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F A M I L Y L A W

## Social Security Benefits and the Modification of Alimony

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In Pennsylvania, alimony paid pursuant to a court order is modifiable upon a showing of substantial and continuing changed circumstances. This differs from alimony provisions contained in an out-of-court agreement that is incorporated into a divorce decree. In such an instance the alimony provision is governed by the terms of the contract and may only be modified if the contract provides the same. In the recent superior court case of *McKernan v. McKernan*, 135 A.3rd 1116 (Pa. Super. 2016), an alimony obligation existed pursuant to a court order and the issue of whether the alimony obligation could be modified because of Teresa McKernan's eligibility for social security benefits, which

she elected not to take, qualified as a substantial and changed circumstance warranting modification. The Superior Court held that it did not.

The facts of the *McKernan* case, in part, are as follows: after a 24-year marriage, the parties divorced and the court entered an order distributing the parties' marital property and ordered Gerald McKernan to pay Teresa McKernan alimony in the amount of \$1,106.77 per month. Thereafter, according to the opinion, Gerald McKernan filed a request to downwardly modify his alimony obligation because of his decreased earnings. Pursuant to his request, the trial court reduced his alimony obligation. Approximately three years later, Gerald McKernan again sought modification of his



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alimony obligation. At issue in Gerald McKernan's modification petition is that he claimed that his income decreased because, though he began collecting social security benefits early, his rental income decreased and that loss offset his pension income and social security income. Because of his decreased earnings and the fact that Teresa McKernan was eligible for early retirement Gerald McKernan claimed that his alimony should be downwardly modified. After a hearing, the trial court denied

Gerald McKernan's request for modification.

According to the opinion, "on appeal, husband argues the trial court erred in refusing to compel wife to apply for social security benefits for which she is eligible and, in the alternative, the court erred in refusing to include as part of wife's income the benefit amount which she is eligible."

The Superior Court highlighted that because Gerald McKernan chose to retire before he reached full retirement age, his Social Security benefit decreased by 24 percent. This decrease in Social Security benefits to Gerald McKernan will proportionately reduce Teresa McKernan's benefit as well. The Superior Court emphasized that the trial court reasoned that "husband has already penalized wife with respect to decreasing her available spousal benefit when she does reach full retirement age and he now seeks to penalize her again by asking the court to include in her earning capacity the early Social Security benefit she elects not to take."

In citing 23 Pa.C.S. Section 3701(e), the superior court stated that a change in a party's income based upon retirement

benefits is a "substantial change of circumstances" upon which a modification of alimony may be based. However, the Superior Court indicated that: "there is no authority empowering a trial court order wife to apply for and obtain Social Security benefits prior to reaching full retirement age." The Superior Court reiterated that there is no provision in the divorce code requiring a party to apply for early reduced Social Security benefits or mandating a court to assess any "retirement income capacity" solely based upon eligibility for Social Security benefits. Therefore, the Superior Court found no error or abuse of discretion by the trial court and affirmed the trial court's denial of Gerald McKernan's request to modify alimony.

This case is an interesting case for family law practitioners. In support cases and alimony modification cases where additional income appears to be available, some argue to include such income or the availability to obtain the income as income available for support purposes. This case is helpful in providing guidance that the mere eligibility for Social Security benefits does

not equate to a higher earning capacity warranting modification of alimony. This case further provides a reminder that alimony pursuant to a court order may be modifiable if there is a substantial change in circumstances, and a change in a party's income based upon retirement benefits is a "substantial change of circumstances" upon which a modification of alimony may be based. •

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