

THE FUTURE OF PERMANENT ALIMONY: GNALL OR NOTHING?

by Christopher R. Barbrack

The concept of *permanent alimony* is well established by New Jersey statute as one of the four categories available to the court to quantify the amount and duration of the financially dependent spouse's legal entitlement from the other spouse following the dissolution of the marriage (the other three categories are *limited duration alimony*, *rehabilitative alimony*, and *reimbursement alimony*). There are no hard and fast rules for determining what category of alimony is appropriate or how much alimony is fair. Awarding alimony gives the Court and enormous amount of discretion. There is legislation wending its way through the New Jersey Assembly (Bill No. 3909 of the 215 Legislature) aimed at removing virtually all of the discretion from the alimony determination (see below). Current legislative proposals seem to trend in the direction of limiting or reducing the alimony obligation. Similar bills have been proposed but have failed. Needless to say this is a prominent issue that won't go away.

N.J.S.A. 2A:34-23b directs the Court to determine alimony by considering twelve situation-specific factors and then to make specific findings for each factor. The factors most frequently relied on in subsequent case law are length of the marriage, age of the spouses, health and educational level of spouses, and marital standard of living. The subjectivity and variability of these factors are intended to help the court fashion customized and equitable outcomes for each spouse. However, any lawyer in this field has war stories about how in practice, the process can produce unpredictable and unexplainable results.

Stanton & Rokusun's recent paper, "Duration of Marriage as It Impacts Alimony" illustrates this situation. An identical hypothetical fact situation was presented to four lawyers

and a judge, all experienced in family law, who were asked what the alimony outcome should be, based on those identical facts. The five responses were anything but consistent: 1) permanent alimony of \$33,000 per year, 2) limited duration alimony for 4 years at \$20,000 a year, 3) limited duration alimony for ten years at \$33,000 for each of the first 2 years, and \$25,000 for each of the following 8 years; 4) limited duration alimony for 6.5 years at \$30,000 a year, and 5) permanent alimony of \$22,000 a year. If this array of outcomes is representative of what happens in alimony cases in New Jersey, it is clear that the current system can be improved to result in more consistent and reliable results. If in theory there is one best amount, then departures from this amount are in a statistical sense "error". In other words there are numerous situations in our courts where spouses are receiving/paying too little or too much alimony for too long or not long enough. This should concern every professional who claims to be interested in fairness in the divorce process.

New Jersey courts have tended to assign primacy to the length of the marriage as the key determinant in alimony analysis. Three categories of alimony evolved until the August, 2013 case of Gnall v. Gnall A-3582-10T1 (App Div 2013) case provide some new clarity and direction in the alimony area. According to Gnall, marriages are categorized as either 1) short-term (10 to 12 years), where presumptively the dependent spouse would never be entitled to permanent alimony; 2) long term (15 years or longer), where presumptively the dependent spouse would be entitled to permanent rather than limited duration alimony, and 3) intermediate or "on the cusp" terms, (12 to 14 years), where the fact analysis would determine alimony without any particular legal presumption.

Gnall has raised eyebrows among family law practitioners. The appellate division seems to have expanded the availability of permanent alimony but to what extent is not clear.

The Gnall marriage was three months shy of 15 years, and the parties were relatively young (42 years old), well educated, and in good health at the time of the divorce. The trial court

concluded that Gnull was not a case for permanent alimony. The appellate division reversed, finding that the trial court erred in concluding that a 15 year marriage presumptively would not support a permanent alimony award. They rejected a rigid application of the "long-term" "short-term" rules, as well as the presumption that permanent alimony is reserved exclusively for long term marriages. So, the Gnull case is being read by practitioners today as coming down on the side of supporting expansion of permanent alimony, even in a case where the duration of the marriage was as short as 14 years and 9 months.

If we apply this logic, it is possible for permanent alimony to be awarded in a situation where the spouses were 20 years old at the time of the marriage, and 35 at the time of the divorce, and with life expectancy being 75-80 years old, making the result for the dependent spouse less like a data-driven valuation of an earned economic interest and more like winning the lottery.

In March, 2013, A3909 was introduced in the NJ Assembly, and if passed would radically change alimony as it is understood today, by elimination of permanent alimony altogether, as well as inclusion of a retroactivity provision that would void all existing permanent alimony awards. The constitutional overreach of the retroactivity provision aside, this proposed legislation, as now written, would simply nullify the concept of permanent alimony. To be sure, this proposal reflects legitimate economic and societal factors (more dual income families, greater longevity, etc). However, this bill creates yet more uncertainty for clients and practitioners on what legal standards would be applied to alimony calculations.(check legislation).

More to come on this important topic.