

Family Law

Marital Momentum: Taking the Good With the Bad

By Jennifer Fortunato

Often a spouse's lifetime dream of retiring early or changing careers at a certain age is shattered in divorce as a result of an award of alimony under the concept of the "marital momentum." This concept has routinely provided a dependent spouse with benefits beyond the filing date of the divorce complaint, on the theory that these benefits were the result of the parties' marital efforts that created a potential or "momentum" beyond the filing date of the divorce complaint. See *Hanson*, A-4492-00T1 (App. Div. 2002); *Gugliermo v. Gugliermo*, 253 N.J. Super. 531 (App. Div. 1992); and *Gugliotta v. Gugliotta*, 160 N.J. Super. 160 (App. Div. 1978).

In *Gugliermo v. Gugliermo*, the Appellate Division stated, "where a family's expenditures and income has been consistently expanding, the dependent spouse should not be confined to the precise lifestyle enjoyed during the parties' last year together." Instead, the supporting spouse's income "should be viewed with an eye toward the future since it was to this potential that both parties contributed during the marriage. The then existing earning potential of the working spouse

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may be shared by the spouse who kept the home, and that standard of living should be implemented through an adequate alimony award."

Similarly, in the unreported case of *Hanson supra.*, the Appellate Division affirmed the trial court's award of alimony, which took into consideration the "marital momentum" of increased earnings of the supporting spouse beyond the filing date of the divorce complaint. The court held that the trial court's use of the term "momentum" was to reflect the supporting spouse's escalating earnings as a result of both parties' efforts, and that this potential transcended the filing date of the divorce. The court noted that the trial court's concept of "marital momentum" was consistent with their decision in *Gugliermo*. Id.

The concept of "reimbursement alimony" is also based upon the concept of "marital momentum." Reimbursement alimony is designed for a spouse who worked during the parties' marriage to place their spouse through school to obtain a degree and/or license. This type of alimony will protect the spouse's expected future financial and material benefits that this degree and/or license would bring them, but for the divorce. In the landmark case of *Mahoney v. Mahoney*, 91 NJ 488 (1982), the wife was awarded reimbursement alimony for putting her husband through the Wharton School of the University of Pennsylvania. The court reasoned that

the wife had made financial contributions towards her husband's professional education with the expectation that they would both enjoy the material benefits that would flow from this professional license or degree, and that it was "patently unfair" to deny the wife the mutually anticipated benefits while her husband not only "keeps the degree, but also all of the financial and material rewards flowing from it."

If a dependent spouse is entitled to reap the benefits of the marital momentum in an alimony award, why shouldn't this spouse also be required to endure its burdens and consequences? I could not find any cases in the context of alimony that require a dependent spouse to bear the burdens and consequences of the marital momentum. In some cases, this outcome is extremely unfair. For example, where a couple built a substantial portfolio in anticipation of the supporting spouse retiring early, the dependent spouse receives a substantial windfall, because courts are not considering the parties' lifetime plan of an early retirement in determining alimony. As a result, the supporting spouse, who has worked extremely hard on the expectation that he or she will only have to work to the age of 50 or 62, is penalized for this hard work and is forced to work beyond his or her expected retirement. This is particularly common for spouses with a Wall Street career, where the average age of retirement is 50. Careers on

Wall Street are analogous to the career of an athlete. They simply don't last that long due to company takeover, political maneuvering and executive burnout by the time one is 50 years old. Yet, when the Wall Street spouse is divorced, he or she is expected to continue to work at the extremely fast pace of Wall Street until the age of 65.

Although "taking the good with the bad" does not appear to be recognized in alimony cases, it has been recognized in the landmark equitable distribution case of *Goldman v. Goldman*, 275 N.J. Super. 452 (App. Div. 1994). In *Goldman*, the value of the husband's business as of the filing date of the divorce complaint was \$294,000, but as of the date of trial, it had no value through no bad faith of the husband. The court held that the value of the business should be determined at the date of trial, as opposed to the filing date of the divorce complaint. To hold otherwise would pro-

vide the wife with an unjust windfall and an inequitable distribution of assets. Simply put, the wife had to endure the burdens of the marital momentum, which ultimately led to the fall of the husband's business.

As a result, in a case where the parties' plan was for an early retirement or a change in career at a particular age or some other lifetime plan, which affects future income, counsel should argue that this was the "marital momentum" of the marital partnership and the dependent spouse's alimony award should reflect this lifetime plan. For a court to hold otherwise, would provide the dependent spouse with a substantial financial windfall — it would provide this spouse with a higher standard of living than the individual would have enjoyed if the parties' remained married. Clearly, this is not what the legislature intended when it enacted the alimony statute.

In a case where there are substantial assets, counsel should argue that the accumulation of these assets is proof of the parties' lifetime plan of an early retirement. The same argument can be made where the parties lived within their means, as opposed to spending excessively. Simply stated, accumulating assets and/or responsible spending is proof that the parties were planning to retire early. Ideally, of course, the parties would have entered into a prenuptial agreement that addressed the supporting spouse's plan of an early retirement prior to getting married.

In sum, "taking the good with the bad" needs to be addressed in alimony cases, as it has been addressed in equitable distribution cases, to avoid the supporting spouse becoming unjustly enriched as a result of divorce (i.e., getting benefits he or she would not have received if the parties remained married). ■