Is Alimony a Pension or is There a Duty to Mitigate?

by James A. Farber and Paris P. Eliades

Everyone remembers the widespread devastation caused by Super Storm Sandy in 2012. Thousands of homes were without electricity. Massive trees were uprooted and scattered like toothpicks on a table. Miles of roads were rendered inaccessible. Homes were damaged or destroyed. Gasoline was in short supply. In areas flooded by the storm, insurance carriers, unable to reach their insureds, notified the public at large to proactively remove the first four feet of sheetrock to avoid the potential spread of black mold. In short, insurers were advising their insureds to mitigate their losses by taking steps to prevent the growth of mold spores, thereby decreasing their financial exposure.

The duty to mitigate is founded on logic and commonsense. Principles of equity spring to mind. It is well settled that injured parties have a duty to take reasonable steps to mitigate damages.[1] "If the victim of a breach can protect himself from its consequences he must do so. He has a duty to mitigate damages....This is a duty, a kind of altruistic duty, towards one's contractual partner, the more altruistic that it is directed to a partner in the wrong. But it is a duty without cost, since the victim of the breach is never worse off for having mitigated. Rather it is a duty that recognizes that contractual duties are onerous enough that they should not be needlessly exacerbated."[2]

In a 1978 Chancery Division case, *Turner v. Turner*, a trial court gave life to the concept of rehabilitative alimony, later codified in N.J.S.A. 2A:34-23.[3] In crafting the argument in support of the necessity for this form of alimony, the *Turner* court noted that "[a]limony should not, as one court said, permit 'a wife capable of work to sit in idleness.'"[4] As another court said, "they (women) are no longer per se entitled to a perpetual state of assured income or, as some would characterize it, assured indolence."[5] The *Turner* case heralded "a new philosophy, which is that a divorced woman, when able, should be required to mitigate the burden of her former husband to pay alimony by utilizing her own financial means or her earning potential or both."[6]

The duty to mitigate has long been a guiding beacon of equity. In a departure from prior, longstanding case law, the

New Jersey Supreme Court held that as a matter of basic fairness, landlords have a duty to mitigate damages when they seek to recover rents due from a defaulting tenant.[7] The duty to mitigate justifiably permeates all areas of the law. Unless the facts establish otherwise, an obligee should be "expected to engage in gainful employment, commensurate with…her education, skills, training and ability to work in accordance with the common law duty to mitigate damages."[8] Stated broadly by Justice Daniel O'Hern in a dissenting opinion involving a wrongful death action, "every person has a duty to mitigate damages."[9]

For all the obvious reasons, logic and fairness dictate that the duty to mitigate must be applied and considered in every alimony analysis. As the Appellate Division noted in 1955:

> It may be that her continued employment benefits the husband monetarily, but as was observed in the *O'Neill* case, this also benefits the wife in more ways than one, and also benefits society. *Self-support, whether of men or women, is to be encouraged.* While the most important factors in estimating support are monetary, there are others less tangible and which must not be lost sight of, including the interest of the state and society in matrimonial litigation.[10]

A non-breaching party's right to compensatory damages is not absolute, and neither is the entitlement to alimony. Indeed, a party seeking damages for breach of contract has a duty to mitigate its losses.[11] In the context of a lease agreement, "[a] landlord has a duty to mitigate damages where [it] seeks to recover rents due from a defaulting tenant."[12] To recover damages, the landlord must further prove it used "reasonable diligence in attempting to re-let the premises."[13]

The same equitable principles should be applied when alimony is first established, and again when later reviewed. Courts have posited that alimony should be viewed as a financial matter. In *Mani v. Mani*,[14] Justice Virginia Long reviewed the history of alimony back to English common law, writing: "Indeed, many distinct explanations have been advanced for alimony. They include its characterization as damages for breach of the marriage contract."

But *Mani* was clear that New Jersey has not adopted that approach.

New Jersey cases have long expressed the view that alimony is neither a punishment for the payor nor a reward for the payee.[15] Rather, it is an economic right that arises out of the marital relationship and provides the dependent spouse with "a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage."[16]

Unfortunately, practitioners have become accustomed to thinking of 'mitigation' as limited to damages. The definition of 'mitigate' is, however, much broader. *Merriam Webster* defines the word as follows: "To cause to become less harsh or hostile: mollify; To make less severe or painful: alleviate; Extenuate."

To determine whether a payee spouse has an obligation under the law to mitigate, one must first look to the alimony statute. The Alimony Reform Act, effective in Sept. 2014, even more so than the predecessor enactments, is replete with language implying that the recipient of alimony is charged with both an initial, and an ongoing, duty to mitigate.

The factors to be considered in an initial award of alimony, none of which are to "be elevated in importance over any other factor" without specific findings, drill the message. They include:

> *The actual need and ability of the parties to pay.*
>
> (4) The standard of living established in the marriage or civil union and the *likelihood that each party can maintain a reasonably comparable standard of living*, with neither party having a greater entitlement to that standard of living than the other.
>
> (5) The earning *capacities*, educational *needs*, vocational skills and *employability* of the parties.
>
> (8) *The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment*, the availability of the training and employment, and the *opportunity for future acquisitions* of capital assets *and income.*
>
> (emphasis added).[17]

At the risk of redundancy, the statute emphasizes, the goal of a post-divorce lifestyle for both parties comparable to the marital lifestyle, the earning capacity and employability of the supported spouse as well as the supporting spouse, what it will entail for the payee to achieve "appropriate employment," and the obligee's opportunity to acquire income prospectively. While the ability of the 'parties' to pay has, in practice, been narrowly construed to apply only to the obligor, is it not necessary and appropriate to consider the obligee's ability to pay for his or her own needs?

Further sealing the statutory duty to mitigate is the recognition that the duty may be tempered. The supported spouse's age is a factor presumptively to be given equal weight. It is readily acknowledged that older divorcing dependent spouses may have difficulties reentering the workforce due to their own physical limitations and the natural biases of employers. By the same token, it is equally true that aging obligors may suffer the loss of their long-term employment under the guise of workforce reduction, only to be unable to replicate their previous income. Similarly, physical and mental health constraints may limit full-time gainful employment. Parental responsibilities may also qualify a payee's ability to be employed in a job requiring travel or overtime, or depending upon a child(ren)'s age or special needs, even a standard nine-to-five position.

All the factors play a part in the ultimate calculus, but it cannot be gainsaid that the statute mandates the supported spouse, in the same manner as the supporting spouse, to continually strive for an independent income consistent with his or her abilities, education, training and experience.

The seminal case on support modification is *Lepis v. Lepis*.[18] The Court instructed: "A closer look should also be taken at the supported spouse's ability to contribute to his or her own maintenance, both at the time of the original judgment *and on applications for modification*." (Emphasis added).

Earlier in the decision, Justice Morris Pashman wrote, "Alimony is only the present obligation of former spouses."[19] In the 1999 Supreme Court case of *Miller v. Miller,* the Court labeled the obligation "the duties of former spouses." The authors believe it therefore follows that an imputed income imposed in a final judgment 10 years ago should not be viewed statically. The duty to use reasonable diligence to contribute to one's needs does not end upon the entry of the final judgment. To the contrary, it continues unabated so long as the corresponding alimony obligation remains. When a supported spouse has not returned to the workforce, assuming there were no intervening physical or mental disabilities, and a modification application has been filed, to balance the equities, the imputed income should be viewed against other objective data. For instance, in a post-judgment application where an income at the 25 percent range for a given field was imputed previously, assuming the facts warrant, that income should be later considered at the 50 percent range or more under the New Jersey Department of Labor and Wage Occupational Statistics, as the separated spouse would have had the opportunity to increase earnings over that 10-year period. There should be no reward to the payee for remaining idle.

In *Shifman v. Shifman*,[20] the court wrote, "[T]he basic premise of an award of rehabilitative alimony is an expectation that the supported spouse will be able to obtain employment or *more lucrative employment* at some future date." (emphasis added). And *Wass v. Wass*[21] held, "[n]evertheless, the ultimate purpose of rehabilitative alimony, whether the subject of a voluntary agreement or otherwise, is to help produce a self-sufficient individual, benefitting not only the recipient of alimony, *but the person paying the alimony*." (emphasis added).

The authors ask, should these worthy goals be limited only to cases involving rehabilitative alimony? Is it not a 'reward for the payee' to require otherwise?

Returning to the statutory language, N.J.S.A. 2A:34-23(c) addresses the factors to be mulled by the court if it is to consider a term of alimony longer than the length of the marriage. Again, the court must wrestle with issues of age (factor 1), "chronic illness or unusual health circumstance" (factor 3), and "[t]he impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child" (factor 6).[22]

This same vein concludes subsection c, which reads: "In determining the length of the term, the court shall consider *the length of time it would reasonably take for the recipient to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate*." (emphasis added).[23]

Turner, supra, dealt with rehabilitative alimony and subsection c tracked the mitigation imperative in limited duration alimony cases. Juxtaposed with Justice Pashman's language in *Lepis, supra*, the logical inference imposes an equal duty on the recipient of open durational alimony both at the entry of the divorce judgment and prospectively when substantial changes warrant modification.

Subsection d legislates rehabilitative alimony and reads:

> Rehabilitative alimony shall be awarded based upon a plan in which the *payee shows the scope of rehabilitation, the steps to be taken, and the time frame*, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified *either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.*
>
> This section is not intended to preclude a court from modifying alimony awards based upon the law. (emphasis added).[24]

Rehabilitative alimony is the easiest of the forms of alimony in which to decipher a clear expectation that the alimony recipient will become independent through the fruits of his or her own labors.

Other sections of the statute continue the theme, including an application to terminate alimony due to retirement and an application to modify. In an application to terminate alimony upon retirement, the court must consider the "*income,* both *earned* and unearned, of the parties" (emphasis added).[25] As for the reasonableness of a prospective or actual retirement, the court shall weigh, "[t]he *obligee's level of financial independence* and the financial impact of the obligor's retirement upon the obligee." (emphasis added).[26] The retirement provisions in section j of the statute reference alimony, generally, and are not limited to rehabilitative or limited term alimony obligations; the corollary is they apply equally to open durational alimony.

For the modification of alimony by a non-self-employed party the factors to be balanced include "*the obligee's reasonable efforts to obtain employment in view of [the] circumstances and existing opportunities;" "[t]he impact of the parties' health on their ability to obtain employment;"* and "the reasons for the change in either party's financial circumstances since the date from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order."[27]

Family law attorneys need no encouragement to argue that the adversary spouse, whether the supporting spouse or the supported spouse, should be imputed a reasonable quantum of income, based on the party's level of education, experience and skills. Push back may include a recitation of the types of circumstances identified earlier—age, mental or physical impediments, child-rearing responsibilities or absence from the job market. Notwithstanding those arguments against imputation, New Jersey law presumptively expects each spouse to be gainfully employed to that party's capacity at all times alimony is in play. The Appellate Division wrote, in *Golian v. Golian*,[28] "[I]ncome may be imputed to a party who is voluntarily unemployed or underemployed."[29] Imputation is just another way of asserting a payee's duty to mitigate. If a payor has the obligation to not be unemployed or underemployed, then the payee bears a complementary duty to not be unemployed or underemployed—a duty to mitigate the amount the ex-spouse must pay in alimony.

"Although plaintiff [supported spouse] has been absent from the workforce for many years, she *retains the obligation to contribute to her support.* Both when setting child support and in reaching a proper alimony award, a judge must examine not only each party's income, but also his or her earning ability."[30] (emphasis added).

The obligation of the supporting spouse does not end upon the initial award. If the alimony award leaves both parties short of the marital lifestyle, a ubiquitous happenstance, and if the payor receives a significant income bump, he or she could well be called upon to pay greater alimony on a modification application, provided the supported spouse will not then rise to a level exceeding the marital lifestyle or the payor's current lifestyle. The concomitant inference compels a downward alimony modification where the payee spouse obtains a significant increase in income.

Modification is not, however, limited to cases where one of the spouses fortuitously is paid enhanced monies. "Capacity to earn is determinative."[31] Consequently, if either ex-spouse has an opportunity to earn more money, all else remaining equal (*e.g.*, the opportunity does not arrive with substantial travel out of the area where children are involved, or require more dangerous work tasks, or entail exponentially greater work hours beyond full-time hours, etc.), then the party has a fiduciary-type duty to the other spouse to accept the higher pay, and share some of the fruits.

From a review of the alimony statute and case law paired with equitable considerations, a supported spouse has equivalent obligations or duties imposed upon supporting spouses. The payee has a duty to obtain, where age, health and childcare responsibilities do not interfere, full-time employment consistent with education, experience and skills so alimony being received might be reduced or even eliminated. It is an ongoing duty, similar to duties imposed on payors by law. That is not to say there should, or will, be a dollar-for-dollar offset in alimony based on the obligee's new or enhanced income, but both parties should reap the benefits of each party's income achievements with a goal being a post-divorce lifestyle comparable to the marital lifestyle for both and the ultimate goal being financial independence. ⚖

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Endnotes

1. *See, e. g., McGraw v. Johnson*, 42 N.J. Super. 267, 273, 126 A.2d 203 (App. Div. 1956).
2. C. Fried, Contract as Promise 131 (1981) (footnote omitted). Quoted in *Ricketts v. Adamson*, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed.2d 1 (1987).
3. *Turner v. Turner*, 158 N.J. Super. 313 (Ch. Div. 1978).
4. *Guindon v. Guindon*, 256 N.W.2d 894, 898 (S.D. 1977).
5. *Grinold v. Grinold*, 32 Conn. Sup, 225, 348 A.2d 32, 33 (Sup. Ct. 1975). *Turner* at p.315 objects to "physical and mental indolence."
6. *Turner v. Turner*, *supra* at 321.
7. *Sommer v Kridel,* 74 N.J. 446 (1977).
8. *Naik v. Naik*, 399 N.J. Super. 390, 398, 944 A.2d 713 (App. Div. 2008). (The admonition in *Naik*, while not directly related to alimony, specifically targeted a sponsored immigrant's obligation.).
9. *Del Tufo v. Township of Old Bridge*, 147 N.J. 90, 125 (1996).
10. *Turi v. Turi*, 34 N.J. Super. 313, 323, (App. Div. 1955) (Emphasis added).
11. *Sommer v. Kridel*, 74 N.J. 446, 454 n. 3, 378 A.2d 767 (1977); *see also McGuire v. City of Jersey City*, 125 N.J. 310, 320-21, 593 A.2d 309 (1991) (holding that we had correctly extended the mitigation rule of *Sommer* to commercial property leases).
12. *Sommer*, *supra*, 74 N.J. at 457, 378 A.2d 767.
13. *Ibid*.
14. *Mani v. Mani*, 183 N.J 70,79 (2005).
15. *Aronson v. Aronson*, 245 N.J. Super. 354,364, 585 A.2d. 956 (App. Div. 1991); *Turi v. Turi*, 34 N.J. Super. 313,322, 112 A.2d. 278 (App. Div. 1955); *O'Neil v. O'Neil*, 18 N.J. Misc. 82,89, 11A.2d 128 (Ch.), *aff'd,* 127 N.J. Eq. 278, 12 A.2d. 839 (E & A. 1940).
16. *Stiffer v. Stiffer*, 304 N.J. Super. 96, 99, 698 A.2d. 549 (Ch. 1997) (*quoting Koelble v. Koelble*, 261 N.J. Super. 190, 192-193, 618 A.2d. 377 (App. Div. 1992)). *Id*. at 98.
17. N.J.S.A 2A:34-23(c).
18. *Lepis v. Lepis*, 83 N.J. 139 (1980). *Id*. at 55.
19. *Id. at* 146. *Miller v. Miller*, 160 N.J. 408,419 (1999).
20. *Shifman v. Shifman*, 211 N.J. Super. 189, 194-195 (App. Div. 1986).
21. *Wass v. Wass*, 311 N.J. Super. 624, 629 (Ch. 1998).
22. N.J.S.A. 2A:34-23.
23. *Id*. at c.
24. *Id*. at d.
25. *Id*. at j(1)(i). (emphasis added).
26. j(2)(g) and j(3)(g)) (emphasis added).
27. k (4), (5) and (8)) (emphasis added).
28. *Golian v. Golian*, 344 N.J. Super. 337,341 (App. Div. 2001).
29. *Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div. 1998) imputing income in a child support setting.
30. *Gnall v. Gnall*, 432 N.J. Super. 129,158-159 (App. Div. 2013), *rev'd for other reasons* at 222 N.J. 414 (2005).
31. *Storey v. Storey*, 373 N.J. Super. 464, 473 (App. Div. 2004).