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Chair's Column

Strength in Numbers

by Patrick Judge Jr.

On May 17, 2012, I was sworn-in as chair of the Family Law Section of the New Jersey State Bar Association. I was honored to accept the position, and I am excited to lead the section during the year ahead. There are many roles our section takes on during any given year. Some are more noticeable than others. The section plans and presents multiple continuing legal education programs, including, but not limited to, the Hot Tips Seminar, multiple young lawyer events, seminars at the state bar association's Mid-Year Meeting, and seminars at the Family Law Section Retreat. These are but a sampling of the educational programs the section is involved in and co-sponsors.

The section sponsors an annual holiday party, which I am pleased to announce will occur again this year at the PNC Performing Arts Center in December. As part of that holiday party, a silent auction will once again take place for the benefit of Court-Appointed Special Advocates of New Jersey (CASA-NJ), a worthy organization giving a voice and protection to those who need it most—abused and neglected children. Our section has been a supporter of this organization for a number of years, and it is our hope to again be able to provide a sizable donation to CASA-NJ.

Throughout any given year, the state bar association as a whole looks to our section to weigh in on issues of proposed legislation that affect the practice of family law. This is a constant function, as we have no control over when legislation is proposed or how quickly it moves through the Assembly and Senate.

And, of course, there is the Family Law Section Retreat, an annual event that brings family law practitioners and experts in the field together for both an educational and fun-filled time (not necessarily in that order). It is my hope that we will bring the next retreat to St. Martin in March 2013. I am actively working with the state bar association to arrive at a contract in this regard.

The above introduction to some of the roles the section plays brings me back to the title of this column—"Strength in Numbers." We are one of the largest individual sections of the state bar association, with a current membership of approximately 1,350. We have remained approximately that size for a number of years. It is time to grow. When a new chair of the Family Law Section is sworn in, it is customary for that individual to announce what issue will be given special focus during the year ahead. For me, it is increasing the size of the Family Law Section.

At the swearing-in of the officers of the Family Law Section at the Annual Meeting in Atlantic City in May, Lee Hymerling stood before the section and articulated a number of serious systemic issues our section should be concerned about, and should be actively trying to address. Those issues are outlined in a column that is included in this issue of the *New Jersey Family Lawyer.* Among those issues are inadequate bench strength and resources; attorney liens; alimony reform efforts; and how alternative dispute resolution should be integrated with the judicial process. I concur with Lee's assessment, and believe that our section should be focused on those issues.

Like so many other areas of life, it is the loudest collective voice that is heard. We are strong, but we can be stronger. It is time to increase our size. I am asking each member of the section to actively recruit their friends, colleagues, associates, and any other individual that practices in this area to become a member of this section, and to be actively involved. I can assure you, and you can assure anyone interested in this section, that if they wish to participate, a role is waiting for them.

An increase in the section membership will mean greater access, as we will have more contacts. It will mean greater networking opportunities at events. It will bring fresh ideas to the continuing legal education programs presented by the section. It will raise the volume of our voice as a section. So join me in the year ahead, and I ask that you bring along with you those you think will contribute to and benefit from section membership. ■

Inside this issue

Outgoing Chair's Column
A Year in Review

by Andrea Beth White

It is hard to imagine that it has been a year since I was sworn in as chair of the Family Law Section. It truly seems it was only yesterday that I began the journey as chair of the section.

It certainly has been an exciting year. Substantive issues have faced the Family Law Section. Notably, we addressed four separate proposed bills, two in the Assembly and two in the Senate, concerning support. Specifically, the Family Law Section Executive Committee was asked to review two bills—one in each house—addressing modification of child support and alimony due to "changed circumstances." I had the opportunity to testify before both the Assembly and the Senate regarding this proposed legislation, which ultimately made its way out of committee. (However, the form of the bill in the Assembly was to be revised.) We are closely monitoring these bills, and will assure that the interests of the New Jersey State Bar Association Family Law Section members are heard and represented throughout this process.

We also had an opportunity to review the proposed bills for the formation of a commission to review alimony. Assembly Bill 32, providing for a "Study Commission on Alimony," and Assembly Bill 36, creating a "Blue Ribbon Commission to Study Alimony Reform," were recently consolidated into a substitute bill, Assembly Joint Resolution 32 and 36, to create a "Study Commission on Alimony." This substitute bill was apparently circulated on Friday, June 15, 2012, and released from the Assembly Judiciary Committee on Monday, June 18, 2012. Although the proposed bill for a "Blue Ribbon Commission to Study Alimony Reform" has not yet come before the Senate Judiciary Committee. The officers in the New Jersey Family Law Section have continued to monitor this proposed legislation, and to actively seek the support of other organizations to build a coalition to address these substantial issues. I can assure all family law practitioners that in the year ahead, as this issue continues to unfold, the Family Law Section Executive Committee will continue to actively monitor and address this proposed legislation.

As many of you know, arbitration and alternate forms of dispute resolution were part of my platform for the year. I believe it is very important that family law practitioners have guidance, and that the court is educated regarding the arbitration process, as well as the procedures in place to assure its success. It is equally important that the arbitration orders are enforced by the court to assure that we, as well as our clients, receive the benefit of the orders we have so carefully drafted and entered.

A subcommittee chaired by Charles F. Vuotto spent significant time drafting a proposed rule for arbitration, which provides specific guidelines for those seeking to enter into arbitration, whether binding or non-binding. The proposed rule even provides a new track for arbitration cases in the court system. Importantly, it provides proposed orders that give the guidance needed when executing the orders for arbitration. It is my sincere hope that in the first few months of the new term, the proposed rule will be completed and come before the Family Law Section Executive Committee for approval. Thereafter, it will be disseminated to the state bar. We seek everyone's support to assure this proposed rule is adopted to help those who choose arbitration as an alternative to litigation.

This year's Family Law Retreat, held in Boca Raton, Florida, at the Boca Raton Beach Club and Resort, was a tremendous success. We had three outstanding seminars, with continuing legal education credit, and enjoyed each other's company at numerous networking opportunities. All the events, from the beach volleyball tournament to the Boca Bowl (where teams competed against one another in a trivia matrimonial Jeopardy game), were thoroughly enjoyed.

Special thanks goes to our game show trivia hosts, including the young lawyer co-chair, Christine Fitzgerald, and our own Edward O'Donnell, who wrote a song for the occasion.

This year would not have been as successful without the support and hard work of my fellow officers, incoming chair, Patrick Judge Jr.; Brian M. Schwartz; Jeralyn Lawrence; and Amanda Trigg. Thank you for all your support in my year as chair.

I also want to thank all the members of the Family Law Section Executive Committee, who worked tirelessly this year on various issues, including proposed legislation, and specifically Legislative Committee members Stephanie Hagan, Timothy McGoughran, and Michael Weinberg.

I am looking forward to the year ahead as the immediate past chair.

Editor-in-Chief Column
Alimony Trends

by Charles F. Vuotto Jr.

This issue of the *New Jersey Family Lawyer* is dedicated to the law of alimony, with particular emphasis on the recent campaign to reform existing law that many believe to be antiquated in the context of modern society and divorce. Most notable among these efforts for reformation in New Jersey are two similar proposals to create a special commission to study the law of alimony for purposes of examining what, if any, changes are necessary in order to keep the law of alimony 'in step' with the 21st century. While there are many supporters of such special commissions aimed at alimony reformation, there are many who fear that the resulting reformation will be too extreme or too rigid. Perhaps the biggest concern surrounding reformation of the existing alimony law is the possibility of the implementation of alimony guidelines, either at the pre-divorce stage or at the time of final resolution.

Nevertheless, despite these concerns, activity to reform the law of alimony continues to gain momentum throughout the country (often in the form of an *alimony reform group* for a particular state), mainly because of the growing concern that the current stated purpose of alimony no longer reflects societal needs, lacks consistency, and too often results in unpredictable or irrational awards. Thus, it is not the issue of whether reform is necessary that is in dispute (with most agreeing that some form of change is necessary), but rather the degree and method of such reformation that has become hotly disputed among practioners and legislators alike.

Modern alimony laws developed at a time when the ability of a woman (originally the only gender that could receive alimony) to work and own property, either didn't exist or was severely limited. (See the article by Stephanie Frangos Hagan on the origins of alimony, published in this issue.) Such circumstances do not presently exist, or at least exist to a far lesser degree. Therefore, the present overriding objective of alimony, as developed through case law (*i.e.,* to maintain the dependent spouse, who could not obtain employment on her own, at the marital standard of living[1]) appears to be inconsistent with current society. Interestingly, this emphasis on marital lifestyle, so highlighted in our case law, is not found in our statutory framework. *Although our alimony statute lists marital lifestyle as a factor, it does not elevate it above other factors, as does our case law.*

The lack of clarity surrounding the basis for an alimony award was highlighted by Justice Virginia Long, writing for the majority of the Supreme Court in the 2005 decision in *Mani v. Mani*.[2] In that decision, Justice Long wrote that "…regarding the theoretical underpinning of post-divorce alimony…there is no consensus regarding its purpose."

The perception problems surrounding post-divorce alimony were well-articulated in the report of the American Academy of Matrimonial Lawyers (AAML) titled *Considerations When Determining Alimony, Spousal Support or Maintenance*, which was approved by the Board of Governors on March 9, 2007.[3] According to that AAML report, there are two major problems related to the fixing of spousal support.

> The first is a lack of consistency resulting in a perception of unfairness. From this flows the second problem, which is an inability to accurately predict an outcome in any given case. This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases because without a reliable method of prediction clients are in a quandary.

These two issues—inconsistent results and inability to predict an outcome—appear almost without exception as the two major problems with alimony noted by states that are exploring alimony reform. Underpinning these complaints is the fact that although society has changed, the law of alimony has not kept pace. As this trend continues to develop, matrimonial attorneys practicing in New Jersey must take notice, investigate, and analyze the issues surrounding the inherent flaws in our current law of alimony so that the flaws can be rectified in the best interest of our practice, and more critically, in the best interests of our clients and the children impacted by divorce.

Any time a statute, case authority, or court rule sets factors for a judge to review and to consider, the resulting judicial discretion may lead to inconsistent results and difficulty in predicting outcomes. For example, N.J.S.A. 2A:34-23.1, the statute dealing with equitable distribution of assets and debts, contains factors that, when applied, are likely to create inconsistent results with unpredictable outcomes. However, when the level of inconsistency and unpredictability rises to that experienced in the alimony determination process, reformation is required.

As referenced above, of particular note is recently proposed legislation by Assemblyman Sean T. Kean (Monmouth and Ocean) and Wayne P. DeAngelo (Mercer and Middlesex), who have introduced legislation (AJR-36) seeking to create a "Blue Ribbon Commission to Study Alimony Reform."[4] The statement to the proposed legislation indicates that it is intended to create an 11-member commission[5] to "review state alimony law and propose potential avenues of reform." In particular, the commission would review the scope of the current alimony laws in New Jersey in comparison with those in other states; trends in alimony awards; the effect, if any, of current economic conditions on trends in state alimony awards; and any other issues the commission may identify as necessary to understanding and reforming state alimony law.

In addition to the proposed legislation to create a blue ribbon commission, Assemblyman Kean has submitted legislation that provides for the modification of child support and alimony payments due to a change in circumstances (A-685).[6] The bill seeks to amend N.J.S.A. 2A:34-23 to provide that:

> The obligation to pay child support may be modified based upon changed circumstances, which may include a diminishment of the obligor's income due to unemployment, temporary disability or similar circumstances *for a period lasting longer than six months*, unless the court determines that such diminution in income was deliberately incurred by the obligor in order to evade such support obligation or that the obligor has failed to make reasonable efforts to secure alternative employment.[7] (Emphasis added)

That legislation was approved by the Assembly Judiciary Committee on Feb. 6, 2012.[8] In a press release issued on that day, Assemblyman Kean advised the public that: "Today's committee approval is the beginning of addressing a topic that should be revisited and thoroughly evaluated to determine whether changing circumstances warrant modifying the way a divorce settlement is structured," said Kean.

"Divorced couples face financial issues that must be fairly resolved and periodically assessed to ensure an undue burden is not placed on a person paying alimony. New Jersey's current divorce law does not set appropriate limits on the duration and amount of alimony payments or provide for adjustments due to a change in a person's financial situation, such as unemployment, disability or retirement," continued Kean. "Alimony should help a person as they transition to self-sustaining employment. It should not be a lifetime financial obligation on the individual making payments. Establishing a commission that is focused on studying alimony and making practical recommendations is the most effective way to reform an antiquated system."[9]

Putting aside some inaccurate statements concerning the current status of the law, Assemblyman Kean's conclusion that the law must be re-examined is well-intentioned. Re-examination does not necessarily mean, however, the automatic imposition of alimony guidelines (although all forms of 'guidelines' should not be dismissed out of hand without consideration of the benefits some variation may provide in not only modernizing the current antiquated law, but in further establishing a higher degree of fairness and predictability to the alimony award). Instead of an automatic imposition of guidelines, the most sensible approach is to embark upon a re-examination of the law of alimony aimed toward creating whatever reform is necessary to both eliminate those portions of the law that are now dated and create new law that is more in touch with the needs of the modern family post-divorce.

When re-examination of the law of alimony is performed, great care must be taken to avoid potential problems that may unduly prejudice either the dependent or the non-dependent spouse. As just one example, the six-month waiting period set forth in the proposed amendment to N.J.S.A. 2A:34-23, although clearly seeking to protect an obligor-spouse from long periods where no reduction in support is granted despite an involuntary change in circumstances, may actually be used to preclude immediate relief that would otherwise be available under current law.

Alimony reform is prevalent not only in New Jersey, but in other states as well. Alimony legislation has been enacted, proposed, or is being investigated in many states, including most recently New York, Massachusetts, Florida, West Virginia, Maryland and Connecticut. Numerous articles have been written about the alimony reformation movement.[10] In some states, alimony reform has led to the adoption of alimony guidelines. In other states, guidelines are applied on an informal basis, and sometimes only in certain portions of a particular state. Lastly, certain states are in the process of investigating the implementation of guidelines. (See the National Alimony Guidelines Survey Chart at the end of this column.)

The bills submitted in New Jersey and Florida, as well as the recent laws enacted in New York and Massachusetts, highlight the growing concerns of many legislators and citizens regarding how alimony laws have developed (or have failed to develop) across the country. Perhaps the greatest objection to reliance upon general statutory factors (which this author acknowledges is the prevalent approach) is that the discretion it provides to the court leads to a high level of inconsistency and unpredictability of both the duration and amount of alimony. That unpredictability leads to heightened litigation and associated costs. In other words, negotiating a settlement that includes spousal support is much more difficult when the parties, attorneys, mediators, arbitrators, and/or judges have no clear way of objectively calculating the appropriate amount and duration of alimony. This uncertainty causes litigation to be extended, while the associated costs (both financial and emotional) accrue.

The article by Cary B. Cheifetz titled "Alimony Guidelines: If it Ain't Broke, Don't Fix it" (which also appears in this issue of the *New Jersey Family Lawyer*) sets forth the arguments against a "guidelines approach." The well-reasoned article lays out the particular formulas used around the country in states including Arizona, New Mexico, Kansas, Pennsylvania and Virginia. These formulas are also highlighted in the survey chart found at the end of this column. Mr. Cheifetz warns against a simplistic approach that is not fact sensitive, would not be tuned to the unique nature of each marriage and divorce case, and would serve to inhibit equitable relief by a judge with appropriate discretion.

As eloquently presented by Mr. Cheifetz, there are legitimate arguments against applying a cookie-cutter approach to any issue in matrimonial law. The dissolution of a marriage includes a multitude of varying facts that likely exceed the variables in any other kind of litigation. There are valid reasons why family law judges should have discretion to craft orders that are appropriate, fair and in the best interest of the parties and their children, based upon the unique facts and circumstances of any particular case.

On the other hand, there are equally compelling arguments calling for more of a 'guidelines-based' approach. As stated above, it is this author's opinion that our current alimony laws are dated and out of sync with the needs of the modern divorcing family, where the non-dependent spouse is usually able to either continue working, return to the work force, or rehabilitate themselves in such a manner to permit an eventual return to the workforce consistent with their premarital earning potential. Accordingly, the focus on marital lifestyle is dated, since it does not consider the dependent spouse's ability to earn income post-divorce, let alone the fact that in many cases the dependent spouse has not suffered any economic injury from the marriage that would impact his or her earning ability post-divorce. This author suggests that the objective of any alimony award should not be a monetary amount necessary to maintain the marital lifestyle, but should rather focus on a monetary amount necessary to compensate a spouse for the economic injury (if any) suffered as a result of the marriage.[11]

The focus on marital lifestyle in an alimony award is misplaced for a number of reasons. First, it seeks to continue the marital partnership, which is undeniably over. The benefits of the marital lifestyle are not simply financial. The marital lifestyle comprises many elements of everyday life that inure to both parties. In the blind goal to provide financial support to the lesser-earning spouse so that he or she may continue in a reasonable approximation of the marital lifestyle, the non-financial benefits of that lifestyle to the greater-earning spouse are forgotten. Second, there is truly no way to continue all of the non-financial aspects of the marital lifestyle for the greater-earning spouse, nor should there be. Third, even viewing the marital lifestyle only in terms of how much the parties spent on living expenses (which would be an

error), that spending level can rarely be maintained for both spouses post-divorce. All in all, the focus on marital lifestyle as the objective of alimony is misplaced.

Although greater guidance is needed, the answer may not be what is typically called alimony guidelines, but rather a baseline policy change in the fundamental principals upon which alimony is awarded. These concepts are well stated in the article titled "To Guideline, or Not to Guideline: That is Not the Correct Question," by Christopher Musulin, included in this issue. Mr. Musulin notes that perhaps the most interesting concept offered over the last 15 years comes from both the American Law Institute (ALI) and modern matrimonial practice in England.[12] Specifically, the new concept focuses upon relationship-generated career loss (RGCL). To disassociate the historic rationale of need and create a new core purpose, the words "alimony" and "spousal support" are eliminated in favor of "compensatory spousal payments." Compensatory spousal payments are awarded if a spouse can demonstrate a career loss/income loss directly attributable to the assumption of primary caretaking or homemaking responsibilities during the course of a matrimonial relationship. This is the essence of sacrifice, and is the subject of appropriate compensation, premised upon the law of damages and the equitable doctrine of detrimental reliance.

Some of the unanswered questions regarding relationship-generated career loss are how to define it, how to quantify it, and how to compensate the spouse for RGCL. As practitioners, we know that most legal theories require a review of factors in order to determine the answers to these questions. This would need to be further explored.

This author believes alimony reform is necessary. There are basic policy considerations that should be adopted as the underpinnings for alimony, and they must be made clear in all cases when the facts are in equipoise. For instance, the duration of the marriage is a 'one-fact' issue. There should be no question that a marriage of X years is either short-term, intermediate-term, or long-term. In fact, some states have already implemented such definitions.[13] Even if 'guidelines' are not implemented for affixing the amount of alimony, the 'duration of the marriage' is a matter of public policy, and should not be left to guesswork.

How the characterization of the marriage (short, intermediate or long) is used in the ultimate alimony award can still be left to the discretion of the court, based upon the statutory framework. Further, if we trust judges to craft fair alimony awards based upon general (and perhaps amorphous) statutory factors, why are we so concerned that they will be unable to opt out of the guidelines or formulaic approach in exceptional circumstances, if such guidelines are put into place? It does, though, bear remembering that our child support guidelines are, in theory, a rebuttable presumption; but in practice, rebutting that presumption seldom, if ever, occurs.

Therefore, this author believes the following positions should be adopted by the bench and bar:

1. New Jersey's alimony law (both statutory and case law) should be re-examined.
2. Support should be given to the creation of a commission to study the law of alimony, but with a greater number of matrimonial law attorneys and judges included.
3. There is no consensus surrounding the reason alimony is awarded. One must be adopted consistent with the current state of our society.
4. The existing flaws in our alimony law reduce consistency and predictability in awards, promote litigation, discourage settlement, and erode public confidence in our judicial system. Reform efforts should focus on increasing consistency, promoting settlement, and increasing confidence in the system.
5. The number of years that constitute a short-, intermediate-, or long-term marriage should be clearly defined.
6. A balance must be struck between revising the current alimony law to reflect changes in society with the need to preserve judicial discretion.
7. The focus of alimony must shift from maintaining the 'marital standard of living' to compensating the dependent spouse for the economic harm caused by the marriage and allowing that spouse to achieve self-sufficiency.
8. The statutory factors for alimony must continue to be considered by the court, but these should be reorganized into a more logical fashion to provide greater guidance.
9. The use of rebuttable presumptions should be considered.

This is a very important time in the matrimonial community, as it is the first time since the 1970 Divorce Reform Commission that our state may undertake a comprehensive examination of the entire subject of alimony. This is especially important given the societal changes since 1970. It is this writer's belief that the New

Jersey State Legislature should enact the bill calling for a blue ribbon panel to address alimony with the hope of refining the law to better define the purpose of alimony consistent with societal changes, while also providing more consistency, predictability and fairness when it comes to this highly contested issue. ■

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Endnotes

1. Two decades ago, in *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980), we reviewed the standards and procedures for modifying support and maintenance awards after a final judgment of divorce. The *Lepis* standards and procedures have stood the test of time well. In this matter, we reaffirm the *Lepis* principle that *the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that [**527] is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage*. The importance of establishing the standard of living experienced during the marriage cannot be overstated. It serves as the touchstone for the initial alimony award and for adjudicating later motions for modification of the alimony award when "changed circumstances" are asserted. (Emphasis added) *Crews v. Crews*, 164 N.J. 11, 16-17 (N.J. 2000).
2. *Mani v. Mani*, 183 N.J. 70, 79 (2005).
3. The report is reprinted in its entirety in this issue of *NJFL* with gracious permission of the AAML.
4. http://www.njleg.state.nj.us/2012/Bills/AJR/36_I1.PDF. A companion bill (SJR-34) has also been submitted to the Senate by Senator Robert W. Singer (Monmouth and Ocean) *see* http://www.njleg.state.nj.us/2012/Bills/SJR/34_I1.PDF.
5. The proposal currently states that the 11-member panel will consist of the following: 1) the chief justice of the Supreme Court (or his designee); 2) the attorney general (or his designee); 3) one member of the Senate appointed by the senate president; 4) one member of the Senate appointed by the senate minority leader; 5) one member of the General Assembly appointed by the speaker of the General Assembly; 6) one member of the General Assembly appointed by the Assembly minority leader; and 7) five public members to be appointed by the governor to include at least two people licensed to practice law in the state with a specialization in marital law. One problem with this laudable legislation, however, is that the proposal includes only two matrimonial attorneys. This writer cannot help but think that the number should be higher. Furthermore, a similar bill, AJR-32, has been submitted to the Assembly by Assemblyman Troy Singleton (Burlington) and Assemblyman Craig J. Coughlin (Middlesex) with a companion bill (SJR-41) being submitted to the Senate by Senator Robert W. Singer (Monmouth and Ocean) seeking to create a nine-member panel "Study Commission on Alimony" to review state alimony law, including any statewide trends in alimony awards, and compare this information with the laws, data and trends in other states. These bills propose a slightly different makeup for the commission: 1) the attorney general (or his designee); 2) one member of the Senate appointed by the Senate president; 3) one member of the Senate appointed by the Senate minority leader; 4) one member of the General Assembly appointed by the speaker of the General Assembly; 5) one member of the General Assembly appointed by the Assembly minority leader; and 6) four public members appointed by the governor, to include at least two persons licensed to practice law in the state with a specialization in marital law and at least one retired judge with experience in the Superior Court, Chancery Division, Family Part. http://www.njleg.state.nj.us/2012/Bills/AJR/32_I1.PDF and http://www.njleg.state.nj.us/2012/Bills/SJR/41_I1.PDF.

6. http://www.njleg.state.nj.us/2012/Bills/A1000/685_I1.PDF; a companion bill (S-1388) has been submitted to the Senate by Senators Nicholas P. Scutari (Middlesex, Somerset and Union) and Gerald Cardinale (Bergen and Passaic) http://www.njleg.state.nj.us/2012/Bills/S1500/1388_I1.PDF.
7. In regard to child support, the bill proposes that child support payments be modified based upon changed circumstances, which may include a diminishment of the obligor's income due to unemployment, temporary disability or similar circumstances for a period lasting longer than six months, unless the court determines that such diminution in income was deliberately incurred by the obligor in order to evade such a support obligation, or that the obligor has failed to make reasonable efforts to secure alternative employment. Regarding alimony, the bill proposes the same (*i.e.*, a modification after a period lasting longer than six months) or upon the non-occurrence of circumstances that the court found would occur at the time of the award. This proposal is only applicable to an award of permanent alimony, limited duration alimony or rehabilitative alimony, and does not seek to modify reimbursement alimony.
8. http://www.njleg.state.nj.us/2012/Bills/A1000/685_S1.PDF.
9. http://www.politickernj.com/54591/kean-sponsored-alimony-bill-passes-committee.
10. For example, *see* Wikipedia's discussion of alimony at http://en.m.wikipedia.org/wiki/Alimony#section_5 and the article titled *Are Alimony Guidelines in Our Future? The Uses and Abuses of Vocational Evidence in Divorce Cases* © 2003 National Legal Research Group, Inc. http://www.divorcesource.com/research/dl/alimony/03nov189.shtml
11. For example, the Pennsylvania alimony and child support guidelines emphasize the parties' net incomes, not their standard of living, which avoids an inquiry into the parties' frugalness or extravagance. *Id.* The court points out that while the reasonable needs of a child are a consideration in child support, the reasonable needs of a spouse are not a proper consideration when calculating spousal support. Therefore, the spousal support guidelines are valid even in high-income cases. *Id.*
12. James Copson, Financial Provision in England After an Overseas Divorce, *Family Law Quarterly* 45 (Fall 2011): 361-67.
13. In the summer of 2010, Florida amended its alimony statute to provide clear definitions of duration for an award of alimony, among other modifications. *See* Fla. Stat. §61.08, which reads, in pertinent part: "61.08(4): For purposes of determining alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. The length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage."

National Alimony Guidelines Survey Chart

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
Alabama			X	
Alaska			X	**Janet D. Platt, Esq.** Law Offices of Janet D. Platt 711 M Street, Suite 101 Anchorage, Alaska 99501 907-276-1515 jdplatt@ak.net
Arizona			X[1]	**Annette T. Burns, Esq.** Law Offices of Annette T. Burns 2600 N. Central Avenue, Suite 900 Phoenix, Arizona 85004 602-230-9118 Annette@BTlawyers.com www.HeyAnnette.com
Arkansas			X[2]	**Administrative Orders of the Supreme Court of Arkansas (Order #10)** https://courts.arkansas.gov/rules/admin_orders_sc/index.cfm#10
California	X[3] (Certain Counties Only)			**Thomas Wolfrum, Esq.** The Law Office of Thomas Wolfrum 1333 N. California Blvd., Suite 150 Walnut Creek, California 94596 925-930-5645 twolfrum@wolfrumlaw.com www.wolfrumcfls.com
Colorado	X[4]			**Kathy Hogan, Esq.** McGuane and Hogan LLP 3773 Cherry Creek North Dr., Suite 950 Denver, Colorado 80209 303-691-9600 kah@mcguanehogan.com

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
Connecticut			X	**Thomas D. Colin, Esq.** Schoonmaker, George, Colin & Blomberg, P.C. 81 Holly Hill Lane, P.O. Box 5059 Greenwich, CT 06831-5059 203-862-5003 llivia@sgcbfamilylaw.com
Delaware			X	**H. Alfred Tarrant Jr., Esq.** Cooch and Taylor P.A. P. O. Box 1680 Wilmington, DE 19899 302-984-3800 ftarrant@coochtaylor.com
Florida			X[5]	**Norman D. Levin, Esq.**[6] Norman D. Levin, P.A. 165 West Jessup Avenue Longwood, Florida 32750 407-834-9494 NDlevin@helpisontheway.cc
Georgia			X[7]	Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.
Hawaii			X	**Geoffrey Hamilton, Esq.** Char Hamilton Yoshida & Shimomoto Pacific Guardian Center 737 Bishop Street, Suite 2100 Honolulu, Hawaii 96813 877-234-9119
Idaho			X	
Illinois			X[8]	**Miles Beerman, Esq.** Chicago Illinois 312-621-9700
Indiana	X[9]			
Iowa			X	**Steven H. Lytle, Esq.** 700 Walnut Street, Ste. 1600 Des Moines, IA 50309 515-283-8159 shl@nyemaster.com

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
Kansas			X[10]	**Gregory D. Kincaid, Esq.** Hubbard Ruzicka, Kreamer & Kincaid, L.C. 130 North Cherry, P.O. Box 550 Olathe, Kansas 66061-3460 913-782-2350 gkincaid@hrkklaw.com
Kentucky			X	**Melinda A. Murphy, Esq.** Chair of the Family Law Section of the Kentucky Bar Association Ecton Murphy & Shannon PLLC, 127 S. Third Street, Richmond, KY 40475 859-624-2252 Murphy@ectonlaw.com
Louisiana			X	
Maine			X	Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.
Maryland			X	**Stephen P. Krohn, Esq.** Krohn & Krissoff, P.A. 133 Defense Highway, Suite 203 Annapolis, MD 21401 410-266-1136 carol@kk-law.com
Massachusetts		X[11]		Massachusetts Law Updates, http://masslawlib.blogspot.com/2011/09/alimony-reform-law-signed.html (last visited Feb. 29, 2012).
Michigan			X[12]	**Lorne B. Gold, Esq.** The Gold Law Firm, PLLC 40900 Woodward Avenue, Suite 265 Bloomfield Hills, MI 48304 Gold@GoldFamilyLaw.com Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.
Minnesota			X	

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
Mississippi			X	
Missouri			X	**Ann Bauer, Esq.**
Montana			X[13]	**Thorin A. Geist, Esq.** P. Mars Scott Law Offices 2920 Garfield Road, Suite 200 P.O. Box 5988 Missoula, Montana 59806 406-327-0600 Thorin.geist@pmarsscott.com
Nebraska			X	**Virginia A. Albers, Esq.** Lieben, Whitted, Houghton, Slowiaczek, Cavan 2027 Dodge Street, Suite 100 Omaha, Nebraska 68102 402-930-1004 valbers@liebenlaw.com
Nevada			X[14]	**Marshal S. Willick, Esq.** and Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.
New Hampshire			X	**Honey Hastings, Esq.** 17 Main Street Wilton, New Hampshire 03086 603-654-5000 hhastings@nhdivorce.com
New Jersey			X	**Charles F. Vuotto Jr., Esq.** Tonneman, Vuotto & Enis, LLC 14 Cliffwood Ave., Suite 100 Matawan, NJ 07747 732-696-2500 cvuotto@tvelaw.com
New Mexico	X[15]	X[16]		**Jon A. Feder, Esq.** Atkinson & Kelsey PA PO Box 3070 Albuquerque NM 87190-3070 505-883-3070 jaf@atkinsonkelsey.com

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
New York	X[17]			**Christopher S. Mattingly, Esq.** Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202 716-849-1333 x351 cmattingly@lglaw.com
North Carolina			X	
North Dakota			X	
Ohio			X	
Oklahoma			X	
Oregon			X	
Pennsylvania	X[18]			Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.
Rhode Island			X	
South Carolina			X	**Pamela E. Deal, Esq.** Deal & Deal, PA P.O. Box 1764 122 Strode Circle Clemson, SC 29633 864-654-1669 scdealp@bellsouth.net
South Dakota			X	**Linda Lea M. Viken, Esq.** Viken Law Firm 4200 Beach Drive Rapid City, South Dakota 57702 605-721-7230 llmv@vikenlaw.com
Tennessee			X	
Texas	X	X		Morgan, Laura W. "Current Trends in Alimony Law – Where are We Now?" *Family Advocate* 34 (Winter 2012): 8-11.

State	Has *Pendente Lite* Guidelines	Has Final Guidelines	Has No Guidelines	Contributing AAML Fellow or Other Source
Utah			X[19]	**David (Sandy) Dolowitz, Esq.** Dolowitz Hunnicutt, PLLC 299 South Main Street, Suite 1300 Salt Lake City, Utah 84111 801-535-4340 sandy@dolowitzhunnicutt.com
Vermont			X	**Caryn Waxman, Esq.** Downs Rachlin Martin, PLLC 199 Main Street, P.O. Box 190 Burlington, Vermont 05402-0190 802-864-3120 cwaxman@drm.com
Virginia			X[20]	
Washington			X[21]	**Kenneth E. Brewe, Esq.** Brewe Layman P.S. 3525 Colby Avenue Everett, Washington 98201 425-252-5167 kenb@brewelaw.com
West Virginia			X	**R. Joseph Zak, Esq.** 607 Ohio Ave. Charleston, West Virginia 25302 304-345-0745 zakslaw@hotmail.com **Jo Lynne Nugent, Esq.** Sheehan & Nugent PLLC 41 15th St. Wheeling, West Virginia 26003 304-232-1064 jnugent116@aol.com
Wisconsin			X	
Wyoming			X	**John A. Thomas, Esq.** 724 Front Street, Suite 600 Evanston, Wyoming 82930 307-789-7876 john@wyfamilylaw.com

Special thanks is given to the above noted fellows of the American Academy of Matrimonial Attorneys, other contributing attorneys, associate editors of the *New Jersey Family Lawyer*, and Lauren E. Koster, Esq. of Fox Rothschild, LLP, for their assistance with the preparation of this chart.

Endnotes

1. **Arizona:** Arizona does not have alimony guidelines, either *pendente lite* or final. Maricopa County (Phoenix area) at one time promulgated guidelines; however, they were never used exclusively and could only be used for settlement purposes. A trier of fact was not permitted to rely exclusively on those guidelines when they were in existence. In 2010, the judges of Maricopa County voted that they would no longer review or consider the guidelines.
2. **Arkansas:** Pursuant to *In re: Administrative Order Number 10: Arkansas Child Support Guidelines*, Supreme Court of Arkansas, Jan. 31, 2002, Arkansas provides for a determination of temporary spousal support for a dependent (non-working spouse) in its administrative order on Arkansas child support guidelines. For the purposes of calculating temporary spousal support only, a dependent custodian may be awarded 20 percent of the net take-home pay for his or her support in addition to any child support awarded.
3. **California:** There is a *pendente lite* formula for spousal support based upon net incomes. If child support is calculated first, it is deducted from payor's income, and not added to payee's income. For permanent spousal support, a court must consider all statutory factors and cannot merely insert numbers into temporary spousal support formula and make an adjustment. A court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. A court may award amount necessary to maintain status quo even if higher than the spouse's needs and higher than formula-driven amount. Each of the 58 counties has its own court of original jurisdiction and four of those counties adopted temporary spousal support guidelines. The other 54 "borrow" one of these formulas. The formulas appear in the Local Rules of Court, but most counties have eliminated county rules for the statewide Rules of Court which do not have a temporary spousal support guideline formula. The formerly published formulas are:
   - **Santa Clara County Guideline:** Temporary spousal or partner support is generally computed by taking 40 percent of the net income of the payor, minus 50 percent of the net income of the payee, adjusted for tax consequences. In the event there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related expenses.
   - **Alameda County Guideline:** Temporary spousal support is generally determined as follows. This guideline is discretionary for use in determining temporary spousal support in appropriate cases. If the amount produced is a negative number, then spousal support is zero. In cases where there is no child support, the guideline shall be 40% of the net income of the payor minus 50 percent of the net income of the payee. In cases where there is to be child support, use the components set forth in Family Code section 4055-4069 in the following formula:
     Spousal support = [HN-(HN) (M) (K) (1+H%)] [.35] - [LN-(LN) (M) (K) (1+H%)] [.4]
     (If H% is greater than 50%, use 2-H% instead of 1+H%) (M = Fam. C sec. 4055 (b) (4) child multiplier.)
   - **Marin/Kings County Guideline:** Temporary Spousal Support. The following presumptions for temporary spousal support will apply:
     - In cases where the recipient of spousal support is not receiving child support from the same payor, the presumed temporary spousal support will be 40 percent of the net income of the payor less 50 percent of the net income of the payee.
     - In cases where the recipient of spousal support is also the recipient of child support from the same payor, the presumed temporary spousal support will be 35 percent of the net income of the payor (after deduction of child support), less 45 percent of the net income of the payee (without addition of child support).

     The court may deviate from the presumed level of temporary spousal support, in its discretion, for good cause shown.

As to duration, the California formulas also include guidelines for the duration of alimony which are based on the length of the marriage. If the marriage lasts less than ten years, the alimony should be one-half the length of the months the parties were married. If the parties were married ten to twenty years, the duration of alimony should be not less than the number of months in the following formula: (months married/240) X (months married). All support orders should terminate after the number of months equal to the length of the marriage unless otherwise agreed. (See *"Are Alimony Guidelines In Our Future? The Uses and Abuses of Vocational Evidence in Divorce Cases" © 2003 National Legal Research Group, Inc.* http://www.divorcesource.com/research/dl/alimony/03nov189.shtml)

4. **Colorado:** 40% of higher earner's income minus 50 percent of lower earner's income but only in cases where combined gross is $75,000 or less
5. **Florida:** Recent amendments to Florida Statute 61.08 makes getting award of permanent alimony more difficult. Statute focuses on need of depend. Alimony may not leave payor with significantly less net income than that of the payee unless there are written or findings of exceptional circumstances.
6. **Florida:** There is a software program for 11 states called DPA (Divorce Power Analyzer). It has eight alimony guideline computers in them for:
    1. Santa Clara California
    2. PA Temporary Guidelines
    3. Ohio Krauskopt Formula
    4. Kentucky – Petrilli Formula
    5. Maricopa County AZ
    6. Johnson County, Kansas; and
    7. AAML Guidelines (now adopted for temporary in New York)
7. **Georgia:** Supreme Court has recommended adoption of alimony guidelines.
8. **Illinois:** Mr. Beerman advises that the Illinois family bar has spent considerable time addressing the issue. Attorney Andre Katz has been appointed to lead a commission to redraft their dissolution act and to address the issue of alimony guidelines.
9. **Indiana:** *Pendente lite* spousal support should not exceed 35 percent of the obligor's gross income less child support and spousal support from prior marriages. Total support from child support and *pendente lite* spousal support cannot exceed 50 percent of the obligor's gross income less child support and spousal support from prior marriages. Ind. Rules of Court, Child Support Guidelines, Guideline 2. Rehabilitative spousal maintenance cannot exceed three years in duration. IC 31-15-7-2(3).
10. **Kansas:** Some counties have local guidelines. The Johnson County, Kansas guidelines use the formula 20 percent of the difference in the parties' income for a term equal to the first to occur of death, remarriage, cohabitation or 1/3 of the length of the marriage. Other counties throughout Kansas (such as Sedgwick, Shawnee and Wyandotte) also use a similar formula. Those guidelines are often referred to and cited as a "reasonable approach" to the determination of alimony. But, "the court may not award maintenance for a period of time in excess of 121 months." K.S.A. §60-1610(b)(2).
11. **Massachusetts:** Alimony Reform Act of 2011, a sweeping alimony reform bill, was signed into law this past year on Sept. 19, 2011. The new law is effective for alimony judgments entered on or after March 1, 2012. The Massachusetts law provides guidance as to the term (or length) and amount of alimony.
12. **Michigan:** Has an alimony guidelines committee, which has reviewed guideline computer programs and recommends a particular one for use in the state.
13. **Montana:** In Montana, maintenance (alimony) is statutory and requires a showing that a spouse (1) lacks sufficient property to provide for their needs; and (2) that they are unable to support themselves through appropriate employment. Mont. Code Ann. § 40-4-203. The term "sufficient property" means that the property must be income-producing, rather than income-consuming property. *In re the Marriage of Hanni*, 2000 MT 59, ¶ 36, 299 Mont. 20, 997 P.2d 760. The term "appropriate employment" must be determined with relation to the standard of living achieved by the parties during the marriage." *In re the Marriage of Madson*, 180 Mont. 220, 590 P.2d 110, (1978). Temporary family support (*pendente lite*) is also statutory, and can include maintenance. Mont. Code Ann. § 40-4-121(1). The requirements for temporary maintenance are the same as maintenance under Mont. Code Ann. § 40-4-203.

14. **Nevada:** The Nevada Supreme Court has recommended adoption of alimony guidelines.
15. **New Mexico:** Each party is entitled to half of the net community income after deduction for fixed expenses of the community (rent/mortgage, utilities, minimum monthly payment of credit cards, premiums for all insurance, and other expenses).
16. **New Mexico:** For settlement purposes only. Two formulas, one with minor children of the marriage, and one when none. Court has 10 factors to consider (NMSA 1978 40-4-7)
17. **New York:** The new formula for temporary maintenance requires the court to begin with the parties' gross income as reflected on their most recent federal tax return, less FICA and city taxes. The court must make two alternative initial calculations based upon the payee's income and the payor's income up to the initial cap of $500,000; first, the difference between 30 percent of the payor's income and 20 percent of the payee's income and second, 40 percent of the parties' combined income less the payee's income. The lesser of the results of these two calculations is the "guideline amount of temporary maintenance." Where the payor's gross income exceeds $500,000 the court shall determine any additional guidelines amount to the amount of temporary maintenance through consideration of 19 rated statutory factors and the court shall also set forth the factors it considered and the reasons for its decision. Last, the court must consider whether the guideline amount (presumptive award) would be "unjust or inappropriate considering the 19 rated statutory factors."
18. **Pennsylvania:** A court considers the factors and incorporates them into actual monetary guidelines, which are statutorily mandated in temporary alimony situations. 23 PA. CONS. STAT. § 4322 (2002). The purpose of the Uniform Support Guidelines, which is explained in the comments of the rule, is to "promote (1) similar treatment of persons similarly situated, (2) a more equitable distribution of the financial responsibility for raising children, (3) settlement of support matters without court involvement, and (4) more efficient hearings where they are necessary." Pa. R.C.P. 1910.16-1, explanatory comment. Section 3701, Pennsylvania Statutes, lists factors relevant in determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment. 23 Pa.C.S. 3701 (2002). Once that threshold determination is made that alimony is necessary in a particular case, Section 4322, Pennsylvania Statutes, provides that child and spousal support during the pendency of the dissolution shall be awarded pursuant to a statewide guideline, "so persons similarly situated shall be treated similarly." 23 Pa.C.S. 4322 (2002). (*See "Are Alimony Guidelines in Our Future? The Uses and Abuses of Vocational Evidence in Divorce Cases"* © 2003 National Legal Research Group, Inc. http://www.divorcesource.com/research/dl/alimony/03nov189.shtml)
19. **Utah:** A trial judge must "consider" each factor in exercising discretion.
20. **Virginia:** Fairfax County, Virginia, has enacted *pendente lite* spousal support guidelines for use pending the final hearing. Fairfax Bar Association, Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, VA. No. 2002), available at http://www.fairfaxbar.org/pub_order_form.asp. Those guidelines are considered as one relevant factor in determining temporary spousal support. They are clearly not presumptive in setting temporary support, and they are not a factor at all in setting permanent support. Where the parties have no children, the Fairfax guideline amount is 30 percent of the income of the payor, minus 50 percent of the income of the payee. Where the parties have children, the Fairfax guideline amount is 28 percent of the income of the payor, minus 58 percent of the income of the payee. The guidelines themselves note the guideline amount is less reasonable as gross income rises over $10,000 per month, so that they must be used with caution in high-income cases. The guidelines do not have the force of law or regulation; they were adopted by a committee of local attorneys and judges. In Fairfax County, they have been used reliably since 1981, although the formula was tweaked in 1988, 1991, and 1997. They are therefore among the more established sets of guidelines in force in the country. (See *"Are Alimony Guidelines in Our Future? The Uses and Abuses of Vocational Evidence in Divorce Cases"* © 2003 National Legal Research Group, Inc. http://www.divorcesource.com/research/dl/alimony/03nov189.shtml)
21. **Washington:** Alimony (temporary and final) is based upon case law factors the court must consider.

Editor-in-Chief *Emeritus* Column

The Challenges Our New Chair and Our Section Now Face

by Lee M. Hymerling

This is an expanded version of a portion of the brief address that I made at the Annual Meeting of the Family Law Section, May 17, 2012, upon the occasion of Pat Judge's induction as our section's chair. In addition to speaking of Pat's exceptional abilities as an attorney and leader, as well as his experiences as an officer of this section, an editor of this publication, and as a member of the Supreme Court's Unauthorized Practice of Law and District Ethics Committees, I spoke of the dividing line between North and South Jersey, and how important it is for there always to be a significant presence of South Jersey lawyers in the leadership of our section. I also addressed how fitting it was that Pat became section chair on the very day the bar was to install a Cumberland County practitioner as state bar president.

As significantly, and, in the long-term, more significantly, I addressed my concern that our area of the law and how it is practiced is under siege. Our court system is in trouble. It lacks bench strength and resources. There are vicinages where cases cannot come to trial, because there are not sufficient judges to hear cases, and there are those who would challenge our substantive and procedural law. Whether it be issues of attorneys' liens or alimony, or whether it be about the proper role of alternative dispute resolution as an adjunct to the judicial process, our system faces serious challenges.

Finally, I questioned whether the extent of what we do as a section and as family law practitioners to better the system is fully appreciated. Let there be no doubt that members of this section do more than their share to ensure the family part is able to do its job well. There is nowhere else in the country, and nowhere else in the judicial system as we know it in New Jersey, where a program exists like our matrimonial early settlement panels. Bar members contribute thousands of hours to assist litigants and the Judiciary in resolving matters and moving the calendar along. To a great extent, I believe our contributions are taken for granted, and appropriate credit is not given.

There was a time when I truly believed there was a functioning partnership between the family bar and the court system as part of a greater partnership between the state bar and the Judiciary. Even then, that partnership did not suggest equality. I question the health of that partnership, at least as it pertains to family law practice and the administration of the family part. I say that for the following reasons:

First, the Judiciary should not allow the family part's case calendars to so sag that they suspend trials or to make the lists so long that they protract matters far beyond the disposition times recommended by the Pathfinder's Report years ago. Then it was recognized that letting family law matters languish on the calendar could have a horrific effect upon our state's families and our state's children. Over the years that followed, active consideration was given to timelines that were realistic to meet; but without adequate and trained judicial resources, those goals seem now to have become a memory.

Second, the Judiciary should not use the family part as almost a presumptive first assignment. The family part is indeed the people's court. In no other area of the law are decisions made that so directly influence our state's families and our state's most precious resource, its children. The family part deserves the Judiciary's best, and not, presumptively, the Judiciary's newest.

It is acknowledged that a few judges assigned to the family part want to make service in the family part a career; but when that choice is made, as a matter of policy it should be honored, and that policy should be publicly acknowledged. There is merit to judicial rotation. Judges should have broad experience throughout the various divisions of our trial courts, but that should not necessarily come at the expense of rotating family judges who want to stay.

It cannot be denied that there is a learning curve that every new appointment to the family part experiences. Few new family court judges have experience in family law matters; and even those that do, do not necessarily have experience in all of the substantive areas or 'product lines' each will have to address sitting on the family part bench. Even when there is rotation, it should be deferred so service will include not only the judge's first or second year as a jurist, but also time after the judge has gained experience.

Third, on a similar topic it must be recognized that having a judge spend a week or two with a sitting family part judge and attend introductory courses that might not take place for months after appointment, is insufficient training to familiarize the judge with the procedure or scope of the breadth of the issues they will confront as a family part judge.

As a part of training, the Judiciary, as a matter of policy, should draw upon the experience of family lawyers. It is the spirit of the partnership that created the Matrimonial Early Settlement Program. A similar spirit should be drawn upon to encourage lawyer involvement in judicial training. The argument that doing so would create conflicts or the perception of an appearance of impropriety could easily be addressed. South Jersey attorneys could be assigned to assist in the training of those who will sit in North Jersey, and North Jersey attorneys could be assigned to assist in the training of those who will be assigned to sit in South Jersey.

The benefits of such a program cannot be overestimated. Skilled practitioners would welcome the opportunity. Lawyers *and* judges regularly lecture together on Institute for Continuing Legal Education panels, and even at the Judicial College. More frequently than not, lawyer panelists have more experience than their judicial counterparts because it is we who often have dedicated our careers to this substantive area of practice. I do not suggest that the bar should play the leading role in these educational sessions, but we should be regarded as a valuable resource that would not require the expenditure of precious tax dollars. So put, I wonder why the judicial system has been so reluctant to let lawyers become more involved in what might be called 'bridge the gap' training between being a practitioner and being a judge.

I direct the attention of both the bench and the bar to Recommendations 45 and 46, contained in the Feb. 4, 1998, Report of the Supreme Court Special Committee on Matrimonial Litigation. The Supreme Court, in its Jan. 21, 1999, Administrative Determinations on the Recommendations of the Special Committee of Matrimonial Litigation, responded as follows:

Recommendation 45—Comprehensive Judicial Education Program for Family—The Special Committee, reiterating the conclusions of several past committees, recommended implementation of a 'comprehensive program of Family Part judicial education' building on the prior recommendations of the Supreme Court Judicial Education Committee, the Family Practice Committee, and the Pathfinders committee. The Special Committee further recommended that such training be made available to those assigned to Family 'at the earliest time practicable.' The Court recognizes the obvious value of specialized judicial education and training, particularly in the Family Part, given its complexity and varied case types. The issue remains, however, partially subject to the constraints of resource limitations and scheduling needs. The Court is aware that the Family Practice Committee has created a subcommittee to work expressly on the development of a Family judicial education curriculum. The Court is also aware that the subcommittee will be consulting and working with the Judicial Education Committee in this effort. The Court looks forward to its receipt and review of the Practice Committee's proposal.

Recommendation 46—Priority to Family Judges—The Special Committee recommended that Family Part judges receive priority in terms of all judicial education programs, both in-state and out-of-state. Although the Court declined to adopt the recommendation, it concurred in the underlying intent of that recommendation. Thus, subject to the availability of resources and necessary management considerations, judges of the Family Part should receive every opportunity to participate in appropriate educational programs. The Court will so advise the Assignment Judges, the Family Presiding Judges, and the Judiciary's Office of Education and Training.

I suggest the Supreme Court should direct its Family Practice Committee to study this problem and issue a report on the adequacy of the current programs for training new family part judges, and to submit to the Supreme Court a confidential report card measuring the extent to which the system has, in the almost 13-and-a-half years since the Supreme Court's 1999 administrative determinations, succeeded in the area of judicial education of family part judges. I suggest to the Family Law Section that its new chair appoint of a committee to perform the same role, and to prepare a similar report. Both reports should specifically address the merits of greater lawyer involvement in training judges before they ascend the family part bench.

Fourth, the Judiciary should not, under any circumstances, view the availability of alternate dispute resolution (ADR) as a justification for reducing bench strength. The Judiciary should acknowledge that it has an obligation to hear and decide cases in a timely manner. ADR must remain what the name suggests. It is an alternative, and a good one. It is not a substitute.

Fifth, the Judiciary should recognize that lawyers are entitled to be compensated for their services, and that fee applications deserve prompt and considered attention. Rulings should be such that, in appropriate cases, lawyers should be permitted, consistent with the law, to withdraw from cases in which resources exist but fees have not been paid.

Sixth, as part of the partnership that should exist, there should never be a time when our section's chair, as well as our section's immediate past chair, should not be seated as full members of the Supreme Court Family Practice Committee. As one who had the great privilege of serving on that committee and chairing or co-chairing an important subcommittee of the practice committee for many years, without equivocation I can say that our section's leadership should be given the opportunity to serve. I view such appointments as being appropriate and long overdue. It is not just that the section is an important source of finding qualified committee members, but that those who have gone up the section's leadership ladder have a unique and special perspective from which the practice committee will surely benefit.

Current and recent chairs have a very special role to play, and their membership should not be limited to a single two-year term. Just as a family part judge will rarely reach his or her full stride in the first year of his or her appointment to the bench, and in the first year of his or her family part assignment, so would their involvement not reach its full effectiveness in the first year. The slots assigned to those in positions of section leadership should be appointed to the practice committee for no less two full two-year terms. This suggestion deserves favorable attention not just because our section's leadership will represent an important constituency but, more importantly, because those who lead or who have just led have gained perspectives from the inside that would well serve the practice committee and the people of our great state.

I find it hard to comprehend that this has not been the practice, and there is no reason why it should not be. I recognize that appointments to Supreme Court committees rest within the prerogatives of our chief justice and his or her colleagues on the Court. But I also know that the practice committee would benefit from the presence of those who are leading or who have recently led our section.

Although I did not include all of these comments in my oral presentation before Pat Judge was sworn in, I have in some important ways expanded those comments for purposes of this article. I conclude, however, as I concluded my public address. This is a time for a strong leader of our section, not just to toot our horn, and not just to let our views be known, but to forcefully underscore the great contributions this section and the bar as a whole have made, and to advocate the views of those whom we serve. To the section I say that it has elected a person who will be a very fine chair, and I believe in this time in which our section and our area of substantive practice is under great challenge, Pat has the vision and the ability to advocate positions that serve our members' interests well, and I truly believe that our interests are in the best interests of the people of New Jersey. ■

Meet the Officers

Patrick Judge Jr. (Chair) is a partner in the firm of Louis & Judge, in Toms River. Mr. Judge is a senior editor for the *New Jersey Family Lawyer*. He is a former member of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law and the District IV Ethics Committee for Camden and Gloucester counties. In addition, Mr. Judge serves as an early settlement panelist in Burlington, Camden and Gloucester counties.

Mr. Judge regularly lectures on family law issues and is the author of several articles that have been published in the *New Jersey Family Lawyer*. He is an adjunct professor at Rutgers University Law School-Camden, where he has taught a family law class for the past several years.

Mr. Judge earned his B.A. from Allentown College of St. Francis de Sales, where he graduated *cum laude*, and his J.D. from Widener University School of Law, where he graduated *cum laude*. He served as a judicial law clerk for the Hon Donald P. Gaydos in Burlington County, Family Part.

Brian M. Schwartz (Chair-Elect) is a sole practitioner at Brian Schwartz, Attorney at Law, LLC, in Summit.

Mr. Schwartz has been a member of the Family Law Executive Committee of the New Jersey State Bar Association since 2002. He is also the executive editor of the *New Jersey Family Lawyer*. Mr. Schwartz is a barrister of the Northern New Jersey Inn of Court – Family Law. He had been selected six times by the Institute for Continuing Legal Education (ICLE) to lead the skills and methods course in family law for first-year attorneys. He was a speaker at the Family Law Symposium in 2007, 2008 and 2009. Mr. Schwartz has authored various articles for ICLE, the *New Jersey Family Lawyer*, New Jersey Association for Justice (NJAJ, formerly the American Trial Lawyers Association) and *Sidebar*. He is a frequent lecturer for ICLE, NJAJ, the New Jersey State Bar Association (NJSBA), the New Jersey Society of Certified Public Accountants and local bar associations.

In 2011, Mr. Schwartz was named to the Best Lawyers in America. He has been a Super Lawyer from 2007 to 2012, and was named a "Rising Star" by Super Lawyers in 2006. In 2006, Mr. Schwartz was also named one of the Top Ten Leaders under 45 in matrimonial law in Northern New Jersey, and in 2005 he was named one of the Top Ten Matrimonial Attorneys under 40.

In 2011, Mr. Schwartz was a faculty member in the inaugural American Institute for Certified Public Accountants (AICPA) Expert Witness Skills Workshop in Washington, D.C.; he will be a faculty member again in 2012 in Chicago.

Mr. Schwartz received his B.A. from the George Washington University and his J.D. for the University of Pittsburgh School of Law.

Jeralyn L. Lawrence (First Vice Chair) is a partner in the firm of Norris, McLaughlin & Marcus, P.A. She devotes her practice to matrimonial, divorce and family law, and is a trained collaborative lawyer and divorce mediator. Ms. Lawrence is a fellow of the American Academy of Matrimonial Lawyers, and has been certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is an associate managing editor of the *New Jersey Family Lawyer*. She is also the first vice president of the Somerset County Bar Association. She is an attorney volunteer at the Somerset County Resource Center for Women and Their Families and with the state bar's Military Legal Assistance Program, providing *pro bono* legal assistance to New Jersey residents who have served overseas or active duty in the armed forces after Sept. 11, 2001.

Ms. Lawrence was recently honored by NJBiz as one of New Jersey's best 50 Women in Business. She has received the Kean University Distinguished Alumna Award, was honored as an outstanding woman by the Somerset County Commission on the Status of Women, and has received the New Jersey State Bar Association's Young Lawyers Division's Professional Achievement Award and the annual Legislative Recognition Award. She is also a graduate of the National Institute of Trial Advocacy and a member of the Central New Jersey Inns of Court, and serves on the District XIII Attorney Ethics Committee.

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Point:
Alimony Guidelines: If it Ain't Broke, Don't Fix it

by Cary B. Cheifetz

There are lawyers and legislators who advocate for an overly simplistic, formula-based method by which litigants, and their attorneys, could calculate an appropriate award of alimony in any given case. On its face, it seems a relief to think that determining the amount and duration of alimony could be so easy, reduced to a straightforward numbers game. Many of us who practice family law, however, believe that resolving economic issues is never simple and straightforward. Issue resolution requires extensive diagnostic capabilities, the understanding of the interrelationship of personal and financial issues, and the application of facts to principles of law.

Unfortunately, the lure of an 'easy fix' has led to the development by several states, and even the American Academy of Matrimonial Lawyers (AAML), of alimony guidelines. Proponents argue that guidelines would enhance predictability and consistency of awards, encourage settlement and streamline litigation. But at what cost? Would we be removing advocacy, persuasion and judicial discretion from the equation? What of the equitable considerations that are built into our current system, such as the age and health of the parties, parental responsibility for children, foregone career opportunities, and the standard of living achieved during the intact marriage due to the non-economic contributions of the supported spouse?

Critics of the current methodology argue that alimony guidelines are needed because there is a lack of uniformity in the decisions that are reached by our Judiciary on cases with the same or similar facts. There is a simple and very important reason for this lack of uniformity: Every matrimonial case is different. The marriage may be of different duration; there may or may not have been cohabitation prior to the marriage; there might be one or more children; the ages of the children or parties may be different; and one party may have supported the other or sacrificed 'the best years of their lives' by withdrawing from the job market to raise their children, foregoing contribution to savings by supporting the household while the other spouse completed college or graduate school. Similarly, at the time of divorce, income-producing assets may be different, as well as liabilities and cash flow.

The parties' conditions are different in each case. Age plays an obvious role in the parties' ability for future self-support as it relates to physical ability to work and likelihood of re-entry to the job market. The duration of absence from the job market is also a factor, as are education and work experience. Has a party suffered an illness or chronic condition, one that is perhaps likely to recur or worsen? Does this affect their ability to work or obtain employment? Also unique to each case is each party's post-divorce budget, their need and ability to save for retirement, fluctuations in their incomes, and their ability to convert non-liquid assets into income-producing assets.

No reasonable conclusion exists, other than there is no such thing as 'similarly situated' parties upon which alimony guidelines may be based. Indeed, our current system of determining alimony addresses each of the critical factors listed above, as any method of calculating alimony must do, or risk being inequitable to either or both parties.

There is no colorable argument, therefore, that alimony can be reduced to a simple numbers game as proponents of alimony guidelines would like us to believe. Particularly telling is the fact that consensus has failed to emerge among the states that have experimented with the application of alimony guidelines.

When is a 'Guideline' More Than a Guideline?

Proponents of alimony guidelines in New Jersey argue that any guidelines enacted directly by the Legislature or propounded by the Judiciary through the Court Rules would be just that: guidelines. What does this mean in reality? Would alimony guidelines create, in essence, a rebuttable presumption as our child support guidelines do today? I suggest that before enacting alimony guidelines, the state of New Jersey conduct a

study to determine the current extent that practitioners have achieved regular success in asking the court or their adversaries to deviate from the child support guidelines. And if such deviation is a regular occurrence, then what is the purpose of enacting guidelines?

In actuality, the child support guidelines have become more than just a 'recommendation or suggestion' or 'voluntary in nature.' Practitioners and litigants can rely upon them being ordered by the court, usually without deviation. The application of the child support guidelines within their income limits has become so ubiquitous and simplistic that the family part judges' law clerks run them on computer software provided by the state. They are even provided on websites for laypeople to run.

In Michigan and other states, similar software has been developed and is being utilized by the courts to calculate alimony.[1] There is even an online calculator that can be utilized to calculate alimony pursuant to the formulas currently in existence *using just three to five pieces of data*.[2]

The over-simplicity of the alimony formulas currently in use, together with the ease and availability of the alimony formulas through online sources and dedicated computer software, represent a dangerous development in the field of family law. As we have seen with the child support guidelines, these 'presumptions' are rarely rebuttable.

Alimony Guidelines in Other States

After conducting a study relative to the propriety of alimony guidelines, a commission of the AAML developed a simplified formula, or "considerations," which they recommend for use as a starting point for negotiations.[3] Alimony is determined by calculating 30 percent of the payer's gross income minus 20 percent of the payee's gross income, and the payee's total income is capped at 40 percent of combined gross income of the parties. Duration of alimony is calculated at 30 percent of the number of months of the marriage for a marriage of zero to three years, 50 percent for a marriage of three to 10 years, 75 percent for a marriage of 10-20 years, and permanent for marriages over 20 years. The considerations also provide several factors under which there can be deviations from the guidelines, many of which are similar to those embodied in our own alimony statute.

In Santa Clara County, California, alimony is calculated using 40 percent of the payer's income (net of taxes and Medicare) minus 50 percent of the payee's net income. The duration is 50 percent of the number of months of the marriage for marriages of zero to 10 years' duration, the number of months of the marriage divided by 240 for marriages lasting 10 to 20 years, and a term equal to the number of years of marriage for marriages over 20 years.

Other states, such as Arizona (alimony calculated as the difference in incomes times a "marital duration factor" of .015 multiplied by the number of years married, capped at .5), New Mexico (30 percent of the payer's gross income minus 50 percent of the payees' gross income, or 28 percent of the payer's gross income minus 58 percent of the payee's gross income where there is child support), Kansas (20 percent of the difference in gross incomes of the parties, no adjustment for child support), Pennsylvania (40 percent of the difference in net incomes, or 30 percent where there is a child support obligation, *pendente lite*), and Virginia (30 percent of the payer's gross income minus 50 percent of the payee's gross income, adjustable by factors such as fault, payment of other expenses, and in high-income cases) are utilizing formal and informal alimony guidelines.

These states and others, including Maine (statutory rebuttable presumption that alimony may not be awarded if the parties were married for *less than 10 years*), Massachusetts (alimony capped at 33 percent of the difference in the parties' gross income and a dollar-for-dollar reduction for the amount of child support), Texas (statutory provision that alimony shall not be awarded unless the parties are married for over 10 years), and Kansas (alimony term not to exceed 121 months) have developed limits and parameters on alimony that fly in the face of logic, equity, and effective advocacy. Divorce cases simply do not allow for such cookie-cutter solutions. Perhaps certainty is achieved, but at what cost? Critics of alimony guidelines certainly can argue that such guidelines are not only arbitrary, but backward looking.

Judicial Uncertainty

In response to the finding of the Michigan Supreme Court Task Force on Gender Issues in the Courts that the economic impact of divorce is very different for women than it is for men, the State Bar of Michigan Standing Committee on Justice Initiatives conducted a survey in 2005 of their bench's use and experience with alimony guidelines available in Michigan.[4] Among the task force's concerns were that many judges make erroneous assumptions about a woman's ability to survive economically after a divorce, and assumptions that women will enter the workforce in parity with their male counterparts.

Ultimately, the judges surveyed found that the factors when making an alimony determination had been clearly set out by their appellate courts, as our factors have been set out by the New Jersey Legislature, and many of these factors are not easily quantifiable. These judges opined, moreover, that it would be difficult to design a guideline that considered all factors in any individual alimony determination.

The results of the judicial survey in Michigan are completely consistent with the reality that alimony is far too complicated and interdependent with other economic aspects of each case, and indeed with the economic realities of the workplace, to be determined by a simple mathematical formula. Where our child support guidelines may have succeeded on a limited basis, it was due to the extensive metrics involved in studying the contours of the expenditures of families in New Jersey on their children as they relate to the income of the parties. It is noteworthy that the child support guidelines do not encompass every scenario. Extraordinary and non-recurring expenses are left to judicial discretion, and often allocated between both parents on an income sharing basis. Certainly neither the Legislature nor the Judiciary could dream of a world in which every metric relative to the determination of alimony could be quantified and considered.

Conclusion

As is derived from the small sample of jurisdictions in which alimony guidelines are in place, there is clearly no consensus on how to reduce alimony determinations to a mathematical formula. Naturally, this is because the equities are too numerous and varied to quantify. For the same reason critics of our current system complain that alimony awards are not predictable or consistent, it should not be surprising that the formulas in jurisdictions where they have been attempted defy consistency. This is simply a matter of using the right tool for the right job, basing decisions on facts and applying facts to numbers using a thought process and not a mechanistic process.

Moreover, if alimony guidelines are enacted, by statute or rule, litigation will ensue to minimize or maximize the calculation. This does nothing to ensure that cases will settle more quickly, economically, or predictably. In fact, cases often settle best where a 'range' of alimony is offered by a judge, mediator or early settlement panel. This gives the parties the flexibility to fashion their own fair and equitable resolutions, as per the demands of their particular case. An unjust result can occur where the parties have significant, yet minimally disparate income. Should alimony be paid where one party earns $250,000 per year and the other party earns $285,000? Looking at the alimony guidelines as they stand today in many states, some would require the payment of alimony in the above situation despite such a negligible income differential.

What about a situation in which one party earns $28,000 and the other party earns $18,000? In such a low-income situation, the percentage income differential becomes more significant, so is alimony also warranted despite an arguable inability to pay by the higher earning spouse? Does this guidelines approach help parties settle cases, or cause more litigation? Will client satisfaction be any higher under a guideline regime? This author believes that cases will become more difficult to settle where automatic entitlements come about by arbitrary mathematical formulas.

Notably, the duration of the alimony awards calculated under guidelines is problematic. Should alimony under a 14-year marriage that terminated when the parties were in their 40s be treated the same way as if the parties were in their 60s? Under alimony guidelines calculations, this may be.

No alimony 'worksheet' could possibly encompass all the equities necessary to fashion a support award that is fair to each party. Alimony guidelines may provide some measure of predictability, but only at the ultimate cost of fairness and equity.

As former director of the Office of Management and Budget, T. Bert Lance, stated in the late 1970s, referring to misguided micromanagement by the federal government, "If it ain't broke, don't fix it."[5] Our Legislature and Judiciary have provided us with a rich statutory and case law framework of factors that allow our judges to consider *all* relevant facts in awarding alimony, not just the parties' incomes and the length of the marriage.[6] The current alimony regime allows advocates and litigants in divorce matters to achieve just and equitable results upon the unique and varied facts of each case. Alimony guidelines, even ones that are 'recommendations' and 'voluntary in nature,' as are our child support guidelines, based on simple mathematics, is an unnecessary and ill-advised 'fix' to a nuanced and equitable system that is, arguably, not broken.

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Endnotes

1. Alimony Program by Marginsoft, supporting alimony guideline calculations for Florida, Kentucky, Michigan, Washington and Maryland, and Prognosticator by Springfield Publications, supporting Michigan alimony guidelines, are two such examples. The programs are located at http://marginsoft.net/ and http://www.sppub.com/, respectively.
2. http://www.alimonyformula.com/, last visited Feb. 19, 2012. The data required is the length of the marriage, the gross income of each party, and the net income of each party if a calculation in California or Pennsylvania is desired.
3. A Report of the American Academy of Matrimonial Lawyers on *Considerations when Determining Alimony, Spousal Support or Maintenance* can be viewed at http://www.aaml.org/sites/default/files/AAML-ALI-REPORT-Final%205-02-07.pdf, last visited Feb. 19, 2012.
4. The Alimony Guidelines Survey Report may be viewed at http://www.michbar.org/programs/EAI/pdfs/AlimonyGuidelinesSurvey.pdf, last visited Feb. 19, 2012.
5. Lance was quoted in the newsletter of the U.S. Chamber of Commerce, Nation's Business, May 1977: "Bert Lance believes he can save Uncle Sam billions if he can get the government to adopt a simple motto: 'If it ain't broke, don't fix it.' He explains: 'That's the trouble with government: Fixing things that aren't broken and not fixing things that are broken.'"
6. N.J.S.A. 2A:34-23(b)(1) through (13).

Counterpoint:
To Guideline, or Not to Guideline: That is Not the Correct Question

by Christopher Rade Musulin

Defenders of the existing New Jersey methodology for calculating alimony have systematically utilized the specter of guidelines to successfully preserve the antiquated, intellectually indefensible *status quo* that is N.J.S.A. 2A:34-23 for decades. The current statute and related case law authority are fundamentally perfidious, as they remain premised upon maintenance of the marital standard of living, a historic purpose absolutely unjustifiable in 21st century America. To make matters worse, the complete absence of definitive statutory or decisional authority to precisely determine the length or characterization of the award renders the aggregate calculus incomprehensible. This combination of fatal flaws eliminates consistency of decision making in similarly situated cases, promotes litigation, discourages settlement, and erodes public confidence in our system of justice.

The visceral bloviations of those supporting the existing regime become even more apparent when we acknowledge that alimony guidelines are but one of several different existing models used to calculate spousal support. The debate is not as simplistic as one or the other— alimony guidelines or N.J.S.A. 2A:34-23. Rather, there are legitimate concerns existing on both sides of the debate that merit scrutiny and deliberative consideration.

What we need to do is open our minds; accept some constructive criticism without acrimonious posturing; collectively debate and analyze the strengths and weaknesses of the existing system; and review and consider alternative methods to calculate spousal support, including alimony guidelines. There *is* a middle ground that will satisfy all parties to the discussion, short of maintaining the existing system or adopting a simplistic guideline approach.

The results of inaction will be swift and irrevocable. As was the case with palimony and the statute of frauds, if we remain on the sidelines, decisions may be made that may adversely impact every litigant and matrimonial attorney in the state of New Jersey. We need to have a say in the process or our voices and concerns will go unheeded,with no one to blame but ourselves.

The Utility of Debate

We do not have to look further than our Founding Fathers to acknowledge a fundamental truth: It is always healthy to question authority and challenge the *status quo.* And perhaps no other expression of human existence requires constant debate than the institution of law, the method that defines the contours of societal behavior and establishes boundaries of acceptable human engagement. We are a nation of laws, not of women and men, and respect for rules, norms and procedures prevents society from devolving into chaos and anarchy.

Historically speaking, law remains dynamic, a work in progress, reflecting and reacting to changes in society. The best example of the utility of debate and modification of law can be found in legislation across America acknowledging the legitimacy of same-sex relationships and in an era before, it was civil rights. Imagine if legislators, attorneys, and public officials dogmatically adhered to existing legal standards and norms in the face of overwhelming social science data and public support acknowledging racial equality or the acceptance of same-sex relationships. The law would remain static and out of step with the realities of the world. Frustration and civil unrest would occur, with injustice resulting.

Concerning the issue of alimony, let us accept the fact that the world is a very different place than it was 25 years ago. We should not have a problem with objectively reviewing and debating an alimony statute last modified in accordance with the realities, concerns, and public policies of the Ronald Reagan era rather than the 21st century. Accordingly, let us first focus with precision on the fundamental problem with the existing methodology, the lack of consensus regarding the *purpose* of alimony.

The Purpose of Alimony

The brightest and the best legal minds in the state of New Jersey and across the country remain equally perplexed by the purpose of alimony. This includes Justice Virginia Long, writing for the majority of the Supreme Court in *Mani v. Mani*, 183 N.J. 70 (2005):

> Divorce based on the English practice was available in the American colonies from the earliest times. *Maynard v. Hill*, 125 U.S. 190, 206, 8 S. Ct. 723, 727, 31 L.Ed. 654, 657 (1888). The concept of alimony also carried over. Again, as had been the case in England, the reason for alimony, outside the legal separation scenario, remained an enigma. 2 Homer Harrison Clark, *The Law of Domestic Relations in the United States*, 257-58 (2d ed.1988). That lack of clarity regarding the theoretical underpinning of post-divorce alimony explains why, although alimony is now awarded in every jurisdiction, Collins, *supra*, 24 *Harv. Women's L.J.* at 31, there is no consensus regarding its purpose. Indeed, many distinct explanations have been advanced for alimony. *Id.* at 23. They include its characterization as damages for breach of the marriage contract, Margaret F. Brinig & June R. Carbon, *The Reliance Interest in Marriage and Divorce*, 62 *Tul. L.Rev.* 855, 882 (1988); as a share of the benefits of the marriage partnership, *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974); as damages for economic dislocation (based on past contributions), Elisabeth M. Lands, *Economics of Alimony*, 7 *J. Legal. Stud.* 35 (1978); as damages for personal dislocation (foregoing the chance to marry another), Lloyd Cohen, *Marriage, Divorce, Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 *J. Legal Stud.* 267, 276 (1987); as compensation for certain specific losses at the time of the dissolution, A.L.I., *Principles of Law of Family Dissolution: Analysis and Recommendations*, 8 *Duke J. Gender L. & Pol'y* 1, 28 (2001); as deterrence or punishment for marital indiscretion, Brinig & Carbone, *supra*, 62 *Tul. L.Rev.* at 860-61; and as avoidance of a drain on the public fisc, *Miles v. Miles*, 76 Pa. 357, 358 (1874).[1]

This criticism is not unique to the state of New Jersey. Presently, 41 American jurisdictions utilize statutory "factors" similar to the criteria contained within N.J.S.A. 2A:34-23. In a comprehensive review of these statutes, Professor Mary Kay Kisthardt, of the University of Missouri School of Law, observed the following:

> The lack of a coherent rationale (underlying the concept of alimony) undermines the ability to provide consistency in awards. Alimony statutes vary significantly from state to state with some authorizing payments in a wide variety of situations and others restricting it to very narrow circumstances. But in almost all states judges are given a great deal of discretion with the result that these awards are rarely overturned. Because of an inability to come to a consensus regarding the underlying rationale for alimony, legislatures often include a long list of factors for judges to consider. One commentator found over 60 factors mentioned in the 50 states. Unfortunately there are often internal inconsistencies in the factors and no state provides a priority ranking. Judges struggle with how to apply a myriad of factors to reach a fair result. Statutory criteria, with no rules for their application, then result in a "pathological effect on the settlement process by which most divorces are handled."[2]

Brooklyn Law School professor Marsha Garrison has further concluded that "like cases simply do not produce like results" pursuant to the numerous and often conflicting statutory factors a jmay consider.[3]

The reporters notes to Section 5.02 of the *Principles of the Law of Family Dissolution*, as published by the American Law Institute, contain detailed discussions regarding inconsistencies in the definition of key traditional alimony factors common among the 41 jurisdictions that utilize similar statutory schemes.[4] This includes divergent interpretations of maintenance of the marital standard of living, which is recognized by the New Jersey Supreme Court as the most important factor in calculating alimony.[5]

Searching for an Answer: The Historic Justification for Alimony

The purpose underlying an award of child support is clearly to support children born of the relationship.

This seems obvious. The purpose underlying equitable distribution is also clearly to divide the spoils of the marriage. This is equally obvious. However, consistent with the observations of Justice Long and dozens of other equally learned commentators discussed above, there is absolutely no consensus regarding the modern purpose of alimony.

Before we search for an updated justification for an award of alimony, it is appropriate to review the historic purpose of alimony. This was articulated by a different panel of the New Jersey Supreme Court approximately five years before the *Mani* decision, in *Crews v. Crews*:

> An alimony award that lacks consideration of the factors set forth in N.J.S.A. 2A:34-23(b) is inadequate, and one finding that must be made is the standard of living established in the marriage. N.J.S.A. 2A:34-23(b)(4). The court should state whether the support authorized will enable each party to live a lifestyle "reasonably comparable" to the marital standard of living.[6]

Where does this standard come from? Prior to the 1988 amendments to N.J.S.A. 2:A34-23, the 1971 statute contained only three factors: ability, need and duration of the marriage.

Senator Wynona Lipman sponsored the legislation that eventually resulted in the 1988 amendments, creating most of the factors we are familiar with today, including the fourth factor, maintenance of the marital standard of living. Before it was embedded in the statute, it was available through case law authority.

How did the standard become embedded in case law authority? Historically, there was no equitable distribution of property acquired during the marriage, since ownership turned upon title, and title was restricted to the name of the husband. Most women did not work outside of the home, marriages tended to last a lifetime, and divorces were adjudicated upon fault. It was in this environment that maintenance of the marital standard of living emerged.

When a marriage came to an end because of a husband's fault, a wife needed money to survive or she would become a public charge. She was disenfranchised from wealth since men controlled all property, and she was unable to enter the male-dominated, nondomestic workforce, having served exclusively as a homemaker and primary caretaker of the children. The guilty husband was then responsible to pay the innocent wife-victim sufficient money to sustain her in the lifestyle to which she had become accustomed. This is the historic rationale justifying the obligation to maintain the marital standard of living.[7] Accordingly, virtually every jurisdiction in America adopted maintenance of the marital standard of living as the historic core purpose of alimony awards.

Changes in the World

The rather obvious problem with the historic purpose of alimony is that American society, culture, and laws have changed; thus, the circumstantial underpinnings of the traditional purpose of alimony are simply no longer viable in the 21st century.

First, in virtually every jurisdiction in America, whether pursuant to equitable distribution or community property standards, marital assets are subject to division. The laws of colonial America with regard to exclusive male ownership no longer exist. Furthermore, ownership does not turn upon title in a matrimonial case. In the vast majority of cases, non-business-related assets acquired during the marriage, such as the home, retirement accounts, bank accounts, personal property, and other significant assets, are very often divided equally between the parties. The wife is no longer subject to economic disenfranchisement.

Second, with rare exception, fault is no longer relevant in modern divorce practice. This philosophy has been in place in New Jersey since 1971, when New Jersey adopted the core philosophy of the Uniform Divorce and Marriage Act with regard to the elimination of fault. Ironically, for purposes of the present discussion, fault was further excised from the alimony calculus by Justice Long in her opinion in the *Mani* decision, except in the most extreme situations, and only then limited to economic malfeasance as opposed to aberrational behavior causing the failure of the bond of matrimony.

Third, women are now regular members of the nondomestic workforce. In fact, it is not unusual for a wife to earn more money than her husband.

Finally, marriages are rarely long-term, a fact statistically demonstrable. Marriages are so short in length, the Appellate Division in the decision of *Hughes v. Hughes* commented that a 10-year marriage is, for all intents and purposes, a long-term relationship under modern standards.[8]

Accordingly, the above-referenced changes in the world render the historic purpose of alimony, the main-

tenance of the marital standard of living, intellectually indefensible. This observation cannot be the subject of rational debate.

Follow Your Intuition

On a more pragmatic level, our training and experience have told us for years that maintenance of the standard of living is just plain counterintuitive. By way of a simplistic example, assume a husband earns $100,000 a year and a wife earns $50,000 per year. Further assume there is no other source of earned/unearned income, no inheritance/gifting, no asset invasion, and no significant debt creation. Further, assume a combined average tax rate of 30 percent. It therefore follows that the net income of $105,000 per year defines the marital standard of living. We can't spend what we don't have.

Fast forward to divorce. In the above fact pattern, neither party will be able to enjoy a $105,000 lifestyle. Even if we divide the income in half, each will only enjoy a $52,500 per year lifestyle. It's just that simple.

If there is equitable distribution, women work and no longer serve exclusively as homemakers and/or primary caretakers, marriages tend to be short and fault is irrelevant, why is the spouse with the lower income exclusively entitled to enjoy maintenance of the marital standard of living? It just does not make sense in the year 2012.

Chaos begets chaos. Armed with the *Crews* decision, your adversary pounds away at you, relentlessly arguing that his or her client, as the prospective recipient of alimony, is exclusively entitled to ownership of the marital standard of living. Under N.J.S.A. 2A:34-23 and *Crews*, your adversary is correct. However, operating within the realities of 2012 (and basic common sense and fairness), your adversary is absolutely wrong.

The Problem With Guidelines

What about guidelines; don't they address and resolve this issue? The answer is, no. The problem with guidelines is that most models perpetuate the marital standard of living fallacy by blindly fixing a percentage of the difference in the income models existing at the time of divorce as the appropriate amount of an alimony award. It is a shortcut method that further institutionalizes and reinforces the historic purpose of alimony into what appears to be a revised, enlightened protocol.

A guideline is enticing, even subconsciously, as it is easy and can free us from the absurd constraints of the steroidal adversary who insists on permanent alimony after a three-month marriage.

A guideline is also seductive, as it mimics the proverbial rule of thumb utilized in virtually every New Jersey vicinage, and even acknowledged as a perfectly viable methodology by at least one panel of the New Jersey Appellate Division.[9] This involves fixing alimony based upon 25 or 30 percent of the difference in the income models.

There are literally dozens of guideline models across America, including California, Virginia, Michigan, Arizona, Nevada, Oregon, Minnesota, New Mexico, Kansas and Pennsylvania. Some of these guidelines are limited to specific counties; others are in use by entire state jurisdictions. Some are presently pilot programs; others represent existing statutory standards. Some are easy to comprehend, others highly complicated. Some are limited to *pendente lite* awards; others apply to final dispositions. (See The Massachusetts Alimony Reform Act of 2011, which is a sweeping alimony reform bill that was signed into law this past year on Sept. 19, 2011. The new law is effective for alimony judgments entered on or after March 1, 2012.[10]) There is no uniformity among the different guideline protocols.[11]

Critics of alimony guidelines argue that guidelines will destroy judicial discretion, eliminate advocacy, and overly simplify incredibly complicated, unique factual situations that mandate individualized attention. Supporters of alimony guidelines argue that the absence of uniformity in decision making, especially in similarly situated fact patterns, results in the promotion of litigation and obstacles to settlement, and believe that confidence in the system of justice is undermined by the absence of predictability in awards. Both sides of the debate make extremely valid points.

Is there a place for a guideline award in a matrimonial case? Perhaps. Many guidelines resolve the second major structural problem with the existing New Jersey protocol—the characterization of the award—by limiting alimony awards to a period of time not to exceed the length of marriage, and, further, by terminating alimony upon the natural time of retirement, typically age 65. But guidelines are of limited utility with regard to the amount of alimony since they continue to rely upon marital standard of living as their core rationale.

Salvaging the Existing Regime

Accepting the fact that maintenance of the marital standard of living was a viable purpose for a previous generation, is it possible to remove this factor from our existing statute, reorganize the remaining factors into a

more logical presentation, and consider the use of rebuttable presumptions with regard to characterizing the award?

It makes great sense to utilize the ability factor from the statute. We all understand this factor to generally mean the ability of either party to earn income. Implicit in the ability to earn income is the age, physical and emotional health of the parties; his or her earning capacity, educational level, vocational skills and employability; the length of absence from the job market of the party seeking maintenance; the parental responsibilities for the children; the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the availability of training and employment; and the amount of income available through investment of assets.

All of these considerations, now found in separate paragraphs of the statute, relate to the ability of either party to earn income. Logically speaking, they all belong together, as each impacts the ability to earn.

The need factor should be broken into a separate paragraph and, with the elimination of maintaining the marital standard of living, can become a more realistic expression of basic monthly budgetary needs.

Reorganizing the statutory considerations into the above-described paradigm with the unambiguous elimination of maintaining the marital standard of living is a more appropriate standard to utilize in the 21st century.

The Other Half of the Battle

When fixing initial awards of alimony, determining the appropriate amount of the award is only half the battle. Equally problematic is the issue of characterization—permanent, limited duration, or rehabilitative.

With regard to the characterization of alimony, legislative history underlying N.J.S.A. 2A:34-23 indicates a complete lack of direction in this regard.[12] The resulting case law authority is confounding. The characterization of an award under the current legal standard may present a greater intellectual conundrum than the elimination of marital standard of living with regard to fixing the specific amount of the award.

Characterizing the award is also challenging because it is premised upon the realities of a different era, with the exception of the 1999 amendment creating statutory acknowledgment of limited duration alimony awards. Once again, we should follow intuition. Although the second factor of the existing statute, duration of the marriage, suggests to us that there should be a relationship between the length of the marriage and the length of the award, we have case law specifically telling us there is no such precise correlation.[13]

To make matters worse, we have the occasional aberrational decision that further confounds the analysis, such as *Hughes v. Hughes*, which empowers the irrational adversary to argue for permanent alimony with a 10-year marriage.

Rebuttable Presumptions to the Rescue

To assist the Judiciary, attorneys, and litigants in resolving the problem of characterization, perhaps we should consider the use of rebuttable presumptions. Specifically, where the marriage is five years or less, a rebuttable presumption should exist that no alimony award is appropriate. With a marriage between five years and 15 years, the rebuttable presumption should favor limited duration alimony. Finally, with a marriage in excess of 15 years, the rebuttable presumption should support an indefinite award.

Brilliant in its simplicity, and refreshing in its recognition of reality, the utilization of rebuttable presumptions can solve the second malingering conundrum that makes settling matrimonial cases far too challenging. If we could all agree that in general, a marriage of two years does not merit alimony, but a marriage of 17 years generally requires payment until retirement of the obligor, the world would truly be a better place. The use of rebuttable presumptions as suggested above is generally consistent with our professional experience, and would go a long way toward addressing the concerns of the proponents of alimony guidelines.

Perhaps we can even go a step further, and create an additional rebuttable presumption that attainment of the age of 65, or qualification for Social Security, whichever is later, represents a *prima facie* change of circumstances entitling an obligor to a review of the support obligation.

Is There a More Enlightened Approach?

In 2002, after 11 years of work involving four separate drafts prepared by over 160 judges, law professors and practicing attorneys, the American Law Institute issued *Principles of the Law of Family Dissolution*, the restatement of family law comprised of 1,187 pages.

Chapter 5 addresses the traditional concept of alimony. It replaces the word "alimony" with the concept of compensatory spousal payments, and adopts a completely different paradigm underlying the award: Rather than relief of need or maintenance of the

marital lifestyle, compensation for loss becomes the core rationale, adopted from the substantive law of damages. Financial loss attributed to the marital relationship falls into two primary categories: first, loss of earning capacity attributable to leaving the workforce to care for children; second, loss of earning capacity attributable to serving as a homemaker, without children.

This interesting approach then determines an award of compensatory spousal payments premised upon a fixed percentage of the difference between the income models of the parties. The length—characterization—of the award is largely equal to the length of the marriage.

An analogous approach is presently utilized in England that really gets to the heart of the alimony debate. Spousal compensation is awarded in the event the party seeking the award can demonstrate "relationship generated career loss," the essence of sacrifice. If the spouse can demonstrate a career loss/income loss directly attributable to the assumption of primary caretaking or homemaking responsibilities during the course of a matrimonial relationship, they are entitled to compensatory spousal payments. Relationship-generated career loss replaces maintenance of the standard of living as the core purpose of post-marital spousal compensation.[14]

To provide a simple example, if a couple is married for 10 years, no children are born and each works on a full-time basis throughout the course of the marital relationship, vigorously pursuing their careers, there would be no compensatory spousal payments since neither spouse would be able to demonstrate career interruption or income loss directly attributable to the assumption of primary caretaking or homemaking responsibilities.

To provide an alternative example, if a couple is married for 10 years, and one spouse gives up his or her career to become a full-time caretaker of the children and homemaker of the domestic regime, this spouse would be entitled to compensatory spousal payments, as he or she can clearly demonstrate career interruption or income loss.

Eliminated from the above-mentioned modern paradigm is entitlement to marital lifestyle absent a demonstration of relationship generated career loss. Accordingly, the mere fact that you are married to someone for 10 years and enjoy a heightened standard of living does not, by itself, entitle you to continue to enjoy this standard at the conclusion of the marital relationship. This represents a fundamental departure from current New Jersey law, and effectively abolishes the *Crews* standard.

The justification for the compensation is the belief that the loss experienced by one spouse should be shared between the parties in a fair and equitable fashion. Furthermore, the loss may extend into the future if continuing parental obligations exist, such as caring for a child or if a medical condition renders a spouse unable to work.

Conclusion

There has been more legislative, learned treatise, and press attention to the issue of alimony in the previous two years than has occurred in the previous two decades.[15] This is an incredibly hot topic that requires our immediate attention and involvement.

Inaction may result in the wholesale adoption of revised statutes from sister jurisdictions, such as legislation tentatively proposed by members of the New Jersey Assembly who are enamored with the recently enacted Massachusetts model. We should not blindly adopt alimony guidelines. In the same respect, we cannot blindly accept the existing statutory regime premised upon maintenance of the marital standard of living with the additional absence of precision concerning characterization/length of the award. Rather, we should essentially prune and revise our existing statute by reorganizing the factors into a more logical presentation, and consider adopting relationship generated career loss as the modern core purpose of alimony awards. We may also wish to embed rebuttable presumptions with regard to the characterization of the award, as well as creating a *prima facie* change of circumstance upon the natural date of retirement, presumptively age 65.

This above-mentioned approach will satisfy both sides of the debate. The opponents of alimony guidelines will avoid the adoption of a simplistic model, guarantee the retention of judicial discretion, and remain involved in a system permitting diligent advocacy. The supporters of alimony guidelines will have a more enlightened core purpose related to relationship-generated career loss, eliminate the archaic warhorse that is maintenance of the marital standard of living, and enjoy fair-minded, logical rebuttable presumptions that will create greater predictability in the system.

There is room to compromise and a comfort zone in the middle that all parties should consider. Remember, with the exception of adopting limited duration alimony, there have been no significant or comprehensive revisions to the statute in almost 25 years, with case law

authority landing all over the place, struggling to make sense out of a senseless situation. The winds of change are howling, and we must rise to the occasion and do what is best for litigants, attorneys, and the Judiciary.

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The History of Alimony

by Stephanie Frangos Hagan

The word "alimony" is derived from the Latin word "alimonia," meaning nourishment and sustenance. Initially, alimony was awarded as a rule of sustenance to assure the wife's lodging, food, clothing, and other necessities after divorce.[1]

The practice of paying alimony has deep roots in history, and dates as far back as the Babylonian Code of Hammurabi. If a couple divorced, the man was obligated to return his ex-wife's dowry, grant his ex-wife custody of any children from the marriage, and give her an allowance to sustain her and the children until the children were grown. However, if the ex-wife had violated any of a number of traditions during the marriage, the husband could be entitled to keep the dowry and children, or even relegate his ex-wife to slavery.[2]

Alimony in New Jersey dates as far back as the 17th century. It was derived from the English ecclesiastical courts, which awarded alimony to women in cases of separation. Initially, ecclesiastical courts were prohibited, under common law, from granting an "absolute" divorce. Only Parliament was allowed to grant a divorce in extreme and rare cases. As a result, a complaint for divorce was actually a complaint for "divorce from bed and board." Interestingly enough, New Jersey continues today, four centuries later, to recognize a divorce from bed and board. Historically, a husband was required to pay his ex-wife alimony because when a woman married, her family typically provided property to the husband in the form of a dowry. When the parties divorced, the husband kept his ex-wife's dowry, as well as any other assets acquired during the marriage, since women were not allowed to own property. Because a divorce from bed and board allowed the husband to continue to control his ex-wife's property, the husband had a corresponding duty to continue to support his ex-wife.

Even after the New Jersey Court of Chancery was given the power to grant a divorce, the concept of alimony continued. Initially, the rationale was that women gave up their property rights at marriage, and after the marriage ended, they were without the means to support themselves. Originally, awards of alimony were similar to the wife's claim of dower, and courts used the traditional one-third of the property standard, so instead of one-third of the husband's estate, the wife received one-third of the husband's income at the time of divorce.[3] (Alas, we now know the origins of the one-third of the difference in income rule.)

The first New Jersey alimony statute was enacted more than 200 years ago, on Dec. 2, 1794. It provided that when a divorce was granted, the court of chancery could enter an order for alimony and maintenance for the wife that was "fit, equitable and just." However, divorce could be granted only on the grounds of either adultery or extreme cruelty.

In 1818, the Divorce Act in New Jersey amended the statute to add provisions for security to assure the payment of alimony. No other changes were made to the alimony statute until 1907. The Divorce Act of 1907 amended the alimony statute to allow the court to award permanent alimony to the wife and maintenance of the children of the marriage, and also permitted post-judgment applications. In 1919, the law was again amended, to allow for the issuance of a writ of sequestration, where money was sought from a non-resident defendant who owned or was in possession of property in New Jersey.

Initially, alimony was awarded only to a wife. It was not until the Divorce Reform Act of 1971 that the New Jersey alimony statute was amended to make alimony awards "gender neutral" by replacing the word "wife" with "parties" in the first sentence of the statute.[4] More importantly, for the first time, "no fault" divorce was introduced in New Jersey, with the statute being amended to allow parties to get divorced on the grounds of being "separated" for a period of 18 months or more.[5] It is interesting to note that it was at this time that equitable distribution was also introduced in New Jersey, allowing the wife to receive a share of marital property.[6]

Today, the alimony statute has been further amended to allow the court to order alimony in the dissolution of civil unions, as well as in divorces or complaints for separate maintenance.

The type of alimony that can be awarded has also changed over the years. Initially, a court could award only permanent alimony. The law in New Jersey has

evolved, over the past 40 years, to include rehabilitative alimony, and most recently, reimbursement and limited duration alimony.

Rehabilitative alimony was added to the alimony statute in New Jersey in 1988. At the same time, the statute was amended to include the 10 statutory factors a judge must consider when ordering an alimony obligation.[7]

The concept of reimbursement alimony was first introduced by the New Jersey Supreme Court in 1982, in the case of *Mahoney v. Mahoney*.[8] The concept was introduced to deal with the inequities in those cases where a marriage ends after one spouse has supported the other spouse while he or she obtained a professional degree or license, anticipating that the financial benefits of obtaining that degree or license would be enjoyed by both parties. Although the concept was introduced in 1982, New Jersey's alimony statute was not amended to add reimbursement alimony until almost 17 years later, in Sept. 1999, when the statute was also amended to include limited duration alimony. ■

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Alimony and Equitable Distribution Considerations in Short-Term Marriages

by Derek M. Freed

When the alimony factors set forth in N.J.S.A. 2A:34-23(b) are compared with the equitable distribution factors set forth in N.J.S.A. 2A:34-23, the similarities are striking, as illustrated in Chart 1. In examining each set of statutory factors in the context of a short-term marriage, equitable distribution concerns often bleed into alimony considerations. This article will examine what constitutes a short-term marriage, along with the alimony considerations and equitable distribution considerations in a short-term marriage. Additionally, this article will illustrate that even if a marriage is deemed short-term, there are myriad considerations that will affect any award of alimony and equitable distribution.

What is a Short-Term Marriage?

Before addressing the alimony and equitable distribution considerations for short-term marriages, one must decide what actually constitutes a short-term marriage. In *Cox v. Cox*, the Appellate Division analyzed whether an award of limited duration alimony or permanent alimony was appropriate. The *Cox* court stated:

> limited duration alimony is...intended... to address those circumstances where an economic need for alimony is established, but the marriage was of short-term duration such that permanent alimony is not appropriate. Those circumstances stand in sharp contrast to marriages of long duration....In the former instance, limited duration alimony provides an equitable and proper remedy. In the latter circumstances, permanent alimony is appropriate and an award of limited duration alimony is clearly circumscribed, both by equitable considerations and by statute.[1]

The *Cox* court further clarified the difference between limited duration alimony and permanent alimony, stating:

> Limited duration alimony is to be awarded in recognition of a dependent spouse's contributions to a relatively short-term marriage that nevertheless demonstrated the attributes of a 'marital partnership....' In determining whether to award limited duration alimony, a trial judge must consider the same statutory factors considered in any application for permanent alimony, tempered only by the limited duration of the marriage. All other statutory factors being in equipoise, the duration of the marriage marks the defining distinction between whether permanent or limited duration alimony is warranted and awarded.[2]

Cox suggests that courts have a binary choice: Either a marriage is "short-term" or it is "long-term." This premise, however, is not supported by a review of other New Jersey case law. Courts often describe marriages as having durations that are neither strictly short-term or long-term. For example, in *Hughes v. Hughes*, the Appellate Division stated that a marriage of 10 years in duration should not necessarily be considered a short-term marriage.[3] However, the *Hughes* court did *not* hold that a marriage of 10 years was a long-term marriage. Instead, the Appellate Division stated, "we take issue with a ten-year marriage being considered a short-term marriage. By today's standards, it is not. We must look at the particular facts of this case."[4] In later portions of the decision, the *Hughes* court referred to the parties' 10-year marriage as one of "intermediate" or "medium" length.[5]

Other courts have illustrated the *Hughes* principle, which is that marriages in New Jersey need neither be described as short-term or long-term. In *Finne v. Finne*, the Appellate Division described a "nine-plus"-year marriage as a marriage of "intermediate length."[6] Additionally, in *Valente v. Valente*, the Appellate Division referred to an 11-year, nine-month marriage as being of an "intermediate" length.[7] In *Christopher v. Christopher*, the Appellate Division noted a trial court's reference to

a nine-year marriage as being of "neither long nor short duration."[8] In *Schwartz v. Schwartz*, the Appellate Division referred to a nine-year marriage as "relatively short-term."[9] Similarly, in *Heinl v. Heinl*, the Appellate Division referred to a marriage of seven years and eight months as "relatively short."[10]

The question then arises, when does a short-term marriage cross the durational threshold and become a marriage of intermediate or medium length? In *Hughes*, the Appellate Division contrasted the parties' 10-year marriage with a marriage of "approximately a year and a half."[11] The *Hughes* court also differentiated the parties' marriage from a case where the parties were married for three-and-one-half years.[12]

The Appellate Division's decision in *DuBois v. Brodeur* also provides guidance on what constitutes a short-term marriage.[13] In *DuBois*, the parties were married for seven-and-one-half years. However, there was a period of 10-and-one-half years between the parties' initial cohabitation and the filing of the complaint for divorce.[14] In commenting on these figures (7.5 years and 10.5 years), the Appellate Division stated, "[t]he judge correctly referred to the marriage as one of neither long nor short duration, although the term is decidedly closer to being considered one of short duration."[15]

Thus, based upon these cases, one could argue that a short-term marriage is one in which the parties were married for less than 7.5 to 10.5 years. However, the cases illustrate there is no bright-line test to determine what constitutes a short-term marriage, the same way that there is no bright-line test to determine when a marriage becomes long term.[16] This is contrary to other states, which have created such bright-line rules.[17]

In the Event a Marriage is Deemed Short-Term, What are the Applicable Remedies?

After a marriage is determined to be short-term in duration, a practitioner can begin to determine the rights or potential obligations of their client. These rights and obligations include alimony and equitable distribution.

Alimony in Short-Term Marriages

In evaluating a request for alimony in the context of a short-term marriage, there are two immediate questions that must be resolved: 1) whether an alimony award is warranted in a short-term marriage; and 2) if an alimony award is warranted, the specific type or types of alimony award(s) that may be appropriate.

The Appellate Division's decision in *DeSaro v. DeSaro*, illustrates that a party does not automatically derive an entitlement to alimony as a result of a marriage, especially in the context of a short-term marriage.[18] In *DeSaro*, the parties began dating in May 1999. They began cohabiting in October 1999. They became engaged in December 2000, and married in October 2001. A complaint for divorce was filed in October 2002.[19] Thus, at most, their relationship was three-and-one-half years, with their actual marriage lasting only one year.

The trial court concluded the wife was entitled to one year of limited duration alimony, due to the fact that the parties enjoyed a "luxurious standard of living" during the marriage.[20] On appeal, the husband argued that the trial court erred in awarding the wife alimony. He claimed the wife had failed to prove that she was "entitled" to alimony under N.J.S.A. 2A:34-23(c). The husband also argued the trial court failed to consider the significant equitable distribution (totaling several hundred thousand dollars) the wife received upon the entry of the judgment.[21]

The Appellate Division agreed with the husband, and reversed the trial court's decision. While acknowledging the need to consider the marital lifestyle in making an award of alimony, the Appellate Division looked at the purpose of an award of limited duration alimony.[22] It stated, "'[Limited duration alimony] is available to a dependent spouse who made 'contributions to a relatively short-term marriage that...demonstrated the attributes of a 'marital partnership' and has the skills and education necessary to return to the work force.'"[23] The Appellate Division then stressed that according to *Cox v. Cox*, limited duration alimony is designed for situations where there is "'an economic need for alimony... but the marriage was of short-term duration such that permanent alimony is not appropriate.'"[24]

Critically, the trial court had found that the wife had *not* been adversely impacted by the marriage.[25] In fact, the record suggested the marriage had been an economic boon for the wife. Based upon these facts, the Appellate Division concluded the wife had not demonstrated a need for alimony. It went so far as to eliminate the alimony award, declining to remand the matter.[26]

The *DeSaro* approach is supported by the Appellate Division's decision in *Ferrier v. Anastos-Ferrier*.[27] In *Ferrier*, the Appellate Division affirmed a trial court's denial of alimony in what it called a "short-term five-year marriage."[28] The Appellate Division stated that the party seeking alimony would actually leave the marriage with

more than she brought to the marriage. As that party's position had not changed, the denial of an award of alimony was appropriate.[29]

DeSaro and *Ferrier* suggest that in short-term marriages, a key consideration in the alimony analysis should be whether the party seeking an alimony award was "impacted" by the marriage. In addressing this consideration, relevant considerations may be whether a child was born during the marriage and the concomitant childcare responsibilities that may have arisen. In certain circumstances, especially involving special-needs children born of a short-term marriage, the short-term nature of the marriage may not serve to limit a dependent spouse to a short-term limited duration alimony award.

Additionally, to address the *DeSaro* and *Ferrier* line of inquiry, a party may contend that they gave up economic opportunities in order to enter into the marriage (or declined economic opportunities that arose during the marriage).[30] In those circumstances, the short-term nature of the marriage arguably is 'less important' than the fact that the marriage, *per se*, resulted in some economic disadvantage. For example, where one party gave up an award of permanent alimony to enter into a marriage, that party might contend that upon their divorce, they were adversely impacted by the marriage and in need of alimony. The duration of the marriage would arguably be less important than the fact that the award of permanent alimony deriving from their prior marriage had, in fact, terminated.

In his detailed decision in *Cox v. Cox*, Judge Philip Carchman stated that the purpose of limited duration alimony was to "address those circumstances where an economic need for alimony is established, but the marriage was of short-term duration such that permanent alimony is not appropriate."[31] This language was not meant to mandate a limited duration alimony award in short-term marriages. It was only meant to suggest that limited duration alimony was appropriate in short-term marriages where permanent (or another type) of alimony was not appropriate. The trial court ultimately has discretion to make the award of alimony it deems reasonable under all of the circumstances of the case. Indeed, nothing in the statutory framework of alimony "shall be construed to limit the court's authority to award permanent alimony, limited duration alimony, rehabilitative alimony or reimbursement alimony, separately or in combination, as warranted by the circumstances of the parties and the nature of the case."[32]

Thus, when evaluating the type of alimony award to which a party is entitled (if any) after a short-term marriage, the court must examine: 1) the purpose of the different types of alimony, and 2) the statutory factors set forth in N.J.S.A. 2A:34-23(c). It is only after these concepts are examined, along with the specific facts of the case, that a fair and equitable alimony award can be determined (if such an award is appropriate).

Equitable Distribution in Short-Term Marriages

In short-term marriages, determining a truly 'equitable' distribution of assets and liabilities can prove extremely difficult. The court must first determine whether the asset or liability was "legally and beneficially acquired" by the parties during the marriage.[33] Second, the court must determine a value for the asset or liability.[34] Third, and finally, the court "'must decide how such allocation can most equitably be made.'"[35] As a part of the third step, the court must apply the statutory factors set forth in N.J.S.A. 2A:34-23.1.[36]

In a short-term marriage, determining how the asset should be 'fairly' allocated among the parties brings with it a particular challenge. While there is no stated presumption, experience indicates that it is fairly common for assets and liabilities to be divided equally between the parties in the context of a *long-term* marriage. Courts (and the parties) generally view the assets of long-term marriage to be fruits of a true marital partnership, thereby warranting their equal division.

In a short-term marriage, however, one party (or both) may feel a true partnership never developed. They may also argue the marital assets and liabilities are directly derived from their pre-marital assets or efforts. In *Anunobi v. Anunobi*, the parties were married for 18 months before separating.[37] After the separation, but prior to the filing of a complaint for divorce, the wife purchased a residence. The husband argued that he was entitled to an equitable distribution of that residence, as it was "legally and beneficially" acquired during the marriage.[38]

While conceding the home was "subject to equitable distribution," the Appellate Division held the trial court "correctly determined that defendant was not entitled to equitable distribution of any equity that may have existed" in the residence.[39] The Appellate Division reasoned that: 1) the wife purchased the residence solely in her name; 2) the wife purchased the residence by obtaining 100 percent financing; and 3) the husband failed to contribute to the residence.[40]

The *Anunobi* court focused on the parties' relative contributions to the asset in question. N.J.S.A. 2A:34-23.1(i) states that in making an award of equitable distribution, the court must consider "the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker." However, in reaching its determination, the *Anunobi* court did not discuss any other equitable distribution statutory factor.[41] Thus, despite the requirement that the court consider all of the statutory factors in N.J.S.A. 2A:34-23.1 with no one factor being "superior" to the others,[42] in short-term marriages N.J.S.A. 2A:34-23.1(i) may be the starting point for an analysis that an asset should be disproportionately distributed in the context of equitable distribution.

Pascarella v. Pascarella further supports the notion of an unequal equitable distribution in a short-term marriage.[43] In *Pascarella*, the parties were married for slightly more than eight years. There were no children born of the marriage; however, children from the parties' previous marriages lived with them. After a plenary hearing, the trial court awarded the wife 40 percent of the marital estate. The husband appealed. The Appellate Division held that she was not entitled to that high of a percentage.[44]

In reaching their decision, the Appellate Division stated the trial court gave too much weight to the facts that: "1) the wife had a minimal education, 2) was then-presently incapable of being employed, and 3) was suffering from a mental illness."[45] The Appellate Division held the trial court "did not properly weigh the criteria" as set forth in the statute in reaching its decision regarding how to "most fairly distribute the marital property."[46] The Appellate Division stated the trial judge should have considered that: "1) this was the second marriage for both parties, 2) no children were born during the marriage, 3) the marriage lasted only eight years, and 4) plaintiff [wife] did not bring any money or property into the marriage. When these factors are properly weighed and evaluated together with all of the other pertinent factors...it is evident that the award of 40% of the total marital assets was excessive."[47]

Anunobi and *Pascarella* can be contrasted with the previously discussed *DeSaro* decision. In *DeSaro*, the husband objected to an equal division of assets in the parties' short-term marriage, as he claimed that the assets were "derived solely" from his efforts.[48] The trial court rejected that claim, with the Appellate Division affirming, stating that the husband's claim was without merit to warrant an extended discussion.[49]

Despite that statement, the Appellate Division did provide a brief analysis to explain their reasoning. While they acknowledged, "a substantial portion of the total economic value of the assets was derived from plaintiff's [husband's] pre-marital estate," they stated the husband's overall conduct warranted the distribution.[50] They stated the husband had gifted some of the assets to the wife during the marriage. Moreover, the parties enjoyed a luxurious standard of living.[51] Thus, the *DeSaro* court actually *minimized* N.J.S.A. 2A:34-23(i), and held that a 50-50 sharing of assets was fair despite the short-term nature of the marriage and the parties' relative contributions to the assets and liabilities.

Conclusion

In conclusion, just as it is charged with making an alimony award that is "fit, reasonable, and just," the family part is required to ensure that an award of equitable distribution is truly fair under all of the factual circumstances. These determinations are often complicated in short-term marriages. Certain factors in each statute may prove critical, but the case law discussed above indicates cases will be decided on their particular facts. As such, practitioners should delve into the facts of their case, as well as the applicable statute, to zealously advocate for the needs of their client. ■

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8. *Christopher v. Christopher*, 2009 WL 1918080, (slip op at 6).

9. *Schwartz v. Schwartz*, 2005 WL 2861023 (App. Div. 2005) (slip op at 5).
10. *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div. 1996).
11. *Hughes*, 311 N.J. Super. at 32 (*citing Skribner v. Skribner*, 153 N.J. Super. 374 (Ch. Div. 1977). With due deference to the Appellate Division, their comparison was not exactly an apt one.
12. *IbId.* (*citing D'Arc v. D'Arc*, 164 N.J. Super. 226 (Ch. Div. 1978), *certif. denied,* 85 N.J. 487 (1980), *cert. denied*, 451 U.S. 971 (1981)).
13. *DuBois v. Brodeur*, No. A-1665-05T1 (App. Div. July 13, 2007), 2007 WL 2012387.
14. *Id.* at 25.
15. *Id.* at 46.
16. *See Gordon v. Rozenwald*, 380 N.J. Super. 55, 75 n. 4 (App. Div. 2005).
17. *See*, for example, Massachusetts' alimony reform statute (M.G.L.A. 208 § 53, 54), Maine's statute, which creates a presumption that for a marriage of less than 10 years, a spouse is limited to rehabilitative alimony (19-A M.R.S.A. §951-A(2)), and Florida's statute, which creates a rebuttable presumption that "a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater." F.S.A. §61.08(4). The statute further indicates that there are alimony consequences once the "type" of marriage (short-, moderate-, or long-term) is determined.
18. *DeSaro v. DeSaro*, No. A-1649-04T5 (App. Div. March 23, 2006) (slip op.), 2005 WL 3879582.
19. *Id.* at 2-4.
20. *Id.* at 5.
21. *Id.* at 7.
22. *Id.* at 7-8.
23. *Id.* at 9 (*quoting Cox v. Cox*, 335 N.J. Super. 465, 483 (App. Div. 2000)).
24. *IbId.*
25. *Id.* at 11.
26. *Id.* at 12-13.
27. *Ferrier v. Anastos-Ferrier*, 2005 WL 3617896 (App. Div 2006).
28. *Id.* at p. 12.
29. *IbId.*
30. This argument is akin to the equitable estoppel argument in *Miller v. Miller*, 97 N.J. 154 (1984), as well as various equitable arguments pursued in the Chancery Division for equitable relief.
31. *Cox*, 335 N.J. Super. at 476.
32. N.J.S.A. 2A:34-23(f).
33. *See* N.J.S.A. 2A:34-23(h). See also *Kikkert v. Kikkert*, 177 N.J. Super. 471, 474-75 (App. Div. 1981), *aff'd o.b.,* 88 N.J. 4 (1981).
34. *Sculler v. Sculler*, 348 N.J. Super. 374, 380 (Ch. Div. 2001).
35. *IbId.* (*quoting Rothman v. Rothman*, 65 N.J. 219 (1974)).
36. *IbId.*
37. *Anunobi v. Anunobi*, No. A-5700-06T2 (July 10, 2008) (slip op. at 1), 2008 WL 2677993.
38. *Id.* at 14-15.
39. *Id.* at 15.
40. *IbId.* The Appellate Division also noted that there was a question of whether there was any equity in the property.
41. Moreover, there was no reference to the specific factors examined by the trial court.
42. *See Sculler*, 348 N.J. Super. at 374.
43. *Pascarella v. Pascarella*, 165 N.J. Super. 558 (App. Div. 1979).
44. *Id.* at 561-62.
45. *Id.* at 562. Notably, all of these factors seem highly relevant to any such analysis of equitable distribution.
46. *IbId.*
47. *IbId.*
48. *DeSaro*, No. A-1649-04T5 (App. Div. March 23, 2006) (slip op. at 6).
49. *Id.* at 13.
50. *Id.* at 14-15.
51. *Id.* at 15.

Chart 1

As an illustration of the similarities, the following chart is helpful. This chart correlates the factors set forth in N.J.S.A. 2A:34-23(b) and N.J.S.A. 2A:34-23.1.

Alimony Statutory Factor	Correlating Equitable Distribution Statutory Factor(s)
(b)(1) the actual need and ability of the parties to pay;	f. The economic circumstances of each party at the time the division of property becomes effective; k. The present value of the property; m. The debts and liabilities of the parties; n. The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;
(b)(2) The duration of the marriage or civil union;	a. The duration of the marriage or civil union;
(b)(3) The age, physical and emotional health of the parties;	b. The age and physical and emotional health of the parties;
(b)(4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living;	d. The standard of living established during the marriage or civil union;
(b)(5) The earning capacities, educational levels, vocational skills, and employability of the parties;	g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;
(b)(6) The length of absence from the job market of the party seeking maintenance;	g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;
(b)(7) The parental responsibilities for the children;	l. The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

(b)(8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;	g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;
(b)(9) The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;	h. The contribution by each party to the education, training or earning power of the other; i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker; o. The extent to which a party deferred achieving their career goals; and
(b)(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;	
(b)(11) The income available to either party through investment of any assets held by that party;	c. The income or property brought to the marriage or civil union by each party;
(b)(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment; and	j. The tax consequences of the proposed distribution to each party;
(b)(13) Any other factors which the court may deem relevant.	p. Any other factors which the court may deem relevant.

Revisiting the Alimony Statute: The Forgotten Factors

by Amy Zylman Shimalla

N.J.S.A. 2A:34-23 enumerates the factors to be considered in making determinations of alimony. The factors are as follows:

1) The actual need and ability of the parties to pay;
2) The duration of the marriage or civil union;
3) The age, physical and emotional health of the parties;
4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living;
5) The earning capacities, educational levels, vocational skills, and employability of the parties;
6) The length of absence from the job market of the party seeking maintenance;
7) The parental responsibilities for the children;
8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
9) The history of the financial or non-financial contributions to the marriage or civil union by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
10) The equitable distribution of property ordered, and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11) The income available to either party through investment of any assets held by that party;
12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment; and
13) Any other factors the court may deem relevant.

In reviewing the statute, there are three factors that tend to garner the most attention from family law practitioners. They are the first, second, and fourth factors: the actual need and ability of the parties to pay, the duration of the marriage or civil union, and the marital lifestyle. The Court has emphasized the focus on these factors in cases such as *Lepis v. Lepis*.[1] In this seminal case, the Court stated that "when support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard."[2]

Accordingly, when approaching the issue of alimony, most practitioners will establish the length of the marriage, and then turn to an analysis of the parties' budget and incomes to determine the payee's need, the payor's income ability to pay, and the marital lifestyle of the parties. While all of this information is certainly valuable in evaluating a claim for alimony, the emphasis on the factors has had the effect of overshadowing the other factors in N.J.S.A. 2A:34-23. Overlooking the other factors compromises the practitioner's ability to develop a holistic picture of a case, and to accurately assess an appropriate outcome for the matter. The other factors are an essential part of any assessment of alimony and bear careful consideration.

The Third Factor

The Age, Physical and Emotional Health of the Parties

Age is an important factor in determining the type and duration of alimony. It is a rare circumstance in which a relatively short marriage with a young payee is going to result in permanent alimony. The court notes this in *Heinl v. Heinl*.[3] In *Heinl*, the parties were married for a period of seven years and eight months, and the plaintiff was 34 years of age at the time of the divorce.[4] In criticizing the lower court, the Appellate Division states:

> The [lower] court failed to fully articulate why a relatively short marital life required an award of permanent alimony rather than an award of rehabilitative alimony. *This is particularly important in cases in which the alimony recipient is of a relatively young age. A younger divorcee has a better opportunity to obtain employment than does an older individual who had been married and out of the workforce for many years*." [emphasis added].[5]

Therefore, where the parties are young, permanent alimony will rarely be a suitable outcome, even if the marriage was of a longer length. This can be further demonstrated by the example of parties who are married at 22 years of age for a period of 15 years. In this scenario, using a rule of thumb that a 15-year marriage should result in a permanent alimony obligation, the result would be that the payor would need to pay alimony for 30 years or more, over twice the length of the marriage. This is clearly an unacceptable result.

Likewise, the age of the parties is important for purposes of considering when IRAs, retirement benefits, Social Security, or Medicare will be available to them. The availability of retirement assets impacts the payor's ability to pay, and the needs of the payor and payee. When considering the interplay between age and these assets and entitlements, it is also important to remember that N.J.S.A. 2A:34-23 states: "When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony."[6] Therefore, if parties are near retirement age, it is especially important to consider how a party's retirement assets are being handled in the divorce, and what impact this will have on calculations of alimony.

The physical and emotional health of the parties is another essential inquiry.

In the event the payee is receiving disability benefits, one must be cognizant of the impact of alimony on such benefits. It may be prudent to consider the possibility of a special needs trust under these circumstances. In *J.P. v. Division of Medical Assistance and Health Services*, the court held that alimony did not constitute income received by a Medicaid recipient, where the alimony was paid to a special needs trust created under 42 U.S.C.S. § 1396p(d)(4)(A), pursuant to a family part order as part of divorce proceedings.[7] In this case, the New Jersey Medicaid program could not reduce its contribution to the recipient's nursing home costs by the amount of alimony her ex-husband paid to the special needs trust.[8] Therefore, where a party is receiving alimony and disability benefits, the affect each will have on the other is an important part of the practitioner's evaluation.

The Fourth Factor

The Standard of Living Established in the Marriage or Civil Union and the Likelihood that Each Party Can Maintain a Reasonably Comparable Standard of Living

As noted above, the standard of living is frequently addressed in analyzing alimony. The case of *Crews v. Crews*[9] truly brought the issue of marital lifestyle to the forefront of all alimony discussions. In *Crews*, the Court found that in setting an alimony award, a trial court must make a finding regarding the standard of living established in the marriage, and the court should state whether the support authorized will enable each party to live a lifestyle reasonably comparable to the marital standard of living.[10] Therefore, while this factor is not a 'forgotten factor,' there are several issues that may be overlooked.

First, there is frequently an overemphasis on the payee's entitlement to the marital lifestyle, to the exclusion of the payor. It bears remembering that both parties are entitled to the marital lifestyle, not just the payee. The old adage "he must keep her in the lifestyle to which she has become accustomed" does not apply unilaterally. Both parties are entitled to enjoy the marital lifestyle, if possible. If such a lifestyle is not possible, then both parties must share the deficit by adjusting their lifestyles.

Second, it is important not to limit review of the marital lifestyle to the last year of the marriage. It is critical that practitioners carefully review both parties' budgets, and not automatically add in one-time costs, such as college tuition, major renovations to a home, or a milestone celebration such as a bar or bat mitzvah or wedding celebration.

Third, there is an argument to be made that the marital lifestyle was the family lifestyle. In many intact families, people downsize when their children leave home. They may move to over-55 communities or smaller homes because they no longer need the home they raised their children in. Their transportation costs may go down. Their personal budgets may no longer include their children's expenses. The lifestyle going forward is not equal to that during the time the family was intact.

Therefore, there is an argument to be made that alimony should be set at a level that is cognizant of the family lifestyle, which likely would have decreased over time, if the family remained intact.

Finally, in considering marital lifestyle, it is important to anticipate and account for the impact the divorce will have on each parties' lifestyle going forward. Following the divorce, if the payee-spouse did not work outside of the home, the payor-spouse must now manage or pay someone to handle the former contributions of the payee-spouse, in addition to working to earn monies necessary to pay support. The supporting-spouse may now have to cook, clean, shop, run errands, and do all of those things that the supported-spouse may have been responsible for during the marriage.

In any case, the fact is that few parties can afford to live the marital lifestyle following the divorce. This is especially true when savings is a component of lifestyle. The parties likely either spent or saved their available income. It is important to recognize the fact that the marital lifestyle is one of many factors to consider. Although it is the standard to strive for, it does not mean the parties' incomes should be equalized to achieve it. The family court is one of equity, and there must be an element of fairness in how alimony is awarded.

The Fifth Factor

The Earning Capacities, Educational Levels, Vocational Skills, and Employability of the Parties

This is a factor that has become particularly relevant with the economic downturn. It is also a factor that can be difficult to quantify, as many people have had to replace lost jobs with positions providing less pay or fewer or more costly benefits. In negotiating an agreement, or participating in an alternative dispute resolution process, handling issues of alimony and the economic downturn's effect on people's jobs requires creativity on the part of practitioners. One such way is to utilize formulas to address any future increases in income to the level previously earned (*i.e.*, the parties' earning capabilities). However, it is important in utilizing formulas to acknowledge the unfortunate reality that such an increase may never occur. A person's earning capability may have been reduced for the foreseeable future through no fault of their own.

When unemployment or underemployment is clearly voluntary, a different approach is necessitated. The court addressed this issue in *Storey v. Storey*.[11] In *Storey*, the husband lost his job earning $111,000 as a computer hardware specialist.[12] The court found he did not make a good faith effort to obtain a position with a similar salary in his industry.[13] Rather, he moved to Florida, and trained and began working as a massage therapist, earning $300 per week.[14] He then sought to terminate his $480 per week alimony obligation to his former wife.[15] Meanwhile, Mrs. Storey was working a low-paying job, and had filed for bankruptcy.[16] The court affirmed the trial court's imputation of $60,000 in income, based on prevailing wages for computer service technicians, to Mr. Storey.[17] The court imputed this income to him, rather than use his actual massage therapist income, and the court reduced alimony to $280 per week.[18] The court held that in order to obtain a reduction in alimony based on current earnings, an obligor who had selected a new, less lucrative career had to establish that the benefits he or she derived from the career change substantially outweighed the disadvantages to the supported-spouse, and they did not in this case.[19]

In determining the earning capability of a party, whether they are voluntarily or involuntarily underemployed or unemployed, there are many resources that can assist the practitioner. The use of the New Jersey occupational wage compendium is a good starting point. Courts will often refer to the wage compendium for purposes of imputing income, particularly in calculations of child support.[20] Additionally, there are resources available online. Publicly traded companies, municipalities, and state and federal agencies often list salaries online, and online job postings can provide context for how individuals in a particular field are being compensated in a given area. In particularly complex cases, a vocational expert may be necessary.

The Sixth Factor

The Length of Absence from the Job Market of the Party Seeking Maintenance

Frequently, one spouse has given up his or her career, or agreed that his or her career will take a backseat to that of the spouse who becomes the major earner. This has a significant impact on the ability of the at-home spouse to re-enter the workforce, and to come up to speed. Depending on the other circumstances in the case, a party who has left the workforce for a period of time to raise children may be a good candidate for rehabilitative alimony. In *Cerminara v. Cerminara*, the court stated that "rehabilitative alimony may be employed where one spouse has been out of the

workplace, usually raising a family and maintaining the marital home, thereby allowing the other spouse to pursue career goals. Upon separation, the unemployed spouse needs time and assistance to recover from their absence from the workplace."[21] Following this principle from *Cerminara*, the court in *Ruocchio v. Ruocchio* found that rehabilitative alimony was appropriate where the parties were married for three years, and the wife had been absent from the job market for three years raising the parties' child.[22]

The Seventh Factor

The Parental Responsibilities for the Children

In most households both parents work, and both are involved with the children and their activities. The argument that a parent cannot work because he or she has children at home and they are the parent's first priority, may fall flat before a trier of fact who lives in, or was raised in, a household with two working parents. However, a parent with a child with special needs may be in a better position to make a convincing argument, if he or she details the extra attention required by the child to get out of the house in the morning, to get to appointments after school, to complete homework and other tasks, and why the other parent cannot handle these details.

In *Crews*, on a motion to modify alimony, the Supreme Court directed the trial court to consider the wife's extraordinary childcare responsibilities in light of the parties' special needs child.[23] In an unreported case, *Grinkevich v. Grinkevich*, the husband sought to modify his alimony obligations based on the wife's alleged cohabitation with an unrelated male.[24] In arguing against his request, the wife detailed their child's severe medical condition and argued that the parties' property settlement agreement accounted for higher alimony (and child support) because of the child's condition and the care he required on a daily basis from the wife.[25] She argued that any reduction in the amount of her alimony would be unfair because it had been intended to cover a portion of the husband's child support obligation as well.[26]

The husband did not dispute that the parties had negotiated for higher alimony in the property settlement agreement, and the Appellate Division affirmed the trial court's denial of alimony modification on other grounds.[27] While the Court in *Grinkevich* did not have to decide the merits of the wife's parental responsibilities for the child and any effect this would have on the alimony she would receive, it is clear that where there are exceptional circumstances involved in one parent's childcare responsibilities, a persuasive argument for higher alimony can be made in negotiating an agreement.

The Eighth Factor

The Time and Expense Necessary to Acquire Sufficient Education or Training to Enable the Party Seeking Maintenance to Find Appropriate Employment, the Availability of the Training and Employment, and the Opportunity for Future Acquisitions of Capital Assets and Income

The first part of this factor is particularly relevant to rehabilitative alimony. The purpose of rehabilitative alimony is to "enhance and improve the earning capacity of the economically dependent spouse."[28] In awarding rehabilitative alimony, the statute provides that there must be "a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award."[29]

Therefore, the party seeking rehabilitative alimony must detail their plan to return to the workforce. They must detail training or education they wish to pursue, the time involved, and the cost. They must lay out the type of job they have set as their goal, and the likelihood of achieving that goal. They must show proofs of the income they hope to generate. The more detail, the more likely they will successfully argue this point.

The case of *Wass v. Wass*[30] demonstrates the scrutiny courts will utilize to review a party's plan. In this case, the wife sought an award of rehabilitative alimony of $250 per week for a period of seven years, to obtain her GED and an office certification.[31] The wife detailed the college she sought to attend, identified the program she wished to enroll in, the cost per credit for each course, and the number of credits per semester she planned to carry.[32] The court approved of her plan, but found that there was no reason she could not complete the program in four years, and ordered rehabilitative alimony accordingly.[33]

The second part of this factor, regarding availability of employment, is frequently a focus in light of the number of people losing their jobs and seeking a review of their support obligation as a result. They must show

the effort to locate like employment at a like income level. Once again, the more detailed and reliable information one provides, the more likely he or she will be successful in the application.

The last portion of the factor, the opportunity for future acquisitions of capital assets and income, is one not often discussed, but it provides the basis for a strong argument in a case where the payee-spouse is substantially younger than the payor-spouse, and has more years to accrue retirement assets and other resources than the payor. In such a case, an argument could be made that the tables should be turned on the payee, as the payor has fewer years to save for retirement. This factor can also be used in a situation where one spouse is buying out the other's business interest. One could argue that as the spouse gets paid out, and accrues savings that can generate investment income, this should impact alimony.

The Ninth Factor

The History of the Financial or Non-Financial Contributions to the Marriage or Civil Union by Each Party Including Contributions to the Care and Education of the Children and Interruption of Personal Careers or Educational Opportunities

Under this factor, are arguments similar to those under factor six, but this factor does not require that the parties have children. Here one can argue that the payee moved around the country with the payor, following the payor's career path. Detailing jobs left behind and what they could have evolved into can be useful in showing the sacrifices made on the part of one of the parties.

In *Dudas v. Dudas*, the Court recognized the wife had sacrificed her own career goals to support her husband's career, and the husband's income in the auto parts industry steadily rose during the entire course of the parties' marriage.[34] The court found the husband was better able to concentrate on developing his skills and talents and expertise in auto parts during the marriage because he had a marital partner who was pulling her own weight in the partnership by primarily running the household.[35] The fruits of the parties' joint efforts during their partnership created a momentum in the marriage that ripened into a proven ability by the husband to earn substantially higher income than he ever earned during the marriage, and the court found this needed to be considered for purposes of awarding alimony to the wife.[36]

The 10th Factor

The Equitable Distribution of Property Ordered and Any Payouts on Equitable Distribution, Directly or Indirectly, Out of Current Income, to the Extent This Consideration is Reasonable, Just and Fair

The Court in *Lepis* makes the point that equitable distribution of marital property is "intimately related to support," and the "power to distribute property equitably should be exercised to relieve the strain of total reliance on support payments for financial security."[37] It is intuitive that the payout on equitable distribution must be taken into consideration in determining alimony. In fact, the court in *Clark v. Pomponio*[38] emphasizes that a final decision on alimony cannot be made independently of the equitable distribution award.

It is not difficult to understand the connection between alimony and equitable distribution when one considers various factual situations. One example is where one spouse buys out the other's interest in a business. This aspect of equitable distribution will likely have an impact on the business owner's cash flow and ability to pay alimony. Another situation is where there are few assets to distribute. In this situation, alimony may be even more significant in the case, as the parties only have income on which to support the marital lifestyle.

It is important to note that in a situation where a party has filed for bankruptcy, as the husband did in *Clark*, the court makes clear that a trial court is unable to make a final decision on alimony claims, and hence final resolution of those claims must also be stayed while there is a bankruptcy stay in effect.[39]

The 11th Factor

The Income Available to Either Party Through Investment of Any Assets Held by That Party

This is a factor that must be given consideration given the findings in *Miller*,[40] *Overbay*,[41] *Aronson*,[42] and *Stifler*.[43] In *Miller*, the husband was fired from his job and sought modification of his alimony payments.[44] The issue before the Supreme Court was whether income should be imputed from his underperforming investments for determining his ability to pay alimony.[45] The Court did not impute income from employment to the husband because he was involuntarily unemployed, but chose to impute income earned from his long-term corporate bonds because "justice cannot 'sit...by and be flaunted in case after case before a remedy is available.'"[46] The Court explained that the husband "could invest his principal

differently in higher yield investment options available to him, much in the same way that an underemployed spouse could obtain a higher paying job available to him to make a more productive use of his human capital."[47] The Court concluded that it was "appropriate to impute a reasonable income from [the husband's] investments comparable to a prudent use of his investments, like his human capital."[48]

In *Overbay*, the trial court cited to *Miller v. Miller*, and imputed an annual income of $80,000 to the wife based upon a 7.4 percent rate of return on her inheritance assets.[49] The Appellate Division drew factual distinctions between the husband in *Miller* and the wife in *Overbay*, and found that the rigid application of the formula in *Miller* was not appropriate because the wife's circumstances differed from those in *Miller*.[50] The case was remanded to the trial court with instruction to consider whether, pursuant to *Miller*, it was appropriate to impute additional earnings from the wife's inheritance "comparable to a prudent use of [her] investments."[51]

In *Aronson*, the Appellate Division held that income generated by the wife's inherited assets should have been considered in determining a change of circumstance, even though the assets themselves were exempt from distribution pursuant to N.J.S.A. 2A:34-23.[52] In *Stiffler*, the court carried the argument a step further, and found that when the husband used his inheritance to purchase a home, he could be imputed with the interest income he could have earned had he invested all or part of his inheritance differently.[53]

A corollary issue that may come up under this factor is the situation where a spouse has income from a third-party discretionary trust. In a recent decision by the Supreme Court, *Tannen v. Tannen*, the Court held that income generated from a spouse's interest in a discretionary support trust cannot be taken into consideration in determining alimony.[54]

The 12th Factor

The Tax Treatment and Consequences to Both Parties of Any Alimony Award, Including the Designation of All or a Portion of the Payment as a Non-Taxable Payment

Practitioners normally take the tax consequences of alimony into consideration, so a proper determination can be made of the net of alimony that will be available to meet the payee's needs. It is also important to consider the benefit to the payor of the deduction. Much more rare is the case where all, or a portion, of the alimony award is non-taxable. There may be cases where this would be beneficial, depending on the taxability of the payor's income. There may also be specific payments made by the payor for the payee's benefit, such as a car payment, or COBRA benefits. Where specific payments are made for the payee's benefits, the practitioner must be sure to specify if they are to be taxable to the payee as alimony and deductible by the payor, or not. If not specified, they are arguably taxable.

The 13th Factor

Any Other Factors Which the Court May Deem Relevant

This wonderful catchall clause allows practitioners to argue almost anything the court may deem relevant to a determination of alimony. If there is an argument that does not fit under any other factor, factor 13 allows the court to consider it. This provision provides great latitude to the judge, and allows the family court to exercise its equitable powers to fairly and appropriately determine alimony. ■

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Endnotes

1. *Lepis v. Lepis*, 83 N.J. 139, 152 (1980).
2. *Id.* at 152.
3. *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div. 1996).
4. *Id.* at 346.
5. *Id.* (*citing Capadano v. Capadano*, 58 N.J. 113, 119-20 (1971); *Skribner v. Skribner*, 153 N.J. Super. 374, 376 (Ch. Div. 1977). *Cf. Lynn v. Lynn*, 91 N.J. 510, 517-18 (1982) (holding that length of marriage and the proper amount or duration of alimony do not correlate in any mathematical formula)).
6. N.J.S.A. 2A:34-23.

7. *J.P. v. Div. of Med. Assistance and Health Serv's*, 392 N.J. Super. 295 (App. Div. 2007).
8. *Id.*
9. *Crews v. Crews*, 164 N.J. 11 (2000).
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13. *Id.* at 476.
14. *Id.*
15. *Id.* at 468.
16. Id at 477.
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21. *Cerminara v. Cerminara*, 286 N.J. Super. 448 (App. Div. 1996).
22. *Ruocchio v. Ruocchio*, 2008 N.J. Super. Unpub. LEXIS 1167 (App. Div. 2008).
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33. *Id.* at 637.
34. *Dudas v. Dudas*, 423 N.J. Super. 69 (Ch. Div. 2011).
35. *Id.* at 80.
36. *Id.*
37. *Lepis*, 83 N.J. at 154-55.
38. *Clark v. Pomponio*, 397 N.J. Super. 630 (App. Div. 2008).
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40. *Miller v. Miller*, 160 N.J. 408 (1999).
41. *Overbay v. Overbay*, 376 N.J. Super. 99 (App. Div. 2005).
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43. *Stiffler v. Stiffler*, 304 N.J. Super. 96 (Ch. Div. 1997).
44. *Miller*, 160 N.J. at 415.
45. *Id.* at 419.
46. *Id.* at 424.
47. *Id.* at 423.
48. *Id.* at 424.
49. *Overbay*, 376 N.J. Super. at 102.
50. *Id.* at 108.
51. *Id.* at 112 (*citing Miller*, 160 N.J. 408).
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Alimony and Taxes

by Amy Wechsler and Jeffrey Urbach

Most experienced family law practitioners know the basic rules governing alimony, but lawyers from other practice areas are increasingly handling divorce cases and may not have that information. For these practitioners, and for lawyers who are relatively new to the practice of law, this article sets out the basic rules regarding alimony, along with some practice tips. For more experienced lawyers, the article goes on to address tax issues related to alimony that may not be as well-known or obvious.

Alimony Defined

Alimony, also called spousal support or separate maintenance, describes payments from one spouse or former spouse to another, with an expectation that the payor will be able to deduct the payments from his or her taxable income, and the payee will be required to claim the payment as taxable income. There is no requirement that alimony be tax-affected in this way. Spouses can agree to support payments that will not carry any tax consequences. This article, however, will focus on alimony as it relates to taxes, starting with the basics.

In order to qualify as alimony that will be eligible for tax treatment under I.R.C. Section 71, the payment in question must meet all of the following requirements:

- it must be a "cash" payment
- it must be payable from one spouse (or former spouse) to the other, pursuant to a "divorce or separation instrument"
- the instrument or separation instrument does not specify that the payment will not be includable in the gross income of the payee, or that it will not be deductible to the payer
- the parties are not members of the same household when the payments are made
- the spouses do not file a joint return for the year in which alimony is claimed
- payments must end on the death of the payee

(***Practice Consideration:*** *If even just one of the otherwise qualifying payments is to be made after the payee's death, all the payments will be disqualified.)*

A cash payment is one not in the form of goods or services, and may be in the form of a check or money order, payable on demand. The payment may be made either directly to the party or to a third party 'on behalf of' the payee. A payment to a third party, such as a mortgage payment, car loan payment, utility bill, tuition, etc., will be treated as a cash payment of alimony, provided it meets the following requirements:

- The payment is in lieu of a direct alimony payment to the spouse;
- It is specified in a written request from the recipient spouse that both spouses intend the payment to be treated as alimony; and
- The payor must receive the recipient's written request to make the specified payment before filing the tax return for the year when the payment was made.

(***Practice Consideration:*** *Whenever an agreement calls for alimony, and the intent is for the payor to deduct it and the payee to claim it, always include a provision specifying that the payments end on the death of the payee.)*

Unallocated Support

Orders and agreements, particularly on a *pendente lite* basis, frequently provide for support to cover the needs of a spouse and children, without allocating the payments between alimony and either support for the children or other purposes. In some instances, the support may be for the benefit of the paying spouse, such as when the payee is required to pay car insurance premiums for a policy covering all the cars in the family. If support is not clearly allocated, the recipient spouse runs the risk of having that support included in her or his taxable income.

The leading case on this issue is *Kean v. Commissioner.*[1] Plaintiff Patricia Kean filed for divorce in 1991. Her husband was ordered to pay *pendente lite* support to cover shelter, transportation and personal expenses for

her and the parties' three children, and he was required to deposit the support payments to a joint account over which the wife was granted exclusive use. The *pendente lite* order did not allocate the support between the wife and the children.

From 1993 until 1996, the wife did not withdraw any funds from the account, and she did not claim any of the payments as gross income for tax years 1992 through 1996. Her husband, however, claimed the payments he made during that period as deductions on his returns, and, as a result, the IRS assessed the wife $75,000 in tax deficiencies.

The wife argued that, because the account was in both names, and because she had not withdrawn any funds from the account between 1993 and 1996, she had not, in fact, 'received' the funds. She further argued that, under prior tax court precedent, *Gonzales v. Commissioner*,[2] the payments could not be considered taxable alimony. In *Gonzales*, the tax court held that *pendente lite* support payments were not alimony because, under New Jersey law, payments required under a family support order could continue even after the death of the payee-spouse prior to entry of a final divorce decree.

The tax court disagreed. Although Mrs. Kean had not used the funds, she had been awarded exclusive use of them, and thus, the court found she had received them. Distinguishing the case from *Gonzales*, the court ruled that, had Mrs. Kean died before entry of final judgment, there was no third party to whom Mr. Kean would have had a continuing obligation to make payments. He had joint custody, so in the event of the wife's death, the children would have automatically been transferred to his custody and all payments would cease.

On appeal, the Third Circuit upheld the tax court ruling. The wife had also argued below that some of the support was for the children, so the entire amount should not have been treated as alimony. The court side-stepped that question, stating that other tax court matters supporting that position had "relied too heavily on the intricacies of family law," and had ignored the overall purpose of I.R.C. § 71(c). The court ruled that the payments in question were made "to or on behalf of the spouse,"[3] and that, had Mrs. Kean died while the case was pending, Mr. Kean would have to provide for his children, but not to make any further payments to the wife or her estate. Relying on New Jersey case law, the court noted that divorce cases cease to exist on the death of one of the parties. Because this was a *pendente lite* order, the death of the wife would have resulted in termination of the payments.

(***Practice Considerations:*** *1) Make sure* pendente lite *orders indicate whether support is allocated, and specify what the allocation is between spousal support and other support. Prepare figures available to back up those allocations. Patricia Kean argued after the fact that some of the support was to cover expenses for the children, but by then it was too late. If a judge is inclined to rule that support is unallocated, ask for a determination as to whether it will be deductible for the payor and taxable to the recipient. Request specific allocations and have figures available to back up those allocations. Also note whether, on a* pendente lite *basis, some of the expenses a supported spouse pays are actually for the benefit of the paying spouse, such as in the case of a mortgage payment or a car insurance premium that covers both parties' vehicles. 2) If the parties own a home, ask to allocate the deductions for the mortgage interest and property taxes. If the supported spouse is paying taxes on the amount received, and uses the support to pay the mortgage and property taxes, she should be permitted to claim all of the deductions resulting from those payments if the parties are not going to be filing joint returns.)*

Deductible Support While in Same Household

The general rule and conventional wisdom dictate that support is deductible only when the parties are living in separate households. In certain fact-sensitive cases, however, this is not always the case.

Physical separation via separate residences is required for what are known as Type A and B divorces (*i.e.*, as they are defined under the respective I.R.C. subsections of I.R.C. § 71).

Under Treas. Reg § 1.71-1T alimony and separate maintenance payments (temporary), are found the following:

> If the spouses are not legally separated under a decree of divorce or separate maintenance, a payment under a written separation agreement or a decree described in section 71(b)(2)(C) *may qualify as an alimony or separate maintenance payment notwithstanding that the payor and payee are members of the same household at the time the payment is made.* (Emphasis added).

Referencing this regulation, Mark W. Shirley, CPA/ABV/CFF, CVA, CFFA, CFE, of Baton Rouge, La. writes:

> It is interesting to note that the "separate residence" requirement does not apply in the absence of a legal separation or divorce. Payments made under a written separation agreement or support order as described at IRC § 71(b)(2)(C) may qualify as alimony, even though the parties cohabit.[4] This situation could run contrary to state law where such action is deemed a reconciliation and nullifies any previously filed and pending divorce or separation action.[5]

Alternate Minimum Tax

The alternate minimum tax (AMT) is an alternative to the regular income tax, and applies only to federal income taxes. It is a separate calculation of taxes designed to insure that, despite the fact a taxpayor is permitted to take certain deductions, the taxpayor will nonetheless pay a minimum level of federal income taxes.

In this way, the AMT effectively erodes, and even eliminates, the tax savings permitted for numerous deductions. Moreover, certain types of income that is not subject to regular income tax may be added back to income to calculate the AMT. As several examples, the AMT does not permit: standard deductions, personal exemptions, state and local taxes, mortgage interest on home equity loans, accelerated depreciation, passive losses and passive income, tax-exempt income from private activity bonds, and medical expenses.

The AMT originally was designed to affect the wealthiest Americans, many of whom took advantage of numerous deductions. That, however, is no longer the case. The AMT has extended its reach to middle-class taxpayors, many of whom otherwise would claim only modest deductions.

When negotiating alimony, attorneys and financial advisors seek to give clients as accurate a picture as possible of what their net disposable income will be, given various support options. The AMT can significantly increase taxes and render a given support package inadequate to cover a client's anticipated budget. Thus, any client subject to AMT should consult with an accountant to verify the impact of AMT on his or her bottom line. The calculation of the AMT is complicated, and changes with each new tax year, and is beyond the scope of this article. Lawyers need not know how to calculate it, but they should understand that it is likely to affect a client's tax liabilities, and should steer clients to accountants or utilize up-to-date software that takes the AMT into consideration when estimating tax liabilities.

(***Practice Considerations:*** *1) Have an accountant calculate the estimated AMT to give the client a realistic expectation of his or her actual, after-tax disposable income. This is particularly important for clients who have a very tight budget. 2) If only one of the parties will be subject to the AMT, allocate deductions to the other party who can actually derive the benefit of the deduction. Note that the only item allocable is the exemption for children. Everything else that falls under AMT is derived from the separate earnings and deductions of the ex-spouses.)*

Alimony Recapture Rule

I.R.C. § 71(f) was enacted to prevent front-loading of alimony, and provides for recapture of excess payments that were treated as alimony in the first two years after the date of a decree of divorce or separate maintenance, or a separation instrument. A party's alimony payments are subject to recapture if the alimony paid in the third year decreases from the prior year by more than $15,000, or if the alimony paid in the second and third years decreases significantly from the amount of alimony paid in the first year.[6]

The recapture does not occur in the first two years. It is implemented in the third year, after the year in which excess payments were made, and will affect the taxpayor's liabilities in that third year.

There are exceptions to the recapture rule. The rule does not apply to alimony payments that terminate because either party dies, or when the recipient spouse marries before the end of the third year. The rule also does not apply to payments that decrease from year to year because they are a fixed percentage either of self-employment income or of bonuses paid by third-party employers.[7]

(***Practice Consideration:*** *If a payor spouse fails to make payments in the second and third years, payments made in the first year may be subject to recapture if it results in the threshold decrease in payments from one year to the next. Clients who may have inconsistent payment histories should be advised, in writing, of this risk.)*

Deductibility of Attorneys' Fees

Attorneys and experts are often asked about the tax-deductibility of professional fees incurred in the divorce process. Like everything else related to taxes, there is no one simple answer. As lawyers so often say—the answer is based on the particular facts and circumstances of the case. To answer the question, the starting points are I.R.C. §§ 212 and 262:

> Sec. 212.—Expenses for production of income.
>
> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—
>
> (1) for the production or collection of income,
>
> (2) for the management, conservation, or maintenance of property held for the production of income, or
>
> (3) in connection with the determination, collection, or refund of any tax.
>
> Sec. 262.—Personal, living, and family expenses.
>
> (a) General Rule.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

In addition, the deduction for attorneys' fees is indirectly limited by the following provision:

> Sec. 67.—2-Percent floor on miscellaneous itemized deductions.
>
> General Rule.
>
> In the case of an individual, the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of such deductions exceeds 2 percent of adjusted gross income.

As a general rule, attorney fees and financial expert fees are *not* deductible, because they are considered personal in nature.[8] There are, however, exceptions to this rule, based on the "facts and circumstances" of an individual case.[9]

Treas. Reg. §1.212-1(l) states:

> Expenses paid or incurred by an individual in connection with the determination, collection or refund of any tax, whether the taxing authority be Federal, State or municipal, and whether the tax be income, estate, gift, property, or any other tax, are deductible. Thus, expenses paid or incurred by a taxpayor for tax counsel or expenses paid or incurred in connection with the preparation of his tax returns or in connection with any proceedings involved in determining the extent of his tax liability or in contesting his tax liability are deductible.

Guidance is found in Rev. Rul. 72-545, which discusses three types of situations:

> **ONE** concerns a taxpayor who engages the services of a law firm that "limits its practice to matters involving state and federal taxation," from whom the taxpayor client seeks advice concerning "the Federal income tax consequences to him [or her] of a proposed property settlement agreement." This is an obvious example of a fully deductible legal fee.
>
> **TWO** involves a law firm that "also handled certain non-tax aspects of the divorce" being called upon to advise the taxpayor client of "the federal income, gift, and estate tax consequences to him [or her] of establishing a trust to make periodic payment to his [or her] spouse...to support her [or him], with the remainder...to their children at [the spouse's] death." While clearly the nontax matters are not deductible by the payor spouse, the fees for tax advice fit squarely within I.R.C. § 212(3).
>
> [T]he tax matters were referred to and were handled by a department in the firm that specialized in taxation. The firm's statement to the taxpayor allocated a portion of the total fee to tax matters. The allocation was based primarily upon the time required, the difficulty of the tax questions presented, and the amount of taxes involved.
>
> **THREE** presents a sole practitioner representing a taxpayor client in connection with obtaining a divorce. The attorneys' services also

> "included tax counsel concerning the right of the taxpayor to claim the children as dependents for federal income tax purposes in years subsequent to the divorce." This latter situation involved neither a separate tax department, nor a separate firm. The IRS nevertheless would allow the deductibility of fees allocable to those aspects:
>
> The practitioner's statement to the taxpayor allocated the fee between the tax advice and other nontax matters, based primarily on the amount of the attorneys' time attributable to each, the fee customarily charged in the locality for similar services, and the results obtained in the divorce negotiations.[10]

To better understand the logic (and illogic) of the I.R.C. in this matter, let's review a few examples:

- I.R.C. § 212 allows fees connected to securing income, (*i.e.*, taxable alimony (as per I.R.C. § 71)) as deductible to the *payee* only.
- Legal fees related to negotiating or having the court determine 'non-deductible' alimony are not deductible.
- Fees related to the collection of child support, which is not taxable, are not deductible.
- Fees incurred by the payee of taxable retirement benefits under a qualified domestic relations order (QDRO) are deductible.

The reader can see a pattern here. If the legal (or expert) fee relates to taxable income it will generally be deductible. Makes sense, right? If you think so, read on: Legal fees incurred in an unsuccessful attempt to secure alimony or other taxable income should be deductible. However, legal fees paid to *resist* the collection of taxable alimony by the other spouse are *not* deductible,[11] *nor* are fees for a successful attempt to reduce his (or her) alimony obligation.[12]

The moral of this tax story is never assume logic when dealing with tax law. Either research the issue yourself (if you are the attorney) or seek an opinion from a certified public accountant or other competent tax professional.

Although this article is about alimony, it is important to digress for a moment to matters of equitable distribution. In *United States v. Gilmore*,[13] the Court decided the taxpayor was allowed a basis increase for fees related to defending his title in corporate stock. Thus, there may be fact-sensitive matters that *would* allow the deduction of divorce-related fees to a business.

Fees paid *out of* a litigant's business *may* be deductible in certain circumstances. The matter is complex and beyond the scope of this article, however, and further professional advice should be sought if the question arises.

The amount of legal fees that may be deductible requires the attorney to keep accurate time records for allocation purposes. If timekeeping software allows, attorneys can allocate time spent on tax-related issues and itemize these entries on the client's bill.

(***Practice Consideration:*** *If time is allocated in this way, be wary of including language in the property settlement agreement (PSA) stating no tax advice was rendered and the litigant was advised to seek independent tax counsel.)*

Finally, keep things in perspective and make sure the deductions, which may otherwise be allowable, will yield an actual tax savings. Some otherwise deductible legal fees are taken as miscellaneous itemized deductions on the personal income tax return of the claimant. In high-income cases, at the end of the day, the amount of tax-related deductible fees may not exceed the two percent of adjusted gross income threshold. After passing that threshold, there are further tax thresholds, plus the AMT, which may wipe out the deductions and render the entire issue moot.

Using QDROs to Enforce Alimony (and Child Support)

Many lawyers are unaware that, when there are legitimate, supportable concerns that a spouse will not comply with an alimony or child support order, a QDRO can be used to secure the payments. An excellent discussion of creative uses of QDROs can be found in noted tax attorney Melvyn B. Frumkes, Esq.'s book, *Frumkes on Divorce Taxation*.

> QDROs can be used to enforce alimony and child support obligations. The Internal Revenue Code describes a domestic relations order as "any judgment, decree, or order (including approval of a property settlement agreement) which—(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (ii) is made pursuant to a State domestic relations law (including a community property law).[14]

In *Renner v. Blatte*,[15] Justice Martin Schoenfeld stated:

> [W]hile the imposition of a pre-divorce judgment QDRO may trigger negative tax implications, this is no reason to allow a spouse with a pension or profit-sharing plan to escape his or her obligations, or to allow a spouse without such financial security to starve or to be rendered homeless.[16]

The justice entered a QDRO:

> requiring distribution from the husband's profit sharing plan for sums for maintenance and child support in arrears, counsel fees in arrears, counsel fees in the enforcement proceedings and $41,000 for income taxes that the wife will have to pay upon the withdrawal of the funds.[17]

QDROs have been used in other states to enforce post-divorce arrearages. In *Baird v. Baird*,[18] the appeals court stated, "ERISA permits QDROs to be used to enforce an earlier entered support judgment and collect delinquent maintenance and child support payments against a pension."[19]

(***Practice Consideration:*** *Attorneys should at least consider future defaults of alimony and child support and provide language in the marital settlement agreement (MSA) reserving jurisdiction in the event of such an occurrence. The reader is referred to Mr. Frumkes' book for suggested wording.*[20])

Alimony Trusts

Alimony and child support trusts may be useful for wealthy couples for a variety of reasons, both financial and personal. I.R.C. § 682 allows for the transfer of property to a trust for purposes of paying alimony or child support. These trusts can address concerns about the continued high earning capacity of a spouse, potential bankruptcy or malpractice suits against professionals that might erode the earning capacity or assets of the payor. They can provide an emotional buffer between angry spouses, since a third-party trustee will be administering the trust and writing the checks.

The funding spouse may also want to use a trust when the other spouse is a spendthrift, a compulsive gambler, or chemically dependent person. If the recipient spouse posed a risk of squandering the wealth that might otherwise be placed in trust, the funding spouse could be exposed to continuous claims for additional support.[21] During the 2011 NBA labor talks, *Forbes Magazine* contributor Jeff Landers wrote:

> ...the circumstances *are* quite interesting from the perspective of NBA ex-wives. If the season is further abbreviated or cancelled and NBA players can't earn their usual paychecks, are some NBA ex-wives wondering about the future of their alimony payments?[22]

He went on to say "...in certain circumstances, divorcing women should consider the benefits of an alimony and maintenance trust (also known as a Section 682 Trust)."

Alimony trusts require the transfer of assets, often profitable stocks, or real estate, to a grantor trust. The trust agreement calls for the payment of periodic payments from the income of the trust. It is important to note that the ordinary rules of alimony taxation under I.R.C. § 71 *do not* apply. The payor does not receive an alimony deduction. Transfers to the trust and payments from the trust are *not* considered alimony.

What does occur, which can benefit the grantor, is a shifting of the tax burden. Ordinarily, the income of a grantor trust is taxed to the grantor, let's say the husband. The income, which may be in the form of capital gains, interest, dividends, or even tax-exempt interest, is taxed at the husband's rates and passes through to the husband as a conduit. In the case of an alimony trust, I.R.C. § 682 (b) shifts the tax and the income characterization to the recipient, in our example, the wife. Thus, as the beneficiary of an alimony trust, the wife must include in her gross income the full amount of the periodic payments, even to the extent that they are paid out of trust *corpus*.[23]

Taxation of child support trusts is different. The tax shifting (*i.e.*, inclusion of the income in the gross income of the payee beneficiary spouse) does *not* apply to trust income that, pursuant to a divorce instrument, is designated for the support of the minor children of the obligor-spouse. In child support trust situations, the grantor is taxed as the owner of the trust income.[24] The portion of the income that is payable for the support of minor children is includable in the obligor-spouse's income.[25]

By creating an alimony trust, payments that would otherwise not be deductible as child support (and otherwise taxed to the husband) result in a tax treatment similar to alimony. This would be the case when spouses agree to reductions in support that do not fall within certain I.R.C. § 71 safe-harbor periods, such as when a child reaches 18, finishes school, etc. and would thus be re-characterized as child support.

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5. Mark Shirley, *The Taxation of Financial Support Payments*, 15th Judicial District Court, Family Law Section, Hearing Officers.
6. I.R.S. Pub. 504 at 16-17 (2011)(includes a worksheet for computing the amount of recaptured alimony).
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13. 372 U.S. 39.
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15. 650 N.Y.S.2d 943 (1996) (*citing* I.R.S. Priv. Ltr. Rul. 9234014 (May 21, 1992)).
16. *Renner*, 650 N.Y.S.2d at 943.
17. *Id.*
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Rehabilitative Alimony: Time for a Second Look?

by Lisa Parker

More so now than at any time since adoption of equitable distribution in 1971, the concept of alimony is under great scrutiny, if not actual attack. Today, an award of permanent alimony is certainly something short of lifetime alimony. Indeed, there is arguably a nationwide effort to eliminate the obligation to provide permanent alimony. In fact, a joint resolution has been presented to the New Jersey General Assembly calling for creation of a blue-ribbon commission to study alimony reform in the state. A similar commission was established in Massachusetts, where the alimony laws were recently modified to abolish lifetime alimony in almost all cases, and grant those already paying lifetime support the opportunity to change that obligation commencing in 2013.

While it is impossible to know what the future state of our alimony laws will be, if the dramatic changes in other jurisdictions are a sign of things to come in New Jersey, there is a heightened need to consider fashioning alternative alimony agreements that look beyond permanent alimony. Understanding that even existing agreements to provide permanent alimony could be subject to modification if our laws are altered, the prudent practitioner should consider the need to insure that those agreements on alimony will withstand future attack.

It is, therefore, an opportune time to revisit rehabilitative alimony, which is perhaps the most underused tool in the alimony arsenal. Any attorney representing the supporting spouse should aggressively utilize rehabilitative alimony, either as a mechanism to avoid imposition of a permanent award or to reduce the amount of permanent alimony awarded by attributing a portion of the award to rehabilitative alimony that will terminate. Attorneys representing the supported spouse should consider that rehabilitative alimony may be used in conjunction with other forms of alimony to enhance the award.

This article will review rehabilitative alimony historically and explore its potential benefits at a time when we may be at the precipice of radical changes in our alimony laws.

Historical Development

Prior to the 1988 amendment of N.J.S.A. 2A:34-23(b), rehabilitative alimony was not statutorily recognized, although the 1988 amendment was merely a codification of a concept that had been readily applied for years. Indeed, a decade before the statute was amended, the court in *Turner*[1] articulated the need for a form of alimony that would be paid for a specific but terminable period of time, ceasing after reasonable efforts resulted in the supported spouse being placed in a position of self-support.[2] The *Turner* court found that rehabilitative alimony provided direction and incentive to the supported spouse, while simultaneously providing the supporting spouse with "some certainty of the nature and extent of [the] obligation."[3] In contrast to these benefits, the court noted that permanent alimony failed to encourage a spouse to seek employment and, indeed, accomplished an opposite result by discouraging a spouse to do so, thus remaining in a position of dependency.

Under N.J.S.A. 2A:34-23, when it is determined that an award of permanent alimony is not warranted, the court is mandated to make specific findings concerning its reasoning and, also, to consider whether an alternative form of alimony, including rehabilitative alimony, might be appropriate.[4]

The statute was further amended in 1999 to provide:

> Rehabilitative alimony shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.

The amended statute reflected the Legislature's adaptive response in recognizing and addressing a supporting spouse's varied relationship:

> Rehabilitative alimony permits a short-term award "from one party in a divorce [to] enable [the] former spouse to complete the preparation necessary for economic self-sufficiency[]" "and ceas[es] when the dependent spouse is in a position of self-support."[5]

The well-established purpose of rehabilitative alimony is to "*enhance* and *improve* the earning capacity of the economically dependent spouse."[6] Stated another way by the court in *Kulakowski*:[7] "The purposes of rehabilitative alimony is to exert fair and compassionate pressure upon a [dependent spouse] absent unusual circumstances, to develop marketable skills and obtain employment which will enable her to contribute, in whole or in part, to her support." Despite rehabilitative alimony having been available for over a quarter of a century, lawyers fail to use this statutory provision to either avoid permanent alimony or reduce the amount awarded. Rehabilitative alimony is a useful concept that is routinely ignored in our practice. While *Turner* made this point in 1978, and the Legislature reaffirmed the same principles in 1999, it is a concept that continues to be discounted and misunderstood.

Combination of Permanent and Rehabilitative Alimony

Rehabilitative alimony is not an exclusive remedy. Indeed, a combination of rehabilitative and permanent alimony is favored, where appropriate.[8] Where the supported spouse's ability to earn is less than what is needed to maintain the marital standard of living, a combined award of permanent and rehabilitative alimony is proper.[9]

In *Kulakowski*, the court found it was appropriate to award a combination of permanent and rehabilitative alimony under the theory that there may be circumstances where a supported spouse may be able to gain skills or training that would enable him or her to be employed in some capacity, but not to the extent of fully sustaining the marital standard of living.

The Chancery Division, in *Finelli*,[10] was charged on remand with the task of considering whether a combination of rehabilitative and permanent alimony was appropriate. The *Finelli* court reasoned that a combination should be awarded when "it is shown that the factors necessary for 'permanent' alimony have been proven as well as all factors to show ability to train or educate for future gainful employment so as to become more, though not completely, self-sufficient." The courts in *Finelli* and *Turner*, and the amended statutory language, emphasize the same point—lawyers should use rehabilitative alimony more frequently whenever alimony is an issue, particularly when it can be utilized in conjunction with other forms of alimony.

Requirement for a Rehabilitative Plan

What most distinguishes rehabilitative alimony from other forms of alimony is that it is awarded to meet a tailored need that, once achieved, should result in the *elimination* or *reduction* of the support award—hence, it is startling how infrequently it is used given the desire of most payor-spouses to eliminate or reduce the alimony obligation. In fashioning an award of rehabilitative alimony, whether alone or in conjunction with permanent alimony, it is critical to set forth a clear and unequivocal plan that details the obligations and responsibilities of each party that will, over time, accomplish the established goals for rehabilitation. To this end, the court is statutorily mandated to make specific findings in every case, contested or uncontested, where rehabilitative alimony is sought.[11] Because the law permits modification of rehabilitative alimony, "based upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award," it is crucial that a clear record be made of the intentions concerning the circumstances each party anticipates will occur at the conclusion of the rehabilitative period. Absent such a record, counsel will be severely handicapped in any future application for a modification of an award of rehabilitative alimony.

This point was emphasized in *Carter*, where the Appellate Division directed that when granting rehabilitative alimony, it is imperative the trial court question each party on their understanding of the rehabilitative alimony obligation or, stated another way, illicit a clear record of the rehabilitative plan contemplated by the parties.[12]

The Appellate Division, in *Carter*, relied upon the reasoning set forth in *Milner*:[13]

> *The basic premise of an award of rehabilitative [alimony] rather than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment*

at some future date."…Therefore, if the supported spouse is unsuccessful in obtaining the kind of employment required for economic self-sufficiency anticipated at the time of divorce, "this properly may be viewed as a 'changed circumstance' which would justify the continuation of alimony beyond the original termination date." (Emphasis added)[14]

In *Finelli*, Judge Conrad Krafte highlighted the need for a rehabilitative plan. Upon remand to determine whether a combined award of permanent and rehabilitative alimony was appropriate, the *Finelli* court found it was unable to award rehabilitative alimony, because the record was devoid of any meaningful evidence in support of a rehabilitative plan. Indeed, highlighting the critical need for a well-defined plan of rehabilitation, Judge Krafte found:

> After such limited testimony, this court has no idea of what the defendant could be rehabilitated to, nor what she could earn after she got there. This court cannot operate in a vacuum nor can it indulge in conjecture. It must make determinations based upon real evidence presented through competent witnesses.
>
> This court finds that there is an absolute lack of competent evidence upon which to base any rehabilitative alimony award. To make such an award would be to engage in complete conjecture, which this court is not permitted to do.[15]

Thus, if the parties fail to establish in the record the precise goals of the rehabilitation plan, it becomes virtually impossible for the court to consider, at a later date, whether a change in circumstance has occurred that would justify continuation of alimony beyond the date contemplated by the parties. Similarly, unless the obligations of the payor are specifically outlined, together with the ability of the supporting spouse to meet those obligations, the success of an application to reduce or terminate the rehabilitative award will be tenuous at best.

It is the lawyer's responsibility to craft a specific plan and introduce evidence to paint a complete picture. Since the plan should be supported by documentary evidence, it is prudent to use a pre-trial demand for admissions to insure admissibility. Here, detail is critical. When the record is devoid of such evidence, the court is divested of the ability to award rehabilitative alimony, and a possible viable support option is eliminated from consideration. When arguing for or against an award of combined permanent and rehabilitative alimony, it can be easy to neglect to address the factors for rehabilitative alimony for the sake of arguing for or against permanent alimony. However, such an omission could limit the supported spouse's alimony entitlement or, conversely, could increase the supporting spouse's obligation.

Failure to Meet Rehabilitative Plan Goals

If events subsequent to the divorce show the supported spouse has been unable to achieve the level of self-sufficiency contemplated at the time of the divorce, an application to convert an award of rehabilitative alimony to permanent alimony may be appropriate.[16] In such a case, the standards set forth in *Lepis*[17] and its progeny, apply. The burden of persuasion rests, in the first instance, upon the supported spouse to demonstrate the goals of the rehabilitative plan were not met, resulting in a change of circumstance warranting the continuation of rehabilitative alimony or, in certain cases, the conversion of rehabilitative to permanent alimony.

The timing of such an application can be dispositive. While nothing in the statute limits the time frame in which a party has a right to file such an application, the court in *Shifman*[18] found that an application to extend the term of rehabilitative alimony should not be made until six months before its scheduled termination. The *Shifman* court opined that such timing would give the trial court the ability to assess the supported spouse's circumstances at a time reasonably close to when the payment of alimony would expire, thereby providing the court with the opportunity to better assess the current needs and resources of the parties.

The fact that an obligation to provide rehabilitative alimony has ended does not prohibit the supported spouse from seeking an award of permanent alimony later. In such instances, however, the passage of time between the date that rehabilitative alimony ends and the time the supported spouse makes an application for permanent alimony may be considered in evaluating merits of the application. In such instances, the court would naturally inquire about the extent to which the supported spouse was able to meet expenses absent the receipt of the rehabilitative alimony.

In opposing such an application, it should be noted that a significant delay in filing an application to convert rehabilitative alimony to permanent alimony may give rise to an equitable defense of laches if the payor can

demonstrate prejudice. The payor may proffer that, as a result of the delay, circumstances have changed whereby it is no longer equitable to direct the former spouse to resume an alimony obligation that was anticipated to end. In support of this argument, the payor should note the well-defined public policy favoring enforcement of agreements reached between parties.[19]

Conversion of Rehabilitative Alimony to Permanent Alimony

It is well settled that the court has the equitable authority, and the responsibility, to modify support obligations, regardless of their source.[20] In addition to a finding of changed circumstances, rehabilitative alimony may be modified based upon "the nonoccurrence of circumstances that the court found would occur at the time of the...award."[21]

The fulfillment of an obligation to pay rehabilitative alimony does not prohibit a future application for an award of permanent alimony or an extension of rehabilitative alimony.[22] Simply stated, where support was premised upon certain circumstances actually happening, modification is appropriate if those circumstances are not realized. While circumstances where the supported spouse is unable, at the end of the rehabilitative period, to find employment represents the obvious scenario prompting an application for change of circumstances, there are some non-traditional circumstances that may also give rise to an application to convert rehabilitative alimony to permanent alimony. Consider the impact of income earned or lost from income-producing assets or the effect of increased Schedule A, B or C expenses. Since rehabilitative alimony is premised upon attaining the ability to reach a tailored level of self-sufficiency, any material change, positive or negative, can give rise to an application for a change of circumstance.

While many cases address what occurs when a supported spouse suffers a change in circumstance, there is less guidance for what should occur when the supporting spouse experiences a change in circumstance. The language of the statute provides that an award of rehabilitative alimony may be modified based "either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award." Accordingly, a payor is free to make an application to suspend or terminate an obligation to pay rehabilitative alimony based upon a change in circumstance. Unlike the specific language in the statute that prohibits a court from modifying the length of an award of limited duration alimony absent "unusual circumstances," there is no heightened burden to modify the length of an award of rehabilitative alimony upon a demonstration of changed circumstances.

Often, the amount and term of rehabilitative alimony can differ dramatically from what a supported spouse may have received if permanent alimony were awarded. The amount of rehabilitative alimony must be tailored to a specific plan of rehabilitation. If a payor ceases to make payments during the course of that rehabilitative plan, the payee will most likely suffer a more pronounced adverse consequence. By way of example, consider the classic case of a rehabilitative alimony award that provides funds sufficient to meet the needs of the supported spouse, as well as the additional cost of pursuing a post-graduate degree. The supported spouse enrolls in college, pays tuition and resigns from her job in order to attend school—all of which she is obligated to do to meet her responsibilities under the rehabilitative plan. Thereafter, the supporting spouse ceases paying rehabilitative alimony and applies to the court for a termination of his support obligation. Putting aside any rights initially waived in agreeing to an award of rehabilitative alimony, the supported spouse now suffers a further adverse consequence in no longer receiving alimony, expenditure of funds to pay tuition and the loss of job security she had prior to the award of rehabilitative alimony. Such an outcome is not only contrary to the underlying policy supporting awards of rehabilitative alimony, but is inapposite to public policy.

Extending the Rehabilitative Term

At the opposite end of the spectrum, is the litigant who seeks to extend a term of rehabilitative alimony. Often, the amount of an award of rehabilitative alimony is much higher than an award of permanent alimony might be, due to the limited term of the award.[23] If a payor agrees to provide rehabilitative alimony in a significantly higher amount in exchange for the security of a shorter term, shouldn't the payor have heightened security that the term will not be extended? Absent such an increased burden, a supported spouse could enjoy the windfall of an enhanced level of rehabilitative alimony, only to then reap the benefits of continued alimony past the envisioned end date. Certainly, rehabilitative alimony should not serve to punish the payor while providing a bonus to the payee. Rather, there must be an equitable balance of the rights and duties of the respective parties,

which is measured against the backdrop of why rehabilitative alimony is given in the first instance.

Courts are constrained in considering these types of arguments. The court in *Shifman* cautioned that courts cannot make it more difficult to modify an award of rehabilitative alimony than permanent alimony, since to do so "would be an impediment to negotiated rehabilitative alimony provisions."[24] What the court can do and, in fact, is encouraged to do, is to enforce consensual agreements reached between parties that are fair and reasonable.[25] Accordingly, the prudent practitioner might consider fashioning an award of alimony that recognizes all of the goals of rehabilitative alimony but provides the security of a term and amount the parties agree will result in the supported spouse reaching a level of self-sufficiency.

A negotiated, but non-modifiable, rehabilitative alimony award may be a successful tool in reaching this end. Attorneys might consider drafting an agreement for an award that is in the nature of non-modifiable term alimony emphasizing that the parties have created their own contractual construct, as opposed to simply utilizing the statutory law. Then, modification is governed by the terms of the contract and not the statutory law, enabling the careful drafter to assure the intended result.

Under a theory of a negotiated rehabilitative alimony, the support award would be established that would permit the supported spouse to pursue those efforts that, over a fixed period of time, would be assumed to be sufficient to reach a level of self-sufficiency.[26] However, neither the amount nor term of the negotiated rehabilitative alimony award would be subject to modification by either the payee or the payor. The award would simply be one that provides for a term of alimony in a fixed amount, likely an enhanced amount, which will adequately provide for established needs during the rehabilitative period but would not be subject to modification.

One might argue that a simpler approach would be to just provide for limited duration alimony that would achieve the same goals and has a mandated heightened burden for modification. However, an award of limited duration alimony is not appropriate or legally attainable in all cases. Moreover, one should not discount the benefits to both parties of an award of rehabilitative alimony that are absent in an award of limited duration alimony. Since the primary goal of rehabilitative alimony is to enhance the earning potential of the supported spouse, it can be assumed that at the termination of the rehabilitation period, that spouse will be in a better financial position. It may, in fact, elevate the supported spouse's cash flow to support the marital lifestyle.

In effect, when a dependent spouse is able to replicate that lifestyle, he or she loses the right to an increase in alimony. In other words, rehabilitative alimony may turn out to grant a litigant an anti-*Lepis* clause without paying for it. Moreover, a litigant with elevated earning power resulting from the rehabilitative period will be in a much better position to contribute more toward the needs of children of the marriage. The supported spouse will be able to shoulder a greater portion of child support, college expenses and other extraordinary expenses incurred for a child.

Finally, with a successful plan of rehabilitation, the supported spouse is equipped to meet their own needs, and is not at the mercy of the continued success of his or her former spouse. Placing spouses in positions of self-sufficiency where they can make positive economic contributions to society is one of the long-established purposes of alimony, and a concept that is difficult for a litigant to argue against.[27]

Considerations for Negotiated Rehabilitative Alimony

An award of rehabilitative alimony is narrowly tailored to the supported spouse having a level of income to support him or herself while pursuing the skills that will ultimately provide self-sufficiency. Therefore, unless an award of rehabilitative alimony provides the payee with a level of support that insures a fixed amount of available income, the supported spouse will be unable to meet the obligations of the rehabilitative plan. By way of example, if the supported spouse needs a fixed sum of money to pay for college tuition and to support living expenses while attending college, then the payee must have net funds available on a monthly basis to meet those obligations.

Certainly, the easiest way to approach this would be for the parties to agree that the rehabilitative alimony award will be neither taxable to the payee not tax deductible by the payor. The Internal Revenue Code allows non-taxable alimony, provided it is so designated in the divorce decree.[28] In the alternative, the parties can agree upon a level of taxable rehabilitative alimony that, after payment of taxes, will net the supported spouse sufficient funds to meet the needs of the rehabilitative plan.

An award of alimony that combines negotiated rehabilitative alimony with an award of permanent alimony requires greater attention by the practitioner to insure sufficient net funds are received while not overcharg-

ing the supporting spouse during the period of rehabilitation. If the parties agree the permanent portion of alimony will be taxable, there must be a clear allocation of the total alimony award to distinguish the rehabilitative portion from the permanent award. This allocation is necessary, since the parties must agree on the portion that will terminate at the end of the rehabilitation period. Assuming the entire award of alimony will be taxable, it will be necessary to first anticipate the overall tax bracket the payee will be placed in by virtue of the total taxable income. From there, the portion of alimony dedicated to the rehabilitation plan must be segregated and grossed up to compensate for the tax impact. It is important to include language in the settlement agreement providing that at the end of the rehabilitative period, the payor will be entitled to a reduction in alimony for the total amount of the rehabilitative portion, inclusive of the portion attributed to the tax effect.

A second consideration for negotiated rehabilitative alimony is that the negotiated rehabilitative alimony should be secured in the event of the payor's death. To this end, an agreement providing for negotiated rehabilitative alimony should certainly include a requirement for life insurance or other means of security, in an amount sufficient to meet all financial needs under the rehabilitative plan.

The parties should consider whether or not to allow rehabilitative alimony to survive the payee's remarriage. The statute specifically provides that the remarriage of a former spouse receiving rehabilitative alimony "shall not be cause for termination of such alimony by the court unless the court finds that circumstances upon which the award was based have not occurred or unless the payer spouse…demonstrates an agreement or good cause to the contrary."[29] In bargaining for negotiated rehabilitative alimony, the payor weighs the benefit of an obligation that is terminable in a fixed, relatively short, period of time. Similarly, the payee waives a right to a potentially longer term of alimony in exchange for the security of receiving support uniquely tailored to a plan that will achieve self-sufficiency. In entering into such a bargain, the parties need to weigh the impact of the supported spouse's potential for remarriage during the rehabilitative term and make their intentions clear as part of a well-defined rehabilitation plan.

Conclusion

Rehabilitative alimony has become one of the most underused forms of alimony available to practitioners. When we consider the potential win-win situation created by enabling a spouse to become economically self-sufficient while simultaneously reducing the length of time for payment of support, one is hard-pressed to understand why rehabilitative alimony is not employed with greater frequency. Given what appears to be a nationwide trend to reduce or eliminate the availability of permanent alimony, perhaps practitioners will take a closer look at the benefits provided by an award of rehabilitative alimony. If agreements to provide negotiated rehabilitative alimony are carefully drafted, the inherent benefits will become readily apparent, and a tool that was historically often overlooked may become quite attractive. ■

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Endnotes

1. *Turner v. Turner*, 158 N.J. Super. 313 (Ch. Div. 1978).
2. *Turner* at 314.
3. *Id.*
4. N.J.S.A. 2A:34-23(c).
5. *Cox v. Cox*, 335 N.J. Super. 465 (App. Div. 2000) (Citations omitted).
6. *Cox citing* Frank Louis, Limited Duration Alimony, 11 *N.J. Fam. Law*.133, 135 (1991).
7. *Kulakowski v. Kulakowski*, 191 N.J. Super. 609, 611 (Ch. Div. 1982).
8. *Hughes v. Hughes*, 311 N.J. Super. 15, 32 (App. Div. 1998).
9. *Turner* at 318-319.
10. *Finelli v. Finelli*, 263 N.J. Super. 403 (Ch. Div. 1992).
11. *Carter v. Carter*, 318 N.J. Super. 34, 42 (App. Div. 1998).
12. *Id.* at 43.
13. *Milner v. Milner*, 288 N.J. Super. 209 (App. Div. 1996).
14. *Id.* (Citations omitted)
15. *Finelli* at 407.
16. *Carter* at 45.
17. *Lepis v. Lepis*, 83 N.J. 139 (1980).
18. *Shifman v. Shifman*, 211 N.J. Super. 189, 193 (App. Div. 1986).

19. *Avery v. Avery*, 209 N.J. Super. 155, 160 (App. Div. 1986)("there is a strong public policy favoring stability of consensual arrangement for support in matrimonial matters").
20. *Lepis* at 149.
21. N.J.S.A. 2Al34-23c(a)(d).
22. *See*, *Carter* and *Shifman*.
23. *Cerminara v. Cerminara*, 286 N.J. Super. 448, 460 (App. Div. 1996) *citing Turner.*
24. *Shifman* at 194.
25. *Peterson v. Peterson*, 85 N.J. 638 (1981).
26. The case law refers to "self sufficiency" but the payor would want to use the term marital lifestyle.
27. *Turi v. Turi*, 34 N.J. Super. 313 (App. Div. 1955).
28. 28 U.S.C. §71.
29. N.J.S.A. 2A:34-25.

Report of the American Academy of Matrimonial Lawyers on Considerations when Determining Alimony, Spousal Support or Maintenance

*(**Editor's Note:** The following is a report approved by the board of governors on March 9, 2007. It is reprinted here with permission.)*

The mission of the American Academy of Matrimonial Lawyers is "[T]o encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." In 2003 President Sandra Joan Morris appointed a Commission (AAML Commission) to critically review the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) to analyze the *Principles* and to make recommendations consistent with the mission of the Academy. The Commission's first project was the Academy's Model for A Parenting Plan which was adopted in November 2004 and published in 2005.[1]

After concluding the Parenting Plan the Commission focused on spousal support (also referred to as alimony or maintenance) which remains a difficult issue for practitioners, judges, legislatures and litigants. The ALI Commission conducted a review of Chapter 5 of the *Principles* on Compensatory Payments. The *Principles* are premised on the theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission. The AAML Commission also considered extensive feedback from members of the Academy which was gathered through a national survey, a general meeting of the membership and a discussion session that followed an AAML Commission CLE presentation on the issue.

After considering all these sources of information the Commission concluded that there are two significant and related problems associated with the setting of spousal support. The first is a lack of consistency resulting in a perception of unfairness. From this flows the second problem, which is an inability to accurately predict an outcome in any given case. This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases because without a reliable method of prediction clients are in a quandary.

In response to these concerns, many jurisdictions have adopted a formula approach to setting spousal support. While this approach may appear similar to that used to set child support, there are important differences because the factors for determining spousal support are significantly different than those applicable to setting child support awards. The AAML Commission recognized these differences and its approach for recommending both the amount and length of a spousal support award reflect and respond to the challenges of arriving at a fair result in these cases.

The proposed considerations are designed to be used in conjunction with state statutes that first determine eligibility for an award. They are not intended to replace existing state public policy regarding eligibility for an award. In addition, the factors that are listed as deviations are intended to address the considerations for setting an amount and duration of an award found in most states' statutes. These recommendations are ones that the Commission hopes Academy members can utilize in advocating for a fair result for their clients. It is further hoped that the approach outlined here will be adopted by judicial officers and state legislatures as they attempt to provide consistent, predictable and equitable results.

Background

The origins of alimony date back to the English common law system. Historically there were two remedies from the bonds of marriage. Although an absolute divorce was theoretically possible it required an act of Parliament and was therefore hardly ever used. More

commonly a plea was made to the ecclesiastical courts for a separation from mensa et thoro (bed and board). The action was akin to our current day separation. A husband who secured such a divorce retained the right to control his wife's property and the corresponding duty to support his wife. When Parliament authorized the courts to grant absolute divorces, the concept of alimony remained and was adopted by the colonies.

The initial rationale based on a fault based system of divorce appeared to be two-fold. First, alimony was seen as damages for breach of the marital contract reflected in the fact that in most states it was only available to the innocent and injured spouse. The other rational appears to have been the assumption that women would be unable to support themselves through employment. Although these rationales were undermined by the acceptance of no-fault divorce and the rejection of gender stereotyping, the practical reality of women's financial dependency remained in many marriages.

With the advent of no-fault divorce, alimony lost its punitive rationale. The Uniform Marriage and Divorce Act (UMDA) changed the character of these awards to one that was almost exclusively needs based and at the same time gave spousal support a new name: maintenance. The marital standard of living was only one of six factors relied upon in making awards under the UMDA where the focus was now on "self-support" even if it was at a substantially lower level than existed during the marriage. In addition, when awards were made they were generally only for a short term, sufficient to allow the dependent spouse to become "self-supporting." This "first wave" of spousal support reform often left wives, who were frequently the financially dependent spouses in long term marriages, without permanent support.

In response to the denial of long term awards for those most in need of them, the "second wave" of reform took place in the 1990's and expanded the factors justifying an award beyond "need." This new legislation encouraged courts to base awards more on the unique facts of a case and less on broad assumptions about need and the obligation to become self-supporting in spite of the loss of earning capacity that often occurs in long term marriages. The use of vocational experts to measure earning capacity became more widespread and there were attempts to quantify the value of various aspects of homemaker services as part of a support award. Many courts rejected these latter attempts. Maintenance was sometimes awarded for "rehabilitative" purposes such as providing income for the time it takes the recipient to acquire skills or education necessary to become self-supporting. Additional rationales for maintenance included contract principles such as expectation or quasi-contract doctrines like restitution or unjust enrichment. Left unanswered however, was the critical question of the measure of the dependent spouse's basic entitlement to support. Is it at the marital standard of living (as provided in the common law) or is it at some other level based on "need"?

The current trend is to provide support based on factors that include need, and in some states, fault. But "need" remains an elusive concept. Is it the marital standard of living? Is it subsistence level? Is it a transfer of money to provide income sufficient to acquire skills or training to become self-supporting? Is it the equitable division of the marital stream of income?

An alternative theory to need-based awards is one premised on "contribution." Here the idea of marriage as an economic partnership, which is the theoretical basis for a sharing of the partnership's assets under the rubric of equitable distribution, can also be used as a basis for compensating a spouse for contributions made to the partnership.

The American Law Institute in its *Principles* focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage. The ALI guidelines are premised on the fact that when a marriage is dissolved there are usually losses associated with it such as lost employment opportunities or opportunities to acquire education or training in order to increase earning capacity. The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners. The *Principles* assume a loss of earning capacity when one parent has been the primary caregiver of the children. They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage. Finally, under the *Principles*, compensation could be awarded based on a loss of a return on an investment in human capital (where one spouse has supported the other through school). This would be most important in the vast majority of states that do not recognize enhanced earning capacity or a degree or license as a divisible marital partnership asset.

While these different approaches to alimony reflected in various states may lead to a disparity in result from state to state, what is more troubling is the tendency to

see very disparate results within a jurisdiction where the judges are supposedly applying the same statute. These disparate results have led many jurisdictions to adopt formulas in an effort to provide both consistency and predictability.

The AAML Commission Recommendations

The AAML Commission studied approaches used in many jurisdictions. While there are certainly many variations, there are two factors that are considerations in virtually all jurisdictions –income of the parties and the length of the marriage. Seeking to provide a formula that Academy members could use regardless of where they practice, the Commission chose to utilize these two universal factors. It should be noted that the application of the proposed AAML considerations yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions.

The AAML Commission recognizes that the amount arrived at may not always reflect the unique circumstances of the parties. Therefore, deviation factors are used to address the more common situations where an adjustment would need to be made.

The recommendations are:

Amount:

Unless one of the deviation factors listed below applies, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income. The alimony amount so calculated, however, when added to the gross income of the payee, shall not result in the recipient receiving in excess of 40% of the combined gross income of the parties.

Length:

Unless one of the deviation factors listed below applies, the duration of the award is arrived at by multiplying the length of the marriage by the following factors: 0-3 years (.3); 3-10 (.5); 10-20 years (.75), over 20 years, permanent alimony.

"Gross Income" is defined by a state's definition of gross income under the child support guidelines, including actual and imputed income.

The spousal support payment is calculated before child support is determined.

This method of spousal support calculation does not apply to cases in which the combined gross income of the parties exceeds $1,000,000 a year.

Deviation factors:

The following circumstances may require an adjustment to the recommended amount or duration:

1) A spouse is the primary caretaker of a dependent minor or a disabled adult child;
2) A spouse has pre-existing court-ordered support obligations;
3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);
4) A spouse has unusual needs;
5) A spouse's age or health;
6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;
7) A spouse has received a disproportionate share of the marital estate;
8) There are unusual tax consequences;
9) Other circumstances that make application of these considerations inequitable;
10) The parties have agreed otherwise.

The Appendix to this report contains examples of the application of the recommendations to several fact patterns.

Respectfully Submitted,
Mary Kay Kisthardt, Reporter
November 2006

Members of the Commission:
Marlene Eskind Moses, Co-Chair
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Endnote

1. *See*, Mary Kay Kisthardt, The AAML Model for A Parenting Plan, *19 J Am. Acad. Matrim. Law* 223 (2005).

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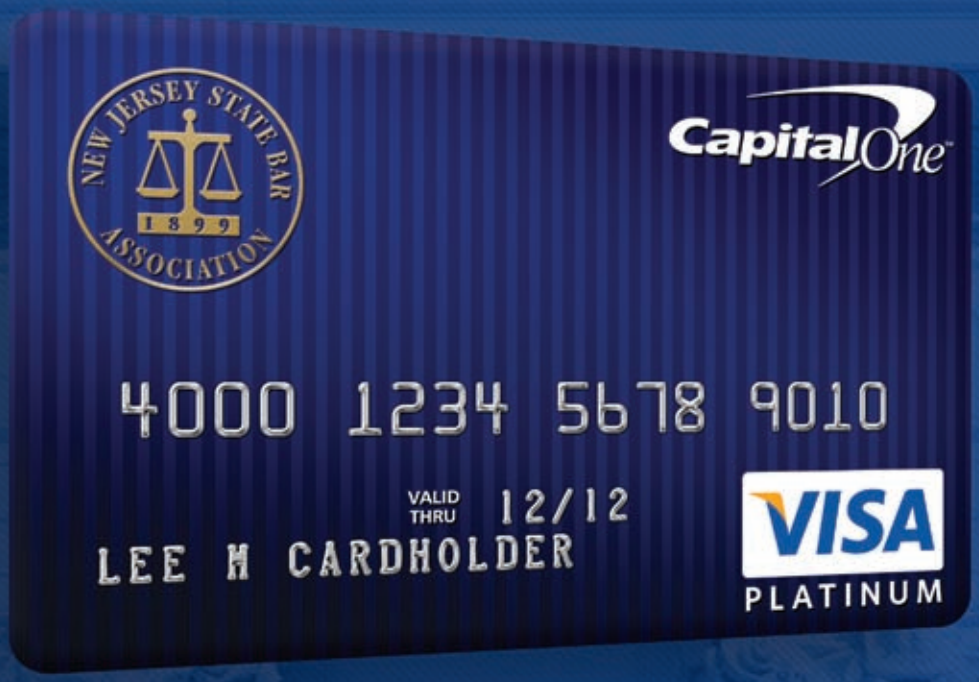

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