

Case Notes

Redefining Forever: Exploring the Modifiability of Permanent Alimony

***Crocker-Fasulo v. Fasulo*, 292 A.3d 591 (Pa. Super. 2023)**

By David C. Hamilton

Brief Summary of Facts and Procedural History:

Gregg Joseph Fasulo (“Husband”) and Sara D’arcy Crocker-Fasulo (“Wife”), were married on Oct. 2, 1982. At the time of their marriage, Husband was in medical school and later graduated in 1985. Husband completed his residency in general orthopedic surgery in 1992. Wife worked until the birth of the parties’ first child in May of 1987, and thereafter, Wife remained a full-time mother and homemaker through the birth of the parties’ second child in 1990 until their separation on Oct. 10, 1998.

Wife filed for divorce in July of 2009. Following a hearing, in 2010, the trial court entered a final divorce decree on Jan. 20, 2012, which ordered that Wife would retain the marital home and requiring her to either sell or refinance within three years; for Husband to maintain a \$1,000,000 life insurance policy with Wife as the beneficiary; and permanent alimony in the amount of \$8,500 per month.

At the time of their separation, the marital assets included the equity in the house, cars, a checking account, Husband’s small retirement with his employer, Lancaster Orthopedic Associates and Husband’s interest in an airplane. From separation through the divorce filing, Husband acquired an interest in Lancaster Orthopedic Group, a new home, interests in two commercial medical buildings, checking accounts with total balances of \$500,000, a brokerage account worth approximately \$160,000, and a 401(k) Profit Sharing account valued at \$440,000. Conversely, Wife had a small savings of \$5,000 and was driving a car titled in Husband’s name.

Beginning in 2012, Husband began to experience symptoms of Parkinson’s Disease. He shifted to a non-surgical practice but was eventually unable to see patients. He was diagnosed with Parkinson’s Disease in 2015, resigned as a partner in Lancaster Orthopedic Group in June of 2015, and was declared incapable of performing surgery effective July 1, 2015.

Despite his loss of career, Husband was able to collect benefits from five private disability policies which provided him an income of approximately \$27,000/month. The policies expired at the end of

2022, with the final policy paying benefits of \$2,159.00/month. Due to his loss of income, Husband had to tap into savings and his IRA to meet his monthly expenses and growing medical expenses.

In comparing the parties’ expenses and assets, Husband owned a home with a monthly mortgage payment of \$2,670, without including taxes. Other than his house, most of Husband’s expenses were medical related: drugs and therapies for his disease. Husband paid approximately \$16,000 per year for health insurance. Husband had approximately \$275,000 set aside for his care. With no cure and a worsening condition, Husband could not predict his treatment expenses. Husband had non-marital assets totaling \$3,400,000.

At the same time Husband’s working career was winding down due to Parkinson’s Disease, Wife began working part-time as a Court Appointed Special Advocate for Children in 2013. Wife was 57 years old. Wife began full-time employment approximately one year later and became the Special Advocates for Children’s program director in 2015 with the intention of retirement in April 2023 at the age of 68. Wife sold the marital residence in 2016, realizing \$265,000 in net proceeds. Thereafter, she purchased two \$100,000 annuities and put \$20,000 toward the purchase of a condominium with her sister. Wife and her sister shared some expenses. Wife estimated that her total income was \$3,500 per month and her expenses were \$5,300 per month.

Following his diagnosis, Husband and Wife agreed to multiple modifications to the alimony payment and on Jan. 1, 2020, Husband was paying \$3,750 per month in alimony. In August 2021, Husband filed a petition for modification or termination of alimony. After a hearing, the trial court entered an order reducing Husband’s alimony award to \$2,500 per month. Husband appealed.

Issues on Appeal:

1. Did the trial court abuse its discretion and commit an error of law in failing to terminate Husband’s alimony obligation in light of his Parkinson’s Disease disability, his involuntary retirement with a significant reduction in income, and that the payment of alimony results in a transfer of non-marital assets from Husband to Wife by a forced liquidation of his non-marital assets to pay Wife?

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2. Did the trial court abuse its discretion and commit an error of law in failing to make its alimony modification order effective retroactive to the date of the filing of the Petition by Husband which was Aug. 30, 2021?

3. Did the trial court abuse its discretion and commit an error of law in ordering Husband to continue providing a \$1,000,000 life insurance policy payable to Wife as beneficiary?

Analysis and Holding:

The Superior Court analyzed the appeal under an abuse of discretion standard. After its analysis, the Superior Court affirmed the trial court with respect to Husband's three issues indicating the trial court acted within its discretion.

The Superior Court analyzed Husband's first claim that the trial court erred by failing to terminate his alimony obligation in light of his Parkinson's Disease that resulted in an early retirement and significant reduction in income. Husband also claimed that his payment of alimony constitutes a post-divorce transfer of non-marital assets. Lastly, Husband asserted that the trial court erred by focusing too much on the asset imbalance between the parties and Wife's budget.

The Superior Court considered the purpose and necessity of alimony, as succinctly laid out in *Leicht v. Leicht*, 164 A.3d 1246, 1248 (Pa. Super. 2017). Moreover, the Superior Court, citing *Cook v. Cook*, 186 A.3d 1015, 1020 (Pa. Super. 2018), addressed whether alimony is necessary and appropriate, including analysis of the 17 factors of 23 Pa.C.S.A. §3701(b).

In assessing Husband's first claim, the Superior Court found the trial court acted within its discretion by modifying the monthly payment to \$2,500 rather than terminating the alimony as Husband requested. Husband incorrectly argued that the trial court could not examine his non-marital assets obtained after divorce in determining alimony, despite the fact that the 17 factors of Section 3701(b), require it. The Superior Court found that Husband did have a change in circumstances as a result of his Parkinson's Disease and medical care; however, Husband had more than adequate funds to provide for his medical expenses. The Superior Court noted that the relief he sought was not prohibited forever. Once Wife begins collecting Social Security or if his Parkinson's Disease progresses thereby increasing the cost of his care, he can petition to modify or terminate the alimony again. The Superior Court agreed with the trial court's assessment of the totality of the circumstances because Wife's monthly income of \$3,500 per month did not meet her expenses of \$5,300 per month. Therefore, she still required alimony to sustain her standard of living and Husband still had the ability to make the alimony payments without issue.

The Superior Court then analyzed Husband's second claim that the trial court erred in failing to make the alimony modification order retroactive to the date he filed his petition. As modification and termination of alimony are governed by statute, the Superior Court examined 23 Pa.C.S.A. §3701(e). The relevant portion of the statute states "[a]ny further order shall apply only to payments accruing subsequent to the petition for the requested relief." The Superior Court did not agree with Husband's recitation of the trial court's ultimate conclusion and instead indicated that Section 3701(e) does not require payments under the modified Order to be retroactive to the date of filing of the petition. While the filing date of a petition may be the earliest date a modification could take effect, the statute does not require retroactive payments to the date of filing.

Lastly, the Superior Court analyzed Husband's third claim that the trial court erred by ordering him to maintain a \$1,000,000 life insurance policy payable to Wife as the sole beneficiary. The Superior Court examined 23 Pa.C.S.A. §3707 since the trial court had determined that Husband's obligation to make alimony payments

should not terminate upon his death and 23 Pa.C.S.A. §3502(d) since the trial court directed Husband to purchase and designate Wife as the beneficiary on a policy insuring his own life. Similar to issue two above, Husband failed to make any substantive arguments or develop the record on this issue. The Superior Court did not disturb the trial court when it required Husband to maintain the questionably high policy amount as the trial court determined that Husband should be obligated to support Wife even upon his death. Such a ruling was within the trial court's discretion.

Commentary:

We generally assume that even "permanent" alimony terminates upon the payor's retirement if at normal retirement age, but this case makes clear that "permanent" alimony can continue on long after a party's retirement, which in this case was due to Husband's significant medical issues. The Superior Court's decision reflects the analysis required including the 17 alimony factors, which factors balance the parties' financial circumstances and needs, and in this case, Husband's substantial post-separation assets, which Husband argued was essentially a redistribution of wealth, but which argument failed. This case also upends most practitioners' assumption that any petition for modification of an alimony award will be modifiable retroactive to the date of filing. However, here, the Court found that the language of Section 3701(e) of the Divorce Code doesn't require retroactivity to the date of filing, but only permits it in the trial court's discretion. Given how long it may take a modification case to be heard depending upon the court's backlog, this could be quite prejudicial depending upon the length of delay. Lastly, the Court upheld Husband's requirement to continue to fund a \$1,000,000 life insurance policy, which Husband argued was the equivalent of 400 months of alimony. Given Husband's health issues and age, the cost of such a policy could be exorbitant, but it appears that Husband failed to develop this argument, and thus the Court simply noted that Husband was free to file a new petition in the future to reduce the amount of the life insurance.



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