# New Jersey Family Lawyer

Newsletter

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## Chair's Column

# AOC: Rotate Judges in the Family Division Last

*by Cary Chiefetz*

Perhaps it is my imagination, but it seems to be more likely than not that a newly sworn-in judge will be assigned to the Family Division than the other parts of the courthouse. As an observer of the chess game of judicial assignments, it seems that experienced and seasoned judges are more likely to be rotated out of the Family Part than into the division. This is an unfortunate trend, which needs to be changed.

The Family Division requires the most experienced, thoughtful and compassionate members of the judiciary. With a divorce rate as high as 35 percent, an individual's contact with the judiciary will either occur when they perform service as a juror or seek to dissolve their marriage. How they are treated by the system will forever color their views of judges and the law. From a public relations point of view, any institution, including the judiciary, should be showcasing its best and brightest by rendering assignments that provide the greatest and most meaningful public exposure to its citizenry.

Assignment to the Family Part is the judicial equivalent of working in the emergency room of a general hospital. Many new judges do not bring to the bench the substantive background or judicial management skills necessary to cope with the demands of sitting in the Family Division. For them, their first assignment is a proverbial trial by fire characterized by a feeling of being overwhelmed. Is it any wonder that after mastering these skills they request assignment out of the Family Division as soon as they are eligible to do so?

**From a public relations point of view, any institution, including the judiciary, should be showcasing their best and brightest by rendering assignments that provide the greatest and most meaningful public exposure to its citizenry.**

Would it not be more productive to the system if a judge's last rotation were into the Family Division? By the time that rotation occurred, the judge would be seasoned, making the transition of learning the substantive law much easier. Maybe he or she would even find the assignment interesting, rewarding and diverse enough to entince the jjudge to stay in the division rather than run from it. Wouldn't the public be much better served?

I am hopeful that the stature of the Family Division assignment is changing for the better within the system. Chief Justice Deborah Poritz is to be applauded for selecting three outstanding Family Division judges — Judge Linda Feinberg, Judge Valerie H. Armstrong and Judge Graham T. Ross as assignment judges in their respective vicinages. This sends an incredibly positive message to the judiciary, the Bar and the public regarding the importance of the work we perform. I know I speak for all members of this section when I state that this is a trend we hope will continue.

Now some news of the section. While the work of the executive

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committee continues each month, we rarely get to hear from our membership, except for when we hold our annual dinner in April. To remedy that situation, we will be putting together regional meetings this year. Patricia Barbarito, Gary Borger and Candace Scott are scheduling meetings that will take place throughout the vicinages over the fall and winter months. Please look for the dates, which will begin in October, and make plans to attend the local meeting in your vicinage.

These meetings will provide an opportunity to engage in meaningful dialogue with the judges of the particular vicinage, officers of the section and executive committee members, as well as the chair and officers of the local county family law bars. In holding these sessions we hope to meet locally with our members and learn from you how the section can further meet your needs. Without hearing from you regularly, we cannot know what local issues confront you and your practice. We also hope that these meetings will make our section stronger by bringing more members into our fold. Toward that purpose, I ask that you bring one non-section member with you to the regional meeting. We would like the opportunity to talk to them about section benefits and leadership and networking opportunities.

One of my goals as chair of this section is to locate and develop our next generation of leadership to keep us vital and meaningful. I am certain that there are many members who would like to take a more active role in the section but don't have a clue as to where to begin. I challenge those individuals to communicate with us! Family lawyers are generally not shy. Let us know you want to become involved. For those of you who would like to become active in this publication, I ask that you write to Mark Sobel or myself. For attorneys admitted to the bar less than 10 years ago, I ask that you contact Debra Weissberg or Brian Schwartz, our young lawyers' liaisons. For everyone else, contact any of our officers, particularly Michael Stanton, our chair-elect, who will have the task of reformulating the executive committee when he takes on his role as chair in May 2002. Don't be afraid, jump right in … the water's fine!

I also have some news about our retreat in Charleston. We have scheduled our trip between April 4 and 7, 2002, at the quaint Vendue Inn. We already have sponsorship commitments from numerous sources, which will help keep many of our costs reasonable. Activities will include golf, dinner at a historic house and garden in Charleston, an oyster roast by the docks and, as always, first-class continuing legal education. There are other activities being planned, which will be announced soon. Please save the dates — you will not want to miss the retreat. ■

# The Valuation of Property Upon Divorce

## A Historical Perspective and Commentary on Current Trends

*by Robert T. Corcoran*

The legislative mandate that requires a court to equitably distribute marital property has been in effect for just under 30 years, since the New Jersey equitable distribution statute took effect on September 13, 1971. Unfortunately, the Legislature did not provide any legislative history to help interpret this new law, and it was left to the courts and the legislative amendments to provide guidance to practitioners as to what will and will not be considered marital property subject to equitable distribution, and to determine how and when to value these assets for distribution purposes.

In its present form, the New Jersey equitable distribution statute provides that a court may effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by the parties or either of them during the marriage.[1] The statute goes on to exclude from the equitable distribution requirements all such property, both real and personal, which was acquired during the marriage by either party by way of gift, devise, or intestate succession, with the sole exception of allowing inter-spousal gifts to remain subject to equitable distribution. Aside from the foregoing, the statute provides no other guidance as to how and when to identify assets subject to equitable distribution, value them, and fairly allocate and distribute them between the parties.

### THE *PAINTER* BRIGHT-LINE RULE

Beginning in 1974, when the New Jersey Supreme Court first grappled with the issue of identifying assets subject to equitable distribution in the case of *Painter v. Painter,*[2] the courts have attempted to formulate guidelines for practitioners to follow when addressing equitable distribution issues. In *Painter,* the Court attempted to use a bright-line rule to simplify the equitable distribution process.

The *Painter* Court established the date that the divorce complaint was filed as the date for identifying assets subject to equitable distribution under the statute, opting for a consistent and practical approach to determining the termination date of a marriage as contemplated by the Legislature in its statutory reference to property acquired "during the marriage."

The Court recognized that the day the divorce judgment is granted would be impractical to use as a cut-off date because it would be impossible to introduce at trial evidence as to the value of assets determined as of that day, and further recognized that the day the marriage irretrievably broke down or the cause of action arose would be unworkable as well since such dates are incapable of precise determination.

Accordingly, the Court selected the date the complaint is filed as the termination date, and thus all property, both real and personal, which was legally and beneficially acquired by the parties from the date of the marriage to the date of the filing of the complaint would be subject to equitable distribution.

This hard and fast rule was reaffirmed by the New Jersey Supreme Court in the cases of *Chalmers v. Chalmers*[3] and *Rothman v. Rothman.*[4] The Court's reaffirmation of the *Painter* bright-line rule was based upon the theory that marriage is a "shared enterprise, a joint undertaking … akin to a partnership,"[5] whereby each spouse contributes something to the overall establishment of the marital estate even though one or the other may actually acquire the particular property.[6] When the parties divorce, each spouse should receive his or her fair share of what has been accumulated during the marriage.

The underlying public policy of the equitable distribution statute was said to be twofold: 1) to protect the wife from the consequences of her former husband's death or financial misfortune were she to receive alimony only; and 2) to recognize a spouse in a support role as well as a non-support role as being entitled to a share of the family assets accumulated during the marriage by virtue of his or her contribution to the marriage as a whole.[7] A division of property upon divorce was supposed to reflect joint contributions made by both parties during the marriage itself.

To the New Jersey Supreme Court, it appeared that the underlying policy of the equitable distribution statute, *i.e.* the equitable division of marital assets between spouses upon divorce, would be

implemented by establishing the date the divorce complaint was filed as the cut-off date for equitable distribution purposes. Since the precise date upon which the marital enterprise collapsed and upon which date the marriage irretrievably broke down, in an effort to precisely implement the public policy of the statute, would be unworkable, the New Jersey Supreme Court, using the "marital partnership" theory, at this time established the date-of-complaint rule as signifying the end of the marriage to be applied consistently in all cases.

**FACTORS JUSTIFYING A CHANGE IN THE RULE**

The Court's approach, however, contemplated only the very limited circumstance whereby a marital asset simply increased in value from the date of the marriage to the date the divorce complaint was filed, with no significant change in value subsequent to the filing date. The cases decided up to this point in time did not take into consideration factors which would justify a different date for identifying and valuing assets subject to equitable distribution.

In *Scherzer v. Scherzer,*[8] the Appellate Division allowed for an equitable argument to prevail since the value of the husband's interest in a closely held corporation had decreased sometime after the filing of the complaint but prior to the trial of the case. The court rejected the wife's argument based upon the *Painter* bright-line rule that the husband's interest in the corporation should be valued as a matter of law as of the filing date of the complaint in favor of the equitable principles underlying the equitable distribution statute where the implementation of *Painter* would have resulted in inequity to the parties, a result not contemplated by the equitable distribution statute. The court hereby left open the possibility that factors based upon fairness to the parties could influence the determination of a marriage termination date for identifying and valuing property subject to equitable distribution.

Just two years later, in 1977, again based upon the equitable principles underlying the equitable distribution statute, the New Jersey Supreme Court allowed for the use of a different valuation date where circumstances clearly demonstrated that the marriage had broken down prior to the filing of the divorce complaint. In *Smith v. Smith,*[9] the Court allowed a signed property settlement agreement accompanied by separation-in-fact to constitute the cut-off date for equitable distribution purposes. In *Smith,* the Court recognized that there may in fact be changes in the value of property between the date of the separation agreement and the date of the divorce decree. While the court felt that minor changes could be dealt with by adjusting the alimony provisions of the decree, the Court recognized that in certain circumstances, where there were significant changes in one party's financial position, an alimony adjustment might not completely satisfy the equitable considerations underlying the equitable distribution statute.

The Court left open the possibility that a litigant may be permitted to apply for appropriate equitable consideration in specialized circumstances since the distribution of marital property must, ultimately, still be equitable regardless of changes in value and simplistic bright-line rules.

Similarly, in *Carlsen v. Carlsen,*[10] the companion case to *Smith* decided the same day, where there was a property settlement agreement made in conjunction with a judicial decree for separate maintenance, the court allowed the agreement to constitute the equitable distribution cut-off date. In addition, in *DiGiacomo v. DiGiacomo,*[11] the court allowed the date that an oral property settlement agreement was carried out, whereby the parties had actually separated and divided their assets, to constitute the cut-off date for the identification of assets subject to equitable distribution.[12]

As can be seen from these cases, the Court's initially rigid approach to the determination of a cut-off date for identifying and valuing assets subject to equitable distribution, which was based largely on pragmatic considerations in *Painter,* was beginning to yield to the reality that some other date might, in appropriate circumstances, be fairly considered to terminate the marriage for equitable distribution purposes. This yield was temporarily cut short, however, by the Appellate Division in the case of *Borodinsky v. Borodinsky,*[13] where the court, while citing the *Smith* case with regard to offsetting any increase or decrease in the value of eligible assets after the termination date for valuing same, nevertheless returned to the *Painter* bright-line rule whereby the valuation date for marital assets was found, under the facts of the case, to be the date the complaint was filed.

*Borodinsky* did not, however, foreclose further possibilities for establishing valuation principles based upon equitable considerations since it recognized, as the *Smith* Court did, that a change in one party's financial position may be so great that it might require specialized "equitable consideration." Later cases did indeed force courts to grapple with more difficult valuation issues, requiring them to apply equitable principles to reach a just result.

**SHOULD EQUITY OR CONSISTENCY PREVAIL?**

The cases which required the courts to address the more difficult valuation issues and ultimately decide whether equity or consistency should prevail involved situations where there was either an increase in the value of marital property post-filing or there was an increase in the value of property that would otherwise be thought of as separate property during a marriage. With the Court being so focused upon establishing consistent rules for the application of equitable distribution laws, and

struggling with the competing considerations of equity and consistency, the courts up until this time had only touched upon these more difficult issues. Relying upon the theory that a marriage is an economic partnership whereby each party contributes to its success or failure, the court in *Scherzer* found an increase during the marriage in the value of closely held corporate stock which was owned by the husband pre-marriage, to be eligible for equitable distribution to the extent that the increase was attributable to the expenditure of effort by the wife. Recognizing that the stock of a closely held corporation obtained its value in large part from the individual's personal participation in the business, the court reaffirmed the economic partnership principle in allowing the wife to receive an equitable distribution share for her efforts within the marriage which resulted in her husband's success within his closely held corporate business.

The theory was that "a homemaker's contribution cannot be given a monetary worth and its value may be gleaned from the earnings of the employed spouse."[14] Even where the marriage was found to be somewhat discordant and acrimonious, the court would not bar the wife from receiving her equitable distribution share, noting that "a sparring partner can [still] be said to contribute in some measure to the success of an adversary,"[15] and that it would be up to the court to award a diminished share to the wife on this basis if it saw fit to do so.

The same theory was applied in the case of *Mol v. Mol,*[16] where the court came to the opposite conclusion and disallowed the wife's entitlement to share in that portion of the enhancement value of the marital home which was due solely to inflation or other economic factors and to which she did not contribute in any way. The wife might have been entitled to an equitable distribution share in that portion of the enhancement value to which she did contribute or for which both spouses were jointly responsible if the court were able to distinguish between that portion of growth and value which resulted from independent economic factors alone as opposed to that portion which resulted from contributions by the parties. This theory again was applied in the case of *Griffith v. Griffith,*[17] where the court permitted the wife to share in that portion of the equity of a home which was owned pre-marital by the husband where the wife, in her position as a full-time homemaker, was found to have contributed to the reduction in the mortgaged amount, again relying upon the theory of marriage as an economic partnership and joint enterprise to which both parties contribute by virtue of both pecuniary and non-pecuniary efforts.[18] Under these circumstances, the court found that the valuation date for purposes of equitable distribution was the date the complaint was filed.[19]

The issue of post-filing increases or decreases in value proved to be more difficult. The New Jersey Supreme Court initially addressed this issue in *Scherzer,* where the defendant's corporate stock interest as well as marketable securities held by a factor as collateral for loans to the corporation became worthless post-filing when the corporation went into bankruptcy. The plaintiff wife argued that she was entitled to an equitable distribution share with respect to those items despite their being worthless on the theory that the value must be fixed as of the date of the filing of the complaint. To the contrary, the Court, while recognizing the *Painter* date-of-complaint rule, erred on the side of equity in finding that it would be unfair to award a distribution of an asset when the asset at the time of distribution had become worthless.

Thus, although the *Painter* Court attempted to draw a bright-line rule for determining a cut-off date for identifying and valuing property "acquired during the marriage" to facilitate the equitable distribution of marital assets since a case by case determination of exactly when the marriage broke down would be unworkable, this pragmatic approach itself proved unworkable in circumstances where there was a substantial increase or decrease in value subsequent to the filing of the divorce complaint and prior to trial. As time went on, the Court focused not only upon the legislative mandate requiring the courts to find the termination date for the marriage, but more and more upon equitable considerations, such as the reason for the increase or decrease in value, as well as the concept of marriage as a joint enterprise/economic partnership.

#### THE NEW THEORY: ACTIVE V. PASSIVE ASSETS

In the case of *Bednar v. Bednar,*[20] the Appellate Division was faced with a situation where the husband's business and a jointly owned motel (managed solely by the plaintiff wife) increased in value substantially until its sale to the plaintiff eight years after the divorce complaint was filed. The trial court had valued the defendant's interest in his business as of the date the complaint was filed; the motel was not specifically evaluated by the court since it was ordered to be sold and the proceeds divided equally among the parties. The motel was acquired in 1972 for $225,000; it was valued at between $232,000 and $273,000 in 1976 at the time the complaint was filed; there was evidence that it was worth $462,000 in late 1981;the divorce was granted in 1982; and the sale of the motel closed in 1984. At the time of the closing, the available equity in the amount of $193,000 was distributed to the parties. The balance of the equity, in the amount of $188,672, represents the disputed sum arising from the questions raised on the appeal.

Under these circumstances, while noting that a common valuation date for all marital assets would

be preferable, and citing *Brandenburg, DiGiacomo, Borodinsky,* and *Smith* in support thereof, the Appellate Division distinguished the issue of enhancement or accretion in value pending distribution. Where the asset increases substantially in value between the time controlling for purposes of including and evaluating assets, which would ordinarily be the date of the filing of the complaint, and the time of actual distribution, the enhancement in value must be analyzed in terms of whether it is attributable to the personal industry of the party controlling the asset, apart from the non-possessory partner, or simply to a fortuitous increase in value due merely to inflation or other economic factors.

Where the increase is found to be due simply to market factors or inflation, each party should share equitably in the increment. Where there are increases in value subsequent to the termination of the marriage (*i.e.* post-filing) and pending actual distribution attributable to the diligence and industry of the party in possession of the asset, independent of market factors, the increase should accrue to that party alone.[21] Accordingly, the date of trial or date of distribution might actually be the appropriate valuation date if equity compels such a result.

The *Bednar* case recognizes both the nature of the marital relationship as well as the nature of a marital asset and the reason for any enhancement in value in determining to whose benefit the increase should accrue. It takes into consideration the underlying legislative intent, requiring that the distribution be equitable. This new concept, namely, distinguishing between changes in value post-filing which are attributable to market factors versus one or the other party's actions, was a precursor to the *Scavone* case, which established the active/passive guidelines in setting forth rules for the treatment of incremental values. In *Scavone v. Scavone,*[22] the court established guidelines regarding whether an asset should be valued as of the date of the complaint or as of the date of distribution based upon the nature of the asset, *i.e.* whether it was deemed active or passive. In *Scavone,* the Appellate Division affirmed the trial court's holding that a party's one-half interest in a seat on the New York Stock Exchange, which was acquired in that party's name only during the marriage, was a passive asset which should be valued as of the date of distribution, rather than the date the complaint was filed. The value at the time the complaint was filed was $400,000; the value at the time of distribution was $700,000. Since the increase in value was caused solely by market forces and not by either party's efforts or diligence, the trial date value applied.

*Scavone* established a number of rules for the treatment of incremental values depending upon the type of asset involved. Where the asset has been acquired prior to the marriage or by way of gift or inheritance prior to or during the marriage, it is immune from equitable distribution by legislative mandate. Where such an asset is deemed passive, *i.e.* one whose value fluctuates based exclusively on market conditions, its incremental value is also separate property and is not subject to equitable distribution. Where the asset is immune from equitable distribution and is titled solely in one name, but is an active asset, and the increase is attributable solely to the efforts of the owner, the increase will also not be distributable. If the increase, however, is partially or solely attributable to the efforts of the non-owner, it is distributable, with the valuation date being the date of distribution.

With regard to post-filing date increases in the value of passive assets acquired jointly during the marriage, which assets are clearly subject to equitable distribution, such increases are also clearly subject to equitable distribution, with the valuation date being the time of actual distribution ordered by the court since the increase in value is attributable simply to market factors or inflation, and each party should share equitably in the increment. Thus the date for valuation of a passive joint asset acquired during marriage is the date of distribution rather than the date of complaint. With regard to incremental values of an active joint asset which was acquired during marriage, if the interim increases pending actual distribution are due to the diligence and industry of the possessory party, independent of identifiable market forces, those increases should accrue to that party alone since the act of filing a divorce complaint signifies the end of the marital relationship and simultaneously terminates the non-participatory spouse's proportionate share of the asset's increased value.

Accordingly, if the increment was due to an active reason, the value would be determined as of the date of the complaint. If the increase in this situation was due, however, to a passive reason, the value would be determined as of the date of distribution.

In general, passive assets are distributable (unless acquired in one name), with the incremental value determined at the time of distribution, whereas active assets are distributable (again unless acquired in one name), with their valuation determined as of the date of the complaint. These guidelines are based upon the underlying principle that a marriage is a partnership, and a spouse should be remunerated for his or her efforts, both pecuniary and non-pecuniary, contributed towards the joint enterprise.[23]

**UNANSWERED QUESTIONS**

Although *Scavone* became a landmark decision for its treatment and guidance regarding the valuation of incremental increases post-filing, it failed to recognize that an active asset can increase for passive reasons, and that a passive asset can increase for active reasons. In addition, it failed to elaborate upon the difference in result depending upon who owns the active or passive asset. Significantly, *Scavone*, decided

in an inflationary economy, failed to take into account the circumstance where an asset might decrease in value after the filing of the complaint and prior to trial despite the good faith effort of the possessory spouse, for passive reasons.

This latter situation whereby an asset might decrease in value post-filing as a result of passive factors, was destined to present itself during the recessionary early 1990s. One such situation presented itself in the 1991 case of *Goldman v. Goldman.*[24] *Goldman* involved the valuation of an automobile dealership that had a value of $294,000 as of the date of the filing of the complaint and no value at all as of the date of trial. The plaintiff husband had purchased the dealership with another person during the parties' marriage, and was always actively involved in the management of the business, whereas the defendant wife was not. Despite good faith attempts to keep the business going during the period between the filing date and the date of trial, the value of the automobile dealership decreased to zero during that time frame for a number of reasons, all of which can only be considered passive. Only two years after the plaintiff entered the automobile business, the stock market collapsed.

With it came the demise of the demand for high-end luxury imported cars, which were the type of cars the plaintiff sold. In addition, the plaintiff's automobile dealership suffered due to the decline of the dollar, certain adverse publicity associated with Audis, and a nationwide decline in the sale of Volkswagens.

Under these circumstances, where the value of the plaintiff's business became worthless by the time of trial for passive reasons despite the plaintiff's good faith attempts to keep it going, the court recognized that it was confronted with a unique situation and that application of a rigid categorical analysis (as presented by *Scavone*) would have hindered the court in fulfilling its ultimate obligation of effectuating a distribution of marital assets which, overall, was equitable to both parties. In finding that the trial date value of zero should apply to the plaintiff's interest in the automobile dealership, the court quoted the *Rothman* principle requiring that the division of property upon divorce be responsive to the concept that "marriage is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership … [where] far more than economic factors are involved."[25]

The *Goldman* court also relied upon the *Scherzer* case, which involved a similar situation, where the court refused to make an award based upon value as of date of complaint when the value of the assets in question were zero at the time of trial, citing the Legislature's mandate that the distribution be equitable, as well as the mandate that the court consider all circumstances of the individuals before it in effectuating an equitable distribution, including any significant changes in the valuation of marketable assets occurring before final judgment.

Significantly, the court in *Goldman* noted that this case presented unique circumstances, not appropriate for application of the *Scavone* principles, since the legislative mandate to distribute marital assets equitably would not be served if the plaintiff were required to suffer the loss which occurred as a consequence of his effort and time exerted. The consequence of value fluctuations for purposes of equitable distribution should not turn wholly on whether an asset is properly classified as active or passive. It would be patently unfair to charge the plaintiff with an asset having a value of $294,000 at the time of the complaint when that asset had no value at all at the time of trial. Accordingly, the car dealership was valued as of the time of trial.

## EQUITY PREVAILS

Surprisingly, the court's well-reasoned opinion in *Goldman* has had very little application in the years since that opinion came down. *Goldman* does, however, fill in at least one of the gaps left open by *Scavone,* and makes practitioners aware that *Scavone* may not have the answer in all situations. As *Goldman* aptly pointed out, the reason for any increase or decrease in the value of an asset should clearly be a more influential factor than the nature of the asset itself when trying to determine whether and when such increase or decrease is distributable. To hold otherwise would, in a number of situations including the not-so-unusual situation of a house that declines in value post filing due solely to market factors, result in an inherently unfair distribution not contemplated by the Legislature in drafting the equitable distribution statute.

The underlying principles of equity and fairness should be the overriding factors in every valuation situation, with the court giving due deference to the concept of marriage as an economic partnership. Although the results in all cases might not be as consistent as the *Painter* court had initially hoped, experience has taught us that rigid rules do not always produce equitable results. The consistency with which the courts should be concerned, and towards which they have worked in establishing the valuation rules up to this point, is in the fairness and equity of the result. When this goal is reached, the legislative mandate will truly be satisfied. ■

## ENDNOTES

1. N.J.S.A. 2A:34-23.
2. 65 N.J. 196 (1974).
3. 65 N.J. 186 (1974).
4. 65 N.J. 219 (1974).
5. *Id.* at 229.
6. *See Chalmers,* 65 N.J. at 194.
7. *See Rothman,* 65 N.J. at 228-29.
8. 136 N.J. Super. 397 (App. Div. 1975), *certif. den.,* 69 N.J. 391 (1976).
9. 72 N.J. 350 (1977).
10. 72 N.J. 363 (1977).
11. 80 N.J. 155 (1979).
12. *cf. Brandenburg v. Brandenburg,* 83 N.J. 198 (1980) (despite actual separation

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## The Appellate Division

# What is Not in the Court Rules

*by Thomas J. Hurley*

Following a decision by a court, an attorney walks into the hallway with his or her client. The first words that come to mind, if he or she has lost, should not be words that are shared with the client. The client, generally in rough and crude terms, might suggest to the attorney that his or her knowledge of the facts or the law, or the other attorney's relationship with the judge, is what engendered a negative result. Discussing these topics with the litigant, at this moment, might not be appropriate. The attorney might delay a disclosure about the standards of review and the methodology of approaching the case to the Appellate Division. At this moment the advice will generally fall upon deaf ears.

This article will attempt to guide attorneys through the appellate process, once the decision is made to venture forth through it.

The New Jersey standards for appellate review require that there be a formal judgment or order of the court.[1] Occasionally, attorneys are faced with a situation where they are requesting certain relief from the court, or an order, and the judge responds: "Counsel, I'm not even going to address that issue." Suggest to the court that you desire the court to enter an order, and that the relief being requested is, therefore, being denied (and that this be included in the order). If that is rejected by the trial judge, counsel could file a motion with the Appellate Division with an appropriate affidavit and a copy of the transcript setting forth the event.

The standard that the Appellate Division will utilize in determining whether or not to overturn a trial court decision is whether or not there has been plain or harmful error "clearly capable of producing an unjust result."[2] Unless an error meets the definition of plain or harmful error, the appellate court will not reverse on the basis of the error. When an error in the fact finding of the judge is alleged, the scope of the appellate review is very limited. The appellate court will only decide whether the findings could reasonably have been reached on sufficient or substantial credible evidence present in the record. The proofs will be considered as a whole. Due regard will be given to the ability of the fact finder to judge the credibility of the litigants or the witnesses. Error of law occurs when the trial judge has misinterpreted or misapplied the law.

Assure yourself that the client understands the above "standards." Advise the client that the appellate court is *not* interested in their emotional outlook and counsel can then proceed forward with filing for the appeal.

A minimal quantity of work should be generated in preparing the case information statement for the Appellate Division. It is a tracking statement utilized by the clerk's office. It is not utilized by the reviewing judges to make a determination regarding the arguments being adduced. Counsel should, therefore, dedicate a modest quantity of time in the preparation for the case information statement.

If it is necessary for immediate review of a judicial decision, counsel should contact the court and the emergency judge. Emergency judges are available every day of the year at every hour of the day. Expedited review, in a matrimonial setting, will not generally take place relating to issues of finances. The issues of custody and visitation, however, can be subject to the court's review in an emergency situation. Appellate Division judges will handle counsel's motions for expedited review and will review the matter promptly upon a request. Notice, of course, must be accorded to opposing counsel.

The drafting of the brief is the most important element of the presentation to the appellate court. The brief should not be a rambling discussion, but rather a pointed argument to the court. It should be utilized by the appellate panel in issuing their own opinion. The perfect brief is one that the panel will mirror in issuing a decision. Pejorative and nasty comments regarding opposing counsel or the litigants are inappropriate. Remember, the Appellate Division issues its opinion in order to provide guidance regarding legal issues. It is not a higher ecumenical court. They are not arbiters of right and wrong, but rather guides for the law.

Make sure that the brief is neat, with all pages properly paginated, and that a judge does not cut him or herself upon the staple holding together the brief. The appellate brief must raise legal issues and not simply regurgitate the emotional

events from the case below.

There is available an Appellate Division checklist for the preparation of the appendix. Review that checklist with each brief prepared. Insure that the appendix has a table of contents and that the initial page of each document is indicated. Attachments to a document must be separately identified in the initial page of each noted. Each volume of a separately bound appendix must be prefaced with the table of contents. If bound with the brief, there should be a single table of contents for both. If a motion decision is being appealed, the motion and any supporting or opposing affidavit and certification must be appended. Trial briefs should not be included in the appendix, unless the question of whether an issue is raised at the trial court is germane to the appeal, in which event only the material pertinent to that issue should be included. Counsel should not simply reproduce their trial briefs to the appellate court and expect the court to overturn the trial court's decision. All of the references to the appendix and to the transcripts *must be accurate.* Omissions, deletions or out-of-context references to the transcript are inappropriate and may cost counsel and the litigant the victory they could achieve.

The presiding judges of the Appellate Division determine scheduling and the reviewing panels for each of the appeals. Counsel should consult with the team managers to determine time frames and oral argument. Oral argument is granted in any case where it is requested.

Clients need not be present at the time of oral argument. They can, in fact, be harmful to the case if they turn into a cheering section or confirm the trial court's impression that they are highly emotional and incapable of controlling themselves. Only a stoic client bereft of emotions should appear at the time of appellate oral argument. Following oral argument, the appellate court generally will issue an opinion within a month. ■

(**Editor's Note:** Thomas J. Hurley thanks Judge Michael Patrick King, P.J.A.D., and Judge Francine Axelrad, J.A.D., for relating their thoughts in conjunction with this article. Judge King and Judge Axelrad gave a seminar to the Camden County Bar Association, and some of the thoughts contained within this article stem from their comments.)

**ENDNOTES**

1. *Credit Bureau Collection Agency v. Lynn,* 71 N.J. Super. 326 (App. Div. 1961).
2. Rule 2:10-2.

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## The Valuation of Property Upon Divorce

**Continued from page 7**

whereby the parties actually maintained separate residences, in the absence of a qualifying separation agreement, the date a complaint is filed will fix the termination date of a marriage for purposes of equitable distribution).

13. 162 N.J. Super. 437 (App. Div. 1978).
14. *Id.* at 401.
15. *Id.*
16. 147 N.J. Super. 5 (App. Div. 1977).
17. 185 N.J. Super. 382 (Ch. Div. 1982).
18. *See also Pascarella v. Pascarella,* 165 N.J. Super. 558 (App. Div. 1979) (the concept of equitable distribution of property contemplates distribution that would equitably compensate each spouse for the value of his or her respective contribution to the marital venture); *but see Wadlow v. Wadlow,* 200 N.J. Super. 372 (App. Div. 1985) (the defendant is not entitled to a share in any increase in value occurring during the course of the marriage because there was no evidence the enhanced value was attributable to the defendant's efforts).
19. *See Graver v. Graver,* 147 N.J. Super. 513, 519-520 (App. Div. 1977) (value of the defendant's pre-owned law practice in terms of equitable distribution is in the appreciation in value of the defendant's interest in the firm during the course of the marriage, and more particularly, the difference in value between the date of the marriage and the date of the filing of the complaint).
20. 193 N.J. Super. 330 (App. Div. 1984).
21. *See id.* at 333. *See also Wadlow,* 200 N.J. Super. At 384-85 (appraisal value of the property at the time of the hearing should be considered where value increased significantly from the date of filing of the complaint due solely to market factors).
22. 230 N.J. Super. 482 (Ch. Div. 1988), *aff'd.,* 243 N.J. Super. 134 (App. Div. 1990).
23. *In accord Weiss v. Weiss,* 226 N.J. Super. 281, 288-289 (App. Div. 1988), *certif. den,* 114 N.J. 287 (1988) (a marital home titled in the husband's name only should be valued as of the date of trial rather than the date of the complaint where the wife continued to reside in the home and participate in its maintenance for more than a year after the divorce complaint was filed and the increase in the value of the home between the filing date and the trial resulted from market factors rather than any improvement or other contributions made by the husband; enhancement in value during the marriage of the husband's interest in the family insurance business was subject to equitable distribution where the wife contributed to the husband's business through her efforts as homemaker and as caretaker of their child, enabling the husband to work 60 hours per week, and where the wife also worked part-time in the business); *Valentino v. Valentino,* 309 N.J. Super. 334 (App. Div. 1998)(where the value of the husband's pre-owned commercial property increased due to the wife's contributions toward its growth and development, the increase was brought about through efforts of the non-owner spouse, and the increase in value was subject to distribution with the valuation date being the date of distribution).
24. 248 N.J. Super. 10(Ch. Div. 1991), *aff'd,* 275 N.J. Super. 452 (App. Div. 1994).
25. *Goldman,* 284 N.J. Super. at 12, *citing Rothman,* 65 N.J. at 229.

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# The Far-Reaching Impact of *Crews*

*by Frank Louis*

In the controversy concerning *Crews*[1] there has been little debate or discussion concerning the decision's significant substantive changes in law and how the *Crews*' procedural requirements affect negotiations and preparation of agreements. *Crews* is a particularly important case which potentially will have a significant impact upon day-to-day practice. This article will outline the substantive changes and how lawyers should address these new developments.

Still, the substantive law changes *Crews* generated may well be overshadowed by the furor created by procedural issues discussed in the decision. The lawyer who views *Crews* only as directing *how* an uncontested case is placed on the record will fail to appreciate the direct, if not the subtle, changes in substantive law it has created, not unlike a person who views a Monet painting but only notes the painting is colorful.

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### WHAT IS THE IMPACT OF *CREWS* ON A *PENDENTE LITE* APPLICATION?

*Crews* requires courts to reconsider not only how they decide *pendente lite* motions, but to identify the proper legal standard for their determination. Having previously argued the legal standard for determining *pendente lite* support is not maintenance of the *status quo*, *Crews* provides guidance on the standard even though it is not a *pendente lite* case.[2] However one characterizes *Crews*, its primary support is found in the statute.

One of the criticisms leveled at *Crews* is that it elevates one statutory factor, the standard of living, above all others. While that is debatable, what is not is that *Crews* emphasizes the importance of the standard of living as a factor to be considered. The emphasis on the standard of living is not unique, as *pendente lite* supported spouses frequently base their entire presentation on their "right" to have that standard maintained. *Status quo* has become a substitute for and is used interchangeably with marital lifestyle. *Crews*, viewed in conjunction with the statutory standards, suggests the invalidity of that approach.

In analyzing the interrelationship between *Crews* and *pendente lite* applications, the discussion most appropriately begins with the statute. The preliminary question is whether the statutory factors and, hence, the standard of living, have any relevance *pendente lite*. Yet, *status quo* is not a statutory factor. Moreover, there is no case that addresses whether the amended statute, which included the statutory factors and which was enacted in 1988, applies to *pendente lite* applications.[3] Of course, there is no case suggesting it does not. In fact, there is no clear precedent holding maintenance of the *status quo* is the correct *pendente lite* legal standard. Yet, in clear and unequivocal language, the Legislature mandated courts to consider the statutory factors "*pending* any matrimonial action."[4]

The phrase "pending any matrimonial action" is neither ambiguous nor vague; although never interpreted, it means something, most logically precisely what it says. In my view, it can only mean the statutory factors, which are a reflection of the public policy our law is intended to promote, must be considered *pendente lite*. Any other interpretation would require that language be written out of the statute. In fact, establishing *status quo* as the standard rewrites the entire statute. It is a standard that cannot be justified by the statute or the policy it seeks to implement.

The statutory factors reflect a certain public policy. In *Miller v. Miller*,[5] the Supreme Court emphasized

the "strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages." Can a serious argument be advanced that the public policy of "fairness and equity" should not apply *pendente lite*, but only at final hearing? What public policy considerations suggest such dramatic bifurcation and disparate treatment for the same spouse? Why have two different legal standards, particularly since there is no statutory justification or precedent for such disparate treatment? Utilization of two fundamentally different standards, one based on the statute and public policy and the other based merely on pre-existing practice (the lore not the law) cannot withstand careful scrutiny.

Such contentions must fail in light of the fundamental public policy that exists when people divorce. Our Supreme Court in *Miller,* in addressing a support imputation issue that had never been specifically examined before at the Supreme Court level, noted spousal support agreements and, in reality all divorce issues, must reflect "the strong public and statutory purpose of ensuring fairness and equity in the dissolution of marriages."[6] This was a clear and unequivocal message to courts, lawyers and ultimately litigants that people, upon divorce, are required to treat each other fairly. Viewing the legal issue through the prism of public policy, there is no logic in applying fundamentally disparate legal standards in a support context, to the same people and facts, in direct contravention of a clear and compelling statutory provision that requires pending a divorce action that statutory factors be considered.

Notwithstanding *Crews* and the statutory language, maintenance of the *status quo* still has a place in a *pendente lite* application, but not with support. *Pendente lite* motions have a unique duality; *pendente lite* courts must first address support issues while simultaneously being cognizant of the ultimate responsibility to equitably distribute assets. There is thus an obvious need to maintain the *res* of the action, which are the assets; if they are dissipated, the court cannot fulfill the statutory mandate to fairly distribute assets which no longer exist. This public policy consideration provides the jurisprudential basis for the principle of maintaining the *status quo*, but only as to assets.

**After *Crews,* a series of statewide seminars were conducted. While there were…diverse views on many issues, there seemingly was consensus that the right to enjoy the marital lifestyle was not allocated to one spouse or the other; rather, it was a right both parties had. Utilizing the statutory language it was a right *each* had.**

Assuring the *res* is available for ultimate determination is not only supported by the statute, but traditional chancery equity jurisdiction. There is another and persuasive basis for distinguishing assets and support. In *Chalmers v. Chalmers,*[7] the court discussed equitable distribution and what was actually occurring when assets were distributed. The court noted equitable distribution was a process by which a court was *allocating* between parties assets that "already belonged" to both parties.[8] This allocation of property rights, regardless of title, cannot be implemented if assets have been dissipated. Thus, assuring that assets be maintained, *i.e.* continuing the *status quo*, is not only mandated by the public policy underpinning equitable distribution, but by a court's responsibility to implement the statutory mandate by implementing a fair distributive scheme. Yet, just as the policy justifies maintaining the *status quo* for assets, that same policy precludes blind adherence to the *status quo* as the standard for *pendente lite* support.

**THE MARITAL LIFESTYLE**

One of the critical issues raised by *Crews* is the interpretation of the statutory term marital lifestyle and applying that basic legal principle to the reality of day-to-day practice, including *pendente lite* applications. The statute directs that courts consider certain factors.

Statutory Factor 4 provides:

> The standard of living established in the marriage and the likelihood that *each party can maintain a reasonably comparable standard of living.* (emphasis added)

Prior to *Crews*, an issue existed whether this meant comparability had to be measured between the parties, or by comparison to the marital lifestyle. That is no longer an open issue. The court emphasized the goal of the statute is to permit:

> the dependent spouse to maintain a standard of living reasonably comparable to the standard established during the marriage.[9]

This language seemingly suggests the right to enjoy a lifestyle comparable to the marriage belongs *only* to the dependent spouse. Yet, the gender-neutral language of the statute, its genesis and the following *Crews* excerpt suggest the marital lifestyle does not belong to either spouse but to both, *i.e.* to each of them:

> In contested divorce actions, once a finding is made concerning the

> standard of living enjoyed by the parties during the marriage, the Court should review the adequacy and reasonableness of the support against the finding. That must be done even in situations of reduced circumstances, when the one spouse's income, or both spouses' income in combination, do not permit the divorcing couple to live in separate households in a lifestyle reasonably comparable to the one they enjoyed while living together.[10]

After *Crews*, a series of statewide seminars were conducted. While there were, as might be expected, diverse views on many issues, there seemingly was consensus that the right to enjoy the marital lifestyle was not allocated to one spouse or the other; rather, it was a right both parties had. Utilizing the statutory language it was a right *each* had.[11]

An analysis of the statutory factors (particularly the word each), their legislative history, and the overall statute itself seemingly confirms the view that this entitlement is not allocated to one or the other as a matter of policy or law; it is a right to be equally enjoyed by both. The 1988 statutory amendments emanated from the Commission on Sex Discrimination. This was confirmed by the Supreme Court in *Innes v. Innes,*[12] where Justice Marie Garibaldi noted the commission's purpose in recommending amendments to New Jersey's Marriage and Family Law was to "conform all statutes and regulations to a standard of sex neutral language."[13]

The commission noted the pre-existing statutes contained "many subtle forms of discrimination reflecting stereotypical attitudes towards men's and women's roles."[14] After reviewing the leqislative history, the Court concluded the commission's amendments (later embodied in our alimony statute) were designed:

> to remove discrimination against women and men and make the rights of mother and father, or wife and husband, equal in the eyes of the law.[15]

It is with that back drop of mandating equality that an analysis of the statutory factors must be conducted. Not one of the statutory factors refers either to a "husband" or a "wife" or even a dependent or supporting spouse. If the legislative intent, as determined by *Innes,* was that husbands and wives "be treated equally under the law," can a gender neutral statutory factor that mandates courts consider the likelihood that each party can maintain a reasonably comparable standard of living possibly mean this right has been allocated not to *each,* as the statute clearly says, but *only* to one? Use of the word each is particularly significant, if not dispositive given this historical context.

Prior to the 1988 amendments, it had been almost basic hornbook law that it was only the wife who had a right to enjoy the standard of living to which she had been accustomed.[16] It would be intellectually dishonest if I did not point out that such language was used by courts even after the 1988 amendments. Yet, it was *dicta*, and certainly not utilized after careful analysis of the rights of respective spouses to enjoy the marital lifestyle in light of the statutory language.[17]

The view that gender has no place in the alimony analysis not only finds support in the statute, but in Justice Pashman's observations in *Lepis v. Lepis.*[18]

> The fact that our alimony and support statute is phrased without reference to gender, N.J.S.A. 2A:34-23 will accomplish little if judicial decision making continues to employ sexist stereotypes. The extent of actual economic dependency, not one's status as a wife, must determine the support as well as the amount.[19]

Importantly, *Lepis* was written eight years prior to the statutory amendments. It may be inferred the Legislature was aware of the Court's broad rejection of sexism as a basis for alimony awards when it adopted the 1988 amendments. It would be inconsistent with the statute, which *Crews* can only interpret and not modify, to conclude the right to a comparable lifestyle as a matter of law or policy should be allocated to only one spouse and not both. *Crews* cannot delete the word each from the statute, nor can it eviscerate the *Lepis* admonition that a wife's status was no longer the determining factor. Moreover, how can that be reconciled with the language referring to *both* parties having the right to live in lifestyles comparable to the marital lifestyle?[20]

How then does the advocate utilize this concept in presenting a case both at final hearing and *pendente lite*? It is perhaps at the *pendente lite* stage that the opportunity to persuasively advance the argument exists most. If I am correct that the legal standard to be applied *pendente lite* is not blind adherence to maintaining the *status quo*, but an analysis of the statutory factors, including "reasonable comparability," then it logically follows (if not actually mandated by the statute) the supporting spouse's attorney should argue, in allocating available dollars, that a court's goal should not be to rewrite the statute and elevate the rights of one spouse above the other. Rather, the court should reasonably allocate the available dollars between the two parties so they *each* (the very term utilized in the statute) have the right to enjoy a lifestyle reasonably comparable to what they enjoyed during the marriage.

If, as in most cases, there are inadequate funds, then reasonably the pain must be allocated if not equally, then certainly fairly. As Justice Pashman observed, to do otherwise would inject the very sexism *Lepis* seemingly rejected and which the Commission of Sex Discrimination and ultimately the Legislature wanted eliminated by adopting gender neutral language in the 1988 statutory factors. Ironically, therefore, a decision I believe was intended to benefit dependent spouses, evidenced by the Court's reliance on

studies revealing the adverse economic impact of a divorce upon women, might ultimately be interpreted to result in fewer dollars allocated to dependent spouses.

Yet, these arguments, while I believe correct, cannot be applied rigidly. First and foremost, when children are involved their rights must take precedence. Our law properly reflects the policy children should not be penalized economically because their parents were unable to stay married. As the Appellate Division noted in *Zazzo v. Zazzo,*[21] "children are entitled to have their needs accord with the *current* standard of living of both parents, which may reflect an increase in parental good fortune. *Zazzo* noted this was confirmed by the requirement that a parent was obligated to share a post-divorce inheritance with children and perhaps even reimburse college expenses retroactively.[22] A child's rights are not circumscribed by the marital lifestyle.

The exercise of a court's discretion in allocating available funds must also recognize the duality of *pendente lite* motions since money must be allocated to maintain assets. In most cases, this means the expenses for the marital home to avoid disruption to children. Of necessity, there would logically be a disproportionate division of available dollars precluding the parties from both (*i.e.* each) enjoying lifestyles comparable to that enjoyed during the marriage. Yet, this disparity is not legally offensive since it flows from concerns bottomed upon childrens' rights. As *Zazzo* observed, even where the custodial parent receives some "incidental benefit" from the roof expenses component of child support, the law is "not offended."[23] Yet, such considerations are inapplicable where there are no children or other prevailing factors. A fair reading of *Crews*, the statute and the public policy the statute reflects, results in the conclusion that each party should have the right to enjoy the lifestyle reasonably comparable to that enjoyed during the marriage. It is fairness, not gender that controls.

Advocates representing supporting spouses thus have the ability to cite *Crews* as strong and compelling precedent for a more equitable allocation of money *pendente lite* which must be done by looking at *net,* not *gross,* dollars. Perhaps the most overlooked practical aspect of support at final hearing is the reality that in the traditional case where the wife receives title to the home and lives there with the children, she enjoys the status of head of household, which places her in a favorable tax bracket. This will permit her to receive a substantial part of her alimony tax free, while simultaneously permitting the husband to receive the benefit of an alimony deduction. In such cases, rigid adherence to the child support guidelines, as opposed to doing what experienced practitioners do by selecting an artificial alimony number and an out-of-guideline child support figure, eliminates the opportunity to creatively utilize the tax planning opportunities that flow from head of household status. In determining alimony, it is the responsibility of counsel and the obligation of the court to consider the relevant tax consequences, not only because it materially affects the end result, but because it impacts upon the court's ability to satisfy the responsibilities to implement the statutory factors.

## IMPORTANCE OF THE TERM ESTABLISHED

The Legislature's use of the word established in N.J.S.A. 2A:34-23 has never been discussed in any case, yet it has relevance and significance given the issues created by *Crews*. *Websters Dictionary* defines established as "to cause to be accepted and used for a long time, i.e. to establish a custom."The term established must be interpreted not only in a common sense way, but in the legal framework of the statute. We may agree there is no legal protection, i.e. entitlement, for a standard of living established by parties in a one-year marriage which might otherwise obligate a husband to pay support for 40 years.[24] Can one argue the word established has some significance in determining when a standard of living establishes a legally predictable right?

There is some logic to linking together the terms duration, establishment and standard of living. The longer the parties enjoy a certain standard of living, the stronger the inference that reflects their determination they consider that standard to be reasonable or, using the statutory terminology, that this is the standard they established by their own conduct; it is what they deem fair, appropriate, and consistent with their income and assets. Such an approach is consistent with prior legal analysis; in interpreting the meaning of a contract, it is well accepted that interpretative judgments can be made by examining the parties' course of conduct.[25] This logical inference may well explain why the Legislature utilized the word established. Moreover, in dealing with cohabitation followed by a marriage it may be significant that the standard of living is determined by the parties themselves in the marriage and not after the marriage or during separation. There is a logical linkage to the parties' marital, not personal, relationship and these three critical terms.

The view that the standard of living is a reflection of what the parties themselves determined as their own measure of reasonable needs is supported by the commentator cited by the Supreme Court in *Crews*.[26] Given this legal framework, alimony appears fairer because, assuming the ability to pay is present, it permits the dependent spouse to continue a life at the same level the parties themselves selected, or established, as reasonable.

**WHAT CONSTITUTES THE STANDARD OF LIVING**

The issue *Crews* does not address, but which is now of the utmost importance, is what does the term standard of living really mean? There are at least three separate components to standard of living that can be articulated. Over time our case law will more precisely determine whether there are more, and the weight to be given to each.

The first is obvious. The standard of living defines *how* a family lived during the marriage. The Appellate Division in *Hughes v. Hughes*[27] suggests that the standard of living is "the way" a couple actually lived. It includes, but is not necessarily limited to, the type of home in which they lived, the cars they drove, the type and frequency of vacations they took and an overall analysis of how the family spent money. It should include how often and where they dined. How they expended their disposable income. Was money spent for non-essential items such as art, jewelry, gifts? If it is the way people actually lived, then the dependent spouse who accompanies the employed spouse on a business trip considers such business travel part of lifestyle. Certainly the employed spouse will continue to enjoy this benefit. If it is the way or how people lived, how can a court ignore such trips? Don't they need to be considered?

It is the lawyer's job to paint, through detailed testimony and demonstrative evidence, a picture of how the client lived. Vacations should be described not solely through testimony, but with photographs and exhibits. In the more significant cases, it is not sufficient to have your client testify the parties went to Europe. The client should describe the types of hotels and restaurants they enjoyed. Did they shop? If so where? How much did they spend? How much was spent on meals? What type of restaurants did they go to? What types of gifts did they purchase? Did they travel first class? Did they take side trips, and stay in a castle? This detailed testimony should be corroborated with pictures, match covers and whatever other demonstrative evidence might exist. As the Appellate Division noted in *Dunne v. Dunne,*[28] it is the "quality of economic life" during the marriage that is important. Use of the term quality seems similar to the language in *Hughes* as to the way in which, or my term how, a couple lived.

The most significant component of a lifestyle is generally the home. There should not simply be testimony about the type of house, the number of rooms and the amenities in the house, but the neighborhood in which it is located. Pictures (a video is even better) enable the court to more fully understand *how* people live. The old saying that "a picture is worth a thousand words" is particularly true in describing lifestyle.

A second significant component to the marital lifestyle is the concept of *savings.* This is not relevant only in the larger cases where people had sufficient disposable income to meet all their needs yet still allocated a portion of their income for investment purposes. It is equally relevant for the case with a dependent spouse not employed outside of the home and the supporting spouse who works for a company such as Verizon or UPS and has a pension.

The importance of saving for one's future is a critical economic element that must not only be emphasized in the presentation, but inter-related with the very studies *Crews* relied upon. These studies emphasized how over time women are economically disadvantaged by divorce.[29] It is insufficient for the supporting husband to argue the marital pension is being divided; it is only shared through the filing date of the complaint. Once the parties are divorced, one party, by virtue of how the marital partnership functions, will continue employment providing future financial security (*i.e.* a pension) while the other party is left with only his or her share of assets acquired during the marriage and the distinct possibility he or she may never be able to save for the future as their ex-spouse can. If savings are not included as part of lifestyle, the logical implication is that the extra money both previously used to save is *all* allocated to the employed spouse. This hardly seems fair, particularly in a marriage of longer duration.

A pension is as important to a family's future financial security as a home. Factor 7 in the statute addresses this very issue by requiring that courts consider in determining alimony the "opportunity for future acquisitions of capital assets and income." A pension is not only a capital asset, but in the future will provide an income stream. Yet, attorneys fail to focus upon this. Failing to focus on the need to save is a critical error in fashioning an overall support and distributive scheme. The need to save should be interrelated with the right to enjoy comparable lifestyles and with the reality a pension was nothing more than a form of deferred savings provided as an employment benefit that is part of an overall compensation package. It simply is paid at a future date. Post filing it will continue to be received by the supporting spouse but not the supported spouse, creating an almost immediate disparity with potentially significant adverse consequences in the future. Over time, the absence of savings by the dependent spouse may create the very disparity the *Crews* studies recognized. If, in the traditional marital partnership, one party sought employment and the other assumed responsibility for child care for the children, when the marital partnership ends the economic reality created by their decisions must be recognized and addressed. It is not solely that savings is a reasonable part of the marital lifestyle; it is an essential ingredient in the marital lifestyle dictated

by the differing roles the parties assume in most marriages. The parties' disparate abilities to save is frequently coupled with fundamentally different earning capacities, both created by marital decisions.

If *Crews* precludes the dependent spouse from receiving any benefit from the supporting spouse's increased income in the future, and a court can reasonably find that the supporting spouse's income will increase, does that not permit the dependent to argue that in order to assure a fair allocation of the economic benefits created by the marital partnership there should be a disproportionate distribution of assets? In other words, the dependent spouse would argue that if *Crews* (primarily out of calendar concerns) prevents me from enjoying increases in the income stream my economic and non-economic contributions helped create, then over time the only way to eliminate unfairness is to provide to me more capital assets which can be invested to provide my own income stream. Thus, over time, there will not be the divergence in our financial circumstances evidenced by the *Crews* studies.

In larger cases, the issue also is present. In every case where there is a history of savings during marriage, proper preparation of a case information statement (CIS) requires inclusion of savings that should be based upon actual saving patterns. It is a simple economic fact that regardless of the level of alimony and distribution of assets, neither spouse will be able to save the same money saved during the marriage. People save for a reason. Future financial security is important, but so is the opportunity to cease working at an earlier point in time. The right to save is important, both as a matter of fairness and for basic economic reasons. Savings must, if the standard of living is to be comparable to the marital lifestyle, be considered in the overall analysis, both in establishment of support in light of *Crews* and whether it is ever prudent for the dependent spouse to *stipulate* the overall settlement provides the marital lifestyle. Why stipulate if only the other spouse can save as both did during the marriage? Where is the comparability to the marital lifestyle? The savings issue is equally important to the dependent spouse whose spouse continues employment with a pension as it is in the larger cases.

The third element of lifestyle most directly relates to how people live, although here the comparison is actually between the spouses, and may be attacked for that reason. No one would dispute that in evaluating one's own life the opportunity to take time from work and enjoy leisure time is an integral element of how one lives, and thus it is part of the lifestyle to be considered by a court. If leisure time is an element of how people live, a reasonable argument exists that it should be part of the term lifestyle.

Leisure or free time may be viewed as an asset; not necessarily one having an ascertainable economic value but, nonetheless, something that does have value. It is something people clearly enjoy, and is and was important to the parties during the marriage. It benefits the individual on many levels, both psychologically and from the standpoint of health. It can be demonstrated by the simple inquiry as to whether a judge looks forward to a vacation. Is that an important part of how he or she lives. Many judges were willing to sacrifice the economic benefits of private practice for the opportunity to have substantial vacation time and not worry about what was happening back at the office.

Interestingly, studies have demonstrated that most workers would prefer additional leisure time to more money, which emphasizes the importance of leisure time to the individual.[30]

The importance of leisure and free time becomes even more significant when it is withheld from one litigant but granted to another. Every attorney has heard the complaint that it is unfair that the supporting spouse must work and undergo the pressures and stress of a job when the dependent spouse is unemployed. It is not difficult to ask a court whether an individual who must work five days a week can enjoy a lifestyle comparable to an individual who is not required to work at all. Of course, the response of the supported spouse is to indicate that given how the marital partnership functioned, economic sacrifices were made by career deferrals. The argument is further weakened by the tendency of courts to impute income to supported spouses even if they choose not to work.

In response to the argument that a significant part of a lifestyle is represented by the marital home, the supporting spouse may argue that when the custodial parent receives title to the house, that represents not only a distribution of assets with alimony implications but also is highly relevant to child support.

In most cases, the custodial parent receives the house because of a desire not to disrupt the children. In this way, the supported spouse can argue that the law is not offended by the custodial parent living in a larger residence than the non-custodial parent because it is not *he or she* that has the house but he or she and the children. If that argument has merit, does it not logically follow that when the children are emancipated the excess value in the home destroys any concept of comparability, *i.e.* the supported spouse can no longer enjoy a marital lifestyle comparable to what the supported spouse has?

Phrased in reference to the statute, is not the excess equity in the home a capital asset within the meaning of the statute that must be considered in the alimony analysis? A little known but important Appellate Division case, *Schaeffer v. Schaeffer,*[31] contains language that suggests deferral of a non-custodial

parent's use of the equity in the home represents an additional contribution to child support. If it is child support, then, arguably, can one argue it is not part of the marital lifestyle? Thus, if it is lost, the dependent spouse cannot argue that support should be paid at a level so that it can be either maintained or, if sold, replaced.

#### DOES *CREWS* APPLY IN A LIMITED DURATION ALIMONY CASE?

An issue not addressed by *Crews* is whether the legal principles apply to an alimony award made pursuant to the Limited Duration Alimony (LDA) statute. *Crews*, obviously, dealt with issues of rehabilitative and permanent alimony. Thus, the Court did not have the need to address limited duration which, until most recently, had never been the subject of any reported decision. In *Cox v. Cox,*[32] the Appellate Division examined the LDA and its inter-relationship with permanent alimony and provided guidance as to whether the *Crews* substantive criteria apply to a LDA case.

In attempting to understand what the Legislature intended in the LDA, the Court properly examined the legislative history. It relied upon the sponsor's message that LDA was to be used in those cases involving "shorter term marriages where permanent or rehabilitative alimony would be inappropriate or inapplicable but where, nonetheless, economic assistance for a limited period of time would be just."[33] The Court also found the legislative history required an examination of the Divorce Study Commission.[34] The Appellate Division cited at length from the report, finding that it was the commission's intent:

> to direct the Court to focus upon the economic impact of the marriage on the parties by examining whether employment opportunities were lost or career opportunities delayed. In addition, the Court would inquire into any advantages obtained by either spouse by the equitable distribution award.[35]

These factors must be inter-related with all relevant economic considerations in determining whether any economic dependency that might exist between the parties was created by the marriage or was the product of the parties' disparate skills and educational opportunities, unrelated to anything that happened during the marriage. The Court's inquiry would focus not on the fact that the parties were married, but on the impact of the marriage on the parties. In addition to this important quote, which captured the essence of the commission's thinking, the Court also noted that the commission was concerned about the impact of child rearing on the earning capacity of either parent.[36]

**The term marital doesn't simply mean the lifestyle occurred during the marriage, but that it was created by efforts or sacrifices that took place during the marriage.**

In light of these factors, *Cox* emphasized that in an LDA case, courts must "bear in mind" limited duration alimony awards "must reflect the underlying policy considerations" which distinguish limited duration alimony from both rehabilitative and reimbursement alimony.[37] The Court correctly concluded limited duration alimony was more "closely related" to permanent alimony; both reflected the important policy that marriage was an "adaptive economic and social partnership" and an award of either validated the principle.[38] In reality, *Cox* was outlining for *every* alimony case the jurisprudential and policy reasons for alimony awards. As such it is a critically important case.

In a marriage of any length, there is an issue relating to the standard of living. Harmonizing *Cox, Crews* and the LDA statute is best done from the standpoint of public policy. The right to enjoy the standard of living is something that is earned. It is not an automatic right granted when you say I do. Saying I do does not mean I must give and you shall receive. The determination whether it is *earned* or *vested* must be analyzed not only in conjunction with the statutory factors, but the public policy the statute intends to implement. As the commission noted, the Court's inquiry should focus not on the fact that the parties were married, but on the impact on the parties of the marriage and whether the standard of living being maintained with income and cash flow that was the product of the marital partnership, as contrasted with the pre-marital income or cash flow from either party. The inquiry is whether the standard of living is the product of marital efforts. The term marital doesn't simply mean the lifestyle occurred during the marriage, but that it was created by efforts or sacrifices that took place during the marriage.

At some point, the economic and non-economic contributions of the dependent spouse during the marriage create as a matter of fairness (and public policy) a right to enjoy the standard of living.[39] Once an entitlement is created, then logically the *Crews* principles would apply. If, however, there is a relatively short marriage without significant economic sacrifices or contributions by the dependent spouse, the fact that during the marriage a certain lifestyle was enjoyed does not create the automatic right for it to be continued. Cox commented with the approval

of the commission's reasoning that it was not the fact that the parties were married, but the "*impact of the marriage* on the parties" that was determinative. (Emphasis added). This is an issue upon which I have previously written both as an observer and as a member of the Divorce Study Commission.[40]

Therefore, whether *Crews* applies to LDA cases requires an analysis of the statutory factors to examine whether an entitlement exists. As *Cox* emphasized, LDA and permanent alimony were more "closely related" than other types of alimony. Yet, that close relationship does not create an automatic entitlement to the standard of living, which is only created if warranted by the facts. While everyone might prefer a bright-line rule, fairness and the policy reflected by the LDA statute requires an inter-relationship of the facts and law. Only then can both parties be fairly treated and the policy the LDA statute was intended to advance be properly implemented.

**DOES *CREWS* APPLY IN REHABILITATIVE ALIMONY CASES?**

This is yet another issue not specifically addressed in *Crews*, although a substantial argument exists that *Crews* must apply in rehabilitative alimony cases because *Crews* itself was a rehabilitative alimony case. Yet, I question that automatic conclusion since *Crews*, most people agree, should have been a permanent alimony case had it been properly presented. The Supreme Court, of necessity, was forced to address the issue as presented, *i.e.* a rehab case, which is fundamentally why the decision was reversed.

While there is some imprecise language in older rehab cases suggesting rehabilitative alimony requires maintenance of the *status quo*, I believe such language flows from the absence of a LDA statute and not from a definitive policy judgment. The recent *Cox* decision more accurately defines the nature of rehabilitative alimony, thus enabling the issue to be analyzed more specifically. As noted in an earlier article, rehab's purpose is to "enhance and improve the earning capacity of the economically dependent spouse."[41] It does not automatically follow that such a goal is linked to the marital lifestyle. It is more logical to link classic rehabilitation with either LDA or permanent alimony.

**The recent *Cox* decision more accurately defines the nature of rehabilitative alimony, thus enabling the issue to be analyzed more specifically. …[R]ehab's purpose is to "enhance and improve the earning capacity of the economically dependent spouse."**

Nonetheless, *Crews* suggests lifestyle is an element in a rehabilitative alimony case.[42] In discussing the relationship between rehabilitative alimony and lifestyle, the Court refers to the supporting spouse reaching a level where he or she can support him or herself "in a manner reasonably comparable to the marital lifestyle," citing *Hughes v. Hughes.*

Yet, *Hughes* was not a rehabilitative alimony case at all. Rather, *Hughes* was an Appellate Division case which suggested a bifurcated permanent alimony award support would be paid at one level and later "reduced" after period of time.[43] It is questionable why *Crews* would cite *Hughes* for the principle that one has an entitlement to the marital lifestyle in a classic rehabilitative case by referring to a case where the Court found the support obligation was of a permanent nature.

In *Carter v. Carter,*[44] the Appellate Division, in a precursor to *Crews*, found that before a settlement involving a rehabilitative alimony issue could be approved, the parties had to testify as to their understandings concerning the possibility rehabilitative alimony could be modified.[45] This reflected, as does *Crews* itself, a systemic concern that settlements be structured to avoid contentious post-judgment motions with factually disputed issues over the agreement or its assumptions. Nevertheless, *Carter* clearly linked the standard of living to rehabilitative alimony since one of the reasons for reversal was the failure to "relate Plaintiff's (the supporting spouse's) rehabilitative alimony obligation to the standard of living of the parties or, more particularly, the Defendant's standard of living during the marriage."[46]

As Judge Philip Carchman observed in *Cox,* the focus of rehabilitative alimony is upon the dependent spouse's ability to engage in gainful employment. *Cox* noted, correctly I believe, that rehabilitative alimony is not to be considered in isolation as an *exclusive* awarded in conjunction with remedy.[47] It might be awarded in conjunction with permanent alimony, citing *Hughes,* and reflecting an approach firmly rooted in precedent.[48] Thus, if you view rehabilitative alimony as a payment of money for a specific purpose designed to enhance earning capacity, it is arguably unrelated to the other statutory factors, i.*e*. the standard of living, although as noted there is commentary in other cases to the contrary. I believe if a right to enjoy the standard of living exists, it should be implemented by an *additional* grant of either LDA or an award of permanent alimony.

Such references must be viewed in a historical perspective. I believe when the Appellate Division, for

example in *Heinl v. Heinl*[49] and *Cerminara v. Cerminara*[50] referred to rehabilitative alimony in conjunction with other statutory factors, it was because limited duration alimony did not exist. Awarding expenses which only related to the enhancement of earning capacity would clearly be insufficient in many cases. More money is needed to live while the earning enhancement was proceeding. If someone needs two years of education to obtain a degree to enhance their earning capacity, they also probably need additional economic assistance for basic living expenses.

*Cox* places the issue in an appropriate perspective. Rehabilitative alimony, if awarded, should have a limited duration or permanent alimony component designed to separately address the other statutory factors, such as earning capacity, standard of living, etc. Rehabilitative alimony should be directed more to the actual direct expense for enhancement of earning capacity.

If you accept this approach, a court could independently focus on two separate but related components. First, what expenses are directly necessary to enhance the dependent spouse's earning capacity? Additionally, what ancillary expenses are required to permit that enhancement to occur, such as roof, auto and personal expenses? These personal expenses must be viewed in conjunction with the facts of the entire case. If the dependent spouse only has a need for the enhancement payments, then rehabilitative award should be limited to these. If, however, the economic necessity of the supported spouse (this might well be most cases), requires ancillary payments they should be tacked onto either a permanent or a limited duration alimony award.

Given this approach, the issue of whether the dependent spouse has a vested right to the standard of living is analyzed as a limited duration issue. If it is a permanent alimony case, then it is reasonable to presume that the entitlement to enjoy the lifestyle exists, and *Crews* applies. If it is a limited duration alimony case, we are forced to return the amorphous answer of maybe — *Crews* might apply, depending on all of the facts as discussed previously.

Notwithstanding this analysis, if you have a rehabilitative alimony case as an advocate and wish to argue *Crews* applies, you would emphasize *Crews*, itself, was a rehabilitative alimony case and that reasonably read, *Heinl, Cerminara* and *Carter* support the principle that the standard of living is a factor in a rehabilitative alimony case mandating a *Crews* analysis. To argue against such a claim, one would present the analysis outlined above and have the court focus on the enhancement payment with an attempt to limit the personal expense component by arguing there was no *entitlement* to have the marital lifestyle (reflected by those personal expenses) maintained. In fact, the argument would continue, that by ordering the enhancement payment, the Court was more than satisfying both the statutory purposes of alimony and the *Miller* fairness imperative.

Logically, enhancement payments should be received without tax consequence and not terminate upon remarriage. If rehabilitative alimony was related to limited duration the ancillary payment predicated on overall need or permanency, it should terminate on remarriage. In summary, therefore, *Crews*, viewed with the *Cox* analysis of the various alimony types, permits rehabilitative alimony to be examined differently than before with the end result it might more accurately achieve its purpose.

## TO STIPULATE OR NOT: THAT IS THE QUESTION

While this article does not address the procedural issues emanating from *Crews*, one of the practical elements confronting counsel is whether a supported spouse should ever stipulate the settlement provides the marital lifestyle. As in any tactical decision, the positives and negatives must be weighed and explored, in some depth, with the client. Prudence, if not concerns about client dissatisfaction, suggests agreeing to such a stipulation is inherently dangerous. There is a misunderstanding, reported anecdotally by lawyers and judges, that some lawyers believe before a court accepts a settled case, it is mandatory there be a stipulation that the settlement provides the marital lifestyle for the dependent spouse. *Crews* has no such requirement, but there are many stipulations which cannot be justified by the facts.

I believe a common sense interpretation of *Crews* allows spouses to stipulate an agreement is fair, equitable and acceptable, even if the parties have been *unable* to agree on whether it provides either the marital lifestyle. It should not be any different than the parties' inability to agree upon what either spouse earns or could earn.

The *Crews* Court, at page 27, noted the supported spouse's ability to contribute to his or her support must be made express in the record when the court enters or approves the settlement. The decision also contains an admonition the "basis for the alimony award" must be made part of the record before a court can accept the divorce agreement. Such statements seemingly require stipulations on *each* of the statutory factors or certainly primary baseline consideration such as income or need. It is difficult enough to settle a matrimonial case. It is far more difficult to incorporate in that settlement a *stipulation* that both parties agree precisely what each party does or could make and each of their needs. In most instances, everyone is sufficiently happy they have been able to reach an agreement on support and equitable distribution, even though they may disagree on *how* it was

reached. Yet, literally read, *Crews* requires specific baseline stipulations as to income.

There are significant legal consequences to a *Crews* stipulation. The precise holding of *Crews* is that once the marital lifestyle is reached, the increased earnings of the supported spouse are irrelevant because, as the Court noted, it would be unfair to let the supported spouse share in the good fortune of the supporting spouse.[51] One may reasonably argue a property settlement agreement, which includes a *Crews* stipulation the settlement meets the marital lifestyle, is the functional equivalent of an anti-*Lepis* provision, *i.e.* if the supporting spouse later makes more money that will not provide a basis to modify alimony. Yet, attorneys who are willing to stipulate the settlement provides the marital lifestyle would simultaneously vehemently reject any suggestion the agreement also include anti-*Lepis* language that precludes a support increase if the supporting spouse's income increases.

If, however, because of pressure from the court, the client or your adversary, you feel such a stipulation must be reached, it should be accompanied by reasonable conditions. Such conditions might include, but not be limited to, the recognition by the supported spouse that the present agreement permits enjoyment of the marital lifestyle but only if contingencies do not occur. These might include inflation, or an increase in expenses. For instance, a change in the mortgage rate created by an adjustable-rate mortgage, maturation of the children, an increase in the children's expenses, modification of child support, emancipation of a child, a new child expense such as college, a decrease in income or income imputation related thereto. Implicit in any *Crews* stipulation is the reality it is entered into based upon consideration of all factors, including alimony, child support and equitable distribution. Thus, in fashioning a *Crews* stipulation, prudence, if not careful lawyering, dictates the inclusion of a provision stating that if *any* of these considerations change, the supported spouse is no longer bound by the stipulation.

Such an approach might undermine the Court's attempt to limit post-judgment motions, but it is nonetheless consistent with traditional alimony theory that repeatedly has been reaffirmed by the Court. The power of a court to enforce a spousal support agreement exists only to the extent that agreement remains fair and equitable in the face of changes in circumstances.[52] That is not simply the holding in *Lepis;* it is a reflection of the nature of alimony and its importance in a public policy context. When there are changes (*i.e.* changes in circumstances) which make the support unfair, as Justice Pashman admonished, the court's equitable power to modify a spousal agreement "cannot be restricted."[53] It is the responsibility of a court to assure that a spousal support agreement is fair and equitable. If it is not, it should not be enforced. Rigid adherence to a *Crews* stipulation precluding modification is fundamentally inconsistent with precedent, the statute, and the public policy upon which both are based. Therefore, if *Crews* did not intend to modify *Lepis* (the decision consistently quotes from *Lepis* with approval[54]) inclusion of conditions as discussed above (and that list is merely illustrative) is not an attempt to subvert *Crews*. Rather, it is careful drafting to guarantee implementation of fundamental alimony law and concepts of simple fairness assuring only fair spousal support agreement will be enforced.

Conversely, a stipulation that contains a representation that the dependent spouse cannot enjoy the marital lifestyle establishes a clear right to seek an increase to reach what the Court has characterized as the goal, *i.e.* allowing the "dependent spouse to maintain a standard of living reasonably comparable to the standard established during the marriage."[55] If *Lepis* assured a neverending case load for matrimonial attorneys, *Crews* provides a guarantee.

The supported spouse will emphasize the word goal, arguing it is the legal standard the Supreme Court was *directing* trial courts to achieve. A stipulation the marital lifestyle is not maintained is the functional equivalent of an agreement by the supporting spouse that this goal has not been met. By implication, such a stipulation invites post-judgment motions; it is not a mere crack in the window, the door is left wide open. Therefore, as soon as circumstances change, a court is *obligated* to try to achieve that goal given new circumstances. It is reasonable to assume supporting spouses confronted with an unwanted post-judgment application will inquire of counsel *why* they were left in such a situation. A stipulation the parties resolved their case, but were unable to agree on the marital lifestyle, avoids the legal downside of any stipulation; it leaves the parties where they were before *Crews*.

The word goal may create other problems. If the systemic goal is assuring the dependent spouse receives the marital lifestyle, then does it not logically follow there should be some form of automatic disclosure of future income to help meet that goal and to avoid post-judgment motions required to establish *Lepis* Stage I? Inevitably, counsel will argue if a trial court is given a goal, does it not have the obligation to fashion a decision to achieve that goal while simultaneously minimizing the systemic impact by limiting post-judgment motions? The only logical response to this responsibility, counsel will suggest, is automatic disclosure so the parties, without court intervention, can negotiate a level of support that permits them to obtain the result the Supreme Court found the law requires.

Thus, a decision that had as its

fundamental procedural basis concerns about stemming post-judgment litigation (Mr. Crews' attorney argued it would "open the flood gates of litigation") may very well create far more litigation than previously existed.

**DOES *CREWS* MODIFY *LEPIS*?**

While most of the focus on *Crews* has been on procedural issues, there are substantive provisions which are significant. Depending upon one's point of view, they are either a clarification of prior law or a substantive modification of longstanding law in derogation of the statute, predicated not on implementing the public policy the statute promotes, but on calendar considerations. In characterizing the issue, there is probably no mistake of my view as my nonobjective phrasing demonstrates.

One of the issues litigated in *Crews* was whether a dependent spouse was entitled to receive alimony that would provide a level of support in excess of the marital lifestyle. *Crews* reaffirms the principle the marital standard of living is the baseline standard for determining alimony provided an ability to pay exists. Yet, calendar concerns led to language that materially prejudices dependent spouses.

During oral argument, counsel for Mr. Crews argued if Mrs. Crews was entitled to share in Mr. Crews' post-agreement income and be provided with money that would permit her to enjoy a lifestyle in excess of the marital lifestyle, it was not only unfair but would unleash a torrent of litigation. The Court was clearly concerned about the systemic impact of a rule of law providing for post-judgment alimony modifications solely because a husband' s income increased, regardless of the correlation between that income level and pre-existing marital effort that helped *create* the income. It was calendar, *i.e.,* procedural concerns, that resulted in the Court concluding, in clear and unequivocal terms, that a post-judgment alimony modification could not be used to enable the dependent spouse to share in the "post divorce good fortune of the supported spouse."[56] There is no precedential basis for that statement, nor was there any reference to the statutory factors. Instead, the Court with the reference "cf," merely referred to *Zazzo v. Zazzo*[57] to distinguish between alimony and child support. *Zazzo* made it clear that children had an entitlement to share in the "enhanced financial status" of the supporting spouse without being limited to the marital lifestyle. I believe this *Crews* holding, based primarily on litigation fears, is largely incorrect; it is inconsistent with precedent and the policy upon which the statute is based. More troubling, it is unfair to dependent spouses who helped create or maintain the very income stream which, now in part, is irrelevant for alimony determination.

In *Gugliotta v. Gugliotta,*[58] the court noted a *paramount* reason for an alimony award was to allow the "wife to share in the economic rewards occasioned by her husband's income level (as opposed merely to the assets accumulated) reached as a result of their combined labors, inside and outside the home."[59] *Gugliotta* was not only affirmed by the Appellate Division, but cited with approval by the Supreme Court cases.[60] After *Gugliotta,* the Legislature included a *presumption* that this income level was created by the marital partnership. It is difficult to harmonize *Crews*, *Gugliotta* and the statute.

By suggesting the dependent spouse is not entitled to share in the husband's "good fortune," *Crews* ignores precedent which suggest it is the financial efforts and nonfinancial efforts of the marital partnership that *created* the skill and expertise of the supporting spouse. In fact, N.J.S.A. 2A:34-23.1 contains a presumption "each party made a substantial financial and nonfinancial contribution to the acquisition of income and property while the party was married," which *Crews* ignores.

Why would that presumption not apply to income earned after the marriage, if the skill and expertise which permitted development of the income stream was the product of marital effort? How can the Supreme Court eviscerate a statutory presumption by creating a bright-line rule contrary to the presumption? Why, in a long-term marriage, is the door closed to the dependent spouse to enjoy the efforts of the marital partnership? Have calendar concerns triumphed over precedent, the statutory factors, public policy and simple fairness?

Should attorneys now argue *Crews* requires the differing disparate earning capacities, created by the marital partnership, be recognized by a disproportionate division of assets if alimony is no longer available? Does it not logically follow that one of the reasons women are economically disadvantaged after divorce is the very *Crews* reasoning they are precluded from sharing in post-divorce income created by marital effort? Being a homemaker is a valuable contribution to the marital partnership, but it does not create an economic ability to generate income. Thus, by foreclosing post-judgment sharing on the concept of good fortune, the court may well be exacerbating the economic trends repetitive studies have documented and which *Crews* noted with concern.

In a long-term marriage, if a professional develops a reputation, skill and expertise that leads to an ever-increasing income, are post-agreement increases which logically flow from what was created during the marriage the "good fortune" of the supporting spouse? Or are they the logical byproduct of the marital partnership to be considered in the overall alimony analysis along with all other factors? If the supporting spouse, subsequent to an agreement, works longer

hours or commences a new career, there is a logical basis, predicated on public policy considerations, that the dependent spouse (as opposed to the children) should not have those additional funds considered in the alimony analysis. Wouldn't it be more consistent with the policy to differentiate between post-judgment increases in income unrelated to marital effort (*i.e.* the later good fortune argument) and increased income which is the product of marital effort? Yet, if the increased income is simply the logical extension of marital effort, to foreclose any consideration of that in alimony is a clear rejection of the principles of the statute, the public policy it represents, and the pre-existing precedent best exemplified by *Gugliotta,* cited with approval by the Supreme Court.[61]

*Crews* would have been less troublesome if it had been linked to statutory factors or some public policy considerations other than calendar concerns. The good fortune reasoning will ultimately adversely impact women. It is, nonetheless, reasonably clear. It represents, at best, a clarification of prior law. More accurately, it is a major substantive modification providing a victory for supporting spouses.

This holding may create pre-judgment problems in the larger cases. Can supporting spouses argue that since the dependent spouse's entitlement is limited to the marital lifestyle any surplus cash flow, above what was actually spent is really their good fortune, *i.e.* the *extra* money. This argument is related to the savings issue because if there is extra money, how is it to be treated? Normally, that extra money was allocated in most marital partnerships to investments. If it were spent on items within a case information statement (CIS), it was logically part of the marital lifestyle. Can the supporting spouse argue *Crews* means that savings cannot be considered as part of the lifestyle or, alternatively, that if there is extra money, that *belongs* to the person who earned it? These are questions that remain open, but if the statutory factors are to be fairly applied, it would be unfair to allocate cash flow created by marital efforts only to the employed spouse. That never has been the logic of our law. It may, unfortunately, however, be an unanticipated byproduct of *Crews*.

One of the substantive questions resolved by *Crews* changed the law. Was the measuring date for support, separation, the agreement or the filing date? Mr. Crews argued it was established by the agreement. He reasonably relied on language in *Lepis* which seemingly suggested change was to be measured "from the support or maintenance provisions involved."[62]

Mrs. Crews argued it was the marital lifestyle, reasoning, of necessity, people frequently accept less because two cannot live as cheaply as one. Yet, there were a series of cases which suggested support was measured by the standard of living at *separation.*[63] This was particularly significant since many cases involve long separations before a complaint for divorce is filed. Using separation, or the agreement as the standard had the tendency to adversely impact dependent spouses, particularly on post-judgment motions since that lifestyle in an agreement (which was frequently less than the marital standard) established a non-modifiable ceiling.

*Crews* correctly resolved the issue by making it clear it was neither separation nor the agreement; rather, it was the "marital lifestyle." Yet, *Crews* did not address whether it was the lifestyle as of the filing date of the complaint or, for example, an average of the last three years. Logically, resolution of this issue cannot fit within any bright line rule. Fairness suggests if there were some non-recurring or unusual event shortly before filing that permitted the parties to enjoy an elevated lifestyle, it would be unfair to use that cash flow as the measuring stick since it did not reflect an ongoing *ability.* For example, if there was an inheritance or a one-time, non-recurring large capital gain utilized over a short period of time to enhance the pre-existing lifestyles, unless the court could conclude these funds would be available in the future, it would not make much sense or be fair to establish the higher expenditure level as the standard.

In contrast, however, if there is a pattern of increasing earnings, logic suggests support be predicted on the parties' financial abilities as of the filing date of the complaint. That is reasonably reflective of marital effort and a reasonable inference exists it will continue post filing. Thus, rigid rules suggesting an average of the last three years or automatically using the filing date are inappropriate. There must be a common sense evaluation of the facts and how they inter-relate to how the marital lifestyle was maintained.

A significant issue exists whether *Crews* has modified the long-standing practice in *Lepis* post-judgment modification motions. Prior to *Crews*, if a dependent spouse came to my office and said the spouse's income increased 100 percent from baselines established in the agreement, I would have said that would have been sufficient to satisfy *Lepis* Stage I, or perhaps even *Lepis* Stage II. Now, that is no longer the result, although it is unclear if that is a change in *law* or *procedure*. *Crews* clearly established the measuring stick to be whether the supported spouse is able to enjoy a lifestyle reasonably comparable to the marital lifestyle.[64] The Court was equally clear that part of the *movant's* burden in a post-judicial application was to focus on the movant's *own* circumstances. These included "efforts by the movant to support himself or herself."[65]

According to the Court, the "better practice" was to keep the focus

of the first prong of the changed circumstance analysis on the movant's condition.[66] Thus, changes in circumstances on the first prong must relate to the movant, not the supported spouse. Therefore, a change in the supported spouse's income, regardless of how substantial, even when the dependent spouse is not enjoying the marital lifestyle, might not satisfy *Lepis* Stage I. Yet, the Court also observed on page 33 that it was the goal to enter an order that allowed the dependent spouse to maintain the lifestyle reasonably comparable to the marital lifestyle, but apparently before reaching that goal, the movant has the *obligation* to address his or her own financial circumstances. The goal therefore might well be illusory or be deemed conditional.

Traditionally, a spousal support order that was no longer fair and equitable because of changes in circumstances could not be enforced.[67] Since alimony operated in the future, once there was a change in circumstances it was always assumed the change was at least relevant in the fairness analysis. If a court determined the agreement was no longer fair, or a question of fairness existed because of the change, then either *Lepis* Stage I or *Lepis* Stage II was satisfied. Now, it is conceivable there could be changes in circumstances, (*i.e.* higher income), which might result in support which is neither fair nor equitable, but which could not be modified because the movant failed to demonstrate changes in their circumstances. This is significant and unfair.

In the future, the first defense to any *Lepis* application will be the contention the movant never met the burden assigned to address his or her own circumstances, or as one might sarcastically suggest — why be concerned with fairness, since procedure is more important? It is inevitable a custodial parent who was not working when the agreement was entered, and is still not working because of custodial responsibilities, will have a post-judgment application denied because, as the movant, no attempt was made to enhance his or her earning capacity. Yet what if the statutory factors, viewed cumulatively, suggest the dependent spouse shouldn't have been required to enhance their capacity because of child-related responsibilities? Should that motion be denied? Instead of analyzing and focusing on fairness, will we now apply an artificial bright-line requirement that will permit advocacy to dominate fairness? This is not what *Lepis* intended. It is inevitable some courts will conclude that in the absence of doing *something* to enhance their earning capacity a supported spouse failed to satisfy *Lepis* Stage I. Is this barrier to post-judgment modification motions consistent with the policy underpinning the alimony statute? Is it consistent with the statutory factors? Is it consistent with the prevailing practice under *Lepis?* Is it fair? There is a consistent strain in *Crews* that the answer to those questions is less important than establishing a procedure to reduce or simplify post-judgment motions because of calendar concerns.

In properly preparing a *Crews/Lepis* modification motion, counsel must intensively review with the movant how their circumstances are different. Some possible changes might include a loss of child support because of emancipation, attendance at college, imposition of a responsibility to contribute to college, increased expenses or lower income (earned or unearned). In larger cases, if interest rate assumptions utilized to generate an imputation and interest rates dropped, that is a factor impacting the *movant's* condition to satisfy the first prong. Certainly, a change in one's health, particularly if it affected earning capacity or expenses, would be relevant. Traditionally, inflation alone might have been considered as a ground to satisfy *Lepis* Stage I. Yet, there is language in *Crews* that strongly suggests inflation alone is not sufficient. After discussing how traditionally inflation affected a supported spouse's ability to maintain the marital lifestyle, the Court still required "a particularized showing of the movant's circumstance."[68] The Court was not persuaded a *per se* rule should be established, thus inflation alone is probably now insufficient.[69] A supporting spouse's income may increase with inflation (along with the expenses for the supported spouse) but that reality is unaddressed in *Crews*.

In defending such an application, the supporting spouse will argue the burden is to demonstrate the efforts made relate to earning capacity, a statutory factor. In the absence of there being clear and definitive effort to improve or enhance earning capacity, or as *Crews* says "efforts by the movant to support himself or herself," such failure is fatal. The supporting spouse will argue that as children become older and the parental responsibilities are diminished (a statutory factor) the obligation of the movement to do what the Supreme Court suggested a supported spouse should do is heightened, *i.e.* enhance their earning capacity.

Further support for this approach is found at page 33 of the opinion, where the Court suggests that once the supporting spouse demonstrates his or her "financial condition substantially improves," and that spouse is still unable to achieve the marital lifestyle, then a *prime facie* change in circumstances has been demonstrated. By referring to the supporting spouse's "later financial condition substantially improving," a supported spouse can argue that it defines the movant's responsibility. Thus, failure to affirmatively move to improve one's earning capacity, in effect, determines the outcome of a post-judgment motion. ■

**ENDNOTES**

1. *Crews v. Crews,* 164 N.J. 11 (2000).
2. *See* Louis, *Pendente Lite* Motions, *Family Lawyer,* Vol. 18, #7 (Nov/Dec 27, 2000).
3. There is a reference in *Mallamo v.*

*Mallamo,* 280 N.J. Super. 8, 11-12 (App. Div. 1995) but it is *dicta* and does not address the statute and its impact *pendente lite.* A recent Monmouth County unreported case by Judge Locascio (*McKenna v. McKenna*) found the statute established the standards for establishing *pendente lite* relief.

4. Emphasis added. *See* N.J.S.A. 2A:34-23.
5. 160 N.J. 408, 418 (1999)
6. *Miller* at 418.
7. 65 N.J. 186, 194 (1974).
8. *Chalmers* at 194.
9. *Crews* at 33.
10. *Crews* at 26
11. *See* N.J.S.A. 2A:34-23 (Factor 4)
12. 117 N.J. 496 (1989)
13. *Innes* at 507, *citing* the Sex Discrimination in Marriage and Family Law: New Jersey Commission on Sex Discrimination and the Statutes (Second Report), September 1981, at i-ii.
14. *Innes* at 507. One might well argue maintenance of the wife alone at the marital standard was just one of those subtle forms of discrimination.
15. *Innes* at 508 (emphasis added)
16. *See generally Capadano v. Capadano,* 58 B.J. 113, 118 (1971); *Martindale v. Martindale,* 21 N.J. 341, 352 (1956); *Bonnano v. Bonnano,* 4 N.J. 268, 274 (1950); *Deitrich v. Deitrich,* 88 N.J. Eq., 560, 561 (E & A 1970); *Boyce v. Boyce,* 27 N.J. Eq. 433, 434 (1976) ($1,000 a year will provide the wife with the amount of the husband's income "she had a right to expect ... had she continued to live with him"); *Richmond v. Richmond,* 2 N.J. Eq. 90 (1838).
17. *See Aronson v. Aronson,* 245 N.J. Super. 354, 364 (App. Div.)(Alimony is a right to continue to live according to the standard established during the marriage provided economic circumstances will allow").
18. 83 N.J. 139 (1980).
19. 83 N.J. at 155 (emphasis added).
20. *Crews* at 26.
21. 245 N.J. Super. 124, 130 (App. Div. 1990).
22. *Generally see Aronson v. Aronson,* 245 N.J. Super. 354 (App. Div. 1991); *Weitzman v. Weitzman,* 228 N.J. Super. 346, 355 (App. Div. 1988) *cert. den.* 114 N J 505 (1989)
23. *Zazzo* at 131.
24. *Compare Skribner v. Skribner,* 153 N.J. Super. 374 (Ch. Div. 1977).
25. *Journeymen Barbers, etc., Local 687 v. Pollino,* 22 N.J. 389, 395 (1956); *Savarese v. Corcoran,* 311 N.J. Super. 240, 248 (Ch. Div. 1997).
26. Krauskopf, "Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony." Family Law Quarterly, Volume XXX at pg. 575, who reasoned the linkage between duration and standard of living was logical; the longer the standard existed the greater the inference the parties felt it was appropriate, i.e., they established it as their measure of what was appropriate.
27. 311 N.J. Super. 15, 34 (App. Div. 1998).
28. 209 N.J. Super. 559, 566 (App. Div. 1986).
29. *Crews* at 32.
30. Best, F., Preferences on Work Like Scheduling and Work Leisure Tradeoffs," Monthly Labor Review, 101 June, 1978: 31-37. See Leisure: Integrating a Neglective Component and Life Planning, National Center For Research And Vocational Education (1982).
31. 184 N.J. Super. 423 (App. Div. 1982)
32. 335 N.J. Super. 465 (App. Div. 2000).
33. *Cox* at pg. 477.
34. As the New Jersey State Bar Association's representative to the commission, I believe this finding to be historically accurate. The LDA was introduced by the two legislatjve commission members. The bill mirrored the commission's recommendations absent the standards the commission proposed which were set forth in the report.
35. *Cox* at pg. 481.
36. *Cox* at pg. 483.
37. *Cox* at pg. 479.
38. *Id.*
39. This article does not and is not intended to address tacking which is the impact of pre-marital cohabitation upon the entitlement to alimony.
40. *See generally* Frank Louis, Limited Duration Alimony 11 *N.J. Fam. Law.* 133 (1991) ; Report of the Commission to Study the Law of Divorce, Recommendation 13 (April 18, 1995); "Divorce Study Commission Report."
41. Frank Louis, Limited Duration Alimony, 11 *N.J. Fam. Law.* 133, 135 (1991) cited in *Cox* at p.475.
42. *See Crews* at pg. 34.
43. *Hughes* at 33.
44. 318 N.J. Super. 34, 43 (App. Div.) 1999.
45. *Carter* at 44.
46. *Carter* at 43.
47. *Cox* at pg. 475.
48. *Kulawkowski v. Kulawkowski,* 191 N.J. Super. 609, 611-12 (App. Div. 1998)
49. 287 N.J. Super 337 (App. Div. 1996).
50. 286 N.J. Super. 448, 460 (App. Div. 1996) *cert. den.* 144 N.J. 376 (1996).
51. *Crews* at 29.
52. *Lepis v. Lepis,* 83 N.J. 139, 149 (1980)
53. *Lepis* at 149
54. *Crews* at 24 and 28
55. *Crews* at 33.
56. Crews at 29.
57. 245 N.J. Super. 124 *cert. den.,* 126 N.J. 321 (1991).
58. 160 N.J. Super. 160, 164 (Ch. Div. 1978) *aff'd* 164 N.J. Super. 139 (App. Div. 1978).
59. *Gugliotta* at 164
60. *Mahoney v. Mahoney,* 91 N.J. 488, 505 (1982).
61. *Id.*
62. *Lepis* at 157.
63. *Lepis* at 150; *Khalaf v. Khalaf,* 58 N.J. 63, 69 (1971); *Innes* at 503; *Heinl* at 346.
64. *Crews* at 32.
65. *Id.*
66. *Id.*
67. *Lepis* at 149.
68. *Crews* at 32.
69. *Id.*

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# Facts:

- **Alcohol is the most widely used and destructive drug in America.**
- **Cocaine use causes marked personality changes; users become impatient, suspicious and have difficulty concentrating.**
- **Marijuana affects memory, concentration and ambition.**
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- **Attorneys can and do suffer from alcohol and other drug abuse problems.**

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