Agreements to Terminate Alimony: When is an Anti-*Lepis* Clause Enforceable?

by Dale E. Console

In an effort to create finality to support obligations, many property settlement agreements incorporate language that asserts that the support provisions are nonmodifiable. Known as "anti-*Lepis* clauses," these provisions can be terse statements or lengthy paragraphs concerning the consequences of *Lepis*. The enforceability of these provisions is still an open question; prudent practitioners may well wish to advise their clients that they cannot guarantee that the anti-*Lepis* clause will be enforced by a court.

The law on anti-*Lepis* clauses is both conflicting and obtuse. In *Fincken v. Fincken*[1] Judge Conrad Krafte opined that anti-*Lepis* clauses did not violate public policy and were enforceable by the court. A year and a half later, Judge Douglas Wolfson, in *Smith v. Smith*,[2] held that the parties could not bargain away the equitable powers of the Court and an anti-*Lepis* clause was not *per se* enforceable. Faced with this conflict in the trial courts, the Appellate Division, in *Morris v. Morris*,[3] announced a bright-line test: An anti-*Lepis* clause is enforceable — unless it is not. The law has remained in equipoise ever since.

Whether an anti-*Lepis* clause will be enforceable requires a careful analysis of the case law, the policies underlying the law and a careful review of the facts of your particular case. Before you can begin to draft a clause that will be enforceable, you have to be prepared to argue the law on the subsequent modification application. This begins with a thorough understanding of the present law.

The enforceability of these provisions is still an open question; prudent practitioners may well wish to advise their clients that they cannot guarantee that the anti-*Lepis* clause will be enforced by a court.

In *Fincken*, the parties entered into a property settlement agreement which required the husband to pay half of the college expenses of the parties' son. When the wife sought to enforce this obligation, the husband moved for downward modification due to decreased income. The agreement contained the following language:

> **[The] parties acknowledge that the rationale in the case of *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980), has been explained to them in the sense that a substantial change of circumstances would permit either party to make an application to a court of competent jurisdiction to modify the within Agreement. It is the intention of the parties hereto, that the rationale of the Lepis case not apply to any present or future interpretation of the reasonableness of this Agreement, for they intend, and they acknowledge, that this Agreement shall express their rights and obligations for now and for all time, despite substantial changes in their monetary circumstances.**

Judge Krafte noted that property settlement agreements are

enforceable to the extent they are fair and equitable. The parties had been represented by competent counsel, and their rights and obligations were explained to them at the time they entered into the agreement. The agreement was explicit, and there was no stipulation as to what factors might constitute changed circumstances, which might arise in the future. Any rights to modification were waived by the parties, and they were bound by the specific terms of the agreement. Judge Krafte opined that while *Lepis* provides for modification under certain circumstances, the Finckens' agreement clearly incorporated language of non-modification in order to provide greater finality. Since the terms of the agreement did not violate any statute or the constitutional rights of the parties, no public policy prohibited the incorporation of the anti-*Lepis* clause, and the voluntary agreement of the parties was enforceable.[4]

Judge Wolfson declined to follow Judge Krafte's approach. In *Smith*, the parties entered into a property settlement agreement after 23 years of marriage. The agreement provided for six years of alimony with the following language:

> **The parties contemplate termination of alimony in no more than six years, regardless of changed circumstances.**

When the wife sought to continue the alimony beyond the six years, the husband raised the anti-*Lepis* clause as an absolute bar to relief. Judge Wolfson held that:

> **An anti-*Lepis* clause, which seeks to preclude the exercise of this Court's equitable responsibility to review and, if warranted, to modify support obligations in response the changed circumstances, is contrary to the public policy of this State as reflected in its legislative acts and its judicial decisions.[5]**

Since the terms of the agreement did not violate any statute or the constitutional rights of the parties, no public policy prohibited the incorporation of the anti-*Lepis* clause, and the voluntary agreement of the parties was enforceable.

Judge Wolfson based this upon a review of the policies set forth in *Lepis*. Granting a greater degree of certainty to agreements, wrote the Supreme Court, would make agreements riskier for spouses who are likely to suffer the harm of changed circumstances. Since these spouses are usually the economically dependent spouses, it would not be in their best interest to permit modification only if the agreement is unconscionable. Accordingly, as Judge Wolfson noted, the *Lepis* court wrote, the "equitable authority of a court to modify support obligations in response to changed circumstances regardless of their source, cannot be restricted."[6]

Having concluded that an agreement which, by definition, deprives the court of its equitable duties defies the express mandate of *Lepis*, Judge Wolfson then turned to an analysis of the present circumstances of the parties. Lepis provides that where the agreement provides for the circumstances alleged to have changed, it may not be fair and equitable to grant modification. Judge Wolfson reasoned that if there were trade-offs between distribution of assets and support obligations, these trade-offs might be taken into account in determining whether and to what extent the agreement should be modified. However, he cautioned, even when trade-offs are present, they may still grant modification if the prevailing circumstances warrant an adjustment in support.[7] Exactly how this would apply is left to our imaginations, since Judge Wolfson decided that the certifications before him were insufficient. He therefore ordered a plenary hearing.

Faced with these conflicting opinions, the Appellate Division attempted to steer a course between the Scylla of enforcing voluntary agreement and the Charybdis of denying modification when circumstances rendered the original agreement unfair.

In *Morris v. Morris*,[8] the parties faced substantial financial losses. After earning $300,000 per year and having a net worth of $3,000,000, the husband's financial fortunes suffered severe decline. Under the agreement the parties entered into, the wife relinquished her rights to virtually all of the marital assets. While the assets were extensive, they were also heavily encumbered. The husband also assumed the marital debt. In return, the wife received "alimony" of $35,000 per year for 10 years, at the end of which she received a lump sum of $150,000. The agreement also provided that the alimony was non-modifiable except in case of the husband's physical disability. It was quite clear that the husband's income at

the time of the agreement was insufficient to pay the support. Writing for the court, Judge William Dreier noted that the only features of these payments which distinguished them from equitable distribution was the fact that they were labeled "alimony" and the agreement provided that the payments terminated upon the death of either party. He also noted this is generally a mechanism to avoid discharge of equitable distribution in bankruptcy.

Faced with the disparate positions of *Smith* and *Fincken*, Judge Dreier held that both opinions were correct. Thus, *Smith* correctly held that parties could not bargain away the equitable powers of the court; however, *Fincken* was also correct in stating that the parties can, with full knowledge of all present and reasonably foreseeable circumstances, bargain for fixed payments or the estimated criteria for payment to a dependent spouse.[9]

Judge Dreier noted that under *Lepis*, if the agreement provides for the circumstances that are alleged to have changed, it may not be fair and equitable to grant modification.[10] *Lepis* poses the example where a spouse claims inability to maintain the marital standard of living, grounds that normally would warrant modification. However, the *Lepis* court noted, if it were shown that a single lump sum payment made at the time of the divorce was included with the express intent of providing a hedge against inflation, that provision might defeat the grounds asserted for modification. In footnote 6, the *Lepis* court further noted that if this provision for changed circumstances proved inadequate, the court could still grant modification if warranted by the prevailing circumstances.[11]

In *Morris*, the court found that rather than provide for the greater needs of the wife, the agreement provided for the husband's decreased ability to pay. The "fair and equitable" predicate of *Lepis* is still applicable, wrote Judge Dreier; however, as noted in footnote 6 of *Lepis*, the court must determine what is warranted under the prevailing circumstances.

In *Morris*, the fairness included the wife's agreement to accept and the husband's agreement to pay a fixed amount regardless of changed circumstances. The standards chosen by the parties were not based on need, and the husband received a benefit by being immune to applications for increases if his income increased. He must therefore accept the burdens if his income declines. "The result," wrote Judge Dreier, "is that modifications are permitted, but only where the failure to modify would be unreasonable and unjust."[12]

Judge Dreier noted that the agreement did not provide that it was non-modifiable for any reason. Rather, the parties merely provided that the modification provisions of *Lepis* would not apply. This, Judge Dreier wrote, encompasses the usual need (and ability to pay) standards: The usual case governed by *Lepis* assumes that the parties have established alimony payments based upon both of parties' needs and incomes. Where there has been a significant change in any of these variables, *Lepis* directs a change in the support. In *Morris*, however, the parties did not establish support based upon the parties' incomes and needs; *Lepis* was therefore largely inapplicable.[13]

Judge Dreier wrote that when the parties were spending $300,000 per year, far more than $35,000 was spent by or on behalf of the wife. Under usual *Lepis* circumstances, if the husband's income now increased so that $50,000 per year was available to the wife, she could seek an increase in support. However, this was not the basis of the parties' agreement: The wife had bargained for a fixed term of payments with a final lump sum payment. If it were not enforceable by the wife, it would result in obvious inequity. Thus, if the husband's income increased, he could hold her to the agreement; but if it decreased, he could claim inability to pay and avoid the debt to her. The defendant must pay if he has the ability to do so or else arrears can accumulate until he does have the ability to pay. This is the result he bargained for when the plaintiff gave up her rights to equitable distribution and higher alimony. Each party therefore has the expected benefits and burdens of the contract they made.[14]

In conclusion, Judge Dreier stated that an anti-*Lepis* clause could be enforceable or not, depending on the circumstances. The parties cannot bargain away the equitable powers of the court, but they can establish their own standards which will be enforced irrespective of the need-based guidelines of *Lepis* that apply when no other standard is set forth. However, if circumstances have made the parties' standards unreasonable, they can be modified in extreme cases.

A word of caution is urged in crafting agreements where alimony is in reality equitable distribution in disguise. These types of agreements are frequently used where, as in *Morris*, the prospect of bankruptcy looms on the horizon, or where the payor spouse wants the tax advantage of alimony. While the former will become less prevalent in light of the amendments to the Bankruptcy Code making equitable distribution less dischargeable, this is still a popular vehicle for avoiding dischargeability. In *Morris*, the court obviously felt that the alimony was more a vehicle for equitable distribution than a true alimony award, and this belief formed the basis for the enforcement of the agreement.

The primary purpose of an anti-*Lepis* clause has been and probably will continue to be a means to create term alimony so that parties have a greater degree of certainty. Courts give great deference to voluntary settlements as a matter of public policy, but also have to be able to modify agreements based on changed circumstances when the original agreement is no longer fair and equitable. When faced with an anti-*Lepis* clause that fixes a

term for alimony, the court must weigh the competing policies of enforcing voluntary agreements with the prohibition against alimony provisions that are unfair. *Morris* strikes a balance between the two and teaches that alimony that is solely need-based will most likely be subject to review by the court; however, alimony that is part of a trade-off with equitable distribution may have a fixed term that will be enforceable.

When viewed against the backdrop of existing law, this makes sense. In *Shifman v. Shifman*[15] the Appellate Division held that rehabilitative alimony was subject to the same showing of changed circumstances for purposes of modification as permanent alimony. While the holding in *Shifman* has been the law for many years, the analysis by the court strikes interesting parallels with the issues involved in an anti-*Lepis* clause.

The trial court in *Shifman* had relied on the decision in *Avirett v. Avirett*,[16] which held that agreements providing for rehabilitative alimony must be awarded greater weight and permanency than those providing for permanent alimony. The Appellate Division in *Shifman* noted a parallel between the rule in *Avirett* and that in *Schiff v. Schiff*,[17] which required a greater showing of changed circumstances before a court could modify support obligations arising from settlement agreements. *Lepis*, of course, rejected the *Schiff* rule on grounds that "granting a greater degree of permanence to negotiated agreements would tend to make them a riskier arrangement for spouses who are likely to be harmed by changed circumstances."[18] Thus, *Lepis* found that settlement agreements are entitled to enforcement without modification so long as they remain fair and equitable. The *Shifman* court found the same reasoning applicable to modifications of rehabilitative alimony:

Lepis, of course, rejected the _Schiff_ rule on grounds that "granting a greater degree of permanence to negotiated agreements would tend to make them a riskier arrangement for spouses who are likely to be harmed by changed circumstances."

> **A rule which would make it more difficult to modify rehabilitative than permanent alimony would be an impediment to negotiated rehabilitative alimony provisions. It also would be inconsistent with the basic responsibility of the courts to enforce support agreements without modification only so long as they remain fair and equitable.[19]**

This statement is interesting when compared with *Morris*. Anti-*Lepis* clauses are often nothing more than an attempt to prevent modification of rehabilitative alimony provisions. The *Shifman* court went on to note the trial court's reliance on *Avirett*, which stated:

> **Since greater trade-offs and equitable distribution considerations are evoked in a voluntary rehabilitative consideration, it would be virtually impossible — and certainly inequitable — for a court to modify such rehabilitative alimony responsibilities without completely revamping what may be years of equitable distribution divisions.[20]**

This led the trial court to impose a higher burden of showing changed circumstances. The Appellate Division expressly disavowed this reasoning:

> **There may of course be trade-offs between the distribution of assets and support obligations in any matrimonial settlement agreement, *Lepis, supra* 83 N.J. at 153-154. However, there is nothing fundamentally different in this regard between permanent and rehabilitative alimony; in exchange for receiving a larger share of assets, a spouse may agree to limit either the amount or the duration or alimony or both. Where such trade-offs are shown to have occurred, this may be taken into account along with all other circumstances in determining whether an award of alimony should be modified and, if so, to what extent, see *Lepis, supra*, at 150-155, but it should not, except in unusual circumstances, provide the occasion for reopening that part of a**

divorce judgment which provides for the equitable distribution of property[21]

Shifman, therefore, states that trade-offs between equitable distribution and alimony are factors to be considered along with all other circumstances in determining if and to what extent modification is appropriate. This rule is cited in *Fincken*, and *Morris* suggests that even if there are trade-offs between equitable distribution and alimony, if the agreement is no longer fair and equitable, it will not be enforced.

It would appear that courts will give deference to agreements that provide for a bargained-for exchange between equitable distribution and spousal support. In *Melletz v. Melletz*,[22] the Appellate Division invalidated an agreement that placed restrictions upon the dependent spouse's personal conduct in defining cohabitation that would establish grounds for terminating support. While the offending provisions were held to be invalid, Judge Dreier also noted:

> **The parties clearly bargained for the clause in question, and it may well be that some consideration was paid beyond the normal alimony that the wife would have received. It would be unfair for us to find the clause unenforceable, yet let the wife retain any additional alimony which may have been paid for the provision. Judge Grasso properly determined that as the clause was to be overturned, the parties must be given an opportunity to renegotiate their agreement or else submit the matter to the court for adjudication. We would merely add to his statement that the wife should receive no less than the alimony that would have been awarded had the anti-cohabitation clause not been included in the agreement.[23]**

It may also appear that the advent of limited duration alimony will obviate the need for the anti-*Lepis* clause.

This leads to the conclusion that where there has been a bargained-for exchange with consideration, the court will give substantially greater deference to the agreement than if the agreement merely attempts to impose a limit on support without consideration. It would appear prudent to set forth the consideration in the agreement rather than leave a subsequent court to infer it from the surrounding circumstances that will certainly be disputed. If there has been a trade-off on equitable distribution, it should be clearly stated. If the parties have bargained for a greater amount of alimony for a short period, the agreement should recognize this fact. The intent of the parties is crucial, and subsequent litigation may be avoided if the basis of the agreement is established in the document. Language in the agreement that establishes detrimental reliance is also prudent. Thus the agreement should state not only that the parties have entered into a bargained-for exchange but that they have relied upon this in reaching the overall settlement and but for the anti-*Lepis* waiver they would not have entered into the settlement.

Even this may be insufficient. In a recent unpublished decision, the Appellate Division extended a term of alimony despite clear language in the parties' agreement indicating that the spousal support was an integral part of the entire agreement.

In *Santamaria v. Meher-Santamaria*,[24] the parties cohabited for eight years and were married for four years. The wife received substantial excess equitable distribution and a three-year term of alimony. The agreement stated that the "spousal support is an integral part of the total cost to the Husband and benefit to the Wife of the within settlement and shall not be altered as to duration or amount under any circumstances." When the wife developed diabetes and moved for a permanent increase in support two years later, the trial judge found that the "fair and equitable" standard of *Lepis* should be applied notwithstanding the parties' agreement to establish a fixed alimony payment that was not necessarily dependent on the wife's need. The Appellate Division affirmed, finding that the trial judge could modify the parties' agreement where the circumstances have made the parties' standards unreasonable regardless of the language of the agreement.

The decision in *Konzelman v. Konzelman*[25] would appear to support the proposition that an agreement freely entered into by parties who were represented by counsel is enforceable regardless of what otherwise would be considered unconscionable. This would then bolster the enforceability of an anti-*Lepis* clause. However, the analysis in *Konzelman* deals almost entirely with the nature of a long-term cohabitation that was akin to a marriage and the policies invoked by termination of alimony upon remarriage. The decision does not address any of the policies inherent in a traditional needs-based alimony analysis. Since the decision does not confront the issue of whether the parties can bargain away the equitable powers of the court in a situation where changed circumstances have rendered the original agreement no longer fair

and equitable, it may provide little support in enforcing an agreement to terminate alimony.

It may also appear that the advent of limited duration alimony will obviate the need for the anti-*Lepis* clause. Thus, we can simply label the support as limited duration alimony and will no longer need to worry about whether the agreement to limit alimony will be enforced down the road. Such a view is probably premature at this point. While there is certainly a place for limited-duration alimony, it should apply to a relatively narrow class of cases. It is likely that attorneys will use limited duration alimony either as a means to terminate rehabilitative alimony or to fix a term in cases that should be permanent alimony cases. Attorneys will still put limits on the duration of support, either by specifying that the alimony is non-modifiable or by labeling it limited-duration alimony. The question of whether these agreements will be enforceable is still open.

Rehabilitative alimony is modifiable as to amount and duration based on changed circumstances, and can be converted to permanent alimony. [26] The amount of limited duration alimony is subject to modification based on changed circumstances, but the duration of the alimony may only be modified in "unusual circumstances." We have neither a legislative history nor a defined body of case law to guide us in determining what circumstances may be deemed sufficiently "unusual" to warrant extension of a term of limited duration alimony. We also lack guidance on whether limited duration alimony is truly needs-based in the classic sense or is intended to provide for some other purpose that will be governed by a different set of rules. This raises uncertainty that litigants and attorneys may justifiably seek to avoid.

The tension between the desirability of enforcing agreements and equitable power of the court to modify support agreements leaves the enforceability of agreements to terminate support open to question. Agreements that are supported by consideration involve trade-offs between support and equitable distribution or are provisions for equitable distribution disguised as alimony present a higher likelihood for enforcement. Agreements that are merely intended to cut off needs-based alimony are less likely to be enforceable if there has been a change in circumstances. Despite the risks involved, the anti-*Lepis* clause may still be preferable to the uncharted territory of limited duration alimony. At least we know what the risks are with an anti-*Lepis* clause. We have no way of predicting what the risks are in limited duration alimony.

The requirement of *Carter* that judges set forth findings on rehabilitative alimony and the new statutory requirements for findings for all alimony types may also impact the ultimate enforceability of an anti-*Lepis* clause. If courts actually make findings on whether an alimony award is truly rehabilitative or permanent as opposed to limited duration, an agreement that terminates the support based upon an arbitrary cutoff date should not be permitted absent some other consideration. If all of this is set forth on the record, it may bolster the enforceability of the agreement on the subsequent modification motion. However, even if the agreement is enforceable initially, there still remain questions of whether the agreement remains enforceable if there is a change in circumstances and what factors would be required to overturn such an agreement.

Anti-*Lepis* clauses at present are neither objectionable per se nor enforceable *per se*. Recent changes in the law have not clarified this issue and may have simply created more issues. The lack of definitive law and the introduction of new statutory standards will leave the enforceability of agreements to terminate alimony — regardless of whether they are labeled as limited duration alimony or an anti-Lepis waiver — subject to the facts of a particular case for the foreseeable future. In the final analysis, we can expect no clearer statement than that of *Morris*: An anti-*Lepis* clause is enforceable unless it is not.

Endnotes

1. 240 N.J. Super. 204 (Ch. Div. 1990).
2. 261 N.J. Super. 198 (Ch. Div. 1992).
3. 263 N.J Super. 237 (App. Div. 1993).
4. 240 N.J. Super. at 205-06.
5. 261 N.J. Super. at 199-200.
6. *Id.* at 201 *citing Lepis v. Lepis*, 83 N.J. 139, 149 (1980).
7. *Id.* at 201.
8. 263 N.J. Super. 237 (App. Div. 1993).
9. *Id.* at 241.
10. *Lepis v. Lepis*, 83 N.J. 139, 153 (1980).
11. *Id.* at 153n.6.
12. 263 N.J. Super. at 243.
13. *Ibid.*
14. *Id.* at 244.
15. 211 N.J. Super. 189 (App. Div. 1986).
16. 187 N.J. Super. 380 (Ch. Div. 1986).
17. 116 N.J. Super. 546 (App. Div. 1971), *certif. den.* 60 N.J. 139 (1972).
18. Lepis, 83 N.J. at 148.
19. 211 N.J. Super. at 194.
20. 187 N.J. Super. at 386.
21. 211 N.J. Super. at 195.
22. 271 N.J. Super. 359 (App. Div.) *certif. den.* 137 N.J. 307 (1994).
23. *Id.* at 368.
24. A-3507-97T3 (decided Feb. 9, 1999).
25. 158 N.J. 185 (1999).
26. *E.g. Carter v. Carter*, 318 N.J. Super. 34 (App. Div. 1999); *Milner v. Milner*, 288 N.J. Super. 209 (App. Div. 1996).

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