To: New Jersey Law Revision Commission
From: Wendy Llewellyn
Re: Remarriage for Purposes of Alimony (*Sloan v. Sloan* and N.J.S. 2A:34-23)
Date: September 10, 2018

M E M O R A N D U M

Executive Summary

In *Sloan v. Sloan*,[1] the Appellate Division considered whether a trial court judge appropriately terminated plaintiff's alimony based on his "remarriage," per the divorce settlement agreement, when his "remarriage," because it was performed without a marriage license, did not meet the statutory requirements of marriage under N.J.S. 37:1-10.[2]

The Appellate Division determined that the trial court did err in terminating plaintiff's alimony, and remanded the case for consideration as to whether plaintiff's alimony instead should be modified under grounds of "changed circumstances" as per case law, and also so that the parties could raise the issue of whether the September 10, 2014, amendments to N.J.S. 2A:34-23 (specifically, N.J.S. 2A:34-23(n)), applied to defendant's alimony obligation.[3]

Background

The Matrimonial Settlement Agreement (MSA) between the plaintiff and the defendant, which was incorporated into their Final Judgment of Divorce in June of 2014, stipulated that defendant, who was to pay permanent alimony to plaintiff, would be released from her alimony obligation "upon the death of [plaintiff] or his remarriage."[4] In 2015, plaintiff and his significant other had a "commitment ceremony," publicly announced they were getting married, announced their "engagement" in a wedding magazine, and began referring to each other as husband and wife.[5] Defendant filed a motion to terminate her alimony obligation based on the provision in the MSA stipulating that alimony could be terminated upon plaintiff's remarriage.[6] Defendant opposed based on the fact that he and his significant other did not obtain a marriage license, and therefore were not "remarried" legally.[7]

The trial court judge terminated plaintiff's alimony because, even though plaintiff was not legally remarried, the judge considered plaintiff's intentional avoidance of legal marriage

[1] *Sloan v. Sloan*, No. A-2620-15T3, 2017 WL 1282764 (N.J. Super. Ct. App. Div. Apr. 6, 2017).
[2] *Id.* at *2.
[3] *Id.* at *4.
[4] *Id.* at *1.
[5] *Id.*
[6] *Id.*
[7] *Id.*

solely to avoid losing his alimony to be inequitable and unjust.[8] However, the Appellate Division determined that the MSA, on its face, specifically stated alimony was to be terminated on "remarriage," and that "marriage" requires a license under N.J.S. 37:1-2 and N.J.S. 37:1-10.[9] Despite ruling that alimony was inappropriately terminated, the Appellate Division did remand the case for consideration of whether alimony should instead be modified due to a change in economic circumstances under existing case law.[10] The Court also noted that neither party had raised the 2014 amendments to N.J.S. 2A:34-23, which governs orders of alimony, and that on remand the parties should be permitted to address whether the amendment adding N.J.S. 2A:34-23(n), providing for the termination or suspension of alimony if the payee cohabits with another person, applied to this case.

The relevant portion of the statute states the following:

N.J.S. 2A:34-23(n):

> Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.[11]

The statute lists factors that the court can consider to determine whether cohabitation exists.[12]

The Appellate Division, in *Sloan*, suggested that the parties should raise on remand the issue of whether the September 10, 2014, amendment permitting termination or suspension of alimony upon the cohabitation of the payee applied in that case. The New Jersey Supreme Court, other Appellate Division panels, and trial court decisions, have reached different conclusions as to whether or not the Legislature intended the amendments to apply to settlement agreements finalized and in effect before September 10, 2014.

The September 10, 2014 amendments to N.J.S. 2A:34-23 added subsections (j) through (n), which address modifications to alimony payments due to retirement, change in income, temporary remedies, and cohabitation.[13]

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[8] *Id.* at *2.
[9] *Id.* at *2-*3.
[10] *Id.* at *4.
[11] N.J.S. 2A:34-23(n).
[12] *Id.*
[13] N.J.S. 2A:34-23(j)-(n).

In *Quinn v. Quinn*, the New Jersey Supreme Court, in a footnote, noted that in enacting the 2014 amendments, the Legislature clarified that this law:

> 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.[14]

Based on that language, the New Jersey Supreme Court in *Quinn* determined that the amendment in question, as to cohabitation, did not apply to the parties' 2006 Property Settlement Agreement (PSA).[15]

Although there are cases in which the *Quinn* footnote and/or the Legislative statement are taken into consideration, and the 2014 amendments are not applied retroactively,[16] there are also cases in which the Appellate Division *has* applied the amendments retroactively when the agreements had included, among other provisions, language indicating that they were to be governed by New Jersey law.[17]

In the later case of *Waldorf v. Waldorf*, the trial court judge "considered and applied the 2014 cohabitation amendment, N.J.S. 2A:34-23(n)" to a judgment of divorce that was finalized December 21, 2011, but the Appellate Division said it was "unsure [the amendment] applies."[18] The Appellate Division in *Waldorf* noted the language accompanying the 2014 amendments, and stated that it had determined in *Spangenburg* that "[t]his additional statement signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments."[19] The Appellate Division then determined that while the Judgment of Divorce in *Waldorf* did not address cohabitation at all, defendant was seeking to modify the alimony that was incorporated into the final judgment of divorce that

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[14] *Quinn v. Quinn*, 225 N.J. 34, 65 n.3 (2016) (quoting *L.* 2014, *c.* 42, § 2).
[15] *Id.* at 65, 38.
[16] *Frick v. Frick*, No. FM-04-1024-09, 2016 WL 7030475, at *4 (N.J. Super. Ct. App. Div. December 2, 2016) (noting "[t]he parties entered into their PSA in 2009. The amendments did not take effect until 2014. Thus the Legislature and subsequent case law make clear that this 2009 PSA remains unaffected by passage of law."); *J.S. v. J.M.*, No. A-5401-15T1, 2018 WL 1597961, at *4 (N.J. Super. Ct. App. Div. April 3, 2018) (holding the amendments did not apply to a 2010 PSA).
[17] *C.C. v. R.C.*, No. A04441-15T4, 2017 WL 6577480, at *3-*4 (N.J. Super. Ct. App. Div. December 26, 2017) (applying factors from the amendments to a PSA entered in 2004 where the PSA was to be governed by New Jersey law); *Signore v. Signore*, No. FM-02-149-04, 2017, 2017 WL 461282, at *1-*3 (N.J. Super. Ct. App. Div. February 3, 2017) (remanding a case for the judge to consider the amendment (k) where the June 28, 2014 agreement stated alimony could be discontinued "for any other reason or circumstances as allowed by the Laws of the State of New Jersey for the termination of alimony/spousal support.").
[18] *Waldorf v. Waldorf*, No. A-4798-15T4, 2018 WL 2186644 (N.J. Super. Ct. App. Div. May 14, 2018).
[19] *Id.* at *4 (citing *Spangenburg v. Kolakowski*, 442 N.J. Super. 529, 538 (App. Div. 2015).

predated the enactment of the 2014 amendment, and it was therefore unclear whether the 2014 amendment applied.[20]

In *Mills v. Mills*, on the other hand, the Chancery Division court contemplated the Legislature's intent regarding the 2014 amendments, specifically subsection (k), and determined that if the Legislature had intended to prohibit retroactive application of the amendments to agreements made before September 10, 2014, it would have included language to that effect.[21]

Later, the Appellate Division in *M.L.M. v. M.W.M.* stated that although *Mills* did retroactively apply the 2014 amendment to N.J.S. 2A:34-23 that added subsection (k),

> *Mills* was not binding on the *[M.L.M.]* trial court and we decline to follow its retroactive application of N.J.S.[] 2A:34-23(k) where the Legislature made no such pronouncement. Indeed, 'the best indicator of that intent is the statutory language.' Nothing in N.J.S.[] 2A:34-23(k) requires the court to apply the statutory factors to a PSA, which pre-dates September 10, 2014, its effective date, especially where a litigant, as defendant in this case, has failed to raise such an argument before the trial court.[22]

The Appellate Division in *M.L.M.* did not specifically find that the 2014 amendment was never to be applied retroactively, but instead did not fully address the issue because it had not been raised at the trial level. The quoted language does, however, indicate a disagreement with the retroactive application of the 2014 amendments.

Finally, in *Landers v. Landers*, the Appellate Division noted that subsection (j)(3), unlike the other amendments, specifically distinguishes alimony orders finalized before the amendment's effective date and those that were finalized after, in that it states "when a retirement application is filed <u>in cases in which there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act</u>."[23] The *Landers* Court took this as an indication that the lack of similar language in the other subsections specifically referencing agreements finalized before the effective date of the amendments meant that the amendments were not meant to apply retroactively.[24]

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[20] *Id.*
[21] *Mills v. Mills*, 447 N.J. Super. 78, 96 (Ch. Div. 2016).
[22] *M.L.M. v. M.W.M.*, No. A-2611-16T3, 2018 WL 2167393, at *5 (N.J. Super. Ct. App. Div. May 11, 2018). (quoting *DiProspero v. Penn*, 183 N.J. 477, 492 (2005).
[23] *Landers v. Landers*, 444 N.J. Super. 315, 323 (App. Div. 2016) (emphasis added).
[24] *Id.* at 324.

Conclusion

Based on *Sloan*, and cases decided after 2014, there appears to be a lack of consensus across the courts as to whether the 2014 amendments to N.J.S. 2A:34-23, adding subsections (j) through (n), apply only to divorce settlement agreements finalized after the 2014 amendments took effect on September 10, 2014, or if the amendments may be applied retroactively. Although language accompanying the bill stated the amendments were not meant to be construed to affect already-finalized agreements, there is nothing in the statute itself to clarify whether the amendments are meant to apply only to agreements finalized as of the amendments' effective date of September 10, 2014.

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether modifying N.J.S. 2A:34-23 in some way would be useful in clarifying this issue.