New Jersey Family Lawyer

Newsletter

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Chair's Column

by Michael J. Stanton

I am extremely proud to assume the office of chair of the Family Law Section of the New Jersey State Bar Association. At the same time, I feel very humble to follow some of the finest attorneys in this state as chair of our section. Although simultaneously experiencing the emotions of pride and humility may be paradoxical under ordinary circumstances, they are appropriate for assuming the role of chair of the section, because I have already learned there is nothing ordinary about this position. It is filled with many professional, political and social challenges.

I perceive the office of chair of the section to be one of service, that is, leadership of a group which serves a constituency. The group is the Family Law Section and the constituency is the family law bar. I intend to approach every issue that comes before the Family Law Section Executive Committee from the perspective of how I can best serve our constituency of family lawyers in the state of New Jersey. I believe that with the collaborative leadership and assistance of the other officers and members of the executive committee we can improve and enhance the practice of family law in the state of New Jersey.

Personally and professionally I am inclined to apply existential standards to my conduct. Our essence is defined by the course of the life we choose to lead. We are free to make our own personal and professional decisions and to choose our own personal and professional commitments; however, it is of paramount importance that we assume full responsibility for those decisions and choices. Said another way, we can choose to be whomever we want, and each of us is responsible for our own choice. We can choose to be professional, courteous, honest and ethical in all of our dealings with the courts and our adversaries; they are our colleagues. We can do this regardless of what our sometimes misguided clients may want us to do. In the end the clients will respect us more. More importantly, in the process each of us will be elevated qualitatively as a practitioner, and collectively we will raise the level of the practice of family law in the state of New Jersey.

We will and should be judged by what we do. Our specialty of family law practice and our profession will be judged by what we do as practitioners. I accept the responsibility of making these choices for myself and for the Family Law Section; and I intend to ask family law practitioners to make similar choices.

I expect that we are going to be confronted with some very interesting issues this year. We are going to continue to be challenged by the concept of best practices. We will be pushed to process our cases faster and more efficiently; but, I ask, at what price? Will it be at the expense of wives and husbands? Will it be at the expense of their children? Will it be at the expense of fairness?

One example of this apparent dilemma is reconciling the competing interests of best practices and best interests of children. Our colleagues in the mental health profession, upon whom we heavily rely to help us determine the best interests of children, are very concerned about the potential negative impact of best practices on their ability to perform complete evaluations of the best interests of children in custody cases. We must address the manner in which we can reconcile these apparently competing concepts to achieve both goals of best practices and best interests of children.

We are also being confronted with the issue of value for equitable distribution purposes. *Brown v. Brown*[1] has, at least for the time being, eliminated the use of discounts in valuing businesses and has brought the whole definition of value into question. Our Family

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Law Section should and will consider this to be an opportunity to have meaningful debate and have meaningful input into creating a fair and reasonable definition of value specifically appropriate to equitable distribution and not borrowed from some other area of the law. These, and I am sure many other interesting issues, will challenge our section this year. I look forward to leading a truly collaborative executive committee that will take responsibility for aggressively advancing the interests of our constituency.

In the area of scholarship, we are very excited about our plans to completely overhaul and revitalize the *New Jersey Family Lawyer.* We have already installed a new editorial board with new responsibilities. Our goal is to ensure that the *New Jersey Family Lawyer* remains in its position of prominence among legal publications. It is an extremely valuable source of communication and education for our constituency.

We intend to continue our emphasis on engaging and developing our young family lawyers, which includes a special Young Lawyers Committee that was created a few years ago. We have plans to involve the members of the Young Lawyers Committee in our educational programs and various events throughout the year. Our goal is to constantly seek out and groom the future leaders of the Family Law Section.

We are also planning several special events between now and next spring. We have scheduled our Annual Family Law Retreat for April 2 through April 6, 2003, in Santa Fe, New Mexico. We are in the process of finalizing the specific plans for the educational program, hotel accommodations and other activities in Santa Fe. The retreat is open to anyone interested in attending.

We plan to have our Annual Family Law Dinner on May 5, 2003, at Rats Restaurant, located adjacent to the New Jersey Grounds for Sculpture in Hamilton, with easy access from major highways in the Trenton area. The annual dinner is also open to anyone interested in attending.

Finally, I want to close my first chair's column by offering my sincere congratulations and gratitude to our immediate past chair, Cary Cheifetz. Last year Cary led our section in his usual successful and elegant style. As always, he made everything look easy and did everything so well. Cary has been and will continue to be one of the leaders and principal voices of the Family Law Section.

ENDNOTE

1. 348 N.J. Super. 466 (App. Div. 2002).

From the Editor Emeritus

Changing of the Guard

by Lee M. Hymerling

It is with great pride and gratitude that I announce with this issue a changing of the leadership of *New Jersey Family Lawyer.* With this issue, our friend and colleague Mark Sobel assumes the position of editor in chief and Cary Cheifetz and Maggie Goodzeit become co-managing editors of *New Jersey Family Lawyer.* With this issue, after 19 years of service, I step down as editor in chief and assume the title of editor in chief emeritus.

The *New Jersey Family Lawyer* had its genesis with a special edition dated July 1981. A total of 21 years later, it remains a beacon for family lawyers. Since *New Jersey Family Lawyer* began, our practice has evolved from the stepchild of legal practice to hold an honored and co-equal place with our civil law and criminal law brethren.

Not insignificantly, the article in the first issue of *New Jersey Family Lawyer* addressed the then-recently issued report of the New Jersey Supreme Court Committee on Matrimonial Litigation, popularly known as the Pashman II Report. Some of those who wrote for that issue remain active in the bar today. Among the authors were Gary Skoloff; Thomas P. Zampino, then the immediate past chair of our section and now for many years a family part judge; Larry Cutler, Jeff Weinstein and Alan Grosman. Over the years, many honored judges and lawyers have written for the publication. Among our distinguished editors who have passed away are Professor Jim Boskey of the Seton Hall Law School and Tom Forkin.

When the publication first emerged, the *New Jersey Family Lawyer* was edited by Alan Grosman and Barry Croland. With Volume III, I assumed the title of editor in chief, with Messrs. Grosman, Croland and Howard Danzig assuming the positions of editors.

Over the years, the publication has not shied away from controversial issues, such as specialization, mediation, forum shopping and much more. The *New Jersey Family Lawyer* frequently has led the way in the development of family law in our state. This is as it should have been, and it will undoubtedly continue.

Mark Sobel, a former chair of our section, a fine lawyer and a skilled writer (and for me a close friend) is particularly well positioned to assume this leadership role. Long a *New Jersey Family Lawyer* editor, he will serve the publication and the bar with distinction, joined by immediate past chair Cary Cheifetz and Maggie Goodzeit, who for many years has been actively involved in keeping the publication afloat. I have full confidence in those who will now lead. To the bar as a whole, I request for Mark, Cary and Maggie and their colleagues the support I have been given over the years. The publication is only as strong as the articles it contains. I call upon lawyers to volunteer to write and judges to continue the tradition of providing scholarly and timely articles on matters of common concern.

Articles by judges frequently appeared in the early years of the publication and beyond. For example, Assignment Judge Samuel G. DeSimone wrote an article titled "*Beck v. Beck:* Joint Custody as an Alternative" shortly after the *Beck* decision was handed down in 1981. Similarly, Judge Harold M. Nito, a member of the Pashman II Committee, wrote in February 1982 about recent amendments to the matrimonial rules, and later, in April 1982, the late Honorable Frank J. Testa discussed "Disarmament in the Divorce Wars: The Cumberland County Matrimonial Early Settlement Program."

The practice of publishing articles written by judges should continue, as should the practice of printing articles from other professionals who touch our practice. Accountants, psychologists, business evaluators and mediators, among others, should be invited to contribute their knowledge and insights to the bar as a whole.

To our new editor in chief and to this publication's new managing editors, I wish you well. I am certain the bar as a whole joins in that wish.

A postscript must be added. Although I have now assumed the title of editor in chief emeritus, most of you know it is impossible for me to simply pass from the scene. Beginning in this issue, I will be authoring a column to discuss matters of vital concern to all of us.

I thank this section for the privilege of serving this publication for so long. I look forward to continued years of service. ■

The Argument Against Executive Goodwill in New Jersey

by Cary B. Cheifetz and Brian M. Schwartz

Succinctly stated, it is the clear law of the state of New Jersey, as annunciated time and time again by the New Jersey Appellate Courts and Supreme Court, that goodwill, which an employee may have in his or her employment as measured by his or her personal earnings, is not marital property subject to equitable distribution. To be sure, in order for goodwill to be distributable, there must be a facet of a larger divisible business asset such as the law practice found in *Dugan v. Dugan,*[1] or the celebrity status of an entertainer as determined by the revenue of earnings flowing through an entertainment corporation, as found in *Piscopo v. Piscopo.*[2] However, where a party has no ownership interest in the underlying entity, marital goodwill cannot attach, and therefore, there is no asset available for distribution.[3]

For almost two centuries, goodwill has been associated with a business. It has been defined as "the probability that the old customers will resort to the old place."[4] This definition has since been amplified in a treatise relied upon by the modern New Jersey courts:

> Goodwill may be properly enough described to be the advantage or benefit which is acquired by an *establishment* beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.[5]

Although New Jersey courts have articulated an expansive definition of what constitutes marital property subject to equitable distribution, our legislative and judicial bodies have consistently indicated that there are limits to that definition. For example, the Legislature has excluded inheritances and gifts received from a party other than one's spouse.[6] The Supreme Court has held that a monetary award received by a spouse in a personal injury suit that compensates for one's pain and suffering is not marital property subject to equitable distribution.[7] Moreover, neither a license to practice in a profession, nor the receipt of a professional degree, even if earned during the marriage, is deemed property available for distribution at the time of a divorce.[8]

The argument for executive goodwill, then, is often attached to a highly compensated employee. In present times, for example, this term is applied to high-level Wall Street executives, whose earnings are well into seven figures per year. Yet, these employees have no interest in their employers. Their spouses have argued — to date unsuccessfully — that the earner has, as part of their employment, goodwill associated with their position, their immense earnings, earning capacity and stature within their respective communities, which is distributable.

New Jersey courts have consistently required that for goodwill to be deemed an asset, it must be linked to a cognizable business enterprise.

However, the New Jersey Supreme Court has considered these issues three times in reported decisions, and the Appellate Division has twice since developed the Supreme Court's position that there is no goodwill which attaches to a person, only to a business entity. Unlike the extreme position adopted in some states,[9] New Jersey courts have consistently required that for goodwill to be deemed an asset, it must be linked to a cognizable business enterprise.

The issues of earning capacity and goodwill were first considered by the New Jersey Supreme Court in 1975 with the case of *Stern v.*

Stern.[10] In *Stern,* the husband, a partner in a law firm, contested the propriety of considering his earning capacity as being a separately identified and distinct item of marital property subject to apportionment for equitable distribution. The trial judge determined such earning capacity to be divisible, finding that:

> His ability [earning capacity] is an amorphous asset of this marriage in the absence of other assets. It consists of natural ability, undergraduate and postgraduate education, marriage to the daughter of a man of high standing and lucrative income in the area of his professional activity, entrée to his office and ultimate partnership, subsequent management of the firm with advancement in the esteem of his professional peers.[11]

Although affirmed by the Appellate Division,[12] the Supreme Court reversed, stating:

> We agree with the defendant's contention that a person's earning capacity, even where its development has been aided and enhanced by the other spouse, as is here the case, should not be recognized as a separate, particular item of property within the meaning of N.J.S.A. 2A:34-23. Potential earning capacity is doubtless a factor to be considered by a trial judge in determining what distribution will be "equitable" and it is even more obviously relevant upon the issue of alimony.[13]

Later, in *Dugan v. Dugan,*[14] the Supreme Court found that an attorney's goodwill in his exclusively owned professional corporation was property subject to equitable distribution. Yet, the Court again differentiated between the goodwill associated with the entity (the practice) and personal goodwill. The Court stated:

> Though other elements may contribute to goodwill in the context of a professional service, such as locality and specialization, reputation is at the core. It does not exist at the time professional qualifications and a license to practice are obtained. We held in *Lynn v. Lynn,* 66 N.J. 340,45 (1982) that a license to practice medicine and a medical degree were not property. They reflected only a possibility of future earnings. This holding was consonant with the proposition in *Stern* [citation omitted] that potential earning capacity is not property within the meaning of the statute … Goodwill is to be differentiated from earning capacity. It reflects not simply a possibility of future earnings, but a probability based on existing circumstances … The possibility of additional earnings is to be distinguished from the existence of goodwill in a law practice and the probability of its continuation. Moreover, unlike the license and the degree, goodwill is transferable and marketable.[15]

The Court specifically pointed out that while goodwill could exist in an attorney's law practice, if the attorney was instead an employee, he or she would, "as any employee, not have goodwill properly ascribable to his employment."[16]

In *Piscopo v. Piscopo,*[17] the appellate court considered whether a professional entertainer's goodwill attributable to his celebrity status was a marital asset subject to equitable distribution. The actor/comedian Joe Piscopo had included within his marital estate Piscopo Productions, Inc., the business he established to manage his entertainment career. Significantly, nearly all of Mr. Piscopo's earnings flowed through Piscopo Productions, Inc. Comparing the celebrity goodwill of Mr. Piscopo to the professional goodwill of the attorney in *Dugan*, the trial court concluded that the actor's celebrity status was a divisible asset.

In *Piscopo v. Piscopo,*…[t]he appellate court concluded that it was valuing a business asset, and not an individual asset in holding in favor of Mrs. Piscopo…emphasizing the *business* goodwill that presumably lay within Piscopo Productions, Inc., rather than the personal earning potential of Mr. Piscopo himself.

The appellate court agreed. Relying heavily on the fact that substantially all of Mr. Piscopo's earned income flowed through Piscopo Productions, Inc., and that this business was subject to appraisal like any other business. The appellate court found that his celebrity had created substantial goodwill in the production company. In reaching that determination, the court turned to *Dugan,* emphasizing that in that case business goodwill was recognized, even though the business depended entirely on the skill of one person and had no book value.[18]

Of importance to the issue at hand, the appellate court once again specifically rejected the New York position set forth in *Golub,*

supra, stating flatly, "Plaintiff contends, and we agree, that New York law differs materially from ours and from that of other states because in New York the value of the license alone is considered marital property."[19] The appellate court concluded that it was valuing a business asset, and not an individual asset in holding in favor of Mrs. Piscopo, again emphasizing the *business* goodwill that presumably lay within Piscopo Productions, Inc., rather than the personal earning potential of Mr. Piscopo himself. The Court stated:

> We accept the accountant's analysis which conforms to ours and to that of the majority of states concerning the value in a marital estate of a business which is based upon personal competence. Plaintiff had such a business, the earnings of which were undisputed, and which he conceded had value.[20]

Recently, the Appellate Division reinforced its position concerning personal goodwill in *Seiler v. Seiler.*[21] The appellate court concluded that a manager of an Allstate Insurance Agency franchise was simply an employee of Allstate, and that his special skills and reputation as a salesman were not cognizable as a basis for finding divisible goodwill subject to equitable distribution. Critical to the court's analysis was its determination that the agency agreement with Allstate limited the defendant's autonomy and ability to control the business he had formed. The court stated:

> Defendant's ability to earn a substantial income must not blind us to the fact that he is an employee of a major insurance company selling its insurance products in accordance with the terms and conditions established by his employer. The compensation scheme does not transform a person in defendant's position into an independent entrepreneur. He remains a salesman whose job is to aggressively solicit new clients and retain old clients.[22]

Taking special note of the fact that the plaintiff sought a finding of divisible goodwill in the person rather than the business entity, the appellate panel concluded:

> When goodwill is recognized as a distributable asset, goodwill is usually a facet of the larger asset, such as the law practice in *Dugan* and the entertainment career in *Piscopo*. We have discovered no case in this State in which goodwill has been recognized as an asset unassociated with the business entity. Under these circumstances, we conclude that any goodwill generated by defendant is attributable solely to Allstate, his employer, and is not an asset subject to equitable distribution.[23]

Like Mr. Seiler, the highly compensated employee is merely that, an employee. Despite significant managerial, sales management or other significant supervisory authority for the employer, the status as employee does not change. To the extent that goodwill exists in the highly compensated employee, it resides in the employer, not the employee. There is no separate asset that is eligible for equitable distribution as a marital asset. In fact, any value in the highly compensated employee's status has already been measured by his or her compensation and the assets accumulated that resulted from same.

Finally, the analysis of equitable distribution of professional licenses and degrees involve the same policy considerations as that of executive goodwill. Neither fits within the traditional legal concept of property. If property is not transferable on an *inter vivos* or testamentary basis, it is without a usufruct and, thus, this *property* is nothing more than a fiction. Instructively, in *Mahoney, supra,* Justice Morris Pashman, in referring to professional degrees and licenses, stated that the New Jersey Supreme Court "has never subjected to equitable distribution an asset whose future monetary value is … uncertain and unquantifiable."[24] Justice Pashman maintained that a professional degree or license is the personal achievement of the holder, and is not a marital asset because it cannot be sold.[25] The same is certainly true in analyzing one's status as an employee.

To the extent that goodwill exists in the highly compensated employee, it resides in the employer, not the employee. There is no separate asset that is eligible for equitable distribution as a marital asset.

In making his determination, Justice Pashman feared that distributing the value of a license or degree would require distribution of earning capacity, which is prohibited by *Stern* and would require speculation in determining income that the holder might never acquire. Valuation "would involve a gamut of calculations that reduces to little more than guesswork."[26]

Moreover, any assets resulting from income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired during the

Justice Pashman maintained that a professional degree or license is the personal achievement of the holder, and is not a marital asset because it cannot be sold. The same is certainly true in analyzing one's status as an employee.

marriage.[27] To complicate the speculative calculation,

> Earnings in the "enhanced" career [must] be reduced by the … income the spouse should be assumed to have been able to earn if otherwise employed. In our view [this] is ordinarily nothing but speculation, particularly when it is fair to assume that a person with the ability and motivation to complete professional training or higher education would probably utilize those attributes in concomitantly productive alternate endeavors.[28]

Thereafter, unforeseen events could affect earning capacity and actual earnings, increasing the probability that equitable distribution of same could prove unfair. How would the court address death, termination of employment, changes in the economy, career changes, involuntary retirement, and similar issues? What of the risks of a highly competitive field or the age or health of the individual?

> The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.[29]

The policy arguments set forth above clearly apply to executive goodwill. Writing about an educational degree, Justice Pashman quoted *In re Marriage of Graham,*[30] in which that court stated:

> An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property". It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[31]

In conclusion, the courts of New Jersey have consistently linked the concept of goodwill to some entity in order to determine that it is subject to equitable distribution. Equity and logic dictate that one's status as a highly paid executive is not an entity, nor is earning capacity of an employee an asset, subject to equitable distribution. Consequently, the concept of executive goodwill is merely that, a scholarly discussion, and not a quantifiable asset subject to equitable distribution in this state. ■

ENDNOTES

1. 92 N.J. 423 (1983).
2. 232 N.J. Super. 559 (App. Div. 1989).
3. *See Seiler v. Seiler,* 308 N.J. Super. 474 (App. Div. 1998).
4. *Cruttwell v. Lye,* 34 Eng. Rep. 129, 134 (1810).
5. Joseph Story, *Commentaries on the Law of Partnerships* Section 99 at 157 (7th ed. 1881) (emphasis added); *quoted in Levy v. Levy,* 164 N.J. Super. 542, 549 (Ch. Div. 1978).
6. *See* N.J.S.A. 2A: 34-23.
7. *See Landwehr v. Landwehr,* 111 N.J. 491 (1988).
8. *See Lynn v. Lynn,* 91 N.J. 510 (1982); *Mahoney v. Mahoney,* 91 N.J. 488 (1982).
9. *See Golub v. Golub,* 527 N.Y.S. 2d 946, 950 (Sup. Ct. 1988) (determining that a special skill that generates substantial income is a divisible marital asset).
10. 66 N.J. 340 (1975).
11. 123 N.J. Super. at 568.
12. 128 N.J. Super. 198 (App. Div. 1974).
13. *Stern, supra.* at 345.
14. 92 N.J. 423 (1983).
15. *Id.* at 433.
16. *Id.* at 439.
17. 232 N.J. Super. 559 (App. Div. 1989), *certif. denied,* 117 N.J. 156 (1989).
18. *Piscopo,* 232 N.J. Super. at 562.
19. *Id.* at 564.
20. *Id.* at 564-65.
21. 308 N.J. Super. 474 (App. Div. 1998).
22. *Id.* at 474.
23. *Seiler, supra.* at 480.
24. *Id.* at 496.
25. *Id.*
26. *Id.* at 497.
27. *Id.*
28. 182 N.J. Super. at 609.
29. *Mahoney, supra,* at 498, *quoting DeWitt v. DeWitt,* 98 Wis. 2d 44 (Ct. App. 1980).
30. 194, Colo. 429 (1978).
31. 91 N.J. 488, 496 (1982).

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Drafting the Post-*Crews* Prenuptial Agreement

by Mark Biel

Since November 1998 the Premarital Agreement Act has been law in New Jersey.[1] Assuming a prenuptial agreement has been executed voluntarily, with full disclosure of earnings, assets and financial obligations, and with the assistance of independent legal counsel, the text of the statute provides for the enforceability of the agreement so long as it was not "unconscionable at the time enforcement was sought."[2]

In *D'Onofrio v. D'Onofrio,* while the court affirmed the validity of the prenuptial agreement, it modified the wife's alimony to better reflect the standard of living *during* the marriage.

The requirement to set aside a prenuptial agreement is placed squarely upon the party seeking to declare it invalid. Carrying the burden requires proof by the enhanced standard of clear and convincing evidence.[3] The statute accordingly provided a material departure from case law, sparse though it was, which placed the burden of proof upon the party seeking to enforce the agreement.

In *Marschall v. Marschall,* the court noted that it could not enforce an agreement that was "unconscionable." Among the definitions of unconscionable, was the providing of a standard of living far below that which was enjoyed both *before* and *during* the marriage.[4] In *D'Onofrio v. D'Onofrio,* while the court affirmed the validity of the prenuptial agreement, it modified the wife's alimony to better reflect the standard of living *during* the marriage.[5]

In *DeLorean v. DeLorean,* the court again applied the unconscionability test, indicating that while it would not enforce any agreement that was unconscionable, it would not refuse to enforce an agreement merely if it was "unfair."[6]

While the statute indicates that the issue of unconscionability of a premarital agreement shall be determined by the court as a matter of law,[7] the Legislature nonetheless established certain benchmarks for unconscionability in the statute's definitional framework wherein the term unconscionable premarital agreement was defined to mean an agreement:

> …either due to a lack of property or unemployability (1) which would render a spouse without a means of reasonable support; (2) which would make a spouse a public charge; or (3) which would provide a standard of living far below that which was enjoyed before the marriage.[8]

Accordingly, if the agreement meets the voluntariness, full disclosure and independent legal counsel requisites of the statute, it would seem that if the agreement provided a mechanism for achieving a specifically defined standard of living consistent with that of the supported spouse prior to marriage, it could not be considered unconscionable and thus, unenforceable. Put another way, assuming the agreement did not create for the supported spouse a standard of living far below that which he or she enjoyed before the marriage, (or indeed, perhaps not lower at all than that which was enjoyed before the marriage), it can certainly be maintained that if such spouse was capable of self-support at that level prior to marriage, the same level would constitute reasonable support as that term is utilized in the statute.

IMPACT OF *CREWS*

But *quaere:* In light of the Supreme Court's pronouncements in *Crews v. Crews,*[9] is the term "reasonable support" defined by the standard of living achieved by the parties during the marriage, thus essentially emasculating the purpose of the statute and calling into question any support and maintenance limitations contained in a comprehensive premarital agreement?

The threshold question to be asked and answered is whether the reasonable support standard in the statute is arguably now the standard of a reasonably comparable lifestyle, particularly in a marriage of significant duration.

The *Crews* decision essentially requires the trial court to make a finding as to the marital lifestyle, even in a settled case. As the court indicated:

> ... 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.[10]

REASONABLE SUPPORT OR REASONABLY COMPARABLE LIFESTYLE

The threshold question to be asked and answered is whether the reasonable support standard in the statute is arguably now the standard of a reasonably comparable lifestyle, particularly in a marriage of significant duration. For example, consider the following:

Each of the parties is entering a marriage for the second time, and both are 38 years of age. We will refer to them as Carol and Paul. Carol is a tenured teacher earning $45,000 annually. Paul is a small businessman earning $60,000 annually. Neither has any child-rearing responsibilities, as neither has had children from their prior marriages. Three years into the marriage, Paul's business takes off and he quickly finds himself earning $500,000 annually. The parties begin to live the good life, starting with the purchase of a large new home, the down payment for which comes from Paul's premarital assets, and he takes title to the home solely in his name. The parties travel extensively, acquire elegant wardrobes, eat regularly at posh restaurants, and acquire lavish jewelry.

Provisions in the prenuptial agreement which had been executed by the parties well in advance of marriage recognize the lifestyles of each of the parties prior to marriage. The lifestyles are described in some detail, and a case information statement as to each party setting forth income, assets and budgetary needs is made part of the agreement. The agreement provides for a complete mutual and reciprocal alimony waiver. At the 15-year mark, divorce proceedings are instituted. In her pleadings attacking the enforceability of the premarital agreement, Carol maintains that if Paul were to provide no alimony, it would render her without a means of reasonable support based upon the parties' lifestyle over many years, and accordingly, the terms of the agreement as applied to the facts of the case render it unconscionable. She further argues that the social policy expressed in *Crews* and its progeny means that in a long-term marriage underemployment as it relates to the marital lifestyle is tantamount to unemployment. Is that a viable position?

Assume the same set of facts, except that several years prior to the divorce proceedings Carol had stopped working by mutual agreement, losing her tenured teaching position. Further, assume that while her health condition makes it impossible for her to now return to a teaching position, Carol will be receiving approximately $1,000,000 in liquid funds, as part of equitable distribution, thus permitting Paul to make the argument that her annual interest and dividend income will approximate the income she would be receiving even if she were teaching, thus arguably taking the issue of unemployability out of the question. Carol nonetheless maintains that such an income level is so dramatically below the level of the enhanced standard of the marriage, that it renders the alimony waiver an unconscionable provision. She also argues that notwithstanding the use of the language "unconscionable" in the statute, in recent decisions our courts have opined that prenuptial agreements made in contemplation of marriage are enforceable only if they are fair and just. For this proposition she cites *Pacelli v. Pacelli.*[11]

She also argues that family law agreements are not governed solely by contract principles, citing *Lepis v. Lepis.*[12] But Paul cites *Konzelman* for the proposition that the court will even enforce an *agreement completely terminating alimony* upon cohabitation if mutually and voluntarily negotiated.[13]

AVOIDING THE *CREWS* DILEMMA

Assuredly, the purpose of this article is not to resolve these issues, and the arguments to be crafted on each side of the ledger are limited only by the imagination of respective counsel. In fact, no published decision has yet considered the ability of the parties to waive the *Crews* catechism, even in the context of a property settlement agreement. Nonetheless, it is suggested that language such as the following may provide an opportunity to avoid a prenuptial agreement being defeated by bootstrapping the underpinnings in *Crews* to a prenuptial agreement:

The parties have evaluated the standard of living of Carol and Paul

as of the execution of this agreement. Attached hereto as exhibits are the parties' case information statements (CIS) which they have executed and which they reaffirm herein are representative of their budgetary requirements and further describe their gross and net annual incomes. The parties have been advised by their respective counsel as to those factors which might render this agreement unconscionable. One of those factors is a support and maintenance provision, which would provide to one of the parties a standard of living far below that which was enjoyed before the marriage. The parties acknowledge that the alimony provisions, including any alimony waivers contained herein, will nonetheless permit each of the parties to maintain a standard of living that would not be far below that which was enjoyed before the marriage. They also acknowledge that the statute indicates that an agreement may be unconscionable if either due to a lack of property or unemployability a spouse would be rendered without a means of reasonable support. The parties agree that the support and maintenance provisions contained herein, including any waivers, will nonetheless provide each of the parties with a means of reasonable support based upon their lifestyles as they enter their marriage.

The parties have further been advised of their statutory rights to pursue a claim for alimony, support and/or maintenance if this agreement was not being entered into and they acknowledge that this agreement limits and defines those rights. They have been advised that under cases such as *Crews v. Crews* and *Cox v. Cox,* and N.J.S.A. 2A:34-23(b)(4) if this agreement were not being executed, each of the parties in the event of separation and/or divorce would be able to assert a legal position which might require an analysis of the lifestyle achieved by the parties during the marriage. In entering into this agreement, each party recognizes that the lifestyle of the parties has the potential to increase significantly during the marriage. In entering into this agreement the parties agree that the term reasonable support as set forth in the prenuptial statute for purposes of this agreement means the support necessary to achieve each parties' present income level at the time they are entering into this agreement, not the level that may be achieved during the marriage, irrespective of the length of the marriage.

One of the purposes for which the parties enter into this agreement is to clearly enunciate their desire to mutually waive any support and maintenance claims, including claims for alimony, which either may have against the other, except as specifically set forth herein, including a wavier of any right to argue that changes in the parties' lifestyle as a result of their marriage should impact or interdict the level of support, maintenance or alimony which either party might otherwise be compelled to pay to the other.

The purpose of this article is not to suggest that the failure to address the underlying predicates of *Crews* will necessarily sound the death knell of an otherwise well-drafted prenuptial agreement, but only to raise the issue such that many years later when the issue is raised upon divorce, at least it will have been addressed in the agreement. ■

ENDNOTES

1. N.J.S.A. 37:2-31 *et seq.*
2. N.J.S.A. 37:2-38(b).
3. N.J.S.A. 37:2-38.
4. 195 N.J. Super. 16, 30-31 (Ch. Div. 1984).
5. 200 N.J. Super. 361, 370 (App. Div. 1985).
6. 211 N.J. Super. 432, 437 (Ch. Div. 1986).
7. N.J.S.A. 37:2-38(d).
8. N.J.S.A. 37:3-32(c).
9. *Crews v. Crews,* 164 N.J. 11 (2000).
10. 164 N.J. 11, 16 (2000). *See also Cox v. Cox,* 335 N.J. Super. 465 (App. Div. 2000).
11. 319 N.J. Super. 186, 189 (App. Div. 1999).
12. 83 N.J. 139, 148 (1980).
13. 158 N.J. 185 (1999).

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Dissolving Final Orders Under the Prevention of Domestic Violence Act Without the Consent of the Victim

by John P. Paone Jr

Since 1981, New Jersey courts have been entering final restraining orders (FROs) under the Prevention of Domestic Violence Act.[1] The numbers regarding domestic violence are staggering. According to the Administrative Office of the Courts (AOC) Report on the Prevention of Domestic Violence Act, in 1999 alone, 43,338 new complaints were filed. These complaints resulted in the entry of 13,181 FROs. Although records only dating back to 1993 have been compiled, the domestic violence central registry "lists 120,000 batterers and their victims."[2]

In New Jersey, FROs do not have a sunset provision requiring that they be renewed or reissued after the passage of time. In short, they last indefinitely. This is contrary to the law in many states where after the passage of time the victim is required to return to court to justify the continuation of the order.[3] In New Jersey, it is incumbent upon defendants to return to court to vacate or modify the FRO.

When considering the subject of dissolving FROs, let us not discount that there may be many orders outstanding of questionable merit. Prior to 1993, restraints were routinely entered without a requirement that the defendant admit to any fault or wrongdoing.[4] Indeed, many practitioners (not foreseeing the repercussions of conceding to permanent restraints) counseled their clients to stipulate to the entry of FROs in order to avoid an *unnecessary* court appearance. In this regard, it is worth recalling that in-house restraining orders were being granted as late as 1995.[5]

In New Jersey, FROs do not have a sunset provision requiring that they be renewed or reissued after the passage of time. In short, they last indefinitely…[and] it is incumbent upon defendants to return to court to vacate or modify the FRO.

While attorneys today understand that the issuance of a FRO is a serious matter, many FROs are entered against unwary *pro se* litigants with no requirement that they receive legal representation. These defendants may not appreciate that the entry of such an order can result in the loss of employment or employment opportunities — or that violation of a FRO is a crime. To the unsophisticated, the entry of a FRO is little more than a harmless restraint.[6] Due to a burdensome calendar and the paramount consideration of protecting victims, trial courts may unknowingly grant specious FROs when *pro se* litigants do not object to their entry.[7]

Compounding the problem is the general impression of practitioners and defendants that, once issued, a FRO can never be vacated without the victim's consent. This impression is not consistent with the law. Although FROs have no fixed expiration date, "the duration of an injunctive order should be no longer than is reasonably required to protect the interest of the injured party."[8] Therefore, it is not that a FRO should continue as long as the victim wants it — a FRO should continue only as long as the victim requires it.

Presently, little attention is being paid to the law governing the dissolution of FROs. Although many FROs are vacated each year, almost all of these cases are the result of victims consenting to the dissolution of restraints after being informed of the cycle of violence. This article will examine the law regarding the dissolution of domestic violence orders without the consent of the victim, and will provide practice tips for successfully making these applications.

[I]n making application to dissolve the FRO, counsel must be prepared to obtain the complete record of the hearing. ...Failure to obtain the transcript will be fatal to the application, as the reviewing court will be unable to determine whether the circumstances existing at the time of the FRO have substantially changed.

OBTAINING THE COMPLETE RECORD

> Upon good cause shown, any final order may be dissolved or modified upon application to the Family Part, Chancery Division of the Superior Court but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.[9]

Due to judicial rotation and retirement, it will be rare when dissolution actions come before the judge who originally entered the FRO. Even when the judge issuing the FRO is available, it is unlikely that he or she will be able to recall the facts of the case. Therefore, in making application to dissolve the FRO, counsel must be prepared to obtain the complete record of the hearing. The complete record has been defined to include the transcript of the final hearing as well as a copy of the original complaint and final order. Failure to obtain the transcript will be fatal to the application, as the reviewing court will be unable to determine whether the circumstances existing at the time of the FRO have substantially changed.[10]

Practice Tip #1: Practitioners should make it a policy to order a transcript of the final hearing (or at least advise clients of the need to order a transcript) at the time of the entry of the FRO.

Dissolution applications are likely to be filed many years after the entry of the FRO. For a host of reasons, transcripts can become unavailable over time. Therefore, obtaining the transcript of the hearing (or at least the audio tape) at the time that the FRO is issued can be essential.

THE BURDEN TO SHOW GOOD CAUSE

After the complete record is assembled, the next step is to demonstrate good cause to dissolve the FRO. However, before demonstrating good cause an issue arises as to the burden of proof that defendants must satisfy. To date, the statute and the case law have not defined that burden. Although the domestic violence law is part of the criminal code, N.J.S.A. 2C:25-29 provides that the standard for proving the allegations of a domestic violence complaint shall be by "a preponderance of the evidence." Therefore, practitioners should argue that the defendant's burden to show good cause to dissolve a FRO should also be by a preponderance of the evidence.

Defendants are not automatically entitled to a plenary hearing regarding these applications.[11] Rather, the moving party has the burden to make a *prima facie* showing that good cause exists for dissolution of the FRO. If that burden is met, the court should then determine whether there are facts in dispute which are material to a resolution of the motion prior to ordering a plenary hearing. Therefore, practitioners must be certain to present a full and complete application to ensure that the matter gets to the hearing stage where discovery may be obtained and the plaintiff can be cross-examined.[12]

DEFINING GOOD CAUSE

The Legislature did not define good cause, and effectively left it for the courts to interpret this standard. In interpreting the good cause standard, the courts have looked to the Legislature's findings and declarations that are embodied in the act. Specifically, the Legislature provided that "it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long term civil and criminal remedies and sanctions...."[13] Furthermore, it is the "intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide."[14] Finally, trial courts are authorized to "grant any relief necessary to prevent further abuse."[15]

It took almost 14 years for the first published case to define the good cause standard. In 1995, Judge Thomas H. Dilts wrote what has become the most important opinion on the subject of good cause.[16] In *Carfagno*, the trial court defined 11 factors to be considered in determining good cause.[17] The Appellate Division has now cited these factors with approval.[18] Practitioners must understand that these factors are to be weighed qualitatively not quantitatively. Nevertheless, the factors represent a road map for establishing good cause.

FACTOR 1: CONSENT OF THE VICTIM TO LIFT THE ORDER

As already noted, the most common way for a FRO to be dissolved is upon the consent of the victim. Where victims do not consent to dissolving the FRO,

practitioners should examine the history between the parties since the entry of restraints. If after the entry of restraints the parties have reconciled voluntarily or shared marital relations, the FRO may be vacated as being unenforceable and stale.[19]

Practice Tip #2: Do not allow the victim's failure to consent to lift the restraints to deter a bona fide *application for dissolution.*

Even where there have been no actions by the victim to undermine the viability of a FRO, the failure of the victim to consent to the dissolution of restraints is not in itself fatal to a dissolution application. The Legislature did not provide that FROs only may be dissolved upon permission of the victim.[20] For the practitioner, the failure of the victim to consent to dissolution of the FRO is the start — not the end — of the inquiry.

Some judges may not entertain a hearing on the issue of dissolution if the victim does not consent (or at least does not object). This practice is inconsistent with the law, and it represents a deviation from the good cause standard.

FACTOR 2: THE VICTIM'S FEAR OF THE DEFENDANT

An important justification for entering a FRO is the fear, dominion and control that a defendant has over the victim. Therefore, before dissolving a FRO it is critical that courts consider whether the victim still fears the defendant. Obviously, victims who do not consent to the dissolution of a restraining order will claim that they fear the defendant. However, this is not the test. The appropriate issue for the court to determine is whether "a reasonable victim similarly situated would have fear of the defendant under these circumstances."[21]

Practice Tip #3: Objective fear, not subjective fear of the victim, is to be considered in an application to dissolve a FRO.

In determining whether the victim objectively fears the defendant, attorneys will need to go back to the underlying act of domestic violence and the facts of the case. As set forth previously, prior to 1993, FROs were issued without a finding or admission of fault. In these cases, practitioners will need to determine what act of domestic violence the defendant may have committed. The more obscure the underlying act of domestic violence, the more likely that a reasonable victim similarly situated may no longer be in fear of the defendant. For example, we all have seen restraining orders entered for a host of minor transgressions that can occur during the intensity of contested litigation.[22] These transgressions viewed years later, away from the heated battle of litigation, may indeed cast doubt on whether the victim has objective fear of the defendant.

FACTOR 3: NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES TODAY

The trial court must determine whether the current relationship between the parties places the victim in a position where the defendant can still exercise control and dominion if the FRO is dissolved. For example, if the parties have an unemancipated child in common, there will likely be frequent contact between the parties giving the defendant the opportunity to exercise control if the restraints are lifted. Conversely, the parties may have no relationship in the aftermath of the FRO. For example, take the case where the parties had a dating relationship when the FRO was entered and now are married to different partners. Another example would be the case where the parties are now separated by great physical distance. Where the relationship between the parties is attenuated, the ability to exert control and dominion is limited or non-existent, and dissolution of the FRO may be warranted.

PRACTICE TIP #4: Always give the court a reason for the defendant bringing the application to dissolve the FRO.

I have heard some judges ask rhetorically, "if the defendant doesn't intend to have contact with the victim, why does the defendant want the restraints lifted?" Even when the question is not expressed, it clearly must be in the mind of many judges reviewing a dissolution application. For this reason a stronger application will be made by informing the court that the application is necessary for some reason outside of the defendant wanting to have contact with the victim. (*e.g.* a defendant seeking employment in law enforcement). Conversely, ignoring the 11 factors for demonstrating good cause and merely relying on the defendant's reason for bringing the application would be an exercise in futility.[23]

FACTOR 4: CONTEMPT CONVICTIONS

Practitioners must determine whether their client has ever violated the FRO. The court needs to know that the FRO has been effective in breaking the cycle of power and control exercised by the defendant over the victim. Defendants committing an act of contempt demonstrate that the FRO needs to continue, as the cycle of power and control has not been broken.

Practice Tip #5: While it is best to be able to show that there have been no contempt convictions against the defendant, do not allow a contempt conviction to deter an otherwise bona fide *application to dissolve a FRO.*

In some cases, the contempt is not an act of defiance as much as an act of ignorance. Many acts of contempt occur as a result of actions taken by the defendant after entry of a temporary restraining order (TRO) but before the final hearing. Indeed, it is not uncommon that the complaint for a FRO will be denied at the final hearing, while the defendant is convicted of contempt of

the TRO.[24] Especially during the period after issuance of an *ex parte* TRO, defendants (many of whom are having their first experience with the legal system) do not appreciate the gravity of their actions. Many are without legal counsel and are confused about their rights and obligations. Most are going through the emotional turbulence of having been evicted from their home and separated from their children. Therefore, the fact that the defendant has committed an act of contempt should not end the inquiry for the practitioner.

FACTOR 5: ALCOHOL AND DRUG INVOLVEMENT

Statistics show that 39 percent of all domestic violence incidents involve alcohol or drugs. Therefore, alcohol or drug use by the defendant is relevant in protecting the victim and to ensure that the dissolution of restraints does not put the victim at risk. Practitioners will need to go back to the underlying proceedings to determine whether alcohol or drugs were involved.

Practice Tip #6: If alcohol or drugs were involved in the commission of domestic violence, ensure that the defendant has received alcohol or drug counseling prior to making the application for dissolution.

Practitioners must be able to assure the court that although alcohol or drugs were an issue before, they are not now. Demonstrating that an alcohol or drug problem that motivated the act of domestic violence now no longer exists, serves to support an application for dissolution. The defendant who has received treatment and is now clean is a clear example of substantially changed circumstances.

FACTOR 6: OTHER VIOLENT ACTS

Past behavior is considered the single most reliable indicator of future behavior in the absence of clear and convincing change. Therefore, the trial court must consider whether the defendant has engaged in other violent acts against the victim or other persons. In this regard, the practitioner will need to go back to the complaint and the underlying hearing to determine whether prior incidents of domestic violence were cited. In the complaint there is a box for victims to check regarding whether there have been any prior acts of domestic violence. If the box was not checked, bring that to the attention of the court.

Obviously, the practitioner must also explore whether the defendant has engaged in violent acts since the filing of the complaint. Assuming there have been no acts of contempt or incidents of violence against the victim, attorneys must also explore the other relationships of the defendant since the FRO. Practitioners should be aware of complaints, police reports, or other claims of violent acts that can be alleged against the defendant. If these incidents do exist, the attorney must obtain full knowledge of what happened and be prepared to explain why it would have no bearing on the dissolution application.

FACTOR 7: WHETHER THE DEFENDANT HAS ENGAGED IN DOMESTIC VIOLENCE COUNSELING

A 1999 amendment to the statute now makes clear that "in any case where the court order contains a requirement that the defendant receive professional counseling, no application by the defendant to dissolve the restraining order shall be granted unless ... the defendant has completed all required attendance at such counseling."[25] However, even where domestic violence counseling is not a requirement of the FRO, the failure to obtain counseling will likely be a fatal flaw to a dissolution application without the victim's consent. Many believe that counseling should be mandatory for any person found to have committed an act of domestic violence.[26] Therefore, counseling is necessary to demonstrate to the court that it is dealing with a changed person, a person who takes seriously the charges and a person who has obtained treatment for the problem that brought about the improper conduct to begin with.

Practice Tip #7: Never make a dissolution application without the defendant obtaining domestic violence counseling.

The defendant who seeks to dissolve the restraints because the FRO was a bum rap will not prevail. The dissolution application is not an opportunity to have a rehearing on the FRO. It is not an appeals process. Rather it is a process of demonstrating what has changed. As stated by the Appellate Division, "the linchpin in any motion addressed to dismissal of a FRO should be whether there have been substantial changed circumstances since its entry that constitute good cause for consideration of dismissal."[27]

FACTOR 8: AGE/HEALTH OF THE DEFENDANT

An argument for dissolution can be made if the defendant is infirm or of an age that makes the defendant no longer a threat to the victim. Age can also be a positive factor in a dissolution application from the standpoint of maturity. Many FROs are issued against defendants who are quite young. Clearly, the conduct of an 18-year-old may be substantially discounted if that same person seeks dissolution many years later, and is able to establish no subsequent involvement in any type of domestic violence.

FACTOR 9: GOOD FAITH OF VICTIM

As set forth previously, FROs are designed to protect the victim — not to punish the defendant.[28] If the victim no longer requires protection from the defendant, the victim is not acting in good faith by refusing to consent to dissolving the FRO. Practitioners must not

discount the possibility that the victim may have an ulterior motive for maintaining the FRO. Is the victim seeking to deprive the defendant from pursuing a job opportunity? Is the victim seeking to use the perpetuation of the FRO to interfere with the defendant's rights to children? No less than the New Jersey Supreme Court has recognized that "in the area of domestic violence ... some people may attempt to use the process as a sword rather than as a shield."[29] If it can be demonstrated that the victim is not acting in good faith, this will provide strong support for a dissolution application.

FACTOR 10: ORDERS ENTERED BY OTHER JURISDICTIONS

The Violence Against Women Act of 1994, directs that all the states give full faith and credit to sister-state protection orders.[30] Therefore, practitioners need to be certain that there are not FROs entered against the defendant in other jurisdictions. If there have been, determine whether they are still in effect. Be mindful that many jurisdictions do not have FROs that continue indefinitely. These jurisdictions require victims to return to court after the passage of time to justify the continuation of the FRO. Where victims have been unable to sustain the burden of continuing FROs in other jurisdictions which arise from the same incident, a case can be made that there is no need for the continuation of the FRO in New Jersey.

FACTOR 11: OTHER FACTORS DEEMED RELEVANT BY THE COURT

This is a catch-all factor which is designed to address the unique facts of every case. One other factor identified by the case law is the passage of time. In *M. V. v. J.R.G.,* the defendant made application to dissolve the FRO only eight months after it had been issued. In denying the defendant's application, the trial court held that the FRO needs to be in effect a "reasonable time" before it could determine whether the factors to establish good cause have been met.[31]

Requiring victims to relitigate issues with the defendant recently after a FRO has been issued can be viewed as another form of abusive and controlling behavior.[32] Conversely, the passage of time works to the defendant's advantage in making a dissolution application. It provides defendants with an opportunity to establish a new track record; to obtain meaningful counseling or treatment; and to present a set of changed circumstances for the trial court.

CONCLUSION

Applications to dissolve FROs without the consent of victims are likely to become more commonplace in the near future. Judges must be prepared to give these applications serious consideration and to go beyond a superficial analysis of whether the victim consents to the dissolution of restraints. Practitioners must be prepared to fully explore the 11 factors constituting good cause in order to adequately represent defendants seeking relief from FROs. ■

ENDNOTES

1. N.J.S.A. 2C:25-1, *et seq.*
2. *New Jersey Lawyer,* September 3, 2001.
3. Connecticut six months CT § 465-15(d); Maryland one year MD § 4-506(g); Pennsylvania 18 months 23 PA § 6108(d); New York five years NY § 530.12(5); Delaware one year 10 DE § 1045(b); California 18 months Cal § 527.6(d); District of Columbia one year DC Rule 11(f)).
4. *See* R. 5:7A(d).
5. *See* N.J.S.A. 2C:25-28.1.
6. *See Chernesky v. Fedorczyk,* 346 N.J. Super. 34 (App. Div. 2001) (FRO not disputed by the defendant is reversed as complaint did not state an act of domestic violence).
7. *Id.* (requiring trial courts to ensure that there is a factual predicate before entering the FRO).
8. *Trans American Trucking v. Ruane,* 273 N.J. Super. 130, 133 (App. Div. 1994).
9. N.J.S.A. 2C:25-29(d).
10. *Kanaszka v. Kuen,* 313 N.J. Super. 600, 606-607 (App. Div. 1998).
11. *Kanaszka* at 608.
12. *See also Depos v. Depos*, 307 N.J. Super. 396 (Ch. Div. 1997) (discovery only allowed in domestic violence cases upon showing good cause).
13. N.J.S.A. 2C:25-18.
14. *Id.*
15. N.J.S.A. 2C:25-29(b).
16. *Carfagno v. Carfagno,* 288 N.J. Super. 424 (Ch. Div. 1995).
17. *Id.* at 434-435.
18. *Sweeney v. Honachefsky,* 313 N.J. Super. 443 (App. Div. 1998).
19. *Mohamed v. Mohamed,* 232 N.J. Super. 474 (App. Div. 1989); *but see A.B. v. L.M.,* 289 N.J. Super. 125 (App. Div. 1996); *Torres v. Lancellotti,* 257 N.J. Super. 126 (Ch. Div. 1992).
20. *Carfagno* at 437.
21. *Carfagno* at 438; *but see State v. Hoffman,* 149 N.J. 564, 585-586 (1997) (indicating a subjective test for proving harassment in a domestic violence proceeding and providing that "the fears of a domestic violence victim ... should not be trivialized").
22. *See Sweeney* at 446 (defendant placed a note and a rose in plaintiff's purse and pursued her after she announced her intention to break up with him).
23. *M.V. v. J.R.G.,* 312 N.J. Super. 597, 602 (Ch. Div. 1997) ("there is nothing in the statute to suggest that victims are entitled to less protection than others by virtue of the employment or personal situation of the defendant").
24. *State v. Sanders,* 327 N.J. Super. 385 (App. Div. 2000).
25. N.J.S.A. 2C:25-27.
26. Assembly Task Force on Domestic Yiolence, Findings and Recommendations, (Recommendation #25 - July, 1998).
27. *Kanaszka* at 609.
28. *M.V.* at 602.
29. *State v. Hoffman* at 586.
30. 18 U.S.C. § 2265 (2000).
31. *M.V.* at 602. *See also Kanaszka* at 609 (rejecting an across the board one-year waiting period to dissolve FROs).
32. *Kanaszka* at 608.

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Climbing the Corporate Ladder:

Obtaining Proper Post-Divorce Compensation to the Dependent Spouse Who Supports the Ascension

by Amanda S. Trigg

Even in these days of the two-income household, circumstances still exist in which one spouse might be unemployed outside of the home yet perform crucial functions in support of the career and income earning capacity of his or her spouse. The non-wage earning spouse deserves credit for his or her role as the person without whom the successful executive or entrepreneur would not have realized the level of economic success that exists at the time of the divorce. Although the wage-earning spouse will likely sustain that level of success in the future, the non-wage earning spouse will not have the same economic advantage. In that case, it is crucial to structure trial claims and/or settlement agreements to adequately compensate the non-working *corporate spouse* for his or her contributions to the past and future earnings capacity of the working spouse.

CLAIMING ALIMONY FOR THE DEPENDENT SPOUSE

Alimony is intended to compensate a spouse for an economic dependency created by marriage.[1] The *Cox* court specifically noted that a permanent alimony award will "reflect the important policy of recognizing that marriage is an adaptive economic and social partnership."[2]

On any application for alimony, the court must first consider and make specific findings on the evidence as to the statutory factors set forth in N.J.S.A. 2A:34-23. The Divorce Study Commission Report addressed the statutory factors as being inter-related with economic factors of a particular case:

> All these [statutory factors] must be inter-related with all relevant economic factors in determining whether any economic dependency that might exist between the parties was created by the marriage or was the product of the parties' disparate skills and educational opportunities, unrelated to anything that happened during the marriage. The court's inquiry would focus not on the fact that the parties were married *but upon the impact of the marriage on the parties* (emphasis added).[3]

For the supportive spouse of a corporate executive or entrepreneur, marriage creates an economic dependency based upon his or her role as a homemaker rather than as a wage earner. The parties' respective roles within the marriage create a transfer of earning power because the supportive spouse increases the working spouse's earning capacity at the expense of his or her own by being responsible for homemaking and child rearing, while the working spouse remains free to devote time to income production while still enjoying family life. Furthermore, the supportive spouse loses earning capacity through years of major responsibility for the home and family.[4]

[I]t is crucial to structure trial claims and/or settlement agreements to adequately compensate the non-working corporate spouse for his or her contributions to the past and future earnings capacity of the working spouse.

In determining that the dependent spouse in *Cox* was entitled to permanent alimony (as opposed to limited duration alimony), the court set forth the "most commonly expressed rationale for permanent alimony":

> 1. To compensate for benefits conferred on the other spouse by being responsible for homemaking and child rearing. The primary benefit is increased earning capacity of the other spouse who, while enjoying family life, was free to devote all productive time to income production.
> 2. To compensate for the opportunity costs of homemaking. This is primarily lost earning capacity through the years of major responsibility for the home, either not being employed or holding employment subject to the needs of the family. Courts recognize this opportunity cost when they refer to the fact that the claimant for alimony had remained in the home in the traditional role of full-time homemaker. There is, also, a cost in lessened opportunity for remarriage, which is greater for women than men, and which increases the longer the marriage lasts.[5]

These lost opportunities result in the aforementioned transfer of earning power from the supportive spouse to the working spouse, such that an alimony award should compensate for that transfer by meeting reasonable needs for support.[6]

In a classic scenario in which one spouse works while the other does not, one will be solely dependent upon the other for support at the time of a divorce. This is especially true in a long marriage.[7] As set forth in *Capodanno v. Capodanno,*[8] "a wife's 'needs' will vary depending upon the case, for 'needs' contemplate the amount of money necessary to maintain a wife in a manner as near commensurate as possible with her former status."[9] If the working party's ability to pay is indisputable, the combination of economic dependency, created by the marriage itself, supports an award of alimony in an amount sufficient to cover demonstrable needs to maintain the standard of living established during the marriage, as set forth in greater detail below.

As set forth in *Lepis v. Lepis*[10] and *Crews v. Crews,*[11] 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." Moreover, "[t]he supporting spouse's obligation contemplates the quality of the parties' economic life during the marriage."[12] A *paramount* reason for awarding alimony is to permit a dependent spouse to share in the financial benefits created by the payor's income level that resulted from their combined efforts:

> We are entirely satisfied that a spouse who maintains the home while her husband's career advances should share in the rewards of their combined efforts. *Scherzer v. Scherzer,* 136 N.J. Super. 397, 401, 346 A. 2d 434 (App. Div. 1975), *certif. denied,* 69 N.J. 391, 354 A.2d 319 (1976). Recent history demonstrates that, most often, the husband's career advances and the wife will live through the lean years, bear the husband's children, and keep his home. *We will not sanction an agreement which prohibits a woman devoted to her husband and family from enjoying the fruits of her labor just as they are about to be reaped.* (emphasis added)[13]

The court can consider marital conduct including but not limited to contributions to the career and earning potential of one spouse with the expectation of mutual benefit in fashioning its alimony award.[14] In developing a case for alimony under this premise, it is crucial to present the history of the spouse's responsibilities during the years of marriage in as great detail as if he or she were fully compensated by a third-party employer. Proof of the tasks performed by the dependent spouse which enabled the wage-earning spouse to pursue his or her career must be provided, such as school records showing which parent attended conferences, medical records indicating which parent took the children to the doctor, checking account records reflecting the signature of the dependent spouse on all checks and thereby demonstrating his or her responsibility for household expenses and accounts. The goal of the presentation is to illustrate the elements of teamwork, which inured to the benefit of the career of the wage-earning spouse, such that the dependent spouse should share equally in those benefits to which he or she contributed.

A paramount reason for awarding alimony is to permit a dependent spouse to share in the financial benefits created by the payor's income level that resulted from their combined efforts.

In the landmark 1998 Connecticut dissolution case of *Wendt v. Wendt,*[15] the court considered issues of support and equitable distribution for a couple where the husband worked as the chair, president and CEO of GE Capital Services, Inc., the largest division of General Electric Corporation. After considering numerous other methods of evaluating the essential contributions by Mrs. Wendt to her husband's career, the trial court referred to Mrs. Wendt's non-monetary contributions to her husband's

career as being part of "human capital," and decided to value each party's contribution equally, based in part upon one expert's observation that the Wendts had a "two person career," because it required two people to perform the high-powered corporate career.

Even when the parties concede that alimony will be paid, the amount is frequently disputed as the potential payor seeks to minimize support payments, perhaps limiting payments to the *actual need*[16] of the recipient and arguing that he or she should only receive adequate support to cover expenses. The concept of enough is enough is not a statutorily designated factor.[17] Rather, our courts have a statutory obligation to consider all factors, including the standard of living established during the marriage.

The concepts of equitable distribution and alimony are closely tied, especially when the assets allocated in equitable distribution could produce income for the owner. A non-working corporate spouse will have a lesser earning capacity, but have the right to maintain his or her assets without depletion to support his or her lifestyle. These ideas may support an unequal distribution of marital assets, as set forth below. It should be argued on behalf of the dependent spouse that he or she should not be required to deplete assets or invade savings to support the marital standard of living. The income-earning spouse will have ample opportunities to acquire new assets or savings in the future but the non-working spouse will not. Both spouses, however, should have an appropriate amount of income imputed from income-producing assets.[18]

In *Miller v. Miller,*[19] the obligee successfully argued that the definition of income for the purpose of calculating alimony should encompass the potential income, which could be realized from the investments of the other spouse. In *Miller*, the parties divorced after a 21-year marriage, during which the wife was a housewife and the husband worked at Merrill Lynch, earning a base salary of $150,000, plus a bonus of $1.1 million during the last year of the marriage. The parties' property settlement agreement provided for alimony to the wife, in an amount based upon the husband's actual earnings each year, including bonus income. Importantly, the husband kept his stock in Merrill Lynch as part of the settlement. Approximately three years after the divorce, in 1991, the husband fell ill and changed jobs within Merrill Lynch to a position paying considerably less. His alimony payments fell into arrears two years later, and he was terminated from employment in 1995.

The New Jersey Supreme Court ... [held] that a supporting spouse cannot insulate assets from alimony calculations by investing those assets in a non-income producing manner.

In post-judgment proceedings, the trial court found that large portions of the husband's assets were invested in growth investments, rather than income investments, making him "equity rich but alimony poor." The New Jersey Supreme Court agreed, holding that a supporting spouse cannot insulate assets from alimony calculations by investing those assets in a non-income producing manner.[20] Rather, it is appropriate to impute a reasonable income from investments comparable to a prudent use of those investments.[21]

The *Miller* court relied heavily upon the analysis in *Stiffler v. Stiffler.*[22] The *Stiffler* court considered whether the court should impute income to the obligor for interest that could have been earned on his inheritance had it been invested in other ways than in the new home he chose to purchase. The *Stiffler* court held that a litigant cannot insulate an inheritance from the alimony calculation by transforming it into a non-income producing asset and, under appropriate circumstances, interest could be imputed to the inheritance:

> In the same way an inheritance, which generates no income solely because its owner has altered its capacity to earn interest, should not be automatically exempt from the alimony calculus. It is its potential to generate income which is germane.
>
> If plaintiff had invested the inheritance so as to generate interest, that additional income would be considered in the computation of alimony. The quantum of alimony should not be diminished because his investment generates no interest. The alimony statute does not prohibit a spouse from doing what he will with his inheritance. Indeed, the spouse can go and lose it all at the racetrack. But it seems beyond question, in light of *Aronson,* that a matrimonial court may look to an inheritance, and its potential to earn income, in its calculation of an award of alimony. If this were not so, future litigants would have a perfect blueprint for evading *Aronson.*[23]

The *Stiffler* court concluded that support orders are primarily based not so much on the actual income of the parties but on their potential to generate income.[24] Therefore, even the dependent spouse must understand that income may be imputed to him or her from the assets held.

INCREASES IN FAMILY LIFESTYLE

It is possible that the history of a family will show an increase in

earnings and economic status. As specifically contemplated in *Guglielmo*, the non-working spouse is entitled to share in the increased earnings of the working spouse based upon non-financial contributions toward the ability to earn the income. Again, demonstrative evidence must be presented to document not only the marital lifestyle at the time of the parties' divorce, but also changes in that lifestyle over the years. Obvious sources of that information would include financial records, in order to show increased spending on housing, cars or other routine expenses, in addition to the addition of luxury items or expenses. That type of information can be summarized into graphs or charts, showing the increases in income and/or spending and making the upward trend clear. Family photographs can literally portray changes in the household standard of living. Showing the upward trend constitutes the best argument for enabling the dependent spouse to continue to enjoy similar upgrades in the future.

Similarly, the court may be asked to consider, as part of marital lifestyle, perquisites which will continue to be available to the working spouse through his or her employment (*e.g.* tickets to sports and cultural events, use of a corporate car, etc.), but for which the dependent spouse will have to expend funds if he or she wishes to enjoy the same events.

SAVINGS AS A COMPONENT OF MARITAL LIFESTYLE

The needs of a dependent spouse must be measured by the sums required to maintain him or her at a level of reasonable comfort and in a manner commensurate with the former marital status.[25] Schedule C of the case information statement specifically requires designation of the amount utilized by the parties per month for savings/ investments as part of the marital lifestyle. The Supreme Court of New Jersey specifically designated an amount for savings, includable in the marital lifestyle, and to be considered on an equal par with other Schedule C expenses, such as food, medical expenses, day care costs, etc. Therefore, the trial court should not ignore this component of marital lifestyle as being any less important that the other expenses contained within Schedule C when all such expenditures are fully documented by the parties' actual outlays during the marriage.

The dependent spouse's right to retain his or her savings without depletion, to maintain a lifestyle similar to that enjoyed during the marriage, is clearly established under New Jersey law.

The dependent spouse's right to retain his or her savings without depletion, to maintain a lifestyle similar to that enjoyed during the marriage, is clearly established under New Jersey law. In *Capodanno v. Capodanno*[26] the Supreme Court reversed an appellate ruling which denied alimony to the dependent spouse and awarded alimony, reasoning that "The amount is necessary ... to maintain her in the pattern of living she had become accustomed to prior to separation and to allow her to retain reasonable savings to provide for an uncertain future."[27]

To ignore the savings component of an alimony award could eliminate your client's ability to save funds on a regular basis, thereby deviating from the former marital standard of living. If a practice of savings existed during the marriage, the dependent spouse should not lose the right to save for the future simply because the parties are divorcing.[28] Therefore, plan to prove the practice of savings during the marriage, not only the existence of reserved funds at the time of the divorce. Showing a pattern of savings from account statements over a period of years is most persuasive and, like the upward trend of economic prosperity, this trend can be summarized in charts if necessary.

Furthermore, there is an argument to be made, in addition to significant savings being a component of the marital lifestyle, the dependent spouse should be able to save some funds "to provide for an uncertain future."[29] Consider, as well, an argument against the payor of alimony that a corporate compensation package will continue to provide retirement funding such that the employee's benefits and expectations of retirement income will securely increase. In contrast, the dependent spouse's ability to accumulate retirement assets is limited after dissolution and distribution of the assets, such that he or she will not be able to enjoy the same level of security or expectation of income when he or she attains the age of retirement unless savings are built into a budget.[30]

SEEKING MORE THAN 50 PERCENT OF MARITAL ASSETS TO THE DEPENDENT SPOUSE IN EQUITABLE DISTRIBUTION

In *Rothman v. Rothman,* the Supreme Court put forth a three-step process for a judge to follow in

effectuating equitable distribution at trial:

> Assuming that some allocation is to be made, he must first decide what specific property of each spouse is eligible for equitable distribution. Secondly, he must determine its value for purposes of such distribution. Thirdly, he must decide how such allocation can most equitably be made.[31]

In determining awards of equitable distribution, N.J.S.A. 2A:34-23.1 directs courts to weigh the presence of certain factors. Some of those factors, as enumerated below, can be used to argue that a dependent spouse, whose economic dependency is a product of the marriage itself, should be awarded a greater portion of the marital assets. For example, N.J.S.A. 2A:34-23.1(f), "the economic circumstances of each party at the time the division of property becomes effective," compels the court to try to leave the parties' comparably situated.[32] If one spouse is in a superior earning position to the other, then due to unequal earning capacity and long-term financial prospects, any attempts at equality will quickly diverge.

Similarly, the income and earning capacity of each party, including educational background, training employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expenses necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, interplays with the alimony factor of the earning capacity of each party.[33] Furthermore, "the contribution by each party to the education, training or earning power of the other" can be illustrative of the contribution of the non-working spouse who supports ascension up the corporate ladder or the development of a successful business.[34] As set forth in greater detail earlier in this article, the contribution of homemaker and corporate spouse enables the working spouse to focus attentions on his or her career, and thereby increase earning power.

This deference to one spouse's career can permanently undermine the earning capacity of the other, while enhancing the earning capacity and future prospects of greater earnings of the working spouse. This disparity in prospects supports not only an equal division of assets, but also an award of a greater share of equitable distribution to the dependent spouse.[35]

In *Rothman,* the court noted that the equitable distribution statute:

> gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife, and mother, she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership.[36]

Similarly, in *Gibbons v. Gibbons,*[37] the Appellate Division acknowledged the stake held by the supported spouse in marital assets exists because "assets represent the capital product of what was essentially a partnership entity."

The non-working spouse's claim for economic support derives in significant part from the economic dependency that was created by the parties' marriage.[38] A claim to a greater proportion of the marital assets derives from the same source. As cited by the *Crews* court, studies indicate that women and their children suffer a 30 percent decline in their standard of living, while men enjoy an average increase of 10 percent in their living standard.[39] Obviously, the working spouse will leave the marriage with an enhanced earning capacity intact, including the skills and experience that will permit him or her to continue to function at increasingly higher economic levels after the divorce.[40] When the dependent spouse will not have any such skills or the capacity to rebuild assets in the future, it is arguably equitable to award more than 50 percent of the marital assets to compensate for that dependency and lesser capacity for future earnings.

As cited by the *Crews* court, studies indicate that women and their children suffer a 30 percent decline in their standard of living, while men enjoy an average increase of 10 percent in their living standard.

CONCLUSION

Having made an investment in years of marriage and the career of the income-earning spouse, the non-wage earning spouse deserves compensation for his or her contributions to the marriage and reparation for the economic dependency created during the course of the marriage. Presenting a case for alimony and/or equitable distribution awards which adequately addresses your client's claim requires creative

thinking as well as analysis and presentation which presupposes entitlement of full compensation for the equal contribution made by the dependent spouse. Only by asserting to the court that, as an equal partner in the marriage your client deserves to share in all partnership benefits, will you ensure that he or she is properly compensated for having been an essential part of the team during the climb up the corporate ladder ■

ENDNOTES

1. *Cox v. Cox,* 335 N.J. Super. 465, 477 (App. Div. 2000), *citing* Senate Commission to Study the Law of Divorce Recommendation 13 (Apr. 18, 1995) ["Divorce Study Commission Report"].
2. *Id.* at 479.
3. *Cox, supra,* at 481, *citing* Divorce Study Commission Report at 46-47.
4. *Cox* at 482. Similarly, economists discuss marriage in terms of the efficiencies that result from a division and specialization of labor. Judge Posner wrote that the family "facilitates the division of labor, yielding gains from specialization. In the traditional family the husband specializes in some market employment (for example engineering) that yields income that can be used to purchase the market commodities needed as inputs into the final production of the household, while the wife devotes her time to processing market commodities (for example, groceries) into household output (for example, dinner)." Richard A. Posner, Economic Analysis of Law at 140 (4th Ed. 1992), cited in Estin, Love and Obligation: Family Law and the Romance of Economics, 36 *Wm & Mary L. Rev.* 989, 1002 (Winter 1995).
5. *Cox* at 483, *citing* Joan M. Krauskopf, Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, 21Fam. L.Q. 573, 583-4 (1988) (footnotes omitted).
6. *Id.*
7. N.J.S.A. 2A:34-23(b).
8. 58 N.J. 113 (1971).
9. *Capodanno* at 118, *referring to* N.J.S.A. 2A:34-23(a), the actual need and ability of the parties to pay.
10. 83 N.J. 139, 150 (1980).
11. 164 N.J. 11, 16 (2000).
12. *Guglielmo v. Guglielmo,* 253 N.J. Super. 531, 543 (App. Div. 1992), *citing Lepis v. Lepis,* 83 N.J. 139, 150 (1980).
13. *Guglielmo* at 543.
14. *Mahoney v. Mahoney,* 91 N.J. 488 (1982); *see also* N.J.S.A. 2A:34-23(h). The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities. Again, the dependent spouse is, essentially, seeking financial compensation through alimony for his her non-financial contributions to the marriage as set forth above. It is to be argued that both the non-working spouse and the working spouse made equal contributions to the marriage in these respects.
15. *Wendt v. Wendt,* Superior Court of Connecticut, 1998 Conn. Super. Lexis 1023.
16. N.J.S.A. 2A:34-23(a).
17. *Wendt, supra,* 1998 Conn. Super. Lexis 1023 at 27.
18. N.J.S.A. 2A:34-23(j), the income available to either party through investment of any assets held by that party.
19. 160 N.J. 408 (1999).
20. *Id.*
21. The court concluded that the rate of income should be based upon the average long-term corporate bond rate of return over the previous five years. Using the Moody's Composite Index on A-rated Corporate Bonds, the Court imputed income at the rate of 7.7 percent, and remanded for recalculation of alimony.
22. 304 N.J. Super. 96 (Ch. Div. 1997).
23. *Stiffler* at 102-103.
24. *Id.* at 101. *See also Bonanno v. Bonanno,* 4 N.J. 268, 275 (1950) (capacity to earn or prospective earnings should be taken into consideration in alimony awards); *Connell v. Connell,* 313 N.J. Super. 426 (App. Div. 1998) (supporting parent cannot avoid child support obligation by investing inheritance in non-income producing assets).
25. *Crews, supra; Koelble v. Koelble,* 261 N.J. Super. 190 (App. Div. 1992).
26. 58 N.J. 112 (1971).
27. *Capodano* at 118; *see also, Martindell v. Martindell,* 21 N.J. 341, 352 (1956) (former spouse was entitled to retain reasonable savings against the day when her ex-husband would die and alimony payments would cease).
28. *See e.g. In re Krupp,* 207 Ill. App. 3d 779, 566 N.E.2d 429 (1990) (reduction in spousal support denied; although dependent former spouse was earning more money, her right to save those earnings arose from the marital lifestyle). Similarly, in *Glass v. Glass,* 131 N.C. App. 784, 509 S.E.2d 236 (1998), the North Carolina Supreme Court noted that established patterns of contributing to savings are part of the parties' standard of living. Likewise, in *Kane v. Kane,* 1998 Ohio App. Lexis 1830, the court upheld an alimony award that incorporated a factual finding that saving was part of the pre-existing standard of living.
29. *Capodanno* at 120. Remember, however, that insurance can guarantee support.
30. *Martindell*, 21 N.J. 341.
31. *Rothman v. Rothman,* 65 N.J. 219, 232, (App. Div. 1974).
32. *See, Lynn v. Lynn,* 91 N.J. 510, 516, 518 (1982).
33. N.J.S.A. 2A:34-23.1(g); N.J.S.A. 2A:34-23(b)(5).
34. N.J.S.A. 2A:34-23.1(i).
35. The criterion of N.J.S.A. 2A:34-23.1(o), "the extent to which a party deferred achieving their career goals" was added to the statute with the following statement appended to the bill: "In a common factual scenario, the wife remains home for a number of years to care for the children and, as a consequence, her earning capacity is materially and adversely affected. By contrast, because of the wife's efforts in caring for the children, the husband has the ability to develop his own career and to have his own earning capacity enhanced." (1977, Chapter 407, Section 1).
36. *Rothman,* 65 N.J. 219, 228 (1974).
37. 174 N.J. Super. 107, 114 (App. Div. 1980), *rev'd on other grounds,* 86 N.J. 515 (1981).
38. *Cox v. Cox,* 335 N.J. Super. 465, 483 (App. Div. 2000).
39. *Crews v. Crews,* 164 N.J. 11,12 (2000).
40. Joyce Davis, Enhanced Earning Capacity/ Human Capital: The Reluctance to Call it Property, 7 *Women's Rts. L. Rep.* 109, 137-9.

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To Save or Not to Save — That is the Question

by Charles F. Vuotto Jr. and Andrea White O'Brien

The question addressed in this article is whether and to what extent savings[1] is a legitimate part of a dependent spouse's monthly expenses when assessing alimony and child support. To answer this question, we must first determine whether savings is a part of marital lifestyle. There is little question that marital lifestyle is a prominent factor intertwined within the statutes, rules and case law of this state.[2] We are instructed to consider lifestyle at every turn. Although many will correctly argue that marital lifestyle is not the only factor, it certainly is one of the most significant factors to be considered when a husband and wife divorce. As such, should we ignore savings if savings is a legitimate aspect of marital lifestyle?

It is instructive to observe how the issue of savings impacts our lives outside of the context of divorce. Savings is the single biggest issue discussed when we consider how we as parents will provide for the education and welfare of our children. We consider savings when we make substantial purchases such as a home, vacation property and life insurance. Every loan application asks for detailed information about savings. Additionally, savings is a major factor in determining how and when we can retire. An allowance for savings is becoming a critical issue as reliance upon Social Security and existing retirement accounts in a declining market becomes more dubious as each day passes. Financial planners advise that we should save at least 10 to 15 percent of our net income.[3] The subject of savings has become an important component of financial planning over the past decade. In light of all of the foregoing, one would be hard-pressed to argue that savings is not a part of our daily lives.

The inescapable conclusion is that savings, in all of its varied forms, is an essential element of lifestyle. As such, it must be appropriately considered when parties divorce.

SAVINGS AS A LINE ITEM ON THE CASE INFORMATION STATEMENT

In New Jersey, parties are required to file a financial disclosure statement known as a case information statement pursuant to New Jersey Court Rule 5:5-2. Specifically, Rule 5:5-2 (a) requires that the case information statement, "...be filed and served in all contested family actions, except summary actions, in which there is any issue as to custody, support, alimony or equitable distribution." The court rule further provides that the financial disclosure statement must be "filed by each party with the clerk in the county of venue within 20 days after the filing of an Answer or Appearance."[4]

The form of the case information statement is explicitly set forth in Appendix V to the New Jersey Court Rules.[5] The requirement to set forth the parties' savings/investments is explicitly set forth in Schedule C of the case information statement, under personal expenses. By requiring a line item for savings/investments, one can reasonably infer that the New Jersey Supreme Court believed this information was a part of the marital lifestyle of the parties, and thereby part of appropriate support award.

The majority of other jurisdictions in the nation also require a standard financial disclosure form or its equivalent in matrimonial proceedings.[6] However, interestingly, only Arizona has a financial disclosure form which includes a specific line item for a savings component. Arizona's form requests information on "voluntary retirement contributions and savings deductions."

NEW JERSEY CASE AUTHORITY

Although there is no statutory authority in any jurisdiction, including New Jersey, which requires the court to consider savings and investments when determining the appropriate support provisions in a matrimonial case, there is relevant case law on this issue. Half a century ago, the New Jersey Supreme Court opened the door to consideration of the supported spouse's need to retain reasonable savings after the divorce.[7] In *Martindell,* the New Jersey Supreme Court found:

> The costs of living were persistently rising and her living facilities were decreasing with equal persistency. She was obligated to give up her car and to maintain her apartment without domestic help of any kind and she

> was in no position to replace her furniture which was over twenty years old. She found it impossible to retain *reasonable savings* which she should justly be permitted to accumulate against the day when alimony payments may cease because of her husband's death. (emphasis added)[8]

The New Jersey Supreme Court again addressed the supported spouse's need to retain reasonable savings 15 years later, in the matter of *Capodanno v. Capodanno.*[9] In this case, the Court addressed whether the supported spouse's (the wife's) *needs* would be met without support from her husband.[10]

The New Jersey Supreme Court found that the wife was entitled to receive *pendente lite* support despite the fact that she "was able to support herself by her own means at a level of moderate comfort."[11] Specifically, the Court stated that the trial court "neglected to consider that she had these same means available when she lived with her husband at which time her husband maintained the home and provided for food, automobile maintenance, drugs and other expenses.[12] Therefore, she would now have to pay these expenses from "her own earnings.[13] "As a result, she has been forced to give up her vacation trips and deplete her savings since the separation."[14] After considering the wife's needs, the Court found she was entitled to support.

The court stated,

> This amount is necessary in light of her present earnings to maintain her in the pattern of living to which she had become accustomed prior to the separation, and to allow her to retain *reasonable savings to provide for an uncertain future.* (emphasis added)[15]

In the case *Hughes v. Hughes,*[16] the court defined the marital standard of living as "the way the couple actually lived...."[17] Therefore, one could certainly infer that if the parties saved as part of their lifestyle it is an important factor to be considered by a court addressing the issues of support.

In the unpublished opinion of *Wszolek v. Wszolek*[18] the appellate court recognized the parties' custom of saving when determining what the defendant husband's alimony obligation would be. The appellate court remanded the issue of alimony to the trial court, stating that:

> ... the budget that the judge predicted for defendant did not allow her any provision for savings, an opportunity which plaintiff undoubtedly will have.[19]

The appellate court also pointed out the "huge disparity in income" which was "noted by the judge."[20] The court went on to state that since savings "was their way of life, it is unreasonable to allow plaintiff, but not defendant, to continue that standard."[21] The issue of alimony was remanded to the trial court.[22] Thereby, the court recognized that a critical element of marital lifestyle was savings; therefore, savings were an important aspect to consider when determining the husband's alimony obligation. Failing to consider the parties' custom of saving would be to ignore a significant aspect of the parties' marital lifestyle.

As the New Jersey Supreme Court in *Crews v. Crews,*[23] stated:

> In summary, the marital standard of living is the measure for assessing initial awards of alimony, as well as for reviewing any motion to modify such awards.[24]

Therefore, to ignore the parties' custom of saving would deprive the supported spouse of the marital lifestyle. In appropriate circumstances, the marital custom of saving must be considered when establishing the initial alimony award as well as when assessing an application to modify an alimony award.

In the unpublished New Jersey case of *Bookstaber v. Bookstaber,* the Honorable Herbert S. Glickman, Chancery Division, Family Part, (Essex Vicinage), concluded that the level of support to be paid by the husband to the wife would "include an amount for savings."[25] In arriving at this decision, Judge Glickman found "the proofs have established that at least since 1984, this family has been able to accumulate significant savings on an annual basis."[26] This amount for savings specifically included "a factor of 10% for savings in [the] alimony calculation."[27]

In the recent Appellate Division case of *Isaacson v. Isaacson,*[28] the court addressed the issue of future savings in the context of child support. In *Isaacson,* the court stated that:

> a true "sharing" in a parent's good fortune may include a potential for *future savings* and securing a child's future. Among appropriate methodologies to provide for future support and "sharing" is the "good fortune trust." *See also Morgan supra.* 13 *Can. J. Fam. L.* at 200-01 (discussing generally the use of such trusts); *See also* Thomas C. Quinlen, Planning for the Future, 2 *V and. J. Ent. L. & Prac.* 108 (Winter 2000).[29]

OUT OF STATE AUTHORITY

At least six other jurisdictions have addressed whether the marital custom of savings should be considered when determining the appropriate amount of support. In California, a divorce court determined that the parties' history of saving significant portions of their income constituted part of the marital standard of living, and thus the spousal support order should have provided an amount sufficient to enable the wife to continue to save as she did during the marriage. This court further found that a rule prohibiting consideration of the parties' marital savings history would penalize those who are prudent enough to save during marriage, and would conflict with sound public policy to encourage such savings.[30]

In Colorado, a court held that an appropriate rate of savings to meet needs in the event of disaster, to make future major acquisitions such as automobiles and appliances, and for retirement can, and in appropriate cases should, be considered as a living expense when considering award of, or reduction in, maintenance.[31]

One appellate court of Florida has held that *in the case of a long-term marriage* where the wife has been supportive of her husband's career, and *there is no indication that the husband will have trouble meeting his identified needs,*[32] it cannot be said that a trial court abuses discretion in determining that the wife should continue to share in a substantial portion of the earning capacity, which was achieved during the marriage.[33] Further, the Florida Appellate Court saw no reason why money which was put aside for a couple's security could not be considered to be part of the reasonable lifestyle of the parties in calculating alimony.[34] However, note *Mallard v. Mallard,*[35] which disapproved of *Messina* by holding that, in awarding alimony, the court may not factor in speculative post-dissolution savings based upon a marital history of frugality. It should be noted that *Mallard* was the only negative authority located on this topic.

In North Carolina, the Appellate Division found in the matter of *Bryant v. Bryant* that in calculating the parties' expenses,

> the trial court may include some amount reflecting the marital pattern of savings. *Cunningham v. Cunningham,* 345 N.C. 430, 439, 480 S.E.2d, 403, 406 (1997). Given that defendant is still employed and has a comfortable and significantly higher income than plaintiff, who is not working, we do not find the trial court abused its discretion by characterizing the funds reflecting a marital pattern of saving as a reasonable expense in this case.[36]

One year later, the North Carolina Appellate Courts, in *Glass v. Glass,* confirmed that the court "can properly consider the parties' custom of making regular additions to savings plans as a part of their standard of living in determining the amount and duration of an alimony award…"[37] The court went on to state that if the martial custom of making regular additions to savings plans were to be excluded, "a spouse could reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans."[38]

In June of 2000, the North Carolina Court of Appeals, in *Rhew v. Rhew,*[39] remanded the case back to the trial court for failing to consider the marital custom of savings when determining the award of alimony.[40] Specifically the Appellate Court stated:

> the trial court can properly consider the parties' custom of making regular addition to savings plans *as a part of their standard of living* in determining the amount and duration of an alimony award. *Glass v. Glass,* 131 N.C. App. 784, 789-90, 509 S.E. 2d. 236, 239 (1998). (emphasis added).[41]

The court in *Rhew* concluded that if there is a "custom of regular savings" which is part of the standard of living, this savings must be accounted for in determining an alimony award.[42]

In 1990, the Illinois Appellate Court also addressed the issue of savings as part of the marital custom or lifestyle.[43] In *Krupp,* the supporting spouse sought to modify and decrease his alimony obligation. The court held:

> While it is true that neither the statute nor the judgment of dissolution gives the petitioner a vested right to set aside $2,202.00 per month for savings, the statute does give her the right to an amount which is sufficient to provide her with the means to satisfy her reasonable means. *Future savings were an important part of the marital lifestyle, and we are not prepared to say that the petitioner has lost her right to future security because she is divorced*...we believe the judge exercised reasonable discretion when she manifested her concern for the lesser potential of the wife's earning ability to secure future savings. (emphasis added)[44]

In the Delaware Family Court opinion in *Alzos v. Alzos,*[45] the trial court recognized the parties historical emphasis on savings and investments when considering the amount of alimony to be awarded to the wife.[46] Specifically, the trial court addressed "the standard of living established during the marriage" and "extensive savings that the couple accumulated."[47] The court found that this "extensive saving" was "in and of itself evidence of their standard of living."[48]

CALCULATING THE SAVINGS COMPONENT

A court cannot consider savings as a factor in alimony, child support or equitable distribution unless it is quantified. Quantification of the savings component is tied to the lifestyle analysis. The first step is to determine the net, after-tax income of the parties from all sources for a certain period of time prior to the filing of the complaint for divorce, (*i.e.,* usually three to five years). The next step is to determine what the parties did with their net income.

One method of calculating savings is to total the net, after-tax income and subtract expenses paid from them for the same period of time. The difference is savings.

Sometimes people make specific contributions to retirement and investment accounts, which can be tracked, quantified and presented as their marital history of savings. Whichever method is chosen, an analysis of net, after-tax income and expenses paid over a certain number of years prior to the termination of the marriage is necessary.

CONCLUSION

Often, upon a divorce, the primary wage earner continues to have the benefits associated with his or her employment, such as retirement plans, and the ability to earn and save in the future. Even in the event that the supported spouse returns to the workforce, his or her capacity to earn often pales in comparison to the primary wage earner's capacity to earn, with little or no ability to save. There have been numerous articles and studies done on the effect of women after they have been out of the workplace for a considerable amount of time.[49] In *Crews,* the court recognized this problem by stating:

> Some studies have concluded that the standard of living for a woman decreases 30 percent after a divorce, while men enjoy a 10 percent increase in living standards on average. *See Peterson, A Revolution of the Economic Consequences of Divorce* 61 *Am. Soc. Rev.* 528 (1996); Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Divorce,* 22 *Demography* 485 (1985); Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households,* 46 *J. Marriage & Family* 115 (1984) Those statistics are troubling.[50]

Unlike the primary wage earner, unless savings is factored into a dependent spouse's budget, he or she has to look to the assets received in equitable distribution as well as the alimony award to maintain the marital lifestyle.[51]

Undoubtedly, a party's ability to save is contingent upon not only the support received but also the capital assets received in equitable distribution. Unlike the primary wage earner who continues to draw upon his or her earnings to save for the future, the same ability often does not exist for the supported spouse. Therefore, it is appropriate to focus on a party's lack of opportunity for savings when addressing whether or not the parties will be able to maintain the marital lifestyle after a divorce.[52]

The family part is a court of equity. Equity cannot be achieved if a basic aspect of our daily lives is ignored in the divorce litigation. The ultimate conclusion is that savings is a component of lifestyle and, as such, is an appropriate factor when determining the respective budgets of the parties for purposes of support. The extent to which this factor should be considered is, in our opinion, linked to the length of the marriage and the supporting spouse's ability to contribute to this particular expense item. Certainly, essentials such as shelter, transportation, food, health care and child-related expenses should take priority. However, in a long-term marriage where the supporting spouse has the financial ability to pay, alimony and child support should be structured to appropriate consider the standard that the parties set for savings during the marriage. ■

ENDNOTES

1. Savings is defined as "thrifty, economical," "something that is saved," and "sums of money saved by economy and laid away." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1707 (2nd Edition 1996).
2. N.J.S.A 2A:34-23 (a) (2), N.J.S.A 2A:34-23 (b) (4), and N.J.S.A 2A:34-23.1 (d). *See also* Rule 5:5-2 (a) regarding the case information statement. Additionally, the importance of marital lifestyle as a factor in divorce has been recently highlighted in the cases of *Crews v. Crews,* 164 N.J. 11 (2000) and *Isaacson v. Isaacson,* 348 N.J. Super. 560 (App. Div. 2002).
3. Jack Wiener, V.P. of Investments, Gibraltar Securities, a Division of TA in Florham Park, NJ.
4. R. 5:5-2(b).
5. R. 5:5-2(b).
6. The only states which do not require a financial disclosure statement are Alaska, Missouri, South Dakota and Virginia. Although Wyoming requires a standard financial disclosure statement in matters involving children, it does not require such a form in other matters. In Tennessee although a financial affidavit is required, there is no standardized form. Although a pretrial statement or affidavit is required in Ohio, it does not provide for itemization or identification of expenses.
7. *Martindell v. Martindell,* 21 N.J. 341 (1956).
8. *Id.* at 353-354. *See also* Angelo Sarno, Esq., "Savings /Investment as a Component in Awarding Spousal Support" *New Jersey Family Lawyer,* Volume XVII, No. 3 pp. 87-90.
9. 58 N.J. 113 (1971).
10. *Id.* at 118.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 120. *See also* "Savings/Investment as a Component in Awarding Spousal Support" at 88.
16. 311 N.J. Super. 15 (App. Div. 1988).
17. *See also* Frank A. Louis, Esq., "The Practical Implication of *Crews v. Crews,*" *2001 Family Law Symposium,* pp. 219-276.
18. A-2581-97T3 (1999).
19. *Id.* at 5.
20. *Id.*
21. *Id.*
22. *Id.* at 7.
23 164 N.J. 11 (2000).
24. *Id.* at 35.*See also* N.J.S.A. 2A: 34-23(b).
25. *Bookstabber v. Bookstabber,* FM-997-94, (June 6, 1996) at 14.
26. *Id.*
27. *Id.*
28. 348 N.J. Super. 560 (App. Div. 2002).
29. *Isaacson, supra.,* footnote 6.
30. *See also In re Marriage of Drapeau,* 93 Cal. App. 4th 1086, 114 Cal Rptr.2d 6, 1 Cal. Daily Op. Serv. 9755, 2001 *Daily Journal* D.A.R. 12, 155.
31. *See also In re Marriage of Weibel,* 965 P.2d 126, 98 CJ C.A.R. 4623, (Colo. App. 1998).
32. It is our opinion that the elements of (1) a long-term marriage and (2) the means availability to meet the identified needs are critical to this analysis.
33. Query: Was this a way of having the non-career spouse share in the enhanced earnings or executive goodwill of the other spouse?
34. *Messina v. Messina,* 676 So.2d 483, 21

Fla. L. Weekly D 1435 (Fla . App. 1 Dist. 1996).
35. 771 *So. 2d* 1138, 25 *Fla. L. Weekly* S1040 (Fla. 2000).
36. *Bryant v. Bryant,* 139 N.C. App. 615, 534 S.E. 2d 230 (2000) at 619.
37. *Glass v. Glass,* 131 N.C.App. 784, 509 S.E.2d. 236 (1998) at 789-790.
38. *Id.* at 790.
39. 138 N.C. App. 467, 531 S.E.2d 471 (2000).
40. *Glass* at 472.
41. *Rhew* at 472.
42. *Glass* at 472.
43. *In re the Marriage of Margo Krupp,* 207 *Ill. App. 3d* 779, 566 N.E. 2d 429, 152 *Ill. Dec.* 742, (1990).
44. *Id.* at 796. *See also* Angelo Sarno, Esq., "Savings/ Investment as a Component in Awarding Spousal Support," *New Jersey Family Lawyer,* Volume XVII, No. 3 pp. 87-90.
45. 1994 *W.L.* 814248 (Del. Fam. cited 1994).
46. Angelo Sarno, Esq., "Savings/Investment as a Component in Awarding Spousal Support," at 88-89.
47. *Alzos, supra.* at 7, as cited in "Savings/Investment as a Component in Awarding Spousal Support," at 88-89.
48. *Id.; See also* "Savings/Investment as a Component in Awarding Spousal Support" at 89.
49. Frank A. Louis, Esq., "Limited Duration Alimony," *New Jersey Family Lawyer,* Volume XI, Number 6, 133-140 at 139.
50. *Crews, supra.* at 32.
51. Frank A. Louis, Esq., "The Practical Implication of *Crews v. Crews*" at 238.
52. *Id.* at 239.

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