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# The Not-So 'New' Alimony Statute: Retroactivity Questions Remain Unanswered

The "new" alimony statute is more than seven years old, yet it still leaves unanswered questions. This article is focused on N.J.S.A. 2A:34-23(k), which permits a non-self-employed spouse to seek a modification of alimony, and whether subsection (k) can be applied retroactively.

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The “new” alimony statute is more than seven years old, yet it still leaves unanswered questions. Among them is whether, and to what extent, the statute’s subsections have retroactive application. The need for a definitive standard is most acute when a non-self-employed litigant files a post-judgment motion seeking to review or modify an alimony obligation that pre-dates the statute. While a court is vested with broad discretion and inherent authority to address each unique factual situation, the lack of a definitive standard has the unintended effect of perpetuating confusion and litigation among attorneys and judges. Due to space limitations, this article is focused on N.J.S.A. 2A:34-23(k), which permits a non-self-employed spouse to seek a modification of alimony. More specifically, it addresses whether subsection (k) can be applied retroactively to cases decided or settled prior to the 2014 statutory amendments.

Subsecton (k) provides that a trial court shall consider the following factors when deciding whether to modify an obligor’s alimony payment:

(1) The reasons for any loss of income;

(2) Under circumstances where there has been a loss of employment, the obligor’s documented efforts to obtain replacement employment or to pursue an alternative occupation;

(3) Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;

(4) The income of the obligee; the obligee’s circumstances; and the obligee’s reasonable efforts to obtain employment in view of those circumstances and existing opportunities;

(5) The impact of the parties’ health on their ability to obtain employment;

(6) Any severance compensation or award made in connection with any loss of employment;

(7) Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;

(8) The reasons for any change in either party’s financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party’s financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

(9) Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigations by the unemployed spouse or partner; and

(10) Any other factor the court deems relevant to fairly and equitably decide the application.

Under circumstances where the changed circumstances arise from the loss of employment, the length of time a party has been involuntarily unemployed or has had an involuntary reduction in income shall not be the only factor considered by the court when an application is filed by a non-self-employed party to reduce alimony because of involuntary loss of employment. The court shall determine the application based upon all of the enumerated factors, however, 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. The court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income.

Clearly, the answer to the subsection (k) retroactivity question cannot be discerned from the statutory text. In turn, we must look to the legislative history.

Legislative intent of retroactivity can be shown: "(1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant." *Ardan v. Bd. of Review*, 231 N.J. 589, 610 (2018)(citation omitted). Although retroactivity is addressed in N.J.S.A. 2A:34-23(j)(3)("When a retirement application is filed in cases in which there is an existing final alimony order or enforceable written agreement established *prior to the effective date of this act* ...."), subsection (k) does not address retroactivity or contain sub-parts that provide pre- and post-amendment approaches to modification. However, the bill adopting the alimony amendments 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*.

L. 2014, *c.* 42, §2 (emphasis added). This language depicts the Legislature's intent to limit the application of the amendments to prevent modifications to "duration" or other "specifically bargained for contractual provisions[.]" *Ibid.* The issue then is whether a pre-amendment agreement or order falls within the purview of N.J.S.A. 2A:34-23(k).

In *Mills v. Mills*, 447 N.J. Super. 78 (Ch. Div. 2016), a case that squarely addressed retroactive application of subsection (k), the trial court looked to the legislative intent of the 2014 amendments. It determined that although the Legislature wanted to "prevent the amendments themselves from becoming an independent basis for a party to unilaterally attempt to un-do a contractual agreement" and to prevent parties from seeking "a do-over on every alimony case," it did not intend to bar the retroactive application of the 2014 amendments. *Id.* at 95. The trial court provided sound reasoning as to the retroactivity of subsection (k):

> [I]f the Legislature intended to exclude every single litigant who was divorced prior to September 10, 2014, from invoking the terms of the amended statute to address any post-judgment loss of employment or substantial downturn in circumstances arising after such date, the Legislature could have easily stated so in the statute, with a simple sentence such as: "*The terms of N.J.S.A 2A:34-23(k) may not be invoked by any litigant who was divorced prior to September 10, 2014, even if the loss of employment or other downturn in financial circumstances occurred after said date and was not previously addressed in the parties' settlement agreement or by a court.*"

*Ibid.* (emphasis in original). The decision in *Mills* is supported by several unpublished Appellate Division cases. *See, e.g.*, *Zaccardi v. Zaccardi*, No. A-3024-15T3 (App. Div. Mar. 9, 2018)(retroactively applying subsection (k) where parties had no written agreement to apply a different standard); *Signore v. Signore*, No. A-1160-15T3 (App. Div. Feb. 3, 2017)(retroactively applying subsection (k) where JOD did not include any provision prohibiting the modification of alimony); and *Klemash v. Klemash*, No. A-1878-14T2 (App. Div. July 21, 2016)(retroactively applying subsection (k) where the JOD did not include a provision concerning modification of alimony or incorporate an agreement between the parties regarding modification).

In one unpublished case, *Freydont v. Lenchner*, No. A-6046-17T1 (App. Div. Oct. 2, 2019), the panel declined to apply subsection (k) retroactively where the "parties agreed that defendant could only seek alimony modification if he could make a prima facie showing of an 'involuntary change in his job status'[.]" Although

the court declined to apply subsection (k) retroactively, its decision stemmed from bargained-for, contract-based language regarding a modification of alimony. Therefore, this decision is not inconsistent with *Mills*.

On the other hand, in one unpublished case, *M.L.M. v. M.W.M.*, A-2611-16T3 (App. Div. May 11, 2018), the panel refused to apply subsection (k) retroactively (specifically rejecting the published trial court decision in *Mills*): "*Mills* was not binding on the trial court and we decline to follow its retroactive application of N.J.S.A. 2A:34–23(k) where the Legislature made no such pronouncement." There is, therefore, a differing approach to retroactivity of N.J.S.A. 2A:34-23(k) at the Appellate Division.

To be sure, as noted in *M.L.M.*, the best indicator of intent is the statutory language. However, where additional extrinsic evidence of legislative intent compels a particular interpretation, a court should not disregard that evidence, *see DiProspero v. Penn*, 183 N.J. 477, 492 (2005). Against this backdrop, it is evident that the Legislature did not intend to limit subsection (k) to post-amendment cases. If it had so intended, the Legislature could have expressly provided for such a limitation in the 2014 amendments. In the absence of that language, and considering the Legislature's intent to create greater fairness and equity for supporting spouses who legitimately suffer a downturn in financial circumstances, it follows that subsection (k) must be applied retroactively in cases where the parties' agreement does not directly address the issue of modification.

For example, if a marital settlement agreement stated: "an application to modify alimony by the Obligor may not be made until she has been unemployed for 12 months," or "alimony may not be modified unless the Obligor suffers a 30% decline in income," the amended N.J.S.A. 2A:34-23(k) would *not* apply because, under those scenarios, the parties "specifically bargained" for a modification standard. However, in the absence of specific, contract-based modification language, it would make little sense to have dueling modification paths —a pre-amendment *Lepis* path and a subsection (k) path—considering that subsection (k) embodies principles from *Lepis* and that the overarching issue is whether financial circumstances have changed sufficiently to modify alimony.

Due to the varying approaches to this issue throughout the state, and the frequency with which it arises, we hope the Appellate Division and Supreme Court have opportunities to answer the retroactivity question in published decisions.

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