



Burdens of Proof for Retirees

by Debra S. Weisberg

On Feb. 22, 2016, Judge Marie E. Lihotz, writing for the Appellate Division, issued a decision in the case of *Landers v. Landers*.¹ This is the first published decision by a court clarifying the New Jersey Legislature's amendments to the alimony statute² addressing the modification of alimony when an obligor retires.³

In *Landers*, the plaintiff appealed from an order entered by the Family Part terminating the defendant's alimony obligation as a result of his retirement.⁴ The trial court judge applied N.J.S.A. 2A:34-23(j)(1), which addresses awards entered after the effective date of the amended statute, as opposed to subsection (j)(3), which governs awards of alimony established prior to the effective date of the amendments to the alimony statute.⁵ In this matter, a final judgment of divorce was filed on June 24, 1991, after the parties' 23-year marriage.

The defendant had an alimony obligation to the plaintiff, and after his 66th birthday he filed an application seeking to

terminate his alimony obligation of 24 years. At that time, the defendant claimed his income consisted of his pension, which he received as part of equitable distribution, and Social Security retirement benefits. In addition, the defendant represented that he had medical conditions, including surgery and being a cancer survivor, which required him to take medications for chronic ailments. These medical conditions directly impacted his decision to retire.⁶

The plaintiff opposed the defendant's application to terminate alimony, identifying her own chronic medical conditions, receipt of her share of Social Security retirement benefits and a Social Security disability benefit.⁷ The plaintiff further argued that the alimony award was non-modifiable under the amended statute, claiming the statutory amendments did not affect the terms of the parties' final judgment of divorce as it was entered prior to the effective date of the amendments on Sept. 10, 2014.⁸ The trial court rejected the plaintiff's position and applied the rebuttable presumption and factors set forth in N.J.S.A. 2A:34-23(j)(1).⁹ The trial court

concluded that the plaintiff failed to overcome the presumption that alimony should be terminated when an obligor attained full retirement age.¹⁰

The plaintiff appealed the retired judge's decision, arguing that the statutory provisions were improperly applied, and that the burden of proof was not on her, but rather on the defendant.¹¹ Accordingly, the Appellate Division reviewed the question of the statute's interpretation on appeal.

The Appellate Division noted that subsection (j) specifically distinguished alimony orders that were entered before Sept. 10, 2014, and those entered after that date, when the alimony statute was amended. The court acknowledged that the amendments included a new subsection (j), which delineated the objective considerations the court must examine and weigh when reviewing an application to either modify or terminate alimony upon the obligor's retirement.¹²

The Appellate Division specifically quoted the legislative history to the amendments of the alimony statute, which stated:

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.¹³

The legislative history recognized the need to enforce prior agreements or orders executed and filed before the statutory amendments were adopted. The court found that the legislative directive was "unambiguous," and that the court's examination of a modification to reduce or terminate alimony

when an obligor retires shall depend on the original date the alimony was awarded.¹⁴ The court went on to explain that subsection (j)(3) applies when an application is filed based on retirement in which "there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act..."¹⁵ The rebuttable presumption, set forth in subsection (j)(1), placing the burden on the obligee to demonstrate that alimony must continue once the obligor reaches full retirement age, is replaced by a different standard as set forth in subsection (j)(3).¹⁶

The requirement in subsection (j)(3) more closely follows the *Lepis v. Lepis*¹⁷ analysis in terms of changed circumstances. This section places the burden of proof on the obligee to overcome a rebuttable presumption that alimony would be modified or terminated when the obligor reaches full retirement age.

The Appellate Division also recognized that subsection (j)(3) required the court to consider the obligee's ability to have adequately saved for his or her retirement, as well as the other factors set forth in the subsection, to determine whether the obligor demonstrated a modification or termination is appropriate by a preponderance of the evidence.¹⁸

Thus, the Appellate Division confirmed that it could not ignore the application made by the defendant to modify his alimony obligation in light of his retirement, which was established prior to the effective date of the amendments to the alimony statute, which thereby triggered a review in accordance with the factors set forth in N.J.S.A. 2A:34-23(j)(3).¹⁹

Accordingly, the Appellate Division reversed the trial court's decision, which erroneously relied on subsection (j)(1), and instructed that the courts must abide by the Legislature's clear direction.²⁰ The trial court's order was vacated and the Appellate Division remanded the matter to the Family Part

judge to conduct the necessary proceedings and apply the factors and burden of proof defined in N.J.S.A. 2A:34-23(j)(3).²¹

As the amendments to the alimony statute were only enacted in 2014, it is likely that a substantial number of cases to come before the court with respect to retirement will be based upon orders entered prior to the effective date of the statute. Accordingly, a careful review of the circumstances surrounding the request for modification on the basis of retirement is necessary, as the standards of review and burden of proof are substantially different and delineated in the statute. ☺

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Endnotes

1. *Landers v. Landers*, 444 N.J. Super. 315 (App. Div. 2016).
2. N.J.S.A. 2A:34-23.
3. N.J.S.A. 2A:34-23(j)(1)-(3).
4. *Landers v. Landers*, 444 N.J. Super. at 316.
5. *Id.* at 317.
6. *Id.* at 317-318.
7. *Id.* at 318.
8. *Id.* at 318-319.
9. *Id.* at 319.
10. *Ibid.*
11. *Id.* at 320.
12. *Id.* at 321.
13. *Id.* at 323.
14. *Id.* at 322.
15. *Ibid*; see, N.J.S.A. 2A:34-23(j)(3).
16. *Id.* at 323.
17. 83 N.J. 139 (1980).
18. *Id.* at 324.
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*