

To: New Jersey Law Revision Commission
From: Arshiya Fyazi
Re: Alimony Statute – Modification in Anticipation of Prospective Retirement N.J.S. 2A:34-23(j) (*Mueller v. Mueller*, 446 N.J. Super. 582 (2016))
Date: January 11, 2021

Memorandum

Executive Summary

In December 2017, Commission Staff proposed a project based on the Chancery Division decision in *Mueller v. Mueller*,¹ wherein the Court considered an application to terminate alimony based on the applicant’s prospective retirement. The issue raised in *Mueller* involved a specific section of the alimony statute, N.J.S. 2A:34-23(j)(2), that permits modification of alimony in advance of retirement, but does not prescribe the time-period for the filing of such application.²

At the December meeting of the Commission, Staff was authorized to solicit input on this topic from matrimonial and elder law attorneys. Staff conducted the requested outreach to ascertain whether amending the statute to include a time frame for filing an application to modify alimony obligation based on prospective retirement would be beneficial to practitioners and their clients.³

As explained below, the preliminary outreach did not yield a definitive answer to the Commission’s question.

Background

In *Mueller*, the Plaintiff agreed to pay the Defendant permanent alimony in sum of \$300 per week pursuant to their matrimonial settlement agreement (MSA).⁴ The MSA was silent on the issue of Plaintiff’s permanent alimony support obligation and its relation to retirement.⁵ Pursuant to the amended alimony statute, the Plaintiff sought a court order that would prospectively terminate his alimony obligation upon his retirement in five years.⁶ He asserted that he would be unable to retire as planned if his alimony obligation were not terminated upon his retirement age of sixty-two.⁷

The Court noted that, “the statute does not establish or address specific time periods for filing an advance motion based upon perspective retirement.”⁸ The Court also indicated that since

¹*Mueller v. Mueller*, 446 N.J. Super. 582 (Ch. Div. 2016); see Memorandum from Renee Wilson, former Legislative Law Clerk on Alimony Modification in anticipation of prospective retirement to the New Jersey Law Revision Commission (Nov. 6, 2017) (on file with the Commission).

² N.J. STAT. Ann. § 2A:34-23(j) (West 2020).

³ See NEW JERSEY LAW REVISION COMMISSION (2017) ‘Alimony Modification’. *Minutes of NJLRC meeting 21 Dec. 2017*, Newark, New Jersey.

⁴ *Mueller* at 586.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 589.

the statute is relatively new, there was no post-amendment guidance available regarding the analysis of a litigant's application to terminate alimony based on prospective rather than actual retirement.⁹ The Court ultimately determined that a reasonable interpretation of the amended statute is

one that allows the court to order a prospective termination or modification of alimony based upon future, prospective retirement, when (a) the prospective retirement will take place in the near future, rather than many years after the actual application, and (b) the applicant presents a specifically detailed, proposed plan for an actual retirement, as opposed to a non-specific, general desire to someday retire. A detailed plan may include...not only a proposed specific date of retirement, but details in terms of the obligor's plan for economic self-support following retirement as well.¹⁰

The Court determined that the Plaintiff's application was premature and did not meet the above criteria.¹¹ The Court suggested that the application would have been more suitable if it had been brought twelve to eighteen months before the plaintiff's prospective retirement.¹²

In addition to other modifications,¹³ the September 10, 2014 amendments to N.J.S. 2A:34-23 added subsections (j)(1) through (j)(3) that dealt principally with alimony modification due to retirement.¹⁴ N.J.S. 2A:34-23(j)(2) authorizes the court to terminate or modify an alimony obligation upon obligor's actual or prospective retirement.¹⁵ However, the statute does not explicitly set forth the time period for filing an advance motion based upon a prospective retirement.¹⁶

Outreach

Request for comment was sent to twelve individuals including attorneys specializing in family law as well as various members of the New Jersey Bar Association – Family Law and Elder Law Section. In response, Staff received two comments.

- *Comment from NJSBA – Family Law Section*

A member of the Family Law Section of the New Jersey Bar Association provided Staff with insight on this subject. According to that commenter, setting a prescribed time-period for

⁹ *Id.*

¹⁰ *Id.* at 591.

¹¹ *Id.* at 592.

¹² *Id.* at 593.

¹³ The amendment to N.J.S. 2A:34-23 added subsections (j)-(n) that addressed modification to alimony payments due to retirement, change in income, temporary remedies, and cohabitation.

¹⁴ N.J. STAT. Ann. § 2A:34-23(j)(1-3) (West 2020). The new retirement section (j)(1) covered termination of alimony obligations established in an order entered after September 10, 2014; section (j)(2) covered termination of alimony based on early retirement; and section (j)(3) covered termination of alimony obligations established in an order entered before September 10, 2014.

¹⁵ *Mueller* at 588.

¹⁶ *Id.* at 589.

filing an application for prospective retirement will be “too arbitrary”.¹⁷ Further, the courts should handle such applications on case-by-case basis because the matters tend to be fact sensitive.¹⁸ Finally, it was suggested that an applicant should be allowed to file depending on his or her circumstances.¹⁹ If the application is premature, the Court can deny it without prejudice subject to refile.²⁰

- *Comment from private practitioner – Matrimonial Law*

A private practitioner specializing in Matrimonial law also provided feedback on this issue. That commenter stated that there might be a benefit to establishing a timeframe for filing such an application. The commenter explained that section (k) of N.J.S. 2A:34-23, that discusses unemployment as a change in circumstance and allows for a 90-day window before an application can be filed, could be used as an example.²¹ Using this section as a model, the prospective retirement section can be modified to include a timeline whereby an application can be made in advance, granted that any such modification or termination of alimony payments allowed by the court will not go into effect until actual retirement is verified.²² A plenary hearing on this matter will allow the litigants to know what their expenses will be as they prepare for retirement.²³

The commenter cautioned, however, that “courts are reluctant to making decision based upon speculative future events.”²⁴ Further, changes in financial circumstances or health conditions of the parties may be affected between the time the order was entered and the eventual retirement of the obligor.²⁵ Unforeseen issues such as this can undermine the desire for the court to grant an order based on the obligor’s prospective retirement application.²⁶

Additional Research

A fifty-state survey was conducted by Staff to ascertain how other states deal with the issue of prospective retirement. Research suggests that no other state has specified a time frame in their statutes regarding when an application may be filed for alimony modification based on changed circumstances or prospective retirement.

¹⁷ Memorandum from Arshiya Fyazi, Counsel, N.J. Law Rev. Commission, to file regarding telephone interview with Ronald G. Liberman, Esq., Chair, N.J. State Bar Association, Family Law Div. (Oct. 20, 2020) (on file with the NJLRC).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ E-mail from Rawan Hmoud, Esq., to Arshiya Fyazi, Counsel to N.J. Law Rev. Commission (Oct. 13, 2020) (on file with the NJLRC).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

A review of the case law from other jurisdictions indicates that courts require a showing that retirement or a change in circumstances occurred prior to filing an application for modification or termination of alimony payments.²⁷ Cases in which the court granted modification based on prospective retirement entailed situations where retirement of the payor was imminent.²⁸

Pending Legislation

In the current legislative session, there are five bills that seek to amend N.J.S. 2A:34-23.²⁹ These bills do not address the time when a litigant may file an application to modify alimony based on prospective retirement.

Conclusion

Muller was decided in 2016 and since then no other case has addressed the specific issue of filing an advanced motion grounded on prospective retirement. Based on the above, Staff seeks guidance from the Commission regarding whether to proceed with the project or to suspend or conclude its work in this area.

²⁷ See *Purin v. Purin*, 158 So. 3d 752, 753 (Fla. Dist. Ct. App. 2015) (Florida District Court of Appeals held that the trial court improperly denied permanent alimony solely because the husband would prospectively retire in 10 years. It found that “trial courts may not consider future or anticipated events in setting current alimony and child support amounts due to the lack of an evidentiary basis or the uncertainty surrounding such future events.”) See also *Speaker v. Speaker*, 183 A.3d 411 (Pa. Super. Ct. 2018) (The Court found that former husband's desire to retire at unknown date in future and his alleged poor health did not constitute a substantial and continuing change in circumstances to warrant modification to alimony payments; *Ryan v. Ryan*, 697 A.2d 60 (Me. 1997) (On appeal the Court denied modification because an intended retirement in the not-too-distant future was too speculative to determine eligibility for modification.)

²⁸ See *Wettstaedt v. Wettstaedt*, 625 N.W.2d. 900 (Wis. Ct. App. 2001) (Court granted modification for reduction in alimony 3-4 months prior to anticipated retirement date of the husband). See also *Spencer v. Spencer*, 720 A.2d 1159, 1162 (Me. 1998) (Impending retirement constituted a sufficient change in circumstances for the court to amend the husband's spousal support obligation.) *McFadden v. McFadden*, 563 A.2d 180, 183 (Pa. Super. Ct. 1989) (The Court granted modification based on husband's filing for reduction in alimony obligation within one month of prospective retirement date.)

²⁹A.B. 1875, and S.B. 1695, 219th Leg., 1st Sess. (N.J.2020) (Regulates the authority of the court to make provision for the educational expenses of an unemancipated child in certain instances involving child support.); A.B. 1302, 219th Leg., 1st Sess. (N.J.2020) (Prohibits awarding alimony to domestic violence offenders; permits termination of alimony based on conviction for crime or offense involving domestic violence.); A.B. 354, 219th Leg., 1st Sess. (N.J.2020) (Permits modification of alimony award based on cohabitation of supported spouse.); S.B. 930, 219th Leg., 1st Sess. (N.J.2020) (Provides for animal protection orders and assignment of pet custody in divorce or dissolution of civil unions.)