in late 2018 and early 2019.² In the absence of universal consensus regarding whether amendments to the alimony statute apply retroactively, the Commission requested additional research regarding this subject matter.³

The current focus of this project is not on what constitutes “remarriage” and its effect on alimony obligations, but on the lack of consensus concerning the retroactivity of the 2014 amendments to the alimony statute. Staff was authorized to conduct additional research to determine whether any recent legislation or case law has discussed whether or not the 2014 amendments to N.J.S. 2A:34-23 were retroactive.

Background

The New Jersey alimony statute, N.J.S. 2A:34-23, was amended on September 10, 2014. The amendments added subsections (j) through (n) that addressed modifications to alimony payments due to retirement, change in income, temporary remedies, and cohabitation (the “Amendments”).⁴ The Amendments do not explicitly state whether they are to be applied retroactively. The Assembly and Senate Judiciary Committee Statements that accompanied the bill, however, provided, with regard to the effective date of the bill, that:

“the law 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

¹ *Sloan v. Sloan*, No. A-2620-15T3, 2017 WL 1282764 (App. Div. Apr. 6, 2017); see Memorandum from Wendy Llewellyn, former Legislative Law Clerk on Remarriage in the Alimony Context to the New Jersey Law Revision Commission (Sept. 20, 2018) (on file with the Commission).

² See Memorandum from Arshiya Fyazi, Counsel, on Remarriage in the Alimony Context to the New Jersey Law Revision Commission (June 08, 2020) (on file with the Commission); and, NEW JERSEY LAW REVISION COMMISSION (2020) ‘Remarriage’. *Minutes of NJLRC meeting June 18, 2020*, Newark, New Jersey.

³ *Id.*

⁴ N.J.S. 2A:34-23(j)-(n).

divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties.”⁵.

This legislative statement has been relied upon by jurists and attorneys who maintain that the Amendments are not retroactive.⁶ Despite such language, the courts appear to be divided on whether the Amendments are meant to only apply to agreements finalized as of the effective date, September 10, 2014.

This issue was brought to the Commission’s attention after the Appellate Division issued its opinion in *Sloan v. Sloan*.⁷ In *Sloan*, the Court reviewed a trial court determination to terminate the plaintiff’s alimony based upon what the court construed as his intentional avoidance of legal marriage solely to avoid losing his alimony.⁸ On appeal, the Appellate Division reversed the trial court based on the provisions of the matrimonial settlement agreement between the parties.⁹ On remand, the trial court was directed to examine the alimony issue in context of “changed circumstances” and to consider the 2014 amendments to N.J.S. 2A:34-23 in its analysis.¹⁰

Additional Research requested by the Commission

• Pending Legislation

To this date there are five pieces of legislation currently pending that seek to amend the alimony statute, N.J.S. 2A:34-23.¹¹ The proposed legislation does not, however, address the retroactive effect of the Amendments.

• New Jersey Alimony Laws

The statutes governing alimony are set forth in N.J.S. 2A:34-23 through 2A:34-27. A review of these statutes confirmed that these statutes were most recently amended in 2014. The Legislature has not addressed the retroactive effect of the Amendments.

A table of alimony statutes with their latest revision date follows:

⁵ See L. 2014, c. 42, § 2.

⁶ Robert A. Epstein, A REVIEW OF COHABITATION LAW IN A POST-AMENDMENT LANDSCAPE, 310-FEB N.J. Law. 16 (New Jersey Lawyer, the Magazine, 2018).

⁷ *Sloan v. Sloan*, No. A-2620-15T3, 2017 WL 1282764 (App. Div. Apr. 6, 2017).

⁸ *Id.* at *2; see Memorandum from Wendy Llewellyn, former Legislative Law Clerk on Remarriage in the Alimony Context to the New Jersey Law Revision Commission (Sept. 20, 2018) (on file with the Commission).

⁹ *Id.* at *2-*3. The MSA between the parties was incorporated into their Final Judgment of Divorce in June of 2014. The MSA specifically stated alimony was to be terminated on “remarriage,” and plaintiff had not acquired a marriage license under New Jersey law.

¹⁰ *Id.* at *4.

¹¹ A.B. 1875, 219th Leg., 1st Sess. (N.J.2020) introduced in the Assembly on Jan. 14, 2020; A.B. 1302, 219th Leg., 1st Sess. (N.J.2020) introduced in the Assembly on Jan. 14, 2020; A.B. 354, 219th Leg., 1st Sess. (N.J.2020) introduced in the Assembly on Jan. 14, 2020; S.B. 930, 219th Leg., 1st Sess. (N.J.2020) introduced in the Senate on Jan. 27, 2020; and, S.B. 1695, 219th Leg., 1st Sess. (N.J.2020) introduced in the Senate on Feb. 13, 2020.

Statute	Title	Date Last Amended / Codified
N.J.S. 2A:34-23	Orders as to alimony or maintenance of parties and care, custody, education, and maintenance of children.	L.2014, c. 42, § 1, eff. Sept. 10, 2014.
N.J.S. 2A:34-23a	Action to enforce and collect child support; counsel fees; payment by defaulting party	L.1989, c. 212, § 1, eff. Dec. 29, 1989.
N.J.S. 2A:34-23b	Direct payment of benefits to health insurance provider; notice of right of custodial parent to have direct payment to appear on child support orders and separation agreements.	L.1993, c. 14, § 1, eff. March 21, 1993.
N.J.S. 2A:34-23c	Child support orders to indicate party required to maintain medical coverage	L.2001, c. 188, § 2, eff. July 31, 2001.
N.J.S. 2A:34-23d	Maintenance of insurance coverage	L.2006, c. 103, § 79, eff. Feb. 19, 2007.
N.J.S. 2A:34-23e	Contempt of support order; incarceration; community service	L.2000, c. 19, § 1, eff. May 1, 2000.
N.J.S. 2A:34-23.1	Equitable distribution criteria	L.2009, c. 43, § 2, eff. July 1, 2009.
N.J.S. 2A:34-23.2	Violation of visitation orders; legislative findings and declarations	L.1997, c. 300, § 1, eff. Jan. 8, 1998.
N.J.S. 2A:34-23.3	Remedies for failure to comply with visitation orders	L.1997, c. 300, § 2, eff. Jan. 8, 1998.
N.J.S. 2A:34-24	Abandonment or separation from obligee; order for support and maintenance; lien for overdue support; priority; order for security, bond or guarantee of support	L.2005, c. 171, § 2, eff. Aug. 5, 2005.
N.J.S. 2A:34-24.1	Divorce by spouse or civil union partner in absence of jurisdiction; support orders	L.2006, c. 103, § 81, eff. Feb. 19, 2007.
N.J.S. 2A:34-25	Remarriage of former spouse or partner; termination of alimony; exceptions	L.2006, c. 103, § 82, eff. Feb. 19, 2007.
N.J.S. 2A:34-26	Attachment of property	L.2006, c. 103, § 83, eff. Feb. 19, 2007
N.J.S. 2A:34-27	Bond for costs	(Does not appear to have been revised in decades.)

- *Cohabitation and the New Jersey Supreme Court*

Since the enactment of the Amendments, the New Jersey Supreme Court has addressed the issue of cohabitation on two separate occasions.

The effect of cohabitation on alimony payments was discussed in *Quinn v. Quinn*.¹² In this case, the Supreme Court focused on whether the trial court may suspend alimony for a period of time the alimony recipient cohabited rather than terminate alimony as required by the express terms of the property settlement agreement (“PSA”) the parties entered into in 2006.¹³

The PSA language in *Quinn* provided that “alimony shall terminate upon 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.”¹⁴ The Court found that the settlement agreement between the parties in a matrimonial dispute is akin to a contract that should be governed by basic contract principles.¹⁵ The Court held that “an agreement to terminate alimony upon cohabitation entered by fully informed parties, represented by independent counsel, and without any evidence of overreaching, fraud or coercion is enforceable.”¹⁶ Further, the Court determined that the statutory language in the Amendments was inapplicable to the parties 2006 PSA because the explicit language of the agreement required termination of the alimony upon payee’s cohabitation.¹⁷ In a footnote, the Court noted that “because this law was enacted after the PSA was entered, it does not govern this case, and the terms of the PSA apply.”¹⁸

In the second case, *Thieme v. Aucoin-Thieme*, the Court considered New Jersey’s equitable distribution statutes, N.J.S. 2A:34–23(h) and N.J.S. 2A:34-23.1, and deliberated over the equitable remedy of a constructive trust in the context of a post-judgment dispute over deferred compensation.¹⁹ The issue of cohabitation arose in this matter only when the Court had to calculate the portion of a bonus that was subject to equitable distribution earned during the marriage and the portion earned during the parties’ cohabitation to determine the amount of the wife’s counterclaim for unjust enrichment against her former husband.²⁰ There was no discussion of cohabitation in connection with the Amendments or alimony.

Though *Quinn* touches upon the issue of retroactivity of the 2014 Amendments when a specifically bargained for contractual provision is in a written agreement between the parties, it does not resolve the issue of whether the Amendments should be applied retroactively if the

¹² *Quinn v. Quinn*, 225 N.J. 34 (2016).

¹³ *Id.*

¹⁴ *Id.* at 40.

¹⁵ *Id.* at 44.

¹⁶ *Id.* at 55.

¹⁷ *Id.* at 65 n.3 (quoting *L. 2014, c. 42, § 2*).

¹⁸ *Id.*

¹⁹ *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 272 (2016). Plaintiff, husband filed a contempt action against his former wife for withdrawing a bonus from joint bank account received by him three months after the parties’ divorce was finalized. The Supreme Court held that the bonus was material asset subject to equitable distribution only for the portion earned during their marriage and percentage of bonus earned during cohabitation was to be held in constructive trust by the Plaintiff until the trial court makes its determination on remand.

²⁰ *Id.*

judgment of divorce and/or matrimonial agreement that was finalized prior to the effective date of the Amendments is silent on the issue of modification of alimony in the event of a payee's cohabitation.

- *Summary of Post-Amendment Cases*²¹

Research regarding cases that have dealt with the issue of retroactivity of the amended alimony statute can be divided into two categories. The first category involves cases in which matrimonial agreements or final orders were filed before the adoption of the Amendments and discuss the issue of modification of alimony. The second group of cases involve matrimonial settlement agreements and final judgments of divorces that were filed before the Amendments and are silent on the issue of modification of alimony.

A closer examination of the cases suggests that prior to the New Jersey Supreme Court decision in *Quinn v. Quinn*, the Appellate Division held that the provisions in matrimonial settlement agreements and final judicial orders settled prior to the effective date of the Amendments would govern the issues of modification to alimony. These decisions were also based on the anti-retroactive legislative statement accompanying the Amendments.

In 2015, in *Spangenberg v. Kolakoski*, the first published Appellate Division decision after the enactment of the Amendments, the Court held that the cohabitation provision of the statute governing alimony did not apply to a prior order reducing the husband's alimony obligation.²² In *Spangenberg*, the Court expressly noted that in 2013, subsequent to the parties' divorce decree but prior to the 2014 statutory amendments, the parties had already returned to court on post-judgment proceedings regarding the obligor's attempt to modify alimony based upon the recipient's cohabitation.²³ Since the order reducing alimony was not appealed in 2013, the post judgment order became final.²⁴ The Court determined that the language of the statute "signals that legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments."²⁵ It further stated that "[c]ourts generally will enforce newly enacted substantive statutes prospectively, unless the law clearly expresses a contrary intent" and since the amendment does not contain any language regarding retroactive application of the cohabitation provision, it did not apply.²⁶

In an unpublished, 2016 decision, the Appellate Division reversed the trial court's decision

²¹ Research showed that there are numerous cases decided after 2014 that focus on the issue of retroactivity of the Amendments. Staff limited the scope of this memo to direct the Commission's attention on the most recent and relevant case law to demonstrate the lack of consensus on the issue of retroactivity.

²² *Spangenberg v. Kolakoski*, 442 N.J. Super. 529, 531 (App. Div. 2015).

²³ *Id.* at 538.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

to grant plaintiff's request to terminate alimony obligation under the 2014 Amendments.²⁷ The Court in *Cherin* noted that an existing alimony clause in the property settlement agreement which dictated the duration of the alimony along with the final order entered in 1997 would not be disturbed in light of the enactment.²⁸

In a post-*Quinn* decision, the Appellate Division once again upheld the provisions of a pre-enactment settlement agreement and affirmed the trial court's determination in *Caso v. Guerrero*.²⁹ The Dual Final Judgment of Divorce which incorporated the terms of the Property Settlement and Support Agreement (PSSA) in *Caso* was finalized in September of 2011. The pertinent part of the agreement stated that:

in the event that [plaintiff] cohabits with an unrelated adult male in a relationship tantamount to marriage, and pursuant and subject to the then current New Jersey case law, [defendant] shall have the right to make an application to the [c]ourt for modification and/or termination of the alimony based upon the then-existing facts and then-existing case law.³⁰

The trial court reasoned that the language of the PSSA meant that “[the court] should apply the facts, statutory law and case law in existence at the time the [c]ourt is called upon to make the cohabitation determination.”³¹ Based on this reasoning, the Court applied the 2014 Amendments along with applicable case law to discern that the payee was cohabiting with her paramour and therefore, terminated the payor's alimony obligation.

These cases demonstrate the importance of including provisions relating to the modification of alimony in a judgment of divorces and settlement agreements. However, there is lack of consensus on the issue of the retroactive effect of the Amendments when a final judgment of divorce or an enforceable written agreement between the parties is silent on the issue of modification of alimony or when there is no final order that has concluded the post-judgment litigation on this issue.

In 2016, the Chancery Division Court in *Mills v. Mills* considered whether subsection (k) of the 2014 Amendments can be retroactively applied to modify a payor's alimony obligation.³² The Court answered in the affirmative noting that the settlement agreement was silent on issue of

²⁷ *Cherin v. Cherin*, 2016 WL 799756 (App. Div. Mar. 20, 2016). The court held that the cohabitation statute could not apply where cohabitation issue was previously resolved in 1997, prior to the enactment of the amendment. Plaintiff's additional argument that the anti-retroactive provision of the enactment only applied to the “duration” of the alimony and not to cohabitation was also rejected by the Appellate Division.

²⁸ *Id.* at *3.

²⁹ *Caso v. Guerrero*, 2017 WL 4021218 (App. Div. Sep. 13, 2017).

³⁰ *Id.* at *1

³¹ *Id.* at *5.

³² *Mills v. Mills*, 447 N.J. Super. 78, (Ch. Div. 2016).

modification of support based upon substantial change of circumstances.³³ Further, the Court noted that because the issue had not been litigated and adjudicated by the Court in prior post-judgment proceedings, the terms of the 2014 Amendments were applicable.³⁴

A month later, in *Klemash v. Klemash*, the Appellate Division heard a similar matter that dealt with the retroactive application of subsection (n) of the Amendments.³⁵ The judgment of divorce in *Klemash* was finalized prior to the effective date of 2014 Amendments and it did not include “any provisions concerning the modification of alimony or incorporate any agreements between the parties regarding modification of alimony.”³⁶ The trial court denied modification to alimony payments. However, the Appellate Division reversed and remanded the matter and directed the court to determine defendant’s claim of changed circumstances based upon cohabitation under N.J.S. 2A:34-23(n).³⁷

Two years later, in *Waldorf v. Waldorf*, the trial court considered and applied the 2014 Amendments (specifically the provision dealing with cohabitation) to a judgment of divorce that predated the enactment of the Amendments.³⁸ As in *Klemash*, the judgment of divorce in *Waldorf* did not address cohabitation. On appeal, the Appellate Division affirmed the trial court’s finding but stated that it was unsure if the Amendments applied.³⁹

In 2018, the Appellate Division in *M.L.M. v. M.W.M.* declined to follow *Mills* retroactive application of N.J.S. 2A:34-23(k) where the property settlement agreement between the parties in *M.L.M.*, “did not contain a provision delineating the standard of review for modification of support”.⁴⁰ The Appellate Division stated that the lower court in *M.L.M.*, was not bound to follow *Mills*, nevertheless it evaded the issue of retroactivity by reasoning that the defendant failed to raise such an argument before the trial court.⁴¹

Conclusion

Staff’s research to this time suggests that the issue of the retroactive effect of the Amendments is unsettled where the judgement of divorce, post-judgment litigation and/or marital settlement agreements between the parties finalized prior to the effective date of the Amendments

³³ *Id.*

³⁴ *Id.*

³⁵ *Klemash v. Klemash*, 2016 WL 3918858 (App. Div. July 21, 2016).

³⁶ *Id.* at *4.

³⁷ *Id.* at *7.

³⁸ *Waldorf v. Waldorf*, 2018 WL 2186644 (App. Div. May 14, 2018).

³⁹ *Id.* at *4.

⁴⁰ *M.L.M. v. M.W.M.*, 2018 WL 2167393 (App. Div. May 11, 2018). The final judgment of divorce was issued in 2011 which incorporated the property settlement agreement (PSA). In the PSA the defendant agreed to pay permanent alimony which was based on defendant’s income at the time of divorce. Defendant moved to modify his alimony based on changed circumstances.

⁴¹ *Id.* at *5.

are silent on the issue of alimony modification. Staff seeks guidance from the Commission regarding whether to proceed with this project or conclude its work in this area.