New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
DECEMBER 28, 2015 NJLJ.COM

FAMILY LAW

The Effective Date of the New Alimony Amendments

By John E. Finnerty

The language and legislative history of the alimony reform amendments make clear that their implementation was intended to be effective *immediately*:

> 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. or any enforceable written agreement between the parties.

The amendments did not say that the law was applicable only to cases started *after* the law was adopted, or that it was not to be applied to *pending* pre- or post-judgment cases. Since the law does not mandate prospective application, it was *not* intended to proscribe application to pending cases. See *Rothman v. Rothman*, 65 N.J. 219, 224 (1974); *Gibbons v. Gibbons*, 86 N.J. 515 (1981).

By their specific terms, the amendments were intended to be effective immediately, except for two carve outs: one prohibited the conversion of *final* decisions or agreement on alimony duration that had *concluded litigation* to the new durational guidelines. If repose had occurred because the time for exercising appellate rights had passed, then the mere adoption of the amendments would not legally justify a successful application to convert permanent alimony in a 10-year marriage into an award of alimony for 10 years or a lesser term. That the Legislature intended this construction of the statute is clear because two prior versions of the amendments, in 2013-14 and 2014-15, had provided for *automatic* conversion of a decree for alimony to the term mandated by those proposed statutes. Those bills were not adopted.

The second carve out precluded use of the amendments to alter contractual provisions that had been "specifically bargained for" and reduced to writing in an agreement or order, such as the agreement to use *Gayet* as the standard to assess cohabitation or to allow retirement at a specific age other than full Social Security retirement age. This carve out protected the sanctity of contracts. U.S. Constitution, Article I, Section 10, Clause I: "No State shall [...] pass any Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts...*" 1947 N.J. Constitution, Article IV, Section VII, Paragraph 3: "The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contacts..."

Impact of the Court's Decision in *Gnall*

When certification was granted in *Gnall v. Gnall* on Jan. 24, 2014, the case seemed critically important for defining the philosophy and standards to distinguish between permanent and limited duration alimony awards. However, after the adoption of the new amendments on Sept. 10, 2014, the case no longer seemed that important because new standards had been created which were to be effective "immediately." What did remain significant was the issue of the effective date of the statute and its applicability to *Gnall*.

When the decision finally came on July 29, there was a passing reference in a solitary footnote to the adoption of the new amendments. It states: "The amendment is not applicable to this case."

The issue of the effective date of the new alimony amendments needs to be litigated. If not, a confusing jurisprudence will develop.

What does that mean? No explanation is offered. With the court underscoring during oral argument that the statutes applicability to *Gnall* could not be decided because it had neither been briefed nor certified, how can the *Gnall* litigants be precluded from advocating that the statute is applicable on remand? The repose of finality had not yet occurred because—as in *Gibbons*—the matter was pending on appeal at the time the amendment was adopted. The trial court on remand cannot be bound by a footnote when the record unequivocally sets forth that that issue was not before the court. See *Barreiro v. Marais*, 318 N.J. Super. 461, 468 (App. Div. 1999)

Finnerty is the founder and senior partner of Finnerty, Canda & Concannon, in Fair Lawn, a practice devoted exclusively to family law and related matters. He assisted in drafting and negotiating the alimony reform amendments adopted by the Legislature in September 2014. He argued Gnall v. Gnall, *222 N.J. 414 (2015), as Amicus on behalf of the Matrimonial Lawyers Alliance. A former Chair of the New Jersey Supreme Court Family Part Committee Subcommittee on Custody and Parenting.*

Social Policy and Statutory Construction

It seems bad policy to have decisions being made a year after the passage of the new amendments that will continue a class of alimony that has been statutorily abolished. The amendments should be applied by the *Gnall* trial court on remand and by all trial courts on cases presently pending, or on direct appeal or new post-judgment applications, so long as the statutory carve outs are honored. If they are not, then the benefits of the law will not be available to any person divorced or who entered an agreement before Sept. 10, 2014. Arguably, they would not become effective for a generation. That certainly was not the Legislature's intention.

Such an application does not offend due process or principles of statutory interpretation. In interpreting a statute, a court first looks to statutory language. *See DiProspero v. Penn*, 183 N.J. 477, 492 (2005); *Maeker v. Ross*, 219 N.J. 565, 575 (2014). If the Legislature has not clearly expressed that the statute is to be applied only prospectively, then this general rule of statutory interpretation should not be applied mechanistically in every case. *See Rothman*, 65 N.J. at 224; *Gibbons*, 86 N.J. at 521.

Curative Legislation

The amendments signified the Legislature's recognition of deficiencies in the standards formulated in the alimony statute to guide the exercise of judicial discretion when fulfilling the statute's mandate to "revise and alter orders" as the "circumstances of the parties" required. N.J.S.A. 2A:34-23. The amendments were intended to cure those deficiencies and to improve the statute.

When there is no clear evidence that the Legislature intended only a prospective application, an amendment may be given retroactive application if it is curative. A curative statute attempts to improve a statutory scheme already in existence. As set forth by then Judge Long in *Kendell v. Snedeker*, 219 N.J. Super 283, 287 (App. Div. 1987), a statute is curative if "it is intended to explain or carry out the intent of the original statute or to remedy *an imperfection or mistake of the statute*." A statute is not curative if it is intended to correct or vacate a judicial decision. *See Botis v. Estate of Kurdrick*, 421 N.J. Super 197, 218 (App. Div. 2011). Moreover, even if statutory amendments are curative and to be applied retroactively, a court must also consider the parties' reasonable expectations regarding whether a retroactive application is warranted, and whether such an application would result in such a manifest injustice to a party such that it would be unfair to apply the statute retroactively.

Gibbons, 86 N.J. at 515, is authority for the construction believed appropriate regarding the alimony amendments. In *Gibbons*, the Legislature amended the equitable distribution statute on Dec. 31, 1980, to exclude inheritances and gifts from being equitably distributed. That statutory amendment occurred six months *after* a Supreme Court appeal was filed as of right, regarding a decision that distributed gifts and inheritance from the husband's family equally to the wife. The appeal was as of right because of a dissent in the Appellate Division.

In its decision, the court said that the statutory amendment would be applied retroactively to the case "and to all other cases pending on direct appeal, in which final judgment has not been entered." The statutory amendment in *Gibbons* set forth that that amendment was to be "effective immediately," language identical to the effective date language of the current alimony amendments.

The *Gibbons* court ruled that there was no clear expression of a legislative intent to apply the statute prospectively. It ruled that the amendment was curative, intended to improve an existing statutory scheme. It held that Mrs. Gibbons was not unfairly disadvantaged by applying the amendments to exclude her husband's inheritances from distribution, despite Mrs. Gibbons having sought only equitable distribution and not alimony because of what she believed was the broad scope of the assets subject to equitable distribution. The court said that manifest injustice would not occur because orders pertaining to alimony may be revised and altered from time to time as the circumstances require pursuant to N.J.S.A. 2A:34-23 and *Lepis v. Lepis*, 83 N.J. 139 at 145-49 (1980).

Without question, the recent alimony amendments are curative in nature. The amendments are reasonably construed to be curative because they clarify and provide additional criteria and more guidance for courts when they exercise their century-old statutory jurisdiction to revise and alter support orders as circumstances may require to assure that awards are "fit, reasonable and just." N.J.S.A. 2A:34-23. The statutory amendments continue to preserve the historic discretion of matrimonial judges; they just create a different prism and add criteria. The statutory amendments improve the existing statutory scheme by making clear that lifestyle is a status to which both litigants are entitled, not just the dependent spouse. The statute prior to amendment said that, but not as emphatically as the amendments do. The amendments make this clear by stating in two locations that neither party has a greater entitlement to maintaining the marital lifestyle.

Moreover, the other amendments also assist courts in exercising their discretionary jurisdiction to "revise and alter" court orders from time to time. They provide realistic criteria for courts to consider when assessing change of circumstance applications regarding job loss, reduced income, retirement or cohabitation. The amendments are not intended to correct or to vacate a judicial decision. Even the new limitation on discretion—that marriages of less than 20 years shall not have alimony longer than the length of the marriage—maintains the court's ability to exercise its discretion to find that there are exceptional circumstances which might warrant open durational alimony and suggests non-exclusive criteria for assessing exceptional circumstances.

Applying the amendments to applications made in concluded cases after the effective date, or to those cases still pending, will not be unfair to any party because as *Gibbons* teaches, no one has the right to expect that the law will never change. If Mrs. Gibbons had no right to rely on receiving a share of her husband's inheritance, upon divorce, so too Mrs. Gnall and others in her position cannot protest that permanent alimony has ended as a matter of statutory revision.

Conclusion

The issue of the effective date of the new alimony amendments clearly has not been litigated in the sense of its presentation to a court with full analysis being made. Someone needs to do that. If not, a confusing jurisprudence will develop, some of which will be based upon a footnote that has neither explanation nor analysis in a decision following an oral argument which made clear that the issue referenced in the footnote was not before the court. ■