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STANDARD OF LIVING– WHAT DOES IT REALLY MEAN ?

[AND OTHER THOUGHTS ABOUT THE ALIMONY CASE]

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With the continued focus of our courts on “standard of living” as it relates to alimony, one might think that standard of living is the only factor considered when determining alimony. [See Crews v. Crews, 164 N.J. 11 (2000); Weishaus v. Weishaus, 180 N.J. 131 (2004).] In this article, I will explore the meaning of standard of living in the context of alimony and examine another statutory factor that has been overlooked, or in my opinion, not properly emphasized.

One cannot begin this discussion without a review of the alimony statute, N.J.S.A. 2A:34-23, which grants the statutory authority to award alimony and recites the factors to be considered when doing so. Specifically, N.J.S.A. 2A:34-23(b) holds in pertinent part:

In all actions brought for divorce, divorce from bed and board, or nullity, the court may award one or more of the following types of alimony: permanent alimony; rehabilitative alimony; limited duration alimony or reimbursement alimony to either party. In so doing, the court shall consider, but not be limited to, the following factors:

- (1) the actual need and ability of the parties to pay
- (2) the duration of the marriage;
- (3) The age, physical and emotional health of the parties;
- (4) **The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;**
- (5) The earning capacities, educational levels, vocational skills, and employability of the parties;
- (6) The length of absence from the job market of the party seeking maintenance;

- (7) The parental responsibilities for the children;
- (8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
- (9) **The history of the financial or non-financial contributions to the marriage by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities;**
- (10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
- (11) The income available to either party through investment of any assets held by that party;
- (12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment; and
- (13) Any other factors which the court may deem relevant.

[N.J.S.A. 2A:34-23(b)(1-13) (emphasis added).]

The focus on marital lifestyle or “ **the standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living** ” has been significant over the past decade in a court’s determination of an alimony award. N.J.S.A. 2A:34-23(b)(4) . Our Supreme Court’s case law draws attention to this factor in the celebrated cases of Crews and Wieshaus. Crews, *supra*, 164 N.J. at 11; Weishaus, *supra*, 180 N.J. at 131. When reading these cases, one could come to the conclusion that maintenance of marital standard of living, is given a disproportionate amount of attention when calculating an alimony award.

Despite this focus on standard of living, there has been little written or presented regarding this topic. Standard of living has been defined as broadly as “. . . the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income.” Hughes v. Hughes, 311 N.J.Super. 15, 34 (App. Div. 1998). We know that the marital standard of living is to be reflected in the original judgment of divorce for the purposes of post judgment relief . Walles v. Walles, 295 N.J.Super. 498, 512 (App. Div. 1996). Although there are multitudes of cases that discuss marital standard of living, there are no cases that specifically outline how to prove standard of living and what to include when proving your case.

The court’s focus on maintaining the non-wage earner spouse as if she/he was still married was addressed in 1971 by the New Jersey Supreme Court in Capodanno v. Capodanno, wherein the court held:

. . . A husband must support his wife according to her needs, but 'needs' are not measured merely by the amount of money necessary to maintain a wife at a level of subsistence or even reasonable comfort. 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.** In determining a wife's needs, a court should take into account the physical condition and social position of the parties, the husband's property and income, and the wife's property and income, if any. [emphasis supplied]

[Supra, 58 N.J. 113, 118 (1971)(citations omitted).]

In that same year, the New Jersey Supreme Court also decided Khalaf v. Khalaf, at which time the court ruled that alimony is “[n]ot fixed [s]olely with regard, on the one hand, to the actual needs of the wife, nor, on the other, to the husband's actual means. There should be taken into

account the physical condition and social position of the parties, the husband's property and income including what he could derive from personal attention to business, and also the separate property and income of the wife. Considering all these, and any other factors bearing upon the question, **the sum is to be fixed at what the wife would have the right to expect as support, if living with her husband.**" Supra, 58 N.J. 63, 67 (1971).[emphasis supplied]

In recent years, our New Jersey Supreme Court has continued its focus on marital lifestyle. Of course, the continuous increase in the divorce rate frequently places the alimony issue squarely before our courts¹. The most recent cases demonstrating the Court's focus on the importance of marital standard of living when determining alimony are Crews and Weishaus. Crews, supra, 164 N.J. at 11; Weishaus, supra, 180 N.J. at 131. In Crews the former wife requested modification of a rehabilitative alimony award to be increased from \$800 to \$3,500 per month, and that the \$3,500 per month be converted into a permanent alimony award. Crews, supra, 164 N.J. at 16. The trial court denied the former wife's motion and the Appellate Division affirmed the alimony award and found that the trial court "appropriately considered the statutory factors, N.J.S.A. 23A:34-23(b), and established an alimony award consistent with [the former wife's] needs as reflected on her Case Information Statement." Id. at 20.

The former wife appealed to the New Jersey Supreme Court. In an opinion authored by Justice LaVecchia, the Supreme Court remarked:

¹According to the June, 2004 National Vital Statistics Report the annual divorce rate in comparison with the annual rate of marriages for the years 2003, 2002, and 2001 are as follows: 2003, there were 54, 380 marriages and 27, 417 divorces; 2002, 51,355 couples married and 29,191 divorced; and in 2001, 54,128 couples married and 28, 495 divorced. National Vital Statistics Reports, Vol. 52, No. 22, June 10, 2004.

Neither the opinion nor the final divorce judgment contains an analysis of the Crewses' marital standard of living. The absence of that fact finding is unexplained. However, we note that the record shows relevant information was available. At the time of the trial of the divorce action [the former wife's] Case Information Statement (CIS) contained two columns of financial information regarding monthly expenses. One column contained a breakdown of expenses for [the former wife] and the parties two children. A second column contained the monthly expenses incurred to support the parties standard of living during the marriage. Many of the items asserted as representative of the marital lifestyle were suggestive of a lavish standard of living. The detailed expenses included a vacation home on Martha's Vineyard, ownership of a sailboat, membership in a yacht club, multiple vacations per year, and several hundred dollars in entertainment and dining expenses per month...from our review of the opinion of the trial court, as well as the accompanying divorce judgment, it appears that the expenses in the second column were ignored. Instead, in awarding alimony and child support, the court focused exclusively on the two monthly expenses for defendant and the two children.

_____ [Id. at 19.]

Ultimately, in Crewses, after analyzing the parties' monthly expenses cited in their Case Information Statements, which dealt with vacations, country clubs, entertainment, and the like, the Supreme Court held that “. . . one finding that must be made is the standard of living established in the marriage....The court should state whether the support authorized will enable each party to live a lifestyle ‘reasonably comparable’ to the marital standard of living.” Id. at 26 (citations omitted). The Supreme Court expanded its analysis to include that “once a finding is made concerning the standard of living enjoyed by the parties during the marriage, the court should review the adequacy and reasonableness of the support award against that finding.” Id. Furthermore, on an uncontested basis “...the court should require the parties to place on the

record the basis for the alimony award, including, in pertinent part, establishment of the marital standard of living, before the court accepts the divorce agreement.” Id.

In 2004, Weishaus v. Weishaus was decided, at which time the Supreme Court “revisit[ed] the] decision in Crews v. Crews.” Weishaus, supra 180 N.J. at 134. Specifically, the Supreme Court reconsidered the determination that “the finding of the marital standard should be mandatory in every uncontested case that involves a provision for support.” Id. at 134. In doing so, the court held: “...trial courts must have the discretion to approve a consensual agreement that includes provisions for support **without** rendering marital lifestyle findings at the time of entry of judgment. Our holding in Crews should no longer be allowed to require findings on marital lifestyle in every uncontested divorce. . . . Even if the court does decide not make a finding of marital standard, however, it nonetheless should take steps to capture and preserve the information that is available.” Weishaus, supra, 180 N.J. at 144. (emphasis added). In making this determination the Supreme Court noted:

The finding of the marital standard is just that -- a finding that is put to use in one of two settings: at the time of the court’s equitable determination of an initial alimony award...or later when a party seeks a modification of alimony. In the determination of the marital standard, the court establishes the amount the parties needed during the marriage to maintain their life style. That is separate from the identification of the source of funds that supported that lifestyle, although that information is of use to a court when making an alimony award, or later when deciding a changed-circumstance application.

[Id. at 145].

No other factor in the alimony statute has received such attention. As a result, marital lifestyle has become the court's, and often counsel's, primary focus when presenting an alimony case.

New Jersey is not the only state that includes standard of living as a factor in determining an alimony award. For example, New York, and Missouri and South Carolina, among many other states, include standard of living as a statutory factor. As in New Jersey, my research did not reveal any other state law or case that outlines a specific criteria for the court to follow when analyzing the marital standard of living.

In New York, the Supreme Court, Appellate Division, held that absent special circumstances "a former matrimonial standard of living based on capital expenditures is not a proper basis for permanent alimony." Orenstein v. Orenstein, 275 N.Y.S. 2d 33, 34 (1966). In a 1984 New York case, Brennan v. Brennan, the Supreme Court, Appellate Division, held that despite a former wife's argument that the trial court erred in denying her alimony in light of her age, physical condition and employability pursuant to the Domestic Relations Law, § 236, part B, subd. 6, par. a:

The statute further directs that a determination of reasonable needs requires a comparison of the respective financial resources of the parties. In the instant case, the wife only proved needs of \$400 a week to meet her current living expenses. No proof was adduced by her that the pre-separation standard of living of the parties would have required a maintenance award in excess of those needs. Since a reasonable return on the aggregate of her distributive award and separate property from an inheritance could be expected to approximate her needs, it cannot be said that Trial Term erred in denying the wife any award for maintenance.

[Supra, 479 N.Y.S. 877, 879 (1984)(citations omitted).]

Thus, in New York the courts have held that proof of standard of living is required to award alimony, but the law is not clear as to what specific proofs are needed to sustain the burden.

In a 2004 Missouri case captioned, Comminellis v. Comminellis, the trial court found that many of the former wife's expenses were "excessive." Supra, 147 S.W. 3d 102, 107 (2004). On appeal, the Appellate Division examined the expenses reviewed by the trial court and found:

Ms. Comminellis listed \$2,600 in monthly expenses for credit cards, recreation and gifts. Of this amount, \$2,050 constitutes credit card payments, \$300 constitutes spending on recreation, and \$250 constitutes spending on gifts. Because the marital standard of living does not automatically establish the same level of need after divorce, expenses for items such as recreation and gifts may bear scrutiny."

[Id. at 107 (citations omitted).]

The court also found that the former wife's testimony lacked credibility in regard to many of her monthly expenses. Id. at 17. For example, the Court cited evidence that suggested that the former wife's employment paid for some of her food expenses cited on her Case Information Statement, and therefore, awarded her less. Id. at 108.

_____ In a 2003 South Carolina case, Hailey v. Hailey, the trial court held that the former wife proffered sufficient evidence to support a change of circumstances when she testified that her standard of living had declined as a result of her poor mental state, which had, among other things, impacted her employability. Supra, 357 S.C. 18, 31 (2003). The Court of Appeals disagreed and held that the "Wife's casual description of her own medical condition is unconvincing, especially in light of the total failure of proof as to any impact upon her income or economic circumstances. Additionally, Wife provided no evidence her medication expense increased after the initial award of alimony." Id. at 30.

What does maintenance of the standard of living established during the marriage really mean in an alimony case? What should be included? How do you prove standard of living? Let's explore these questions and more.

PROVING STANDARD OF LIVING

A . THE CASE INFORMATION STATEMENT

Let us begin our discussion of proofs with an examination of the case information statement. There is no doubt that the single most important document filed in a matrimonial case is the "CIS". Pursuant to the New Jersey Court Rule 5:5-2, a case information statement must be filed within 20 days after the filing of an answer or appearance. Page 5 of the required form, which is located in the appendix of the Court Rules, directs that the column requiring "Joint Marital Lifestyle" reflect standard of living established during the marriage. All too often, attorneys permit the filing of this form with little or no review, understanding, or guidance to their client. This mistake can be devastating to your case when attempting to prove standard of living at trial. Therefore, in an effort to support your trial position from the onset the following "rules of thumb" may be helpful:

_____ **First Rule:** Explain to your client the importance of this document. It is a sworn statement of their standard of living established during the marriage – a critical factor in the alimony statute. It can and will be used as a basis of proofs in a trial. It can and will be the subject of great scrutiny during depositions and cross-examination.

Second Rule: Preparation of “Joint Marital Lifestyle,” as well as preparation of Current Life Style required on page 5 of the Case information Statement, requires a review of checkbooks, charge card statements and any other documents that would assist your client in determining their expenses. This document should not be prepared by guessing or estimating. If a client must estimate due to a lack of access to information , then note so on the form. As discovery (hopefully) makes this information available to your client, update their CIS to reflect the changes.

Third Rule : Review your client’s expenses with your client before submitting schedules A, B & C. This is important. You and your client must understand the basis of the expenses before your client attests to the truth of the document (i.e. actual statements, utility bills, telephone bills, charge card receipts, etc.). It is potentially very embarrassing to your client, as well as to counsel, if questioning demonstrates that the expenses were prepared without backup documentation.

Fourth Rule: Backup , backup, backup! Make sure that your client has justification for each and every number listed on their Case Information Statement . Backup documentation could be in the form of cancelled checks and /or check registers (i.e. total of repairs and maintenance for a period of time), credit card statements (categorize charges—i.e. restaurants, clothing, etc.). Detailing the basis for expenses incurred during the marriage is of great assistance to the trier of fact and re-enforces the credibility of your client in the court’s eyes.

Fifth Rule : Inventory and copy your client’s backup documents for trial. Be assured that during cross-examination, your client will be questioned as to the source of his or her expenses. There is nothing more effective than responding with the production of backup for each number

presented as proof of marital standard of living on your Case Information Statement. As a side note, remember to make sure that you have previously disclosed all these documents during discovery.

Sixth Rule : Quantify the period of time that your client’s expenses represent. For example, did the expenses cover a two year period or a five year period? A footnote in the CIS would be appropriate, however, at the very least, make sure your client knows this before he or she testifies at the time of his or her deposition or trial. This raises another question to be addressed at trial – how long did the parties have to live at the standard of living for the Court to award a spouse alimony based upon that standard? Has the employed spouse’s income skyrocketed in the past three years, while the parties lived more modestly during the first ten years? Should the first ten years be included in standard of living?² If you represent the spouse paying alimony you certainly want to focus on those earlier years. What about the parties who achieved success early on, and in recent years have cut back due to employment circumstances [are they temporary circumstances?] , lifestyle choices [they were trying to simplify their lives] or other circumstances? These facts must be presented and argued. Standard of living is not limited to dollars and cents actually spent during a marriage. It is a much broader topic.

²In the case Guglielmo v. Guglielmo the Appellate Division held: “[w]here a family's expenditures and income had been consistently expanding, the dependent spouse should not be confined to the precise lifestyle enjoyed during the parties' last year together. Defendant's income picture should be viewed with an eye toward the future, since it was to this *potential* that both parties contributed during the marriage. The then-existing earning potential of the working spouse may be shared by the spouse who kept the home, and that standard of living should be implemented through an adequate alimony award. Supra, 253 N.J.Super. 531, 543-44 (App. Div. 1992) (citations omitted).

B. THE FORENSIC ACCOUNTANT

_____In addition to the Case Information Statement, a forensic accountant can be of great assistance in proving standard of living. An analysis of cancelled checks, credit card statements categorized by type of expenditure, and other documents over a period of years summarized is invaluable in proving how the parties actually lived during their marriage.³ A summary prepared on a year by year basis is an efficient and effective way to convince the Court as to the reality of the parties' spending during the marriage. It goes without saying that your expert report must include that which you will rely upon at time of trial. Presentation of your proofs is critical. Your questioning of your expert should include reference to an inventory as to what was relied upon when determining actual expenses incurred during the marriage. It is also an effective tool to have the expert produce during his or her testimony the actual documents relied upon. At the very least, have the documents available for cross-examination.

Not only should your forensic accountant identify actual expenditures when proving standard of living, it is also as important to demonstrate to the Court that the parties had the cash available to spend to meet these expenses. In a recent case, after our accounting expert established what the parties spent year by year over a seven year period, he testified as to their available income year by year over that same period. Year by year, our expert identified annual earnings, other sources of income, actual taxes paid, as well as adjustments. Furthermore, the expert provided the Court with a yearly, then monthly, amount that the parties had available for cash flow purposes. He then compared that number with actual monies spent. It was compelling to

³ Evidence Rule 1006, "Summaries" is extremely helpful in this regard as it permits a "qualified witness" to present to the court "the contents of voluminous writings . . . which cannot conveniently be examined in court" in "the form of a chart, summary, or calculation."

hear the extent to which the available cash flow was sufficient to spend. Even more powerful was the accountant's testimony that there was an amount of money available each year not spent that accounted for the accumulation of their wealth.

C. OTHER THAN ACTUAL MONIES SPENT, WHAT ELSE IS THERE?

_____ Once you have presented proofs as to actual monies spent and the availability of cash flow to meet those expenses, what else is there to prove? Plenty! Standard of living is not simply reflected in what people spent, it is reflected in how they lived, their life plan and their patterns of spending money.

Let's start with what I call the "intangible factor," which includes the social aspect of people, with whom they associated, the events that they attended, the way in which they entertained - the ambience of their life together. For example, if a lifestyle included attending several prominent charity balls annually with distinguished guests, that is part of their standard of living. However, a divorced spouse can no longer have the lifestyle which included the social aspect of these events without sufficient money to donate to the charities in the future. While it may be difficult to translate the social benefit of lifestyle into dollars, one could argue, and I believe effectively, that having the money available to continue donations and the attendance at these functions would permit the divorced spouse to have access to a certain level of society and all that comes with it.

Along these lines, how a family spent money (i.e. on lavish parties verses investments and savings) should be considered when establishing standard of living. I call this the “event family.” This is the family who always celebrates in a big way — from \$7,000.00 christenings, to \$10,000.00 birthday parties with 200 of their closest friends. While this family may have accumulated some wealth for equitable distribution purposes, they chose to spend their monies on events, as opposed to accumulate tangible assets. Testimony as to these choices, the style of living and the expectation that the ability to continue to celebrate life in the future in the same way, is critical in proving standard of living.

Next, let’s look at the “where, why and how often” factor. Proof of actual expenses is not enough to prove standard of living established during the marriage. Your client must personalize the numbers that he or she has testified to in an attempt to communicate true lifestyle to the court. Where did the parties shop (i.e. Macy’s or Nieman Marcus)? Why did they shop there (to present a certain image, because of the quality of the merchandise)? How often did they travel, shop, entertain, eat out etc. (whenever they wanted to, once every two weeks, once every two years, etc.)? The point here is that there is no persuasion as effective as the testimony of the spouse looking at the trial judge explaining that which simply does not translate into dollars. Never underestimate the power of the personal touch.

Another important component of standard of living is how the parties paid their expenses to maintain their lifestyle. Take for example the Wall Street wiz, the “master of the universe,” earning lots of money – some in salary, but mostly in a bonus as is often the situation. Assume that the monthly expenses during the marriage were \$50,000.00. The question that arises is “how did the parties maintain their standard of living?” Did they incur \$50,000.00 per month in

expenses and pay them off at bonus time or did they place the bonus aside each year and live off of it at the rate of \$50,000.00 per month? This proof becomes critical, particularly in a situation where the income varies greatly from year to year. Most likely, the spouse receiving alimony and child support wants a fixed amount to be paid every month. However, the spouse earning the money may prefer to have alimony and child support based upon his or her draw on a monthly basis and a percentage of the bonus on an annual basis. One must present evidence as to how this was done during the marriage to make an effective argument. This is part of standard of living.

Similarly, as the Hughes case suggests, whether or not the parties borrowed money to live is a factor to be considered when determining standard of living. Hughes, supra, 311 N.J.Super. 15. While it seems absurd to suggest that divorced spouses should continue this pattern, case law reveals that standard of living includes “. . . the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income.” Id. at 34.

Should the fact that one of the parties’ parents annually gifted or regularly supplemented lifestyle be a factor considered when determining alimony? If maintenance of the standard of living relies on a continued contribution from a party’s parents, should a determination of alimony be based upon that on an ongoing basis? These unique facts cannot be ignored when arguing an alimony issue.

D. THE FUTURE

How does a divorcing spouse’s future come into play when considering standard of living? Yes, schedule C of the CIS does have a line item for “savings/investments” and “other,” but does

the Court's statutory obligation to consider standard of living established during the marriage mean that a divorcing spouse's future should be considered?

As an example, let's look at a couple married for 25 years and in their late 50s with emancipated children. Although the husband has earned a substantial salary for most of the marriage, they experienced an extremely frugal lifestyle. They spent approximately \$2,500.00 per month to live and saved on an average of \$50,000.00 per year in the husband's 401k and other savings. Should their long-term investment philosophy be considered when determining alimony? How about the fact that the husband will continue to have the ability to save \$18,000.000 per year in 401k monies, but the former wife will have no such retirement vehicle available to her because she is not employed outside of the home?

Separate and apart from receiving alimony to address the former wife's needs based upon their standard of living, shouldn't her ability to save for the future and retire in luxury be considered? Perhaps the tax laws should be changed to permit alimony to be considered income not only for payment of tax purposes, but so as to permit the recipient of alimony to participate in a retirement fund on a pretax basis.

Thus, the question begs - Should the continued accumulation of wealth be expected going forward? If your position is that it should be, then a presentation of facts addressing how the parties accumulated wealth during the marriage must be presented. One effective way to present this evidence would be to have your expert compare available cash flow with actual monies spent, identifying how much was left over to accumulate wealth and how it was accumulated during the marriage.

Having hopefully encouraged you to think beyond the obvious when addressing the standard of living in an alimony case, one must also consider alimony from the payor's point of view. Both parties' marital standard of living have to be considered. The reality is that, despite the Court's focus on standard of living in alimony cases, but for cases with great wealth, maintaining the marital standard of living for both parties after a divorce is not possible. A consideration of what I call the "getting out of bed" factor has to be addressed before ordering alimony. The paying spouse must not be so discouraged by the award of alimony that he or she is not motivated to "get out of bed" in the morning and go to work to earn the living that pays the alimony. Maintenance of the standard of living established during the marriage should not lead to an award of alimony that ignores the paying spouse. The compromise of marital lifestyle should be by both parties, each sharing the pain of no longer being able to live based upon the standard of living established during the marriage.

I want to shift your attention to another statutory factor in the alimony statute that, in my opinion, is not adequately emphasized when arguing the alimony case. Specifically, factor (b)(9), 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. N.J.S.A. 2A:34-23(b)(9). As a result of societal trends in the United States, the true definition of this statutory factor has drastically changed.

Traditionally, the basic premise of the marital partnership theory is that "economic and non-economic contributions have equal value within the ongoing marriage." Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony, 27 J. Fam. L. 351, 360 (1988-89). However, when parties divorce the spouse who has played the "primary non-economic role is left

to confront the fact that such unpaid work is not highly valued by society, particularly employers. The result is a striking disparity in standard of living after divorce: the wife alone pays the price for having lived a life based on the partnership model. The husband, of course, keeps the enhanced earning power that he developed during the marriage, which is often the couple's only substantial asset at the time of the divorce." Id.

Years ago, it was easier to identify the roles in a marriage. Tradition frequently dictated that the non-economic contributions (i.e. raising children, maintaining a home, accompanying a spouse to business events, being the CEO of the home) were the basis of the marital partnership. Carrying this logic to its natural conclusion, in the event of divorce, the non-income earning spouse's role permitted the employed spouse to succeed financially. Thus, there was logic to award alimony.

Presently, however, I am confident that in today's day and age, with the number of successful working women⁴, the movement in America is toward a household employing various professionals to conduct the duties that were traditionally performed by the spouses that stayed home (i.e. a cook, nanny, chef, babysitter, personal assistant, etc.). For example, take the couple married after college and presently in their late 40's. She entered the work force in an environment that was (finally) receptive to promoting women. She worked hard,⁵ was promoted

⁴ Since the 1970s "The number of women in the paid labor force has increased by 112 percent. The percentage of children with mothers in the paid workforce has increased 28 percent. Combined work hours for dual-earner couples with children rose 10 hours a week." <http://www.aflcio.org/issuespolitics/women/factsaboutworkingwomen.cfm>.

⁵ "In 2000, the average middle-income married couple with children spent close to 3,700 hours per year at work, compared to about 3,100 in 1979, an increase of 600 hours a year or four added months of full time work" State of Working America 2002-2003.

and achieved success. He, on the other hand, held a job, was of average ambition, and made significantly less money than his wife. The wife was responsible for hiring the nanny, arranging the play dates, planning meals, going to the doctors, and attending all the school functions, which she did alone. The husband, on the other hand, worked, earned an average income, watched television, played occasionally with the children and was not very social. This is hardly the scenario of the marital partnership that was envisioned when creating the non-economic contribution factor of the alimony statute.

It is not enough to examine lifestyle. One must explore the basis of the economic and non-economic partnership when arguing alimony. Should the husband who succeeded despite his wife's support pay the same amount of alimony as the husband whose wife was the reason for his success? It is a different world, and we must try our cases cognizant of this fact.

Over the past five years standard of living has been the major focus of several court opinions with regard to alimony determination. If a party maintained a high standard of living by living a lavish lifestyle, for instance, it is extremely likely that the alimony award would be higher so that the ex-spouse could continue to maintain that lifestyle. However, those same factors that are contemplated in making a determination of marital standard of living also play a role in “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. . . .” N.J.S.A. 2A:34-23(b)(9). More specifically, if a marital lifestyle included a nanny, maid, and/or cook, a non-supporting spouse's contribution to the care and education of the children will be less when viewed in light of the

traditional marital partnership since those hired services would have, in essence, performed the tasks originally contemplated by N.J.S.A. 2A:34-23(b)(9).

Ironically, the purpose of alimony has been defined as “the continuation of the standard of living enjoyed by the parties prior to their separation.” Innes v. Innes, 117 N.J. 496, 503 (1990) (citations omitted). The prevailing theme of an alimony award is, in fact, standard of living. Thus, when looking at a person’s non-financial contributions to the marriage, including his or her contributions to the care and education of the children and the interruption of his or her personal career or education, it is paramount to examine how those contributions pertain to the traditional marital partnership.

In Glass v. Glass, the Appellate Division stated that, prior to beginning their analysis in regard to permanent alimony and the modification thereof, the court must set forth “basic but relevant principals regarding permanent alimony and modification of alimony awards or agreements.” Supra, 366 N.J. Super. 357, 370 (App. Div. 2004). In setting forth these basic principles the Appellate Division held that:

Permanent alimony is of statutory origin...and reflects “the important policy of recognizing that marriage is an adoptive economic and social partnership”... Marriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial. ... Imposing an obligation by judicial mandate or agreeing to support permanently reflects the judicial and, where agreed upon, personal recognition of the marital relationship and partnership.

[Id. at 369-70.]

Therefore, in applying the statutory factor under N.J.S.A. 2A:34-23(b)(9) it is paramount to examine the history of the marriage as it reflects the emotional and financial partnership. Reid v. Reid, 310 N.J. Super. 12, 22 (App.Div. 1998). In Reid, the trial court denied the former wife's

request for alimony. The Appellate Division affirmed and held, among other things, that the history of the marriage did not reflect an emotional and financial partnership. Id. (emphasis added). In making this determination, the Appellate Division held:

. . . this is the "rare" case justifying consideration of [former wife's] conduct during the marriage as a basis for rejecting her alimony demand. Judge Coogan could not ignore the embezzlement by [the former wife] and her misappropriation of marital assets which "significantly impacted on her husband." The judge also observed that after the misappropriation and embezzlement, [the former wife] attempted to "cover [her defalcations] up." We agree entirely with the Chancery judge's conclusion that this conduct should not be rewarded in a court of equity by an order entitling her to alimony. Moreover, the history of the marriage did not reflect an emotional and financial partnership. Rather, the parties were "individual investors" who exhibited no degree of emotional or financial dependence upon the other."

[Id at. 23.]

_____ In a changing society, the issue of marital partnership must be explored in an alimony case. . "Under the marital partnership theory, a wife's contribution of services to the family unit is viewed as equally valuable as a contribution of wages or other financial support." Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony, 27 J. Fam. L. 351, 357 (1988-89). "The homemaker performs indispensable services for the family. These commonly include such tasks as child care, cooking, laundry, house cleaning and shopping. No less important, homemakers typically provide emotional and psychological support, overseeing social relationships within and outside the family." Id.

What if the non-wage earner is not providing the "non-economic contributions" to the marriage, which the alimony statute contemplated as having equal value to that of the wage earning spouse? A study released in November, 2004 by the U.S. Census Bureau reveals that the number of stay at home mothers has increased 19% over the past decade to 5.4 million.

Boston Globe Article dated December 26, 2004 “Staying at Home a Status Symbol: More Moms Are Leaving Work - If They Can Afford It.” Furthermore, “[t]he family of those mothers are concentrated at the top income levels accordingly to the first Census analysis of stay at home parents...” Id. “It is the new privilege of our society,” to stay at home, according to Barbara Defoe Whitehead, coordinator of the National Marriage Project at Rutgers University. Thus, it is becoming increasingly clear that the “non financial” contribution as contemplated by N.J.S.A. 2A:34-23(b)(9) in light of the traditional marital partnership no longer exist.

_____ In closing , I hope that you have been inspired to be somewhat more creative when trying your next alimony case. Think beyond the obvious . The issue of alimony, like so many legal issues in family law, continues to evolve. We, as trial lawyers, are responsible for encouraging our Court’s to explore the law, and create new understandings of existing law.

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