

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2018

PHILADELPHIA, TUESDAY, APRIL 17, 2018

VOL 257 • NO. 74

An **ALM** Publication

FAMILY LAW

Court Examines the Impact of Retirement in Alimony Termination Case

BY MICHAEL E. BERTIN

Special to the Legal

Alimony is a post-divorce remedy that consists of a monthly payment from one spouse to the other that begins upon the entry of a divorce decree. If alimony is being paid pursuant to a provision in the parties' property settlement agreement that is thereafter incorporated but not merged with the divorce decree divorcing the parties, the alimony payments may only be modified pursuant to the terms of the written agreement. In many instances, alimony provisions contained in a property settlement agreement are not modifiable, as the agreement will state. However, when alimony is ordered by a court, the alimony order is subject to modification and termination upon a showing of a substantial and continuing change in circumstances pursuant to the Pennsylvania Divorce Code (23 Pa.C.S. Section 3701(e)).

Modifying an alimony order as a result of retirement is commonly discussed



MICHAEL E. BERTIN is a partner at the law firm of Obermayer Rebmann Maxwell & Hippel. He is co-author of the book "Pennsylvania Child Custody Law, Practice, and Procedure." Bertin is a fellow of the American

Academy of Matrimonial Lawyers, a former chair of the family law section of the Philadelphia Bar Association, the current co-chair of its custody committee, and holds the officer position of first vice chair of the family law section of the Pennsylvania Bar Association. Contact him at 215-665-3280 or michael.bertin@obermayer.com.

among family law practitioners. In the recent case of *Speaker v. Speaker*, ___ A.3d ___, 2018 PA Super. 58 (March 16), the Pennsylvania Superior Court addressed the issue of the payor's retirement in relation to the modification and termination of an alimony order. In the *Speaker* case, the husband and wife were married for approximately 20 years and the husband was a successful lawyer and managing partner of his law firm for approximately half of the marriage. The wife was a homemaker during the marriage and obtained her real estate license in 2005 (when the parties separated).

According to the opinion, the parties entered into a marital settlement agreement that was incorporated into the parties' divorce decree entered in 2008. As the opinion indicates, on the date of the parties' divorce decree, "the trial court issued an alimony order that ordered the husband to pay \$4,500 per month in alimony to wife." The opinion also states that: "The alimony order also provided, pursuant to the agreement: 'the husband's alimony obligation will be modifiable based upon the terms and provisions as contained in the divorce code of the commonwealth of Pennsylvania, 23 Pa.C.S. Section 3101, et. seq. but in any event, shall be reviewable on or after Jan. 1, 2017.'"

The husband filed a petition to terminate order of alimony where he requested modification or termination of the alimony award. The husband's petition, filed on Sept. 14, 2016, was based upon "substantial changes in the economic circumstances of both parties." The wife filed a counterclaim seeking an increase in alimony. The trial court held a hearing and

granted husband's petition where it decreased his alimony payments for 2018 and 2019 and then terminates alimony effective 2020. The wife appealed the trial court's order and the Superior Court reversed the trial court.

At the trial, according to the opinion, the husband testified that he earned approximately \$450,000 in 2016, which was significantly higher than his income of \$286,165 when the parties divorced. However, the husband testified that he will no longer be eligible to serve a new three-year term as the managing partner of his firm and that his income will, therefore, decrease. Further, the husband stated that he has medical conditions including "Hepatitis C, cardiac arrhythmia, acid reflux and arthritis." The husband testified that he has had Hepatitis C for 20 years but that he started to experience fatigue, headaches, joint and muscle aches and nausea related to his Hepatitis C during the past three years. Interestingly, the husband also testified at the hearing that he had recently started treating his Hepatitis C with a medication called Harvoni, which can cure Hepatitis C. The husband's treating physician testified via deposition taken prior to the husband beginning his Harvoni treatment. In support of the husband's claim that his alimony should be reduced or terminated he indicated that his doctor recently advised him to cut back on his workload and as a result of his doctor's advice he would like to start working less and eventually retire

at age 65. However, the husband's doctor testified that continuing his current workload would be "reasonable" if the husband completed the Harvoni treatment, became cured, had improvement in his symptoms, and a biopsy showed stability in his liver.

The wife raised a number of issues on appeal. However, the crux of the case rests on whether the trial court abused its discretion in basing its order on a potential future retirement of the husband. The Superior

This case is an important case for the family law practitioner and the bench. This case reiterates the importance and the impact of retirement on an ongoing alimony order.

Court found that the trial court erred in considering a future retirement in terminating or modifying the alimony, as the focus should be based on the current circumstances. The Superior Court termed the husband's request as being "premature." In citing numerous court opinions, the Superior Court reiterated that changed financial circumstances resulting from voluntary retirement is a substantial and continuing change in circumstances sufficient to allow a modification of an alimony award. However, the Superior Court stressed that in the present case the husband "has not retired and has not

set a definitive retirement date." Further, the Superior court highlighted that the husband's income had actually increased significantly since the alimony order was entered. The Superior Court also highlighted that the "husband did not present any evidence to show that his 'poor health' has affected his financial circumstances, his ability to work, or that it is of a 'continuing' nature." Therefore, the Superior Court vacated the trial court's order.

This case is an important case for the family law practitioner and the bench. This case reiterates the importance and the impact of retirement on an ongoing alimony order. If the retirement is occurring here and now, under Section 3701(e) of the divorce code, it can be grounds for modification or termination of an alimony order depending upon the circumstances. Further, an issue raised on appeal by the wife in this case was the fact that the trial court did not go through a detailed analysis of the 17 alimony factors set forth under Section 7101(b) of the divorce code. The Superior Court did not address that issue as it vacated the order based upon the lack of a current change in circumstances that is continuing in nature. However, such an analysis is a key part of the processing of such a request. •