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CHAIR'S COLUMN

An Interview with Ed in Cabo

Cabo was—well Cabo. Beautiful landscapes, sand, sea, whales, dolphins and mmmm…great food. The setting was a beach resort where all rooms faced the ocean. The pool was warm, the drinks flowed, and the sunset, ah yes, the sunset was amazing. The not too infrequent whale sighting was the only regular interruption faced by the members in attendance. The Family Law Section's Annual Retreat was a labor of love for our, Chair Ed O'Donnell. I had the opportunity to touch base with Ed at the retreat to discuss some of his thoughts on his year as our leader.

ASC: Charles Vuotto wants to know how many scouting trips he can legitimately take to plan for Aruba?

EO: Legitimately? One trip would be sufficient. I would highly recommend that he take five or six trips.

ASC: Aside from being able to convince a few hundred people to go on vacation with you, what is the purpose of these annual retreats?

EO: In the corporate world, they call it team building. The paradox is that we make our living by being adversaries, but we work together as the Family Law Section in shaping the substantive law and the procedures and policies affecting the administration of justice in the family part. These retreats give everyone the opportunity to build and nurture relationships, which facilitate the work we do collectively as an organized bar.

There is the educational component as well. You will recall that at each of our three substantive programs, we had a standing-room-only crowd. Many of our members missed tee times and prime sun-worshiping opportunities to attend the programs.

Lastly, the members of the section all work very, very hard, not just in their individual practices, but in doing the work of the section itself. The Annual Retreat gives us an opportunity to collectively reward ourselves for a job well done.

ASC: This was a busy year for you as chair of the Family Law Section Executive Committee and president of the Essex County Bar Association. I know you relied on many of us to assist you, but are there any people in particular who should be acknowledged?

EO: Yes, there are people who should be acknowledged, but the list is too long! The successes of the past year have been truly attributable to the hard work of many individuals. Indeed, much of the work was even done by our section members who do not sit on the executive committee, but who nevertheless chaired or sat on various subcommittees. It was clearly a year where everybody pitched in, and I think the section is stronger for that.

Of course, there were members who truly wowed me. Our Young Lawyers Division co-chairs, Sheryl

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All Things Support: A Note About This Issue

by Amy Sara Cores

This issue focuses on issues relating to support. Specifically, we have articles addressing alimony, palimony, and support modifications. This publication has not had a themed issue in some time, a void the editors hope to fill in the future. We hope this issue will serve as a relevant and up-to-date guide for all practitioners on all things support.

Frank Louis has penned a relevant piece on one of the most talked about legal issues today, palimony. As many of our readers are aware, this issue is at the fore-

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Seiden and Carrie Schultz, were on fire. Amanda Trigg did an outstanding job chairing the legislation subcommittee; Bea Kandell worked feverishly on the CourtSmart and rule committees; everyone on the Cabo committee, including yourself, Jeralyn Lawrence, Alison Leslie, Stephanie Hagan and Jerry D'Aniello, worked their "burros" off! *It was truly a team effort!*

ASC: You took time specifically to discuss the status of the palimony statute. Can you give some insight into the position of the section and the status?

EO: This really took us by surprise. As you know, the bill is essentially a statute of frauds, which says that any agreement between unmarried persons for support must be in writing. The legislation itself is a knee-jerk reaction to probably some legitimate criticism voiced in the wake of the *Roccamonte* and *Devaney* decisions. Obviously, the bill goes too far. This bill is dangerous. People, mostly women, will be hurt by it. The section did oppose the bill in 2004. And until recently, we thought the bill was dead. We are doing our best to lobby against the Assembly's proposed sister legislation. We have also put together a subcommittee, consisting of myself, Amanda Trigg, Bonnie Frost, Chuck Vuotto, Rebecka Whitmarsh and Cheryl Connors, that will be drafting our own proposed bill so the Legislature will have a choice.

ASC: Another hot topic this year has been the recommendation to dissolve the current Skills and Methods program in favor of mandatory continuing legal education. How do you think this is going to affect our section?

EO: You know it's a funny thing. Look at the attendance records for all of the family law and matrimonial continuing legal education programs co-sponsored by our section. Look at Frank Louis' Annual Symposium, which now draws more than 500 people. For our section members, there really was never a need to make continuing legal education mandatory. Nevertheless, I anticipate that more people will be joining the NJSBA and the Family Law Section to avail themselves of the continuing legal education programs that are now mandatory. Growth is a good thing. And the irony is that the section will be better for mandatory continuing legal education. As for our younger lawyers, the substantive and mentoring programs we have sponsored as a section are, in my opinion, much more valuable and relevant than Skills and Methods.

ASC: What has been your greatest accomplishment as chair of the section?

EO: Well, there were a couple of highlights. Chief Justice Stuart Rabner's initiative to appoint a committee to oversee the CourtSmart recording system as a result of our subcommittee's work, as well as the dialogue relating to Justice Barry Albin's report on public access to matrimonial records come to mind. But, for me, the most important things have been the relationships we have built and strengthened with the NJSBA officers and trustees, with the bench and with each other. The outreach initiatives started by Ivette Alvarez, when she was chair, and continued by Lizanne Ceconi and myself, have borne incredible fruit. There is more diversity in the section, and the young lawyers have really stepped up to the plate. I really cannot take credit for most of this, but I am grateful that so much has been accomplished during my tenure.

ASC: What would you like to see accomplished by the section next year, or what goals should we be setting to accomplish?

EO: There are several things on the agenda already. We need to resolve the issue of the proposed bylaws, especially as it pertains to the editorial independence of the *Family Lawyer*. This is an extremely important issue, and the subject of a piece I am writing for publication. Ironically, the editorial may not be published in the *Family Lawyer*. Seeing the pending palimony legislation issue through to its end, and hopefully its demise, is extremely important. And, of course, the section itself has to take a more active role in continuing legal education programming throughout the year. The important thing, though, is that the section continues to be responsive to its membership and follow the lead of its membership in addressing issues that are important to our individual members. We have to address *their* goals and *their* issues. I suspect that issues dealing with the economics of practicing family law will be in the forefront.

ASC: Okay. So now that you have publically announced your engagement to Alison during the Annual Retreat. I am sure everyone wants to know who will be preparing the pre-nups.

EO: I am sure everyone does want to know, but it's privileged!

ASC: Good luck to Ed and Alison. We wish them the best. As his term as chair has ended, I would note that Ed has continued the tradition of inclusiveness. There were many new faces on the executive committee, at the retreat, and at the many events throughout the year. He also actively encouraged the young lawyers of our section, who have blossomed into an active group of future leaders. ■

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front of the current discussions at the state bar level, and with our state Legislature. This article is in part a response to recently proposed legislation and in part a statement of the legal principles and policies driving the maintenance of a legal system that compels us to maintain palimony as a cause of action.

We next have an article previously published by John Finnerty several years ago. This version, updated with Amy Sara Cores, remains relevant to the practice. The authors provide a practical guide to the presentation of a case dealing with the issue of alimony, as well as references to cases to assist the practitioner.

Charles F. Vuotto Jr. and Lisa Steirman Harvey address the issue of permanent versus limited duration alimony. The authors tackle this complicated quandary of which the courts have given practitioners limited guidance. Importantly, the authors have given our readers a comprehensive overview of the case law on this subject.

Robin Bogan addresses the current economic crisis and making modification applications to the court. The article presents an overview of arguments, relevant economic facts, case law, and most importantly, creative suggestions for the court and practitioner when addressing these issues.

Finally, Elizabeth Vinhal discusses involuntary loss of employment and its potential impact on support obligations.

The Editorial Board also wishes a speedy recovery to our editor in chief emeritus, Lee Hymerling. It has been through his efforts and devotion to this publication that it exists as a guide to both the courts and practitioners. ■

EDITOR-IN-CHIEF'S COLUMN

Rethinking the *Lepis* Requirements in Difficult Economic Times

by Mark H. Sobel

Prior to our Supreme Court's decision in *Lepis v. Lepis*,[1] it was far from clear whether any litigant, after signing a property settlement agreement, could go back to court to change the terms of their settlement. Certainly, the idea that settlements are sacrosanct and entitled to enforcement with certainty would have led one to question the ability to 're-do' consensual agreements and alter the terms of the previously executed contract. As we now know, our Supreme Court in *Lepis* gave litigants that right and fathered a new 'sub-industry' of post-judgment *Lepis* applications. For that, we thank the Court for the ability to offer our litigants a 'new product line' with, of course, concomitant expenses to be paid to counsel.

The ebb and flow of the amount of *Lepis* applications in some part reflects the ebb and flow of our economy. When either extreme predominates, such as the expansive economic times during the 1980s or the current recession of the early 2000s, there would seemingly be an increase in such applications. While increases pursuant to court orders in the 1980s seemed somewhat prevalent, the opposite does not seem to be true presently, as our courts now are relying upon the court-imposed requirement that the change not be predicated upon a temporary alteration in the factual matrix. The trial level courts now are rejecting such applications, predicated upon the Supreme Court's statement in *Lepis* that:

> Courts have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred.[2]

From that brief one-line commentary citing in support thereof three cases, none of which deal with temporary alterations in circumstances, we have now developed a body of law that requires something substantially more than a temporary alteration to obtain relief. The question is, why?

The cases cited by the Supreme Court for the above proposition that the change be more than temporary are the Appellate Division's 1949 opinions in *Sassman v. Sassman*[3] and *McDonald v. McDonald*.[4] In *Sassman*, the individual was retired and unemployed, however, was receiving unemployment compensation and Social Security benefits. At the time of the decision, the litigant's unemployment benefits had not ceased. Similarly, in *McDonald*, while the payor was terminated from employment, he had been given severance of a year's salary, as well as two months of vacation pay, and at the time of the application had not suffered any actual economic downturn.

It is from these two rather limited opinions, in very specific fact situations, that we have now expanded the *Lepis* requirement of a non-temporary reduction to the current requirement. This requirement was most recently affirmed in *Larbig v. Larbig*,[5] where a payor's application to reduce support filed 20 months after the entry of divorce was deemed premature and temporary, not entitling the payor to a downward modification.

In order to obtain a downward modification, our Supreme Court in *Lepis* determined that a *prima facia* showing would be required. The Court stated such a *prima facia* showing as follows:

> when the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself.[6]

Nothing in that statement requires permanency. What the statement provides, as is equitable, is that there is a showing at the time of the application that a fact or facts have changed that now substantially impair the ability [of a party] to support him or herself. Nothing says a word about it being long-standing.

When someone loses their job and does not have other economic resources, they face the real-life problem *immediately* of paying for their home, clothing, medical needs, and a host of other daily requirements. These costs are not abated. These expenses do not await some future showing of our inability to pay. Those problems are

immediate. The question is, how long does someone have to face such immediate problems before a court of equity imposes something that is fair, just and equitable?

Would it not be fair, just, and equitable to impose some immediate relief with the opportunity to review that relief, based upon other events that may or may not occur in the future? Such an analysis could utilize the same thought process as articulated in *Mallamo,* where *pendente lite* relief can be altered at time of trial. Certainly, it would seem far more equitable to recognize the reality of an immediate economic event rather than force someone into likely violations of a property settlement agreement, noncompliance of a court order, and motions in violation of litigant's rights. All of these seemingly provide an inequitable result that ignores the predominate fact that if the money simply is not there, it cannot be paid.

Given the perilous economic times we are now encountering, does there really need to be a showing over many months for someone who has lost their job that they can no longer afford that which was previously agreed to? Is it not a wiser, fairer course of conduct to allow for interim relief, and perhaps adjust the interim relief later in time when a new job is obtained? Should there really be a requirement that the payor must go into arrears on his or her credit cards, risk foreclosure of his or her property, reduce savings down to nothing and incur debt, while searching for a job in a limited or nonexistent job market, and not be able to obtain relief?

The fairest way to analyze these types of applications is through the prism of that which would have been undertaken if the family unit had remained intact. In such a situation, if one or both of the parties lost their jobs there would have been a 'kitchen table discussion' to reduce expenses, to limit costs, to do all a prudent family would do in difficult economic times. In the event a divorce precedes such events, the same thought pattern and decision-making should be imposed. In fact, we currently do that in the body of case law regarding child support.

Under *Zazzo,* and its progeny, our courts already have articulated that an increase in economic factors for a supporting parent *alone* can justify an increase in child support, as the children of divorce never are deemed divorced and are viewed as part of an 'intact family.' That same philosophy can and should apply during adverse economic times.

The failure to provide for such temporary relief creates violators of court orders who likely never have violated a law or order in their life. It creates individuals who are viewed as being defiant of existing orders (haven't we all made those types of arguments) when the reality is there simply are not the same funds that were previously available.

The Supreme Court in *Lepis* provided a safety valve, even though the parties consensually agreed to very finite, concrete terms. That safety valve was imposed because it was the fair and just thing to do. Similarly, the fair and just thing to do in these adverse economic times is to provide the individual who is suffering due to those economic forces relief. Such relief must be immediate to be relief at all. Such relief must be effectuated before all of the assets are utilized, before the savings for college are utilized, before the credit card balances exponentially increase and before foreclosure is imminent. For relief to be meaningful it needs to be swift. It would seem the non-temporary requirement *Lepis* matter-of-factly imposed upon such applications is not appropriate in these economic times. Rather, it is suggested that a *prima facia* case is made where, regardless of the length of time of the adverse economic circumstances, the current economic needs of the *entire* family cannot be satisfied with the current economic resources of the *entire* family. If that standard is applied, and relief is immediately imposed, we can eliminate repetitive enforcement applications, repetitive motions in aid of litigant's rights, and repetitive denials of the economic reality these individuals really face. It is the fair, just, and equitable resolution of such dire economic situations.

Certainly, the fair, just, and equitable resolution should carry the day over an artificial imposition of a requirement that neither has statutory basis nor sound judicial footing. It is a proposal that, given the current economic situation, needs to be immediately addressed so everyone in the family has a stake in the economic fortunes of the family, whether in good times or bad. ■

ENDNOTES

1. 83 N.J. 139 (1980).
2. *Lepis, supra* at 151.
3. 1 N.J. Super. 306 (App. Div. 1949).
4. 6 N.J. Super. 11 (App. Div. 1949).
5. 384 N.J. Super. 17 (App. Div. 2006).
6. *Id.* at 157.

EDITOR-IN-CHIEF EMERITUS COLUMN

Mark H. Sobel: A Worthy Tischler Award Recipient

by Lee M. Hymerling

The editorial board of the *New Jersey Family Lawyer* takes pride in recognizing Mark H. Sobel as the 2009 recipient of the Saul Tischler Family Law Section Award. Since the inception of that award in the early 1980s, its winners have represented the very best of New Jersey's family law bench and bar. We take pride in Mark receiving this singular honor because of his long service as one of our own, and, for 11 years, his service as only the second editor-in-chief of the *New Jersey Family Lawyer* since its founding in 1981. His tenure with this publication has been exemplary, but it is only one component of his distinguished career as an advocate; an active member of the New Jersey State Bar Association's Family Law Section; a longtime member of the New Jersey court's Family Part Practice Committee and it Subcommittee on Rules and Procedures; a former member of the Supreme Court's Special Committee on Matrimonial Litigation; and, as a highly regarded writer and lecturer.

Mark's accomplishments have lead to him being recognized as a Super Lawyer, and he continues to be listed in *Best Lawyers in America*. And now Mark has added to his impressive *curriculum vitae* the well-deserved title of Tischler honoree. The fact that hundreds of his colleagues and friends joined him for the awards dinner and ceremony reflect the respect he has earned from his colleagues.

There have been many facets to Mark's career. George Washington University and the University of Pennsylvania School of Law prepared Mark well for what lay ahead. His experience as an Essex County prosecutor afforded Mark perspectives on how the law is administered. It gave Mark a unique opportunity to know the courtroom, and also how the judicial process operated in New Jersey's most pressurized counties. It also allowed Mark to gain experience in a part of the judicial system few family lawyers ever see.

Mark's insights were instrumental in the creation of many rules under which we now all practice. His lively intellect, coupled with the persuasiveness of his arguments, often carried the day.

Upon leaving the prosecutor's office in 1980, Mark joined Greenbaum, Rowe, Smith & Davis, and has been a partner of the firm since 1985. Mark is now honored to serve that firm as one of its co-managing partners, a tribute to the trust and high regard in which Mark is held by those with whom he practices.

At Greenbaum, Rowe, Mark learned from a master mentor, and one of New Jersey's finest lawyers, Paul Rowe. Their close relationship was evident as Paul spoke from his heart when he had the honor of presenting Mark's award.

Five aspects of Mark's professional life deserve special mention.

First, for more than 25 years of service Mark has been far more than simply a member of the New Jersey State Bar Association's Family Law Section. He has been a member of the section's executive committee for two decades. Mark was a past chair and officer. Mark's abilities have shaped many of the positions our section has taken, which have benefited not only the bar but also the public. Early in his career on the executive committee, a past chair chose Mark to argue the section's position before the New Jersey Supreme Court.

Second, for more than 15 years Mark has served on either or both the New Jersey Supreme Court Family Part Practice Committee and its Subcommittee on Rule and General Procedures, and in late 1990s, on the New Jersey Supreme Court's Special Committee on Matrimonial Litigation. The latter presented a blueprint for the family part and family law practice in our state. On both, Mark was the antithesis of a 'back bencher.' Mark's insights were instrumental in the creation of many rules under which we now all practice. His lively intellect, coupled with the persuasiveness of his arguments, often carried the day. If truth be told, Mark was the author of such provisions as the rights and responsibilities language that must be included in all retainer agree-

ments we now sign.

Third, Mark's reputation and influence can be seen in his frequent participation in Institute for Continuing Legal Education and other continuing legal education programs, addressing some the most critical family law issues of our times. A high-powered and engaging speaker, it is never hard to learn from Mark's teachings. He is fascinated by what he does, believes in the causes he advocates and is able to project himself from the podium in a way that has benefited a generation of New Jersey family lawyers.

Fourth, Mark has been a lawyer's lawyer, and the epitome of what we all aspire to be. Hearing Mark argue is a learning experience in and of itself. Despite being well over 50, his youthful appearance and his unbounded energy is omnipresent.

And finally, Mark's singular leadership of this publication that he so loves cannot be overemphasized. As only the second editor-in-chief of the *New Jersey Family Lawyer*, Mark immediately discovered the heavy responsibility that comes with the title. He understood the pressure of having issues come out in a timely fashion; the importance of quality control; and the unique role the editor-in-chief plays as one of only three people whose columns, should he so elect, may appear in each issue. He understood the importance of the pulpit the job affords. His words reach more than 1,000 people each time an issue appears. He has an opportunity, spanning years, that few in our chosen field are accorded. And, he has not wasted that opportunity. From his pen (or these days his computer) come pithy columns that have important things to say. And he has been heard.

Mark has also played a critical role in expanding the breadth of this publication by broadening the base of its editorial board, a board that now spans the ages, backgrounds and life experiences of our section's membership. Not only does he make our editorial board meetings lively and fun, he also draws out the best from each of our editors.

I have had the great good fortune to not only call Mark my close friend, but also to watch his career for almost 30 years. He is a credit to our profession, a spokesman for what each one of us does, a scholar and a fine human being. To Mark and his wonderful wife, Wendy, our editorial board extends hearty congratulations for this well-deserved recognition. He is, indeed, one who is deserving of this award for "his singular contributions to the advancement of family law in the state of New Jersey." ■

The Question of Fairness in Palimony

by Frank A. Louis

(Editor's Note: The full version of this article has not been published here. This is merely an excerpted, edited version of it. The entire article, which provides more detail and context of the history of the law on palimony, was published in the Family Law Symposium seminar materials on Jan. 31, 2009. Original editing of this article was provided by Hany A. Mawla.)

There is perhaps no area of the law as misconstrued and misunderstood as palimony. This is largely the function of the law having developed through a series of cases that generally involved egregious facts that warranted judicial intervention. Thus, the law evolved from these cases, which involved stark facts and are not the cases we necessarily, as practicing attorneys address. Nor should the law solely be governed by cases involving extreme facts. Ask attorneys how palimony cases are resolved and most will say by a lump sum payment; however, a lump sum payment is but *one* way cases might be resolved, it is not the only way, either under existing law or under the proposal outlined in this article.

This article will address why the law is misunderstood, and analyze palimony principles from the perspective of what the actual legal principles are and how they logically fit in our overall body of law. Logic is important here because it begets fairness, and palimony legal principles should, fundamentally, be consistent with the overriding public policy in the area of family law, which is fairness and equity to the litigants. Fairness and common sense necessarily mean that economic realities must be considered as well. Whether tried or settled lawyers, litigants and judges alike should consider the ability to pay, 'lifestyle' and tax consequences, to name but a few considerations, in making palimony awards fair.

IMPLIED CONTRACT THEORY AS MEANS FOR ACHIEVING FAIRNESS

At the outset, and as noted, this article dispenses with the historical overview of palimony cases in New Jersey, which starts with Judge Bertram Polow's decision in *Kozlowski v. Kozlowski*.[1] The New Jersey Supreme Court granted *certiorari*, and ultimately adopted the California Supreme Court's reasoning in *Marvin v. Marvin*[2] to establish palimony as a cause of action in New Jersey. And while the concept of palimony as being one only borne of an express contract and one only compensable by way of lump sum award seems to have been the product of the early case law (*Crowe* and its progeny included), the history of the law is important because the intent, at least as articulated in *Marvin* and adopted by our courts, is more nuanced than that.

In *Devaney v. L'Esperance*,[3] the Supreme Court quoted *Marvin* at length in articulating the intent of the law in palimony:

> In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.
>
> We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated, of the pervasiveness of nonmarital relationships in other situations.
>
> The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.
>
> We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration.[4]

Crowe v. DeGioia[5] was the next time cohabitation was addressed by our courts. The Appellate Division there affirmed the trial court decision, which found that an express contract existed where Mr. DeGioia had "expressly promised to take care of Crowe for the rest of his

life."[6] In affirming the lower court's decision to award a lump sum to Ms. Crowe, the court relied on *Kozlowski,* where the court awarded "a sum equal to the present value of the reasonable annual support payable for her life expectancy."

Thus, *Crowe* and *Kozlowski* are premised on the same factual finding of the existence of an enforceable contract, but each trial judge determined what the terms of the contract were. Each judge ultimately concluded, based on the evidence presented in each case, that promises were made for the dependent party to be supported for the rest of her life. Just because there was a 'contract,' however, did not mean it was a contract to provide support for the remainder of the other party's life. For example, in *Crowe*, Judge Robert Garrenger Jr. made factual findings concerning what was not included in the contract (*i.e.* there had not been a promise to equally share the assets that had been acquired), thus emphasizing the critical nature of fact finding in the analysis.

The lesson here is that there are no automatic givens or mandated remedies merely because people live together. The result of both *Crowe* and *Kozlowski* flowed from the trial court's finding that each man had made a promise for lifetime support. Critical to the analysis is an understanding of what the contract was, and, in most cases, it is implied not express (*i.e.* it arises from conduct not words). Even more critical to understanding the nature of the contract is for one to fully appreciate that the case law, having been predicated on the quoted language from *Marvin supra*, does not mean the court will only enforce an express contract, and only do so in the manner affirmed by the appellate courts in *Crowe* and *Kozlowski*.

In order to understand that a lump sum award is not the only means by which a palimony case may be resolved, we must begin by utilizing implied contract theory as a means to approach a palimony case. This is because implied contracts achieve the Supreme Court's goal that *both* contract law and equitable considerations of fairness should equally apply in palimony matters as they do in family law altogether. Utilizing an implied contract analysis allows courts to focus on what they do best—applying the law to the facts and assuring the end result is fair—both as a matter of economics and fundamental policy.

The Supreme Court cases make it clear under a contractual analysis that parties' palimony agreement can either be express or implied. The contractual approach is clearly not the author's preference, but it can be utilized without sacrificing the true equitable nature of palimony. In advocating for the use of implied contract theory, it is important to understand what is not an express contract. An express contract, according to Samuel Williston in *Williston On Contracts: A Treatise on the Law of Contracts*, is one whose terms are stated by the parties. In contrast, an implied contract is one whose terms are not so stated.

Williston defines an implied contract as:

> An implied contract refers to that class of obligations which *arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words.* Despite the fact that no words of promise or agreement have been used, such transactions are nevertheless true contracts and may properly be called "inferred contracts" or "contracts implied in fact."[7]

According to Williston, a promise may be stated in words *or* may be *inferred wholly in part from conduct*.[8] How people interact with each other provides a more equitable framework for determining their rights, duties and obligations when relationships end. People should be responsible for the consequences of their actions; how they acted in their relationship *with* each other is a fair standard to determine what they should be required to do *for* each other when the relationship ends.

Except in the rarest cases, do people who reside together ever make express contracts concerning legally binding obligations? It simply is not the nature of life or personal relationships for such clear and unequivocal promises to be made. But at the same time, both as a matter of contract law, policy and fairness, obligations may be created by *conduct,* which help define the impact of the relationship on the parties. How people interact and treat each other determines the economic impact on them. That impact (*i.e.* the result of the relationship) helps determine whether there should be obligations when the relationship ends and what those obligations should be. The Supreme Court said as much in *Roccamonte*; "each couple defines its way of life and each party's expected contributions to it in its own way."[9]

Thus, the impact of those decisions on the parties should determine the scope of the legal duty when the relationship ends.

Yet, the trio of Supreme Court cases creating and defining palimony as a cause of action in New Jersey turned primarily on what trial courts found to be an *express* promise. Not only are such contracts uncommon, they are improbable, and so are the results reached within the case law. Indeed, a promise to support another person for life without regard to ability, and without considering one's future financial circumstances or whether one later decides to marry, seems unlikely an occurrence under any circumstances. So how can the law be based on the improbable?

The law should be predicated on a realistic appraisal of these relationships and how people actually live, and within the context of public policy that at the end of a marriage-like relationship the parties should treat *each other fairly*.[10] As

the Supreme Court said in *Crowe v. DeGioia,*[11] "to achieve substantial justice in other cases, we have adjusted the rights and duties of parties in light of the realities of their relationship."[12] Why, then, should palimony cases be any different? Each party has an obligation when the relationship ends to be fair to *each* other.

In *Carino v. O'Malley*,[13] Judge Katharine Sweeney Hayden recently, perceptively and correctly based her analysis on the principles of fairness set forth by the Court in *Kozlowski* and *Crowe*. *Carino* involved a 17-year relationship that began in 1988, when the plaintiff was an 18-year-old college sophomore and the defendant, then 55 and divorced, was a member of the board of directors of a financial brokerage firm in Philadelphia.

O'Malley filed a summary judgment motion arguing since the parties never cohabitated the complaint must be dismissed based on *Levine v. Konvitz*.[14] In *Levine* the Appellate Division dismissed a palimony case because it concluded that absent cohabitation there could not be a valid palimony claim. Ultimately, and tellingly on the issue of fairness, that case was reversed by the New Jersey Supreme Court in *L'Esperance v. Devaney*,[15] but *Carino* was written after *Levine* and prior to *L'Esperance*.

In *Carino*, Judge Hayden, rejected cohabitation as a prerequisite for a valid palimony claim, and held that such bright line tests are incongruent with palimony as a cause of action.[16] She specifically pointed out the language in *Roccamonte* quoted above, emphasizing that fact sensitivity in palimony matters via the analysis of a couple's way of life and their contribution to it is the "hallmark of all [palimony] cases."

She noted that:

> as well it should be and must be, because the palimony cause of action arose out of equitable concerns, and has been deemed to belong in the Chancery Division, Family Part, where a fact sensitive approach is the fundamental task for each decision maker.[17]

Thus, by utilizing the implied contract principles set forth in *Carino*, the palimony analysis is consistent with contract law and does not require a trial court to ignore the Supreme Court finding cohabitation cases are to be determined not by the parties' relationship but by the parties' promises.[18] In other words, because promises in an implied contract are not specific, the courts, as Williston noted, focus on *conduct*. How parties conduct themselves in their relationship determines their rights, duties and obligations, which is most appropriate. Parties who live together for a significant period of time and have a marital family-type relationship and inter-dependent economics should have responsibilities to each other when their relationship ends. Parties who create, by virtue of their conduct, an economic dependency of one to the other should expect the law to impose a remedy appropriate to their conduct.

Following from this, is whether or not the court owes an obligation of fairness to the parties by mandating a lump sum payment at the conclusion of a palimony case, and whether, by not requiring such a payment, ability to pay, 'lifestyle' and taxes should be a consideration. Unequivocally, the answer is "yes."

As emphasized by *L'Esperance*, *Kozlowski* as a matter of *policy* concluded that agreements between adult parties living together are enforceable provided the contract is not predicated on a relationship proscribed by law or on a promise to marry. Reviewing the precise language in *Marvin v. Marvin*,[19] the infamous California case upon which *Kozlowski* is predicated, is also helpful. *Marvin* addressed the responsibility of courts to fulfill "the reasonable expectations of the *parties*." Importantly, *Marvin* emphasized the expectation was of *both* parties. That important observation seemingly has been lost because often the obligor in palimony matters is called upon to pay the award in one lump sum fashion with little or no regard to the ability to pay.

The *Roccamonte* Court stated that a trial court first had to determine if there was contract and, if so, what were its terms.

> We made clear in *Kozlowski* that the right to support in that situation does not derive from the relationship, but rather is a right created by contract. Because, however, the subject of that contract is intensely personal rather than transactional in a customary sense, special considerations *must be taken into account by a court obliged to determine whether such a contract has been entered into and what it's terms are.*[20]

Where the unique circumstances involved such "intensely personal" relationships, the Supreme Court has directed trial courts "give special consideration" in determining what the terms of the contract were. Thus, if we are truly considering what the terms of a contract arising from the way two parties resided with one another are, should we investigate how they lived? What were their incomes, expenses, assets and liabilities? How did they play a factor in their lifestyle and the promises they made to one another? If we do this, we will find that it is rare that one party would promise to provide another a lump sum payment, let alone a lump sum payment without consideration of how the parties lived.

In assessing fairness issues and the feasibility of a lump sum payment, the case law points out many factors for consideration that are consistent with an alimony or an equitable distribution analysis. For example, in *Zaragoza v. Capriola*,[21] the ultimate conclusion was that cohabitation of 11 months was inadequate to establish a palimony obligation. While the court in

Zaragoza concluded that no agreement existed between the parties, either express or implied, it is clear from reading the entire case and the references to the length of time involved in the precedents, that the true basis of the decision was that the length of this cohabitation was not sufficient to warrant legal protection.

The *Zaragoza* court also noted that the commitment people make to each other, such as relinquishing other relationships, providing companionship and fulfilling needs financially, emotionally, physically and socially, is sufficient consideration to enable such contracts to be enforced, but that they did not exist in that case.[22]

This is similar to the limited duration alimony cases involving very short marriages where the parties enjoyed an elevated lifestyle. This is also similar to the case law in equitable distribution, requiring the court assume that a marital "partnership" existed and consider the sacrifices and contributions made by the parties during the marriage in the division of assets.[23] These considerations occur because not all relationships create legal duties and responsibilities. Before a court will impose a legal obligation, there must be some policy justification to do so. In the cohabitant setting, unlike a marriage, the relationship must be of sufficient duration to convince a court that a legal responsibility exists. Similarly, in a marriage, there must be some policy reason to justify imposing an alimony responsibility on a spouse.

Generally, that policy reason is reflective of the marital relationship with one party making economic and non-economic contributions or, alternatively, sacrifices in furtherance of that relationship. It is what happened during the relationship that determines whether an alimony obligation exists. Similarly, in the palimony analysis the law should focus on the parties' living circumstances. In that fashion the result is customized to realities of the parties' relationship and the rights, duties and obligations are created in effect, by what decisions the parties made.

When a court refuses to enforce a lifetime obligation to pay support for people who are young and the relationship is short, it is effectively holding that principals of fairness suggest that the parties did not intend for there to be a legal entitlement of the end. The remedy is linked to the nature of the relationship. Both *Kozlowski* and *Zaragoza* cited *Hewitt v. Hewitt.*[24] *Zaragoza* in particular relied on the *Hewitt* observation that before palimony would be imposed, the plaintiff had to demonstrate existence of a "stable family relationship extending over a long period of time," *i.e.* examine how both the parties conducted themselves. Utilizing merely a contractual analysis, the determination of "damages" focuses on the circumstances of only *one* party. And so critical concepts such as ability to pay or consideration of *both* parties' lifestyle become trivialized and are lost if one were to proceed solely under contract theory.

As such, a statutory framework should be developed setting forth several factors to be considered in palimony. Critical to assessing the financial circumstances of a case, especially as to the critical factors in every case, are need and ability to pay; moreover, a case information statement from each party should be a mandatory document in every palimony case. Doing otherwise creates a dual standard to resolve cases in the family part that cannot be justified on policy. Consistency is important, provided it is fair and furthers the public policy of equal protection under the law. But before discussing solutions for assuring fairness in palimony, we must first address how courts address fairness in other family law contexts.

There is a logical way to harmonize palimony principles with fairness and establish clear parameters that satisfy not only the parties' legitimate interests, but society's overriding concerns, all within the same governing legal principles and policy. Palimony law should not be aberrational; it should be consistent with the legal principles applied in the family part. Enforcing contracts in the family part is, and should be, distinctly different than in the commercial settings, where free enterprise concepts only allow the state to intervene if the contract is either unconscionable or void as contrary to public policy.[25] Given the uniquely personal relationship between parties in a palimony action, these cases must be treated differently than the typical commercial dispute.

As Justice Morris Pashman famously stated in *Lepis*, "contract principles have little place in the law of domestic relations."[26] Justice Pashman's choice of words is instructive—he was not limiting that broad policy statement to an analysis of alimony under N.J.S.A. 2A:34-23. Rather, he used the terms "domestic relations," essentially incorporating all actions now cognizable under Part 5 of our Court Rules—thus including palimony actions. At present, contract principles hold not only a "little place" but the *entire* place in palimony cases.

The Appellate Division has noted that specific performance in the family setting is an analysis that requires the consideration of *all* the circumstances.[27] Recently, in *Hogbin v. Hogbin-De Laurentis*,[28] an unpublished Appellate Division opinion written by two former family part judges, the court noted trial courts were "obligated to consider *the context* in which this dispute arose." (emphasis added)

They noted that:

> The law *grants particular leniency* to *agreements made in the domestic arena*, and likewise allows *judges greater discretion when interpreting such agreements.* Such discretion lies in the principle that although marital agreements are contractual in nature,

> *contract principles have little place in the law of domestic relations. Guglielmo v. Guglielmo*, 253 N.J. Super. 531, 542 (App. Div. 1992) (internal quotes omitted).[29]

This approach fits nicely with implied contracts, and is consistent with the overall body of family law interpreting agreements. The legal standard must be linked to policy, and when a standard creates unfairness as opposed to assuring fairness it is both poor policy *and* bad law. The state's interest is to assure fairness at the end of a relationship, not to guarantee a rigid inflexible contractual analysis that has nothing to do with fairness at all.

There is no greater evidence of the primacy of policy and fairness in family law than in examining the instances where courts have addressed conflicts between accounting principles and family law principles and issues. Both legislatively and judicially, government has recognized that abstract, but nonetheless legitimate and market-based accounting principles, must nevertheless give way when they conflict with implementing the broader policy considerations predicated on one simply fact: fairness is the *sine qua non* in family cases.

For example, it is a general accounting principle that when assets are sold, a taxable event occurs creating a liability for payment of capital gains taxes by the selling party. Yet, that broad-based principle was *not* applied to divorces.The policy determination is that it is inappropriate to tax people who are selling assets to each other "incident to a divorce."To implement this societal determination that people should not be taxed when they divide their assets in a divorce, Section 1041 of the Internal Revenue Code was adopted. That provision provides that sales, denominated as 'transfers,' between spouses are not taxable events so long as they are "incident to a divorce."

This policy determination was implemented in the Deficit Reduction Act of 1984, where Congress overruled the 1962 Supreme Court Decision in the *United States v. Davis*.[30]

Davis had held that transfers of property from one spouse to another, incident to a divorce, required recognition of gain or loss. By enacting Section 1041 of the Internal Revenue Code as part of the 1984 amendments, Congress made clear that for income tax purposes, no gain or loss will be recognized by the parties when there was a transfer of properties incident to a divorce. The policy determination to provide spouses special treatment is also exemplified by gift law, which is philosophically related to the Section 1041 transfers; in each instance spouses may make unlimited gifts to each other without gift tax consequences. Even children are not treated so liberally, since parental gifts are subject to gift tax rules. Only spouses have the unrestricted freedom to do as they please, a determination flowing from the status of marriage as a fundamental societal institution.

Another illustration of family law trumping accounting principles was the provision in the regulations relating to Section 71 of the Internal Revenue Code (IRC) permitting parties to designate otherwise taxable income (*i.e.* alimony) as *non-taxable* income. As with divorce-related property transfers, the determination was made that in transactions involving spouses, there was no public policy reason to have a bright line rule that alimony must be deductible by the payor and includable in the recipient's income. This distinction is particularly significant; it emphasizes that divorce-related transactions have traditionally been treated differently than other accounting transactions. For example, even if a person was an employee of a charitable organization, he or she must report their salary as part of their gross taxable income. Only if people marry do they have the right to designate income as tax-free income.[31]

A related, but different, area is child support income. It is an obvious policy determination to designate that cash flow to be tax free.

In fact, the alimony deduction itself is yet another example of policy dictating law. Until 1942, alimony was neither taxable to the recipient nor deductible by the payor.[32] That year Congress amended the Revenue Act to provide for deductibility. This provision was ultimately embodied in IRC Sec. 71 (215). Policy and the fairness it reflected, dictated the result.

Having linked the issue of policy to the development of law, the next issue is to define the policy. Certainly, as Justice Pashman made clear, it is not the strict, rigid, specific enforcement of a contract regardless of its terms or the impact on the parties, since that would be directly contrary to the very essence of our law: that at the end of a relationship, the parties must treat each other fairly. Fairness mandates the tax treatment of palimony payments be adjudicated uniformly. The case law in this regard is not clear.

Although it is the subject of another yet-unwritten article, the taxability of palimony awards to the payee and the deductibility of them as gifts or outright as if an alimony payment is not settled. For example, in *U.S. v. Harris*,[32] the 7th Circuit Court of Appeals reversed the convictions of two women on tax evasion for having received substantial sums from a wealthy widower with whom they had a relationship; however, the court refused to make a clear ruling as to the taxability of such payments. Instead, the court said:

> We do not decide whether *Marvin*-type awards or settlements are or are not taxable to the recipient. The only point is that the Tax Court has suggested they are not. Until contrary authority emerges, no taxpayer could form a willful, criminal intent to violate the tax laws by failing to report *Marvin*-type payments.[33]

In *Connell v. Diehl*,[34] a recent palimony case, the Appellate Division remanded the trial court's decision because the judge "made no findings with respect to the effective potential liability for payment of State and Federal taxes."[35] *Connell* involved a lump sum payment, but the issue seems relatively clear: In either event payments made in a cohabitation setting are *not* periodic payments within Section 71 of the Internal Revenue Code; hence, they are neither deductible by the payor nor includable as income on the part of the payee.

The failure to provide a standardized method of assessment for the tax consequences of a palimony award is a substantial pitfall for both the parties and the lawyers settling or trying a palimony case. Some standardized method must be adopted for the treatment of palimony awards. Perhaps a model can be adopted that mirrors the tax treatment of palimony and equitable distribution. By this the author mean that lump sum awards should be tax free and akin to equitable distribution, and monthly awards should be treated like alimony income and made deductible to the payor and includable to the payee. In this way, couples in a palimony matter would have the same menu of choices and the same protections as a couple in divorce.

There remains the important question of whether the lifestyle enjoyed by the cohabitants should be the basis for a judicial determination. Related to this is whether the ability to pay should also be considered in these cases. Certainly, in a marriage, the statute and the case law make both lifestyle and ability to pay an important factor. In the language of *Crews*, lifestyle is the "goal" to be achieved. The lifestyle analysis is relevant when the contract to be enforced is express, which requires, under present law, the calculation of a lump sum benefit. It is also relevant if the framework is implied contract. In the latter, there would be contract payments to be made by one party to the other, which would not be deemed alimony; thus, they would not be deductible under Section 71 of the Internal Revenue Code.

In *Connell supra*, for example, the Appellate Division found "no error in the exercise of the Judge's discretion in using Connell's post separation lifestyle as the base of her palimony award." The standard apparently was that support had to be "reasonably adequate and did not leave Connell reliant on public assistance, such as food stamps."[36] In language that was particularly significant, the Appellate Division noted that the case law "does not require that Connell be able to live just as before." Rather, the award need only provide reasonable support sufficient to meet "her minimal needs and prevent the necessity of her seeking public welfare," citing *Crowe v. DeGioia*.

Yet, is that the correct legal standard or a situation where an appellate court simply found a trial judge made a reasonable decision within the wide range of their discretion? Clearly, the requirement of an award tied to the lifestyle as articulated in a case information statement would avoid the harshness of the standard the Appellate Division seemed to be upholding, of avoiding a result where litigants are on public assistance. Such a standard treats litigants in palimony suits unfairly because it does not consider either party's needs and the payor's ability to pay. This yields results that are extreme.

In *Roccamonte*, the Supreme Court addressed lifestyle indirectly as well. The Court concluded that Mr. Roccamonte was concerned for what the Court characterized as the plaintiff's "economic well being," because they concluded he had provided for her "lavishly," and that it was highly unlikely "he intended to leave her in an impoverished old age." The Court reasoned that promise, if not express, was clearly "implied," and that the standard was that she be "adequately provided for during her lifetime."[37] There was no further discussion of what the term "adequate" meant. Again, a case information statement would have been helpful. Avoiding lifestyle, ability to pay and a case information statement in palimony cases vitiates any ability to understand the nature of the implied contract in its totality and any consideration of fairness.

In conclusion, the author would suggest the following factors be considered, either within a statutory framework or as an informal group of factors without fault being a consideration:

1. Length of the relationship;
2. Children born to the relationship, if any;
3. The degree to which the dependent party sacrificed their earning capacity;
4. Lifestyle—both before and after the commencement of the relationship;
5. Sharing of assets by virtue of titling them in joint names;
6. Each party's non-economic contribution to the relationship;
7. Age and physical condition of the parties;
8. Need;
9. Ability to pay; and
10. The tax consequences of the palimony award.

This is a perfect departure point to differentiate the rights of people who choose not to get married and those who do. The author believes people who live together and choose not to marry should not be treated differently than those who select marriage. Palimony cases should be analyzed within the framework of implied contract. The standard of living enjoyed by the parties during their relationship should be a *factor.* Fairness should be analyzed not only in favor of the payee, but also considering the payor's needs as well by analyzing ability to pay. Finally, as with married couples, unmarried couples should also both be afforded fairness in the

policy of palimony by a uniformity in the tax considerations arising from such awards. In sum, the implementation of a statutory analysis is needed in order to make palimony determinations consistent with the intent of the law, which is to afford equal protection under the law and fundamental fairness. ■

ENDNOTES

1. 164 N.J. Super. (Ch. Div. 1978).
2. 557 P.2d 106 (1976).
3. 195 N.J. 247 (2008).
4. *Devaney* at 254.
5. 203 N.J. Super. 22 (App. Div. 1985).
6. *Crowe* at 28.
7. *Williston on Contracts: A Treatise on the Law of Contracts*, Samuel Williston, 4th Edition by Richard A. Lord, 1990 (Lawyers Cooperative Publishing), Sec. 1.5. (emphasis added)
8. *See* Williston at Section 1.5 page 24.
9. *In re Estate of Roccamonte*, 174 N.J. 381, 392-93 (2002).
10. *See Kozlowski v. Kozlowski*, 80 N.J. 378, 390 (1979) (Pashman, J. concurring opinion).
11. 90 N.J. 126 (1982).
12. *Crowe* at 135 *citing McGlynn v. Newark Parking Authority*, 86 N.J. 551, 559 (1981); *State v. Shack*, 58 N.J. 297, 307 (1971).
13. 2007 WL 951953 (D.N.J. 2007) Slip. Op.
14. 383 N.J. Super. 1 (App. Div. 2006).
15. 195 N.J. 297 (2008).
16. *Carino* at 12-14.
17. *Id.* at 5.
18. *Roccamonte* at 389.
19. 557 P.2d 106 (1976).
20. *Roccamonte* at 389.
21. 201 N.J. Super. 55 (Ch. Div. 1985).
22. *Zaragoza* at 63-64.
23. *See Rothman v. Rothman*, 65 N.J. 219, 229 (1974) and *see also* N.J.S.A. 2A:34-23.1(a), (d), (e), (f), (g), (h) and (i).
24. 62 Ill.App. 3d 861, 380 N.E. 2d 454 (App. Ct. 1978).
25. *See Vasquez v. Glassboro Service Ass'n. Inc.,* 83 N.J. 86 (1980); *Henningsen v. Bloomfield Motors,* 32 N.J. 358 (1960); *Int'l Tracers of America v. Rinier*, 139 N.J. Super. 573 (App. Div. 1976).
26. *Lepis v. Lepis*, 83 N.J. 139, 148 (1980).
27. *See Schiff v. Schiff*, 116 N.J. Super. 546, 560 (App. Div. 1971); *see also Keppler v. Terhune*, 88 N.J. Super. 455, 465 (App. Div. 1965); *Stehr v. Sawyer*, 73 N.J. Super. 394, 404 (App. Div. 1949).
28. 2008 WL 2840689 (App. Div. 2008),
29. *Hogbin-De Laurentis* at 3 (emphasis added).
30. 370 U.S. 64 (1962).
31. *See* Reg. 1.71(T) Q8.
32. 942 F.2d 1125 (1991).
33. *Harris* at 1133.
34. 397 N.J. Super. 477 (App. Div. 2008).
35. *Connell* at 499.
36. *Connell* at 498-99.
37. *Roccamonte* at 395.

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Alimony: Law, Policy, Practice and Presentation

by John E. Finnerty Jr. and Amy Sara Cores

(Editor's Note: The original version of this article written by John Finnerty Jr., previously appeared in NJFL Vol. 19 No. 2 February-March 1999. Most of the original article has been reprinted, but it has been edited and updated by the authors. The guidance provided to practitioners is as relevant today as it was in 1999.)

There is a rich and bountiful body of law pertaining to spousal support. Is it possible to arrive at some theoretical formulation that would enable the construction of a model that could be used as the basis for accurate predictions about alimony awards? A review of the New Jersey jurisprudence inevitably leads to the conclusion that there is no organizing theoretical premise that enables precise predictability or model building. Rather, the law of alimony is an amalgam of concepts and criteria to be molded by creative lawyers in the service of the positions they advocate to judges and their peers.

We do our best work as lawyers when we can feel and understand the human perspective we seek to present to the court. When we intuitively come to understand that dynamic, we are best able to create an embroidery for the court that will assist it in understanding and assessing what is fair and appropriate. Courts depend on lawyers to present the human family perspective in connection with the conflict that must be adjudicated.

There is no area of the law in which as much discretion is lodged as practice in the family part. Our skills as advocates are challenged to make real the family dynamic we present to the court. One day we may appear before the court asking that a 10-year marriage result in rehabilitative alimony only, while the next day we may appear for the other side in another 10-year marriage advocating permanent support. We maintain credibility with the court only if we bring to life the distinctions in each family that justify the seemingly disparate results advocated.

This article identifies concepts and criteria that most often are utilized by the courts in attempting to calculate and assess appropriate spousal support. The article also discusses current issues relevant to each of these concepts, and offers practice pointers that will assist the practitioner in his or her day-to-day work, with both clients and courts.

ALIMONY: BASIC THEORY AND THE JUDICIAL ATTITUDE

The legislative mandate is simple. Courts are charged by N.J.S.A. 2A:34-23, "pending any matrimonial action brought in this State or elsewhere, or after Judgment of Divorce or maintenance," with the discretionary authority to "make such order as to the alimony or maintenance of the parties,...as the circumstances of the parties and the nature of the case shall render, fit, reasonable and just...." What a call to arms this jurisdictional grant provides! It places a premium on advocacy, providing there is some harmonizing commonsense premise to the position advocated.

Judges are people. Their personalities and values influence their analysis and determination of cases, particularly in the family part, where decisions on the ultimate issues in a case do not require analysis of complex commercial principles, but rather reflect an intuitive sense of what is fair for a family. How can we influence judges and help them do their work and reach results that are fair to the family while also favorable to our client? What tools can we use to persuade a judge to adopt our position—to make them comfortable with the end we seek to achieve?

1. Find Authority. It may help to let the judge know he or she will not be alone if he or she decides the way you suggest. Review the unreported opinion alerts that are available in summary form each day. You may be able to draw some authority that will offer comfort to a judge who you are asking to embark upon a new course. If the judge knows he or she is not alone, he or she may be more emboldened in his or her decision making. You also may get some ideas for cases that you are handling from the issues raised and decided the day before. "Just today, Your Honor, the Appellate Division held that…" are powerful words in the courtroom.

When you cite the authority, do not just string-cite cases or paraphrase holdings. Read the whole case. Make sure it applies to the facts of your case, and provide a relevant indented textual quotation for the court's guidance and assistance.

Also, review the entire case to ensure that the 'wonderful lan-

guage' does not also contain a result inconsistent with the position you are advocating. Taking a quote about rehabilitative alimony and its applicability under certain circumstances from a case that has facts similar to yours in which rehabilitative alimony was denied, will not only hurt your client's case, but also diminish your credibility with the court.

Do not misquote. Do not take a quotation in a case out of context. Not only will you embarrass yourself, but you will also enable your adversary to drive a wedge between you and the court and argue that neither you nor your client are being accurate with the facts. *Never allow that to happen.* Judges and their law clerks are not impressed with lawyers who quote Supreme Court cases that are completely out of context and do not stand for the proposition advanced.

When you present evidence, do not do so unfairly. Do not introduce bank account statements to show the small rate of expenditures and leave out the ATM advance section of the statement that shows other expenditures. Be the side that the court feels it can count on for truth telling. Make the court believe it can rely on you.

2. Know Your Client. If you are going to advocate a specific position on alimony, you need to understand the dynamics of the position you assert. If you are going to be able to effectively present who your client is to the court, you need to know and understand that client. In getting to know your client, you also get a sense of whether your client's demands are so wide of the mark they offend any sense of human reasonableness. If they are that wide of the mark, you have an obligation to bring them back to center. Again, you do not want to be perceived by the judge who is going to be deciding the case as seeking to effectuate an unfair result. You want to be perceived as the truth teller, and the conveyor of fair, logical approaches, based upon the facts of each case you present to the court.

How do you do this with each client in a presumed busy practice with day-to-day courtroom responsibilities? At the beginning of your relationship, give your clients copies of the statutory criteria for equitable distribution, child support, and alimony. Tell them to provide you with narratives of their marriages, including detail about the statutory criteria and any other thing they wish to call to your attention about the relationship. Encourage them to advise you of their concerns in writing, so you are fully informed and there is no confusion about what you have been told by the client. Encourage them to type their narratives so it will be easier for you to read them.

Schedule a meeting with the client early on to discuss these issues. Meet with him or her regularly throughout the case to discuss changes. Use email to have your clients send you information about the marital relationship or current events. Review the file regularly, so you do not have to 'cram' before a court appearance. Although these things are time consuming, they will allow you to best serve your client and make a more coherent presentation to the court. It is billable! So there is no excuse to not know the facts of the case and the relevant law.

Make sure before your client testifies in a proceeding that you spend time preparing them. Provide them with a script of questions you will be asking them. Organize the script in a way that is interesting, so the trier of fact will want to keep taking notes. You can only do this by going over your questions with your client and spending time with them before trial.

This serves two purposes. First, the client will be a better witness because he or she will not be as nervous and he or she will expect the questions and respond appropriately. Second, you will continue to learn information from your client that will assist you in presentation at trial. Never put a witness—your client or a third party—on the stand and ask a question for which you do not know the answer. Clients do not always know what facts are important. They frequently need to be told!

Try to empower your client by developing a lawyer/client fact-gathering presentation team. Engaging the client in the case preparation helps assuage anxiety. Help open up the client to the power of his or her own knowledge and perceptions. Educate a client so that if he or she has the slightest thought or question about a particular event or fact, he or she does not censor that thought or question, but rather shares it with you. Invariably, such thoughts or questions, when communicated, lead to other questions that serve as springboards for the acquisition of additional information and insights.

Explain the legal process to the client so he or she has some sense of what is about to unfold. Educate the client on case stages, the importance of thinking in terms of evidence and how a case is about 'provable truth.' Encourage your client to take notes and repeat the information as many times as is necessary. As attorneys, we hold the keys to unlock the doors to the courthouse. It is our duty to guide our clients. However, you are only as effective an advocate as your client is forthcoming with information. Do not just request bank statements; explain what you will use them for in the course of the litigation.

3. Using Associates. Obviously, those of us who are fortunate enough to develop busy practices sooner or later conclude we must hire associates, not only for our own ability to earn money, but to assure physical survival. If you are going to hire an associate, you cannot simply look at them as a profit center that will generate a certain number of billable hours that can be multiplied by a certain billable

rate. You have an obligation to train them. If you want them to do the kind of work that will reflect well on you, and your client, you must teach them. You must inspire them to want to learn and to want to do good work.

You cannot just send a junior lawyer in to meet with a client and tell him or her to fill out a case information statement and submit it to the court for the *pendente lite* support application. That is an invitation for disaster. Provide them with case memos after you have completed the intake on the case, so they have an idea of the themes you want pursued and the approaches you want explored. It is too much to ask a young lawyer to conceptualize a case from a human perspective. They have neither the legal experience, nor the maturity, to fully ferret out the subtleties of the human situation that should be presented to the court.

4. Strategize and Analyze Your Allegations. As you present pre-trial certifications to the court, do not simply write conclusions. Do not simply accept your client's assertions about what is, without questioning him or her regarding the basis for those assertions. Inquire about factual predicates. Break things down to the most fundamental building blocks.

Think in terms of evidence. Every word that is written in a certification is grist for the mill of cross-examination. Be a devil's advocate with your client and make him or her provide you with the basis for whatever he or she is telling you about their economic life, to the extent that they can. If the litigant says: "I know my husband took cash from the business," ask how she knows this. The fact that he always had $200 in his pocket as a factual predicate for that conclusion is far different in impact than admissions that $5,000 in cash was being glommed weekly, or that envelopes with scores of $100 bills found their way into the safe deposit box weekly.

Try to think in terms of the factual basis of conclusions rather than simply the conclusion itself.

5. Statutory Criteria. When a case begins, you should try to organize the alimony case—and the balance of your case—by reviewing the statutory factors the Legislature has identified must be considered by courts in making an award or denial of alimony. Your trial proofs should similarly be marshaled and presented with these statutory criteria in mind. Although it is not suggested you necessarily organize the entire trial examination solely by reference to questions pertaining to statutory criteria, you should formulate your questions, evidence, and summations so the mosaic of information required by these criteria is presented to the court. Remember not to elevate one factor to the exclusion of another. In *Boardman*, the Appellate Division reversed a trial judge's alimony award in part because he failed to consider all the statutory factors.[1] Moreover, in *Carter*,[2] the Appellate Division reversed a post-judgment conversion of rehabilitative alimony into permanent alimony because the trial judge did not review all of the statutory factors before ruling such a conversion should occur. The trial judge had focused on the issue of marital lifestyle.[3]

The following is an overview of the statutory factors and the case law that has developed around each. The authors have omitted a full discussion of the 'duration' factor, since there is another article in this volume addressing this factor specifically. The issues addressed below are equally applicable to the *pendente lite* and final hearing phases of the case.

ACTUAL NEED AND ABILITY OF THE PARTIES TO PAY

It is important to present a net/net disposable income analysis. Have an accountant perform a calculation that demonstrates the after-tax impact on each party in terms of available disposable income as a result of the implementation of various permutations and combinations of alimony and child support awards. Alternatively, provide the court with an analysis using one of the many software programs available. Compare which party is above or beneath budget based upon this net/net analysis. If there is a nonsensical demand for alimony and support, chart mathematically what the impact will be.

In ascertaining the tax rate to be plugged into the net/net formulation, do not use the tax tables, which may not be reflective of the *actual tax* rates the parties experience by virtue of the deductions they have. Use the tax returns to arrive at appropriate tax rates. Of course, those returns reflect certain deductions that may not be retained by each party after divorce; therefore, in connection with final hearing, there may be some reassessment of the tax rate assumptions about which you provide information to the court.

Pendente lite applications are important because they set the tone of the case. If you get off on the wrong (or right) foot, it creates leverage for the balance of the case, client relations problems, and potentially increased costs because each side will dig in. The winner—feeling justified—may refuse to settle for less. The loser—feeling either a loss of hope or the need for Armageddon—may hold out for the solace of retroactive relief, which likely can occur only at the final hearing. Therefore, it is important during the *pendente lite* phase to provide judges with sound, hard evidence that will enable them to provide a modicum of fairness to both sides until the final proofs are submitted. An inappropriately high or low *pendente lite* award will deter fair resolution of the case, and really is the worst thing that can happen to both litigants.

The case information statement (CIS) is the initial presentation of needs. It is important to consider whether you want to distinguish in your CIS between needs of a spouse

and needs of children. It may be difficult to do this at the commencement of a case, when you are trying to establish *pendente lite* support. Moreover, if the family continues to live together it may be unnecessary to do so at that juncture, since you are seeking only to maintain the status quo, and to make sure there is enough money for the entire household to continue to exist.

Always be careful to accurately identify the number of people whose needs are presented in connection with the support request. The CIS form requires delineation of such information. If your client simply reviews a check register of expenses without making adjustments, then the expenses listed are probably those for the entire family, including the other spouse. This point needs to be made to the client in connection with the preparation of the CIS. This is particularly important for the final CIS, which presumably anticipates spousal separation. An allocation of expenses between wife and children makes easier post-judgment reviews on applications for increased child support or alimony. However, you may not want to facilitate that review. Needs may change in the future. If you lock into an allocation now, you will be limiting the base line expenditures that will be reviewed in connection with application post-judgment for increased alimony and/or child support.

The form found in the Appendix to the Rules of Court, or generated by the computer software many practitioners use, is a baseline. You can attach as many exhibits or schedules as necessary to accurately set forth the family lifestyle, or as may be necessary to advocate for your client. If your client has an unusual or extraordinary expense, provide the court with documentation. Pictures dramatically help drive home lifestyle.

If you represent the paying spouse, you must make clear that your client has his or her own expenses. This, of course, naturally will be done in connection with final trial, because the CIS will contain actual expenses if there has been a separation, or reasonable estimation of expenses based upon future separation. However, during the *pendente lite* phase, do not presume the dependant spouse is going to allow life to continue as usual with support ordered paid to be available for product purchases for the payor. There actually have been cases where the supported spouse put a combination lock on the refrigerator so the payor spouse would not have access to the food in the refrigerator.

The CIS is also the initial repository of information about the ability to pay. The paystub your client receives may not accurately set forth earnings for the year that will reoccur the following year. If separate paystubs are not provided for bonuses, then of course there is a potential for inaccuracy going forward, because the bonus may not be the same or guaranteed. Moreover, the paystub may reflect both an old salary level and a salary increase. You must make clear, and explain in riders, what the income means and the actual periodic regularly reoccurring income level.

Be careful not to routinely engage in wide-ranging restraints or preliminary injunctions with respect to use of accounts. Wall Street movers and shakers frequently have minimal salaries, but huge bonuses that come all at once at the beginning of the new year, or in two payments, one at the end of the year and one at the beginning of the next year. As a result, the marital lifestyle may have been maintained by using the 'savings' from these bonuses. Assuming the same lifestyle is to be maintained *pendente lite*, you must maintain for your payor clients the ability to spend this money on a *pendente lite* basis. There will be no fathomable way in which high expenses can be met unless accounts are used, as they were during the marriage.

Whatever you do, make sure you fill out the CIS carefully. Define the terms so the CIS cannot be used against your client in the future. It is a form filled out under oath, and it is impeachment material after it is signed, filed, and exchanged. At the beginning of the case, these CISs may not be as reliable as those prepared at the end of the case, after discovery is completed. Use schedules to explain the varied components of income. Explain that it may not be reoccurring. Make clear that expenses are estimates subject to forensic lifestyle analysis. Frequently, the provision of information is estimated. Make sure you indicate in the document that it is estimated, and the basis for the estimation. If your client does not have the information to complete the form, simply indicate that an expense or asset exists, and that you will provide an updated document after more discovery is exchanged. That will curb use of the document for impeachment purposes.

ABILITY TO PAY AND RELATIONSHIPS WITH CHILDREN

With respect to ability to pay, if a man during his marriage works two jobs, 80 hours a week, because he wants to save for the family's future, and can see his children daily since he works in his home, must he continue this level of work to maintain a comparable lifestyle after a divorce and separation? If the income from one position places the earning professional in the 95th percentile of income levels in America, must he nevertheless continue with the extra 30 to 40 hours per week? Does a new separated status, including separation from his children, now allow him to work more normally so he will have time available to see them?

In at least one case, the answer was "yes." In a case involving a doctor who also was a hospital staff doctor and consultant and expert witness, the agreement was premised upon a negotiation of a fixed amount of money through

which support would be calculated, based upon more normalized work efforts. This agreement was negotiated following input from the court during settlement discussions in the midst of trial.

The court in *Innes* focused on the higher-earning spouse's ability to earn enough to satisfy the expenses of the family.[4] In *DiPietro*,[5] the court discusses the dependent spouse's skills in relation to her ability to contribute to her own needs; and in *Clarke*,[6] the court concluded that it was within the trial judge's discretion in addressing earning capacities to employ as a benchmark the amount of time the plaintiff had devoted to his work during the marriage, and to expect him to continue working at that level.

In *Steneken*,[7] the Supreme Court held that the actual income of the paying spouse is the lodestar for determining the extent of that party's alimony obligation. However, the supporting spouse's property, capital assets, and capacity to earn the support awarded by diligent attention to a business are also proper elements for consideration. A trial court's determination of alimony is subject to an overarching concept of fairness.

The cases reflect that there are no bright-line tests or hard and fast rules that enable you to predict what an alimony award will be or its duration.[8] Advocates are left to their own insights and intuitions when presenting their cases. As has been stated repeatedly over the decades:

> …because no two cases are exactly alike (*Bonanno v. Bonanno*, 4 N.J. 268, 274 (1950), neither bright-line tests or hard and fast rules should be imposed when imputing a reasonable rate of return any more than when determining an appropriate award of alimony. *See, e.g.* N.J.S.A. 2A:34-23(b)(13) (requiring a court to consider, in addition to twelve enumerated factors, [a]ny other factors which the court may deem relevant"; *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 157 (App. Div. 2002) ("[A] court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied." (*quoting Graziano v. Grant*, 326 N.J. Super. 328, 342 (App.. Div. 1999); *Habble v. Habble*, 99 N.J. Eq. 53, 56 (Ch. Div. 1926) (A particular method for determining alimony "is only a guide, and not a hard and fast rule. Each case must be separately judged according to the circumstances.") *See also, Alston v. Alston*, 331 Md. 496, 629 (1993) ("[N]o hard and fast rule can be laid down and … each case must depend upon its own circumstances to insure that equity be accomplished."); *Tracey v. Tracey*, 328 Md. 380 (1992) ("[E]quity requires sensitivity to the merits of each individual case without the imposition of bright-line tests").[9]

Lawyers must rely upon their instincts and analysis in crafting arguments that bring to life to the trier of fact the realities of the human situation about which a decision must be made.

DURATION OF THE MARRIAGE

Charles Vuotto and Lisa Steirman Harvey have prepared in this issue of *New Jersey Family Lawyer* an excellent analysis of unreported and reported opinions in an attempt to opine whether there is any correlation between length of marriage and the nature of the alimony award, *i.e.*, permanent or LDA, and the duration of the LDA award. They say the law requires a clear definition by the Legislature or the courts of terms such as "short-term marriage," "intermediate-length marriage," and "long-term marriage." Vuotto and Harvey come down on the side of giving predominate weight to the characterization of marriage duration in ascertaining whether an award should be permanent or limited duration, but they also acknowledge the length of the marriage should not be the only consideration.

The authors agree, but believe the underlying nature of the marital relationship, the economic dependencies created during the relationship and contributions made need to be carefully considered before making a final assessment. A long marriage for one judge may be of moderate length for another, and short for yet a third. Whether a judge perceives a marriage as long, short, or moderate in duration may depend upon the judge's own state of marital bliss, about which, of course, you will never know. A practitioner will be aided by careful review of the Vuotto/Harvey analysis and citation of the facts of various reported and unreported opinions.

Simply because a marriage is long—whether it is perceived to be long because it is eight years, 10 years, or 26 years—does not automatically create permanency. You must advocate to the court all the factors that have to be considered and evaluated when assessing the appropriateness of particular kinds of alimony. The skills of our learned craft should facilitate our ability to marshal facts from our clients, and to present them based upon our knowledge of ever-evolving principles of law and their application from case to case. Preparation is key. There are no bright-line tests or hard and fast rules, but there is creativity and ingenuity, which always must be tempered against the knowledge that decisions in these matters are substantially fact sensitive and subject to the biases and values of the judges who daily try to sort out what is fair and equitable.

In *Hughes*, the panel took "issue with a ten year marriage being a considered a short term marriage." It distinguished the length of marriage in the case before it with the length of the marriage before the trial court in *Skribner*,[10] where the marriage was only a year and one-half, and *D'Arc*,[11] which was a marriage of three and one-half years duration.

Although acknowledging that it took issue with the 10-year marriage being considered short term,

the court also opined that "perhaps because the marriage was of an intermediate length, defendant need not be supported in the standards of the very summit of the parties' lifestyle..."[12]

However, the cases teach us that even after the appropriate label has been affixed to a particular marital length, there is not always a precise correlation between the length of the marriage and the proper amount or duration of alimony.

Justice Morris Pashman said:

> However, the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula. Where the circumstances of the parties diverge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune—the fate of their shared enterprise.[13]

In *Wass*, the court discussing appropriate alimony for a nine-year marriage, said that:

> Even a party capable of retraining under a temporary alimony scenario might still be entitled to some permanent alimony to finally maintain a comparable standard of living as experienced during the marriage.[14]

However, in *Heinl* the Appellate Division reversed and remanded a trial court decision that did not consider rehabilitative alimony before awarding permanent alimony to a wife who held two part-time jobs and had been employed full-time prior to the birth of the parties' child in a marriage that lasted approximately seven years.[15]

Moreover, in *Carter*, the appellate court particularly was concerned that the trial judge had not considered the duration of the marriage factor when converting rehabilitative alimony into permanent alimony. The court noted that the parties had been married only approximately nine years before separation, and that it was "not clear from those facts that an award of permanent alimony would have been considered appropriate *ab initio*."[16]

However, the authors note that the cases that discuss duration of the marriage and affirm or reverse alimony awards do not do so solely on the basis of that factor. The message is that when you make your arguments for a particular kind of alimony, you should do it not simply based on a uni-dimensional analysis, which emphasizes one factor to the exclusion of others. Integrate and interrelate your factors. Emphasize the age and the physical condition of the person at the time of the end of the relationship.

There is confusion in the courts regarding what the actual impact of marriage duration should be, and there are no bright-line rules. Duration of the marriage is important, but so is the economic condition of the parties at the end of the marriage, the equitable distribution the parties receive, and the ability of a person to work to contribute to support, as well as the contributions and sacrifice made during the marriage by each that bears upon what is fair at the conclusion of the union. Do not hesitate to argue, on behalf of a payor spouse, that despite an absence from the job force, assuming physical and emotional health, the policy of the law should be to encourage economic self-sufficiency by encouraging the supported spouse to return to the workforce. A spouse is more likely to have enhanced self-esteem by going to work and developing new associations, rather than staying at home and obsessing concerning the failed relationship.

THE AGE, PHYSICAL AND EMOTIONAL HEALTH OF THE PARTIES

As stated in discussion of the prior criteria, the age of the parties at the end of the marriage is as least as important as its length. A woman at the end of an eight-year marriage who is 46 is in a far different position than a woman at the end of the eight-year marriage who is 32, with no parenting responsibilities.

In *Heinl*[17] the court found that a younger divorcee has a better opportunity to obtain employment than does an individual who has been married and out of the work force for many years." In *Staver*[18] it was "significant" that the wife was age 64 at the time of the divorce, and in *Skribner*[19] the court found that age 40 presented a lack of impairment to employment efforts. In *Hughes*,[20] although the wife was in her mid-40s at the time of the divorce, the court weighed more heavily the income of the husband and lifestyle of the parties.

If there is a contention concerning physical or emotional infirmity, then obtain an expert to support your conclusion. If you are contending your client is unable for physical or emotional reasons to work, that contention, in the authors' view, cannot be established or accepted without an expert opinion.[21]

STANDARD OF LIVING ESTABLISHED IN THE MARRIAGE AND THE LIKELIHOOD EACH PARTY CAN MAINTAIN A REASONABLE AND COMPARABLE STANDARD OF LIVING

The pertinent measuring unit for the marital lifestyle is not the lifestyle enjoyed at the date of the filing of the complaint, but rather the lifestyle enjoyed until the parties separated.[22]

Consequently, if you are representing the supporting spouse and there has been a significant increase in income between separation and complaint filing, be careful to carefully distinguish between these levels. Your emphasis must be on the former level rather than the latter, because it is this level that the law recognizes.

Conversely, if you represent the supported spouse, you want to have a large color blow up of the opinion in *Guglielmo*, more particularly that portion of the opinion

where the judge said, for a unanimous panel:

> Where a family's expenditures and income had been consistently expanding, the dependant spouse should not be confined to the precise lifestyle enjoyed during the parties' last year together. Defendant's income picture should be viewed with an eye toward the future, since it was to this *potential* that both parties contributed during the marriage.[23]

If you represent the supported spouse, and if the supporting spouse's income has grown during the time between the separation and the eventual trial, and his or her employment has remained the same, you want to highlight that it was because of your client's contributions. He or she was there at the beginning of the climb up the corporate ladder, and without his or her support the climb would not have started. In other words, he or she would not be on the ladder if it were not for your client.

Telling too, in terms of having an impact upon the judicial consciousness or conscience, is a comparative presentation of what the parties did when they were together and what each has been able to do since the separation prior to the divorce trial. If one party is continuing to enjoy the old standard of living, or has an enhanced standard by virtue of earnings growth since the separation, but nevertheless meagerly seeks to screen every nickel and dime of your client's expenditures, you need to point that out to the court. To do so, you need to be aware of it, and to be aware of it you need to have current information about what the supported spouse is earning, accumulating, doing; where he or she is vacationing; and the like. All of this information is required to be provided to you based upon the statutory factors that set forth that current financial circumstances are relevant considerations. This enables you to collect data about current credit card expenditures, corporate perks, expense accounts, vacations, recreational patterns, purchases, etc.

In *Crews* the Court instructed that: "The goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."[24]

However, the Court also found that a statement regarding maintenance of the marital standard of living was essential to a future analysis of changed circumstances, regardless of whether the original spousal support award was entered as part of a consensual agreement or a contested divorce judgment. Four years later, in *Weishaus*[25] the Supreme Court "clarified" *Crews* in part, holding that the trial courts have the discretion to allow consensual agreements that include provision for support without rendering marital lifestyle findings at the time of entry of judgment.

Of course, Rule 5:5-2(e) fully defines the parties' obligations with respect to marital standard of living declarations. It may be that the parties are unable to define a marital standard of living and do not even want to bother to take the time or spend the money to have lifestyle analysis done. The rule provides a perfect out by simply allowing parties to maintain copies of CISs, or preparing Part D of the statement if no CIS has previously been prepared in the litigation.

To the extent that the parties can agree on what the marital lifestyle is, they are ahead of the game in connection with potential future reviews. However, many litigants simply do not wish to incur the substantial expense attendant to preparation of lifestyle analysis, and do not wish to take the time out of their busy lives to try to reconstruct the way they spent their money over the prior two to five years. The rule now provides a menu of options for people with respect to dealing with the issue of lifestyle definitions.

How the lifestyle enjoyed is created should be relevant, but it may not be. In *Hughes,* the appellate panel rejected the trial judge's limitation of the marital standard of living to that which was effectuated without regard to excessive borrowing.[26] The appellate court stated:

> The standard of living during the marriage is the way the couple *actually lived*, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income.[27]

The panel disapproved of the trial judge's view that the defendant/dependant spouse was to exist on support that would have kept her at the reduced level of lifestyle the couple would have had without borrowing, which at the same time recognized that the plaintiff would be able to resume the higher standard of living, based upon his current actual earnings. The post-separation actual earnings were to be considered, not in the context of determining the appropriate marital lifestyle, but with reference to whether the supporting spouse was able to afford to maintain the supported spouse at the lifestyle reached during the marriage, regardless of how that style was created.

The court noted that the parties' decision to continue the lifestyle even after earnings decreased through debt was relevant because it was a recognition by the parties that the earnings would return and the debt could be satisfied. The *Hughes* court analogized to the law's tendency to hold payor spouses to a support level set at an economically more prosperous time, where there have been temporary setbacks in business or a change in careers.[28]

It is interesting how the court came to the conclusion that a lifestyle created by borrowings was a lifestyle to which the parties were to be held going forward. The court

stated:

> During this time they chose not to change the way they lived, even though it put them in debt, because they *apparently realized* that once the real estate market recovered, plaintiff would most probably resume his former income, enabling them to repay their debt without having had to change their standard of living. [emphasis supplied][29]

There was no evidence in the record cited for the conclusion about the "apparent realization." It is just as likely to assume that these people simply were living above their means.

However, the Appellate Division did not say, in its holding, that if the actual earnings or earning capacity was not available, the parties, or one of them, had to borrow after divorce to maintain the same lifestyle. Perhaps it is not as important how you assess or find a lifestyle, so long as the obligation to maintain it after divorce is based upon actual earnings or a proven capacity to earn. This case does not stand for the proposition that borrowings must continue after marriage to maintain the marital lifestyle originally created by borrowings. In *Hughes*, the parties actually had at one time earned enough to create the lifestyle, but after economic misfortune, they chose to maintain that lifestyle through borrowings. Certainly, the lesson learned in this post-subprime world should impact a court greatly when assessing whether a prior lifestyle occasioned by debt creation should be the basis for an ongoing support award, in the absence of current earnings to support such spending.

The marital lifestyle is a measuring stick to ascertain the appropriate quantum of support, *after analyzing the other statutory criteria*, including the supported spouse's ability to contribute to that support. In *Carter*, the appellate panel emphasized again the need to relate the alimony award made to the standard of living of the parties during the marriage.[30]

However, the proofs presented to establish lifestyle are critical. In *Heinl*,[31] although criticizing the trial court for certain aspects of its decision, nevertheless a unanimous three-judge Appellate Division panel supported the trial court's reduction of the plaintiff's claimed lifestyle requirements. The trial court had reduced the sum the plaintiff claimed she required to maintain the marital lifestyle because cross-examination revealed her itemized expenses were "speculative and in many respects, unverified."[32]

How does one best present proofs of lifestyle? The more precise and documentary your proofs, the more comfortable the trial court will be in adopting your client's position. Consequently, obtain the records that were utilized by the family to spend money for pertinent times prior to the separation, *e.g.,* checking accounts, credit cards, check registers. To deter arguments that you are cherry-picking for a particular time period, talk with your client about pertinent years and levels of spending, and select different time periods. Make sure you get records for all accounts that are used. This requires careful review with your accountant, you, and your client. Do not double-count transfers. Have an accountant prepare a report based upon a review of the expenditures (credit cards, cancelled checks, or whatever payment methodology was used) in categories that track CIS line items. If there were one-time capital improvement expenses, or extraordinary expenses for other reasons, they should be identified and highlighted separately. If there are large cash expenditures and there are questions about the appropriateness of these expenditures (drugs, glomming cash for a war chest, etc.) these too should be quantified and identified, and summaries prepared with and without inclusion of this as part of the day-in/day-out lifestyle. If it is alleged that a post-separation or a post-divorce enhanced lifestyle has been manipulated, your trial exhibits should reflect charts or blow-ups comparing what is sought with what used to be. For economic reasons, you may not be able to employ all these investigative or time-sensitive techniques in every case, but the concepts can be carried over to some degree in any case, and utilized to organize your proofs.

Certainly, you may not be able to do a mathematical accounting analysis if the case involved glommed cash, which was spent out of a safe deposit box or some other secreting place. People glomming cash 'professionally' do not deposit it into bank accounts. In those cases—or in any case—pictures help. Pictures of family vacations, or palatial residences, expensive cars parked in driveways, special holiday celebration parties, bar mitzvahs at fancy hotels, recreational vehicles, boats, basement jukeboxes, video games, certainly demonstrate in a very compelling way how people live their lives. Any document evidencing substantial expenditures accomplishes the same purpose, but there is something about pictures that brings it all home simply and sweetly. However, when you use pictures, try to get them for a wide timeframe so the lifestyle is consistently demonstrated.

With respect to the issue of lifestyle, what about the relevance of corporate perks that were freely available to the non-employee spouse? Perquisites create an enhanced lifestyle that will no longer be available to the supported spouse following the divorce. To replace them will cost more money. Perquisites, such as corporate boxes for athletic events and concerts; trips for business-related ventures that are recreational as well; accumulation of business frequent flyer miles, which are allowed to be personally retained, provide lifestyle enhancement at nominal or no cost.

Is this corporate or business

largesse any different from gifts or loans from third parties or family that helped create the lifestyle? Should these be legitimate lifestyle considerations? Should the court's inquiry be whether the supporting spouse has sufficient income or earning capacity available to allow the supported spouse to continue to participate in that lifestyle, even though it is no longer available through the corporate association? To be sure, these benefits, when paid for personally, will be far more costly than when they are made available through corporate or business offices, but it is the lifestyle the courts have said is important, not how a family got the lifestyle.

In assessing the issue of lifestyle and its impact on courts, the case of *Glass* is instructive.[33] Although lifestyle is a significant criteria that must be considered and assessed when setting support, that too is not a factor that can be assessed in a vacuum. In *Glass*, the husband sought to terminate his $1,000 a month alimony payments to his wife,which had been negotiated as part of a final divorce settlement in 1986 following their marriage in 1974.

The husband opined that the wife's earnings had risen to a level where she no longer required his alimony payments to maintain the marital lifestyle. The judge granted the plaintiff's motion, concluding that the wife had not demonstrated that she continued to need the former husband's support to maintain the standard of living during the marriage. The appellate court reversed and remanded the matter based on *Crews* for a specific finding of the standard of living established during the marriage.

The trial court conducted the hearing pursuant to the remand instruction and terminated alimony based upon its finding of marital lifestyle, concluding that the wife could maintain the lifestyle without alimony. The trial judge concluded there were no equities that weighed in favor of not terminating the husband's alimony obligation because the wife failed to show that she gave any form of consideration in exchange for a guarantee of support to make reducing or terminating alimony inequitable.

The Appellate Division reversed the trial court's decision and reinstated alimony with a remand on the issue of counsel fees. The Appellate Division concluded that the court's "numbers inquiry and analysis" was too narrow and too limited, and that the parties' agreement upon dissolution was entitled to significant consideration. The court said:

> We fail to understand why the judge could not consider what appears obvious to us that defendant waived any interest in plaintiff's business present or future in consideration of her future security provided by permanent alimony.[34]

The court concluded that at the time of the agreement, the parties knew the defendant wife would have to be employed to contribute to her support to create security for her future. The appellate panel concluded that this understanding at the time of the execution of the property settlement agreement should have been considered by the trial court. To do otherwise, the panel asserted, was "to reduce the change of circumstance hearing to an accounting analysis, a result neither mandated nor contemplated by *Lepis*, *Crews*, or any other cases interpreting those holdings."[35] The panel concluded that the analysis required careful scrutiny, not only of needs and resources to maintain the marital lifestyle, but also an analysis of "understandings, aspirations, expectations, and the intentions" of the parties.

THE EARNING CAPACITIES, EDUCATIONAL LEVELS, VOCATIONAL SKILLS AND EMPLOYABILITY OF THE PARTIES

If earning capacity is an issue, you need to retain employment and vocational experts to evaluate the actual capacity to earn of the party in question. If questions of underemployment arise, we have guidance from the Appellate Division regarding the appropriateness of findings about being voluntarily under-employed.

In *Dorfman,* the Appellate Division reversed the trial court's conclusion that there had been no change of circumstance proved by the payor because for five years in the past he earned $90,000 to $120,000, and that, therefore, such income should reasonably be imputed to him.[36] Although the case involved imputation of income for child support, the court's comments about the predicates for imputation are equally authoritative with respect to alimony issues.

Judge Robert Fall stated:

> Underpinning the basis of every support order is the proposition the payor has the ability to pay the amount set or agreed to. Inherent in the finding of underemployment is the notion the obligor is intentionally failing to earn that which he or she is capable of earning.[37]

In commenting on such a finding on the face of the record in this case, Judge Fall identified all the defendant had attempted to do, and thereby provided a road map for those who wish to assure they have, in good faith, sought employment after a loss of income or termination.

Judge Fall stated:

> All the information then before the court leads to the conclusion he was not underemployed. Defendant was involuntarily terminated from his employment of seventeen preceding years in September, 1996. There was nothing in the record to suggest his termination was induced by misconduct, or that it was voluntary. He immediately sent out resumes, followed through with telephone calls and arranged for interviews. He received one offer in the $40,000 range and eventually accepted employment at the $60,000 per

> annum rate in October, 1996. This was a significant salary reduction, clearly constituting change circumstances. Defendant also lost the benefit of employer-supplied automobile expenses allowance, health insurance, and life and disability insurance. He was able to defer filing his modification motion until July 1997, because he received a termination benefit, and had reduced his weekly contribution to the extraordinary expenses of the children from $140 to $71.[38]

With respect to imputation of income, noteworthy is Judge Fall's comment about Mr. Dorfman's loss of his job not being attributable to his misconduct. Does this mean that if someone has lost a job because he or she is not working hard enough, flirted with the receptionist, or whatever other reason creates culpability, the income imputed should be what the job would have paid if he or she kept it?

To what extent does the law require someone who has worked in a job and earned a certain sum of money, who is miserable at that job but cannot earn as much money at a job that is gratifying, continue the position so that his or her family can be supported at the same level? Is there a different answer to that question, depending upon whether the person involved has been the primary breadwinner, or is the supported spouse who is returning to the workforce? Do factors 6, 7, 8 and 9, which the authors characterize as the rehabilitative alimony factors, create a special status for spouses who have been out of the workforce, giving them an opportunity to retrain themselves for meaningful positions they prefer and have interest in, rather than the first job at Burger King that comes along? To what extent must a woman who has been out of the workforce for a substantial period, but is returning, return to the same kind of job that she had before she left to raise children, even though she has a burning desire to do something else?

Can one reasonably argue now, based upon Factor 8, that a person who has been out of the job force and requires education or training to find 'appropriate' employment, may hold out for a job of preference rather than employment of necessity? The authors believe the answer depends upon the economic situation of the family. If the husband has had the opportunity to develop his career and the family is reasonably comfortable, with no dire economic emergencies, it is reasonable that the wife should have an opportunity to pursue and explore training and careers in which she has interest, rather than to return to what she may have done as a young woman before her marriage. If she was supportive to her husband while he found and developed his career, then the law should seek to enable her to accomplish the same. However, if there is an economic crisis or a serious shortfall, then gratification may become the stepchild of economic necessity. This likely would occur as well in the intact family and, therefore, the result does not seem unconscionable or unfair.

What of the man who has been planning at the time of the divorce to begin a new career; who has planned to take some of the savings that have been accumulated while he has miserably slaved away performing laparoscopies for 20 years and to go to law school and publish law books? What if that was the plan the couple had agreed upon and worked toward for some time?

The authors do not believe there is necessarily any right answer to these questions, but they are human issues that can be articulated for a court with respect to balancing equities and fundamental fairness. This is what is meant by sensing the human perspective in a case and articulating issues in a way that will touch the court's basic human instincts.

REHABILITATIVE ALIMONY FACTORS

The following factors are collectively referred to as rehabilitative alimony factors in this article, because they pertain to the calculus of weighing permanent as opposed to rehabilitative alimony.

i. Length of absence in the job market of the party seeking maintenance. (Factor Six)
ii. Parental responsibilities for the children. (Factor Seven)
iii. Time and expense necessary to acquire sufficient education or training to enable the parties seeking maintenance to find appropriate employment and opportunity for future acquisition of capital assets. (Factor Eight)
iv. Contributions to care and education of children, which result in the interruption of personal careers and educational opportunities. (Factor Nine)

The basic premise of an award of rehabilitative 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, as stated in *Wass*.[39] As the court said in *Wass*:

> Effectively, rehabilitative alimony is term alimony payable for a reasonable period of time, beyond which it is anticipated such support will no longer be needed.[40]

Clearly, rehabilitative alimony may be converted to permanent alimony if at the end of the rehabilitative term need still exists.[41] However, there appears to be some judicial sense that a marriage of 'medium' duration mitigates against the dependent spouse being supported "to the standards of the very summit of the parties lifestyle." While recognizing that the supported spouse is not to be 'cast adrift' after a brief period of rehabilitative alimony, and concluding that the supported party need not return to the premarital standard of living lower than that of the supporting party, nevertheless, the court con-

cluded in *Hughes*:

> On remand, the trial judge should reconsider this issue with a view that defendant is to receive permanent alimony, but perhaps at some reduced rate to reflect a marriage of this medium length. The rehabilitative alimony ordered should be blended into such an award so that once her capacity to earn income is established, defendant's lifestyle can be maintained, perhaps not at the full level of plaintiff's, but somewhat reflective of how the parties lived during their marriage.[42]

It is as if a supported spouse, following the marriage of a certain duration perceived by a court to be limited, has no entitlement to maintain the lifestyle achieved during that marriage, unless there are medical or emotional reasons that prevent her from being weaned from support.[43]

REVIEW OF REHABILITATIVE ALIMONY AGREEMENTS

The *Carter* case dramatically impacts both the manner in which rehabilitative alimony agreements are negotiated and the trial practices imposed on courts when putting through divorces with agreements that provide for rehabilitative alimony.[44] The Appellate Division ruled that trial judges, when "putting through" divorces in settled cases that contain rehabilitative alimony provisions, must inquire about the parties' understanding and intentions with respect to the rehabilitative award memorialized in the agreement. In order to facilitate review of a rehabilitative award on a post-judgment modification application, the Appellate Division has said, regarding the statutory criteria:

> We consider the statutory mandate that the court make specific findings on rehabilitative alimony as a clear direction to the Family Part that it must adhere to the statutory requirement in every case, *whether contested or uncontested, including those cases which result in a settlement on the day of trial or during a trial*. We previously stressed the importance of adherence to the statutory admonition in our discussion in *Cerminara v. Cerminara*. We adhere to our view that N.J.S.A. 2A:34-23(b) must be addressed in every dissolution proceeding where rehabilitative alimony will be paid subsequent to the dissolution of a marriage. (Emphasis supplied).[45]

In underscoring the future obligation of trial courts when confronted with settled cases to conduct inquiry into the nature of the agreement reached concerning rehabilitative alimony and the parties' intentions, the appellate panel said:

> When granting rehabilitative alimony or in approving a rehabilitative alimony provision where rehabilitative alimony is a negotiated term of a property settlement agreement, *the trial judge must inquire of each party as to the parties' understanding of the rehabilitative alimony obligation*. This is particularly necessary where one or both of the parties may wrongfully believe that the obligation to pay alimony will end at the conclusion of the rehabilitative period. *A probing inquiry at the time the marriage is dissolved will be of utmost assistance to any other judge who may be called upon to consider a motion for modification of rehabilitative alimony*. The initial inquiry will enable the modification motion judge to determine whether the terms of the agreement continue to be fair and equitable. *Had each party testified at the divorce proceeding on the issue of rehabilitative alimony, any misperception as to the effect of rehabilitative alimony could have been clarified*. If clarification was required, renegotiation of the terms of the property settlement agreement could have occurred. It would clearly have been in the parties' interest to resolve those disputes prior to the finalization of the divorce proceeding.[46][emphasis supplied/citations omitted]

The *Carter* court believed that if there is a "probing inquiry" at the time the marriage is dissolved, any misperceptions between the parties can be clarified and "renegotiation of the terms of the property settlement agreement" can occur. However, the actual result of such a procedure may discourage settlements. If issues about the future are spelled out precisely now, litigants may not be willing to commit today. Litigants simply may not wish to be bound into the future.

It poses real challenge for lawyers to negotiate agreements and incorporate language that creates flexibility and enables courts to address the non-occurrence of anticipated events and changes that occur so there continues to be fairness and equity between the parties. The *Carter* decision provides risk of returning to the notion that change may not occur in the future if the circumstances that gave rise to it were contemplated or foreseeable at the time the agreement was executed. If *Carter* is so interpreted, this will dramatically alter the notion created by *Lepis* that support agreements are continually reviewable in connection with fairness and equity, regardless of the issue of foreseeability, which ceased being a relevant legal concept after *Lepis*.

In *Carter*, the appellate court noted that the divorce proceeding record did not reflect any testimony as the specific intent of either party regarding rehabilitative alimony. The agreement itself was silent regarding the parties' intentions. The trial record had not in any way explored the connection between the rehabilitative sum agreed upon and the standard of living of the parties. Consequently, there never had been a review of the statutory factors.The court set a road map for future conversion applications and indicated that trial judges must utilize the statutory standards, subject to consideration of the parties' prior rehabilitative agreement, equitable considerations, which included the passage of time; the payors current financial obligations incurred after rehabilitative alimony

ceased; and their general current financial circumstances. In *Carter*, the payee had sought conversion after the rehabilitative period had expired and payments had stopped.

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

There is a general view that earnings on property equitably distributed are to be considered when calculating alimony because such earnings reduce needs. This principle is applicable both to property distributed, or property retained that is not eligible for distribution.

As stated in *Esposito*:

> Our determination of the issue of equitable distribution will result in a substantial capital fund which plaintiff will be able to invest in order to produce additional income. The sale of the Livingston home, as contemplated by plaintiff, should have resulted in a net fund of approximately $112,000 before taxes. The additional distribution of $108,000 under our order will therefore create a total available cash fund of $220,000. If this sum is invested conservatively in prime corporate bonds at a current available return of 8%, it would yield $17,600. If this income of $17,600 is added to the support order for annual payments of $14,200, plaintiff would receive $31,800 a year, without invasion of capital and subject only to income taxes.[47]

Of course, the contrary argument is that the other spouse also retains assets to which income may be imputed and that after such mutual imputation the parties are in equipoise.[48]

Although lifestyle may be created by gifts and borrowings, it is more than just income earned. The decision of *Miller*[49] remains the benchmark decision in calculating appropriate rates of return and considerations of risk with regard to invested assets. However, in *Overbay*,[50] the Appellate Division held that by strictly adhering to the standard set forth in *Miller*, the ex-wife was deprived of an opportunity to control her investment options. The court indicated that such factors as the advice of the ex-wife's financial planner, her age, her serious health problems, her limited employment income, her aversion to risk and her stated desire to preserve capital, the manner in which her assets had been invested during marriage, the historical rate of return, or availability of appropriate alternative investment options, should be considered.

FAULT

Since this article was first published, clarification has been provided by the Supreme Court with respect to the issue of marital fault and its impact on alimony. Fault is not one of the specific statutory criteria. However, it continued as a reference point based upon N.J.S.A. 2A:34-23. In *Mani* the Supreme Court made clear that marital fault may be considered when calculating alimony only if it has negatively affected the economic status of the parties, or if the conduct by one of the divorcing parties is so outrageously egregious because it violates the social contract between the parties that society would not abide to continue the economic bonds between them in view of the conduct found.[51]

Moreover, *Calbi* concluded that the wife's criminal beating of the parties' child, and his resultant death, did not disqualify her *per se* from continuing to receive alimony.[52] It found the conduct not egregious because the wife was under the influence of alcohol, there was no evidence of premeditation and the injured that resulted in the child's death was extremely rare. The court concluded that the suspension of the husband's alimony payments and vacation of arrears that accrued following the child's death was justified because the court never conducted a hearing to determine whether the child's death affected the husband's ability to pay alimony.

In defining egregious fault that might impact alimony, the court in *Calbi* referenced California legislation, which barred alimony payments to a dependent spouse who was attempting to murder the supporting spouse.[53]

ANTI-*LEPIS* CLAUSES

A modification of support is warranted upon a showing of "changed circumstances."[54] A basis for a change in circumstances may be as varied as the breadth of human experience, including but not limited to decrease in the supporting spouse's income, illness, disability, or the good fortune of the supported spouse.[55] However, the parties to an agreement may agree to specific terms for modification of support, or that one or both will not seek a modification of support for specific reasons. This type of agreement is commonly referred to as an "anti-*Lepis*" provision. The issue of the enforcement and/or validity of an anti-*Lepis* provision has been addressed by the courts of this state in only four published decisions: *Smith*, *Finckin, Morris*, and *Savarese*.[56]

In *Morris,* the appellate court resolved the conflict between two Chancery Division opinions, *Smith* and *Finckin*, concerning whether an anti-*Lepis* clause is enforceable. In *Smith,* the court determined that "an 'anti-*Lepis*' clause, which seeks to preclude the exercise of this Court's *equitable responsibility* to review and, if warranted, to modify support obligations in response to changed circumstances, is contrary to the public policy of this State as reflected in its Legislative Acts and its judicial decisions."[57] In *Finckin*, the court concluded that public policy did not prohibit the use of an anti-*Lepis* clause. The appellate court in *Morris* stated that "[t]o some extent we agree with both

decisions."[58] The court went on to state that since it would be "equitable and fair" to grant modification for unforeseen or unplanned circumstances, it would, likewise, not be equitable and fair to permit such modification, either as to alimony or child support, when the parties have taken into account such future or increasing needs.[59] In short, the *Morris* court held that an anti-*Lepis* provision pertaining to alimony would be strictly enforced, so long as it remained fair and equitable.

The authors suggest that in the context of alimony only, an anti-*Lepis* provision may be considered. The basis of the court's holding in *Morris* was premised on the clear intention of the parties that the wife forgo support and the distribution of assets for a series of guaranteed payments.

The court suggested:

> A wife might agree to give up half of the support to which she might have been entitled, or to accept reduced equitable distribution, in exchange for a guaranteed payment to be made, irrespective of her husband's finances or her own future good fortune. Their agreement is not based on her need or his ability to pay; they have set standards other than need and ability. If the husband accepts the benefits of this agreement, he also must ordinarily accept its burdens. If the payments which he expected to equal a third of his income later equal half or even two-thirds of his income, he can no more complain than could the wife if the husband's original income had doubled so that the expected thirty percent burden was reduced to fifteen percent. If, however, these hypothetical spouses failed to include a physical disability provision (which was included in the case before us) and the husband became completely disabled with meager income, barely able to cover his uncompensated hospital costs, would a court of equity require that the income be paid to the ex-wife and the medical treatment not be rendered to the husband? Of course not. The agreed-upon support would no longer be "warranted in the light of prevailing circumstances."
>
> We have used extreme examples here, but we have applied *Lepis* principles, without the usual need-based *Lepis* guidelines. *Lepis* recognized the parties' standards as they may be reasonably enforced. The result is that modifications are permitted, but only where the failure to modify would be unreasonable or unjust.[60]

Therefore, in order for an anti-*Lepis* clause to be enforceable there must be a clear statement of the bargained-for exchange. Regardless of the inclusion of an anti-*Lepis* clause the ultimate inquiry into its sustainability will focus on the fairness of the provision based on the then-existing circumstances of the parties. The authors suggest that such a provision is always subject to attack, and should be cautiously considered by both parties prior to utilization.

CONCLUSION

Alimony is a fluid concept that is utilized by courts to attempt to effectuate fairness between people who have lived together and become mutually dependant upon each other. Our job as lawyers is to use the tools provided to us by law and our experience, and commonsense, to assist the court in making fair assessments that will protect and promote our client's interests, and result in fairness for the family, which is dissolving.

As we do our work, we must remember that our advocacy is directed to judges who are as varied as our clients in their values, personalities, and biases. We must also remember that no two cases are exactly alike. This area of the law does not lend itself well to cookie cutter rules of thumb and bright-line tests. We must do our best patiently to explore and learn the facts and to understand the human dynamics that our clients (and their spouses) face. Through our presentation and advocacy, we must help finders of fact understand the equities of the human dynamics about which we ask them to make decisions. ■

ENDNOTES

1. *Boardman v. Boardman*, 314 N.J. Super. 340 (App. Div. 1998).
2. *Carter v. Carter*, 318 N.J. Super. 34, 47 (App. Div. 1999).
3. *Id*.
4. *Innes v. Innes*, 117 N.J. 496 (1990).
5. *DiPietro v. DiPietro*, 183 N.J. Super. 69, (Ch. Div. 1982).
6. *Clarke v. Clarke*, 349 N.J. Super. 55, 58 (App. Div. 2002).
7. *Steneken v. Steneken*, 183 N.J. 290 (2005).
8. *See Overbay v. Overbay*, 376 N.J. Super. 99 (App. Div. 2005).
9. *Overbay,* at 100-11.
10. *Skribner v. Skribner*, 152 N.J .Super. 174 (Ch. Div. 1977).
11. *D'Arc v. D'Arc*, 175 N.J. Super. 598 (App. Div. 1980).
12. *Hughes v. Hughes*, 311 N.J. Super. at 31.
13. *Lynn v. Lynn*, 91 N.J. 510 (1982).
14. *Wass v. Wass,* 311 N.J.Super. 624 (Ch. Div. 1998).
15. *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div. 1996).
16. *Carter,* 318 N.J. Super. 34, 47 (App. Div. 1999).
17. *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div.1996).
18. *Staver v. Staver*, 217 N.J. Super. 541 (Ch. Div. 1987).
19. *Skribner v. Skribner*, 153 N.J. Super. 374 (Ch. Div. 1977).
20. *Hughes v. Hughes*, 311 N.J. Super. 15 (App. Div. 1998).
21. *See generally, Turner v. Turner*, 158 N.J. Super 313 (Ch. Div. 1978); *Adler v. Adler*, 229 N.J. Super. 496 (App. Div. 1988).
22. *Lepis v. Lepis*, 83 N.J. 139 (1980); *Mahoney v. Mahoney; Innes v. Innes; Koelble v. Koelble; Heinl v. Heinl*.
23. *Guglielmo v. Guglielmo*, 253 N.J. Super. 531, 543-4 (App. Div. 1992).
24. *Crews v. Crews*, 164 N.J. 11, 16 (2000).

25. *Weishaus v. Weishaus*, 180 N.J. 131 (2004).
26. *Hughes v. Hughes*, 311 N.J. Super. 15 (App. Div. 1988).
27. *Id.* at 34.
28. *See generally, Hughes, supra., citing Lynn v. Lynn*, 165 N.J. Super. 328 (App. Div. 1979) and *Arribi v. Arribi*, 186 N.J. Super. 116 (App. Div. 1982).
29. *Hughes*, at 34.
30. *Carter v. Carter*, 318 N.J. Super. 34, 47 (App. Div. 1999).
31. *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div. 1996).
32. *Id*.
33. *Glass v. Glass*, 366 N.J. Super. 357 (App. Div. 2004).
34. *Glass,* at 374, 375).
35. *Id.*, at 376.
36. *Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div.1998).
37. *Id*.
38. *Id. See also Lopez v. Lopez; Stevens v. Stevens*.
39. *Wass v. Wass*, 311 N.J. Super. 624 (1998).
40. *Id.* at 628.
41. *Carter v. Carter*, 318 N.J. Super. 34 (App. Div. 1999).
42. *Hughes v. Hughes*, 311 N.J. Super. 15 (App. Div. 1988).
43. *See Lynn, supra*.
44. *Carter, supra.*
45. *Carter*, at 42.
46. *Carter,* at 44.
47. *Esposito v. Esposito*, 158 N.J. Super. 285, 300 (N.J. Super. 1978).
48. *See also Aronson v. Aronson* and *Stiffler v. Stiffler* (interest income imputed to an inheritance to the extent that the cost of house purchased with inheritance was in excess of the selling price of the former marital residence. *See also Sarwin v. Sarwin*.
49. *Miller v. Miller,* 160 N.J. 408 (1999).
50. *Overbay v. Overbay*, 376 N.J. Super. 99 (App. Div. 2005).
51. *Mani v. Mani*, 183 N.J. 79 (2005).
52. *Calbi v. Calbi*, 396 N.J. Super. 532 (App. Div. 2007).
53. *See D'Arc v. D'Arc*, 164 N.J. Super. 226 (Ch. Div. 1978) *affirmed in part, reversed in part*, 175 N.J. Super. 598 (App. Div. 1980) *certif. denied*, 85 N.J. 487 (1980).
54. *Lepis v. Lepis*, 83 N.J. 139 (1980).
55. *Id.*, at 151.
56. *Smith v. Smith*, 261 N.J. Super. 198 (Ch. Div. 1992), *Finckin v. Finckin*, 240 N.J. Super. 204 (Ch.Div.1990); *Morris v. Morris*, 263 N.J. Super. 237 (App. Div. 1993); and, *Savarese v. Corcoran*, 311 N.J. Super. 240 (Ch. Div. 1997), (affirmed for the reasons set forth by the trial court at 311 N.J. Super. 182 (App. Div. 1998)).
57. Smith, at 199-200.
58. *Morris*, at 241.
59. *Id.* at 242.
60. *Id*. at 242-3.

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Alimony: Permanent v. Limited Duration (Guidance Please!)

by Charles F. Vuotto Jr. and Lisa Steirman Harvey

It is axiomatic that uncertainty in outcome breeds litigation. Litigation generates increased fees and emotional stress for the parties and their children. There is no question that uncertainty regarding the duration of alimony causes many cases to be prolonged longer than necessary, triggering many of the negative aspects of divorce to occur.

It is perhaps one of the most frequently asked question by our family law clients: "Is my spouse (or am I) entitled to permanent alimony?" It is usually followed, of course, by the question, "If I am obligated to pay limited duration alimony, how long and how much will I have to pay?" Or, if you represent the supported spouse, "If I am only entitled to limited duration alimony, how long will it last and how much will I receive?"

Unfortunately, these questions, so often raised by our clients, usually create more questions for an advocate than answers.

The authors of this article originally sought to delve into the case law of our state in a sincere effort to define the law surrounding limited duration alimony. Specifically, the authors sought to delineate those factors (besides the length of a marriage) that a court focuses on when determining between limited duration and permanent alimony and, if limited duration alimony is awarded, those factors that a court considers when determining duration.

Unfortunately, instead of providing concrete answers, the authors discovered that the jurisprudence in this area may, in fact, raise more questions. Indeed, there appears to be no distinct answers contained in any key case law. However, when viewed as a mosaic, the entirety of the case law does provide some instruction. There is certainly strong argument favoring the establishment of a more focused set of factors or guidelines to fill in the blanks when it comes to duration of alimony in order to eliminate some degree of uncertainty. However, there is, perhaps, an equally strong counter-argument against the broad application of 'cookie-cutter' guidelines to such a subjective (and sensitive) matter as alimony.

The authors of this article hope to provide the reader with an overview of the existing law of limited duration alimony in order to stimulate debate about whether alimony guidelines are the answer to all our unanswered questions, or whether they are a poor substitute for the subjective analysis truly required to determine an alimony obligation.

SEMINAL LAW DISTINGUISHING LDA FROM PERMANENT ALIMONY

On Sept. 13, 1999, the Legislature amended the alimony statute, N.J.S.A. 2A:34-23, to include limited duration alimony as a cognizable support award available to the courts. Although the award of limited duration alimony has quickly become commonplace, the vague language of the amendment, coupled with a dearth of published case law, has created great confusion concerning the actual law to be applied when determining whether a dependent spouse is entitled to permanent or limited duration alimony (LDA).

Specifically, N.J.S.A. 2A:34-23(c) sets forth:

> In any case in which there is a request for an award of permanent alimony, the court shall consider and make specific findings on the evidence about the [factors delineated by N.J.S.A. 2A:34-23(b)]. If the court determines that an award of permanent alimony is not warranted, the court shall make specific findings on the evidence setting out the reasons therefore. The court shall then consider whether alimony is appropriate for any or all of the following: (1) limited duration; (2) rehabilitative; (3) reimbursement. In so doing, the court shall consider and make specific findings on the evidence about factors set forth above. The court shall not award limited duration alimony as a substitute for permanent alimony in those cases where permanent alimony would otherwise be awarded.[1]

The seminal case distinguishing permanent and LDA is the Appellate Division decision of *Cox v. Cox*.[2] As *Cox* is the only published decision truly detailing the distinguishing characteristics of LDA from permanent alimony, it is necessary to digest the case at length. In *Cox,* the plaintiff former wife, who had been married to the defendant for 22 years, appealed the trial court's award of limited duration alimony on grounds that permanent alimony was the appropriate award.[3]

The parties married in 1977. There was one child born of the marriage, who was in college. During the

marriage, the defendant worked as a crane operator earning approximately $120,000 per year in gross income. The defendant acknowledged that he worked 80–90 hours per week, but set forth that the mental and physical stress of the job were starting to effect his health.The plaintiff, who received her law degree in 1998, worked for a year as a law clerk earning $30,000.[4] The plaintiff, although unsuccessful in her first attempt to pass the bar examination, did obtain employment at a law firm earning $33,000 per year in gross income.[5]

Despite the fact that the *Cox* trial court found the parties' marriage to be "long-term," and further determined there to be a "substantial disparity between the parties' incomes," the trial court awarded limited duration alimony for a period of five years in the amount of $200 per week.[6] The plaintiff appealed.

On appeal, the *Cox* Appellate Division explored the parameters of LDA, distinguishing it from permanent, rehabilitative, and reimbursement alimony. The *Cox* Appellate Division emphasized that unlike rehabilitative or reimbursement alimony, "Limited duration alimony is not intended to facilitate the earning capacity of a dependent spouse or to make a sacrificing spouse whole, but rather 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."[7]

The *Cox* appellate court then addressed the legislative intent surrounding the creation of LDA, explaining that the amendment was proposed in order to "establish limited duration alimony as a third type of alimony, to be used in all cases involving shorter-term marriages where permanent or rehabilitative alimony would be inappropriate or inapplicable but where, nonetheless, economic assistance for a limited period of time would be just."[8] Although this further elaboration is slightly less cloudy, it still does not provide clear direction to the bench and bar as to the purpose of LDA and when it is appropriate.

Based on both the express language of N.J.S.A. 2A:34-23(c), and the legislative history of the same statute, the *Cox* appellate court delineated the procedure to be followed by courts when determining whether LDA should be awarded. Specifically, the Appellate Division instructed:

> On any application for permanent alimony, it is incumbent upon the trial judge to first "consider and make specific findings on the evidence" as to the statutory factors set forth in N.J.S.A. 2A:34-23(b). If the Judge determines that permanent alimony is not warranted, further specific findings setting forth the judge's reasons for that determination must be made. Consideration of any other form of alimony, including limited duration alimony, may follow only after those determinations and findings have been made.[9]

One of the basic problems with the above approach is that it is not clear which statutory factors the court must focus on to determine the issue of duration of the alimony.

Guiding trial courts in their alimony determinations, the *Cox* appellate court explained that unlike rehabilitative and reimbursement alimony,"Permanent and limited duration alimony, by contrast, reflect the important policy of recognizing that marriage is an adaptive economic and social partnership, and an award of either validates that principle."[10] Therefore, this statement does not assist in determining between permanent or LDA.

The *Cox* appellate court then discussed the legislative exclusion of LDA awards in long-term marriages, quoting from the *Divorce Study Commission Report*, *supra*:

> In particular, it is singularly inappropriate in long marriages. It is, therefore, the clear and unequivocal view of the Commission that such term alimony should be limited to shorter marriages and not be ordered in long-term marriages.[11]

The *Cox* Appellate Division instructed that when determining whether to award permanent or limited duration alimony, the same exact factors of N.J.S.A. 2A:34-23b must be considered, and, if all other facts are equal, the determining factor must be the duration of the marriage.[12] Specifically, the Appellate Division noted:

> 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 awarded.[13]

Applying the above principles to the case at hand, the *Cox* Appellate Division concluded the trial court erred in awarding LDA, rather than permanent alimony to the wife, since the trial court "failed to perform a proper analysis of the statutory factors and to set forth the requisite findings as to why permanent alimony was not warranted."[14]

The *Cox* Appellate Division further declared that the trial court had applied "considerations more appropriate to rehabilitative alimony than to limited duration alimony," and had failed to acknowledge that the parties' " twenty-two year marriage represented a marital partnership."[15]

Reversing and remanding, the *Cox* Appellate Division declared: "Because this was a twenty-two year marriage, permanent alimony

should have been awarded absent a clear statement of reasons to the contrary."[16]

Based on the foregoing, the *Cox* Appellate Division reversed and remanded for further proceedings, consistent with its opinion.

Five years after *Cox,* in the case of *Gordon v. Rozenwald,*[17] the Appellate Division slightly clarified its previous definition of LDA, emphasizing that LDA is available to a dependent spouse who made "contributions to a relatively short-term marriage that …demonstrated the attributes of a 'marital partnership', but who has the skills and education necessary to return to the workforce" after the divorce.[18] As in *Cox,* the *Rozenwald* Appellate Division distinguished LDA from permanent alimony due to the length of the marriage, and further distinguished LDA from rehabilitative alimony because the term of the alimony "is not based upon projections about time needed to acquire education or job skills."[19]

CONCLUSIONS DRAWN (AND QUESTIONS RAISED) FROM SEMINAL CASE LAW

The decisions of *Cox* and *Rozenwald* permit the following conclusions to be drawn regarding the considerations a court must examine when determining between an award of permanent or LDA: 1) LDA is not appropriate in 'long-term' marriages; 2) permanent alimony is not appropriate in 'short-term' marriages; 3) the deciding factor between LDA and permanent alimony is the length of the marriage; 4) LDA and permanent alimony are both based on an analysis of the same statutory factors; 5) LDA and permanent alimony are both based on the concept of marital partnership; 6) LDA and permanent alimony are both based on economic need (including the need to maintain the marital lifestyle in appropriate cases), but an award of LDA recognizes that an award of permanent alimony would not be appropriate given the length of the marriage; and 7) LDA is appropriate in a situation where a dependent spouse contributed to a marital enterprise of relatively short term (or intermediate duration), but also has the skills and education to return to the workforce after the parties' divorce.

As established above, the language of *Cox,* as well as the legislative history quoted, makes it abundantly evident that LDA is not to be awarded in "long term marriages," and permanent alimony is not to be ordinarily awarded in "short term" marriages.[20] Therefore, the law is clear that in those marriages easily defined as short-term, if any support is awarded, it must be LDA as opposed to permanent. Likewise, in those cases where the marriage can be easily defined as long-term, LDA is not to be awarded and permanent alimony must be considered. Neither the statute nor *Cox* provides any direction with regard to those marriages that do not fit easily into the categories of short-term or long-term. The law is silent regarding these intermediate-length marriages. Indeed, the law expounded above raises the following critical questions:

1. Is there a particular bright line distinguishing the length of marriage warranting permanent alimony from the length of marriage warranting LDA?
2. In those marriages of medium, or intermediate, duration, what factors must a court examine when determining whether LDA or permanent alimony is appropriate?

Both of the above questions, as well as questions surrounding the appropriate length of limited duration alimony, are addressed below.

IS THERE A BRIGHT LINE DISTINGUISHING THE LENGTH OF MARRIAGE WARRANTING PERMANENT ALIMONY FROM THE LENGTH OF MARRIAGE WARRANTING LDA?

The law is manifest. "There is no bright line rule that divides the duration of a marriage that warrants an award of permanent alimony from the duration of a marriage that is too brief for an award of permanent alimony."[21] Why is this? If it is a key threshold factor, shouldn't the courts provide some guidance? Although there is no 'magic number' separating a short-term marriage from a long-term marriage, the case law of New Jersey does suggest that marriages lasting less than 10 years are generally considered shorter-term marriages not warranting permanent alimony.[22]

Similarly, the case law indicates that marriages lasting from nine years to as long as 14 years may be considered "intermediate marriages," warranting an award of either LDA or permanent alimony, depending on the circumstances.[23]

IN MARRIAGES OF INTERMEDIATE DURATION, WHAT FACTORS DO COURTS CONSIDER WHEN DETERMINING BETWEEN AN AWARD OF PERMANENT ALIMONY OR LDA?

Although *Cox* is clear that all of the factors outlined in N.J.S.A. 2A:34-23 should be considered when determining between permanent alimony and LDA, the case law of New Jersey indicates the courts give greater deference to the following factors discussed below, namely: 1) economic need/earning capacity (including impact of children and childcare responsibilities); 2) contributions/sacrifices made by the supported spouse [or lack thereof] during the marriage and whether the supported spouse was financially prejudiced as a result thereof; 3) existence of a marital partnership; and, 4) marital standard of living.

Below is a summary of cases demonstrating the court's focus on each of the above-referenced factors when determining whether to award permanent alimony or LDA.

Economic Need/Earning Capacity (Including Age of Dependents and Impact of Children)

- ***Valente v. Valente*, 2009 WL 169294 (N.J. Super. A.D.).** The

Appellate Division reversed the trial court's decision awarding permanent alimony in a marriage of 11 years and nine months. When determining that permanent alimony was not appropriate in the "intermediate length" marriage, the Appellate Division focused on the young age of the wife (40), the fact that she had a college degree and worked prior to the marriage earning $24,000 per year (although she did not work during the marriage), the fact that the parties' children were now old enough to be in school full time, and the fact that the wife was in good health and "perfectly capable of supporting herself and the family unit."[24] The court placed little, if any, weight on the fact that the parties enjoyed a very high marital lifestyle, supported by the fact that the husband was a successful businessman who earned an average of $323,000 over the three years prior to the complaint for divorce.[25]

- ***Schwartz v. Schwartz,* 2005 WL 2861023 (N.J. Super. A.D.).** In a nine-year marriage where the husband earned approximately $100,000-$150,000 and the wife did not work, the Appellate Division reversed the trial court's award of permanent alimony. The *Schwartz* Appellate Division focused on the following facts: the wife had a college degree, was employed for six years during the beginning of the marriage earning $22,000, was young, and was fully capable of returning to the work force to regain her earning potential.[26]
- ***Pollack v. Pollack,* 2005 WL 2649331 (N.J. Super. A.D.).** The Appellate Division affirmed the trial court's award of permanent alimony, focusing on the fact that the wife had not worked outside of the home during the parties' marriage of over 12 years.
- ***Doctoroff v. Doctoroff,* 2007 WL 2728415, 1 (N.J. Super. A.D.)**. Although not referencing the length of marriage, the court provided for LDA of 12 months in order to allow the wife to complete her residency and provide "an appropriate period of transition into her new employment" as a family practitioner.
- ***KhatKhat v. Hussein,* 2008 WL 1744485, 1 (N.J. Super. A.D.).** In a marriage of approximately five years, the wife was entitled to LDA. The wife had a minimal earning capacity of $202 per week, whereas the husband earned $56,725 per year. In addition to the discrepancy in income/education between the parties, the wife had limited English skills and needed to obtain a high school equivalency degree in order to support the young children of the family.
- ***Finne v. Finne,* 2008 WL 2078504, 5-6 (N.J. Super. A.D.).** An award of LDA for nine years was affirmed on appeal. The parties were married for 10 years. The husband earned between $70,000 and $78,000 during the last three years of the marriage. The wife worked as a bartender before and during the marriage, earning between $7,000 and $10,000 per year. The parties had no children. The Appellate Division noted that the trial court focused on the fact that the wife did not forego all of her earning potential during the marriage. Since the wife continued in her employment as a bartender during the marriage (although on a reduced basis), and she was able to support herself prior to the marriage, the LDA would allow a sufficient transfer of earning power to the wife.
- ***MacFarland v. MacFarland,* 2008 WL 2415260 (N.J. Super. A.D.).** The Appellate Division affirmed the trial court's award of permanent alimony in a marriage of approximately 30 years, focusing on the discrepancy in income between the parties and the wife's need for support from her husband to pay her bills.
- ***Pack-Eisenberg v. Gechtman,* 2006 WL 1749627 (N.J. Super. A.D.)**. The Appellate Division noted, *in dicta*, that the trial court denied alimony despite the length of the parties' 37-year marriage, because the wife earned more than the husband during the marriage.
- ***Booth v. Booth,* 2006 WL 2056862 (N.J. Super. A.D.).** The Appellate Division affirmed a four-year term LDA award on a three-year marriage based upon the financial need of the wife, whose salary as a schoolteacher did not cover the monthly living expenses of her and the minor child.
- ***Palmiere v. Cortes-Palmiere*, 2006 WL 2096066, 4-5 (N.J. Super. A.D.)**. The Appellate Division affirmed the trial court's denial of LDA in a six-year marriage, but premised the affirmation on the fact that the trial court appropriately determined alimony was not warranted due to the assets the wife would be receiving in equitable distribution.
- ***Kotbi v. Kotbi,* 2008 WL 3914870, 6 (N.J. Super. App. Div.).** The Appellate Division reversed the trial court's denial of alimony in a nine-year marriage on grounds that the trial court failed to examine whether the wife had a financial need for LDA.
- ***Fuzer v. Fuzer,* 2008 WL 2120860, 4 (N.J. Super. A.D.).** The Appellate Division affirmed an award of LDA for a term of four years on a marriage of 10 years, where the parties had no children, the husband was imputed $100,000 to $120,000 of income, and the wife was imputed $30,000 of income. The Appellate Division explained that the award of limited duration was appropriate due to the discrepancy of income and earning potential between the parties, as well as the marital standard of living.
- ***Whitesell v. Whitesell,* 2006 WL 1302407, 4 (N.J. Super.**

A.D.). The Appellate Division affirmed an LDA award of one year in a 2.5 year marriage, since such "financial relief" was necessary due to the special needs of the parities' minor child, and in order "to permit the child to gain in age and the wife to re-enter the employment market…")

Contributions/Sacrifices Made by Supported Spouse [or Lack Thereof] During the Marriage and Whether the Supported Spouse Was Financially Prejudiced as a Result

- ***Weaver v. Weaver*, 2005 WL 1562798 (N.J. Super. A.D.).** The Appellate Division reversed the trial court's award of permanent alimony in a 14-year marriage (although the parties were separated after 12.5 years). When determining that LDA, not permanent alimony, was appropriate, the Appellate Division focused on the fact that the wife did not contribute to the marriage by way of being a homemaker and childcare provider, nor did she forego any earning potential during the marriage. Specifically, the *Weaver* Appellate Division opined:

  > Although an award of permanent alimony, as opposed to limited duration alimony, may be ultimately warranted, the record on appeal does not support the traditional rationale for an award of permanent alimony, as outlined in *Cox, supra,* 335 N.J. Super. at 482-83. Specifically, it does not appear that an award of permanent alimony was ordered by the trial court to compensate defendant for the value of benefits she conferred upon plaintiff by being responsible for homemaking and child rearing, with the primary benefit to plaintiff being an increase in his earning capacity. Here, the record reflects that both parties actively pursued their chosen careers, seemingly largely unaffected by their roles in the marriage. For the same reasons, the findings of the trial court do not support a conclusion that the permanent alimony award was to compensate defendant for the opportunity costs of homemaking causing lost earnings through the years due to her assuming the major responsibility for the home. We also discern no "transfer of earning power" to have occurred during the parties' marriage that would have been characterized by defendant's efforts to increase the earning capacity of plaintiff at the expense of her own. Rather, as noted, it appears that both parties advanced their education and careers, worked throughout the marriage, and both significantly increased their earning capacities during that time. Of course, without further findings, we can reach no definitive conclusions on the alimony issue. A remand is necessary for the court to address and assess these relevant considerations.[27]

- ***Robertson v. Robertson*, 381 N.J. Super. 199 (App. Div. 2005).** The trial court's award of permanent alimony to the wife in a 12-year marriage was affirmed, since the wife had sacrificed her earning potential to be the primary caretaker of the three minor children. The husband was thus able to excel in his career (earning in excess of $200,000). It was improbable the wife could maintain the marital standard of living on her earning potential alone, although it was likely permanent alimony would be decreased once the youngest child reached age 16.
- ***Naik v. Naik,* 399 N.J. Super. 390, 392 (App. Div. 2008).** Apart from support mandated by an immigration affidavit of support (Form I-864EZ), the wife in a less-than-three-year marriage was not entitled to LDA since the parties were young, no children were born of the marriage, the parties were in good health, the wife was well educated, and the marriage did not absent the wife from the job market.

Marital Partnership

- ***Anunobi v. Anunobi,* 2008 WL 2677993 (N.J. Super. A.D.).** In a four-year marriage where the wife left the husband with the parties' children after two years in order to obtain a law degree, the wife was not entitled to LDA, since there was no semblance of a marital partnership.
- ***Ferrier v. Anastos Ferrier,* 2005 WL 3617896, 15-18 (N.J. Super. A.D.)**. LDA was not warranted in a five-year marriage, since the wife had not been financially prejudiced during the parties' "short-term marriage." The trial court concluded that since permanent alimony would not be awarded under these circumstances, LDA could not be awarded, since a party "must qualify for permanent alimony but for the limited duration of the marriage" before an award of LDA may be considered. Affirming the decision of the trial court, the Appellate Division stressed the wife's earning potential had not been adversely impacted by the marriage, and the parties, who lived in separate states and pursued separate pursuits throughout the marriage, never had a "marital partnership" that would support an award of alimony.

Marital Standard of Living

- ***Tarantino v. Tarantino,* 2006 WL 572197, 3-4 (N.J. Super. A.D.).** In a five-year marriage, the Appellate Division affirmed an award of LDA for a period of five years. The wife, who did not require further education to obtain a substantial earning capacity as a lawyer, required financial support to maintain the extremely high standard of living established during the marriage. The husband's earnings averaged approximately $743,000 during the last three years of the parties' marriage. The Appellate Division also noted that the award of LDA recognized the non-economic contributions made by the wife during the marriage, which included her decision to

seek a less demanding job in a small firm so she could maintain the household and entertain the husband's clients so he could increase his earning potential.

- ***Weimer v. Weimer,* 2005 WL 3148504, 4 (N.J. Super. A.D.).** The Appellate Division reversed the trial court's award of LDA for a period of eight years on a marriage of approximately 10 years, due to the trial court's failure to take into consideration the marital standard of living in a situation where the wife did not work outside of the home during the marriage. The wife's highest income before the marriage was $23,000, while the husband had earned between $263,000 and $407,794 during the last three years of the marriage (although he was voluntarily unemployed at the time of the divorce).
- ***Wardencki v. Wardencki,* 2001 WL 1827519, 2 (N.J. Super. A.D.).** The appellate panel affirmed an award of permanent alimony in a marriage of approximately 10 years—noting that the trial court focused heavily on the marital standard of living and, in particular, the fact that "had the parties not divorced, they would be enjoying a new home and vacationing on their boat." The court also focused on the fact that during the marriage, the wife supported the husband financially while he reduced his employment to part-time so he could further his education.
- ***Cetin v. Cetin,* 2006 WL 20560, 6 (N.J. Super. A.D.).** The Appellate Division concluded that the trial court's award of 2.5 years of reimbursement alimony on a 6.5 year marriage, which was based upon the fact that the wife forewent her own employment to work in the husband's store, should have correctly been characterized as LDA.
- ***E.I. v. L.I.,* 2006 WL 1764473, 8 (N.J. Super. A.D.)**. In a marriage of approximately 10 years, the Appellate Division affirmed an LDA award of three years in a situation where the wife earned 25,000, the husband earned $87,000, and the husband had custody of the children. The court concluded that the receipt of LDA would enable the wife to "live the same modest lifestyle the parties had acquired while living together."
- ***De Saro v. De Saro,* 2005 WL 3879582, 5 (N.J. Super. A.D.).** The Appellate Division reversed the trial court's decision to award LDA of one year on a marriage lasting only one year since the trial court failed to consider the wife's receipt of substantial equitable distribution, coupled with her own earning capacity, and the bad faith she demonstrated during the proceedings, which precluded an award of LDA.
- ***Dubois v. Brodeur,* 2007 WL 2012387 (N.J. Super. A.D.).** The Appellate Division reversed the trial court's award of permanent alimony to the wife on a 7.5-year marriage. The husband was a professional hockey player, who earned millions of dollars during the marriage. The Appellate Division noted that the 7.5-year marriage was of neither short or long duration, but was "decidedly closer" to a being considered one of short duration.[28] The Appellate Division noted that even though the wife would never be able to maintain the standard of living established during the marriage without the support of the husband, such a finding in an intermediate-length marriage did not require an award of permanent alimony.[29] The Appellate Division then opined that based on the length of the relationship, the young age of the wife, the age of the minor children, and the wife's responsibilities as caretaker for the children, the wife was entitled to LDA, rather than permanent alimony.
- ***Morse v. Morse,* 2007 WL 3101687 (N.J. Super. A.D.).** The Appellate Division reversed the trial court's denial of alimony in a 25-year marriage based on the trial court's error in determining the wife did not need support in order to maintain the marital standard of living.
- ***Ceca v. Ceca,* 2007 WL 1745306, 4 (App. Div. 2007).** The Appellate Division reversed the trial court's award of LDA for a term of 10 years on a marriage of approximately six years, based on the court's determination that the trial court failed to make any determinations concerning marital lifestyle and the wife's current need related to the marital lifestyle.

WHAT GUIDANCE DOES THE STATUTE PROVIDE REGARDING THE APPROPRIATE LENGTH OF LDA?

The Legislature provided only vague directive regarding a court's determination of the length of an award of LDA. Specifically, N.J.S.A. 2A:34-23(c) provides:

> In determining the length of the term, the court shall consider the length of time it would reasonably take for the recipient to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate.

Although the statute indicates that the term of LDA should coincide with the amount of time necessary for the supported spouse to improve his or her earning potential "to a level where limited duration alimony is no longer appropriate," the statute provides no guidance on what constitutes a situation where LDA is "no longer appropriate." Unfortunately, as detailed below, the case law of New Jersey is also silent regarding what degree of earning capacity is sufficient to reach a "level where limited duration alimony is no longer appropriate."[30] Further, the authors point out that this 'standard' flies in the face of the language in *Cox,* which appears to hold to the contrary.

The *Cox* Appellate Division emphasized that unlike rehabilitative or reimbursement alimony,

"[l]imited duration alimony is not intended to facilitate the earning capacity of a dependent spouse or to make a sacrificing spouse whole, but rather 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] Therefore, it appears a contradiction exists in the law, which requires either correction or clarification.

WHAT FACTORS DO THE COURTS EXAMINE WHEN DETERMINING THE APPROPRIATE DURATIONS OF LDA?

In the seminal case of *Gordon v. Rozenwald,*[32] the Appellate Division explained that the duration of an LDA award must be based on "historical" factors existing during the marriage, and must not be based on speculations about future circumstances. Specifically, the *Gordon* court declared:

> The length of a term of limited duration alimony is based primarily upon the historical facts of the marital enterprise, not predictions about future events…
>
> The premise for a term of limited duration alimony under N.J.S.A. 2A:34-23c is primarily historical not predictive and it is not based upon estimates about financial circumstances at the time of termination. Thus, the end date of a term of limited duration alimony is the equivalent of an arrangement to terminate support at a predetermined time or event, regardless of need.[33]

Although the authors may agree with this stated purpose, more direction is needed. Further, the language of *Gordon* quoted above appears to contradict the statutory mandate that requires a court, when determining the term of LDA, to consider the supported spouse's future ability to "improve his or her earning capacity to a level where limited duration alimony is no longer appropriate."[34]

In other words, how can a court determine how long it will take a spouse to "improve his or her earning potential to a level where limited duration alimony is no longer appropriate" without taking into consideration "estimates about financial circumstances at the time of termination?[35]"

Perhaps due to the inconsistency between the statute's directive requiring predictions regarding future earning capacity and the language of *Gordon* prohibiting predictions about future events when determining the term of LDA, the courts of New Jersey consistently rely upon predictions when determining the length of an award of LDA.[36]

Notwithstanding the directive of N.J.S.A. 2A:34-23(c) and the law of *Gordon,* the courts frequently default to the ages of the children when determining the length of LDA. Indeed, the ages of the parties' children weighs more heavily in a court's determination on the length of LDA than it does in the court's determination of whether permanent or LDA should be awarded.[37]

As a final point, it must be noted that although the law is clear that an award of LDA should be of an amount to help the supported spouse maintain the standard of living, the law is also clear that a spouse's absolute inability to ever maintain the standard of living does not warrant permanent alimony.[38] Consequently, the following question is raised: In situations where a spouse will never be able to reach an earning potential that will enable him or her to achieve the marital standard on his or her own, when is his or her receipt of LDA "no longer appropriate" pursuant to N.J.S.A. 2A:34-23(c)?

CLOSING REMARKS

The authors suggest that when it comes to the amount of permanent or LDA, and to a lesser degree the duration of LDA (once determined appropriate), a full consideration of all statutory factors is certainly required. However, when determining the threshold question of 'permanent' vs. 'LDA,' the length of the marriage is a factor that has been elevated above all others. Therefore, the authors suggest the rule of law established by *Cox* requires a clear definition, by the Legislature or the courts, of the following terms:

- short-term marriage
- intermediate-length marriage
- long-term marriage

The number of years associated with each of the foregoing terms should be a clear and unequivocal number, no matter what other considerations are in play. The authors do no suggest that the length of the marriage should be the only consideration, but it certainly should be the predominant one. However, since it has been made, according to the *Cox* decision, a threshold factor, the bench and bar should be told the exact number of years that places the marriage into one of these categories. The determination of this threshold issue cannot be left to guesswork. Guesswork hurts families by causing uncertainty in outcome. Therefore, the authors suggest the number of years to be associated with the following terms should be:

- short-term marriage: one to nine years
- intermediate-length marriage: 10 to 15 years
- long-term marriage: 16 and over

The number of years associated with each of the foregoing terms is consistent with the case law and current societal norms.

The authors are hopeful this article has not only broadened the reader's mind on the current status of the law concerning limited duration alimony, but has further sparked debate regarding whether more precise definitions or guidelines regarding the length of a marriage are in order. ■

ENDNOTES

1. N.J.S.A. 2A:34-23(c).
2. 335 N.J. 465 (App. Div. 2000).
3. *Id.* at 469-70.
4. The Appellate Division notes that plaintiff's reply brief and letter brief set forth that as a result of her inability to pass the bar examination, plaintiff was terminated from her position at the law firm. However, the Appellate Division further notes that since these facts were not part of the record below, they could not be considered on appeal.
5. *Id.* at 470-71.
6. *Id.* at 472.
7. *Id.* at 476. The authors question the clarity of this standard.
8. *Id.* at 477-78 (*quoting* S. No. 54, 6-7, 208th Leg. (N.J. 1998) (statement of Sens. Kavanaugh & Martin) (emphasis added) (*citing* Report of Commission to Study the law of Divorce, Recommendation 13 (April 18, 1955) ["Divorce Study Commission Report"]).
9. *Id.* at 478-79 (citations omitted).
10. *Id.* at 479.
11. *Id.* at 482 (*quoting* Divorce Study Commission Report, *supra,* at 47*)* (emphasis added).
12. *Id.* at 483.
13. *Id.*
14. *Id.*
15. *Id.* at 483-84.
16. *Id.*
17. 380 N.J. Super. 55 (App. Div. 2005).
18. *Id.* at 65-66.
19. *Id.*
20. *Cox,* 335 N.J. at 482; *Adams v. Adams,* 2006 WL 587713, 5 (N.J. Super. A.D.) ("LDA is only available to marriages of short duration where permanent alimony is not appropriate, but where economic assistance is just").
21. *Gordon,* 380 N.J. Super. at 74, fn. 4.
22. *Bornstein v. Bornstein, 2*007 *WL 2*403534, 5 (N.J. Super. A.D.) ("The parties' marriage…was short of ten years, diminishing the strength of a possible claim by either spouse for permanent alimony").
23. *Hughes v. Hughes,* 311 N.J. Super. 15, 33-34 (App. Div. 1998) (although decided prior to the enactment of LDA, instructive in so far as it determines a marriage of 10 years to be of "medium" length warranting an award of permanent alimony under certain circumstances); *Finne v. Finne,* 2008 WL 2078504, 5-6 (N.J. Super. A.D.) (marriage of approximately 10 years was of "intermediate length" and LDA, not permanent, was the more appropriate support award); *Valente v. Valente,* 2009 WL 169294, 3 (N.J. Super. A.D) (reversing trial court's decision to award permanent alimony and noting that marriage of 11.9 years was of "intermediate length"); *Weaver v. Weaver,* 2005 WL 1562798, 16 (N.J. Super. A.D) (reversing and remanding trial court's decision to award permanent alimony in a 14-year marriage [although parties separated after 12.5 years], and noting that the marriage was of "limited duration"); *Pollack v. Pollack,* 2005 WL 2649331, 2 (N.J. Super. A.D.) (noting that a marriage of almost 13 years was not a "short-term" marriage, and affirming the trial court's award of permanent alimony); *Schwartz v. Schwartz,* 2005 WL 2861023, 4 (N.J. Super. A.D.) (reversing the trial court's award of permanent alimony in a nine-year marriage, and further declaring, "The difficult decisions [regarding whether to award LDA or permanent alimony] arise in the context of "intermediate length" marriages, such as the ten-year marriage in *Hughes,* and the nine-year marriage in the instant case."); *Newell v. Hudson,* 376 N.J. Super. 29, 46 (App. Div. 2005) (In a nine-year marriage with no children, LDA of four years is "presumptively fair.").
24. *Id.* at 3.
25. *Id.*
26. On remand, the trial court awarded 14 years of LDA. On appeal, the Appellate Division affirmed, but noted that it would not have "rendered the same decision had [it] been the trial court." *Schwartz,* 2007 WL 1756778, 1 (N.J. Super. A.D.).
27. *Weaver,* 2005 WL 1562798, at 17.
28. *Id.* at 19.
29. *Id*. at *20.*
30. N.J.S.A. 2A:34-23(c); *see also Patel v. Katariya,* 2008 WL 5194453 (N.J. Super. A.D).
31. *Id.* at 476.
32. 380 N.J. Super. 55, 68 (App. Div. 2005).
33. *Gordon,* 380 N.J. Super. at 67-68.
34. N.J.S.A. 2A:34-23(c).
35. *Gordon*, 380 N.J. Super. at 68; *see also Rothfeld v. Rothfeld,* 2008 WL 4763271 (N.J. Super. A.D.) (hinting upon the inherent inconsistency between the prohibition on predictive factors established in *Gordon* and the express language of N.J.S.A. 2A:34-23(c) that requires the court to predict the amount of time it would take for the supporting spouse to reach a level where limited duration alimony is no longer appropriate).
36. *See Doctoroff v. Doctoroff,* 2007 WL 2728415, 1 (N.J. Super. A.D.) (awarding LDA for one year based on the amount of time needed for the wife to obtain her residency and transition herself into her new employment); *Finne v. Finne,* 2008 WL 2078504, 6 *(*N.J. Super. A.D. 2008) *(*affirming the trial court's award of LDA

and noting that the trial court based its determination as to length of the LDA award, in part, on estimates about future financial circumstances of the parties).

37. *Schwartz v. Schwartz,* 2007 WL 1756778, 1 (N.J. Super. A.D.) ("The duration of the term alimony, though lengthy, was linked rationally to the youngest child's graduation and driven by the plaintiff being a full-time homemaker and child care provider."); *Weaver v. Weaver,* 2005 WL 1562798, 17 (N.J. Super. A.D.) (noting that the duration of an award of LDA may be fixed upon "the period of time that [wife] and the children will be residing in the marital domicile, or with the minority of the children"); *Whitesell v. Whitesell,* 2006 WL 1302407, 4 (N.J. Super. A.D.) (affirming an LDA award of one year in a 2.5-year marriage since such "financial relief" was necessary due to the special needs of the parities' minor child, and in order "to permit the child to gain in age and the wife to re-enter the employment market…").

38. *Dubois v. Brodeur,* 2007 *WL* 2012387 (N.J. Super. A.D.) (Reversing the trial court's award of permanent alimony to the wife on a 7.5-year marriage, and noting that although the wife would never be able to maintain the standard of living established during the marriage without the support of the husband, such a finding in a short term marriage did not require an award of permanent alimony).

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Current Economic Depression Requires a New Approach to Post-Judgment Modification Applications

by Robin C. Bogan

In years past, a payor spouse seeking a downward modification of his or her support obligations had an uphill battle. To be successful on such a post-judgment application, the payor spouse needed to demonstrate the reduction in income was involuntary, and that he or she utilized his or her best efforts to secure comparable employment. This included hiring headhunters, sending out numerous resumes, visiting career websites, going on interviews, and actively seeking new employment.

Additionally, the application could not be made until the payor could establish that either the period of unemployment or the reduction in income was no longer 'temporary.' Our case law provides that temporary unemployment is an insufficient basis to modify support obligations.[1] Often, the payor spouse needed to endure over a year of unemployment or a reduction of income until he or she could file such an application and have a chance of being successful.

Judges viewed a payor spouse's application to reduce support obligations with initial disbelief. The payor's proofs were critically scrutinized. Not only did the court examine the reasons for the payor's reduction in income, but also whether meaningful efforts were made to obtain comparable employment. Judges also examined whether there were any changes to the payor's lifestyle, whether there was an increase in borrowing, and whether the payor depleted assets to either pay support or other expenses.

This article encourages attorneys and family judges to think creatively about addressing the unique circumstances the current economic crisis presents. A rigid application of our legal principles alone will not promote fairness. These economic realities require a different problem-solving approach, so our families weather this economic storm together.

AN UNPREDICTABLE ECONOMY

Today's economic climate is best described as unpredictable. There is no question New Jersey, as well as our entire country, is experiencing an economic crisis. New Jersey's workforce was reduced by 19,700 jobs in February 2009.[2] The state's unemployment rate soared to 8.2 percent, which is the highest since December 1992. Certain industries are plagued by high unemployment rates. The hardest hit industry was construction. Professional managers, legal services, and traffic collectors are also suffering.

The brunt of the economic downturn disproportionately affects less-educated workers. The unemployment rate for workers without a college degree is higher than for workers with a college degree. There is a higher rate of job loss in construction and retail.[3] Many economists predict the unemployment rate will hit 10 percent toward the end of 2009. The only two sectors that are predicted to add workers in 2009 are education and health services.[4]

The average workweek in March 2009 dropped to 33.2 hours, which is a record low.[5] As the economic crisis has reduced sales and profits, companies are laying off workers and resorting to other cost-saving measures, including reducing hours, furloughs, and freezing or cutting pay just to survive the tempest.

The sting of reduced income is even more piercing given other economic realities. It is difficult to borrow money. Savings and investments that people have worked so hard to accumulate are now down by 30-50 percent, even for the savvy investor. It used to be that a family going through difficult financial times could sell their house, take the equity, and move into smaller housing or into a rental. In this economic climate, many people cannot sell their homes for a profit.

To make matters worse for family part judges, even the most notable economists disagree on how long this depression will last. According to a December 2008 survey of 50 professional forecasters by blue chip economic indicators, the economy should have bottomed out and gradually started growing by the time you read this article.[6] Many economists are much more pessimistic.

Nouriel Roubini, professor of economics at New York University, foresees "a deep and protracted contraction" lasting at least until the end of

2009. He further anticipated that even in 2010 recovery may be so weak we will still feel the effects, even if the recession is over.[7] Moody's Economy.com predicts employers around the country will add jobs in 2010, but that the amount of jobs will not reach the number existing prior to the recession until late 2011. An even gloomier outlook from another consulting firm, IHS Global Insight, is that we will not attain the jobs existing pre-recession until the third quarter of 2012.[8] Even if the recession ends this year, companies will delay hiring until they feel the economy is out of the woods and in a true recovery.[9]

OUR GUIDING LEGAL PRINCIPLES

While the present state of the economy requires both family lawyers and judges to think creatively, an analysis of a post-judgment application for a reduction in support must begin with our long-standing legal framework. At the outset, New Jersey courts recognize a number of scenarios that constitute "changed circumstances." A decrease in the supporting spouse's income is one such situation.[10] It is the obligor's burden of persuasion to prove there is a change in circumstances warranting a modification of support.[11]

The seminal case of *Lepis* established the approach courts must take when faced with a request for modification of child support or alimony.[12] Procedurally, a payor seeking a downward modification of support must initially demonstrate there are sufficient changed circumstances that have impaired the ability of the payor to support him or herself, which warrants a modification. If that threshold burden is met, a court may order discovery of both parties' financial circumstances. It is then within the judge's discretion whether there are genuine issues of material fact requiring a hearing.

In *Lepis*, the Supreme Court stated that N.J.S.A. 2A:34-23 provides the family courts with equitable power to modify alimony and support orders at any time.[13] As a result of this judicial authority, alimony and support orders only define the present obligations of the former spouses. Those duties are always subject to review and modification upon a showing of changed circumstances.[14]

As stated in *Larbig*, every single motion to modify an alimony obligation "rests upon its own particular footing and the appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters."[15] In most cases, courts will make a modification to render the situation equitable and fair.[16]

As explained in *Larbig*, there is no bright line rule to measure when changes in circumstance have taken place long enough to want a modification of a support obligation. Such matters depend upon the discretionary determinations family part judges make in light of their experience, and by taking into consideration all relevant circumstances presented.[17]

In modifying the support obligation, the trial court must determine what is equitable and fair under all the circumstances.[18] This demands not only an examination of the parties' earnings, but also how they have spent their income and utilized their assets.[19] In *Donnelly*, the trial judge recognized it would be inequitable for the obligor's support obligations to be reduced while he maintained a lavish lifestyle at the obligee's and the children's expense.[20]

When a payor files an application seeking a downward modification of support, the inquiry then turns on his or her ability to pay.[21] In analyzing whether a downward modification is appropriate, the judge may consider not only the payor's income, but also his or her respective assets.[22] Thus, the payor shoulders not only the burden of showing the financial changes he or she experienced, and that those changes are permanent, but also an inability to pay the level of support either ordered or agreed upon.

If a court does order a downward modification in support, child support can only be retroactively modified back to the date the motion is filed with the court.[23] There is no statute barring retroactive modification of alimony to a date prior to the filing date of the application.

THINKING OUTSIDE THE BOX

Family court, as a court of equity, strives for fair results based upon all of the circumstances. Due to the current economic climate, attorneys and judges need to adopt a slightly different approach to post-judgment applications for reductions in support.

Unpredictability of Economic Impact

The author believes the court should consider treating such post-judgment applications like *pendente lite* support applications. New Jersey has long recognized the judiciary's authority to award temporary financial support pending a full investigation of a case.[24] *Pendente lite* practice involves the court making a support determination based upon incomplete information contained in client certifications. *Pendente lite* support, since it is temporary, can be retroactively modified upon a showing that the court's original award was not based on accurate information.[25]

Similar to a *pendente lite* application, but due to the unpredictability of the current economy, a judge has incomplete information when analyzing these post-judgment applications seeking a reduction in support obligations. For some, the economic downturn will have permanent effects, and for others, while the economic impact will be devastating, it may only last a year or two. For example, a 55-year-old Wall Street executive may never be able to duplicate prior earnings in the financial industry. In contrast, consider the employee who suffers

a 50 percent reduction in income for a two-year period, or does not receive bonuses or commissions, which were a significant piece of the income upon which support was based.

Given the uncertainty, judges may reduce support obligations on imputed income that never materializes. How does a judge impute income to an individual in the financial industry who has earned between $200,000 and $300,000 over the last three years and is now unemployed for nine months? In this scenario, a judge's imputation may miss the mark because there is nothing a judge can rely upon to determine what this individual is capable of earning in the future until some time passes, a diligent job search is conducted and possibly another job obtained.

If a court determines a payor spouse is entitled to some relief, whether it is a reduction in support, suspension of partial or full payments, or that assets will be utilized for a certain period of time, there should be a subsequent review. This review may be part of a separate application, or if the parties agree, they could attend mediation to make adjustments based upon full information at a later time. This relief should also be made retroactive to the filing of the first application. Such a review would take place either upon the payor spouse obtaining new employment or periodically (every six months or every year), depending upon the facts of each case.

The unpredictability makes it difficult for judges as well as practitioners. By treating these applications like *pendente lite* support applications, judges are able to compel the production of updated additional information and make adjustments. This resolves the problem created by families who need immediate relief, presenting judges with insufficient information to make a final ruling. These cases will need subsequent review and monitoring. However, we need to be sensitive to litigation costs, which these families are even less able to afford, and encourage them to attend mediation or order mandatory periodic private reviews prior to filing subsequent applications with the court.

This approach recognizes both parties have to share some of the financial burden that has impacted their family. It also recognizes these circumstances may either be short-lived or long-lasting.

Timing of Applications

The difficulty for the payor spouse is to determine how long to wait before bringing a motion seeking to reduce support obligations. Clearly, if the application is made too soon, litigation costs may be incurred and the application denied. However, the longer the payor spouse waits, credit card debt increases or assets are depleted, and the relief can only be made retroactive to the date when the motion is filed. Still, in these tough economic times, the author believes a payor spouse should wait at least six months prior to filing an application.

New Middle Ground Approach

The author's experience is that there has been a shift in the way judges are approaching these applications. Prior to the current economic crisis, the court viewed these applications with heightened skepticism. Today, payors are readily given the benefit of the doubt that our economy has contributed to a reduction in their income.

To achieve fairness, the author believes we need a middle ground approach. The courts need to remember that supported spouses have relied upon court ordered or agreed upon support in budgeting and making financial decisions. Supported spouses have entered into mortgages, auto leases, and other fixed expenses based upon the support they were entitled to receive.

This new approach should not abandon the level of judicial scrutiny that has been previously applied to these applications. The payor spouse needs to demonstrate a significant salary reduction or unemployment, and link that loss in income to the current economic climate. The payor's application needs to provide details of his or her efforts to obtain employment, efforts to borrow, and assets he or she utilized to pay expenses. If the payor spouse is able to demonstrate and provide credible evidence that there has been a significant and involuntary reduction in income, the problem is that no one can predict how long these circumstances will last.

At the same time, the concept of alimony is based on marriage being a shared enterprise. Both parties made financial and non-financial contributions to the marriage. Alimony is recognition of the supported spouse's contributions to the marriage. If the parties were living together and faced an economic crisis, joint decisions would be made as to how to financially survive. Now that the parties are divorced, the payor spouse should not be required to carry the entire burden of the financial effects of this economic crisis. If each party received equitable distribution, a payor spouse should not be required to deplete all his or her assets, or to put him or herself further into debt, without the payee being required to make similar financial adjustments.

Attorneys need to assist judges in analyzing these applications by coming up with creative 'game plans' for the family to survive the current economic depression. If the family cannot borrow from financial institutions, a plan may include borrowing from a third party, such as a family member or a friend at a low interest rate. There may be proposed spending cuts. There must be an exchange of information to keep both parties informed. In most cases, mediation may be much more cost effective than litigation and a plenary hearing.

The current economic circumstances require creative intervention. This article presents just a few of the arguments attorneys can make to encourage and convince family judges to adopt fair and equitable resolutions in response to the unpredictable economy. Thinking outside the box is the only way to achieve fairness in these uncertain economic times. ■

ENDNOTES

1. *Bonanno v. Bonanno*, 4 N.J. 268, 275 (1950); *Innes v. Innes*, 117 N.J. 496, 504 (1990).
2. Harper, "Joblessness in New Jersey tops federal rate, hits 8.2 percent," www.pressofatlanticcity.com/186/story/439253.html, March 25, 2009.
3. "Who is hit worst by the recession?", www.marketplace.publicradio.org/display/web/2009/03/04/pm_whos_hit-q., March 4, 2009.
4. "Jobs: Map Shows states hit hardest; forecasts for rebound," www.usatoday.com/money/economy/employment2009-02-08-recession-unemployment, Feb. 10, 2009.
5. Aversa, "Jobless rate bolts to 8.5 Percent, 663K jobs lost", www.finance.yahoo.com/news, April 3, 2009.
6. Uchitelle, "Some Forecasters See a Fast Economic Recovery," www.nytimes.com/2009/01/03/ business/economy/03econ.html, Jan. 2, 2009.
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8. "Jobs: Map Shows states hit hardest; forecasts for rebound," www.usatoday.com/money/economy/employment/2009-02-08-recession-unemployment, Feb. 10, 2009.
9. Aversa, "Jobless rate bolts to 8.5 Percent, 663K jobs lost," www.finance.yahoo.com/news, April 3, 2009.
10. *Lepis v. Lepis*, 83 N.J. 139 (1980).
11. *Storey v. Storey*, 373 N.J. Super. 464, 473 (App. Div. 2004); *Golian v. Golian*, 344 N.J. Super. 337, 341 (App. Div. 2001).
12. *Lepis*, *supra.*
13. *Lepis*, at 145.
14. *Id*. at 146.
15. *Larbig v. Larbig*, 384 N.J. Super. 17, 21 (App. Div. 2006) (*quoting Martindell v. Martindell*, 21 N.J. 341 (1956)).
16. *Dolce v. Dolce*, 383 N.J. Super. 11, 19 (App. Div. 2006).
17. *Larbig*, at 23.
18. *Lepis*, at 158.
19. *Donnelly v. Donnelly*, 405 N.J. Super. 117, 130 (App. Div. 2009).
20. *Id.*
21. *Miller v. Miller*, 160 N.J. 408, 420 (1999).
22. *Id.*, at 422.
23. N.J.S.A. 2A: 17-56.23(a).
24. *Crowe v. Di Gioia*, 90 N.J. 126, 132 (1982).
25. *Mallamo v. Mallamo*, 280 N.J. Super. 8 (App. Div. 1995).

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Involuntary Loss of Employment in the New Economy: A Temporary Change of Circumstance or the Basis for Modification?

by Elizabeth M. Vinhal

As a result of the economic crisis this country is presently facing, it is no surprise that the court system has been flooded with hundreds of applications in the last several months whereby litigants are requesting a reduction and/or termination in their support obligations due to an involuntary loss of employment. The issue lawyers and judges are grappling with is how to reconcile the prevailing legal concept that a temporary loss of employment does *not* warrant a modification of support when the unemployment rates in this 'new' economy are staggering and the prospect of finding employment is daunting.

This article is not intended to be instructive, but rather to provoke thought regarding reasonable approaches to both sides of this argument. They are as follows:

REPRESENTING THE PAYOR

Assuming the payor recently lost his or her job due to a reduction in workforce, a family law practitioner's argument may begin with reliance on N.J.S.A. 2A:34-23, which holds in pertinent part:

> Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders.... *Orders so made may be revised and altered by the court from time to time as circumstances may require.*[1]

Citation to the landmark case *Lepis v. Lepis*[2] would also be appropriate, noting that "...courts have recognized 'changed circumstances' that warrant modification in a variety of settings" including a "...decrease in the supporting spouse's income."[3]

After providing the court with the statutory authority and case law that allows it to amend the payor's support obligation, it may be prudent to remind the court of the unprecedented economic times. Robin Bogan has provided an overview of some statistics on the current state of the economy in her article contained elsewhere in this issue of *New Jersey Family Lawyer*. Based on the opinions of top economists, the payor's employment prospects may be bleak.

Demonstrating the payor's diligent efforts to obtain new employment, evidenced by volumes of resumes he or she has sent, along with each and every rejection letter, is essential. This will assist the court in concluding that despite the payor's extensive job search, he or she has been unable to obtain employment at a comparable income or at all. Urge the court to grant relief to your client, even if temporary in nature. If the payor has absolutely no income or prospect of income in the future, which is not a product of his or her own making but rather a result of the economic times we presently live in, then relief must be granted.

The argument may conclude by relying on "the important policy of recognizing that marriage is an adaptive economic and social partnership."[4] As noted in the Bogan article, if the parties were still married they would weather the storm together.

REPRESENTING THE PAYEE

On the other hand, the argument from the attorney representing the payee will likely dismiss the "poor economic times argument" and focus on the reality that "courts have consistently rejected requests for modification based on circumstances which are only temporary..."[5] In fact, in 2006 the Appellate Division expanded the definition of temporary when it held, in *Larbig v. Larbig,*[6] that "in light of the timing" the trial court did not abuse its discretion when it denied the husband's application for a reduction in support when the application was filed "only 20 months after the execution of the PSA." Thus, "any change was anything other than temporary."[7]

Unless significant time has passed, it will be noted that the payor has not made a *prima facia*

showing of a change in circumstances as "...in all probability his unemployment is only temporary....there is nothing in the record before us to indicate that the defendant is incapacitated or otherwise incapable of working or that his unemployment is other than temporary."[8]

It is important to stress that it is irrelevant that the economy is in decline. The fact of the matter is that case law is clear that unless a payor can show that his or her circumstances are not temporary in nature, he or she has not shown a change of circumstances, and, therefore, a termination or reduction in support is not warranted.

RECONCILING THE TWO APPROACHES

Based on the above schools of thought, the issue remains: Does the law need to catch up with this new economy and allow for a reduction and/or suspension in support obligations while payors are diligently looking for new employment? Or, to the contrary, should courts remain firm in the clearly established legal principles and deny payors' requests for a reduction or suspension in their support obligations unless they can prove their change of circumstance is permanent in nature?

Unfortunately, regardless of how desperately lawyers and judges want a bright line rule to address this issue, one does not exist. Lawyers do not have the substantive expertise to analyze this economy or the market environment. In order to do so, experts must be retained, which is costly to both parties. The trier of fact is no more able to make a conclusion about whether the change in circumstances is temporary or permanent. The reality of the situation is that the drastic market fluctuations are a moving target. The circumstances litigants are facing are fluid and have not stabilized. This is an extremely uncomfortable predicament for lawyers and judges to be in, because both parties are trained to attack problems and find a solution. There is no solution. Thus, courts must review each case on a case-by-case basis in hopes they can craft a fair and equitable resolution in this new economic environment. ■

ENDNOTES

1. N.J.S.A. 2A:34-23 (emphasis added).
2. *Lepis v. Lepis*, 83 N.J. 139, 151 (N.J. 1980).
3. *Id.*
4. *Cox v. Cox*, 335 N.J. Super. 465, 479 (App. Div. 2000).
5. *Larbig v. Larbig*, 384 N.J. Super. 17, 23 (App. Div. 2006).
6. *Banana v. Banana*, 4 N.J. 268, 275 (N.J. 1950).
7. *Larbig, supra*.
8. *Id.*

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