

- A. A list of experts that will testify on behalf of the defendants;
- B. The professional qualifications of expert witness:
 - 1. List of educational institutions attended;
 - 2. Degrees acquired;
 - 3. List of professional organizations to which they belong;
 - 4. Professional awards or accreditations;
 - 5. List of all published professional articles they have written.
- C. The opinion of the expert;
- D. A summary of the facts and other grounds upon which the expert relied in forming his professional opinion.

MCFADDEN V. MCFADDEN, C.P. Franklin County Branch,
No. F.R. 1980-520

Divorce - Modification of Alimony

- 1. A consent order dealing with both equitable distribution and alimony may not be modified unless specifically permitted by the order.
- 2. Where the parties previously agreed to an amount of alimony, the foreseeable retirement of one party does not qualify as a substantial change in circumstances justifying modification.

David C. Cleaver, Esquire, Counsel for the Plaintiff
Robert C. Schollaert, Esquire, Counsel for the Defendant
William R. Davis, Esquire, Master

OPINION AND ORDER

WALKER, J., May 13, 1988:

This matter is before the court on exceptions filed by both parties to the master's report which was prepared as a result of a petition by the plaintiff, David George McFadden, for modification of alimony payable to the defendant, Marjorie Marotte McFadden. The parties were divorced by decree dated October 1, 1981. Mr. McFadden remarried within the year, and on March 13, 1986, filed a petition for modification which alleged that the alimony payments should be reduced because of his upcoming retirement. Mr. McFadden subsequently retired on April 1, 1986.

The divorce decree incorporated a stipulation and agreement

entered into by the parties on October 1, 1981. This agreement provided, among other things, that "The plaintiff [David] is to pay defendant [Marjorie] alimony in the amount of \$400 per month so long as she may live or until changed by order of court . . .". Since this agreement integrates alimony and equitable distribution of the material property, the threshold question for the court is whether or not the amount of alimony is modifiable by the court.

This question was addressed by the Pennsylvania Superior Court in *Stanley v. Stanley*, 339 Pa. Super. 118, 488 A.2d 338 (1985). The parties were divorced on September 23, 1982. Subsequently, they entered into a consent order resolving the wife's claim for equitable distribution and permanent alimony. The consent order obligated the husband to pay the wife "\$300.00 per month alimony for five (5) years from January, 1983 until the wife dies, remarries or cohabitates for a period of thirty (30) days." *Id.* at 119, 488 A.2d at 338. The Superior Court affirmed the lower court decision which held that a consent decree combining alimony and equitable distribution was entered under Section 401 of the Divorce Code, not Section 501, and could only be modified for the reasons set forth in the decree. Both the Superior Court and lower court decisions were based on *Fleming v. Fleming*, 130 P.L.J. 68 (1982).

In *Fleming*, the parties were divorced in 1982, and a consent decree which combined equitable distribution and alimony was entered on April 9, 1981. This decree provided that the alimony order then effective would continue until the proceeds from the sale of the parties' house was distributed and would

"then increase to Fourteen Thousand (\$14,000) Dollars per year, payable monthly, until Plaintiff is sixty-five (65) years, then to be Twenty (20%) Percent of his gross from all sources except Social Security . . ." *Id.* at 68.

Subsequent to decree, the husband filed a petition to modify the alimony based on an alleged significant change in circumstances — the employment of the wife. *Stanley, supra*, at 121, 488 A.2d at 339.

Judge Strassburger of the Court of Common Pleas of Allegheny County, recognized that the issue presented by this case, whether a consent order for alimony may be modified, and if so, when, was an important issue of first impression in Pennsylvania, and that this issue had perplexed other jurisdictions for years.

Judge Strassburger, discussed the modifiability of consent orders in two (2) contexts. Firstly, where the order to be modified is for alimony only and is silent as to modifiability. Judge Strassburger concluded that Pennsylvania would permit modifiability, as do the majority of jurisdictions. The second situation was where the order to be modified contains both alimony and equitable distribution issues and is silent to modifiability. It was this situation that the court faced in *Fleming*.

In holding that where a single order combined alimony and equitable distribution, the alimony order is not modifiable, Judge Strassburger stated that: "We would be naive to think that tradeoffs do not occur between equitable distribution and alimony." *Fleming, supra*, at 70. If a court attempted to modify an alimony/property distribution, it would be "most inequitable" and "would wreck havoc upon the parties to an equitable distribution proceeding. . . ." *Id.*

In recognition of these factors, the court feels that the provision in the McFadden's consent decree allowing for change by order of court was meant to have the same effect as the limitation provision in *Stanley*. In other words, the amount of the alimony Mrs. McFadden was receiving would be changed to zero in situations similar to her death, remarriage or cohabitation for a period of thirty (30) days.

Support for this interpretation can be found in the rules of grammar, as adopted by the courts in Pennsylvania. The provisions of the agreement in dispute is that Mrs. McFadden is to receive "alimony in the amount of \$400.00 per month so long as she may live or until changed by order of court." It is well settled that a modifier operates only upon the phrase preceding it. *Equitable Gas Co. v. City of Pittsburgh*, 507 Pa. 53, 488 A.2d 270. In the McFadden agreement, "or until changed by order of court" operates only upon the preceding phrase, "so long as she may live," not "\$400.00 per month." This construction, which is in accord with the modification provision in *Stanley, supra*, indicates that the parties intended to only allow for modification of the time period Mrs. McFadden would be receiving alimony, not the amount of the alimony she would be receiving.

This court also finds support for its reluctance to modifying the amount of alimony incorporated in the agreement between the McFaddens in a recent amendment to the Divorce Code of 1980.

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BAR NEWS ITEM

August 30, 1988

APPELLATE COURT NOMINATING COMMISSION
OFFICIAL NOTICE

The Appellate Court Nominating Commission, appointed by the Honorable Robert P. Casey, Governor of Pennsylvania, is seeking candidates to fill an expected vacancy in the Commonwealth Court of Pennsylvania.

The Commission requests that all individuals who seek consideration for such appointment obtain and complete a Judicial Questionnaire to be returned to the office of the Commission chair, James F. Mundy, Esquire, 1845 Walnut Street, Suite 2000, Philadelphia, Pennsylvania, 19103.

Copies of the Judicial Questionnaire may be obtained through the Commission Chair.

ALL APPLICATIONS MUST BE RECEIVED ON OR BEFORE WEDNESDAY, OCTOBER 21, 1988 AT THE OFFICE OF THE COMMISSION CHAIR.

BAR NEWS ITEM

At special ceremony conducted before the Court of Common Pleas of the 39th Judicial District, Pennsylvania, Franklin County Branch, at the Court House, in Chambersburg, Pennsylvania, on Wednesday morning August 31, 1988, Timothy S. Gordon, Esquire, was admitted to the Registry of Attorneys regularly practicing law in Franklin County, Pennsylvania.

President Judge John W. Keller presided, and he was assisted by Judge John R. Walker and Judge William H. Kaye. Presenting the petition for Attorney Gordon's said registration was David C. Wertime, Esquire, of the Franklin County Bar. At present, Attorney Gordon maintains his office in Hagerstown, Maryland but he plans to be conducting practice of the law within Franklin County, Pennsylvania.

We welcome Tim to our midst and wish him a successful career of service in our profession.

Act 13 of 1988, effective February 12, 1988 (Senate Bill 409). Section 2 added Section 401.1, entitled Effect of agreement between the parties, to the Divorce Code. Section 401.1 provides that

"In absence of a specific provision to the contrary appearing in the agreement, a provision regarding . . . alimony . . . shall not be subject to modification by the court."

Although the act does not define the term "specific provision," specific has been defined elsewhere as "Precisely formulated or restricted; definite; explicit; of an exact or particular nature." *Black's Law Dictionary* 1254 (5th ed. 1979).

By requiring a precisely formulated provision, which is not present in the McFadden agreement, for modification of an agreement between the parties, the General Assembly has recognized the realities which occur in formulating an integrated agreement between the parties. A certain amount of bargaining occurs, and the amount of alimony agreed upon may have affected the other provisions of the agreement. Thus, the public policy of this Commonwealth is that agreements between the parties should be subject to minimal interference by the judiciary, and should be modified in only those circumstances which the parties have explicitly provided for. Thus, based upon the foregoing, this court finds that the integrated agreement between the parties for alimony and equitable distribution is not modifiable.

If the court did find that the agreement was modifiable, the court would still not reduce the amount of alimony. Alimony may only be changed upon a showing of changed circumstances of a substantial and continuing nature. *Hollman v. Hollman*, 347 Pa. Super. 500 A.2d 837 (1985). The plaintiff, in his brief, points out that the master found that defendant's circumstances have not substantially changed. Thus, the question is whether or not the plaintiff's circumstances have materially changed. The plaintiff contends that his foreseeable and expected change in employment status qualifies as a substantial change in circumstances justifying modification of the alimony. The master agreed with plaintiff, citing Rouck, *Pa. Matrimonial Practice* Part I at 442, 450, as authority.¹ *Report of Master* at 14.

An early case which held that a voluntary retirement was a sufficient change in circumstances to reduce the amount of a

¹Only the case cited on page 442 is from Pennsylvania. The case cited on page 450 is a Florida case, and therefore, is non-binding precedent.

husband's support to his wife, was *Com. ex rel. Ross v. Ross*, 206 Pa. Super. 429, 213 A.2d 135 (1965). The court in *Ross* began by stating that a support "order should not be based on the husband's earnings in the past, if it is unrealistic in light of his age or other circumstances." *Id.* at 432, 213 A.2d at 137. In addressing these factors, the court enunciated what has come to be known as the "station in life" analysis. Simply put, the court believed that since retirement often reduces the income of the retired couple, they acquire a new station of life, and

"the wife could not have reasonably expected that [her husband's] income would remain constant after retirement." *Id.* at 433-34, 213 A.2d at 138.

This analysis hinges upon the wife's reasonable expectations, which is without doubt an appropriate analysis for some situations.

The Pennsylvania case cited in *Pa. Matrimonial Practice, supra*, and later cases, recognized that the reduction of support upon retirement is not absolute, and held that although the voluntary retirement of the plaintiff-husband may justify a reduction in alimony, the "entire circumstances of his retirement must be examined to determine the extent of the husband's responsibility" to his ex-wife. *Com. ex rel. Burns v. Burns*, 232 Pa. Super. 295, 331 A.2d 768 (1974). When the court looks at the entire circumstances surrounding the retirement of Mr. McFadden, those circumstances do not justify a reduction in the amount of his alimony payments.

In a situation like the case at bar, where the parties agreed upon the amount of the support, the foreseeable and expected change in employment status of one party does not qualify as a substantial change in circumstances justifying modification of the support. *Com. ex rel. Scanlon v. Scanlon*, 311 Pa. Super. 32, 457 A.2d 98 (1983). In *Scanlon*, a husband entered into a support agreement for his wife and minor children knowing of his wife's pending employment, just as Mr. McFadden entered into an alimony agreement for his wife knowing of his impending retirement.

When the husband in *Scanlon* filed a petition to reduce support, the basis of which was that his wife's employment status had changed, the lower court granted the petition. On appeal, the Superior Court of Pennsylvania reversed, stating that it "cannot agree with the lower court's conclusion that Mr. Scanlon proved a change of circumstances such as to warrant a reduction of the order." *Id.* at 38, 457 A.2d at 101.

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When a party voluntarily enters into an agreement, adopted in a modifiable court order, in which he agrees to provide support or alimony, the amount to be paid may be modified only upon a showing of changed circumstances of a substantial and continuing nature. When an agreement is entered into, however, with full knowledge of an impending change in a party's employment status, the change in circumstances sufficient to justify modifying the order. Therefore, the court would hold that Mr. McFadden's retirement would not be a sufficient change of circumstances to modify the amount of alimony agreed upon in the agreement of October 1, 1981.

ORDER OF COURT

May 13, 1988, the court has reviewed and considered plaintiff's petition to terminate or reduce alimony, the master's report and recommendations, and plaintiff's and defendant's briefs on exceptions to the master's report.

Having decided that the integrated agreement dated October 1, 1981, between the parties is not modifiable and that plaintiff's voluntary retirement was a foreseeable and expected change that would not qualify as a substantial change in circumstance, the court enters the following order:

1. The existing stipulation and agreement between plaintiff and defendant dated October 1, 1981, and the order of court dated October 1, 1981, shall remain in effect and plaintiff shall pay to the defendant alimony in the amount of \$400 per month, payable in the amount of \$200 on the first and fifteenth day of each month, payments to be made by plaintiff directly to defendant.
2. Plaintiff shall pay to defendant, in one lump sum, the arrearage created by his failure to make his alimony payments from March 15, 1986 to the date of this order of court. Payment of this arrearage shall be made to the defendant no later than sixty (60) days from the date of this order.
3. Court costs as listed in the bill of costs submitted by the master shall be divided equally between plaintiff and defendant. It is noted that plaintiff has apparently paid \$174.60 for the transcript and defendant has apparently deposited the sum of \$225 with the prothonotary, and each should receive credit for any amounts already paid.