## <u>Determining the Marital Standard of Living: An Analysis of N.J.S.A. 2A:34-23(b)(4) and</u> the Importance of Accurately Identifying the Marital Lifestyle when Calculating Alimony

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One's marital lifestyle is one of fourteen factors considered by New Jersey courts when calculating an alimony award. Specifically, N.J.S.A. 2A:34-23(b)(4) requires the court to consider "[t]he standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other." Marital lifestyle is similarly discussed in subsection (c) of the statute, wherein the length and amount of alimony for marriages and civil unions enduring less than twenty years is addressed: "[T]he court shall also consider the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto." Id.

Though true, marital lifestyle is but one factor considered by a court when determining an appropriate alimony award, New Jersey case-law precedent unequivocally confirms that identifying the marital standard of living is necessary when determining an initial alimony award as well as any future modifications to same. This article will address the importance of accurately identifying the marital lifestyle, appropriate considerations necessary to determine same, and how the marital lifestyle may impact an initial alimony award or modifications to a preexisting alimony award.

It is well settled that the standard of living established during the marriage serves as the "touchstone" in any alimony determination. <u>Crews v. Crews</u>, 164 <u>N.J.</u> 11, 16, 751 A.2d 524 (2000).

Alimony is considered an "economic right" and one which "provides the dependent spouse with a 'level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage." <u>Mani v. Mani</u>, 183 <u>N.J.</u> 70, 80, 869 A.2d 904 (2005). Simply put, the "basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation." <u>Innes v. Innes</u>, 117 <u>N.J.</u> 496, 503, 569 A.2d 770 (1990) (citing <u>Mahoney v. Mahoney</u>, 91 <u>N.J.</u> 488, 501-02, 453 A.2d 527 (1982).

Among other considerations, the needs of the dependent spouse, the payor spouse's ability to contribute to those needs, and his or her ability to maintain the dependent spouse at the marital standard of living must be considered by the court. <u>Wass v. Wass</u>, 311 <u>N.J. Super</u>, 624, 629 (Super. Ct. 1998) (citing <u>Lepis v. Lepis</u>, 83 <u>N.J.</u> 139, 152, 416 A.2d 45 (1980). To the extent that same is financially feasible, an alimony award will "enable each party to live a lifestyle 'reasonably comparable' to the marital standard of living." <u>Id</u>. at 26. Accurately determining the marital standard of living "cannot be overstated. It is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award." <u>S.W. v. G.M.</u>, 228 A.3d 226 (N.J. App. Div. 2020).

New Jersey case-law precedent defines the marital standard of living as "the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income." <u>Hughes v. Hughes</u>, 311 <u>N.J. Super.</u> 15, 34, 709 A.2d 261 (App.Div. 1998). One must additionally consider whether or not the parties elected to accumulate savings during the marriage when determining the marital lifestyle. <u>Lombardi v. Lombardi</u>, 447 <u>N.J. Super.</u> 26, 36-37, 145 A.3d 709 (App. Div. 2016). Further, a determination as to marital lifestyle must be articulated numerically: "To the extent <u>Crews</u> and <u>Hughes</u> implicitly required that marital lifestyle be determined numerically, we now explicitly state a finding of marital

lifestyle must be made by explaining the characteristics of the lifestyle and quantifying it.". <u>S.W.</u> <u>v. G.M.</u>, 228 A.3d 226 (N.J. App. Div. 2020). Once a finding has been made as to marital lifestyle, a court "should review the adequacy and reasonableness of the support award against this finding." <u>Crews</u>, 164 <u>N.J.</u> at 26.

Numerically articulating the marital standard of living in contested divorce matters may necessitate that a trial court judge obtain and consider relevant testimony, which may include expert testimony from a forensic accountant, and review Case Information Statements and supporting financial documents, among other relevant evidence. <u>S.W. v. G.M.</u>, 228 A.3d 226 (N.J. App. Div. 2020). Notably, "the judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle using any combination of the presentations." <u>Id</u>. However, numerically articulating the marital standard of living does not equate to simply identifying and equalizing the net income of the parties. To the contrary,

<u>N.J.S.A.</u> 2A:34-23(b)(4) does not signal the Legislature intended income equalization or a formulaic application in alimony cases, even where the parties spent the entirety of their income. Had the Legislature intended alimony be calculated through use of a formula, there would be no need for the statutory requirement that the trial court address all the statutory factors. The Legislature declined to adopt a formulaic approach to the calculation of alimony. <u>See</u> Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage). <u>Id</u>.

This analysis is based upon the premise that expenses incurred during the marriage are frequently not attributable to both parties, and under some circumstances, neither party.

To that end, and per the Appellate Division in <u>S.W.</u>, "[t]he portion of the marital budget attributable to a party is likewise not subject to a formula. Contained in most marital budgets are expenses, which may not be associated with either the alimony payor or payee, including those associated with children who have since emancipated or whose expenses are met by an asset or a third-party source having no bearing on alimony . . . [T]here are expenses which only one party incurred during the marriage." <u>Id</u>. (<u>See also Crews</u>, 164 <u>N.J.</u> at 32-33). For these reasons, "after finding the marital lifestyle, a judge must attribute the expenses that pertain to the supported spouse. Only then may the judge consider the supported spouse's ability to contribute to his or her own expenses and the amount of alimony necessary to meet the uncovered sum." <u>Id</u>.

Though no one statutory factor controls a court's determination as to an appropriate alimony award, New Jersey statutory law and case-law precedent unequivocally confirm that a court must numerically identify the marital standard of living enjoyed by the parties prior to establishing or modifying an alimony award. Furthermore, New Jersey statutory law and case-law precedent prohibit courts from utilizing simplistic formulas, such as the equalization of the parties' net incomes, when determining the sum and duration of an alimony award. To the contrary, courts are tasked with numerically establishing how the parties actually lived during the marriage. This analysis may include a savings component, among other relevant considerations. It is similarly within the court's discretion to consider all costs and expenses incurred by the parties during the marriage, including but not limited to those costs associated with one party, the parties' child(ren), or in some circumstances, other third-parties. Identifying the marital standard of living is critical, both prior to entry of an initial alimony award and any modifications made to same. Thus, depending upon the circumstances in any given case, the parties may require the assistance of a forensic accountant to perform a lifestyle analysis.

## N.J. Stat. § 2A:34-23

This section is current through New Jersey 219th First Annual Session, L. 2020, c. 59, and J.R. 1

LexisNexis® New Jersey Annotated Statutes > Title 2A. Administration of Civil and Criminal Justice (Subts. 1 - 12) > Subtitle 6. Specific Civil Actions (Chs. 22 - 65) > Chapter 34. Actions for Divorce or Nullity of Marriage (Arts. 1 - 7) > Article 6. Alimony; Support; Maintenance (§§ 2A:34-23 - 2A:34-27)

## § 2A:34-23. Alimony, maintenance

### Alimony, maintenance.

Pending any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere, or after judgment of divorce or dissolution or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, including, but not limited to, the creation of trusts or other security devices, to assure payment of reasonably foreseeable medical and educational expenses. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.

The court may order one party to pay a retainer on behalf of the other for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just. In considering an application, the court shall review the financial capacity of each party to conduct the litigation and the criteria for award of counsel fees that are then pertinent as set forth by court rule. Whenever any other application is made to a court which includes an application for pendente lite or final award of counsel fees, the court shall determine the appropriate award for counsel fees, if any, at the same time that a decision is rendered on the other issue then before the court and shall consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party. The court may not order a retainer or counsel fee of a party convicted of an attempt or conspiracy to murder the other party to be paid by the party who was the intended victim of the attempt or conspiracy.

**a.**In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:

(1)Needs of the child;

(2)Standard of living and economic circumstances of each parent;

(3)All sources of income and assets of each parent;

(4)Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and

the length of time and cost of each parent to obtain training or experience for appropriate employment;

(5)Need and capacity of the child for education, including higher education;

(6) Age and health of the child and each parent;

(7)Income, assets and earning ability of the child;

(8) Responsibility of the parents for the court-ordered support of others;

(9) Reasonable debts and liabilities of each child and parent; and

(10) Any other factors the court may deem relevant.

The obligation to pay support for a child who has not been emancipated by the court shall not terminate solely on the basis of the child's age if the child suffers from a severe mental or physical incapacity that causes the child to be financially dependent on a parent. The obligation to pay support for that child shall continue until the court finds that the child is relieved of the incapacity or is no longer financially dependent on the parent. However, in assessing the financial obligation of the parent, the court shall consider, in addition to the factors enumerated in this section, the child's eligibility for public benefits and services for people with disabilities and may make such orders, including an order involving the creation of a trust, as are necessary to promote the well-being of the child.

As used in this section "severe mental or physical incapacity" shall not include a child's abuse of, or addiction to, alcohol or controlled substances.

**b.**In all actions brought for divorce, dissolution of a civil union, divorce from bed and board, legal separation from a partner in a civil union couple or nullity the court may award one or more of the following types of alimony: open durational 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 or civil union;

(3) The age, physical and emotional health of the parties;

(4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other;

(5) The earning capacities, educational levels, vocational skills, and employability of the parties;

(6) The length of absence from the job market of the party seeking maintenance;

(7) The parental responsibilities for the children;

(8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(9)The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11)The income available to either party through investment of any assets held by that party;

(12)The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;

(13)The nature, amount, and length of pendente lite support paid, if any; and

(14) Any other factors which the court may deem relevant.

In each case where the court is asked to make an award of alimony, the court shall consider and assess evidence with respect to all relevant statutory factors. If the court determines that certain factors are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. No factor shall be elevated in importance over any other factor unless the court finds otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard.

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

**c.**In any case in which there is a request for an award of alimony, the court shall consider and make specific findings on the evidence about all of the statutory factors set forth in subsection b. of this section.

For any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union. Determination of the length and amount of alimony shall be made by the court pursuant to consideration of all of the statutory factors set forth in subsection b. of this section. In addition to those factors, the court shall also consider the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto.

Exceptional circumstances which may require an adjustment to the duration of alimony include:

(1)The ages of the parties at the time of the marriage or civil union and at the time of the alimony award;

(2)The degree and duration of the dependency of one party on the other party during the marriage or civil union;

(3) Whether a spouse or partner has a chronic illness or unusual health circumstance;

(4)Whether a spouse or partner has given up a career or a career opportunity or otherwise supported the career of the other spouse or partner;

(5) Whether a spouse or partner has received a disproportionate share of equitable distribution;

(6) The impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;

(7) Tax considerations of either party;

(8) Any other factors or circumstances that the court deems equitable, relevant and material.

An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.

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

**d**.Rehabilitative alimony shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed

circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.

This section is not intended to preclude a court from modifying alimony awards based upon the law.

**e.**Reimbursement alimony may be awarded under circumstances in which one party supported the other through an advanced education, anticipating participation in the fruits of the earning capacity generated by that education. An award of reimbursement alimony shall not be modified for any reason.

**f.**Except as provided in subsection i., nothing in this section shall be construed to limit the court's authority to award open durational alimony, limited duration alimony, rehabilitative alimony or reimbursement alimony, separately or in any combination, as warranted by the circumstances of the parties and the nature of the case.

**g**.In all actions for divorce or dissolution other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce, dissolution of civil union, divorce from bed and board, or legal separation from a partner in a civil union couple where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the party to pay in determining an amount of maintenance to be awarded.

**h.**Except as provided in this subsection, in all actions where a judgment of divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union couple is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution. The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of an attempt or conspiracy to murder the other party.

i.No person convicted of Murder, <u>N.J.S.2C:11-3</u>; Manslaughter, <u>N.J.S.2C:11-4</u>; Criminal Homicide, <u>N.J.S.2C:11-2</u>; Aggravated Assault, under subsection b. of <u>N.J.S.2C:12-1</u>; or a substantially similar offense under the laws of another jurisdiction, may receive alimony if: (1) the crime results in death or serious bodily injury, as defined in subsection b. of <u>N.J.S.2C:11-1</u>, to a family member of a divorcing party; and (2) the crime was committed after the marriage or civil union. A person convicted of an attempt or conspiracy to commit murder may not receive alimony from the person who was the intended victim of the attempt or conspiracy. Nothing in this subsection shall be construed to limit the authority of the court to deny alimony for other bad acts.

As used in this subsection:

"Family member" means a spouse, child, parent, sibling, aunt, uncle, niece, nephew, first cousin, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother, or half sister, whether the individual is related by blood, marriage or civil union, or adoption.

j.Alimony may be modified or terminated upon the prospective or actual retirement of the obligor.

(1)There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown based on specific written findings of fact and conclusions of law.

The rebuttable presumption may be overcome if, upon consideration of the following factors and for good cause shown, the court determines that alimony should continue:

(a) The ages of the parties at the time of the application for retirement;

(b)The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;

(c)The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil union;

(d)Whether the recipient has foregone or relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;

(e)The duration or amount of alimony already paid;

(f)The health of the parties at the time of the retirement application;

(g)Assets of the parties at the time of the retirement application;

(h)Whether the recipient has reached full retirement age as defined in this section;

(i)Sources of income, both earned and unearned, of the parties;

(j) The ability of the recipient to have saved adequately for retirement; and

(k)Any other factors that the court may deem relevant.

If the court determines, for good cause shown based on specific written findings of fact and conclusions of law, that the presumption has been overcome, then the court shall apply the alimony factors as set forth in subsection b. of this section to the parties' current circumstances in order to determine whether modification or termination of alimony is appropriate. If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(2)Where the obligor seeks to retire prior to attaining the full retirement age as defined in this section, the obligor shall have the burden of demonstrating by a preponderance of the evidence that the prospective or actual retirement is reasonable and made in good faith. Both the obligor's application to the court for modification or termination of alimony and the obligee's response to the application shall be accompanied by current Case Information Statements or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification.

In order to determine whether the obligor has met the burden of demonstrating that the obligor's prospective or actual retirement is reasonable and made in good faith, the court shall consider the following factors:

(a)The age and health of the parties at the time of the application;

(b)The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c)The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d)The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e)The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f)The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g)The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h)Any other relevant factors affecting the obligor's decision to retire and the parties' respective financial positions.

If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(3)When a retirement application is filed in cases in which there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act, the obligor's reaching full retirement age as defined in this section shall be deemed a good faith retirement age. Upon application by the obligor to modify or terminate alimony, both the obligor's application to the court for modification or termination of alimony and the obligee's response to the application shall be accompanied by current Case Information Statements or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification. In making its determination, the court shall consider the ability of the obligee to have saved adequately for retirement as well as the following factors in order to determine whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate:

(a)The age and health of the parties at the time of the application;

(b)The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c)The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d)The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e)The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f)The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g)The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h)Any other relevant factors affecting the parties' respective financial positions.

(4)The assets distributed between the parties at the time of the entry of a final order of divorce or dissolution of a civil union shall not be considered by the court for purposes of determining the obligor's ability to pay alimony following retirement.

**k.**When a non-self-employed party seeks modification of alimony, the court shall consider the following factors:

(1)The reasons for any loss of income;

(2)Under circumstances where there has been a loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;

(3)Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;

(4) The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;

(5) The impact of the parties' health on their ability to obtain employment;

(6) Any severance compensation or award made in connection with any loss of employment;

(7) Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;

(8)The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

(9)Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing employment investigations by the unemployed spouse or partner; and

(10) Any other factor the court deems relevant to fairly and equitably decide the application.

Under circumstances where the changed circumstances arise from the loss of employment, the length of time a party has been involuntarily unemployed or has had an involuntary reduction in income shall not be the only factor considered by the court when an application is filed by a non-self-employed party to reduce alimony because of involuntary loss of employment. The court shall determine the application based upon all of the enumerated factors, however, no application shall be filed until a party has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days. The court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income.

**I**.When a self-employed party seeks modification of alimony because of an involuntary reduction in income since the date of the order from which modification is sought, then that party's application for relief must include an analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order.

**m**. When assessing a temporary remedy, the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties.

**n.**Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

When assessing whether cohabitation is occurring, the court shall consider the following:

(1)Intertwined finances such as joint bank accounts and other joint holdings or liabilities;

(2)Sharing or joint responsibility for living expenses;

(3) Recognition of the relationship in the couple's social and family circle;

(4)Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;

(5)Sharing household chores;

(6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and

(7)All other relevant evidence.

#### N.J. Stat. § 2A:34-23

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

As used in this section:

"Full retirement age" shall mean the age at which a person is eligible to receive full retirement for full retirement benefits under section 216 of the federal Social Security Act (42 U.S.C. § <u>416</u>).

### History

L. 1951 (1st SS), c. 344; amended 1971, c. 212, § 8; 1980, c. 181, § 1; 1983, c. 519, § 1; <u>1988, c. 153</u>, § 3; <u>1997,</u> <u>c. 302</u>, § 1, eff. Jan. 8, 1998; <u>1999, c. 199</u>, § 1, eff. Sept. 13, 1999; <u>2005, c. 171</u>, § 1, eff. Aug. 5, 2005; <u>2006, c.</u> <u>103</u>, § 78, eff. Feb. 19, 2007; <u>2009, c. 43</u>, § 1, eff. July 1, 2009; <u>2014, c. 42</u>, § 1, eff. Sept. 10, 2014.

Annotations

## LexisNexis® Notes

### Notes

### **OLS Corrections:**

Pursuant to <u>*R.S.1:3-1*</u>, the Office of Legislative Services, through its Legislative Counsel and with the concurrence of the Attorney General, inserted "or" preceding "legal separation from a partner in a civil union couple" in the second sentence of subsection g. in L. <u>2006, c. 103</u>, § 78.

### Editor's Note:

Offset of certain lottery prizes for child support indebtedness, see <u>5:9-13.17</u>.

### **Effective Dates:**

Section 96 of L. <u>2006, c. 103</u> provides: "This act shall take effect on the 60th day after the enactment of this act, but the Commissioner of Health and Senior Services and the Director of the Administrative Office of the Courts may take such anticipatory administrative action in advance as shall be necessary for the implementation of the act." Chapter 103, L. 2006, was approved on Dec. 21, 2006.

Section 5 of L. <u>2009, c. 43</u> provides: "This act shall take effect on the first day of the third month following enactment." Chapter 43, L. 2009, was approved on April 15, 2009.

Section 2 of L. <u>2014, c. 42</u> provides: "This act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into: a. a final judgment of divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties." Chapter 42, L. 2014, was approved on Sept. 10, 2014.

### Amendment Note:

### N.J. Stat. § 2A:34-23

2006 amendment, by Chapter 103 which established civil unions, in the first sentence, inserted "or action for dissolution of a civil union" and "or dissolution"; in the first sentence of b., inserted "dissolution of a civil union" and "legal separation from a partner in a civil union couple", and inserted "or civil union" in b.(2), b.(4), and b.(9); in g., inserted "or dissolution" in the first sentence, and in the second sentence inserted "dissolution of civil union" and "or legal separation from a partner in a civil union couple" and made related changes; and in the first sentence of h., inserted "dissolution of civil union" and "or legal separation from a partner in a civil union" and "or legal separation from a partner, and in the second sentence of h., inserted "dissolution couple", made related changes, and added "or civil union", and in the second sentence of h., inserted "or civil union" and "or gifts between partners in a civil union couple."

2009 amendment, by Chapter 43, in the second paragraph, added the final sentence; in f., added "Except as provided in subsection i."; in h., added the final sentence, and added "Except as provided in this subsection" to the first sentence; and added i.

2014 amendment, by Chapter 42, substituted "open durational alimony" for "permanent alimony" in the first sentence of the introductory language of b. and in f.; added "with neither party having a greater entitlement to that standard of living than the other" in b.(4); inserted b.(13); redesignated former b.(13) as b.(14); inserted the second paragraph of b.; in c., rewrote the first paragraph and inserted the second and third paragraphs; deleted "permanent" preceding "alimony" in the second paragraph of d.; added the second sentence of e.; inserted "or civil union" in the second paragraph of i.; and added j. through n.

## Case Notes

Bankruptcy Law: Case Administration: Administrative Powers: Stays: General Overview

Bankruptcy Law: Case Administration: Administrative Powers: Stays: Remedies: Invalidity of Improper Actions

Bankruptcy Law: Case Administration: Examiners, Officers & Trustees: Voidable Transfers: General Overview

Bankruptcy Law: Discharge & Dischargeability: Effects of Discharge: Protection

Bankruptcy Law: Discharge & Dischargeability: Liquidations: Eligible Debts

Bankruptcy Law: Discharge & Dischargeability: Nondischarge of Individual Debts: Alimony, Divorce Settlements & Support

Bankruptcy Law: Estate Property: Abandonment: General Overview

Bankruptcy Law: Estate Property: Content

Bankruptcy Law: Exemptions: Bankruptcy Code

**Civil Procedure: Justiciability: Abatement on Death of Party** 

Civil Procedure: Justiciability: Standing: Personal Stake

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Personam Actions: Long-Arm Jurisdiction

## Crews v. Crews

Supreme Court of New Jersey February 1, 2000, Argued ; May 31, 2000, Decided A-20 September Term 1999

#### Reporter

164 N.J. 11 \*; 751 A.2d 524 \*\*; 2000 N.J. LEXIS 649 \*\*\*

ROBERT B. CREWS, JR., PLAINTIFF-RESPONDENT, v. BARBARA D. CREWS, DEFENDANT-APPELLANT.

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division.

the standard of living enjoyed during the marriage. If the supported spouse could not, and if the supporting spouse's financial condition permitted, a modification to the support award was appropriate and warranted. The court found the trial court made no specific finding in respect to the marital standard of living. Therefore, there was no assurance that in setting defendant's support award, the trial court concluded that it would provide her with adequate resources to enable her to support herself in a lifestyle reasonably comparable to the lifestyle that existed during the marriage. The court reversed the decision and remanded to the trial court for further proceedings.

## **Core Terms**

alimony, spouse, divorce, marital, marriage, modification, rehabilitative, modify, lifestyle, decree, permanent, self-sufficiency, equitable, movant, childsupport, part-time, fact-finding

## **Case Summary**

### **Procedural Posture**

Defendant wife appealed a decision by the Superior Court, Appellate Division (New Jersey), denying her motion for modification of a rehabilitative alimony award.

#### Outcome

The court reversed the decision and remanded the case to the trial court, because the trial court made no finding in respect to defendant's standard of living during the marriage.

### LexisNexis® Headnotes

#### Overview

Defendant wife filed a motion for modification of a rehabilitative alimony award. The motion court denied the motion, the appellate court affirmed, and defendant appealed. The court held the standard for a motion for modification was whether the supported spouse could maintain a lifestyle that was reasonably comparable to Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN1[📩] **Amending Judgments**

That standard for an initial alimony award, or a subsequent motion to modify alimony, is whether the supported spouse can maintain a lifestyle that is reasonably comparable to the standard of living enjoyed during the marriage. If the supported spouse cannot, and if the supporting spouse's financial condition permits, a modification to the support award is appropriate and warranted.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN2[ Modification & Spousal Support, Termination

Courts have the equitable power to establish alimony and support orders in connection with a pending matrimonial action, or after a judgment of divorce or maintenance, and to revise such orders as circumstances may require.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

#### HN3[ Modification & Termination, Changed Circumstances

Alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of changed circumstances.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN4[ ] Marital Termination & Spousal Support, **Spousal Support** 

Relief From Judgments, Altering & When support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard.

> Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

### HN5 [ Modification & Termination, Changed Circumstances

The marital standard of living is an essential component in the changed-circumstances analysis when reviewing an application for modification of alimony.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN6 [ Marital Termination & Spousal Support, **Dissolution & Divorce**

The marital standard of living is essential to an analysis of changed circumstances regardless of whether the original support award was entered as part of a consensual agreement or a contested divorce judgment. In all divorce proceedings, trial courts must consider and make specific findings under N.J. Stat. Ann. § 2A:34-23(b) when awarding alimony pursuant to a divorce decree.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN7 [ Marital Termination & Spousal Support, **Spousal Support**

An alimony award that lacks consideration of the factors

set forth in <u>N.J. Stat. Ann. § 2A:34-23(b)</u> is inadequate, and one finding that must be made is the standard of living established in the marriage. <u>N.J. Stat. Ann. §</u> <u>2A:34-23(b)(4)</u>. The court should state whether the support authorized will enable each party to live a lifestyle reasonably comparable to the marital standard of living.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

## <u>HN8</u>[**\***] Marital Termination & Spousal Support, Dissolution & Divorce

In contested divorce actions, 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 this finding. That must be done even in situations of reduced circumstances, when the one spouse's income, or both spouses' incomes in combination, do not permit the divorcing couple to live in separate households in a lifestyle reasonably comparable to the one they enjoyed while living together during the marriage.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN9</u>[ Marital Termination & Spousal Support, Dissolution & Divorce

The setting of the marital standard of living is equally important in an uncontested divorce. Accordingly, lest there be an insufficient record for the settlement, the court should require the parties to place on the record the basis for the alimony award including, in part, establishment of the marital standard of living, before the court accepts the divorce agreement. *N.J. Ct. R. 5:5-2* already requires in divorce actions the filing of a case information statement (CIS) with detailed financial information, and that subsection (c) places a continuing duty on the parties to update the information provided to the court no later than 20 days prior to the final hearing. However, the CIS information generally reflects a more current financial picture of the parties. It does not necessarily provide information reflective of the standard of living enjoyed during the marriage. Therefore, that information is not a substitute for the parties' stipulation on the marital standard of living.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > Marital Termination & Spousal Support > General Overview

## <u>*HN10*</u>[**\***] Marital Termination & Spousal Support, Spousal Support

In either a contested or uncontested divorce setting, the earnings of the supporting spouse at the time of entry of the divorce do not limit the standard of living enjoyed by the parties' during the marriage. Indeed, in establishing the marital standard of living, a supporting spouse's current earnings are not determinative. The supporting spouse's current earnings become relevant when determining whether, and the degree to which, the supporting spouse can support the dependent spouse in maintaining a lifestyle reasonably comparable to the standard of living enjoyed during the marriage. And, although the supporting spouse's current income is the primary source considered in setting the amount of the support award, his or her property, capital assets, and capacity to earn the support awarded by diligent attention to his or her business are all proper elements for consideration.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>*HN11*</u>[**\***] Marital Termination & Spousal Support, Spousal Support

The supported spouse's ability to contribute to his or her own support must be made express in the record when the court enters or approves a support award. <u>N.J. Stat.</u> <u>Ann. § 2A:34-23(b)(1), (5)-(10)</u>.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>*HN12*</u> Modification & Termination, Changed Circumstances

Alimony and support orders define only the present obligations of the former spouses, thereby acknowledging that those duties are always subject to review and modification on a showing of changed circumstances. But, to be entitled to a hearing on whether a previously approved support award should be modified, the party moving for the modification bears the burden of making a prima facie showing of changed circumstances. Specifically, the party seeking modification of an alimony award must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself. This reference to the ability to support oneself must be understood to mean the ability to maintain a standard of living reasonably comparable to the standard enjoyed during the marriage.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN13</u> Spousal Support, Modification & Termination

A prima facie showing of changed circumstances must be made before a court will order discovery of an exspouse's financial status. Only after the movant has made this prima facie showing should the respondent's ability to pay become a factor for the court to consider.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Need

## <u>HN14</u> Modification & Termination, Changed Circumstances

A motion to modify alimony may not be used to enable a dependent spouse to share in the post-divorce good fortune of the supporting spouse. When modification is sought, the level of need of the dependent spouse must be reviewed in relation to the standard of living enjoyed by the couple while married. If that need is met by the current alimony award and there are no other changed circumstances, support should not be increased merely because the supporting spouse has improved financial resources.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN15</u> Modification & Termination, Changed Circumstances

Past holdings that refer to increases in the supporting spouse's income should not be read loosely to suggest that the improved financial status of a supporting spouse alone provides a basis for a finding of changed circumstances in all cases.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

## <u>HN16</u> Spousal Support, Modification & Termination

Only in very limited circumstances will the financial condition of the supporting spouse satisfy the requirement of demonstrating changed circumstances. One such circumstance would be when the supporting spouse seeks a downward modification of a support award. In that limited context, a substantial change in the financial condition of the supporting spouse after the entry of the divorce decree would be relevant. That information would be material in determining whether the moving party can show that changed circumstances have substantially affected his or her ability to support himself or herself, and the supported spouse, as required by the first step in a Lepis review.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN17</u> [] Modification & Termination, Changed Circumstances

When the moving party is the dependent spouse, the financial condition of the supporting spouse is not relevant to the first step in the Lepis review, in which the movant must show that circumstances have changed for him or her. The improved financial condition of the supporting spouse does not demonstrate how the dependent spouse is unable to support himself or herself at the standard of living established during the marriage. The financial condition of the supporting spouse becomes germane to the second step of the Lepis review, which only takes place if changed circumstances have been presented by the movant, the supported spouse.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN18</u> Spousal Support, Modification & Termination

Changed circumstances can be shown by a dependent spouse when inflation substantially affects a supported spouse's ability to maintain a lifestyle comparable to the marital standard of living. But that still requires a particularized showing of the movant's circumstances. Trial courts should not presume that whenever a household is split by divorce the supported spouse is no longer enjoying a lifestyle reasonably comparable to the marital standard of living. Nor should courts eliminate the movant's burden to show changed circumstances, including his or her own efforts to increase earnings, because that would turn a modification application for additional support into one that focuses only on whether the supporting spouse's financial condition has improved. That is not to suggest, however, that every supported spouse is able to enhance his or her income.

Termination > General Overview

# <u>HN19</u> Spousal Support, Modification & Termination

The better practice is to keep the focus of the first prong of the Lepis changed circumstances analysis on the movant's condition, including efforts by the movant to support himself or herself. In doing so, a motion court may find that a dependent spouse, who has not been able to obtain employment that would permit him or her to achieve the economic self-sufficiency anticipated at the time of divorce, has shown changed circumstances.

Family Law > ... > Spousal Support > Modification & Termination > Need

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

### HN20[1] Modification & Termination, Need

The factors that should be considered on a motion for modification of a support award for an economically dependent spouse are the same factors used during the initial analysis of an alimony award: the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard. The goal is to enter an order that allows the dependent spouse to maintain a standard of living reasonably comparable to the standard established during the marriage, while also considering the ability of the dependent spouse to become self-sufficient.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN21</u>[📩] Marital Termination & Spousal Support, Spousal Support

When appropriate, a trial court should expressly find that there is a higher need existing at the time of the initial award based on the standard of living maintained during the marriage, and that the higher need for support could not be met by the supporting spouse at the time of the divorce. Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

## <u>HN22</u>[ Spousal Support, Modification & Termination

After a finding that a higher need existed at the time of the initial award based on the standard of living during marriage is made, if a supporting spouse's later financial condition substantially improves, and if the supported spouse demonstrates that he or she is still unable to achieve a lifestyle level that is reasonably comparable to the marital lifestyle, then a prima facie showing of changed circumstances has been made and the burden shifts to the supporting spouse to demonstrate why additional support is unwarranted. The supported spouse's ability to do more to support herself or himself would be as relevant for a modification ruling as when establishing the initial alimony award. That latter inquiry should occur regardless of whether an award of rehabilitative alimony was included in the initial alimony award. The supporting spouse's continuing ability to, and efforts at, contributing to their own support are not limited in relevance only to situations where rehabilitative alimony was awarded.

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

## HN23

A rehabilitative alimony award is intended to enable the former spouse to complete the preparation necessary for economic self-sufficiency. It is payable for a terminable period of time when it is reasonably anticipated that a spouse will no longer need support. But, self-support does not mean some subsistence level; it describes the point at which the supported spouse is deemed to have reached a level where he or she can support himself or herself in a manner reasonably comparable to the marital standard of living. Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

# **<u>HN24</u>** Spousal Support, Modification & Termination

When rehabilitative alimony does not work as originally intended, a court may utilize its equitable power to order an additional alimony award.

## Syllabus

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Robert B. Crews, Jr. v. Barbara D. Crews (A-20-99)

Argued February 1, 2000 -- Decided May 31, 2000

LaVECCHIA, J., writing for a unanimous Court.

In this appeal, the Court considers the propriety of a denial of a motion for modification of a rehabilitative alimony award and reexamines the concept of "changed circumstances" justifying a modification to an alimony award.

Plaintiff, Robert Crews, and defendant, Barbara Crews were married in 1977. Following a separation, they were divorced in June 1994. Two children were born of the marriage, both of whom resided with Barbara Crews following the divorce. On April 29, 1994, following [\*\*\*2] a trial in which Barbara Crews did not participate, the trial court issued a written opinion outlining the monetary obligations of each party. In respect of alimony, the court's award consisted of one paragraph, which required Robert Crews to pay to Barbara Crews the sum

of \$ 800 per month as alimony for a period of three years. In reaching its determination, the trial court considered Robert Crews earning capacity as well as Barbara's. The court determined that if Barbara worked full -time, instead of part-time, she would be able to earn approximately \$ 26,000 per year by the end of the three-year period set forth in the final judgment. Prior to the entry of the final judgment, and pursuant to a temporary consent order, Robert Crews had been paying Barbara the sum of \$ 1,600 every other week, plus additional expenses.

The trial court's opinion constitutes the sole source for ascertaining the court's reasoning for the alimony award. Neither that opinion nor the final divorce judgment contained an analysis of the Crews' marital standard of living, despite the availability of relevant information in that regard. Specifically, at the time of the trial of the divorce action, Barbara [\*\*\*3] Crews' Case Information Statement (CIS) contained financial information regarding expenses for Barbara and the two children, as well as monthly expenses incurred to support the Crews' 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. In making its alimony and child support award, the trial court focused on the monthly expenses for Barbara and the two children, ignoring the expenses set forth in Barbara's CIS in respect of expenses incurred to support the Crews' standard of living during the marriage.

Following the trial court's entry of the final judgment, Barbara filed a motion for reconsideration of the child support award, the alimony award, and the equitable distribution award. The trial court denied the motions. Barbara appealed.

The Appellate Division affirmed the alimony award finding that the trial judge appropriately considered the statutory factors for the award of alimony and further established an alimony award consistent with Barbara Crews' needs as reflected in her CIS.

During the years following the divorce, although she worked on a regular basis, [\*\*\*4] Barbara never was able to earn the \$ 26,000 per year that the trial court assumed she would. Barbara maintained that her efforts to maintain a full-time job were hindered by the health of one of her children, who began to suffer from serious depression following the separation and continuing through 1996.

Rehabilitative alimony ended in April 1997. In February

1998, Barbara filed a motion to modify the terms of the final judgment of divorce. Specifically, she sought to reinstate and increase her alimony award, and to convert it from rehabilitative to permanent alimony. In support of her motion, Barbara presented proof that she had incurred a significant amount of debt since the divorce in an effort to maintain a standard of living similar to that which she and her children had enjoyed while the Crews were married. She further asserted that the financial condition of Robert Crews had improved substantially since the time of the final judgment. Finally, Barbara contended that the alimony she received pursuant to the divorce decree was inadequate, and that it did not allow her to obtain a decent-paying job that would enable her to support herself in a lifestyle similar to the one [\*\*\*5] enjoyed during the marriage. In that respect, she asserted that her earning ability was suppressed because she had to attend to the special health needs of her child, which allowed her to obtain only employment that allowed her to have scheduling flexibility.

The motion court denied Barbara's request, finding that she had chosen to work only part-time. In addition, the motion court held that she could not "re-appeal" whether she was entitled to permanent alimony because the earlier Appellate Division opinion upheld the alimony provisions of the initial divorce decree.

On appeal from that ruling, the Appellate Division affirmed, reiterating that the earlier Appellate Division panel had concluded that the appropriate statutory factors had been considered by the trial court in setting the original alimony award. The Appellate Division further concluded that although law permits the modification of an alimony award on the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award (such as a certain level of earning), that clause was inapplicable to the facts of this case. In addition, relying on the language of Lepis v. Lepis, [\*\*\*6] the Appellate Division concluded that Robert's improved financial condition could not justify a modification because Barbara did not establish that she could not live as expected by the original divorce decree. Finally, the panel concluded that Barbara had not been sufficiently diligent in securing employment, agreeing with the motion court's assessment that she had voluntarily elected to work only part-time.

The Supreme Court granted Barbara Crews' petition for certification.

HELD: The marital standard of living is the measure for

assessing initial awards of alimony and for reviewing any motion to modify, and because the trial court made no finding in respect of Robert and Barbara Crews' standard of living during the marriage when it made its initial support determinations, the matter is remanded for a finding in that respect and for a disposition of Mrs. Crews' motion for modification of the support award in that context.

1. Alimony and support orders define only present obligations of the former spouses. Those duties are always subject to review and modification on a showing of "changed circumstances." (pp. 13-14)

2. When support of an economically [\*\*\*7] dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard. (p. 15)

3. Identifying the marital standard of living at the time of the original divorce decree is critical to any subsequent assessment of changed circumstances when an adjustment to alimony is sought. (pp. 15-17)

4. In an alimony award in both contested and uncontested actions, a court should state whether the support authorized will enable each party to live a lifestyle "reasonably comparable" to the marital standard of living. (pp. 17-18)

5. In either a contested or uncontested divorce setting, a supporting spouse's current earnings are not determinative in establishing the marital standard of living. The supported spouse's ability to contribute to his or her own support must be made express in the record when the court enters or approves a support award. (pp. 18-19)

6. A party seeking modification of an alimony award must demonstrate that changed circumstances have substantially impaired the ability to support [\*\*\*8] himself or herself in a standard reasonably comparable to the standard of living enjoyed during the marriage. (pp. 19-20)

7. A *prima facie* showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. (pp. 20-21)

8. A motion to modify alimony may not be used to enable a dependent spouse to share in the post-divorce good fortune of the supporting spouse. (pp. 21-22) 9. The improved financial status of a supporting spouse alone does not provide a basis for a finding of "changed circumstances" in all cases. (pp. 22-23)

10. There should be no examination of a supporting spouse's financial condition until a showing of changed circumstances otherwise has been made. (p. 23)

11. Only in very limited circumstances, such as where a supporting spouse seeks a downward modification of a support award, will the financial condition of the supporting spouse satisfy the requirement of demonstrating changed circumstances. (p. 24)

12. The failure to achieve economic self-sufficiency as anticipated by an original divorce decree may constitute a changed circumstance if the dependent spouse demonstrates that he or [\*\*\*9] she could not maintain the marital standard of living. (pp. 24-25)

13. The focus of the first prong of the "changed circumstances" analysis should be on the movant's condition, including efforts by the movant to support himself or herself. (pp.25-27)

14. Changed circumstances may exist where the initial support award, coupled with the supported spouse's expected effort to contribute to his or hew own support, was determined at the time of entry of the divorce decree to be insufficient to allow the supported spouse to maintain a standard of living reasonably comparable to the marital standard of living. When appropriate, a trial court should expressly find that there is a higher need existing at the time of the initial award based on the standard of living maintained during that marriage, but that the higher need could not be met by the supporting spouse at the time of the divorce. (pp. 28-29)

15. When rehabilitative alimony does not work as originally intended, a court may utilize its equitable power to order an additional alimony award; an award of rehabilitative alimony does not mean that an order of permanent alimony always must be rejected. (pp. 29-30)

16. The **[\*\*\*10]** marital standard of living is the measure for assessing initial awards of alimony, as well as for reviewing any motion to modify such awards. Because the trial court made no finding in respect of the Crews' marital standard of living, the case must be remanded for a specific finding in that respect. Once that finding is made, the motion to modify may be properly considered. In reviewing that motion, the court should re-examine the original alimony award in light of the established marital standard of living. (pp. 30-31) 17. If the court finds that the original alimony award was not consistent with the standard of living established during the marriage but that it was all that Mr. Crews could afford at the time, then it should exercise its inherent equitable power to modify the award and tailor a modified alimony award that takes into account the marital standard of living and Mr. Crews' current financial condition. (p. 31)

18. Even if the court determines that the original award was properly set in light of the now determined marital standard of living, Mrs. Crews' claims that she was limited in her job search by her daughter's special health needs should be fairly considered. [\*\*\*11] (pp. 31-32)

19. Once a marital standard of living is set, Mrs. Crews should be permitted to present evidence in support of a finding of "changed circumstances" sufficient to justify a modification of her support award. (pp. 32-33).

Judgment of the Appellate Division is **REVERSED** and the matter is **REMANDED** to the Chancery Division, Family Part, for further proceedings consistent with the Court's opinion.

CHIEF JUSTICE PORITZ and JUSTICES O'HERN, STEIN, and VERNIERO join in JUSTICE LaVECCHIA'S opinion. JUSTICES COLEMAN and LONG did not participate.

**Counsel:** Dale Elizabeth Console, argued the cause for appellant (*Ulrichsen, Amarel & Eory*, attorneys).

*Francis W. Donahue*, argued the cause for respondent (*Donahue*, *Braun*, *Hagan*, *Klein & Newsome*, attorneys).

Judges: The opinion of the Court was delivered by LaVECCHIA, J. Chief Justice PORITZ and Justices O'HERN, STEIN, VERNIERO join in Justice LaVECCHIA's opinion. Justices COLEMAN and LONG did not participate.

**Opinion by: LaVECCHIA** 

[\*16] [\*\*526] The opinion of the Court was delivered by

LaVECCHIA, J.

Defendant, Barbara Crews, seeks review of the denial of her motion for modification of a rehabilitative alimony award. [\*\*\*12] Her motion sought to reinstate and increase alimony from \$ 800 to \$ 3500 per month, and to convert the increased amount to permanent alimony. In this appeal, she seeks reexamination of the concept of "changed circumstances" justifying a modification to an alimony award.

Two decades ago in Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980), we reviewed the standards and procedures for modifying support and maintenance awards after a final judgment of divorce. The Lepis standards and procedures have stood the test of time well. In this matter, we reaffirm the Lepis principle that the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that [\*\*527] is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage. The importance of establishing the standard of living experienced during the marriage cannot be overstated. It serves as the touchstone for the initial alimony award and for adjudicating later motions for modification of the alimony award when "changed circumstances" are asserted.

This case illustrates the pitfalls associated with the failure to establish the marital standard of living. [\*\*\*13] The initial divorce decree failed to set forth the standard of living established during the Crewses' marriage. Without this information, defendant's [\*17] motion for modification could not be properly analyzed. And, naturally, that same flaw permeates the initial alimony decision. Thus, we have no assurance that either the initial alimony award or the subsequent motion to modify alimony was judged in accordance with the proper standard. HN1 (1) That standard is: whether the supported spouse can maintain a lifestyle that is reasonably comparable to the standard of living enjoyed during the marriage. If the supported spouse cannot, and if the supporting spouse's financial condition permits, a modification to the support award is appropriate and warranted.

Typically, we would not at this late date revisit an issue that should have been resolved initially at trial or on appeal. However, basic fairness requires that we act to

Opinion

remedy a lack of essential fact-finding in order to be assured that Mrs. Crews' motion for modification of her alimony award is evaluated properly now.

Ι.

Plaintiff, Robert Crews, and defendant were married in 1977 and separated in 1991. A final judgment of divorce was entered [\*\*\*14] on June 6, 1994. Two children were born of this marriage, both of whom resided with defendant after the divorce.

The Crewses' divorce trial was listed for April 11, 1994. Twelve adjournments were granted prior to that date. Issues relating to plaintiff's income and the value of his closely held corporation were hotly disputed throughout discovery. On April 11, Mrs. Crews' attorney requested a thirteenth adjournment. In part, that request was a result of the court's denial of defendant's motion for *pendente lite* counsel fees, which defendant asserts contributed to the delay in completing discovery. The trial court denied the adjournment request and ordered the case to proceed.

The trial began the next day. Mrs. Crews' attorney informed the court that he and his client would not participate in the proceedings. After the lunch break, Mrs. Crews and her attorney left the courtroom and the proceedings continued on a default **[\*18]** basis. On April 29, 1994, the trial court issued a written opinion outlining the monetary obligations of each party.

Issues relating to equitable distribution were detailed in the divorce judgment. They reflect the degree of dispute over the value of plaintiff's [\*\*\*15] business. Defendant received in value \$ 513,000 of non-business assets under equitable distribution, the bulk of which was the marital home, valued at \$ 415,000. She also received \$ 91,490 as her share of business assets, which plaintiff was required to pay to defendant over a six-year period with interest at 8% per annum. Although expert reports prepared by defendant's experts were admitted into evidence, it appears that the court relied primarily on the testimony of Mr. Crews, as well as Mr. Crews' expert's report and the report of the court-appointed expert, in reaching its conclusions.

Concerning alimony, the court's award was contained in a single paragraph:

Commencing May 1, 1994, [the plaintiff] shall pay to the [defendant] the sum of \$ 800.00 per month as alimony for a period of three (3) years.

The trial court opinion constitutes the sole source for

ascertaining the court's reasoning for the alimony award. The court [\*\*528] noted that factual findings relevant to the alimony analysis were derived from the testimony of Mr. Crews, as well as from two experts who reached conclusions concerning the cash-flow evaluations of Mr. Crews' business. The court then stated in [\*\*\*16] a conclusory fashion that Mr. Crews was in a "superior earning position" because the earnings available for support "may approach \$ 150,000 to \$ 175,000 per year."

Mrs. Crews' financial position also was examined in tailoring the alimony award. The court found that Mrs. Crews could earn approximately \$ 18,000 per year from her job at a clothing store, so long as she went from working part-time to full-time at the job, which then paid \$ 8.50 per hour, because "there is no reason proffered by [Mrs. Crews] not to contribute toward her own support and make some contribution toward raising her children." The court found that if Mrs. Crews worked fulltime and earned [\*19] \$ 18,000 per year, and in addition received child support and alimony that totaled \$ 27,600, she could meet her expenses. The court also expressed the belief that Mrs. Crews could increase her earnings to approximately \$ 26,000 per year, rather than the \$ 18,000 per year imputed to her at the time of the divorce.

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 [\*\*\*17] information was available. At the time of trial of the divorce action, defendant's Case Information Statement (CIS) contained two columns of financial information regarding monthly expenses. One column contained a breakdown of expenses for defendant 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. Mrs. Crews contended that these marital expenses were paid for by her husband's business, Benjamin Books Inc. From our review of the opinion of the trial court, as well as the accompanying divorce judgment, it appears that the expenses in this second column were ignored. Instead, in awarding alimony and child support, the court focused exclusively on the monthly expenses for defendant and the two children.

Defendant promptly filed a post-judgment motion, [\*\*\*18] seeking reconsideration of the child-support award, the alimony award, and the equitable-distribution award, as well as a stay of the child-support and alimony awards pending appeal. The trial court denied the motions in their entirety. Review of the *pendente lite* order reveals that Mrs. Crews received considerably more support under the temporary consent order than under the divorce decree. Under the temporary consent order the divorce judgment Mrs. Crews was awarded a flat \$ 800.00 per month.

Defendant appealed, objecting to the terms of the divorce judgment. In addition, she argued that the trial court should not have vacated and modified an award of attorney's fees for defendant's representation. <sup>1</sup>

[\*\*\*19] The Appellate Division concluded that the "[t]rial court did not abuse [its] discretion in refusing to adjourn the trial for a [\*\*529] thirteenth time, in refusing to order the immediate payment of previously ordered attorneys' fees [], or in conducting the trial without the participation of Mrs. Crews and her attorney." In affirming the alimony award, the Appellate Division found that

[t]he trial judge appropriately considered the statutory factors, <u>N.J.S.A.</u> 2A:34-23(b), and established an alimony award consistent with Mrs. Crews' needs as reflected on her case information statement. This decision is, of course, without prejudice to Mrs. Crews' right to seek an increase in alimony based on changed circumstances, <u>Lepis v.</u> Lepis, 83 N.J. 139, 416 A.2d 45 (1980), or the discovery of concealed assets. <u>Von Pein v. Von Pein, 268 N.J. Super. 7, 632 A.2d 830</u> (App.Div.1993) (emphasis added).

In contrast to its review of the alimony award, the Appellate Division held that the trial court's findings were deficient concerning the child-support award, noting that necessary fact-finding and conclusions required by *Rule* 

*1:7-4* were not **[\*\*\*20]** provided. The matter was remanded to the trial court for the required findings, in accord with <u>Curtis v. Finneran, 83 N.J. 563, 570, 417</u> <u>A.2d 15 (1980).</u><sup>2</sup>

[\*\*\*21] [\*21] Review of the divorce judgment and opinion indicates that the alimony and child-support awards were handled in a similar manner by the trial court. Both were resolved in conclusory fashion. The Appellate Division found deficiencies in the child-support award because the trial court's ruling lacked sufficient factual findings. Similar deficiencies in the alimony award were not addressed by the reviewing court.

During the years following the divorce, defendant worked on a regular basis, but she never was able to earn the \$ 26,000 per year that the trial court assumed she would. Defendant maintains that from 1994 through 1996 she worked 40 hours a week for part-time pay at a retail clothing store located close to defendant's residence. From March 1996 to September 1996, she worked full-time as a manager of a coffee shop. She was then unemployed for several months. In June 1997, she obtained a trainee position, studying and attending a course to become a financial advisor with Smith Barney in the hope of achieving a position that would pay \$ 35,000 per year. However, she could not pass the required exam despite taking it twice. Defendant then returned to her retail position [\*\*\*22] part-time and also worked part-time as a non-certified substitute teacher.

Defendant maintains that the needs of her eldest child hindered her attempts to obtain full-time employment. The child began to suffer from serious depression in

Defendant filed another application with the court on July 23, 1997, resulting in an order, dated December 1, 1997, that required plaintiff to pay all college expenses, to comply with the various provisions of the judgment regarding unreimbursed medical expenses, and ordering that child support be increased to \$ 805 per week for the two children. The court reasoned that plaintiff, with his improved financial condition, could now afford those expenses and his children should benefit accordingly.

<sup>&</sup>lt;sup>1</sup>Under the *pendente lite* fee award, defendant's attorney was to receive \$ 10,000 in attorney's fees. Reconsideration of this initial order resulted in defendant receiving an additional \$ 35,000 for attorney's fees. The trial court vacated that modification, reducing the additional amount to \$ 10,000. In the end, defendant was awarded \$ 20,000 in counsel fees.

<sup>&</sup>lt;sup>2</sup> On remand, the trial court issued a letter opinion on October 2, 1994, declining to alter the \$ 1,500 per month child-support provision. Defendant again appealed, and on June 18, 1996, the Appellate Division again remanded the matter to the trial court for additional findings.

On the second remand of this matter, a letter opinion setting support at \$ 2,100 per month was issued on January 9, 1997. Both parties moved for reconsideration and an order was issued for \$ 1,859.70 per month for child support.

1992 following the Crewses' separation. She required ongoing care for her illness from 1992 through 1996, including a period of hospitalization lasting for **[\*22]** several months during 1996. Defendant maintains in her certifications that her daughter's illness required "constant attention to keep her depression from spiraling downward."

[\*\*530] Rehabilitative alimony ended in April 1997. Defendant filed a motion to modify the terms of the final judgment of divorce in February 1998. She sought to reinstate and increase her alimony award, and to convert it from rehabilitative to permanent alimony.

Defendant presented proof that she had incurred a significant amount of debt since the divorce. She claimed that she had spent all of her alimony, child-support, and equitable-distribution payments, and that she had encumbered the marital residence with an equity loan, cashed in an IRA, sold assets and borrowed heavily, all so that she could attempt to maintain a standard of living [\*\*\*23] similar to that which she and her children had enjoyed while the Crewses were married.

In support of her motion, defendant also asserted that the financial condition of Mr. Crews had improved. That claim was supported by tax returns and CIS forms Mr. Crews had filed in connection with previous applications to the court concerning medical and schooling costs for the children. Mrs. Crews points out that based on this information, in December 1997 the motion Court had concluded that Mr. Crews was earning in excess of \$ 400,000 without any examination of Mr. Crews' business tax returns for any personal expenses paid by his companies.

Defendant also contended that the alimony she received pursuant to the divorce decree was inadequate. She asserted that the award did not allow her to obtain a decent-paying job that would enable her to support herself in a lifestyle similar to the one enjoyed during the marriage. Defendant also claimed that because she had to attend to her children's special health needs, she could obtain only employment that allowed her to have scheduling flexibility. Accordingly, her earning ability was suppressed because of her child-rearing responsibilities.

[\*23] The motion [\*\*\*24] court denied defendant's request on the grounds that Mrs. Crews "has chosen [sic] to only work part-time, currently making \$ 12 per hour." The court reasoned that plaintiff's improved financial condition would be considered only in the

limited context of considering an award increasing support for the children. But the court held that defendant could not "re-appeal" whether she was entitled to permanent alimony because the earlier Appellate Division judgment upheld the alimony provisions of the initial divorce decree. On appeal from that ruling, the Appellate Division affirmed.

The Appellate Division first noted that it would not disturb the original affirmance of the alimony award by the earlier Appellate Division panel. The Appellate Division reiterated that that earlier decision held that the appropriate statutory factors, set forth in N.J.S.A. 2A:34-23(b), had been considered when the court set the alimony award. Also, the Appellate Division held that Mrs. Crews should not be permitted to relitigate the award of rehabilitative alimony, reasoning that "[t]he divorcing judge believed that with reasonable efforts within a three year period, Mrs. Crews could achieve [\*\*\*25] self-sufficiency." Although the law permits the modification of an alimony award "upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award," see N.J.S.A. 2A:34-23(b), the Appellate Division held that that clause was inapplicable to the facts of this case.

The Appellate Division also reasoned that the improved financial condition of plaintiff could not justify "allowing a litigant to reopen her Divorce Judgment" in a motion for modification. Relying on the language of this Court in *Lepis*, that "[a]n increase in support becomes necessary whenever changed circumstances substantially impair the dependent spouse's ability to maintain the standard of living reflected in the *original decree or agreement*," *Lepis, supra, 83 N.J. at 152-53, 416 A.2d 45*, the panel concluded that Mrs. Crews did [\*\*531] not establish that she could not live as expected by the original divorce decree. *Id.* (emphasis added).

**[\*24]** Finally, the panel concluded that Mrs. Crews had not been sufficiently diligent in securing employment, agreeing with the motion court's assessment that Mrs. Crews had voluntarily elected to work only part-time.

[\*\*\***26**] We granted certification, *162 N.J. 132, 741 A.2d 99 (1999)*.

II.

**HN2** Courts have the equitable power to establish alimony and support orders in connection with a pending matrimonial action, or after a judgment of divorce or maintenance, and to revise such orders as circumstances may require. <u>Lepis, supra, 83 N.J. at</u>

145, 416 A.2d 45.

circumstances when an adjustment to alimony is sought.

As a result of this judicial authority, <u>HN3</u> alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of "changed circumstances."

## [*Lepis, supra, 83 N.J. at 146, 416 A.2d 45* (citations omitted).]

In *Lepis,* the Court sought to achieve an "accommodation" between a court's duty to consider requests for adjustment to spousal support orders and the "desirable features of stable arrangements and spousal cooperation." *Id. at 150, 416 A.2d 45.* The Court concluded that an appropriate accommodation was most likely achieved by "an approach linking the notion of 'changed circumstances' to the initial support determination, be it judicial or consensual." *Ibid.* 

Focusing on the initial support determination, the Court reiterated holdings, decades old in New Jersey, that [\*\*\*27] tie the supporting spouse's support obligation to

the quality of economic life during the marriage, not bare survival. The needs of the dependent spouse and children contemplate their continued maintenance at the standard of living they had become accustomed to prior to the separation.

[Ibid. (citations omitted).]

A three-part examination was articulated in Lepis:

**HN4**[**^**] When support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard.

#### [Id. at 152, 416 A.2d 45.]

[\*25] Identifying the marital standard of living at the time of the original divorce decree, regardless of whether a maintenance order is entered by the court or a consensual agreement is reached, becomes critical, then, to any subsequent assessment of changed

It is clear from Lepis and its progeny that motion courts have found that HN5 [The marital standard of living is an essential component in the changed-circumstances analysis [\*\*\*28] when reviewing an application for modification of alimony. Id. 83 N.J. at 152-53, 416 A.2d 45; see also Innes v. Innes, 117 N.J. 496, 504, 569 A.2d 770 (1990) (suggesting that when motion court reviews alimony award, reference to a number of factors assists in determination of whether former marital standard of living is being maintained); Carter v. Carter, 318 N.J. Super. 34, 43, 722 A.2d 977 (App.Div.1999) (finding that motion court is at disadvantage when reviewing modification motion because trial court failed to "relate [the supporting spouse's] rehabilitative alimony obligation to the standard of living of the parties or, more particularly, [the dependent spouse's] standard of living during the marriage"); Guglielmo v. Guglielmo, 253 N.J. Super. 531, 542-44, 602 A.2d 741 (App.Div.1992) (finding that supporting spouse has not fulfilled his continuing obligation to support dependent spouse at former standard of living).

HN6[1] [\*\*532] The marital standard of living is essential to an analysis of changed circumstances regardless of whether the original support award was entered as part of a consensual agreement or of a contested divorce [\*\*\*29] judgment. See Lepis, supra, 83 N.J. at 148, 416 A.2d 45 (holding that "[c]onsensual agreements and judicial decrees should be subject to the same standard of 'changed circumstances.'"). In all divorce proceedings, trial courts must "consider and make specific findings" under N.J.S.A. 2A:34-23(b) when awarding alimony pursuant to a divorce decree. Carter, supra, 318 N.J. Super. at 42-43, 722 A.2d 977 (finding that N.J.S.A. 2A:34-23(b) is mandate that directs Family Part to "adhere to the [\*26] statutory requirement in every case, whether contested or uncontested," including those that result in settlement, when fashioning order for alimony); Boardman v. Boardman, 314 N.J. Super. 340, 345, 714 A.2d 981 (App.Div.1998) (concluding that remand to review alimony award was necessary because trial court did not take into account parties' standard of living, as well as other controlling legal principles, when tailoring alimony award); Heinl v. Heinl, 287 N.J. Super. 337, 346, 671 A.2d 147 (App.Div. 1996) (finding remand to be necessary because trial court's reasoning in awarding permanent alimony was "very [\*\*\*30] generalized").

HN7 An alimony award that lacks consideration of

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

**HN8** In contested divorce actions, 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 this finding. That must be done even in situations of reduced circumstances, when the one spouse's income, or both spouses' incomes in combination, do not permit the divorcing couple to live in separate households in a lifestyle reasonably comparable to the one they enjoyed while living together during the marriage.

HN9[1] The setting of the marital standard of living is equally important in an uncontested divorce. Accordingly, lest there be an insufficient record for the settlement, the court should require the parties to place [\*\*\*31] 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. In this regard we note that Rule 5:5-2 already requires in divorce actions the filing of a CIS with detailed financial information, and that subsection (c) places a continuing duty on the parties to update the information provided to the court no later than twenty days prior [\*27] to the final hearing. However, the CIS information generally reflects a more current financial picture of the parties. It does not necessarily provide information reflective of the standard of living enjoyed during the marriage. Therefore, that information is not a substitute for the parties' stipulation on the marital standard of living.

Finally, we note that <u>HN10</u> in either a contested or uncontested divorce setting, the earnings of the supporting spouse at the time of entry of the divorce do not limit the standard of living enjoyed by the parties during the marriage. Indeed, in establishing the marital standard of living, a supporting spouse's current earnings are not determinative. <u>Hughes v. Hughes, 311</u> <u>N.J. Super. 15, 35, 709 A.2d 261</u> (<u>App.Div.1998</u>). [\*\*\*32] The supporting spouse's current earnings become relevant when determining whether, and the degree to which, the supporting spouse can support the dependent spouse in maintaining a lifestyle reasonably comparable to the standard of living enjoyed by the parties during the marriage. *Ibid.* And although **[\*\*533]** the supporting spouse's current income is the primary source considered in setting the amount of the support award, his or her property, capital assets, and "capacity to earn the support awarded by diligent attention to his [or her] business" are all proper elements for consideration. *Innes, supra, 117 N.J. at* 503, 569 A.2d 770 (citing *Bonanno v. Bonanno, 4 N.J.* 268, 275, 72 A.2d 318 (1950)). *HN11* Similarly, the supported spouse's ability to contribute to his or her own support must be made express in the record when the court enters or approves a support award. *N.J.S.A.* 2A:34-23(b)(1), (5) to (10).

III.

Having reviewed the findings that must be in the record on a trial court's approval or entry of a spousal support award, we turn now to the vexing issue of motions to modify support awards. Motion courts have rightfully taken a hard look at applications [\*\*\*33] to modify previously-entered support awards out of concern for promoting the fairness and finality of the bargained-for agreement [\*28] or the awards for support entered by the trial court. We believe that approach to be correct.

In Lepis we sought a fair balancing of interests in our approach to modification applications. We held that HN12 [1] alimony and support orders define only the present obligations of the former spouses, thereby acknowledging that "[t]hose duties are always subject to review and modification on a showing of 'changed circumstances." Lepis, supra, 83 N.J. at 146, 416 A.2d 45; accord Miller v. Miller, 160 N.J. 408, 419, 734 A.2d 752 (1999). But to be entitled to a hearing on whether a previously-approved support award should be modified, the party moving for the modification "bears the burden of making a prima facie showing of changed circumstances." Miller, supra, 160 N.J. at 420, 734 A.2d 752 (citing Lepis, supra, 83 N.J. at 157, 416 A.2d 45). Specifically, the party seeking modification of an alimony award "must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself." Lepis, supra, 83 N.J. at [\*\*\*34] 157, 416 A.2d 45. This reference in Lepis to the ability to support oneself must be understood to mean the ability to maintain a standard of living reasonably comparable to the standard enjoyed during the marriage.

We described a two-step process in Lepis, as follows:

**HN13** A prima facie showing of changed circumstances must be made before a court will

order discovery of an ex-spouse's financial status.

Only after the movant has made this *prima facie* showing should the respondent's ability to pay become a factor for the court to consider.

### [Lepis, 83 N.J. at 157, 416 A.2d 45.]

In this case, Mrs. Crews must carry the burden of showing that changed circumstances have impaired her ability to maintain a standard of living reasonably comparable to the Crewses' marital standard of living. Seizing on the trial court's initial failure to define the marital standard of living, Mrs. Crews, in effect, asks this Court (1) to assume that two people previously [\*29] living together and then living in two separate households invariably live at a lesser standard than that enjoyed in the marriage, and then (2) to hold that the improved financial status of Mr. Crews constitutes sufficient grounds to support [\*\*\*35] a finding of changed circumstances. Mr. Crews, in contrast, asks us by implication to assume the opposite: that the trial court's original award is premised on the finding of a marital standard of living. Absent the required factfindings below, however, we decline to indulge either assumption.

HN14 A motion to modify alimony may not be used to enable a dependent spouse to share in the postdivorce good fortune of the supporting spouse. Cf. Zazzo [\*\*534] v. Zazzo, 245 N.J. Super. 124, 584 A.2d 281 (App.Div.1990), (holding that children are not divorced from their parents and are entitled to share in enhanced financial status of supporting spouse without being limited to lifestyle enjoyed during marriage of parents) certif. denied, 126 N.J. 321, 598 A.2d 881 (1991). When modification is sought, the level of need of the dependent spouse must be reviewed in relation to the standard of living enjoyed by the couple while married. If that need is met by the current alimony award and there are no other changed circumstances, support should not be increased merely because the supporting spouse has improved financial resources.

**HN15** Past holdings that refer to increases in the supporting spouse's [\*\*\*36] income should not be read loosely to suggest that the improved financial status of a supporting spouse alone provides a basis for a finding of "changed circumstances" in all cases. For example, we stated in *Innes,* that "[o]ne 'changed circumstance' that warrants modification of the alimony order is an increase or decrease in the supporting spouse's income." *Innes, supra, 117 N.J. at 504, 569 A.2d 770*,

(citing <u>Lepis</u>, <u>supra</u>, <u>83</u> N.J. <u>at</u> <u>151</u>, <u>416</u> <u>A.2d</u> <u>45</u>; <u>Martindell v. Martindell</u>, <u>21</u> N.J. <u>341</u>, <u>355</u>, <u>122</u> <u>A.2d</u> <u>352</u> (<u>1956</u>)). But that was said in the context of a motion for termination of alimony brought by the supporting spouse. *Id.* <u>at</u> <u>501</u>, <u>569</u> <u>A.2d</u> <u>770</u>. The payor spouse in *Innes* was fired from his job some time after the divorce had become final. He was seeking a downward modification of the initial alimony award due to a decrease in his salary. *Id.* <u>at</u> <u>501-02</u>, <u>569</u> <u>A.2d</u> <u>770</u>. The actual holding in *Innes* focused [\*30] on whether payments generated by pension benefits that previously were part of an equitable distribution award may be considered income when reconsidering the alimony obligations of the supporting spouse. *Id.* <u>at</u> <u>500</u>, <u>569</u> <u>A.2d</u> <u>770</u>.

We reaffirm the basic two-step changed-circumstances analysis [\*\*\*37] set forth in *Lepis*. For twenty years now, that test has promoted finality in divorce judgments, while at the same time reasonably allowing a movant to have that finality disturbed for good cause when sufficiently compelling changed circumstances are shown. The *Lepis* test appropriately discourages an application to modify alimony merely because a supporting spouse's income has increased. There should be no examination of a supporting spouse's financial condition until a showing of changed circumstances has otherwise been made.

Some situations are consistently found to be changed circumstances warranting revision of a support award in favor of a dependent spouse. For instance, in *Lepis* we noted that

[w]hen children are involved, an increase in their needs--whether occasioned by maturation, the rising cost of living or more unusual events--has been held to justify an increase in support by a financially able parent. . . . Their emancipation and employment may warrant reduction in their support.

### [83 N.J. at 151-52, 416 A.2d 45.]

**HN16** Only in very limited circumstances, however, will the financial condition of the supporting spouse satisfy the requirement [\*\*\*38] of demonstrating changed circumstances. One such circumstance would be, as in *Innes*, when the supporting spouse seeks a *downward* modification of a support award. In that limited context, a substantial change in the financial condition of the supporting spouse after the entry of the divorce decree would be relevant. That information would be material in determining whether the moving party, there the supporting spouse, can show that

changed circumstances have substantially affected his or her **[\*31]** ability to support himself or herself and the supported spouse, as required by the first step in a *Lepis* review.

HN17<sup>[</sup> On the other hand, when the moving party is the dependent spouse, the financial condition of the supporting spouse is not relevant to the first step in the Lepis [\*\*535] review, in which the movant must show that circumstances have changed for him or her. The improved financial condition of the supporting spouse does not demonstrate how the dependent spouse is unable to support himself or herself at the standard of living established during the marriage. The financial condition of the supporting spouse becomes germane to the second step of the Lepis review, which [\*\*\*39] takes place only if changed circumstances have been presented by the movant, the supported spouse. An example of a changed circumstance would be the dependent spouse's inability to reach the level of selfsufficiency anticipated by the trial court when awarding alimony, and, therefore, the dependent spouse demonstrated that he or she could not maintain the marital standard of living. Milner v. Milner, 288 N.J. Super. 209, 216, 672 A.2d 206 (App.Div. 1996), provides such an example. In *Milner*, a rehabilitative alimony award was converted into a permanent alimony award when the supported spouse demonstrated that she had not achieved the level of self-sufficiency that would permit her to live at the standard of living established during the marriage. Id.at 216, 672 A.2d 206. The Appellate Division noted that the failure to achieve economic self-sufficiency as anticipated by the original divorce decree constituted a "nonoccurrence" of the circumstances that supported the original alimony award. Id. at 214, 672 A.2d 206. Thus, the evidence provided a valid basis for a motion for modification was provided. Ibid.; see also N.J.S.A. 2A:34-23(b) (stating that modification [\*\*\*40] of alimony is appropriate "upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award").

We can envision other circumstances wherein the dependent spouse's inability to maintain himself or herself at a standard of living comparable to the marital standard of living would support a finding of changed circumstances. We have the benefit of research **[\*32]** on that subject. Some studies have concluded that the standard of living for a woman decreases 30% after a divorce, while men enjoy a 10% 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.

We acknowledge that <u>HN18</u> [ ] changed circumstances can be shown by a dependent spouse when inflation substantially affects a supported spouse's ability to maintain a lifestyle comparable to the marital standard of living. Martindell, [\*\*\*41] supra, 21 N.J. at 353-54, 122 A.2d 352. But that still requires a particularized showing of the movant's circumstances. We are not persuaded that a per se rule should be established. Trial courts should not presume that whenever a household is split by divorce the supported spouse is no longer enjoying a lifestyle reasonably comparable to the marital standard of living. Nor should courts eliminate the movant's burden to show changed circumstances, including his or her own efforts to increase earnings, because that would turn a modification application for additional support into one that focuses only on whether the supporting spouse's financial condition has improved. That is not to suggest, however, that every supported spouse is able to enhance his or her income.

We believe <u>HN19</u> the better practice is to keep the focus of the first prong of the "changed circumstances" analysis on the movant's condition, including efforts by the movant to support himself or herself. In doing so, a motion court may find that a dependent spouse who has not been able to obtain employment that would permit him or her to achieve the economic self-sufficiency anticipated at the time of divorce has shown changed circumstances.

[\*\*\*42] [\*\*536] The factors that should be considered on a motion for modification of a support award for an economically dependent [\*33] spouse are the same factors used during the initial analysis of an alimony award: "the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard." *Lepis, supra,* <u>83 N.J. at 152, 416 A.2d 45</u>. The goal is to enter an order that allows the dependent spouse to maintain a standard of living reasonably comparable to the standard established during the marriage, while also considering the ability of the dependent spouse to become self-sufficient. *Hughes, supra, 311 N.J. Super.* <u>at 33-34, 709 A.2d 261</u>.

In this regard, we note that the basis for a subsequent

demonstration of changed circumstances may exist in the class of cases in which the initial support award, coupled with the supported spouse's expected effort to contribute to his or her own support, was determined at the time of entry of the divorce decree to be insufficient to allow the supported spouse to maintain a standard of living reasonably comparable to the marital standard of living. Our ruling today [\*\*\*43] will require trial courts to ensure that the record addresses that critical issue at the time of entry of the divorce decree in all cases. HN21 [1] When appropriate, a trial court should expressly find that there is a higher need existing at the time of the initial award based on the standard of living maintained during the marriage, and that the higher need for support could not be met by the supporting spouse at the time of the divorce.

HN22 [1] After such a finding is made, if a supporting spouse's later financial condition substantially improves, and if the supported spouse demonstrates that he or she is still unable to achieve a lifestyle level that is reasonably comparable to the marital lifestyle, then a prima facie showing of changed circumstances has been made and the burden shifts to the supporting spouse to demonstrate why additional support is unwarranted. The supported spouse's ability to do more to support herself or himself would be as relevant for a modification ruling as when establishing the initial alimony award. That latter inquiry should occur regardless of whether an award of rehabilitative alimony was included [\*34] in the initial alimony award. The supporting spouse's continuing [\*\*\*44] ability to contribute and efforts at contributing, to his or her own support are not limited in their relevance only to situations in which rehabilitative alimony was awarded.

In this matter, the trial court awarded Mrs. Crews rehabilitative alimony. It is well recognized that HN23 ] a rehabilitative alimony award is intended to "enable [the] former spouse to complete the preparation necessary for economic self-sufficiency." Hill v. Hill, 91 N.J. 506, 509, 453 A.2d 537 (1982). It is "payable for a terminable period of time when it is reasonably anticipated that a spouse will no longer need support." Dotsko v. Dotsko, 244 N.J. Super. 668, 677, 583 A.2d 395 (App.Div.1990). But "self-support" does not mean some subsistence level; it describes the point at which the supported spouse is deemed to have reached a level at which he or she can support himself or herself in a manner reasonably comparable to the marital standard of living. Hughes, supra, 311 N.J. Super. at 31, 709 A.2d 261.

**HN24** [1] When rehabilitative alimony does not work as originally intended, a court may use its equitable power to order an additional alimony award. <u>Lepis, supra, 83</u> <u>N.J. at 149, 416 A.2d 45</u> (finding [\*\*\*45] that "[t]he equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted").

An example may be found in <u>Hughes, supra, 311 N.J.</u> <u>Super. at 32, 709 A.2d 261</u>, in which the Appellate Division noted that an award of rehabilitative alimony does not mean that an order of permanent alimony [\*\*537] always must be rejected. See also <u>Carter, supra, 318 N.J. Super. at 50, 722 A.2d 977</u> (concluding that "obligation to pay rehabilitative alimony does not *per se* prohibit a former spouse from thereafter seeking permanent alimony"); <u>Milner, supra, 288 N.J.</u> <u>Super. at 216, 672 A.2d 206</u> (holding that dependent spouse's inability, despite her efforts, to obtain level of economic self-sufficiency comparable to the marital standard of living enjoyed during her long-term marriage warranted conversion of her rehabilitative alimony award to permanent award).

### [\*35] IV.

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. Regrettably, we have no assurance that in setting Mrs. Crews' support award, the trial court concluded that it would provide [\*\*\*46] her with adequate resources to enable her to support herself in a lifestyle reasonably comparable to the lifestyle that existed during the marriage. That is because the trial court made no finding in respect of the Crewses' marital standard of living. This case must be remanded to the trial court for a specific finding of the standard of living established during the Crewses' marriage. Once that finding is made, then the motion to modify may be properly considered. In reviewing Mrs. Crews' motion to modify, the motion court should also re-examine the original alimony award in light of the established marital standard of living.

The motion court may conclude that the initial alimony award was not consistent with the standard of living established during the marriage but that it was all that Mr. Crews could afford at the time. If the court so finds, then it should exercise its inherent equitable power to modify alimony awards and tailor a modified alimony award that takes into account the marital standard of living and Mr. Crews' current financial condition. <u>Lepis</u>, <u>supra, 83 N.J. at 148-49, 416 A.2d 45</u> (indicating that spousal agreements should be enforced without modification "only as long [\*\*\*47] as they remain fair and equitable").

If the original award were found to be set properly in light of the now-determined marital standard of living, the trial court should re-examine Mrs. Crews' demonstration of changed circumstances that she argues would warrant modification of the original rehabilitative alimony award. For instance, Mrs. Crews' child-care responsibilities, especially those associated with the care of her daughter, demonstrate unusual and unfortunate events that should be carefully reviewed to see whether they reasonably prevented Mrs. Crews from achieving the greater level of "self-sufficiency" that was envisioned at the time of divorce. Mrs. [\*36] Crews was unable to meet the salary goal targeted by Mr. Crews' expert. Her argument that she reasonably believed that she could take only employment positions that provided her with scheduling flexibility so as to be responsive to her children's special needs should be fairly considered.

Mrs. Crews has asserted that she has not lived at the marriage's standard of living since the divorce, and that she never received the benefit that rehabilitative alimony is designed to promote. In fact, Mrs. Crews fared better under the [\*\*\*48] pendente lite order than under the divorce judgment. <u>Supra at 19-20</u>, 751 A.2d at 528. The motion court's determination of the marital standard of living will be a relevant backdrop to all of these arguments.

In conclusion, once a marital standard of living is set, Mrs. Crews should be permitted to present evidence in support of a finding of "changed circumstances" sufficient to justify a modification of her support award. Only with that necessary fact-finding will a court have the appropriate context in which to determine whether Mrs. Crews, through her own available and imputed resources, requires continuing support from her exhusband. If she [\*\*538] shows that the marital standard of living was not met by the initial alimony award and her imputed resources, or if she otherwise shows changed circumstances, Mr. Crews' financial condition becomes a relevant issue for the court's consideration.

We cannot determine whether the relief defendant seeks, namely, a continuation and conversion to permanent alimony, or a combination of permanent and rehabilitative alimony, is appropriate in these circumstances because there has been no finding of the

marital standard of living to guide our [\*\*\*49] review. That is best left for the trial court on remand, in accordance with the principles stated.

V.

We reverse the judgment of the Appellate Division and remand to the Chancery Division, Family Part, for further proceedings consistent with this opinion. [\*37]

End of Document

## Mani v. Mani

Supreme Court of New Jersey September 13, 2004, Argued ; April 6, 2005, Decided A-53 September Term 2003

#### Reporter

183 N.J. 70 \*; 869 A.2d 904 \*\*; 2005 N.J. LEXIS 298 \*\*\*

BRENDA MANI, PLAINTIFF-RESPONDENT, v. JAMES J. MANI, DEFENDANT-APPELLANT.

court improperly considered marital fault in reducing the award of alimony payable by respondent former wife under <u>N.J. Stat. Ann. § 2A:34-23(b)</u> and in denying him counsel fees.

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division.

<u>Mani v. Mani</u>, 178 N.J. 453, 841 A.2d 91, 2004 N.J. LEXIS 35 (2004)

Disposition: Reversed and remanded.

## **Core Terms**

alimony, fault, divorce, marital, marriage, spouse, matrimonial, calculus, equitable, cruelty, stock, adultery, no-fault, recommendations, calculation, dissolution, consecutive, fault-based, pendente, lite, boardwalk, egregious, paraprofessional, enumerated, desertion, confound, duration, sexual, adulterous, lifestyle

## Case Summary

### **Procedural Posture**

Appellant former husband challenged the judgment of the Appellate Division (New Jersey), which affirmed a trial court's award of alimony to the husband in a lesser sum than that sought by him and its refusal to award counsel fees. The husband alleged that the appellate

#### Overview

The wife filed suit for divorce, alleging adultery and extreme cruelty, after she learned that the husband was having an affair. Since the wife's assets were substantially greater than the husband's, the husband, at trial, sought permanent alimony of over \$ 68,000 per year. The trial court awarded alimony in the amount of \$ 610 weekly, and the appellate court affirmed, holding that the reduction in the husband's standard of living was justified by the finding that the husband was adulterous. On appeal, the court held that marital fault was irrelevant to alimony under § 2A:34-23(b) unless the fault negatively affected the economic status of the parties or the fault so violated societal norms that continuing the economic bonds between the parties would be unjust. Thus, the court held that since there was no allegation that the husband's fault had any economic consequences or that it was egregious, the appellate court improperly considered fault to justify the alimony award. Further, the court held that the appellate court also improperly considered fault to justify the denial of counsel fees because marital fault was irrelevant to the question of whether such an award was proper.

#### Outcome

The court reversed the judgment of the appellate court

and remanded the matter for reconsideration of the issues of alimony and counsel fees without regard to fault, giving due deference to the trial court's findings and conclusions.

## LexisNexis® Headnotes

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

## <u>HN1</u>[📩] Marital Termination & Spousal Support, Spousal Support

Alimony is neither a punishment for the payor nor a reward for the payee. Rather, it is an economic right that arises out of the marital relationship and provides the dependent spouse with a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

# <u>HN2</u>[**1**] Marital Termination & Spousal Support, Dissolution & Divorce

<u>N.J. Stat. Ann. § 2A:34-23(b)</u> provides that in all divorce actions 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. Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN3</u>[🃩] Marital Termination & Spousal Support, Spousal Support

When ordering alimony, a court shall consider a nonexclusive list of enumerated factors in <u>N.J. Stat. Ann. §</u> <u>2A:34-23(b)</u>.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN4</u>[ Marital Termination & Spousal Support, Spousal Support

See N.J. Stat. Ann. § 2A:34-23(b).

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN5</u> Marital Termination & Spousal Support, Spousal Support

See N.J. Stat. Ann. § 2A:34-23(g).

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN6</u>[**1**] Marital Termination & Spousal Support, Spousal Support

Although New Jersey's case law has consistently recognized that, under its statutory scheme, fault may be considered in calculating alimony, for over a quarter of a century, courts have declined to place their imprimatur on a wide-ranging use of fault in that context.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

## <u>HN7</u>[**\***] Marital Termination & Spousal Support, Spousal Support

The focus of the decision regarding alimony is generally on the financial circumstances of the parties; the practical consequences of succeeding on fault based grounds are minimal; and marital fault rarely enters into the calculus of an alimony award.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Family Law > ... > Dissolution & Divorce > Fault Based Grounds > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Governments > Legislation > Interpretation

### HN8[1] Judges, Discretionary Powers

The legislature's failure to modify a judicial determination is some evidence of legislative support for the judicial construction of the statute.

Evidence > Relevance > Relevant Evidence

HN9 [ ] Relevance, Relevant Evidence

See N.J. R. Evid. 401.

Evidence > Relevance > Relevant Evidence

### HN10 Relevance, Relevant Evidence

The probative value of evidence is the tendency of evidence to establish the proposition that it is offered to prove.

Evidence > Relevance > Relevant Evidence

Family Law > ... > Dissolution & Divorce > Fault Based Grounds > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN11[1] Relevance, Relevant Evidence

Given the economic basis of alimony, there can be no quarrel over the notion that fault that has altered the financial status of the parties is relevant in an alimony case. The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margins of nearly every case and therefore those grounds should not be interjected into an alimony analysis.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>*HN12*</u> Marital Termination & Spousal Support, Spousal Support

To the extent that marital misconduct affects the economic status quo of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>*HN13*[</u>] Marital Termination & Spousal Support, Spousal Support

Some conduct, by its very nature is so outrageous that it can be said to violate the social contract, such that society would not abide continuing the economic bonds between the parties. In the extremely narrow class of cases in which such conduct occurs, it may be considered by the court, not in calculating an alimony award, but in the initial determination of whether alimony should be allowed at all.

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

# <u>*HN14*</u> Marital Termination & Spousal Support, Costs & Attorney Fees

In awarding attorney's fees, N.J. Stat. Ann. § 2A:34-23 requires a court to consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party.

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees <u>HN15</u> Marital Termination & Spousal Support, Costs & Attorney Fees

See N.J. Ct. R. 5:3-5(1)(c).

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

<u>*HN16*</u> Marital Termination & Spousal Support, Costs & Attorney Fees

See N.J. Ct. R. 4:42-9(b).

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

### <u>*HN17*</u> Marital Termination & Spousal Support, Costs & Attorney Fees

In awarding counsel fees in a divorce case, the court must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.

Family Law > Marital Termination & Spousal Support > Costs & Attorney Fees

### <u>*HN18*</u> Marital Termination & Spousal Support, Costs & Attorney Fees

Bad faith for counsel fee purposes in a divorce case relates only to the conduct of the litigation and that there is nothing in the statutory scheme to suggest that the underlying issue of marital fault is a consideration.

## Syllabus

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

#### Brenda Mani v. James J. Mani (A-53-2003)

#### Argued September 13, 2004 -- Decided April 6, 2005

#### LONG, J., writing for a majority of the Court.

The appeal in this family law case presents the issue of whether marital fault is a factor in the determination of alimony and the award of counsel fees.

Plaintiff, Brenda Mani and defendant, James Mani, met in 1970 when she went to work for him in his seasonal amusement business on the Seaside Heights boardwalk. James, a college graduate, was at the time a half-owner of the boardwalk business and a partner in a travel agency in Florida that later failed. Brenda was a college student. Brenda graduated in 1971 and taught preschool for two years while working with James at his business during the summer.

Before the parties were married [\*\*\*2] in 1973, they purchased their first home in Toms River for \$ 30,000. They jointly contributed \$ 5,000 or \$ 6,000 out of profits from the boardwalk business to buy the property. The balance of the purchase price was financed by a \$ 25,000 mortgage held by Brenda's father.

After their wedding, the parties, who have no children, worked together in the boardwalk business 100 hours per week from Memorial Day through Labor Day of each year. They also worked weekends in the fall and Christmas. During the marriage, Brenda's father gave her significant gifts of money and investments in her name only. She received stock in a family-owned business that appreciated to \$ 1.7 million by 1991. As a condition of the gift, James was required to sign a waiver stating that he was not entitled to share in the stock. Brenda also received an interest in an investment partnership formed by her father for his five children. Brenda liquidated her interest in the partnership in 1987 for just over \$ 500,000 and invested that money in her name. Brenda's investment income was needed to pay for the couple's expenses because income from the boardwalk business was not enough to support their comfortable lifestyle.

[\*\*\*3] In 1986, the parties purchased another home in Toms River for \$ 145,000 using proceeds from Brenda's stock and \$ 129,000 from the sale of the other house. The property, at 22 Central Avenue, was conveyed to the parties as husband and wife, although title was later transferred to Brenda. The parties razed the existing house on that lot and built another in its place, ultimately spending between \$ 500,000 and \$ 750,000 in improvements on a lavish new home.

In 1993, the parties retired from the boardwalk business and lived an extravagant lifestyle almost exclusively out of Brenda's investment income. James worked briefly for real estate brokers in Florida, although he earned only about \$ 20,000 total in income.

The couple spent seven years together in retirement before Brenda discovered that her husband was having an affair with a woman with whom the parties socialized. Brenda filed a complaint for divorce alleging adultery and extreme cruelty. The trial judge granted James' motion for *pendente lite* relief, awarding \$ 1,006 per week as spousal support and \$ 7,000 as counsel fees.

By the time of trial, Brenda's investment assets were valued at \$ 2.4 million. James' [\*\*\*4] assets consisted of an IRA with a value of \$ 80,000. He also had a partial interest in accounts held jointly by the couple and a shared interest in property from his father's estate valued at \$ 50,000.

At trial, James sought permanent alimony of over \$ 68,000 per year and Brenda sought to deny alimony altogether. The trial judge determined that the property at 22 Central Avenue, which at the time of trial was under contract for sale for \$ 500,000, was subject to equitable distribution and that James was entitled to thirty percent of the net proceeds of the sale (\$ 141,000). The judge held that Brenda's remaining assets were immune from equitable distribution. With respect to alimony, the judge awarded James \$ 610 per week based on his economic dependency. In reaching that conclusion, the judge attributed to James the ability to earn a minimum of \$ 25,000 annually.

James appealed, claiming that the alimony award was insufficient to maintain the marital standard. He also argued that he was entitled to half of the proceeds of the sale of the marital residence, and that he should have been awarded counsel fees. Brenda cross-appealed, arguing that James was not entitled to any [\*\*\*5] alimony. She contended that James had not contributed remunerative activities to the marriage, and that his economic dependency was not occasioned by the marriage, but by his own indolence.

The Appellate Division affirmed, holding there was sufficient credible evidence in the record to support the award of permanent alimony. It reasoned that the reduction in James' standard of living was justified, in part, by the finding that Brenda had established he was adulterous and committed acts of extreme cruelty. The court observed that the parties' standard of living was not the result of their joint efforts, but solely due to gifts from Brenda's father.

The Supreme Court granted James' petition for certification on issues of alimony and counsel fees.

**HELD**: Marital fault is irrelevant to alimony except in two narrow instances: cases in which the fault negatively affects the economic status of the parties and cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice. Marital fault is irrelevant to a counsel fee award.

1. Historically, the reason for alimony is not clear. That **[\*\*\*6]** lack of clarity explains why, although alimony is now awarded in every jurisdiction, there is no consensus regarding its purpose. New Jersey cases have long expressed the view that alimony is neither a punishment for the payor nor a reward for the payee. (pp. 9-14)

2. <u>N.J.S.A. 2A:34-23(b)</u> provides that when ordering alimony, a court shall consider a non-exclusive list of enumerated factors. The words "marital fault" and "responsibility for the breakdown of the marriage" do not appear among the factors, although there is a "catch all category" that arguably permits a court to consider any other factor it "may deem relevant." <u>N.J.S.A. 2A:34-23(g)</u> further guides the court's determination of alimony, providing that; "in all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just." The genesis of that provision bears on the issue before the Court. (pp. 14-15)

3. New Jersey enacted a comprehensive divorce reform package, the [\*\*\*7] <u>Divorce Reform Act</u>, in 1971. Before the passage of the Act, the Legislature created the Divorce Law Study Commission, which issued a *Final Report* that contained findings about existing divorce law in New Jersey and proposed a Divorce Reform Bill. Because New Jersey law prior to 1971 only provided for divorce on the grounds of fault, the focus of the Commission was the need for legal recognition of no-fault divorce on grounds of separation. The Commission proposed such a new ground where there

is no prospect for reconciliation between the parties. The final Divorce Reform Act gave couples the right to divorce after eighteen months of separation regardless of which party caused the breakdown in the marriage. The Commission did not recommend the complete elimination of fault as a consideration in marriage termination, and the Legislature followed suit, preserving the traditional fault-based grounds for divorce. The Commission's Final Report also briefly addressed the relationship between fault and alimony, noting that where fault is asserted as a ground for relief, it would be a proper consideration in dealing with alimony and support. The Commission proposed the language that was adopted [\*\*\*8] by the Legislature in N.J.S.A. 2A:34-23(g). In its comments to the proposed bill's alimony provisions, the Commission stated that as long as fault grounds for divorce are retained, it was logical that fault should affect judicial discretion in awarding alimony. (pp. 15-21)

4. Although our case law has consistently recognized that, under our statutory scheme, fault may be considered in calculating alimony, courts have declined to make wide-ranging use of fault in that context. In Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1977), this Court noted that the practical consequences of succeeding in a divorce action on fault-based grounds are minimal. Addressing N.J.S.A. 2A:34-23, the Court stated that the focus on the decision regarding alimony is generally on the financial circumstances of the parties, and that marital fault rarely enters into the calculus of an alimony award. The Court reaffirms that approach. Kinsella reflects the direction of our jurisprudence for a long period. During that time, the Legislature has, on several occasions, undertaken to amend the law in other respects. The Court takes [\*\*\*9] that as some indication that the Legislature is satisfied with the general approach adopted in Kinsella and its forbears. (pp. 20-26)

5. In order to avoid the exercise of wholly unguided discretion by trial judges, the task of the Court in this case is to put some flesh onto *Kinsella's* bones. After reviewing the cases from other jurisdictions and the conclusions of legal writers and scholars, the Court determines that in the narrow band of cases in which marital fault has negatively affected the economic status of the parties, it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, an appropriate amount representing the lost savings and retirement may be included in the alimony award to the other spouse. This conclusion flows from a relevance perspective. There

can be no quarrel over the notion that fault that has altered the financial status of the parties is relevant in an alimony case. The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margin of nearly every case and therefore those grounds should not be interjected into an alimony analysis. The [\*\*\*\*10] only exception to this rule is the narrow band of cases involving such egregious fault that society would not abide continuing the economic bonds between the parties. By way of example, California has legislatively barred alimony payments to a dependent spouse who has attempted to murder the supporting spouse. Where such conduct occurs, it may be considered in the initial determination of whether alimony should be allowed at all. (pp. 26-32)

6. In this case, there was no allegation that James' marital fault had any economic consequences or that it was, in any way, egregious. Indeed, the trial judge did not weigh fault in the alimony analysis. Yet, the Appellate Division relied on James' marital misconduct to justify the alimony award. Because the alimony award was a close call, the Court cannot say that the Appellate Division would have reached the same conclusion in the absence of the fault consideration. The Court therefore remands to the Appellate Division for reconsideration of alimony without regard to fault. (pp. 31-32)

7. The Court notes that this case involves nothing more than statutory interpretation. Neither the purposes underlying alimony, the words of the statute, [\*\*\*11] nor the legislative history can be said to provide clear guidance as to the kind of fault that is to be considered in an alimony calculation. The dissent misperceives the Court's role in such a case - the Court is not free to abdicate its responsibility to interpret legislation consistent with its language and with precedent that supplies content to broad statutory pronouncements. The Court also rejects the dissent's suggestion that the holding announced today will create more mischief than it will resolve. By delimiting the kinds of fault that may be taken into account in an alimony calculus, the Court creates a template for uniformity and predictability in decision-making and relieves matrimonial litigants and their counsel from the need to act upon the nearly universal and irresistible urge for retribution that follows on the heels of a broken marriage. (pp. 32-34)

8. In awarding counsel fees, the relevant statute and Rules of Court require a court to consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature [\*\*\*12] of the legal services rendered; and the reasonableness of the fees. The parties agree, as does the Court, that bad faith for counsel fee purposes relates only to the conduct of the litigation and not to the underlying issue of marital fault. Here, the trial judge did not explain the denial of James' application for counsel fees. Nevertheless, the Appellate Division affirmed the denial, making reference to the substantial *pendente lite* award and the "proved grounds for divorce." This Court takes the latter language to be an unwarranted reference to marital fault. The issue of counsel fees also must be remanded to the Appellate Division for reconsideration without regard to fault. (pp. 34-37)

**JUSTICE WALLACE** has filed a separate **concurring** opinion to state that, unlike the majority, he finds no need to redefine and expand upon the appropriate use marital fault in determining an alimony award. He is satisfied with the view expressed in *Kinsella* that "marital fault rarely enters in the calculus of an alimony award," and notes that the trial judge in the present case did not consider fault in computing the alimony award.

**JUSTICE RIVERA-SOTO** has filed [\*\*\*13] a separate opinion **dissenting in part and concurring in part**. He dissents from the majority's holding regarding the consideration of fault in fixing alimony, expressing the view that the language of the Divorce Act, its legislative history, and our jurisprudence permit a court to use a parties' proofs of the fault grounds for divorce to determine alimony that is fit, reasonable and just. He concurs in the majority's holding on the issue of the consideration of fault in awarding counsel fees, but would not allow James another opportunity to submit the affidavit of services required for such an award.

The judgment of the Appellate Division is **REVERSED** and the matter is **REMANDED** to the Appellate Division for reconsideration of the issues of alimony and counsel fees without regard to fault.

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, and ALBIN join in JUSTICE LONG's opinion. JUSTICE WALLACE has filed a separate, concurring opinion. JUSTICE RIVERA-SOTO has filed a separate opinion concurring in part and dissenting in part.

**Counsel:** *Dale E. Console* argued the cause for appellant.

*Patrick T. Collins* argued the cause for respondent (*Franzblau* [\*\*\*14] *Dratch*, attorneys).

Bonnie C. Frost argued the cause for amicus curiae, New Jersey State Bar Association (*Edwin J. McCreedy*, President, attorney; *Ms. Frost* and *Stephen P. Haller*, on the brief).

**Judges:** Justice LONG delivered the opinion of the Court. WALLACE, JR., concurring. Justice RIVERA-SOTO, concurring in part and dissenting in part. Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI, ALBIN and WALLACE. Justice RIVERA-SOTO.

#### Opinion by: LONG

## Opinion

[\*72] [\*\*905] Justice LONG delivered the opinion of the Court.

The appeal in this family law case presents the issue of whether marital fault is a factor in the determination of alimony and the award of counsel fees. We hold that marital fault is irrelevant to alimony except in two narrow instances: cases in which the fault has affected the parties' economic life and cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice. The former may be considered in the calculation of alimony and the latter in connection with the initial determination of whether alimony should be allowed at all. We likewise hold [\*\*\*15] that marital fault is irrelevant to a counsel fee award.

### [\*73] I

The facts and procedures that gave rise to this appeal are as follows: Plaintiff, Brenda Mani and defendant, James Mani met in 1970 when she went to work for him in his seasonal amusement business on [\*\*906] the Seaside Heights boardwalk. James, a college graduate, was at the time, a half-owner of the boardwalk business and a partner in a travel agency in Florida that later failed; Brenda was a college student. Brenda graduated in 1971 and taught preschool for two years while working with James at his business during the summer.

Before the parties were married in 1973, they purchased their first home at 400 Lexington Avenue in Toms River for \$ 30,000. They jointly contributed \$ 5,000 or \$ 6,000 out of profits from the boardwalk business to buy the property. The balance of the purchase price was financed by a \$ 25,000 mortgage held by Brenda's father. The house was purchased in Brenda's name with the intention that it would be used as the marital home.

After their wedding, the parties, who have no children, worked full time together "side by side" at the boardwalk business 100 hours a week, from Memorial Day through Labor Day [\*\*\*16] each year. They also worked weekends in the fall, over Christmas, and in the late spring but spent the remaining months at trade shows or vacationing in Florida and Mexico.

During the early years of the marriage, Brenda's father gave her and her siblings significant gifts of money and investments, including checks for \$ 10,000 a year. Brenda also received tax-free bonds from her father, which, per her father's instructions, were always kept solely in her name.

In 1981, Brenda received a gift of stock from her father in a family-owned business, Ultimate Corporation, that later traded publicly. As a condition of the Ultimate stock gift, Brenda's father required each of his children and their spouses to sign a waiver stating that the spouses were not entitled to share in the stock. Over the years, the stock rose in value and split several **[\*74]** times, eventually appreciating to \$ 1.7 million in 1991. Brenda's investmentincome was needed to pay for the couple's expenses because income from the boardwalk business was not enough to support their comfortable lifestyle.

At some point Brenda began to sell her shares of Ultimate stock and, with the proceeds, purchased taxfree bonds in her [\*\*\*17] own name. According to Brenda, she made those stock sales under the direction and advice of her father. Although she discussed her investments with James, Brenda testified that she made all final decisions about investing only after speaking with her broker and financial adviser. James, on the other hand, claimed that he was a knowledgeable investor whose ideas were the impetus for the stock sales. In the early 1980's, Brenda's father formed a partnership called BAS for his five children and made investments of bonds and stocks in the BAS account. Every year, Brenda received roughly \$ 40,000 from the partnership and the parties used that money for living expenses. In 1987, Brenda liquidated her interest in BAS in an amount just over \$ 500,000, which she then placed in a stock account. Again, the parties dispute the role of James's financial advice in Brenda's decision to liquidate the stock.

In 1986, the parties purchased a second home in Toms River for \$ 145,000 using proceeds from Brenda's Ultimate Stock and \$ 129,000 from the sale of the Lexington Avenue house. That property, at 22 Central Avenue, was conveyed to the parties as husband and wife. Later, title was transferred to [\*\*\*18] Brenda. The parties razed the existing house on that lot and built another in its place, ultimately spending between \$ 500,000 and \$ 750,000 in improvements on a lavish new home.

In addition to the house on Central Avenue, Brenda purchased vacation and rental [\*\*907] properties in Florida with funds generated from her investments. She testified that the Florida properties were ultimately a financial loss and that, as a result, she sold them to pay her mortgage.

**[\*75]** In 1993, when they were in their 40's, the parties retired from the boardwalk business and lived, in the words of the trial judge, an "extravagant" lifestyle almost exclusively out of Brenda's investment income. According to the parties, the monthly budgetary expenses of their household ranged from \$ 7,360 to \$ 13,143. Following the conclusion of the boardwalk operation, James, who had obtained a real estate license in Florida, worked briefly for real estate brokers. Although he provided a few referrals, he never showed a property for the firms and earned only about \$ 20,000 in income in all.

The couple spent seven years together in retirement before Brenda discovered that her husband was having an affair with a woman with whom the **[\*\*\*19]** parties socialized. Brenda filed a complaint for divorce alleging adultery and extreme cruelty. The trial judge granted James's motion for *pendente lite relief*, awarding \$ 1,006 per week as spousal support and \$ 7,000 as counsel fees, subject to allocation at the time of the final hearing.

The case proceeded to trial. James claimed entitlement to a permanent alimony award of \$ 68,320 per year and

Brenda sought to deny alimony altogether. By the time of trial, Brenda's investment assets were valued at \$ 2.4 million. James's assets consisted of an IRA with a value of \$ 80,000 as of 1999. He also had a partial interest in accounts held jointly by the couple and a shared interest in property from his father's estate valued at \$ 50,000.

The trial judge determined that the property at 22 Central Avenue, which at the time of trial was under contract for sale for \$ 500,000, was subject to equitable distribution but that Brenda's remaining assets were immune.

With regard to Central Avenue, the judge determined that James was entitled to thirty percent of the net proceeds (\$ 141,000). In immunizing Brenda's remaining assets from distribution, the judge found that James's investment advice was [\*\*\*20] "of little significance and import" and that it did not contribute to the growth of Brenda's assets. The judge also denied James's request for counsel fees.

**[\*76]** With respect to alimony, the judge awarded James \$ 610 per week based "in substantial part on the defendant's economic dependency." In reaching that conclusion, the judge attributed to James the ability to earn a minimum of \$ 25,000 annually and denominated the alimony award as necessary to maintain the marital standard of living.

James appealed, claiming that the alimony award was insufficient to maintain the marital standard. He contended that even with the additional \$ 25,000 earning capacity attributed to him by the trial judge, he would still be \$ 4,000 short each month in meeting his self-described budgetary needs. He also argued that the distribution of the marital residence was inequitable because he was entitled to half of the sale proceeds, and that he should have been awarded counsel fees based on his need, good faith, and Brenda's superior ability to pay.

Brenda cross-appealed, arguing that James was not entitled to any alimony and should have received no more than sixteen percent of the proceeds from the marital [\*\*\*21] residence because that was the percentage of the purchase price attributable to the sale of the house on Lexington Avenue. She further contended that alimony was inappropriate because James did not contribute non-remunerative activities to the [\*\*908] marriage, and his economic dependency was not occasioned by the marriage, but by his own "indolence."

The Appellate Division affirmed and held that there was sufficient credible evidence in the record to support the trial judge's permanent alimony award; that "though the alimony award may be insufficient for defendant to maintain his relaxed marital lifestyle, the reduction in his living standard is justified, in part, by the finding that plaintiff established he was adulterous and committed acts of extreme cruelty;" that the trial judge did not abuse his discretion in allocating the parties' interests in the property at 22 Central Avenue; and that the denial of the counsel fee application was proper in light of the substantial *pendente lite* award and the finding of marital fault.

[\*77] In reaching its conclusions, the court observed that "[t]he Manis' standard of living was not the result of the parties' joint efforts, but rather solely due to [\*\*\*22] gifts from plaintiff's father." The panel also noted that although the trial court did not specifically mention adultery and extreme cruelty as factors in the alimony analysis, it did find that the Brenda had proven the grounds asserted in her complaint. According to the Appellate Division, James's adultery was significant and "his marital indiscretions warrant consideration in the amount of that award." The court also cited marital fault as a factor in the denial of counsel fees.

We granted James's petition for certification on issues of alimony and counsel fees, <u>Mani v. Mani</u>, 178 N.J. 453, 841 A.2d 91 (2004), and accorded *amicus* status to the New Jersey State Bar Association.

James asks us to establish, as a rule of law, that in modern matrimonial practice, fault should play no part in an alimony determination or in an award of counsel fees. He contends that, as a matter of practice, courts are abiding by that rule and that the Appellate Division decision has upended the *status quo* by wrongly interjecting fault into the equation.

Brenda counters that <u>N.J.S.A. 2A:34-23(b)</u> gives courts discretion to "consider any other [\*\*\*23] factors which the court may deem relevant" in arriving at an alimony decision, including marital fault. However, she candidly concedes that the present practice is to focus on the finances of the parties and rarely involves fault.

With respect to counsel fees, she acknowledges that marital fault is not a consideration and argues that the real reason for the denial of fees in this case was the \$ 7,000 *pendente lite* award, the \$ 141,000 in equitable distribution, and the failure of James to submit an

П

Affidavit of Services.

*Amicus Curiae* urges us to rule that fault should not be a factor in the determination of alimony except in the most egregious **[\*78]** circumstances and that the focus of alimony should remain, as is the present practice, on the parties' financial circumstances.

Ш

We turn first to the question of whether fault should be considered in an alimony analysis.

### Α.

The history of alimony is instructive. In early England, two forms of marital dissolution existed. The most common was an ecclesiastical divorce from bed and board (a mensa et thoro). Robert Kirkman Collins, The Theory of Marital Residuals: Applying An Income Adjustment Calculus to the Enigma of Alimony, [\*\*\*24] 24 Harv. Women's L.J. 23, 28 (2001). In reality [\*\*909] that "divorce" was a legal separation that, in accordance with religious teaching on the indissolubility of marriage, did not terminate the marital relationship. John Witte Jr., The History and Evolution of Marriage From Sacrament to Contract: Marriage, Religion and Law in Western Tradition 156, 160-61 (1997). The other form--a civil divorce (a vinculo matrimonii)--which literally means severing the chains of matrimony, although technically available, was extremely rare because it required an act of Parliament. 13 Halsbury's Laws of England, 245 (1975).

Alimony was granted only in the former class of cases on the theory that husband was obliged to continue to support his wife as long as they remained married. Collins, *supra, 24 Harv. Women's L.J. at 28-29 (2001)*. Somehow, with the passage of time, the distinction between true divorce and mere separation was obliterated and alimony began to be awarded in all cases. No rationale was advanced to explain why parties, who were no longer married, remained economically bound to one another. As one legal scholar put it:

By the time that matrimonial law [\*\*\*25] reform in Great Britain created universally accessible civil divorce in the mid-nineteenth century, the concept of alimony was so well-accepted that it was carried over and applied to those new cases where the [\*79] marriage itself was actually ending, without apparent reflection or explanation as to why it should continue once the marital relationship had been extinguished. <u>Section 32</u> of the Matrimonial Causes Act [of] 1857 gave the judge discretion to order a husband to provide for his wife even after the marriage had ended in an amount reflecting her own wealth, his own means, and their respective conduct during the marriage. Posterity was not, however, provided with a rationale.

### [Ibid.]

Divorce based on the English practice was available in the American colonies from the earliest times. <u>Maynard</u> <u>v. Hill, 125 U.S. 190, 206, 8 S. Ct. 723, 727, 31 L. Ed. 654, 657 (1888)</u>. The concept of alimony also carried over. Again, as had been the case in England, the reason for alimony, outside the legal separation scenario, remained an enigma. 2 Homer Harrison Clark, *The Law of Domestic Relations in the United States,* 257-58 (2d ed.1988). That lack of clarity [\*\*\*26] regarding the theoretical underpinning of post-divorce alimony explains why, although alimony is now awarded in every jurisdiction, Collins, <u>supra, 24 Harv. Women's L.J. at 31</u>, there is no consensus regarding its purpose.

Indeed, many distinct explanations have been advanced for alimony. Id. at 23. They include its characterization as damages for breach of the marriage contract, Margaret F. Brinig & June R. Carbon, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855, 882 (1988); as a share of the benefits of the marriage partnership, Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496 (1974); as damages for economic dislocation (based on past contributions), Elisabeth M. Lands, Economics of Alimony, 7 J. Legal. Stud. 35 (1978); as damages for personal dislocation (foregoing the chance to marry another), Lloyd Cohen, Marriage, Divorce, Quasi Rents; Or, "I Gave Him the Best Years of My Life," 16 J. Legal Stud. 267, 276 (1987); as compensation for certain specific losses at the time of the dissolution, A.L.I., Principles of Law of Family Dissolution: Analysis and Recommendations, 8 Duke J. Gender L. & Pol'y 1, 28 (2001); [\*\*\*27] as deterrence or punishment for marital indiscretion, Brinig & Carbone, supra, 62 Tul. L. Rev. at 860-61; and as [\*\*910] avoidance of a drain on the public fisc, Miles v. Miles, 76 Pa. 357, 358 (1874).

**[\*80]** Obviously, some of those purposes favor consideration of fault and some disfavor it. Thus, for example, in jurisdictions that continue to consider alimony as a punishment for marital indiscretion, deterrence against bad behavior, or damages for breach of the marital contract, fault logically figures into the

calculus. Contrariwise, in those jurisdictions that view alimony solely in economic terms and prohibit its characterization as punitive, fault would not likely be considered as a weight at all. In other words, the purpose that is identified by a jurisdiction as the rationale for awarding alimony is closely connected to the question whether fault should be a factor in its calculation.

New Jersey cases have long expressed the view that **HN1**[**^**] alimony is neither a punishment for the payor nor a reward for the payee. Aronson v. Aronson, 245 N.J. Super. 354, 364, 585 A.2d 956 (App.Div.1991); Turi v. Turi, 34 N.J. Super. 313, 322, 112 A.2d 278 (App.Div.1955); [\*\*\*28] O'Neill v. O'Neill, 18 N.J. Misc. 82, 89, 11 A.2d 128 (Ch.), aff'd, 127 N.J. Eq. 278, 12 A.2d 839 (E. & A.1940). Rather, it is an economic right that arises out of the marital relationship and provides the dependent spouse with "a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage." Stiffler v. Stiffler, 304 N.J. Super. 96, 99, 698 A.2d 549 (Ch.1997) (quoting Koelble v. Koelble, 261 N.J. Super. 190, 192-193, 618 A.2d 377 (App.Div.1992)). If that were our sole benchmark, resolving the issue whether fault should be an alimony consideration would be relatively simple. The answer would be "no." There is, however, more to consider.

### В.

**HN2**[**↑**] N.J.S.A. 2A:34-23(b) provides that in all divorce actions "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." **HN3**[**↑**] When ordering alimony, a "court *shall* consider" a non-exclusive list of enumerated factors:

[\*81] <u>HN4</u> (1) The actual need and ability of the [\*\*\*29] 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 [\*\*911] indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

[\*\*\*30] (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.

### [<u>N.J.S.A. 2A:34-23(b)</u>.]

As is obvious, the words "marital fault" and "responsibility for the breakdown in the marriage" do not appear in the statute, although the so-called "catch all category" arguably permits a court to consider "any other factor" it may "deem relevant." <u>N.J.S.A. 2A:34-23(g)</u> further guides the court's determination of alimony:

**HN5** In all actions for divorce other than those where judgment is granted solely on the ground of separation the court *may consider* also *the proofs made* in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.

[<u>*N.J.S.A.* 2*A*:34-23(g)</u> (emphasis added).]

The genesis of that provision bears on the issue before us.

C.

In the late 1960's, the California [\*\*\*31] Legislature "launched the modern-day reform movement in divorce laws by adopting the [\*82] first no-fault divorce law in the United States and eliminating the concept of fault in

marriage dissolution actions." Larry R. Spain, The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience, 28 Wm. Mitchell L. *Rev.* 861, 861 (2001). New Jersey followed suit in 1971 when it enacted a comprehensive divorce reform package (L. 971, c. 212, (the "Divorce Reform Act")), that endeavored to "adequately respond to the felt needs of our present day society" in the area of divorce law. Painter v. Painter, 65 N.J. 196, 203, 320 A.2d 484 (1974). Before the passage of the Act, the Legislature created the Divorce Law Study Commission ("Commission") with an eye toward incorporating into the law "modern concepts" of divorce and "sociological aspects of marriage, including many changes in viewpoint." L. 1967, c. 57 (amended by L. 1968, c. 170 and L. 1969, c. 25); see also Painter, supra, 65 N.J. at 203, 320 A.2d 484 (recounting history of New Jersey's revision of divorce law). The Commission issued a Final Report that contained findings [\*\*\*32] about existing divorce law in New Jersey, and proposed a Divorce Reform Bill. See Divorce Law Study Commission, New Jersey, Final Report to the Governor and The State (1970) [hereinafter Final Report]. "In very large part" the resulting statute, N.J.S.A. 2A:34-23, was "based upon the proposed Divorce Reform Bill" contained in the Final Report. Painter, supra, 65 N.J. at 203-04, 320 A.2d 484.

Because New Jersey law prior to 1971 only provided for divorce on the grounds of fault, the focus of the Commission was the need for legal recognition of nofault divorce on grounds of separation. Final Report, supra, at 5-6, 99-100. The Commission proposed such a new ground "where there is no prospect for reconciliation" between the parties. Id. at 5. That recommendation was based on the policy objective of "mak[ing] it legally possible [for parties] to terminate dead marriages" without requiring litigants to "resort to the hypocrisy of accusing one or the other of a marital wrong recognized by our present statutes." Id. at 6. The Commission also concluded that "mutuality of fault should [\*\*912] not be a bar to divorce" because such [\*\*\*33] a restriction would only serve as an unjustified "punishment by the State." Ibid.

**[\*83]** Presumably the Legislature agreed with those conclusions because a central feature of the final Divorce Reform Act was the allowance of divorce on no-fault grounds. *Painter, supra, 65 N.J. at 205, 320 A.2d* <u>484</u>. That statutory initiative gave couples in New Jersey the right to divorce after eighteen months of separation, regardless of which party caused the breakdown in the marriage. *N.J.S.A. 2A:34-2(d).* As we noted in *Painter,* the separation provision represented a "move away"

from the concept of fault on the part of one spouse as having been solely responsible for the marital breakdown, toward a recognition that in all probability each party has in some way and to some extent been to blame." <u>65 N.J. at 205, 320 A.2d 484</u>.

However, unlike the approach taken by some other jurisdictions that eliminated fault grounds for divorce altogether, the Commission Report stated, "[t]he Commission does *not* recommend, at this time, the complete elimination of fault as a consideration in marriage termination." *Final Report, supra,* at 6-7. The Legislature followed [\*\*\*34] suit, preserving the traditional fault-based grounds for divorce, although "somewhat liberalizing the requisites for their availability." *Id. at 205-06, 320 A.2d 484*.

In addition to the Commission's no-fault based proposals, the *Final Report* and proposed bill also briefly addressed the relationship between fault and alimony. The Commission noted that "fault, where so asserted as a ground for relief, *will be a proper consideration for the judiciary in dealing with alimony and support." Id.* at 7 (emphasis added). The proposed bill language presented by the Commission reflected that position:

In all actions for divorce, divorce from bed and board, or nullity, the court may award alimony to either party and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable, and just.

[*Id.* at 93, 112 (stating proposed language for <u>*N.J.S.A.* 2A:34-23</u>)(emphasis [\*\*\*35] added).]

In its comments on the bill's alimony provisions, the Commission explained:

**[\*84]** [A]n attempt is made by [the proposed language] to direct the courts' attention to economic factors and the duration of the marriage as primary considerations in setting an amount of alimony that is fit, reasonable, and just. The court retains discretion, the factors enumerated are but guidelines, but their importance is stressed.

The last sentence of the proposed amendment permits the court to deny alimony to a spouse who is guilty of one of the fault grounds for divorce. As long as fault grounds are retained, it is traditional logic that fault also should affect judicial discretion in awarding alimony. After further study a new Commission may conclude that fault has no place in either the provision of grounds for divorce or in determining alimony but for the time being the substance of existing law is retained.

[Final Report, supra, at 94-95 (emphasis added).]

In an Appendix to the Final Report, the Commission recognized the tension between considering fault in awarding alimony and the modern notion of no-fault divorce. [\*\*913] Id. at 129-30. According to the Commission, [\*\*\*36] "the concept of fault is prominent in the determination of alimony" in many jurisdictions and, therefore, litigating the question of fault may be "necessary." Id. at 130. Although the Commission noted that recent trends gave greater weight to other factors, such as "the needs of the parties and their private estates and earning capacities," it apparently viewed the retention of fault-based grounds for divorce as an obstacle to the development of that trend in New Jersey. It concluded that "perhaps the penalty should fit the 'crime,' i.e., the flagrant offender, whether plaintiff or defendant (husband or wife) may be subject to equitable principles when alimony, custody and property rights are determined." Id. at 8. The Commission did not, however, further define flagrancy.

The Legislature adopted the relevant language in the Commission's proposed bill, word for word, in <u>N.J.S.A.</u> <u>2A:34-23(g)</u>, evidencing its apparent intention that courts should have discretion to consider fault in awarding alimony. Whether it incorporated the notion of the "flagrant offender" referred to by the Commission is unclear, as is the Legislature's intent in respect of [\*\*\*37] how the court is to calculate the impact of fault on an alimony award.

[\*85] Since the enactment of <u>N.J.S.A. 2A:34-23</u>, and despite the Commission's stated hope that further study would refine the subject, no subsequent body has been charged with the duty of revisiting the fault-alimony connection and the language of the statute has remained unchanged in the face of several statutory amendments over the years. <sup>1</sup> That is the legislative backdrop of our inquiry.

D.

Judicial interpretations of N.J.S.A. 2A:34-23(g) have

varied. In <u>Greenberg v. Greenberg, 126 N.J. Super. 96,</u> <u>99-100, 312 A.2d 878 (App.Div.1973)</u>, the trial court increased the amount of alimony to be awarded to an economically dependent wife because her husband's extreme cruelty caused the dissolution of the marriage. The Appellate Division reversed, characterizing [\*\*\*38] the economic roots of alimony as its sole basis, holding <u>N.J.S.A. 2A:34-23(g)</u> fault neutral and declaring that it "does not bespeak legislative intendment that marital misconduct may generate an award for alimony in excess of that which might be supported by longestablished and traditional bases for such grants." <u>Greenberg, supra, 126 N.J. Super. at 99, 312 A.2d 878</u> (emphasis added).

The following year, in <u>Chalmers v. Chalmers, 65 N.J.</u> <u>186, 194 n.4, 320 A.2d 478 (1974)</u>, we paraphrased the *Final Report* and observed that although it is not an appropriate criterion for consideration in equitable distribution, "fault where so stated as a ground for relief, will be a proper consideration for the judiciary in dealing with alimony and support."

Thereafter, <u>Mahne v. Mahne, 147 N.J. Super. 326, 329,</u> <u>371 A.2d 314 (App.Div.1977)</u>, presented the inverse of *Greenberg* insofar as it involved a proposal to bar alimony altogether to a blameworthy spouse. In Mahne, a divorce was granted to the husband on the fault-based ground of adultery after the wife had an affair with [\*86] her husband's "best friend." <u>Id. at 327-28, 371 A.2d</u> <u>314.</u> [\*\*\*39] The trial judge awarded alimony to the wife in the amount of \$ 300 a month. *Ibid.* The husband appealed, arguing that the award was excessive in light of his wife's marital infidelity. <u>Id. at 328, 371 A.2d 314</u>. The Appellate Division agreed, and reversed the grant of alimony based on the wife's fault.

[\*\*914] Shortly thereafter, in <u>Nochenson v. Nochenson,</u> <u>148 N.J. Super. 448, 449-50, 372 A.2d 1139</u> (<u>App.Div.1977</u>), the Appellate Division clarified its decision in <u>Mahne</u>, stating that, although dictum in that case could be read to support an alimony bar based on fault, the holding actually "went no further than accepting fault as a 'consideration' or factor in determining the grant or denial of alimony." Nochenson suggested that "lurid details" about the nature of Mrs. Mahne's adultery--though largely unspecified--justified a denial of alimony. *Ibid.* 

Later cases have taken the lead of *Chalmers* and *Nochenson* and recognized that fault may be considered as one factor in an alimony analysis but have moved in the direction of circumscribing such

<sup>&</sup>lt;sup>1</sup>The statute was amended in 1980, 1983, 1988, 1997, and 1999. See <u>N.J.S.A. 2A:34-23</u>.

consideration. For example, Lynn v. Lynn, 165 N.J. Super. 328, 333, 398 A.2d 141 (App.Div.1979), [\*\*\*40] involved a wife who "committed, by her admission, many acts of adultery, beginning a few months after her husband deserted the marital residence." The trial judge ruled in favor of the husband, a physician, and denied alimony altogether to the wife, who earned only \$ 50 a week publishing a newsletter. Id. at 346, 398 A.2d 141. In reversing and remanding for reconsideration of alimony, the Appellate Division cited Chalmers and the Final Report, and noted that although marital fault is a proper consideration, "Mrs. Lynn's admitted postdesertion sexual conduct was in our view hardly such egregious fault as to equitably preclude her right to claim alimony under the Mahne-Nochenson standard." Id. at 336-37, 398 A.2d 141. Lynn focused on the economic considerations that arise in the dissolution of a marriage, stating "that a paramount reason for alimony is to permit a wife to share in the economic rewards occasioned by her husband's income level (as opposed merely to assets accumulated), [\*87] reached as a result of their combined labors, inside and outside the home." Ibid. (internal citation and quotation marks omitted).

The Appellate Division employed a similar analysis in Gugliotta v. Gugliotta, 164 N.J. Super. 139, 140, 395 A.2d 901 (App.Div.1978), [\*\*\*41] where the husband argued that the trial judge erred in awarding alimony to the adulterous wife. In affirming, the Appellate Division acknowledged that although fault is a factor for consideration, the circumstances of the adulterous activity in that case did not warrant a denial of alimony. Ibid. Rather, the court suggested that marital fault comes into play only when it relates to the economics of a breakdown in the marriage or when there is egregious harm to the other party. In addition, that panel suggested that fault is a less important factor than "the earning capacity of the parties and the length of the marriage." Id. at 141, 395 A.2d 901. See also Ruprecht v. Ruprecht, 252 N.J. Super. 230, 240, 599 A.2d 604 (Ch.Div.1991) (holding discovery regarding alimony limited to economic aspect of defendant's adulterous acts).

We commented on the limited role of fault in an alimony analysis in <u>Kinsella v. Kinsella, 150 N.J. 276, 285, 696</u> <u>A.2d 556 (1997)</u>, where the husband filed for divorce on the ground of the wife's extreme cruelty, including allegations of verbal abuse and "bizarre behavior." The wife counterclaimed on the ground of extreme [\*\*\*42] cruelty, including allegations of physical abuse. <u>Id. at</u> <u>286, 696 A.2d 556</u>. Although the issue before us in

Kinsella was not an alimony award (the case involved the release of psychological records), we discussed the significance of fault in matrimonial proceedings after passage of the Divorce Reform Act, noting that "the practical consequences of succeeding in a divorce action on fault-based grounds, as opposed to separation, are minimal." Id. at 313-14, 696 A.2d 556 (emphasis added). [\*\*915] After recounting that fault is irrelevant to equitable distribution, child support and custody, we addressed N.J.S.A. 2A:34-23 and stated that "the focus of the decision regarding alimony is generally on the financial circumstances of the parties" and that "in today's practice, marital fault rarely enters into the calculus of an alimony award." [\*88] Kinsella, supra, 150 N.J. at 314-315, 696 A.2d 556 (emphasis added).

Recapping, HN6 [1] although our case law has consistently recognized that, under our statutory scheme, fault may be considered in calculating alimony, for over a quarter of a century, courts have declined to place their imprimatur on a wide-ranging [\*\*\*43] use of fault in that context. Ruprecht, for example, adopted a narrow model allowing consideration of economic fault only. Lynn and Gugliotta refused to consider nonegregious fault. Kinsella attempted to reconcile the statute with the cases by pointing out that  $HN7^{\uparrow}$  the "focus of the decision regarding alimony is generally on the financial circumstances of the parties"; "the practical consequences of succeeding . . . on fault based grounds . . . are *minimal*"; and "marital fault rarely enters into the calculus of an alimony award." Id. at 314-15, 696 A.2d 556 (emphasis added).

We reaffirm Kinsella's approach. The thirteen alimony factors listed in N.J.S.A. 2A:34-23(b) clearly center on the economic status of the parties. That is the primary alimony focus. However, the Legislature adopted both the spirit and the language of the Final Report that stated that "fault, where so asserted as a ground for relief will be a proper consideration for the judiciary in dealing with alimony and support." (Emphasis added). Thus in Kinsella we rendered congruent those seemingly discordant themes by recognizing, on the one [\*\*\*44] hand, the potential for considering fault, and on the other, the rarity of such use in an alimony analysis. That judicial gloss on the alimony statute has existed for over seven years, and reflects the direction of our jurisprudence for a much longer period. During that time, the Legislature has, on several occasions, undertaken to amend the divorce law in other respects. We take that as some indication that the Legislature is satisfied with the general approach adopted in Kinsella

and its forebears. See <u>Massachusetts Mut. Life v.</u> <u>Manzo, 122 N.J. 104, 116, 584 A.2d 190 (1991)</u>(stating <u>HN8</u>[] Legislature's failure to modify judicial determination is some evidence of legislative support for judicial construction of statute).

### [\*89] E.

It is noteworthy that the statutory provision permitting consideration of "the proofs made" in a fault-based divorce does not specify how judges are to weigh proof of fault in establishing alimony. In order to avoid the exercise of wholly unguided discretion by trial judges and in the interest of uniformity and predictability in decision-making, our task in this case is to search for a principled approach to the relationship between fault and alimony [\*\*\*45] consistent with legislative intent. To do so, we have scoured the approaches taken by our sister states. Many jurisdictions, without restriction, allow fault to be factored into an alimony award. See, e.g., Allen v. Allen, 648 So. 2d. 359 (La.1994); Hammonds v. Hammonds, 597 So. 2d 653 (Miss. 1992); Thames v. Thames, 191 Mich. App. 299, 477 N.W. 2d 496 (1991); Hegge v. Hegge, 236 N.W.2d 910 (N.D.1975). Many others prohibit any consideration of fault. See, e.g., Oberhansly v. Oberhandsley, 798 P.2d 883 (Alaska 1990); In re Marriage of Bultman, 228 Mont. 136, 740 P.2d 1145 (1987); In re Williams' Marriage, 199 N.W.2d 339 (lowa 1977). Those approaches are not particularly helpful because [\*\*916] the legislative and judicial backdrop on which our case is to be considered does not justify an all-or-nothing approach.

We have looked, as well, at the words of legal writers on the subject. Like the states, they reflect the full spectrum of approaches. For example, one commentator argues that even in the era of no-fault divorce, there should be consideration [\*\*\*46] of fault in determining alimony to morally coerce better marital conduct. Adrian M. Morse, Jr., *Fault: a Viable Means of Re-Injecting Responsibility in Marital Relations, <u>30 U. Rich. L. Rev. 605, 651</u> (1996). Another contends that legal recognition of fault may "provide protection and compensation for victims of abuse or spousal trust." Barbara Bennett Woodhouse, <i>Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era, <u>82 Geo L.J. 2525, 2529-30 (1994)</u>.* 

Other scholars counter that "the potentially valid functions of a fault principle are better served by the tort and criminal law, and **[\*90]** attempting to serve them through a fault rule risks serious distortions in the resolution of the dissolution action." Mark Ellman, *The Place of Fault in a Modern Divorce Law, 28 Ariz. St. L.J.*  773, 808-09 (1996). That view aligns with the most recent report of the American Law Institute on *Principles* of the Law of Family Dissolution: Analysis and Recommendations, supra. <u>8 Duke J. Gender L. Pol'y at</u> <u>59</u>. That report concluded that economic fault is a valid alimony factor, but that consideration of non-economic fault should [\*\*\*47] be avoided because of its deleterious effect on the dissolution action. More particularly, the ALI report notes that, in a scheme such as ours, in which alimony has economic roots,

[i]t will be the unusual case in which the fairness of the result will be improved by a judicial inquiry into the relative virtue of the parties' intimate conduct. In some [cases] the result will become less fair. And the rules that invite such misconduct claims will surely increase the cost and degrade the process in many other cases, even those in which the claim is ultimately cast aside.

#### <u>Id. at 60</u>.

We agree and hold that in cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, and the assets are inadequate to allow the other spouse to recoup her share, an appropriate savings and retirement component may be included in the alimony award.

Our conclusion flows purely from a relevance perspective. HN9 [1] "Relevant evidence" is "evidence" having a tendency in reason to prove or disprove any fact of consequence [\*\*\*48] to the determination of the action." N.J.R.E. 401; see also State v. Wilson, 135 N.J. 4, 13, 637 A.2d 1237 (1994) (noting that HN10 1 probative value of evidence is "tendency of evidence to establish the proposition that it is offered to prove"). HN11 [1] Given the economic basis of alimony, there can be no guarrel over the notion that fault that has altered the financial status of the parties is relevant in an alimony case. See, e.g., Noah v. Noah, 491 So. 2d 1124, 1126 (Fla. 1986) (holding adultery not cognizable in alimony award unless it depleted family resources); [\*91] Williamson v. Williamson, 367 So. 2d 1016, 1019 (Fla. [\*91] 1979) (holding court in alimony case may consider fault of one spouse in creating economic hardship facing couple).

The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margins of nearly every case and therefore those grounds should not be interjected into an alimony analysis. To do so would distort the application of the principles the Legislature has **[\*\*917]** adopted to secure economic justice in matrimonial cases. Moreover, without concomitant benefit, considering **[\*\*\*49]** non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship. Not only is non-economic fault nearly impossible to factor into an alimony computation, but any attempt to do so would have the effect of generating complex legal issues regarding the apportionment of mutual fault, which is present in nearly all cases. That, in turn, would result in the protraction of litigation and the undermining of the goals of no-fault divorce, again without a corresponding benefit. <sup>2</sup>

Thus we hold that <u>HN12</u> to the extent that marital misconduct affects [\*\*\*50] the economic *status quo* of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.

#### F.

The only exception to that rule is the narrow band of cases involving the kind of egregious fault alluded to in Gugliotta and Lynn. Although Gugliotta and Lynn did not define egregious fault, they left open its characterization as something more than [\*92] ordinary fault. It seems to us that, in this context, egregious fault is a term of art that requires not simply more, or even more public acts of marital indiscretion, but acts that by their very nature, are different in kind. By way of example but not limitation, California has legislatively barred alimony payments to a dependent spouse who has attempted to murder the supporting spouse. Cal. Fam. Code § 4324. Deliberately infecting a spouse with a loathsome disease also comes to mind. Underlying those examples is the concept that HN13<sup>[</sup> some conduct, by its very nature is so outrageous that it can be said to violate the social contract, such that society would not abide continuing [\*\*\*51] the economic bonds between the parties. In the extremely narrow class of cases in which such conduct occurs, it may be considered by the court, not in calculating an alimony award, but in the initial

determination of whether alimony should be allowed at all.

G.

In this case, there was no allegation that James's marital fault had any economic consequences or that it was, in any way, egregious. Indeed the trial judge did not weigh fault in the alimony calculus. Yet, the Appellate Division relied on his marital misconduct to justify the trial judge's alimony award. Because the alimony award was a close call, (the Appellate Division stating that it "may be insufficient" to support James in the marital life style), we do not know whether the court would have reached the same conclusion in the absence of the fault consideration. We therefore reverse and remand the case to the Appellate Division for reconsideration of alimony without regard to fault, giving due deference to the trial judge's findings and conclusions.

IV

One final note on the alimony-fault intersection. This is nothing more than a case involving statutory interpretation. Neither the purposes underlying alimony, [\*\*918] the words [\*\*\*52] of the alimony statute, nor the legislative history behind the act can be said to provide [\*93] clear guidance as to the kind of fault that is to be considered in an alimony calculus. The dissent misperceives the Court's role in such a case--we are not free to abdicate our responsibility to interpret legislation consistent with its language and with precedent that supplies content to broad statutory pronouncements. Indeed, because our case law over the last thirty years has soundly rejected the wideranging use of fault and because the Legislature has declined to intervene, we take it that it is satisfied with the way our cases have construed the statute. This case codifies what has been the nearly universal practice in our courts. It is hard to fathom how the dissent can suggest that our lower courts' approach "has served us well" enough to warrant our inaction, and, at the same time, urge that we discard the very conclusion that most courts have reached: that ordinary fault should not play a part in an alimony award.

Finally, we reject the dissent's suggestion that the narrow use of fault we have approved today "will create far more mischief than it will ever resolve. [\*\*\*53] " Given the choice that has come to us as a result of a legislative ambiguity, affording matrimonial litigants more weapons to use against each other is not a decision we should make. By delimiting the kinds of fault

<sup>&</sup>lt;sup>2</sup> Some non-economic fault may be compensated in appropriate cases by the filing of a tort claim. See <u>Tevis v.</u> <u>Tevis, 79 N.J. 422, 434, 400 A.2d 1189 (1979)</u> (recognizing interspousal tort actions); <u>Brennan v. Orban, 145 N.J. 282, 305, 678 A.2d 667 (1996)</u> (holding interspousal tort action to be addressed in matrimonial action).

that may be taken into account in an alimony calculus, we have not only created a template for uniformity and predictability in decision-making but have relieved matrimonial litigants and their counsel from the need to act upon the nearly universal and practically irresistible urge for retribution that follows on the heels of a broken marriage. How that will create "more mischief" than the endless trials that will inevitably flow out of the dissent's scheme, in which the opening salvo and concomitant response in every single matrimonial case will be a replay of the grievances of the marriage, is hard to fathom.

#### V

We turn next to the issue of attorneys' fees. <u>HN14</u> [ $\uparrow$ ] In awarding attorney's fees, <u>N.J.S.A. 2A:34-23</u> requires a court "to consider [\*94] the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party." *R.* 5:3-5(1)(c) in turn provides: [\*\*\*54]

(c) Award of Attorney Fees. HN15 [1] Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of interspousal agreements relating to family type matters and claims relating to family type matters in actions between unmarried persons. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective financial circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following [\*\*\*55] factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties; [\*\*919] (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each

party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

#### R. 4:42-9(b) further provides in relevant part:

(b) Affidavit of Service. HN16 [1] Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition [\*\*\*56] of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client. For purposes of this rule, paraprofessional services shall mean those services rendered by individuals who are qualified through education, work experience or training who perform specifically delegated tasks which are legal in nature under the direction and supervision of attorneys and which tasks an attorney would otherwise be obliged to perform.

In a nutshell, HN17 in awarding counsel fees, the court must consider whether the party requesting the fees is in financial need; [\*95] whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees. [\*\*\*57] Williams v. Williams, 59 N.J. 229, 233, 281 A.2d 273 (1971) (stating when awarding counsel fees "courts focus on several factors, including wife's need, husband's financial ability to pay and wife's good faith in instituting or defending action"); Mayer v. Mayer, 180 N.J. Super. 164, 169-70, 434 A.2d 614 (App.Div.1981) (noting award of counsel fees involves critical review of nature and extent of services rendered, complexity and difficulty of issues determined, and reasonableness and necessity of time spent by counsel rendering legal services).

The parties agree, as do we, that <u>HN18</u> bad faith for counsel fee purposes relates only to the conduct of the litigation and that there is nothing in the statutory scheme to suggest that the underlying issue of marital fault is a consideration. <u>Yueh v. Yueh, 329 N.J. Super.</u> <u>447, 460-61, 748 A.2d 150 (App.Div.2000)</u>; <u>Borzillo v.</u> <u>Borzillo, 259 N.J. Super. 286, 292-93, 612 A.2d 958</u> (Ch.Div.1992).

Here, the trial judge did not explain the denial of James's application for counsel fees. Nevertheless, the Appellate Division, pursuant to an exercise of its original jurisdiction (*R. 2:10-5* [\*\*\***58**]) affirmed the denial for the following reasons:

The judge ordered plaintiff to advance to defendant counsel fees in the amount of \$ 7,000 in his *pendente lite* order dated March 23, 2001. We conclude from the evidence and the judge's other findings that [James] was financially able to pay his counsel. In light of the substantial *pendente lite* award *and the proved* [\*\*920] grounds for divorce, the judge did not abuse his discretion in ordering each party to pay their own attorney.

[(Emphasis added).]

We take the "proved grounds for divorce" language to be an unwarranted reference to marital fault. We therefore reverse the order of the Appellate Division and remand the case to that court to reconsider the issue of alimony without regard to fault.

[\*96] We are equally concerned about the claim that no Affidavit of Services was proffered by James. It is curious to us that neither the trial judge nor the Appellate Division commented on the absence of an Affidavit, if indeed that is the case. It may be that, because there was a legitimate issue over whether counsel fees were warranted at all, the parties agreed to allow the filing of an affidavit if the judge was theoretically [\*\*\*59] inclined to grant fees. We simply do not know. Because the issue of counsel fees has already been remanded for reconsideration without regard to fault, we expect the Appellate Division to resolve the issue of the missing affidavit as well.

VI

The judgment of the Appellate Division is reversed. The matter is remanded for reconsideration of the issues of alimony and counsel fees based on the principles to which we have adverted.

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, and ALBIN join in JUSTICE LONG's opinion.

JUSTICE WALLACE has filed a separate, concurring opinion. JUSTICE RIVERA-SOTO has filed a separate opinion concurring in part and dissenting in part.

**Concur by:** WALLACE , JR.; RIVERA-SOTO (In Part)

## Concur

WALLACE, JR., concurring.

I concur in the result. Unlike the majority, I find no need to refine and expand upon when it is appropriate to use marital fault in determining an alimony award. I am satisfied with the view we expressed in <u>Kinsella, supra</u> that "marital fault rarely enters in the calculus of an alimony award." <u>150 N.J. at 315, 696 A.2d 556</u>. Our trial judges have consistently complied with that admonition as evidenced by the paucity of appeals in [\*\*\*60] which fault is an issue in determining the amount of the award of alimony.

Moreover, in the present case, the trial judge did not consider fault in computing the alimony award. I find no abuse of discretion in that regard.

In all other respects I concur with the majority opinion.

Dissent by: RIVERA-SOTO (In Part)

## Dissent

Justice RIVERA-SOTO, concurring in part and dissenting in part.

Today this Court announces two new rules of law concerning the interpretation and application of the Divorce Act of 1971, as **[\*97]** amended, <u>N.J.S.A.</u> <u>2A:34-1, et seq.</u>: (1) in the exercise of their statutory discretion in determining an alimony award, trial courts are now barred from considering marital fault save for "two narrow instances: cases in which the fault has affected the parties' economic life and cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice," *ante, 183 N.J. at 72, 869 A.2d at 905* and (2) in the trial court's exercise of statutory

discretion in awarding counsel fees, "marital fault is irrelevant to a counsel fee award." *Ibid.* Preliminarily, I address these issues [\*\*\*61] in that order.

My main disagreement with the majority stems from its conclusion that trial courts are to be restricted in their computation of alimony awards solely to the types of fault the majority finds abhorrent. According to the majority, this result is compelled by what the majority views as its obligation to "reaffirm Kinsella's [Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1997)] approach." Ante, 183 N.J. at 88, 869 A.2d at 915. I simply cannot read Kinsella's dicta in the same manner [\*\*921] or with the same import the majority does. I also cannot ignore the plain reading of a statute, disregard completely its clear legislative history and jettison over thirty years of our own jurisprudence. Further, this Court is not the proper forum for the relief sought, as it should be sought from the Legislature. Finally, even assuming that the majority's legal analysis is correct, that the majority's conclusion is consonant with the statute and its legislative and decisional history, and that this branch of government is the proper forum for this decision, the construct tendered by the majority is unworkable.

As to the latter issue, while I concur with the majority's [\*\*\*62] conclusion that "marital fault is irrelevant to a counsel fee award," I do so for reasons different from those espoused by the majority. In my view, the only factors relevant to a counsel fee award are those specifically enumerated in the Divorce Act of 1971. I also concur with the majority's conclusion that it is unclear whether the [\*98] time for the filing of an affidavit of services had passed and, hence, a remand on that issue is appropriate.

Ι.

The majority's recitation of the facts fairly presents the context for this matter. I highlight only the fact that plaintiff and defendant financed their early-retirement marital lifestyle from over \$ 2,000,000 in gifts plaintiff's father gave solely to her over time and which, at her father's direction, plaintiff retained as her separately titled property.

II.

I address first the limited issue on which I concur in the majority's conclusions: that marital fault is irrelevant to an award of counsel fees. In my view, however, that conclusion does not end the inquiry. The trial court's obligation to consider an award of counsel fees is rooted in the Divorce Act of 1971 itself:

Whenever any other application is made to a court [\*\*\*63] which includes an application for pendente lite or final award of counsel fees, the court shall determine the appropriate award for counsel fees, if any, at the same time that a decision is rendered on the other issue then before the court and shall consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party.

[N.J.S.A. 2A:34-23 (emphasis supplied).]

Under the enabling statute, then, the trial court must consider three separate factors when determining the award, if any, of counsel fees: "the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party." *Ibid.* Those shall be examined separately.

*Rule* 4:42-9(*b*) and (*c*) specifically, clearly, and unequivocally set forth the proof requirements on any application for counsel fees. There is nothing permissive about the dictates of *Rule* 4:42-9; its command is mandatory and compliance with its terms is not optional. When, as here, [\*\*\*64] the matter in issue is a "family action," [\*99] *Rule* 5:1-2(*a*) imposes additional requirements on an application for counsel fees.

On the record before us, it appears, at first blush, that defendant eschewed compliance with both *Rule 4:42-9* and *Rule 5:3-5(c)*. However, because we are unable to ascertain the reason for that failure of proof, a limited remand is appropriate. Nevertheless, this remand should not be an invitation for a *nunc pro tunc* submission of an affidavit of services; if an affidavit of services should have been filed and [\*\*922] was not, it should not be considered now and nothing in the majority's opinion should be read so as to authorize any untimely affidavit of services.

In sum, while I agree that the concept of marital fault is irrelevant to an award of counsel fees, my concurrence stems from my view of what the Divorce Act of 1971 and our Rules of Court specifically enumerate as relevant to a counsel fee award, and not on any notion of forgiving a party's unexplained failure to bear its clearly established burden of proof. Those principles, and those [\*\*\*65] principles alone, should govern the remand on counsel fees.

III.

This brings me to the core issue on appeal: can marital fault be considered by the trial court in an alimony award and, if so, to what extent. As noted earlier, the majority concludes that trial courts are barred from considering marital fault save for "two narrow instances: cases in which the fault has affected the parties' economic life and cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice." *Ante, 183 N.J. at 72, 869 A.2d at 905.* I respectfully disagree.

#### Α.

As the majority properly points out, the interrelationship between marital fault and alimony is well engrained in our system. From its adoption, the Divorce Act of 1971 specifically provided [\*100] that, "[i]n all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just." N.J.S.A. 2A:34-23g. The Divorce Act of 1971 enumerates the grounds for divorce; having [\*\*\*66] begun with the 1907 grounds for divorce of adultery and desertion, L. 1907, c. 216, § 2, p. 474, to which extreme cruelty was added in 1923, L. 1923, c. 187, § 1, p. 494, they now also include separation, voluntarily induced drug or alcohol addiction, institutionalization for mental illness for more than twenty-four consecutive months, incarceration for eighteen or more consecutive months, and nonconsensual voluntary deviant sexual conduct. L. 1971, c. 217, § 11, p. 1075 (codified at N.J.S.A. 2A:34-2). Eliminating separation from the list, then, means that, under the plain language of the Divorce Act of 1971, "the court may consider also the proofs made in establishing [adultery, desertion, extreme cruelty, voluntarily induced drug alcohol addiction, or institutionalization for mental illness for more than twenty-four consecutive months, incarceration for eighteen or more consecutive months, and nonconsensual voluntary deviant sexual conduct] in determining an amount of alimony or maintenance that is fit, reasonable and just." N.J.S.A. 2A:34-23.

### Β.

This commonsense reading of the Divorce Act of 1971 is buttressed [\*\*\*67] by its legislative history. During the late 1960's, New Jersey considered whether to update its then-dated divorce laws, some of which harkened back to 1907 and had most recently been amended in

1948. As a result, in 1967, New Jersey legislatively created the New Jersey Divorce Law Study Commission. *L.* 1967, *c.* 57, as amended *L.* 1968, *c.* 170 and *L.* 1969, *c.* 25. The statutory duty of the Divorce Law Study Commission was

to study and review the statutes and court decisions concerning divorce and nullity of marriage and related matters, particularly as contained in Title 2A of **[\*\*923]** the New Jersey Statutes as amended and supplemented and other legislative enactments, **[\*101]** relating to the said subject matter and to study the advisability and practicality of creating a family law court.

[L. 1967, c. 57, § 4].

See also Public Hearing before the New Jersey Divorce Law Study Commission, at 1 (Jan. 30, 1969) (1969 Hearing) (The purpose of the Divorce Study Commission is to engage in "the study and review of the statutes and court decisions concerning divorce, annulity [sic] of marriage and related matters."). The charge of the Divorce Law Study Commission was clear: [\*\*\*68]

The commission may meet and hold hearings at such place or places as it shall designate during the sessions or recesses of the Legislature and shall report its findings to the governor and the Legislature accompanying the same with any legislative bills which it may desire to recommend for adoption by the Legislature on or before January 13, 1970, or as soon thereafter as may be possible.

[*L*. 1969, *c*. 25, § 1 (amending *L*. 1967, *c*. 57, § 8 and *L*. 1968, *c*. 170, § 1).]

Whether marital fault should be retained as an element of alimony was a matter of debate before the Divorce Law Study Commission, with strong opposition advanced against retaining marital fault as part of the alimony formula. See 1969 Hearing, at 71 ("[T]he alimony concept should be retained, but it should not be awarded on the basis of fault."); *id.* at 26A ("I would try to eradicate the fault element because this is what perverts and distorts alimony in many states.").

In its final report, the Divorce Law Study Commission struck a compromise. It started from the premise that "fault, where so asserted as a ground for relief [for divorce], will be a proper consideration for the judiciary in dealing [\*\*\*69] with alimony and support," New Jersey Divorce Law Study Commission, *Final Report to the Governor and the Legislature*, at 7 (May 11, 1970)

(*Final Report*), and concluded with the aspirational thought that "perhaps the penalty should fit the 'crime,' i.e., the flagrant offender, whether plaintiff or defendant (husband or wife), may be subject to equitable principles when alimony, custody and property rights are determined." *Id.* at 8. That conclusion, however, was couched in terms of what the Commission thought the Legislature--and not the judiciary--should consider in connection with future changes to the Divorce Law. *Ibid.* 

**[\*102]** The compromise reached by the Divorce Law Study Commission was straightforward and fairly grounded on the Divorce Law Study Commission's recommendation that a new "no fault" ground for divorce--separation--be adopted as part of New Jersey's legal landscape. ("This revision proposes that <u>2A:34-23</u> be amended to permit the fault of the parties to be considered in awarding alimony but that such element should be excluded when the divorce is based upon the new separation ground." *Id.* at 64-65.) The *Final Report's* conclusions on this matter **[\*\*\*70]** are worthy of review at length:

The last sentence of the proposed amendment permits the court to deny alimony to a spouse who is guilty of one of the fault grounds for divorce. As long as fault grounds are retained, it is traditional logic that fault also should affect judicial discretion in awarding alimony. After further study a new Commission may conclude that fault has no place in either the provision of grounds for divorce or in determining alimony but for the time being the substance of existing law is retained.

[\*\*924] Where both parties make out a ground for divorce the court *may* deny alimony to either party. There is no automatic bar, as in New York, nor disregard of matrimonial fault, as under the new California law. Thus, the adulterous, deserting, or extremely cruel wife may be deprived of alimony at the court's discretion. Fault is irrelevant, however, where the non-fault ground of separation is the ground for divorce, and in such cases the economic factor and the duration of the marriage will be the determinants as to alimony.

The objective of the proposed amendment is to adapt <u>section 2A:34-23</u> to the new and revised grounds for divorce with the least possible [\*\*\*71] amount of disruption pending a full scale study by a new Commission of the present law of alimony and matrimonial property. The major change in policy is the granting of discretion to award alimony where both parties make out a cause for divorce. In other words, giving cause for divorce would not be an automatic bar to alimony where there was actual need and ability to pay, but the court may consider it in the exercise of its judicial discretion. In the case of the non-fault separation ground, it appears to be logically consistent to make fault irrelevant both as to the ground and the possible grant of alimony.

[*Id.* at 94-95 (emphasis in the original and supplied).]

The Divorce Law Study Commission thus expressed a well-founded confidence in our trial courts, and therefore commended marital fault as a factor to be considered by the trial court in the exercise of its discretion in determining alimony. The Divorce Law Study Commission emphasized that any future consideration of whether fault plays a part in an alimony award was reserved to [\*103] the Legislature, either directly or by again creating a Commission to examine the question.

When the Legislature considered the work [\*\*\*72] and recommendations of the Divorce Law Study Commission, it also heard from individual members of the Divorce Law Study Commission. Among the matters on which the Legislature focused was the retention of fault as a factor in alimony awards. In response to a question from the Chairman of the Assembly Judiciary Committee, the then-Chairman of the Divorce Law Study Commission made clear that:

[t]he three factors that will be considered [in determining alimony] in all cases are: actual need of both parties, ability to pay or resources of both parties, and the duration of the marriage. Where fault is introduced under one of the traditional grounds, whether affirmatively or by way of defense, that will be the fourth factor to be considered by the court. That was a policy judgment by the Commission, espoused very vigorously by Senator Beadleston that the Commission ultimately adopt it, that under certain circumstances fault should appropriately be considered. [Statement of Assemblyman Richard W. DeKorte, Chairman of the Divorce Law Study Commission, Public Hearing before the New Jersey Legislature, Assembly Judiciary Committee, on Assembly Bill No. 1100, at 30A-31A (Oct. 30, 1970). **[\*\*\*73]** ]

Based on the recommendations of the Divorce Law Study Commission, the Legislature adopted <u>N.J.S.A.</u> <u>2A:34-23g</u> which, as noted earlier, now as then provides

that "[i]n all actions for divorce other than those where judgment is granted solely on the ground of separation [that is to say, either adultery, desertion, extreme cruelty, voluntarily induced drug or alcohol addiction, institutionalization for mental illness [\*\*925] for more than twenty-four consecutive months, incarceration for eighteen or more consecutive months, and nonconsensual voluntary deviant sexual conduct] the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just." N.J.S.A. 2A:34-23g. It is most telling that, when it enacted N.J.S.A. 2A:34-23g, the Legislature adopted--word for word--the language submitted by the Divorce Law Study Commission. Compare N.J.S.A. 2A:34-23g with Final Report, at 93, 112. Since then, and although the Legislature has revisited the alimony and support provisions of the [\*\*\*74] Divorce Act of 1971 five different times since its enactment--in 1980, 1983, 1988, [\*104] 1997 and 1999--the Legislature chose not to amend the language now codified at N.J.S.A. 2A:34-23g.

It is on this rather plain expression of legislative intent that today we engraft a new--and, in my view, wholly unwarranted--limitation, requiring that <u>N.J.S.A. 2A:34-23g</u> now be read as follows:

In all actions for divorce where judgment is granted on the fault ground of adultery, desertion, extreme cruelty, voluntarily induced drug or alcohol addiction, institutionalization for mental illness for more than 24 consecutive months, incarceration for 18 or more consecutive months, and nonconsensual voluntary deviant sexual conduct, but not separation, the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just, *but only to the extent that such fault ground either (1) affected the parties' economic life or (2) so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice.* 

#### [added [\*\*\*75] language emphasized.]

As the preceding analysis demonstrates, this new limitation is unfounded in either the enabling statute or in its legislative history. It is similarly unfounded in the over thirty years of jurisprudence emanating from the Divorce Act of 1971.

Divorce Act of 1971; we did so in a quartet of cases handed down the same day and we addressed the scope of fault in determining alimony in three of these four cases. <sup>3</sup> In the first of these, <u>Scalingi v. Scalingi, 65</u> <u>N.J. 180, 320 A.2d 475 (1974)</u> (per curiam), we sustained an alimony award against a claim that it was excessive in light of the equitable distribution made. Rejecting that argument, we stated:

[\*105] We are dealing with the breakup of a 35year marriage with defendant found to be the marital wrongdoer. Plaintiff, now 60 years of age, no longer has the comforts of the marital home which had been provided by defendant. Considering these factors as well as the respective incomes of the parties, it has not been shown that the order for support, as presently applied, is arbitrary or unreasonable.

[*Id. at 184, 320 A.2d 475* [\*\*\*76] (citation omitted).]

Clearly, then, at our very first opportunity to do so, we endorsed the application of [\*\*926] marital fault to an award of alimony under the Divorce Act of 1971.

We next decided <u>Chalmers v. Chalmers, 65 N.J. 186,</u> <u>193-94, 320 A.2d 478 (1974)</u>, where we distinguished between alimony and equitable distribution under the Divorce Act of 1971, noting that "[o]ur amended statute . . . mentions the grounds for a divorce (other than separation) as a consideration in determining an amount of alimony or maintenance[.]" In *Chalmers,* we also [\*\*\*77] noted that the *Final Report* states that "fault where so stated as a ground for relief, will be a proper consideration for the judiciary in dealing with alimony and support." <u>Id. at 194 n.4, 320 A.2d 478</u>.

In the last relevant case of the original quartet, <u>Painter</u> <u>v. Painter, 65 N.J. 196, 205, 320 A.2d 484 (1974)</u> (citing <u>N.J.S.A. 2A:34-23</u>), we made clear that

[a]limony may be awarded to either spouse. Except where the judgment for divorce is granted on the no-fault ground of separation, the court may, in

C.

<sup>&</sup>lt;sup>3</sup>The fourth case in this quartet, <u>Rothman v. Rothman, 65 N.J.</u> <u>219, 320 A.2d 496 (1974)</u>, does not consider the issue of fault as a factor in determining alimony, as it deals almost exclusively with equitable distribution. However, it does contain a discussion of the relationship between equitable distribution and alimony that, while not directly on point, assists in informing the discussion here. <u>Id. at 228-30, 320</u> <u>A.2d 496</u>.

awarding alimony, consider the proofs submitted in support of the ground upon which the judgment of divorce is made to rest.

This brings us quickly to <u>Kinsella v. Kinsella, 150 N.J.</u> <u>276, 696 A.2d 556 (1997)</u>. As even the majority acknowledges, *Kinsella* is not an alimony case, but one dealing with

whether the psychologist-patient privilege may be invoked by a patient to prevent discovery of psychotherapeutic treatment records in the context of three aspects of matrimonial litigation: a marital tort claim against the patient, an extreme cruelty claim for divorce by the patient, and a child custody [\*\*\*78] dispute between the patient and his spouse.

#### [Id. at 285, 696 A.2d 556.]

In that context, and only in the way of dicta, *Kinsella* states that "the focus of the decision regarding alimony is generally on the financial circumstances of the parties[,]" and that "[o]ur perception **[\*106]** is that, in today's practice, marital fault rarelyenters into the calculus of an alimony award." *Id. at 314-15, 696 A.2d* <u>556</u>.

The majority relies on *Kinsella* as the starting point for its analysis. However, any reliance on *Kinsella* as the basis for today's limitation on the role of fault in an alimony award is misplaced for at least two separate reasons. First, *Kinsella* itself introduces its discussion on alimony with the overriding principle that, "[a]ccording to the statute, except where the judgment is granted solely on the ground of separation, proofs made in establishing the grounds for divorce may be considered 'in determining an amount of alimony or maintenance that is fit, reasonable and just." *Id. at 314, 696 A.2d 556*. Thus, anything else *Kinsella* describes concerning alimony must be viewed through that prism.

Second, and perhaps more importantly, Kinsella [\*\*\*79] admits--much as the majority also perforce admits--that its sense that "marital fault rarely enters into the calculus of an alimony award" is entirely anecdotal, thus underscoring the need foreseen by the Divorce Law Study Commission over thirty years ago: that any future consideration of whether fault plays a part in an alimony award is properly reserved to the Legislature, either directly or by again creating a commission to study the conduct public hearings and make matter. recommendations to the Legislature. Final Report, at 95 ("The objective of the proposed amendment is to adapt

<u>section 2A:34-23</u> to the new and revised grounds for divorce with the least possible amount of disruption pending a full scale study by a new Commission of the present law of alimony and matrimonial property."). At oral argument, even defendant's counsel readily conceded that this is a matter that [\*\*927] must be addressed by the Legislature. With the party advancing the proposition here having made that concession, the proper path is clear: relief, if any, lies in the legislative, and not in the judicial, branch.

Common sense compels agreement with *Kinsella's* general observation that, "[i]n most [\*\*\*80] cases, the practical consequences of succeeding in a divorce action on fault-based grounds, as opposed [\*107] to separation, are minimal." *Kinsella v. Kinsella, supra, 150 N.J. at 313, 696 A.2d 556*. However, one cannot pick and choose among *Kinsella's* dicta, because, as *Kinsella* readily admits, the Divorce Act of 1971 retains a practical and meaningful difference between fault and no-fault divorces: the relevance of fault to alimony. *Id. at 314, 696 A.2d 556*. More to the point, as an appellate court that consistently insists that its rulings must be firmly grounded in the record, our reliance on what is admittedly anecdotal is unjustified.

Since 1977, no published decision of this Court has seen the need to address squarely the effect of N.J.S.A. 2A:34-23g on the calculation of alimony. <sup>4</sup> That absence of case law suggests strongly that everyone readily understands what the Legislature intended when it gave trial courts the discretion, but not the obligation, to consider fault proven as part of an alimony determination. In that regard, the underpinnings of the majority's analysis -- a lack of clarity as to "the Legislature's intent in respect [\*\*\*81] of how a court is to calculate the impact of fault on an alimony award," ante, 183 N.J. at 84, 869 A.2d at 913 that requires a "search for a principled approach to the relationship between fault and alimony consistent with legislative intent," ante, 183 N.J. at 89, 869 A.2d at 915 is far too slender a reed upon which to rest the jettisoning of now well-settled law.

The statutory standard embodied in *N.J.S.A. 2A*:34-23*g*, the exercise of judicial discretion, is clear and requires no additional explanation. Our trial courts have applied this standard in a manner consistent with basic principles of justice and equity, and there is no wrong

<sup>&</sup>lt;sup>4</sup> To the extent any Appellate Division decision can be read to the contrary, I would specifically disapprove it.

here that requires a remedy. Plaintiff's counsel, at oral argument, said it best: "If it's not broken, don't fix it."

D.

My objection to our new rule of law restricting the role of fault in the calculus of an alimony award is not assuaged even if I were [\*\*\*82] [\*108] to assume either that the majority's legal analysis is correct, or that the majority's conclusion is consonant with the statute and its legislative and decisional history, or that this branch of government is the proper forum for this decision. As structured, the construct tendered by the majority is unworkable.

The paradigm we adopt today undoubtedly will generate its own flood of litigation because it defies definition. As a result, it takes little imagination to foresee the unending number of claims the standard adopted today--that a party's fault "affected the parties' economic life"-will bring. Determining just what "affected the parties' economic life" means and, when proven, to what degree the parties' economic life must be affected before that fault can be considered as part of an alimony calculus will add a highly combustible additive to the already overly-charged atmosphere of matrimonial litigation. The imprecision and resulting confusion of this new standard is brought into sharp focus when it is [\*\*928] gauged against the standard it seeks to supplant, and a standard in which our trial courts are well versed: the exercise of discretion.

Similarly, determining what constitutes [\*\*\*83] "fault [that] so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice" is too subjective a standard, converting the analysis into a simple question of whose personal value system will prevail. It is not a stretch to conclude that having your spouse engage in sexual relations with your friend and yet still demand that you support his lifestyle after divorce at the rate of over \$ 150,000 per year "confound[s] notions of simple justice." If that is not what this standard means, then it is meaningless. If, on the other hand, that is precisely what this new standard means, then we have created a new and unproven process to achieve a result already reached by tried-and-true methods.

IV.

After thirty uninterrupted years of consistent jurisprudence, we are called on to discern the Legislature's intent when it stated, in **[\*109]** rather plain words, that "the court may consider also the proofs

made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just" in determining alimony in all fault-based actions for divorce. N.J.S.A. 2A:34-23g. The Legislature [\*\*\*84] could not have been clearer. To claim that "the statutory provision permitting consideration of 'the proofs made' in a fault-based divorce does not specify how judges are to weigh proof of fault in establishing alimony," ante, 183 N.J. at 89, 869 A.2d at 915 misses the point persuasively made by the Legislature: the effect of fault on the calculus of alimony is entrusted to the sound discretion of the trial court. The Legislature commanded that, in the exercise of discretion, the trial court should consider all fault grounds proved, and not just the limited categories we ratify today. Whether, in the exercise of that discretion, trial courts give greater or lesser weight to one aspect of fault over another is precisely what the exercise of discretion is all about. Given the clear statutory intent, it is improper to judicially codify legislatively-rejected limits on that exercise of discretion.

In the final analysis, I would not jettison that which has served us well for over thirty years. If there is a groundswell of opposition to the terms of the Divorce Act of 1971 or the manner in which it has been applied. it has certainly escaped everyone's attention--including that of the practitioners [\*\*\*85] who toil in the area daily. By the same token, in light of both the clear message of the drafters of the Divorce Act of 1971, the clear language of the Divorce Act itself, and over thirty years of consistent judicial interpretation by this Court, the Divorce Act should be read to mean precisely what it says. Defendant's complaint should not be addressed to this Court, but to the forum where it properly belongs: the Legislature. We should analyze this case under the traditional abuse of discretion standard and determine that, under the circumstances, the trial court did not abuse its discretion. Anything more exceeds our proper role.

For the foregoing reasons, I respectfully dissent.

**End of Document** 

## Innes v. Innes

Supreme Court of New Jersey April 24, 1989, Argued ; January 17, 1990, Decided No Number in Original

#### Reporter

117 N.J. 496 \*; 569 A.2d 770 \*\*; 1990 N.J. LEXIS 9 \*\*\*

FRANK T. INNES, PLAINTIFF-APPELLANT, v. NITA L. INNES, DEFENDANT-RESPONDENT

## **Core Terms**

alimony, pension, equitable, divorce, spouse, modification, retirement, property-settlement, marriage, marital, retroactively, modify, double-counting, termination, monthly, pre-existing, annuity, Sex, negotiating, decree, alimony-modification, doubledipping, anticipated, equitable-distribution, recommended, curative, matrimonial, settlement, disabled, sponsors

Under the divorce decree, defendant was awarded a portion of plaintiff's pension, and an agreement between the parties stated that both relinquished further rights to each other's pensions. The trial court determined that plaintiff's termination of employment constituted a change in circumstances sufficient to result in a reduction in alimony. Plaintiff contended that the trial court improperly considered the income he received from his pension and an annuity. The appellate court rejected this contention. The court affirmed in part and reversed in part, holding that N.J. Stat. Ann. 2A:34-23, amended by 1988 N.J. Laws, ch. 153, § 3, prevented payments generated by pension benefits that had been previously equitably distributed from being considered income for the purposes of alimony modification. The court also held that the payments from the annuity plaintiff purchased with the proceeds of the equitabledistribution award from the sale of the family home were not "income" to the extent that they reflect the principal, as opposed to income generated by it.

## Case Summary

### **Procedural Posture**

Plaintiff husband sought review of an order of the Appellate Division (New Jersey) which reversed and remanded a trial court's order of modification of alimony under <u>N.J. Stat. Ann. 2A:34-23</u>, amended by 1988 N.J. Laws, ch. 153, § 3, in favor of defendant wife, thereby allowing the trial court to consider plaintiff's pension and annuity in its modification.

### Outcome

The order affirming the trial court's decision was reversed as to plaintiff husband's pension and affirmed as to the remand. Payments generated by pension benefits that had already been equitably distributed were not "income" for the purpose of alimony modification. Payments from the annuity purchased with the proceeds of an equitable-distribution award might have been "income" to the extent that they reflected interest on the principal.

#### Overview

Plaintiff husband sought modification of the alimony he was required by divorce decree to pay defendant wife.

## LexisNexis® Headnotes

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>*HN1*</u> Marital Termination & Spousal Support, Dissolution & Divorce

In divorce actions, courts may award alimony as the circumstances of the parties and the nature of the case shall render fit, reasonable, and just. <u>N.J. Stat. Ann. §</u> 2A:34-23.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN2</u>[**\***] Marital Termination & Spousal Support, Spousal Support

The basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation. The supporting spouse's obligation is set at a level that will maintain that standard.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN3</u>[ Marital Termination & Spousal Support, Spousal Support

Although the supporting spouse's current income is the primary source considered in setting the amount of the award, his or her property, capital assets, and capacity to earn the support awarded by diligent attention to his or her business are also proper elements for consideration.

Evidence > Inferences & Presumptions > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal

Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

## HN4[1] Evidence, Inferences & Presumptions

After initial alimony awards have been made, courts may modify alimony orders as circumstances may require. *N.J. Stat. Ann. § 2A:34-23.* The party seeking modification has the burden of demonstrating a change in circumstances warranting relief from the support or maintenance obligations.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN5</u>[ Modification & Termination, Changed Circumstances

One changed circumstance that warrants modification of the alimony order is an increase or decrease in the supporting spouse's income.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>*HN6*[</u>] Spousal Support, Modification & Termination

When an alimony order is reviewed, the primary factors assessed to determine whether the former marital standard of living is being maintained are: the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard. Other criteria include whether the change in circumstance is likely to be continuing and whether the agreement or decree explicitly provided for the change. Temporary circumstances are an insufficient basis for modification. Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>*HN7*</u>[] Modification & Termination, Changed Circumstances

The modification of alimony is best left to the sound discretion of the trial court.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

<u>HN8</u>[**土**] Spousal Support, Modification & Termination

See <u>N.J. Stat. Ann. 2A:34-23</u>, amended by 1988 N.J. Laws, ch. 153, § 3.

Governments > Legislation > Interpretation

## **<u>HN9</u>**[**±**] Legislation, Interpretation

In construing a statute one first considers its plain language.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Property Distribution > Equitable Distribution > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

<u>*HN10*</u>[**\***] Spousal Support, Modification & Termination

A portion of pension payments flowing from benefits

earned after divorce may be considered in determining changed circumstances, but those attributable to benefits earned during the marriage and subject to equitable distribution may not.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Governments > Legislation > Effect & Operation > Amendments

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN11[</u>📩] Spousal Support, Modification & Termination

The plain language of the amendment states that it takes effect on September 1, 1988, and shall apply only to orders and judgment entered after that date, and extends its reach to any order, including a modification of an original order that is entered after September 1, 1988. <u>N.J. Stat. Ann. 2A:34-23</u>, amended by 1988 N.J. Laws, ch. 153, § 3.

Family Law > Marriage > Nature of Marriage

Governments > Legislation > Interpretation

## HN12

In statutory interpretation, avoid constructions that render any part of a statute inoperative, superfluous, or meaningless.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

<u>HN13</u> Spousal Support, Modification & Termination

<u>N.J. Stat. Ann § 2A:34-23</u> is to be retroactively applied because that interpretation is necessary to make it workable and give it its most sensible interpretation.

Civil Procedure > Settlements > Settlement Agreements > Incorporation in Judgment

Family Law > ... > Property Distribution > Equitable Distribution > Property Settlements

Governments > Legislation > Effect & Operation > Prospective Operation

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

# <u>*HN14*</u> Settlement Agreements, Incorporation in Judgment

The test of expectation is whether the parties relied on prior law to their detriment, such that retroactive application would cause a deleterious and irrevocable result.

Civil Procedure > Settlements > Settlement Agreements > Modification of Agreements

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

# <u>*HN15*</u> Settlement Agreements, Modification of Agreements

There is no reason to distinguish between judicial decisions and consensual agreements when changed circumstances call for the modification of either.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

## <u>HN16</u> Dissolution & Divorce, Property Distribution

Payments generated by pension benefits that had been previously equitably distributed are not income for purposes of alimony modification.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN17</u>[📩] Dissolution & Divorce, Property Distribution

Annuity payments purchased with the proceeds of an equitable-distribution award are not income for the purpose of modification of alimony to the extent that they reflect return of the principal as opposed to income generated by the principal.

**Counsel:** [\*\*\*1] James J. Byrnes argued the cause for appellant (*Byrnes & Guidera*, attorneys).

John A. Craner argued the cause for respondent (*Libby E. Sachar*, attorney; *Norman W. Albert*, of counsel; *Libby E. Sachar, Norman W. Albert*, and *John A. Craner*, on the briefs).

James P. Yudes submitted a brief on behalf of *amici* curiae Family Law Section and Women's Rights Section of the New Jersey State Bar Association.

**Judges:** For affirmance in part, reversal in part -- Chief Justice Wilentz and Justices Handler, Pollock and Garibaldi. For concurrence in part, dissent in part --Justices O'Hern and Stein. The opinion of the court was delivered by Garibaldi, J. Stein, J., concurring in part and dissenting in part. Justice O'Hern joins in this opinion. O'Hern, J., concurring in part and dissenting in part. Justice Stein joins in this opinion.

#### **Opinion by:** GARIBALDI

## Opinion

**[\*500] [\*\*772]** We hold today that payments generated by pension benefits that were previously equitably distributed are not "income" for purposes of reconsidering the pensioner's alimony obligations. Our decision is based on the recent amendment to <u>N.J.S.A.</u> <u>2A:34-23</u>, the pre-existing case law and the specific language **[\*\*\*2]** of the parties' agreement.

After thirty-one years of marriage, Frank T. Innes, plaintiff, filed a complaint for divorce on October 8, 1982. The ground for the complaint was the continuous separation of Innes and his wife-defendant, Nita L. Innes, since June 2, 1974. A Dual Judgment of Divorce was entered on March 26, 1984. The judgment incorporated the terms of a property-settlement agreement reached between the parties.

The agreement required plaintiff to pay defendant \$ 650 per month in alimony and \$ 100 in child support directly to the unemancipated daughter of the marriage. Three other children born of the marriage were emancipated at the time of the divorce. Plaintiff also agreed to maintain defendant as beneficiary on a life-insurance policy with a face amount of \$ 50,000.00.

The agreement also disposed of the parties' two major assets, the marital home and the husband's pension. Defendant could live in the former marital residence until March 1, 1985, when the house would be sold and the net proceeds divided equally between the parties. Plaintiff agreed to pay defendant an equitable (distribution) share of his pension, \$ 19,000, less forty percent of the value of the [\*\*\*3] defendant's existing pension. Plaintiff was to pay defendant this money from the proceeds of the sale of the marital home. The agreement also contained a [\*501] provision that stated: "Except as otherwise set forth herein each of the parties hereby waives and relinquishes all rights to participate in the assets including pension funds of the other party."

The marital home was sold in 1985; the plaintiff received \$ 39,028.70 and defendant received \$ 74,042.52. The

difference between the amounts, \$ 35,000.00, is attributable to the cash settlement paid to defendant representing the value of the plaintiff's pension plan.

On June 14, 1985, the plaintiff was unexpectedly fired by his employer. He was sixty-one years of age at the time of his termination. His monthly income was reduced from \$ 2,054 to \$ 879, which he received in unemployment compensation. After his discharge plaintiff made every effort to find new employment but was unable to do so.

Unable to procure a new position, plaintiff filed a motion for an order terminating **[\*\*773]** alimony on June 28, 1985. Defendant filed a Notice of Motion for Aid to Litigant on December 4, 1985, based on plaintiff's failure to pay alimony **[\*\*\*4]** pursuant to the divorce decree. On December 31, 1985, the trial court denied the motion to terminate alimony but entered an order finding that plaintiff had failed to comply with the divorce judgment. Plaintiff appealed both orders, and on May 7, 1986, the case was remanded to the trial court for reconsideration because plaintiff asserted a change in circumstances after the entry of the two orders.

In December 1985, when his unemployment benefits ceased, the plaintiff elected to receive social-security benefits of \$ 622 per month. In April 1986 the plaintiff elected to receive his pension benefits. At that time he also purchased a \$ 24,000 annuity from the College Retirement Equity Fund using the proceeds he had received from the sale of the marital home. The monthly income from the pension, \$ 720.00, and the annuity, \$ 160.00, totalled \$ 880. He also received approximately \$ 139.00 in income from other savings. He had assets of \$ 19,580.

**[\*502]** Defendant, who was disabled, had moved to Florida by the time of the hearing. She received monthly income from the University of Pennsylvania of \$ 420.00, disability social-security benefits of \$ 280.00, and approximately \$ 400.00 [\*\*\*5] per month from a cash management account. She had approximately \$ 68,000.00 in assets.

The trial court determined that plaintiff's termination of employment constituted a change in circumstances sufficient to result in a modification of the alimony award. Accordingly, the trial court reduced the alimony from \$ 650 to \$ 550 per month, beginning April 1, 1987, and required plaintiff to pay the defendant \$ 100 per month toward the arrearage until it was paid in full, and \$ 1,200 for defendant's counsel fees. In making its decision, the trial court considered the fact that the cost of living had increased, plaintiff's income had decreased, and plaintiff had paid \$ 200 per month to his daughter while she was attending college.

Plaintiff appealed, contending that in determining alimony the trial court should not have considered the income he received from his pension and annuity. Including that income, he argued, constituted an inequitable form of "double-dipping," inasmuch as it flowed from assets that had already been equitably distributed. He relied on D'Oro v. D'Oro, 187 N.J.Super. 377 (Ch.Div.1982). aff'd, 193 N.J.Super. 385 (App.Div.1984), which prohibits such [\*\*\*6] The Appellate Division reversed and consideration. remanded, 225 N.J.Super. 242 (1988), because the trial court had made no findings concerning the parties' circumstances in establishing the alimony award. However, the Appellate Division rejected plaintiff's argument that his pension and annuity should not be considered in determining alimony. In its holding it specifically rejected the D'Oro rule. Id. at 247. Judge Long dissented from so much of the decision as held that pension and annuity payments were income for the purposes of determining alimony. Id. at 248-50. She found that

[\*503] [p]laintiff and defendant divided the pot of marital assets at the time of the divorce. In so doing, defendant took her share of plaintiff's pension in a lump sum. Plaintiff now receives his share of the pension periodically. Periodicity does not change the nature of the transaction or the character of the pension payments as assets and This is not a situation in which a not income. distributed asset generates or throws off income. In that event, the income would clearly be a part of the post-judgment alimony base. Here, the pension payments sought to be tapped by [\*\*\*7] defendant as alimony are plaintiff's equitable share of the marital asset; as such they are not includible in the calculation of available income for an alimony award. It is not the fact that the pension is not income. Simply stated, no asset, however derived, should be considered part of the income available for alimony purposes. [Id. at 248-49].

The recent amendment to <u>N.J.S.A. 2A:34-23</u>, which codifies the holding in *D'Oro*, had not been enacted when the Appellate Division decided the case. Accordingly, neither [\*\*774] Appellate Division opinion discussed the applicability of the amendment to this case.

Plaintiff filed an appeal of right pursuant to Rule 2:2-1(a)(2).

I

HN1 [ ] In divorce actions, courts may award alimony "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . ." HN2 [1] The basic purpose of N.J.S.A. 2A:34-23. alimony is the continuation of the standard of living enjoyed by the parties prior to their separation. Mahoney v. Mahoney, 91 N.J. 488, 501-02 (1982). The supporting spouse's obligation is set at a level that will maintain that standard. Lepis v. Lepis, 83 N.J. 139, 150 Although [\*\*\*8] (1980). HN3[1] the supporting spouse's current income is the primary source considered in setting the amount of the award, his or her property, capital assets, and "capacity to earn the support awarded by diligent attention to his [or her] business" are also proper elements for consideration. Bonanno v. Bonanno, 4 N.J. 268, 275 (1950).

Plaintiff is applying for a modification of the initial alimony award due to changed circumstances. <u>HN4</u> After initial alimony awards have been made, courts may modify alimony orders "as circumstances may require." <u>N.J.S.A. 2A:34-23</u>. **[\*504]** The party seeking modification has the burden of demonstrating a change in circumstances warranting relief from the support or maintenance obligations. <u>Lepis v. Lepis, supra, 83 N.J.</u> at 157; <u>Martindell v. Martindell, 21 N.J. 341, 353 (1956)</u>. <u>HN5</u> ] One "changed circumstance" that warrants modification of the alimony order is an increase or decrease in the supporting spouse's income. <u>Lepis v. Lepis, supra, 83 N.J. at 151</u>; <u>Martindell v. Martindell, supra, 21 N.J. at 355</u>.

**HN6**[**↑**] When an alimony order is reviewed, the primary factors assessed to determine whether the former marital standard of living [\*\*\*9] is being maintained are: "the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard." *Lepis v. Lepis, supra, 83 N.J. at 152*. Other criteria include whether the change in circumstance is likely to be continuing and whether the agreement or decree explicitly provided for the change. *Ibid.* Temporary circumstances are an insufficient basis for modification. *Bonanno v. Bonanno, supra, 4 N.J. at 275* (temporary unemployment not sufficient).

In this case we do not decide whether plaintiff's alimony payments should be modified. HN7[1] The modification of alimony is best left to the sound discretion of the trial court. Hence, we remand the case to the trial court to determine whether there were changed circumstances, and if so, whether there should be a modification of alimony. The issue before us is whether the trial court in determining whether plaintiff's alimony payments should be modified may consider plaintiff's pension payments. <sup>1</sup> [\*505] We hold that it may not. Our disposition of this issue is governed by the recent amendment [\*\*\*10] to N.J.S.A. 2A:34-23, pre-existing law, and the specific language of the parties' agreement. The amendment reads, in relevant part, as follows:

## <u>HN8</u>[**个**]

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by [\*\*775] that share for purposes of determining alimony. [L.1988, c. 153, § 3.]

## [\*\*\*11] <u>HN9</u>[**^**]

It is axiomatic that in construing a statute one first considers its plain language. <u>Kimmelman v. Henkels &</u> <u>McCoy, Inc., 108 N.J. 123, 128 (1987)</u>; <u>Renz v. Penn</u> <u>Cent. Corp., 87 N.J. 437, 440 (1981)</u>; <u>Sheeran v.</u> <u>Nationwide Mut. Ins. Co., Inc., 80 N.J. 548, 556 (1979)</u>. The plain language of the pertinent amendment provides that income from pension benefits that have been treated as an asset for equitable distribution purposes (those benefits reflecting work during the marriage partnership) is not to be considered in determining alimony. Conversely, under the amendment income from pension benefits earned after the marital partnership has ended may be considered. This interpretation is substantiated by Senate Judiciary Committee, *Statement to Senate*, No. 976, which provides "that when a share of a retirement benefit is treated as an asset for purpose of equitable distribution, the income generated by that share *only* is not to be considered in determining alimony." (Emphasis added).

Although the legislative history underlying the amendment is sparse, the statute sets forth no new position and simply codifies and embodies the holding and policies of the [\*\*\*12] decision in D'Oro v. D'Oro, supra, 187 N.J.Super. 377. There, consistent with Kikkert v. Kikkert, 177 N.J.Super. 471, 477-78 (App.Div), aff'd o.b., 88 N.J. 4 (1981), a wife received a one-third share of the present value of her husband's pension. The D'Oro court [\*506] reasoned that "it would be inequitable for [her] to be able to include his pension income twice for her benefit, first for a share of equitable distribution, and second for inclusion in his cash flow determination of an alimony base." 187 N.J.Super. at 379; accord HN10 [1] Staver v. Staver, 217 N.J.Super. 541, 547 (Ch.Div.1987) (portion of pension payments flowing from benefits earned after divorce may be considered in determining changed circumstances, but those attributable to benefits earned during the marriage and subject to equitable distribution may not).

The *D'Oro* holding also was based on the court's decision to promote the immediate-offset method of pension distribution. <u>187</u> *N.J.Super. at* <u>377</u>. That method was encouraged in <u>Kikkert, supra, 177</u> <u>*N.J.Super. at* <u>478</u>, to avoid the "continued strife and hostility" that arises from long-term and deferred sharing [\*\*\*13] of financial interests. We recently reaffirmed that policy in <u>Moore v. Moore, 114 N.J. 147, 162 (1989)</u>. As Judge Long acknowledged in her dissenting opinion in the instant case, the policy favoring the immediate offset method will be eviscerated if the majority opinion of the Appellate Division is adopted because</u>

[m]ost thoughtful matrimonial lawyers will advise their clients in continuing alimony cases to await the receipt of the pension for distribution at which time both spouses will receive their share in periodic payments. This will obviate the possibility that the dependent spouse will tap the asset twice. \* \* \* [Also], it will contravene the plain language of *Kikkert* encouraging such settlements. [225 *N.J.Super.* 242.]

Here plaintiff's entire pension was treated as an asset for purposes of an immediate offset equitable-

<sup>&</sup>lt;sup>1</sup>At the request of the Court, the Family Law Section and Women's Rights Section of the New Jersey State Bar Association filed an *amicus curiae* brief. The brief concluded that the recent amendment applies to initial alimony awards as well as to applications for modification of alimony, that the amendment applies retroactively to agreements entered into before the effective date of the statute, that the amendment precludes consideration on alimony-modification applications of both income attributable to the distributed share of a retirement benefit and the distributed share itself; and that neither spouse's share of a distributed retirement benefit (or earnings attributable thereto) should be considered when determining alimony.

distribution award. This distribution was consistent with <u>Moore v. Moore, supra, 114 N.J. at 162</u>, and <u>Kikkert v.</u> <u>Kikkert, supra, 177 N.J.Super. at 477</u>. Nothing in the record suggests that merely a portion of plaintiff's pension was considered marital property subject to equitable distribution. Therefore, the recent amendment [\*\*\*14] immunizes plaintiff's pension from consideration in alimony-modification determinations.

[\*507] This result is consistent with the legislative intent underlying the recent amendment. Although that specific amendment was first proposed in 1985, further amendments to N.J.S.A. 2A:34-23 and other modifications of New Jersey family and matrimonial law were addressed in the early 1980s by the New Jersey Commission on Sex Discrimination. In amending N.J.S.A. [\*\*776] 2A:34-23, the Legislature relied to a great extent on the Commission's findings. In recommending amendments to New Jersey's marriage and family law, the Commission on Sex Discrimination in the Statutes stated that its two-fold purpose was to appointment of more recommend women to commissions, boards, and agencies, and to conform all statutes and regulations to a standard of sex-neutral language. Sex Discrimination in Marriage and Family Law: New Jersey Commission on Sex Discrimination in the Statutes (2d Report, Sept.1981) at i-ii. In the introduction, the Commission reported that it found the New Jersey marriage and family-law statutes "contained many subtle forms of discrimination reflecting stereotypical attitudes [\*\*\*15] towards men's and women's roles." Id. at 2.

The recommended amendments support the Committee's expressed goal of neutralizing any language that supports sexual stereotypes. For example, N.J.S.A. 2A:34-13, the statute regarding the age at which a party can bring a matrimonial action, previously allowed a man of eighteen years and a woman of sixteen years to do so. The amended statute reads a "person" of sixteen years, eliminating the gender-based age requirement. N.J.S.A. 9:6-3 states that when a parent or guardian abuses a child, the abuser may be required to pay a monetary penalty to the wife, guardian, custodian, or trustee of the child. The recommended amendment would eliminate the silent assumption that the husband or father would normally be the abusing parent, and substituted "nonabusing parent" for "wife." The Commission also recommended changing N.J.S.A. 9:2-4, regarding parental rights to custody, to eliminate the mother's preference as custodial parent, and make custody rights completely equal between the parents.

**[\*508]** Thus, the amendments proposed by the Commission were designed to remove discrimination against women and men, and to make the **[\*\*\*16]** rights of mother and father, or wife and husband, equal in the eyes of the law. Similarly, the amendment at issue, designed to avoid double-dipping, reflects the Legislature's intent to follow the Commission's recommendation that husbands and wives be treated equally under the law.

In holding that the recent amendment applies to the instant case, we also hold that it is applicable to both initial alimony orders and modifications of earlier alimony awards. We find no support for the position of our dissenting colleagues that the amendment applies only to initial orders and not to modifications of alimony. The plain language of the amendment, the canons of statutory interpretation, and preexisting principles of matrimonial law undermine their contentions. Prior to the recent amendments to N.J.S.A. 2A:34-23, we stated that "[t]he equitable power of the courts to modify alimony and support orders at any time is specifically recognized by [that statute.]" Lepis v. Lepis, supra, 83 N.J. at 145. "As a result of this judicial authority, alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and [\*\*\*17] modification on a showing of 'changed circumstances.' " Id. at 146. We affirmed in Gibbons v. Gibbons, 86 N.J. 515, 525 (1981), the wellestablished principle that any orders pertaining to alimony or other support may be revised and altered by the Court from time to time as circumstances may require. We recognized both in Lepis and Gibbons that such authority flows from a section of N.J.S.A. 2A:34-23 (alimony "[o]rders so made may be revised and altered by the Court from time to time as circumstances may require. . . ."). The Legislature's failure to remove or limit that provision when it recently amended N.J.S.A. 2A:34-23 confirms the Legislature's intent that the recent amendment applies not only to an initial alimony award but also to a modification of alimony based on changed circumstances.

[\*509] <u>HN11</u> Moreover, the plain language of the amendment states that it "takes effect on September 1, 1988, and shall apply only to orders and judgment entered after that date," and extends its reach to any order, including a modification of an original order that is entered after September 1, 1988. *L*.1988, *c*. 153, § 9. <u>HN12</u> Indeed, a contrary [\*\*777] conclusion would [\*\*\*18] violate well-established canons of statutory interpretation: avoid constructions that render any part of a statute inoperative, superfluous, or

meaningless, Abbotts Dairies v. Armstrong, 14 N.J. 319, 328 (1954); Paper Mill Playhouse v. Millburn Township, 95 N.J. 503, 521 (1984), or lead to absurd results, State v. Gill, 47 N.J. 441, 445 (1966). Given the nature of marriage, divorce, and aging in our society, parties usually obtain a divorce before they are retired and begin receiving pension benefits. Accordingly, disputes about pension income as it relates to alimony will almost always occur after the parties are divorced. More importantly, the statute is tailored to apply primarily where an immediate payout of the pension has been made before income is generated. The ill the statute is designed to remedy is subsequent consideration of income generated by that portion of the pension that had previously been considered for purposes of equitable distribution. Hence, the issue of doubledipping will most frequently occur in the context of an application for alimony modification rather than an initial alimony award.

Nor are we persuaded that the recent [\*\*\*19] amendment should not apply to plaintiff's request for alimony modification because the final judgment of divorce and initial award of alimony were rendered prior to the amendment's enactment. As previously discussed supra at 503, such a finding would be inconsistent with the language of the amendment and the authority of the courts to constantly review and alter alimony awards as circumstances change. Our dissenting brethren would freeze the divorce agreement and provide that regardless of whether a newly-enacted statute is curative, merely reflective of preexisting law, or consistent with the expectations of the parties, the modification of alimony must be determined by law in effect at [\*510] the time the final judgment of divorce and initial award of alimony was entered.

Their contention is inconsistent with common-law principles governing retroactive application of legislation. See Gibbons v. Gibbons, supra, 86 N.J. at 522-25; Rothman v. Rothman, 65 N.J. 219 (1974). When N.J.S.A. 2A:34-23, the equitable-distribution statute, was enacted, one of the first questions this Court confronted was whether the statute was to be retroactively applied or applied [\*\*\*20] only prospectively. HN13 [1] In Rothman v. Rothman, 65 N.J. 219 (1974), we held that the statute was to be retroactively applied because that interpretation was necessary to make it workable and give it its most sensible interpretation. Specifically, in Rothman v. Rothman, supra, 65 N.J. at 223-24 (footnote omitted), we held:

Momentarily ignoring constitutional compulsions, and viewing the issue simply as one of statutory construction, we find ourselves unable to believe that the Legislature intended its grant of power to undertake an equitable distribution of marital assets to apply solely to property acquired on or after the effective date of the act. Were this construction to be adopted, it would, in each case, become necessary to determine the date of acquisition of each asset acquired during marriage, often a difficult if not impossible task. A further question would arise should the particular property interest under consideration, though acquired after the effective date of the act, have been purchased with, or received in exchange for, money or other property owned before that date. Moreover, if defendant's contention were adopted, it has been estimated, apparently [\*\*\*21] without exaggeration, that the full effect of the statute would not be felt for at least a generation.

To make this amendment workable and to give it its most sensible interpretation, it must be applied to modification of alimony orders that were entered prior to the effective date of the amendment. The dissents' proposed prospective application would result in a court in each case undertaking a painstaking review of the prior negotiations resulting in the initial alimony award and equitable-distribution settlement. Additionally, the full effect of this amendment **[\*\*778]** would not be realized for a long period of time.

Moreover, <u>N.J.S.A.</u> 2A:34-23 as amended does not represent new law but is merely reflective of preexisting law. <u>Gibbons v. [\*511]</u> Gibbons, supra, 86 N.J. at 524. A review of the criteria listed in <u>N.J.S.A.</u> 2A:34-23 discloses that the statutory language merely sets forth the well-established guidelines that courts have understood and embraced for years in considering the needs and circumstances of the parties in determining appropriate alimony and equitable-distribution awards. *Commission on Sex Discrimination Report, supra*, at 26-27.

Additionally, [\*\*\*22] the amendment also is consistent with the reasonable expectations of the parties. <u>HN14</u>[ The test of expectation is whether the parties relied on prior law to their detriment, such that retroactive application would cause a "deleterious and irrevocable" result. <u>Gibbons v. Gibbons, supra, 86 N.J. at 523-24</u>. At the time the property-settlement agreement was incorporated in the dual judgment for divorce, both the *Kikkert* and *D'Oro* decisions had been rendered. Indeed, the parties followed those decisions. Defendant received in equitable distribution a lump-sum payment for plaintiff's pension, which they both recognized was an asset and to which defendant relinquished her right. That is clear from the language of their agreement: "Except as otherwise set forth herein each of the parties hereby waives and relinquishes all rights to participate *in the assets including pension funds of the other party.*" (Emphasis added).

The dissents' suggestion that the Legislature intended the double-dipping amendment not to apply to consensual property-settlement agreements but only to court decrees is equally unpersuasive. HN15 [1] In Lepis v. Lepis, supra, 83 N.J. at 149, we specifically [\*\*\*23] found that there is "no reason to distinguish between judicial decisions and consensual agreements when 'changed circumstances' call for the modification of either." Likewise, we see no reason why the unfair policy the Legislature intended to prohibit by the amendment is not equally applicable to consensual agreements and court decrees. Moreover, the distinction between the two is meaningless. Indeed, most parties negotiate the terms of a propertysettlement [\*512] agreement, which is then incorporated in the divorce decree by the Court. Hence, most property-settlement agreements are voluntary and incorporated in a court decree.

Evidently, our dissenting brethren do not like the amendment and want the Court to alter the Legislature's enactment. Under Justice Stein's alteration, the double-dipping prohibition would be "presumptive" rather than a clear rule, *post*, at 534. This, however, is not the amendment the Legislature enacted. Moreover, such a proposal not only flies in the face of the plain meaning of the statute but it is vague, unworkable and creative of further complications in an already confused area of the law.

Applying the recent amendment codifying the preexisting [\*\*\*24] law is consistent with the Legislature's intent, the remedial policies underlying the pre-existing law at the time of its enactment, namely, avoiding "double-dipping" of retirement benefits and encouraging the immediate-payout method of retirement benefits, and the clearly-expressed expectations of the parties.<sup>2</sup>

### [\*\*\*25] [\*513] [\*\*779] III

The final issue we must address involves the trial court's consideration of the annuity payments. The recent amendment concerning retirement benefits is not applicable to plaintiff's annuity. We agree with Judge Long's dissenting opinion and hold that such payments are not "income" for purposes of determining changed circumstances insofar as they reflect principal rather than "income generated by the \$ 24,000 plaintiff received in distribution. . . . " 225 N.J.Super. at 250. Had the plaintiff shoved the \$ 24,000.00 in a friend's mattress and asked that friend to start sending him \$ 200.00 a month, there is no question that those payments could not be considered "income" for purposes of altering an earlier alimony award. The same is true of the portion of the annuity payments that reflect return of the principal. On the other hand, income generated by the principal and given to the plaintiff on a monthly basis is "income" for purposes of determining "changed circumstances." That portion of the payment constitutes an increase in his income and aggregate resources. Thus it is eligible for inclusion in the calculus used to arrive at a modification of the alimony [\*\*\*26] award. Lepis v. Lepis, supra, 83 N.J. at 151; see Martindell v. Martindell, supra, 21 N.J. at 355.

As previously stated, we do not decide whether plaintiff's alimony payments should be modified. That question is best left to the sound discretion of the trial court. In each case, the court must closely examine the

adjustment on retirement (early or otherwise). . . ." Id. at 78. In the Horton property-settlement agreement, the fifty-five-yearold plaintiff had received his pension benefits and the defendant had received the marital home. One year later, the plaintiff retired and moved to eliminate his alimony obligation. Id. at 78. Because the parties had not considered imminent retirement, the Horton court found that the plaintiff's pension benefits could be included in reconsideration of alimony obligations. Emphasizing that the plaintiff had voluntarily accepted early retirement, thereby substantially reducing his income, the court held that the benefits could be included until the pensioner reached ordinary retirement age, which the court found to be "coincident to the eligible age for receiving Social Security benefits." Id. at 79. The recent amendment rejects Horton as well as the Appellate Division majority opinion in the case at bar and follows D'Oro. We need not address the question of whether the amendment should be retroactively applied to parties who crafted property-settlement agreements in reliance on the holding in Horton or, for that matter, the Appellate Division decision in the instant case. The parties in the case at bar drafted their agreement several years before the Horton decision in a manner that clashes with that decision.

<sup>&</sup>lt;sup>2</sup> In <u>Horton v. Horton, 219 N.J.Super. 76 (Ch.Div.1987)</u>, D'Oro was limited to its facts. The court found that D'Oro would apply only "[w]hen imminent retirement is anticipated and equitable distribution and alimony are bargained for, or, barring those factors, the parties *specifically* anticipate alimony

circumstances of both parties. The court must make a complete and thorough analysis of the incomes, income capacities, and general financial circumstances, including assets and income, of both parties in reaching its conclusion. Depending on the parties' circumstances a court **[\*514]** may award a spouse a disproportionate share of the other spouse's *actual* income.

What the trial court can no longer do, however, is determine alimony by considering income generated by a retirement share that has been equitably distributed, either at the time of divorce or when it considers a modification application. The Legislature has concluded that it is inappropriate to make equitable distribution of a retirement benefit and then consider that distributed share for purposes of determining alimony. As did the court in *D'Oro*, the Legislature found "double-dipping" [\*\*\*27] of this asset to be improper.

**HN16** Hence, we hold that payments generated by pension benefits that had been previously equitably distributed are not income for purposes of alimony modification. **HN17** Further, we hold that annuity payments purchased with the proceeds of an equitable-distribution award also are not "income" for that purpose to the extent that they reflect return of the principal as opposed to income generated by the principal.

Accordingly, the Appellate Division judgment is affirmed in part and reversed in part and the cause remanded for further proceedings consistent with this opinion.

**Concur by:** STEIN (In Part); O'HERN (In Part)

Dissent by: STEIN (In Part); O'HERN (In Part)

## Dissent

STEIN, J., concurring in part and dissenting in part.

This case involves an important issue of matrimonial law. The question concerns the Chancery Division's authority, on a husband's motion to modify an alimony obligation set forth in a property-settlement agreement, to consider the husband's monthly benefit payments from a pension that was treated as an asset for purposes of equitable distribution when the parties divorced. Reversing the Appellate Division, the Court today holds that prior decisional law absolutely bars such [\*\*\*28] consideration of the pension benefit. The Court also holds that a recent amendment to <u>N.J.S.A.</u> [\*\*780] 2A:34-23, L.1988, c. 153, absolutely bars any such consideration of the pension benefit. That amendment provides in part:

[\*515] When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

The Court concludes that this amendment is intended to apply retroactively to property-settlement agreements executed and to divorce judgments entered prior to the amendment.

In my view, the Court has overstated the precedential significance of prior decisional law on the issue in this case. It has also accorded the statutory amendment a scope and effect neither contemplated nor intended by the Legislature. Most important, the Court's opinion needlessly restricts the broad equitable powers of the Chancery Court to consider all relevant factors in deciding applications to modify alimony based on changed circumstances.

I.

The majority opinion sets forth the relevant facts. I restate them only to the extent necessary to frame the issue. [\*\*\*29] The trial court had to resolve an alimonymodification motion in a case in which both parties had limited funds. The Inneses divorced in March 1984, after thirty-three years of marriage, the last ten years of which they lived apart. Plaintiff was sixty-years old at the time of the divorce and had net earnings of \$ 2,054 a month from his full-time employment. The agreement incorporated in the divorce judgment required plaintiff to pay alimony to defendant of \$ 650 per month, terminable on the death of either party or the defendant's remarriage. The net proceeds from the sale of the marital home were to be equally divided. Defendant was to receive \$ 19,000, representing forty percent of the value of plaintiff's pension as of the date the divorce complaint was filed, reduced by plaintiff's forty-percent share of the value of defendant's pension. <sup>1</sup> Plaintiff also agreed to [\*516] pay child support of \$

<sup>&</sup>lt;sup>1</sup>When the marital home was sold and the proceeds distributed, plaintiff received \$ 39,028.70 and defendant, \$ 74,042.52; the difference reflected plaintiff's payment to defendant of approximately \$ 17,500, representing her forty-percent share of the value of plaintiff's pension, reduced by

100 per month and to maintain defendant as beneficiary of a \$ 50,000 life-insurance policy. The child-support obligation had terminated when the trial court issued the alimony-modification order that is the subject of this appeal.

[\*\*\*30] Plaintiff's employer fired him in June 1985, fifteen months after the divorce. Two weeks later he moved to terminate alimony based on his changed circumstances. While that motion was pending, defendant moved to compel plaintiff to pay accumulated arrearages of \$ 3,250, alleging that plaintiff had unilaterally terminated alimony payments after his discharge. Granting defendant's motion, the trial court compelled payment of alimony and the accumulated arrearages. On plaintiff's appeal the Appellate Division, with the consent of both parties, remanded to the trial court for reconsideration.

The trial court conducted the remand proceedings in March 1987, relying only on the parties' certifications and arguments of counsel. Although there are slight discrepancies between plaintiff's Case Information Statement and his certification filed in May 1986, both the Appellate Division, 225 *N.J.Super.* 242, 247-48, and the majority, *ante* at 501, adopt the following categorization of his monthly income at the time of the remand proceedings:

## Go to table1

[\*\*\***31**] Plaintiff's assets, excluding the annuity, had a value of \$ 19,800.

At the time of the remand proceeding defendant was disabled and living in Florida. She received social security disability benefits of \$ 280 monthly and a monthly payment from the [\*517] University of Pennsylvania [\*\*781] of \$ 420. (The record contains various references to this payment as a "pension." Presumably it is this pension that was valued and deducted from defendant's share of plaintiff's pension in calculating the amount payable to defendant in equitably distributing the marital assets.) Defendant also received unspecified income from a \$ 60,000 cash-management account, established with defendant's share of equitable distribution proceeds. The Appellate Division estimated that income at \$ 271 monthly, 225 N.J.Super. at 248. The majority's estimate is \$ 400 per month. Ante at 501-502. Thus, depending on which estimate is used,

defendant's income at the remand proceeding was between \$ 971 and \$ 1,100 monthly.

The trial court considered the needs and income of both parties, including their respective pensions, and modified plaintiff's future alimony obligation from \$ 650 to \$ 550 monthly. The court [\*\*\*32] also awarded defendant arrearages and counsel fees.

The Appellate Division reversed and remanded for reconsideration because the trial court "made no findings as to the parties' circumstances." 225 N.J.Super. at 248. However, the Appellate Division, which did not address the propriety of the trial court's consideration of defendant's pension in resolving the alimony-modification motion, was divided on whether the trial court had properly considered plaintiff's pension benefits in calculating the appropriate amount of alimony. The majority held that the trial court should have considered plaintiff's pension benefits even though defendant had received a percentage of plaintiff's pension as equitable distribution in the divorce judgment. Id. at 247. According to the dissent, because plaintiff's pension was his "equitable share of [a] marital asset," it was not "includable in the calculation of available income for an alimony award." Id. at 249. Neither the majority nor dissenting opinion referred to the recent amendment to N.J.S.A. 2A:34-23.

### [\*518] II.

Because the Court relies in part on "pre-existing case law," *ante* at 500, it is useful first to restate [\*\*\*33] the general principles that govern resolution of alimonymodification motions. We need look no further than *Lepis v. Lepis, 83 N.J. 139 (1980)*, in which Justice Pashman, writing for a unanimous Court, set forth the guiding substantive and procedural standards. Acknowledging that *N.J.S.A. 2A:34-23* specifically recognizes the judiciary's equitable power to modify alimony and support orders, we noted in *Lepis* that

alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of "changed circumstances." [*Id.* at 146 (citations omitted).]

With respect to property-settlement agreements, we observed that at one time the judiciary's statutory power over alimony was considered to have terminated the Chancery Court's pre-existing equitable power specifically to enforce spousal support agreements. *Ibid.* (citing *Apfelbaum v. Apfelbaum, 111 N.J.Eq. 529* 

plaintiff's forty-percent share of the value of defendant's pension.

(E. & A.1932)). Repudiating that rule, Schlemm v. Schlemm, 31 N.J. 557 (1960), reaffirmed the longstanding power of the Chancery Court, apart from its statutory authority, specifically to enforce spousalsupport [\*\*\*34] agreements "to the extent they are just and equitable." *Id.* at 581-82. The relevant considerations for determining whether support agreements are equitable "include not only the ability to pay and the respective incomes of the spouses but the needs of each spouse as well." Petersen v. Petersen, 85 N.J. 638, 645 (1981); accord Martindell v. Martindell, 21 N.J. 341, 355 (1956) ("When an application for alteration of alimony is presented, the court should justly circumstances, including consider all relevant particularly the changed needs of the former wife and the changed financial resources of the former husband.").

In *Lepis* we also noted our holding in <u>Smith v. Smith, 72</u> <u>N.J. 350 (1977)</u>, disapproving of the rule that had **[\*\*782]** developed requiring that "[a] far greater showing of changed circumstances \* \* \* be made before the court can modify a separation agreement **[\*519]** than need be shown to warrant the court amending an order for alimony or support." <u>Lepis, supra, 83 N.J. at</u> <u>147</u> (quoting <u>Schiff v. Schiff, 116 N.J.Super. 546, 561</u> (App.Div. 1971), certif. denied, 60 N.J. 139 (1972)). We held in *Smith*:

Henceforth the extent [\*\*\*35] of the change in circumstances, whether urged by plaintiff or defendant, shall be the same, regardless of whether the support payments being questioned were determined consensually or by judicial decree. In each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements. [72 N.J. at 360.]

We also set forth in *Lepis* examples of factors that have been held to constitute changed circumstances and emphasized

that "changed circumstances" are not limited in scope to events that were unforeseeable at the time of divorce. \* \* \* The proper criteria are whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change. [83 N.J. at 151, 152.]

We acknowledged in *Lepis* that parties should be permitted to prove that other provisions of the agreement were included for the purpose of anticipating

or offsetting the "changed circumstance" alleged as the basis for modification of a spousal-support agreement:

If the existing support arrangement has in fact provided for the circumstances [\*\*\*36] alleged as "changed," it would not ordinarily be "equitable and fair," Smith, 72 N.J. at 360, to grant modification. For example, although a spouse cannot maintain the marital standard of living on the support payments received, this would not ordinarily warrant modification if it were shown that a single large cash payment made at the time of divorce was included with the express intention of meeting the rising cost of living. In other cases, the equitable distribution award -- which we have recognized is intimately related to support, id. -might have been devised to provide a hedge against inflation. The same might be true with respect to child support. A lump sum payment or a trust established for the benefit of the children could be shown to have been designed to cover the certain eventuality of increasing needs. [Id. at 153] (footnote omitted).]

We emphasized in *Lepis* the bifurcated procedure to be employed in post-judgment motions to modify the support provisions of spousal agreements. We held:

The party seeking modification has the burden of showing such "changed circumstances" as would warrant relief from the support or maintenance provisions [\*\*\*37] involved. A *prima facie* showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. \* \* \*

**[\*520]** Only after the movant has made this *prima facie* showing should the respondent's ability to pay become a factor for the court to consider. \* \* \* Courts have recognized that discovery and inspection of income tax returns should only be permitted for good cause. Because financial ability of the supporting spouse may be crucial to the proper disposition of a motion for modification, we conclude that a *prima facie* showing of changed circumstances meets this good cause standard. [*Id.* at 157-58 (citations and footnote omitted).]

Finally, we held in *Lepis* that not every application for modification of support requires a plenary hearing:

[A] party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary. [*Id.* at 159.]

Application of the *Lepis* principles to the facts of this case raises the preliminary issue whether the plaintiff's loss of full-time employment and the reduction of his net income from \$ 2,054 to \$ 1,641 monthly, [\*\*783] offset by termination [\*\*\*38] of his child-support obligation, constituted a change of circumstances sufficient to warrant modification of defendant's monthly alimony. Determination of that question -- which is a precondition to resolving whether modification of alimony is appropriate and, if so, whether plaintiff's pension can be taken into account in re-establishing alimony -- should focus on the intention of the parties as expressed in the property-settlement agreement. The agreement. entered into when plaintiff was sixty years of age, provides that alimony is payable until the death of either party or until defendant's remarriage, but does not provide for termination on cessation of full-time employment. It would have been preferable for the parties to have made express provision in the agreement to indicate the effect on alimony, if any, of plaintiff's discharge from or termination of employment. Id. at 154. But Lepis does not preclude this defendant, or other supported spouses similarly situated, from attempting to prove that the amount of alimony set forth in the agreement was intended to be maintained whether or not plaintiff continued to be employed. Cf. Berkowitz v. Berkowitz, 55 [\*\*\*39] N.J. 564 (1970) (modification of child-support payments was unjustified where parties envisioned alleged "changed circumstances" and provided for them in agreement). Thus, in cases raising the [\*521] preliminary issue whether termination of employment is a changed circumstance sufficient to justify modification of alimony, consideration of a supporting spouse's pension may be highly material to the question whether the parties intended alimony to continue at the prescribed level after the husband's retirement, even if the pension was taken into account for purposes of equitable distribution.

The majority opinion relies in part on pre-existing case law for its conclusion that pension benefits treated as assets for equitable distribution cannot be considered as income in an alimony-modification proceeding, citing <u>D'Oro v. D'Oro, 187 N.J.Super. 377 (Ch.Div.1982)</u>, aff'd, 193 N.J.Super. 385 (App.Div.1984), and <u>Staver v.</u> <u>Staver, 217 N.J.Super. 541 (Ch.Div.1987)</u>. Ante at 505-506. I find the pre-existing case law on this question to be both inconclusive and unpersuasive.

In <u>D'Oro v. D'Oro, supra, 187 N.J.Super. 377</u>, the parties divorced in 1982 [\*\*\*40] after thirty-seven years of marriage. The defendant was sixty-four years old and intended to retire in July 1982. Unlike this case, the

parties in D'Oro had not entered into a propertysettlement agreement. As part of equitable distribution, the trial court awarded plaintiff one-third of the value of defendant's pension and also awarded her alimony of \$ 685 monthly. In October of that year, after his anticipated retirement, defendant moved for elimination of alimony on the basis that his monthly income, exclusive of his pension benefit, was less than plaintiff's income. The court granted defendant's motion to eliminate alimony, concluding that defendant's pension could not be considered as income in determining his ability to pay alimony. The court expressly left open the question whether defendant's pension could be considered as a source of alimony after defendant had received payments equalling two-thirds of the value of the pension at the time of the divorce:

[T]his court finds that plaintiff has received the present use of her share of defendant's pension. Defendant has not. He must, perforce, survive for a **[\*522]** stated time to receive such dollars as may **[\*\*\*41]** equate to 2/3 of his share of "present value," including developmental and cumulative interest.

This court finds that plaintiff is *not* entitled to have defendant's pension flow considered as income to him for modification consideration. Whether such consideration should be given *after* such point in time as defendant has received his share of "present value" is left to another day. [*Id.* at 379-80.]

The holding in *D'Oro* cannot be regarded as a settled principle of matrimonial law. It was distinguished in *Johns v. Johns, 208 N.J.Super.* 733 (*Ch.Div.1985*), in which the court held that benefits from a pension that had been equitably distributed [\*\*784] in the divorce judgment should nevertheless be considered as income for purposes of child support. *Id.* at 736-37. *D'Oro* was followed in *Staver v. Staver, supra, 217 N.J.Super.* 541, in which the court also ruled that the husband's pension could be considered for purposes of alimony to the extent that post-divorce earnings had enhanced its value. *Id.* at 545.

However, in <u>Horton v. Horton, 219 N.J.Super. 76</u> (<u>Ch.Div.1987</u>), Judge Krafte, who decided D'Oro, declined to apply that case when the [\*\*\*42] plaintiffhusband took early retirement at age fifty-six, one-andone-half years after the parties had divorced. The divorce decree incorporated a property-settlement agreement that provided for alimony of \$ 125 weekly; it also provided for distribution of the marital home to the wife and the full value of the pension to the husband. The court rejected plaintiff's contention that the value of his pension could not be considered as income in determining his ability to pay alimony:

Plaintiff's reliance upon D'Oro is misplaced. In that case, it was expressly stated at the trial that the husband intended to retire in several months. In the present case, no such imminent retirement was considered. There was no reason for defendant to consider that plaintiff would not work for the normally anticipated time. No early retirement was anticipated or bargained for. Plaintiff surrendered employment paying some \$ 34,000, at age 55, and now has a pension income of \$ 13,794.36, gross. D'Oro must be limited to its facts. When imminent retirement is anticipated and equitable distribution and alimony are bargained for, or, barring those factors, the parties specifically anticipate [\*\*\*43] alimony adjustment on retirement (early or otherwise) D'Oro will apply. [Id. at 78.]

Implicit in the holding in *Horton* is the suggestion that in certain cases a husband's voluntary termination of employment [\*523] might be regarded as a selfinduced "changed circumstance," not warranting modification of a prior alimony agreement. Whatever its underlying rationale, Horton illustrates that the scope and precedential force of D'Oro is unresolved. In view of Judge Krafte's comment in Horton that "D'Oro must be limited to its facts," ibid., it is clear that D'Oro affords but fragile support for the majority's conclusion that the recent amendment to N.J.S.A. 2A:34-23 "is curative, merely reflective of preexisting law." Ante at 509. Significantly, the Appellate Division decision here, filed six months prior to the amendment to N.J.S.A. 2A:34-23, specifically rejects the D'Oro rule. 225 N.J.Super. at 247. I would characterize the law prior to the statutory amendment as unsettled and sorely in need of this Court's clarification.

III.

Subsequent to the Appellate Division decision in this case, the legislature passed *L*.1988, **[\*\*\*44]** *c*. 153, which "establishes standards to guide the courts *in rendering decisions* related to child support, alimony and equitable distribution." Senate Judiciary Statement, Senate Bill No. 976 (emphasis added). The Legislature explicitly mandated that *L*.1988, *c*. 153 "shall take effect on September 1, 1988, and *shall apply only to orders and judgments entered after that date.*" *L*.1988, *c*. 153, § 9 (emphasis added); *cf. Gibbons v. Gibbons, 86 N.J.* 

515, 520-21 n. 4 (1981) (When signing into law L.1980, c. 181, exempting from equitable distribution property acquired during marriage by gift, devise or bequest, Governor acknowledged absence of any legislative Act's application.). consensus on retroactive Remarkably, the majority ignores the Legislature's explicit direction and concludes that the pertinent provision of the amendment should be applied retroactively to the 1984 divorce judgment in this case and to the property-settlement agreement incorporated in that judgment. The majority's conclusion is clearly erroneous. Equally erroneous, although perhaps not so clear, is the majority's conclusion that the pertinent language of [\*524] [\*\*\*45] the amendment should apply not only to original awards of alimony but also to modifications of property-settlement agreements.

**[\*\*785]** I first address the majority's holding that the pertinent provision of chapter 153 applies retroactively. As amended by chapter 153, <u>N.J.S.A. 2A:34-23b</u> provides in part:

In all actions brought for divorce, divorce from bed and board, or nullity the court may award permanent or rehabilitative alimony or both to either party, and in so doing 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 and custodial responsibilities for children of the party seeking maintenance;

(7) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate [\*\*\*46] employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(8) 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;

(9) 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; and (10) Any other factors which the court may deem relevant.

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony. [Emphasis added.]

Prior to the enactment of chapter 153, the corresponding portion of <u>N.J.S.A. 2A:34-23</u> provided:

In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. [\*\*\*47] In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.

[\*525] The Senate Judiciary Committee Statement to chapter 153 emphasizes that the amendment authorizes the award of both permanent and rehabilitative alimony and supplements the criteria formerly used to set alimony -- actual need, ability to pay, and duration of the marriage -- with a number of additional statutory factors. As Justice O'Hern points out in his dissent, the predecessor bill to chapter 153, relying on the Report of the Commission on Sex Discrimination in Marriage and Family Law, was introduced "for the express purpose of eliminating inequities in divorce and alimony statutes that had worked to the detriment of women \* \* \*." Post at 536. The statutory factors established by chapter 153, consistent with that objective, mandate that courts consider a variety of historic, economic, and personal factors in arriving at an appropriate award of alimony. Because the new criteria set forth in chapter 153 [\*\*\*48] effect so substantial a change in the alimony statute, it is understandable that the Legislature explicitly provided that chapter 153 apply only prospectively.

We explained in *Gibbons* that the traditional rule of statutory interpretation is one favoring prospective application of statutes:

The courts of this State have long followed a general rule of statutory construction that favors prospective application of statutes. *E.g., Skulski v.* 

Nolan, [\*\*786] 68 N.J. 179, 202 (1975); LaParre v. Y.M.C.A. of the Oranges, 30 N.J. 225, 229 (1959); Kopczynski v. County of Camden, 2 N.J. 419, 424 (1949); Burdett v. Municipal Employees Pension Comm'n of Newark, 129 N.J.L. 70, 72-73 (E. & A.1942); Weinstein v. Investors Savings and Loan Ass'n, 154 N.J.Super. 164, 167 (App.Div.1977). The rationale for this rule has been succinctly stated as follows:

"It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects [\*\*\*49] are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not been made. [2 Sutherland, Statutory Construction, § 41.02 at 247 (4th ed. 1973) quoted in Weinstein v. Investors Savings, supra, 154 N.J.Super. at 167.]."

[\*526] [<u>86 N.J. at 521-22</u> (footnote omitted).] Moreover,

[a] cardinal rule in the interpretation of statutes is that words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied. [*Kopczynski v. County of Camden, 2 N.J. 419, 424* (1949).]

We took note in *Gibbons* of some exceptions to the general rule of prospectivity: statutes in which the Legislature has expressed a contrary intent; statutes that are ameliorative or curative; and statutes lacking clear provision for prospective application where retroactive application would better serve the expectations of affected parties. [\*\*\*50] <u>86 N.J. at 522-</u>23. None of these exceptions applies to chapter 153.

The Legislature has unmistakably expressed its intent that the statute apply prospectively. Although the majority asserts that chapter 153 is "curative, merely reflective of preexisting law," *ante* at 507, that statement is simply incorrect, whether it is addressed to *all* of the alimony-related provisions of chapter 153 or merely to the specific provision at issue in this case. As noted, the statutory criteria for alimony adopted by chapter 153 are new, replacing the significantly-less-specific standard of prior law. The uncertain state of prior law concerning the relevance of a pension, considered as an asset for equitable distribution, to an application to modify the alimony provision of a property-settlement agreement has been previously discussed. *Supra* at 507-509. Moreover, it is inaccurate to characterize chapter 153 as "curative" to sustain its retroactive application. As explained by Sutherland:

A curative act is a statute passed to cure defects in prior laws \* \* \*. Generally, curative acts are made necessary by inadvertence or error in the original enactment of a statute or in [\*\*\*51] its administration. [N. Singer, 2 *Sutherland Statutory Construction* § 41.11 (Sands 4th ed.1986).]

The Legislature adopted chapter 153 to set new and more comprehensive standards to guide courts in determining alimony and equitable distribution, not to "cure" a defect in the prior law.

[\*527] We also observed in *Gibbons* the need to avoid "manifest injustice" in determining the appropriateness of retroactivity, focusing on whether a party "relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute" and on whether "it would be unfair to apply the statute retroactively." 86 N.J. at 523-24. This inquiry highlights the most persuasive argument against retroactive application of chapter 153's prohibition against the double-counting of pensions. The prohibition's underlying premise is quite obvious: it ordinarily would be unfair for a *court* to [\*\*787] compel a husband to pay alimony out of a pension that he has already shared with his ex-spouse as part of equitable distribution of their assets.

Notwithstanding this theoretical unfairness, parties to settlement agreements executed prior to chapter 153 were [\*\*\*52] completely free to negotiate and execute agreements that took into account a retirement benefit as a source of *both* equitable distribution and alimony. Perhaps the wife's equitable share of a retirement benefit might have been diminished in order to justify greater alimony. Or the overall payout of equitable distribution might have been deferred over a longer term in return for higher alimony. Alternatively, a husband might agree to equitable distribution of a pension, and a level of alimony dependent in part on that pension, in

return for other negotiated advantages -- the right to continue to live in the marital home or the right to retain a vacation home. The nuances of give-and-take negotiation that may find expression in complex property-settlement agreements are unlimited.

In that context it would be incongruous to attempt to apply chapter 153's prohibition against double-counting of pensions retroactively. It is one thing for the Legislature to prohibit courts in the future from treating a pension simultaneously as an asset for equitable distribution and as income for purposes of alimony. But the Legislature would not and did not ordain that previously-negotiated [\*\*\*53] agreements, in which the parties had voluntarily considered a pension for both purposes, must retroactively [\*528] be invalidated. Retroactive application of chapter 153 to the propertysettlement agreement in this case is clearly erroneous and contradictory to the statute's express provision mandating only prospective application.

The majority's reliance on Rothman v. Rothman, 65 N.J. 219 (1974), is misplaced. Noting that Rothman held that the equitable distribution statute "was to be retroactively applied," ante at 510, the majority reasons that chapter 153 should also be retroactive. The Rothman analogy does not support the majority's conclusion. Although we held in Rothman that the equitable-distribution statute, L.1971, c. 212, would apply to property acquired prior to the statute's effective date, in all other respects the statute's application was prospective only. See N.J.S.A. 2A:34-1. Thus, we held in Smith v. Smith, 72 N.J. 350 (1977), that the equitabledistribution statute does not invalidate an earlier property-settlement agreement that constituted the "substantial equivalent of an equitable distribution of marital assets." [\*\*\*54] Id. at 358.

In my view, the Court's holding that chapter 153 applies to agreements executed prior to its enactment is most extraordinary, particularly in the face of the legislative directive that it apply prospectively. There is the potential for unjust results if the holding is applied to agreements in which the parties anticipated that a pension benefit might serve as a source for both equitable distribution and alimony. I trust that trial judges, alert to such potential injustices, will consider in such cases whether the party seeking a reduction in alimony has demonstrated the existence of changed circumstances, a question whose resolution may make consideration of chapter 153 unnecessary.

Similar analysis suggests that chapter 153's prohibition

against double-counting of pensions should not apply even prospectively to applications for modification of alimony agreements entered into *after* its effective date. Rather, I would construe the prohibition to apply only to cases in which a court **[\*529]** is *determining* both equitable distribution and alimony, and not to cases involving modification of property-settlement agreements.

The plain language of the statute [\*\*\*55] supports limiting application of chapter 153's prohibition against double-counting of pensions. As amended, <u>N.J.S.A.</u> <u>2A:34-23b</u> provides in pertinent part as follows:

In all actions brought for divorce \* \* \* or nullity the court may award permanent or rehabilitative alimony or both to either party, and in so doing shall consider but not be limited to the following factors. [Emphasis added.]

[\*\*788] After itemizing the ten specific criteria to be considered by a court in fixing alimony, the statute provides:

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, *the court* shall not consider income generated thereafter by that share for purposes of determining alimony. [*Ibid.* (emphasis added).]

The literal language of <u>N.J.S.A. 2A:34-23b</u> appears to restrict the bar against double-counting of pensions only to cases in which a court -- not the parties -- is determining equitable distribution and alimony.

The most basic tenet of statutory interpretation is that the words of a statute, absent any ambiguity, should be construed in accordance with their plain meaning. State v. Butler, 89 N.J. 220, 226 (1982); [\*\*\*56] N Singer, 2A Sutherland Statutory Construction § 46.01 (Sands 4th ed.1984). This principle dictates that chapter 153's prohibition against double-counting of pensions applies only to court-determined awards of alimony where the court has treated the retirement benefit as an asset for purposes of equitable distribution. The statutory prohibition against double-counting of pensions does not mention property-settlement agreements, and nothing in the legislative history of chapter 153 remotely suggests that the Legislature intended that prohibition to apply to voluntarily-negotiated agreements. Although prohibiting a court from relying on a retirement benefit for purposes of both equitable distribution and alimony is an obvious legislative purpose, prohibiting parties from voluntarily negotiating property-settlement

agreements **[\*530]** that contemplate the use of a pension for both those purposes serves no legislative goal.

Prospective application of the pension double-counting prohibition to alimony-modification motions directed at property-settlement agreements would also have the effect of inhibiting parties from negotiating in good faith agreements that consider one spouse's [\*\*\*57] pension for both equitable distribution and alimony. Although such agreements may be relatively unusual, a variety of circumstances might induce parties voluntarily to consider a pension benefit for both purposes. Apart from any other factors, a dependent spouse might agree to accept a relatively small share of a pension for equitable distribution in return for a guaranteed amount of alimony that contemplates payments in part from the supporting spouse's pension. Application of the statutory prohibition against double-counting to such an agreement, on a motion to modify alimony, would plainly frustrate the parties' understanding: in effect, the statute would prohibit a court from considering pension benefits that the parties intended to be a partial source of permanent alimony. Such an application of chapter 153 would unnecessarily inhibit parties from voluntarily negotiating agreements in which a retirement benefit is intended, at least in part, to contribute both to equitable distribution and alimony.

Finally, the majority's application of chapter 153's prohibition against double-counting of pensions to property-settlement agreements encroaches on the historic power of the [\*\*\*58] Chancery Court to modify such agreements based on changed circumstances. Lepis, supra, 83 N.J. at 146; Chalmers v. Chalmers, 65 N.J. 186, 192 (1974); Martindell v. Martindell, 21 N.J. 341, 352-53 (1956); Boorstein v. Boorstein, 142 N.J.Eq. 135 (E. & A.1948): Lindquist v. Lindquist, 130 N.J.Eq. 611, 613 (E. & A.1941); Parmly v. Parmly, 125 N.J.Eq. 545, 548-49 (E. & A.1939). No sound reason exists for construing chapter 153 to restrict the long-standing equitable power of courts to consider and resolve alimony-modification motions. In Schlemm v. Schlemm, supra, 31 N.J. 557, the Chancery Court's power [\*531] specifically to enforce property-settlement agreements was challenged on the basis that the statutory provisions relating to alimony were preemptive. Justice Jacobs, writing for a unanimous Court, held that the Chancery Court's statutory authority over alimony does not supersede its inherent jurisdiction to grant specific performance of such agreements.

Apfelbaum [v. Apfelbaum, 111 N.J.Eq. 529 (E. &

A.1932)] (and the cases [\*\*789] which followed it) broadly intended to withdraw from Chancery the power [\*\*\*59] equitable to grant specific performance of support agreements in the belief that the statutory provisions relating to alimony were more flexible and should be dealt with as exclusive. But, as we have already indicated, such belief failed to take into account the highly flexible of Chancery's specific performance nature jurisdiction and its earlier application by the New Jersey courts in the enforcement of husband-wife support agreements to the extent that they were just and equitable. We are satisfied that the restrictive approach in Apfelbaum was an unnecessary departure from fundamental principles of equitable jurisdiction, was not dictated by any sound reason or any statutory policy, and does not effectively serve the interests of justice; it may now be considered as discarded in favor of the view that, apart from its statutory authority, the Superior Court has power to direct the specific performance of the terms of husband-wife support agreements to the extent that they are just and equitable. [Id. at 581-82 (citation omitted).]

IV.

On the assumption that chapter 153's prohibition against double-counting of pensions does not apply at all to motions to modify property-settlement [\*\*\*60] agreements, or at least does not apply retroactively to such agreements, there remains for consideration only the question left unresolved by <u>D'Oro v. D'Oro, supra,</u> <u>187 N.J.Super. 377</u>, and its progeny: on the motion to modify alimony provided for in this property-settlement agreement, to what extent should the court have considered pension benefits that the parties treated as an asset for purposes of equitable distribution.

Lepis provides the proper analytical approach. The preliminary issue is whether the moving party has sustained "the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." *Id.* at 157. Presumably the supporting spouse, as here, would rely on a reduction in income resulting from termination **[\*532]** of full-time employment and would seek to exclude the pension benefit as a source of alimony. The dependent spouse should be permitted to prove, for example, that the parties had negotiated the alimony award set forth in the property-settlement agreement with the expectation of retirement and use of the pension as a partial source of alimony, and hence that

circumstances have not [\*\*\*61] changed. Assuming the court is satisfied that alimony was determined with the expectation of continued full-time employment and that retirement or discharge constitutes proof of "changed circumstances," the question of modification of alimony must be resolved case by case. In the ordinary case, requiring a supporting spouse to pay alimony out of a pension that has already been subject to equitable distribution would obviously be unfair. However, on a modification motion, where the focus is on the proper amount of support for an economically dependent spouse,

the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard. [*Id.* at 153.]

In the Appellate Division, the majority held that the pension could be considered on the modification motion as a source of alimony, reasoning that "equitable distribution and alimony are not the same" and hence that it was

not inconsistent for a dependent wife to receive the value of a portion of her husband's pension as her share of the marital partnership, and nevertheless **[\*\*\*62]** look to later pension payments as evidence of her former husband's ability to contribute towards maintaining her at their former marital economic standard. [225 N.J.Super. at 245-46.]

The dissenting judge took the position that the pension, treated as an *asset* for equitable distribution, could not thereafter be regarded as income for alimony purposes:

[\*\*790] Here, the pension payments sought to be tapped by defendant as alimony are plaintiff's equitable share of the marital asset; as such they are not includable in the calculation of available income for an alimony award. It is not the fact that the pension was part of the marital distribution which is pivotal. It is that the pension is not income. Simply stated, no asset, however derived, should be considered part of the income available for alimony purposes. [*Id.* at 249.]

**[\*533]** In my view, a middle ground between these two positions better expresses the traditional function of the Chancery Court. Although equitable distribution and alimony serve different purposes, courts should recognize that parties ordinarily would be disinclined to look to a pension as a source for both. But it is too

categorical to [\*\*\*63] conclude that because a pension is treated as an asset for equitable distribution purposes, it can never be regarded as a partial source of alimony. Thus, if the pension has already been the subject of equitable distribution, a court must take that use of the pension into account in adjusting alimony. Ideally, a pension that was divided for equitable distribution purposes should be excluded as a source of alimony. Even if the circumstances of the parties are such that total exclusion of the pension would result in a disproportionate burden on the dependent spouse, a court must consider the pension's role in equitable distribution. Thus, the greater the dependent spouse's share of the pension's value as equitable distribution, the less a court should rely on the pension as a source for alimony.

Therefore, the general rule should be that when the parties valued a retirement benefit for purposes of equitable distribution, a court reviewing a motion to modify the alimony provisions of a property-settlement agreement would not ordinarily consider it as a source of alimony. The dependent spouse should be permitted to contest the existence of changed circumstances by proving that the [\*\*\*64] parties contemplated that the retirement benefit would replace employment earnings as the source of alimony. If the court finds that changed circumstances have been established, resort to the retirement benefit as a partial source of alimony should be restricted only to those cases in which the minimal needs of the dependent spouse cannot otherwise be addressed. In such cases, the extent to which the retirement benefit may be looked to as a source of alimony should be influenced by the extent to which its value was distributed to the supported spouse as part of equitable distribution. Thus, the bar against doublecounting of the [\*534] retirement benefit should be presumptive, but not absolute, in order that the Chancery Court may properly perform its intended function:

When an application for alteration of alimony is presented, the court should justly consider all relevant circumstances, including particularly the changed needs of the former wife and the changed financial resources of the former husband. [*Martindell v. Martindell, supra, 21 N.J. at 355.*]

Although I am in accord with the majority's conclusion that the matter should be remanded to the trial court [\*\*\*65] for reconsideration, my view is that such reconsideration should be based on the principles set forth in this opinion.

O'HERN, J., concurring in part and dissenting in part.

While I concur in Justice Stein's analysis of the Legislature's undoubted intent not to have these 1985 support guidelines applied retroactively to invalidate preexisting agreements or prospectively to modify certain agreements, I add these few observations about the devastating effect of the majority's opinion on most homemaker-wives. Only those who can speak out of both sides of their mouths will find solace in the opinion of the Court.

After thirty-one years of marriage, Frank T. Innes entered a solemn contract on March 26, 1984 to pay his soon-to-be-divorced wife \$ 650 per month in alimony. He did not say, "I promise to pay \$ 650 per [\*\*791] month so long as I am employed by Monroe Systems for Business." He said he would pay until "the death of the plaintiff, the death of the defendant or the remarriage of the defendant."

He lived up to that promise for a little over a year, but when he lost his job with Monroe Systems for Business he decided that he would not support his wife anymore. He unilaterally suspended [\*\*\*66] his alimony payments. His wife had to bring an action to compel him to live up to his contract to pay the agreed [\*535] support. In those proceedings the trial court allowed him a reduction of \$ 100 per month.

I feel sorry that a corporate restructuring caused Mr. Innes to be displaced from his job and take an early retirement. I am sure that the Family Part has balanced, and would balance, the equities of the situation properly. But I fail to see how the legislation that was enacted to correct sex discrimination in marriage and family law could be interpreted to cause the abrogation of his agreement.

Were there fraud, or a change of circumstances that was not reasonably foreseeable, I could see the majority's position. But what we have is a disabled spouse who has moved to Florida in reliance on her husband's promise. All that she asks is that before letting the husband out of his contract, a court consider how well off he really may be.

The cloth is quite binding in this case because the husband does not have a golden parachute or anything of that nature. There is not a lot of money to go around. But let us up the ante a bit and consider the case as one involving a top [\*\*\*67] executive at Warner Communications who loses his job in a merger with Time, Inc. And assume that he too had entered an

agreement to pay his wife \$ 650 per month and had given her a share of his pension in equitable distribution from which she bought a home. Then assume that he is eased out, but that his pension will give him \$ 70,000 per year in income. Would it be wrong to think that he is able to meet his commitments to the wife who had helped him up the corporate ladder? I should hope not.

It will strike the sponsors of the legislation to implement the report of the New Jersey Commission on Sex Discrimination in Marriage and Family Law (Commission) as the bitterest parody of justice that the law they sponsored to counter discrimination against women in our divorce law should have the unintended consequence of tearing up separation agreements.

The legislative history of the bill is quite adequately set forth in the brief for the defendant-wife. The bill that eventually [\*536] amended N.J.S.A. 2A:34-23 was introduced in 1981 by Senators Lipman and DiFrancesco for the express purpose of eliminating inequities in divorce and alimony statutes that had worked to the detriment [\*\*\*68] of women, keeping them in economic bondage. The uncertain economic plight of divorced homemakers was of special import to the sponsors of the bill. The sponsors relied on the report of the Commission. See Discrimination in Marriage and Family Law: New Jersey Commission on Sex Discrimination in the Statutes (2d Report, Sept.1981). Some excerpts from a Commission report prepared in conjunction with Senators Lipman and DiFrancesco's 1984 version of the bill are illustrative of the sponsors' concerns.

Research indicated that divorce led to improved economic status for men while lessening the economic status of women. The wage-earning spouse continued to reap the benefits of what had been acquired through the joint efforts of the parties, increased assets and earning potential, while the homemaker with fewer skills and much less work experience endured a "dramatically difficult change in lifestyle." New Jersey Commission on Sex Discrimination in the Statutes, *Analysis of Senate Bill 554: Background*, p. 7 (1984). Concluding that divorce "discriminates against the non-wage-earning partner," the Commission's recommended factors for determining alimony emphasized that "alimony [\*\*\*69] is an appropriate tool for bringing a non-wage-earning spouse up to par with the wage-earner." *Ibid*.

We know little about the Inneses, but we can infer that the homemaker-spouse also **[\*\*792]** worked outside the home. She does have a retirement pension from the University of Pennsylvania. Nonetheless, the principle adopted by the majority would be applicable to the prototype situation that concerned the Commission. In most marriages, as the Commission noted, "one spouse may have foregone earning potential in performing the domestic duties \* \* \*. It would be inequitable upon dissolution to saddle (this spouse) with the burden of reduced earning potential and allow the (other) spouse to continue in an advantageous **[\*537]** position which was reached through joint effort." *Id.* at 11. In such a case, in which a wife helped her husband up the corporate ladder, we can see how the majority's interpretation would work to her disadvantage.

The particular provision the Court relies on was not part of either the 1981 or 1982 versions of <u>N.J.S.A. 2A:34-</u> <u>23</u>. It was not until 1985 that a proposed Assembly Bill added the following language to the factors for determining an alimony award: [\*\*\*70]

When a share of income that is earned but not received from a profession or business is treated as an asset for purposes of equitable distribution, the court shall not consider that income when it is received for purposes of determining alimony and child support.

The drafters of the proposed 1985 version also addressed the issue in terms of equitable distribution. They added the following language to the 1985 bill:

When the court awards a share of the future income of a business or profession as *pendente lite* support, alimony or child support, it shall not include the same income in its award of equitable distribution.

In other words, do not count the income twice. Do not award alimony from anticipated future income and then capitalize it and treat it as a marital asset. The purpose of the amendment was simple: to prevent that kind of double-dipping. The sponsors deleted that language, however, because they thought that it would prove unworkable and lead to protracted litigation.

A later version of the bill, Assembly Bill No. 2619, contained the predecessor language to the current amendment to <u>N.J.S.A. 2A:34-23</u>. It read:

When a share of a retirement benefit [\*\*\*71] is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that asset for purposes of determining alimony.

It carries the same logical intent, namely, no double-

counting of income.

The current language appears to have been added for fear that in awarding alimony courts might not consider income derived from retirement assets that were *not* subject to equitable distribution. In other words, if the parties were married for only ten years and the pension was of thirty years **[\*538]** longevity, the first twenty years would belong only to the husband. That income can be counted. The last amendment was obviously a restrictive amendment intended to narrow the scope of the bill.

None of these factors is present in this case. There has been no double-counting in this case. The husband made an agreement to pay alimony. In reaching that agreement, no portion of his pension was doublecounted for purposes of the property settlement.

What we have is a case in which the court must consider, in the context of Lepis v, Lepis, 83 N.J. 139 (1980),whether this so-called "change in circumstances" is one that was indeed [\*\*\*72] not reasonably foreseeable by the parties in the making of the contract. Because the husband was sixty years old when the agreement was entered and normal retirement age would be sixty-five, an early retirement was clearly within the foreseeable future for this husband. It may be bad drafting or bad planning on his part, but I do not think it calls for the draconian interpretation that the Court imposes on the statutes designed to ameliorate the condition of women, not eviscerate their condition.

The limited purposes of the recent amendment to N.J.S.A. 2A:34-23, i.e., to [\*\*793] prevent doublecounting, do not in any sense require cancellation of this property settlement. This does not mean, as the majority opinion assumes, that the Family Part will blind itself to the realities of the situation. There is only so much money to go around in this case. But the affidavits show which of the two partners in this long marriage is now in a better position to cope with this economic adversity. Mrs. Innes is disabled. She is unable to work. There is nothing to indicate that Mr. Innes is unable to work. Presumably, he has chosen I cannot fault him for this. not to work. It is something [\*\*\*73] to which we all aspire. Many of us would like to get out of our contracts at age sixty-one if we could. Life just does not work that way. (I should not prejudge Mr. Innes' ability to find [\*539] work. It is undoubtedly not an easy time for him either. But the majority's opinion would apply as well to one who took an elective early retirement.)

Hence, I think the majority of the Appellate Division panel resolved the statutory issue correctly. The loss of employment by the spouse is a factor appropriately to be considered; on the other hand, the Family Part is not to blind itself to the husband's other available resources in meeting his contractual commitments. I am sure that the sound discretion of our Family Part judges would result in an equitable disposition of the matter.

### Table1 (Return to related document text)

Social Security	622.00
Annuity (Purchased from proceeds of	160.00
sale of marital home)	
Income from IRA and other savings.	139.00
	\$ 1,641.00

Table1 (Return to related document text)

**End of Document** 

## Mahoney v. Mahoney

Supreme Court of New Jersey September 13, 1982, Argued ; December 15, 1982, Decided

A-41

Reporter

91 N.J. 488 \*; 453 A.2d 527 \*\*; 1982 N.J. LEXIS 2638 \*\*\*

MELVIN M. MAHONEY, PLAINTIFF-RESPONDENT, v. JUNE LEE MAHONEY, DEFENDANT-APPELLANT

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division, whose opinion is reported at *182 N.J. Super. 598 (1982)*.

## **Core Terms**

spouse, alimony, equitable, marriage, reimbursement, license, divorce, marital, holder, unfairness, household, enhanced, training, career, mutual

defendant paid all of the household expenses. Both parties sought a divorce that was granted, and defendant sought reimbursement for support she provided while plaintiff obtained his degree, plus half of the cost of his tuition. The trial court ordered plaintiff to reimburse defendant for the support she provided. Plaintiff appealed, and the decision was reversed. Defendant appealed, and on further review, the court reversed. Although the court agreed with the appeals court that a professional degree was not property subject to equitable distribution, defendant provided support while plaintiff pursued his degree with the expectation of deriving material benefits for both spouses. Thus, the case was remanded so that the trial court could determine whether reimbursement alimony should have been awarded in this case and, if so, in what amount.

## **Case Summary**

### **Procedural Posture**

Defendant wife appealed the decision of the Superior Court, Appellate Division (New Jersey) holding that plaintiff husband's professional degree was not property subject to equitable distribution and denying defendant any recovery for contributions made to plaintiff's professional education.

### Outcome

Judgment reversed because although plaintiff's professional degree was not subject to equitable distribution, the court should have considered awarding reimbursement alimony because defendant contributed to plaintiff's professional education with the expectation of deriving material benefits from the degree later.

### LexisNexis® Headnotes

### Overview

While plaintiff and defendant were married they shared household expenses, except during the period when plaintiff pursued an advanced professional degree when

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview <u>HN1</u>[📩] Dissolution & Divorce, Property Distribution

Regarding equitable distribution, this court has frequently held that an "expansive" interpretation is to be given to the word property.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans Law > Servicemembers > Retirement

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

# <u>HN2</u>[] Dissolution & Divorce, Property Distribution

Courts subject a broad range of assets and interests to equitable distribution including vested but unmatured private pensions, military retirement pay and disability benefits, unliquidated claims for benefits under workers' compensation, and personal injury claims.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

# <u>HN3</u> Dissolution & Divorce, Property Distribution

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property."

Family Law > ... > Property Distribution > Classification > Degrees, Enhanced Earnings & Licenses

Family Law > Marital Duties & Rights > Property Rights > General Overview

Family Law > ... > Property Rights > Characterization > General Overview Family Law > ... > Property Distribution > Characterization > Marital Property

# <u>HN4</u>[**\***] Classification, Degrees, Enhanced Earnings & Licenses

The value of a professional degree for purposes of property distribution is nothing more than the possibility of enhanced earnings that the particular academic credential will provide. A professional's earning capacity, even where its development has been aided and enhanced by the other spouse should not be recognized as a separate, particular item of property within the meaning of N.J. Stat. Ann. § 2A:34-23. Potential earning capacity should not be deemed property as such within the meaning of the statute. Equitable distribution of a professional degree would similarly require distribution of "earning capacity" income that the degree holder might never acquire. The amount of future earnings would be entirely speculative. Moreover, any assets resulting from income for professional services would be property acquired after the marriage.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

# <u>HN5</u>[📩] Dissolution & Divorce, Property Distribution

N.J. Stat. Ann. § 2A: 34-23 restricts equitable distribution to property acquired during the marriage.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>*HN6*[</u>] Modification & Termination, Changed Circumstances

Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not be adjusted. Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN7</u>[**\***] Marital Termination & Spousal Support, Spousal Support

Several courts, while not treating educational degrees as property, have awarded the supporting spouse an amount based on the cost to the supporting spouse of obtaining the degree. In effect, the supporting spouse was reimbursed for her financial contributions used by the supported spouse in obtaining a degree.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN8</u>[**\***] Marital Termination & Spousal Support, Spousal Support

Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

### 

To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction

of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the concept of reimbursement alimony has been introduced into divorce proceedings.

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

### HN10[1] Obligations, Periodic Support

Regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > General Overview

### HN11[1] Obligations, Rehabilitative Support

A basic purpose of alimony relates to the quality of economic life to which one spouse is entitled and that becomes the obligation of the other. Alimony has to do with support and standard of living.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

# <u>*HN12*</u> Marital Termination & Spousal Support, Dissolution & Divorce

Alimony should be tailored to individual circumstances, particularly those relating to the financial status of the parties. Thus, in all actions for divorce, when alimony is awarded, the court should consider actual need, ability to pay and duration of the marriage. In a "fault" divorce, however, the court may consider also the proofs made in establishing such ground in determining alimony that is fit, reasonable and just. <u>N.J. Stat. Ann. § 2A:34-23</u>. There is nothing in the statute to suggest that the standards for awarding alimony are mutually exclusive.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

# <u>HN13</u> Spousal Support, Modification & Termination

Only monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits should be a basis for such an award.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

<u>HN14</u> Dissolution & Divorce, Property Distribution

Reimbursement alimony should not subvert the basic goals of traditional alimony and equitable distribution.

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN15

Alimony awards under <u>N.J. Stat. Ann. § 2A:34-23</u> must take into account the supporting spouse's ability to pay; earning capacity is certainly relevant to this determination.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN16</u>[📩] Spousal Support, Modification & Termination

Even though the enhanced earning potential provided by a degree or license is not "property" for purposes of <u>N.J. Stat. Ann. § 2A:34-23</u>, it clearly should be a factor considered by the trial judge in determining a proper amount of alimony. If the degree holder's actual earnings turn out to diverge greatly from the court's estimate, making the amount of alimony unfair to either party, the alimony award can be adjusted accordingly.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > Marriage > General Overview

Family Law > Marriage > Certificates & Licenses > General Overview

# <u>*HN17*</u>[**소**] Marital Termination & Spousal Support, Spousal Support

Courts may not make any permanent distribution of the value of professional degrees and licenses, whether based upon estimated worth or cost. However, where a spouse has received from his or her partner financial contributions used in obtaining a professional degree or license with the expectation of deriving material benefits for both marriage partners, that spouse may be called upon to reimburse the supporting spouse for the amount of contributions received.

**Counsel:** Joseph C. Glavin, Jr., argued the cause for appellant (*Schumann, Hession, Kennelly & Dorment*, attorneys).

Charles J. Casale, Jr., argued the cause for respondent.

**Judges:** For reversal and remandment -- Chief Justice Wilentz and Justices Pashman, Clifford, Schreiber, Handler, Pollock and O'Hern. For affirmance -- None. The opinion of the Court was delivered by Pashman, J.

**Opinion by: PASHMAN** 

### Opinion

[\*491] [\*\*529] Once again the Court must interpret this state's law regarding the distribution of marital property upon divorce. The question here is whether the defendant has the right to share the value of a professional business (M.B.A.) degree earned by [\*492] her former husband during their marriage. The Court must decide whether the plaintiff's degree is "property" for purposes of N.J.S.A. 2A:34-23, which requires equitable distribution of "the property, both real and personal, which was legally and beneficially acquired . . . during the marriage." If the M.B.A. degree is not property, we must still decide whether the defendant [\*\*\*2] can nonetheless recover the money she contributed to her husband's support while he pursued his professional education. For the reasons stated below, we hold that the plaintiff's professional degree is not property and therefore reject the defendant's claim that the degree is subject to equitable distribution. To this extent, we concur in the reasoning

of the Appellate Division. Notwithstanding this concurrence, we reverse the judgment of the Appellate Division, which had the effect of denying the defendant any remedial relief for her contributions toward her husband's professional education and remand for further proceedings.

I

When the parties married in Indiana in 1971, plaintiff, Melvin Mahoney, had an engineering degree and defendant, June Lee Mahoney, had a bachelor of science degree. From that time until the parties separated in October 1978 they generally shared all household expenses. The sole exception was the period between September 1975 and January 1977, when the plaintiff attended the Wharton School of the University of Pennsylvania and received an M.B.A. degree.

During the 16-month period in which the plaintiff attended school, June Lee Mahoney contributed [\*\*\*3] about \$ 24,000 to the household. Her husband made no financial contribution while he was a student. Melvin's educational expenses of about \$ 6,500 were paid for by a combination of veterans' benefits and a payment from the Air Force. After receiving his degree, the plaintiff went to work as a commercial lending officer for Chase Manhattan Bank.

[\*493] Meanwhile, in 1976 the defendant began a parttime graduate program at Rutgers University, paid for by her employer, that led to a master's degree in microbiology one year after the parties had separated. June Lee worked full time throughout the course of her graduate schooling.

In March 1979, Melvin Mahoney sued for divorce; his wife filed a counterclaim also seeking a divorce. In May 1980, the trial court granted dual judgments of divorce on the ground of 18 months continuous separation.

At the time of trial, plaintiff's annual income was \$ 25,600 and defendant's income was \$ 21,000. No claim for alimony was made. The parties owned no real property and divided the small amount of their personal property by agreement.

The only issue at trial was the defendant's claim for reimbursement of the **[\*\*530]** amount of **[\*\*\*4]** support she gave her husband while he obtained his M.B.A. degree. Defendant sought 50% of the \$ 24,000 she had contributed to the household during that time, plus one-half of the \$ 6,500 cost of her husband's tuition.

The trial court decided that defendant should be reimbursed, 175 N.J. Super. 443 (Ch.Div.1980), holding that "the education and degree obtained by plaintiff, under the circumstances of this case, constitute a property right . . . ." Id. at 447. However, the court did not attempt to determine the value of plaintiff's M.B.A. degree. Instead, finding that in this case "[t]o ignore the contributions of the sacrificing spouse would be . . . an unjust enrichment of the educated spouse," id. at 446, the court ordered the award of a "reasonable sum as a credit [for] . . . the maintenance of the household and the support of plaintiff during the educational period." Id. at 447. Plaintiff was ordered to reimburse his wife in the amount of \$ 5,000, to be paid at the rate of \$ 100 per month. The court did not explain why it chose this amount.

Plaintiff appealed to the Appellate Division, which reversed the award. 182 N.J. Super. 598 (1982). It not only [\*\*\*5] rejected defendant's claim for reimbursement but also held that neither a [\*494] professional license nor an educational degree is "property" for the purposes of the equitable distribution statute, N.J.S.A. 2A:34-23. In so holding, the Appellate Division stated that it was bound by Stern v. Stern, 66 N.J. 340, 345 (1975), where the Court held that "a person's earning capacity . . . should not be recognized as a separate, particular item of property within the meaning of N.J.S.A. 2A:34-23." (footnote omitted). The Appellate Division noted that if enhanced earning capacity is not property, then "neither is the license or degree, which is merely the memorialization of the attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity. . . . " 182 N.J. Super. at 605. The court noted that degrees and licenses lack many of the attributes of most property rights, id. at 605, and that their value is not only speculative, id. at 609, but also may be fully accounted for by way of alimony and equitable division of the other assets. Id. at 607.

In rejecting defendant's claim for reimbursement, [\*\*\*6] the Appellate Division disapproved of the attempt to measure the contributions of the parties to one another or to their marriage. The court cited with approval <u>Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115, 123</u> (<u>Ct.App.1981</u>), where an Arizona appeals court stated:

[I]t is improper for a court to treat a marriage as an arm's length transaction by allowing a spouse to come into court *after* the fact and make legal arguments regarding unjust enrichment . . . .

. . . [C]ourts should assume, in the absence of

contrary proof, that the decision [to obtain a professional degree] was mutual and took into account what sacrifices the community [of husband and wife] needed to make in the furtherance of that decision. [emphasis in original]

The Appellate Division saw no need to distinguish contributions made toward a spouse's attainment of a license or degree from other contributions, calling such special treatment "a kind of elitism which inappropriately depreciates the value of all the other types of contributions made to each other by other spouses . . . ." <u>182 N.J. Super. at 613</u>. Finally, the court noted that in this case each spouse left the [\*\*\*7] marriage "with comparable earning [\*495] capacity and comparable educational achievements." <u>Id. at 615</u>. The court did not order a remand.

We granted certification, 91 N.J. 191 (1982).

Ш

This case first involves a question of statutory The Court must decide whether the interpretation. Legislature intended an M.B.A. degree to be "property" so that, if acquired by either spouse during a marriage, [\*\*531] its value must be equitably distributed upon divorce. In determining whether the Legislature intended to treat an M.B.A. degree as property under N.J.S.A. 2A:34-23, the Court gains little guidance from traditional rules of statutory construction. There is no legislative history on the meaning of the word "property" in the equitable distribution statute, L.1971, c. 212, N.J.S.A. 2A:34-23, and the statute itself offers no guidance. 1 Therefore, statutory construction in this case means little more than an inquiry into the extent to which professional degrees and licenses share the qualities of other things that the Legislature and courts have treated as property.

[\*\*\*8] Regarding equitable distribution, this Court has frequently held that an "expansive interpretation [is] to be given to the word 'property,'" <u>Gauger v. Gauger, 73</u>

<sup>&</sup>lt;sup>1</sup>The 1980 amendments to the law, *L*.1980, *c*. 181, which excluded from equitable distribution property acquired after the marriage by way of gift, devise or bequest, had no bearing on the issue of what types of chattels or interests should be treated as property.



N.J. 538, 544 (1977). Accord Kruger v. Kruger, 73 N.J. 464, 468 (1977); Painter v. Painter, 65 N.J. 196, 217 (1974). New Jersey HN2[1] courts have subjected a broad range of assets and interests to equitable distribution including vested but unmatured private pensions, Kikkert v. Kikkert, 88 N.J. 4 (1981); military retirement pay and disability benefits, Kruger v. Kruger, <sup>2</sup> supra; unliquidated claims for [\*496] benefits under workers' compensation, Hughes v. Hughes, 132 N.J. Super. 559 (Ch.Div.1975); and personal injury claims, DiTolvo v. DiTolvo, 131 N.J. Super. 72, 80-82 (App.Div.1974). But see Amato v. Amato, 180 N.J. Super. 210 (App.Div.1981) (reversing trial court's equitable distribution award requiring wife to give husband 25% of any proceeds she might recover for medical malpractice that occurred during the marriage).

[\*\*\*9] This Court, however, has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license. The Appellate Division discussed at some length the characteristics that distinguish professional licenses and degrees from other assets and interests, including intangible ones, that courts equitably distribute as marital property. Quoting from *In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 77 (1978)*, in which the Colorado Supreme Court held that an M.B.A. degree is not subject to equitable distribution, the court stated:

HN3 [1] 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. lt is simply an intellectual [\*\*\*10] 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. [182 N.J. Super. at 605]

A professional license or degree is a personal achievement of the holder. It cannot be sold and its value cannot readily be determined. A professional license or degree represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. By contrast, the vested but unmatured pension at issue in <u>Kikkert, supra</u>, entitled the owner to a definite amount of money at a certain future date.

[\*\*532] <u>HN4</u>[1] The value of a professional degree for purposes of property distribution is nothing more than the possibility of enhanced earnings that the particular academic credential will [\*497] provide. In <u>Stern v.</u> <u>Stern, 66 N.J. 340, 345 (1975)</u>, we held that a lawyer's

earning capacity, even where its development has been aided and enhanced by the other spouse . . . should not be recognized as a separate, particular item of property within the meaning of <u>N.J.S.A.</u> <u>2A:34-23</u>. Potential earning capacity . . . should not be [\*\*\*11] deemed property as such within the meaning of the statute. [footnote omitted] <sup>3</sup>

Equitable distribution of a professional degree would similarly require distribution of "earning capacity" -- income that the degree holder might never acquire. The amount of future earnings would be entirely speculative. Moreover, any assets resulting from income for professional services would be property acquired *after* the marriage; <u>HN5</u>[] the statute restricts equitable distribution to property acquired *during* the marriage. <u>N.J.S.A. 2A:34-23</u>. Accord <u>In re Marriage of Aufmuth</u>, 89 Cal.App.3d 446, 152 Cal.Rptr. 668, 678 (1979).

Valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces [\*\*\*12] to little more than guesswork. As the Appellate Division noted, courts would be required to determine far more than what the degree holder could earn in the new career. The admittedly speculative

<sup>&</sup>lt;sup>2</sup>In *McCarty v. McCarty*, 453 *U.S.* 210, 101 *S.Ct.* 2728, 69 *L.Ed.*2d 589 (1981), the United States Supreme Court held that federal military retirement pay was not subject to state divorce laws. On September 8, 1982, this holding was overruled by the enactment of the "Uniformed Services Former Spouses' Protection Act," 10 *U.S.C.* § 1401 note, § 1408(c)(1).

<sup>&</sup>lt;sup>3</sup> A professional degree should not be equated with goodwill which, as we noted in *Stern*, may, in a given case, add economic worth to a property interest. <u>Stern v. Stern, 66 N.J.</u> at 346-47 n. 5 (1975).

dollar amount of

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 alternative endeavors. [182 N.J. Super. at 609]

Even if such estimates could be made, however, there would remain a world of unforeseen events that could affect the earning potential -- not to mention the actual earnings -- of any particular degree holder.

[\*498] A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a speciality, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may [\*\*\*13] never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after the divorce. [*DeWitt v. DeWitt, 98 Wis.2d 44, 296 N.W.2d 761, 768 (Ct.App.1980)* (footnote omitted)]

Moreover, the likelihood that an equitable distribution will prove to be unfair is increased in those cases where the court miscalculates the value of the license or degree.

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. [*Id.*]

The finality of property distribution precludes any remedy for such unfairness. <u>HN6</u>[1] "Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not [be adjusted]." *Id.* (footnote omitted).

Because of these problems, most courts that have faced the issue have declined to treat professional degrees and licenses as marital property subject to distribution upon divorce. See, [\*\*\*14] e.g., <u>Wisner, supra</u>

(medical license); Frausto v. Frausto, 611 S.W.2d 656 (Tex.Civ.App.1981) (medical license); DeWitt, supra (law degree); Aufmuth, [\*\*533] supra (law degree); Graham, supra (M.B.A.); Wilcox v. Wilcox, 173 Ind.App. 661, 365 N.E.2d 792 (1977) (Ph.D. degree); Todd v. Todd, 272 Cal.App.2d 786, 78 Cal.Rptr. 131 (1969) (law degree). HN7[1] Several courts, while not treating educational degrees as property, have awarded the supporting spouse an amount based on the cost to the supporting spouse of obtaining the degree. In effect, the supporting spouse was reimbursed for her financial contributions used by the supported spouse in obtaining a degree. See, e.g., DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (medical degree); Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla.1979) (medical degree); In re Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (law degree). Cf. Inman v. Inman, 578 S.W.2d 266, 269 (Ky.Ct.App.1979) (dental license held to be property but measure [\*499] of wife's interest was amount of investment in husband's education).

Even if it were marital property, [\*\*\*15] valuing educational assets in terms of their cost would be an erroneous application of equitable distribution law. As the Appellate Division explained, the cost of a professional degree "has little to do with any real value of the degree and fails to consider at all the nonfinancial efforts made by the degree holder in completing his course of study." <u>182 N.J. Super. at 610</u>. See also <u>DeWitt, supra, 296 N.W.2d at 767</u>. Once a degree candidate has earned his or her degree, the amount that a spouse -- or anyone else -- paid towards its attainment has no bearing whatever on its value. The cost of a spouse's financial contributions has no logical connection to the value of that degree.

As the Appellate Division correctly noted, "the cost approach [to equitable distribution] is plainly not conceptually predicated on a property theory at all but rather represents a general notion of how to do equity in this one special situation." <u>182 N.J. Super. at 610</u>. Equitable distribution in these cases derives from the proposition that the supporting spouse should be reimbursed for contributions to the marital unit that, because of the divorce, did not bear its expected fruit for [\*\*\*16] the supporting spouse.

The trial court recognized that the theoretical basis for the amount of its award was not equitable distribution, but rather reimbursement. It held that "the education and degree obtained by plaintiff, under the circumstances of this case, constitute a property right subject to equitable offset upon the dissolution of the marriage." <u>175 N.J. Super. at 447</u> (emphasis added). The court allowed a "reasonable sum as a credit . . . on behalf of the maintenance of the household and the support of the plaintiff during the educational period." *Id.* Although the court found that the degree was distributable property, it actually reimbursed the defendant without attempting to give her part of the *value* of the degree.

[\*500] This Court does not support reimbursement between former spouses in alimony proceedings as a Marriage is not a business general principle. arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, "marriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership." Rothman v. Rothman, 65 N.J. 219, 229 (1974); [\*\*\*17] see also Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 141 (1980). But every joint undertaking has its bounds of fairness. HN8 [1] Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

In this case, the supporting spouse made financial contributions towards her husband's professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree. It is therefore patently [\*\*534] unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it.

Furthermore, it is realistic to recognize that in this case, a supporting spouse has contributed more than mere earnings to her husband with the mutual expectation that both of them -- she as well as he -- will realize and enjoy [\*\*\*18] material improvements in their marriage as a result of his increased earning capacity. Also, the wife has presumably made personal financial sacrifices, resulting in a reduced or lowered standard of living. Additionally, her husband, by pursuing preparations for a future career, has foregone gainful employment and financial contributions to the marriage that would have been forthcoming had he been employed. He thereby has further reduced the level of support his wife might otherwise have received, as well as the standard of living both of them would have otherwise enjoyed. In effect, [\*501] through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed, as it were, present consumption and a higher standard of living, for the future prospect of greater support and material benefits. The supporting spouse's sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled. The unredressed sacrifices -loss of support and reduction of the standard of living -coupled with the unfairness attendant upon the defeat of the [\*\*\*19] supporting spouse's shared expectation of future advantages, further justify a remedial reward. In this sense, an award that is referable to the spouse's monetary contributions to her partner's education significantly implicates basic considerations of marital support and standard of living -- factors that are clearly relevant in the determination and award of conventional alimony.

HN9[1] To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony into divorce proceedings. The concept properly accords with the Court's belief that HN10 [The regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover all financial contributions towards the former spouse's education. includina household [\*\*\*20] expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.

This result is consistent with the remedial provisions of the matrimonial statute. <u>N.J.S.A. 2A:34-23</u>. <u>HN11</u> A basic purpose of alimony relates to the quality of economic life to which one [\*502] spouse is entitled and that becomes the obligation of the other. Alimony has to do with support and standard of living. See <u>Khalaf v. Khalaf, 58 N.J. 63, 69 (1971)</u>. We have recently recognized the relevance of these concepts in accepting the notion of rehabilitative alimony, which is consonant with the basic underlying rationale that a party is entitled to continue at a customary standard of living inclusive of costs necessary for needed educational training. <u>HN12</u> [1] <u>Lepis v. Lepis, 83 N.J.</u> <u>139, 155 n. 9</u>.

The statute recognizes that alimony should be tailored to individual circumstances, particularly those relating to the financial status of the parties. Thus, in all actions for divorce (fault and no-fault), when alimony is awarded, the court should consider actual need, ability to pay and duration of the marriage. In a [\*\*\*21] "fault" divorce, however, the court "may consider also the proofs made in establishing such ground in determining . . . alimony . . . that is fit, reasonable and just." N.J.S.A. 2A:34-23. There is nothing in the statute [\*\*535] to suggest that the standards for awarding alimony are mutually exclusive. Consequently, the financial contributions of the parties during the marriage can be relevant. Financial dishonesty or financial unfairness between the spouses, or overreaching also can be material. The Legislature has not precluded these considerations. Nothing in the statute precludes the court from considering marital conduct -- such as one spouse contributing to the career of the other with the expectation of material benefit -- in fashioning alimony awards. See Lepis v. Lepis, supra. The flexible nature of relief in a matrimonial cause is also evidenced by the equitable distribution remedy that is provided in the same section of the matrimonial statute.

The Court does not hold that every spouse who contributes toward his or her partner's education or professional training is entitled to reimbursement alimony. <u>HN13</u> [] Only monetary contributions made with the mutual and [\*\*\*22] shared expectation that both parties to the marriage will derive increased income and [\*503] material benefits should be a basis for such an award. For example, it is unlikely that a financially successful executive's spouse who, after many years of homemaking, returns to school would upon divorce be required to reimburse her husband for his contributions toward her degree. <u>HN14</u> [] Reimbursement alimony and equitable distribution.

In proper circumstances, however, courts should not hesitate to award reimbursement alimony. Marriage should not be a free ticket to professional education and training without subsequent obligations. This Court should not ignore the scenario of the young professional who after being supported through graduate school leaves his mate for supposedly greener pastures. One spouse ought not to receive a divorce complaint when the other receives a diploma. <sup>4</sup> Those spouses supported through professional school should recognize that they may be called upon to reimburse the supporting spouses for the financial contributions they received in pursuit of their professional training. And they cannot deny [\*\*\*23] the basic fairness of this result. <sup>5</sup>

[\*\*\*24] As we have stated, reimbursement alimony will not always be appropriate or necessary to compensate a spouse who has contributed [\*504] financially to the training. partner's professional education or "Rehabilitative alimony" may be more appropriate in cases where a spouse who gave up or postponed her own education to support the household requires a lump sum or a short-term award to achieve economic selfsufficiency. The Court specifically approved of such limited alimony awards in Lepis v. Lepis, 83 N.J. 139, 155 n. 9 (1980), stating that we did "not share the view that only unusual cases will warrant the 'rehabilitative alimony' approach." However, rehabilitative alimony would not be appropriate where the supporting spouse is unable to return to the job market, or has already attained economic self-sufficiency.

Similarly, where the parties to a divorce have accumulated substantial assets during a lengthy marriage, courts should compensate for any unfairness to one party who sacrificed for the other's education, not by reimbursement alimony but by an equitable [\*\*536] distribution of the assets to reflect the parties' different circumstances and earning capacities. [\*\*\*25] In

<sup>4</sup> New York Times, Nov. 21, 1982, at p. 72, col. 2.

<sup>5</sup>This decision recognizes the fairness of an award of reimbursement alimony for past contributions to a spouse's professional education that were made with the expectation of mutual economic benefit. We need not in the present posture of this case determine the degree of finality or permanency that should be accorded an award of reimbursement alimony as compared to conventional alimony. As noted, an award of reimbursement alimony combines elements relating to the support, standard of living and financial expectations of the parties with notions of marital fairness and avoidance of unjust enrichment. We must also recognize that, while these cases frequently illustrate common patterns of human behavior and experience among married couples, circumstances vary among cases. Consequently, it would be unwise to attempt to anticipate all of the ramifications that flow from our present recognition of a right to reimbursement alimony. We therefore leave for future cases questions as to whether and under what changed circumstances such awards may be modified or adjusted.

*Rothman, supra*, the Court explicitly rejected the notion that courts should presume an equal division of marital property. <u>65 N.J. at 232 n. 6</u>. "Rejecting any simple formula, we rather believe that each case should be examined as an individual and particular entity." *Id.* If the degree-holding spouse has already put his professional education to use, the degree's value in enhanced earning potential will have been realized in the form of property, such as a partnership interest or other asset, that is subject to equitable distribution. *See Stern, supra*, 65 *N.J.* at 346-47.

The degree holder's earning capacity can also be considered in an award of permanent alimony. <sup>6</sup> HN15 **?**] Alimony awards **[\*505]** under *N.J.S.A.* 2A:34-23 must take into account the supporting spouse's ability to pay; earning capacity is certainly relevant to this Our courts have recognized that a determination. primary purpose of alimony, besides preventing either spouse from requiring public assistance, is "to permit the wife, who contributed during marriage to the accumulation of the marital assets, to share therein." Lynn v. Lynn, 153 N.J. Super. 377, 382 (Ch.Div.1977), rev'd [\*\*\*26] on other grounds, 165 N.J. Super. 328 (App.Div.1979); accord Gugliotta v. Gugliotta, 160 N.J. Super. 160, 164 (Ch.Div.), aff'd, HN16 [1] 164 N.J. Super. 139 (App.Div.1978). Even though the enhanced earning potential provided by a degree or license is not "property" for purposes of N.J.S.A. 2A:34-23, it clearly should be a factor considered by the trial judge in determining a proper amount of alimony. If the degree holder's actual earnings turn out to diverge greatly from the court's estimate, making the amount of alimony unfair to either party, the alimony award can be adjusted accordingly.

#### [\*\*\***27**] |||

We stated in <u>Stern, supra</u>, that while earning potential should not be treated as a separate item of property,

[p]otential 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. [66 N.J. at 345]

We believe that *Stern* presents the best approach for achieving fairness when one spouse has acquired a professional degree or license during the marriage. **HN17** Courts may not make any permanent distribution of the value of professional degrees and licenses, whether based upon estimated worth or cost. However, where a spouse has received from his or her partner financial contributions used in obtaining a professional degree or license with the expectation of deriving material benefits for both marriage partners, that spouse may be called upon to reimburse the supporting spouse for the amount of contributions received.

**[\*506]** In the present case, the defendant's financial support helped her husband to obtain his M.B.A. degree, which assistance was undertaken with the expectation of deriving material benefits for both **[\*\*\*28]** spouses. Although the trial court awarded the defendant a sum as "equitable offset" for her contributions, the trial court's approach was not consistent with the guidelines we have announced in this opinion. Therefore, we are remanding the case so the trial court can determine whether reimbursement alimony should be awarded in this case and, if so, what amount is appropriate.

The judgment of the Appellate Division is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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<sup>&</sup>lt;sup>6</sup> It should be noted that alimony is not generally available for a self-supporting spouse under the laws of Minnesota, see <u>DeLa</u> <u>Rosa, supra, 309 N.W.2d at 758</u>, or Kentucky, see <u>Inman, supra, 578 S.W.2d at 270</u>, two states that have treated professional licenses as property. Those states are thus handicapped in their ability to do equity in situations where little or no marital property has been accumulated and the supporting spouse does not qualify for maintenance unless they treat professional licenses as property.

## Wass v. Wass

Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County

February 17, 1998, Decided ; April 2, 1998, Filed

DOCKET NO. FM-13-2024-96C

#### Reporter

311 N.J. Super. 624 \*; 710 A.2d 1053 \*\*; 1998 N.J. Super. LEXIS 243 \*\*\*

ELAINE J. WASS, PLAINTIFF, v. HOWARD L. WASS, DEFENDANT.

**Subsequent History:** [\*\*\*1] Approved for Publication May 4, 1998.

## **Core Terms**

alimony, rehabilitative, permanent, marriage, monthly, spouse, certificate, full-time, training, salary, skills, duration, phase

was employed full-time, and demonstrated no concrete desire or plan to better her employment situation. The court awarded plaintiff former wife rehabilitative alimony in the amount of \$ 250.00 per week for a period of four years from the date of entry of a finalized order in the matter. The court held that a weekly spousal support award of \$ 250.00, coupled with child support in the amount of \$ 118.84, would be appropriate. The court found no reason why plaintiff could not complete her GED requirements and achieve the desired office assistant certificate in eight regular semesters, while seeking, simultaneously, appropriate employment, whether or not she was aided in placement by the program in which she participated. Finally, plaintiff's failure to undertake and complete the program diligently and in good faith would be a factor in evaluating any future permanent alimony application base upon "changed circumstances".

## **Case Summary**

### **Procedural Posture**

Plaintiff former wife sought an award of rehabilitative alimony for a period of seven years. Defendant former husband argued that plaintiff sought impermissible term alimony, that she was employed full-time, and demonstrated no concrete desire or plan to better her employment situation.

### Outcome

The court awarded plaintiff former wife rehabilitative alimony in the amount of \$ 250.00 per week for a period of four years from the date of entry of a finalized order in the matter.

### LexisNexis® Headnotes

### Overview

Plaintiff former wife sought an award of rehabilitative alimony award of \$ 250.00 per week for a period of seven years. Defendant former husband argued that plaintiff sought impermissible term alimony, that she

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

## <u>HN1[</u>] Spousal Support, Modification & Termination

The primary goals of rehabilitative alimony are to reduce post-divorce recourse to the courts, to provide the supporting spouse with some degree of certainty as to the nature and extent of the support obligation owed to the former spouse, and to encourage a supported spouse to develop employment skills within a precise period of time so as to become self-supporting.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

# <u>HN2</u>[🎿] Spousal Support, Modification & Termination

The court is authorized pending any matrimonial action or after judgment of divorce to make such order as to the alimony or maintenance of the parties as the circumstances of the parties and the nature of the case shall render fit, reasonable and just. *N.J. Stat. Ann. §* <u>2A:34-23</u>. The legislature in 1988 explicitly recognized the concept of rehabilitative alimony but did not significantly change the common law concept as it has developed.

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

### **HN3** Dbligations, Periodic Support

The basic premise of an award of rehabilitative rather

than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment, at some future date. Effectively, rehabilitative alimony is term alimony payable for a reasonable period of time, beyond which it is anticipated such support will no longer be needed. Moreover, the essential purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation. Specifically, in this regard, the factors that must be considered include the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of these needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard.

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### HN4[ ] Obligations, Rehabilitative Support

The ultimate purpose of rehabilitative alimony, whether the subject of a voluntary agreement or otherwise, is to help produce a self-sufficient individual, benefiting not only the recipient of the alimony, but the person paying the alimony. In reaching its decision as to any award for alimony, the trial court must fully and specifically articulate findings of fact and conclusions of law in support of its decision.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN5</u>[**1**] Marital Termination & Spousal Support, Spousal Support

Courts must consider the duration of the marriage in awarding alimony. <u>N.J. Stat. Ann. § 2A:34-23</u>. However, the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula. Where the circumstances of the parties divurge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune-the fate of their shared enterprise.

Family Law > ... > Spousal Support > Obligations > Periodic Support

### **HN6** Civil Procedure, Remedies

It is certainly a plaintiff's right to knowingly and voluntarily waive various claims for relief.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN7</u>[ Marital Termination & Spousal Support, Spousal Support

Ultimately, the court must decide, as to the issue of a possible alimony award, what would be fit, reasonable, and just. *N.J. Stat. Ann.* § 2A:34-23.

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

### <u>HN8</u> Obligations, Rehabilitative Support

A factor to be considered in determining as to an alimony award under N.J. Stat. Ann. § 21:34-23(b) is 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.

**Counsel:** Brian P. Latimer, for plaintiff (Jacobowitz, Grabelle, Defino, McGoughran & Latimer, attorneys).

*Robert B. Woods,* for defendant (*Robert B. Woods,* attorney).

Judges: HAYSER, J.T.C., temporarily assigned.

Opinion by: Hayser

Opinion

[\*626] [\*\*1054] HAYSER, J.T.C., temporarily assigned.

Plaintiff in this action seeks an award of rehabilitative alimony. Although not argued by the plaintiff at trial, must the court, in the alternative, under the facts and circumstances of this case, consider an award of permanent alimony if rehabilitative alimony is not appropriate?<sup>1</sup>

[\*\*\*2] The essential facts are not in dispute. Plaintiff left high school in the tenth grade. She worked for a manpower training program as a switchboard operator for one year. She married for the first time in 1976, and gave birth to her first child in 1977. That child is now emancipated.

In 1981, the plaintiff met the defendant, and, before her divorce from her first husband in 1983, the parties began living together. At that time, the plaintiff was, at best, sporadically or seasonally employed as a waitress, Avon and Amway representative and as a secretary, with a temporary employment agency. At the same time, defendant was beginning his career in the construction industry, initially earning less than \$ 15,000.00 per year.

In December 1986, the parties' child was born, and thereafter the parties married in February 1987. The parties apparently agreed that the plaintiff would not seek further employment until **[\*627]** their child began attending school full-time. However, prior to the commencement of this action, plaintiff was temporarily employed at a nursery school and as a secretary for an eye doctor. Plaintiff was also temporarily employed as the manager of a mall kiosk business and as **[\*\*\*3]** a Macy's seasonal salesperson.

<sup>&</sup>lt;sup>1</sup> In her complaint, filed June 27, 1996, plaintiff sought unspecified alimony. Defendant has not previously been required to provide spousal support, although by court order entered January 31, 1997, he was required pendente lite to pay 80% of the roof expenses for the marital residence, where the plaintiff and the parties' child continue to reside.

Presently, plaintiff is employed full-time at Lord & Taylor, earning approximately \$ 7.45 per hour, and working a thirty-eight (38) hour week, with a resulting gross weekly salary of \$ 283.00, or an annual gross salary of approximately \$ 14,721.00. Defendant continued his employment in the construction field, earning a gross salary and bonus in 1997 of \$ 54,878.00, which did not include approximately \$ 1,200.00 of additional income which he earned in that same year for "occasional" carpentry jobs.

Twice in recent years the plaintiff made unsuccessful attempts to obtain her GED certificate. Plaintiff is forty years of age. She now seeks rehabilitative alimony to permit her to attend Brookdale Community College in order to obtain her GED, through a basic skills test and remedial courses, and, thereafter, complete a business office certification program, involving twenty-three (23) credits at a cost of \$ 85.00 per credit. Plaintiff expects this program to prepare her to be employed as a secretary with requisite skills. She has had limited previous experience as a [\*\*1055] secretary. She expects to complete the program in three years.

Plaintiff seeks a rehabilitative [\*\*\*4] alimony award of \$ 250.00 per week for a period of seven (7) years. Defendant argues that plaintiff is in fact seeking impermissible term alimony, that she is presently employed full-time, earning \$ 7.45 per hour, and has demonstrated no concrete desire or plan to better her employment situation.<sup>2</sup>

[\*628] Rehabilitative alimony was first substantially sanctioned in Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (Ch.Div. 1978), and although not lacking objection (see, Arnold v. Arnold, 167 N.J. Super. 478, 401 A.2d 261 (App.Div. 1979)), was [\*\*\*5] recognized, at least implicitly, in Lepis v. Lepis, 83 N.J. 139, 155, 416 A.2d 45 (1980).<sup>3</sup>

Moreover, HN2 [7] the Family Part has long been authorized "... [p]ending any matrimonial action ... or after judgment of divorce ... [to] make such order as to the alimony or maintenance of the parties ... as the circumstances of the parties and the [\*\*\*6] nature of the case shall render fit, reasonable and just ... " N.J.S.A. 2A:34-23. The Legislature in 1988 explicitly recognized the concept of rehabilitative alimony but did not significantly change the common law concept as it has developed. Milner v. Milner, 288 N.J. Super. 209, 214, 672 A.2d 206 (App.Div. 1996).

"HN3[1] The basic premise of an award of rehabilitative rather than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment, at some future date." Shifman v. Shifman, 211 N.J. Super. 189, 194-95, 511 A.2d 687 (App.Div.1986) [emphasis added]. Effectively, rehabilitative alimony is term alimony payable for a reasonable period of time, beyond which it is anticipated such support will no longer be needed. Dotsko v. Dotsko, 244 N.J. Super. 668, 677, 583 A.2d 395 (App.Div.1990).

[\*629] Moreover, the essential purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation. Mahoney v. Mahoney, 91 N.J. 488, 501-02, 453 A.2d 527 (1982). Specifically, in this regard, the factors that must be considered include "the dependent spouse's [\*\*\*7] needs, that spouse's ability to contribute to the fulfillment of these needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard." Lepis, supra, at 152, 416 A.2d 45.

Nevertheless, HN4[1] the ultimate purpose of rehabilitative alimony, whether the subject of a voluntary agreement or otherwise, is to help produce a selfsufficient individual, benefiting not only the recipient of the alimony, but the person paying the alimony. Avirett v. Avirett, 187 N.J. Super. 380, 454 A.2d 917 (Ch.Div.1982), overruled on other grounds, Shifman v.

are to reduce post-divorce recourse to the courts, to provide the supporting spouse with some degree of certainty as to the nature and extent of the support obligation owed to the former spouse, and to encourage a supported spouse to develop employment skills within a precise period of time so as to become self-supporting.

[Supplement to N.J.L.J., July 16, 1981, 14].

<sup>&</sup>lt;sup>2</sup> From her weekly gross salary of \$ 283.00, in addition to regular federal and state tax deductions, plaintiff pays \$ 34.71 per week for medical and vision coverage for herself, and dental coverage for the parties' daughter. Although defendant was required to provide health insurance coverage for the plaintiff and the child under a December 6, 1996 pendente lite court order, his medical plan apparently, at the least, does not provide dental coverage.

<sup>&</sup>lt;sup>3</sup>In its report issued in July 1981, the Supreme Court Committee on Matrimonial Litigation, Phase Two, cited with approval 3 Western N.E.L.Rev. 127, 132-33 (1980):

Shifman, 211 N.J. Super. 189, 511 A.2d 687 (App.Div.1986). Finally, in reaching its decision as to any award for alimony, the trial court must fully and specifically articulate findings of fact and conclusions of law in support of its decision. <u>Heinl v. Heinl, 287 N.J.</u> Super. 337, 347, 671 A.2d 147 (App.Div.1996).

Specific consideration must be given, therefore, to the relevant statutory factors set forth in <u>N.J.S.A. 2A:34-23(b)</u>:

1. The actual need and ability of the parties to pay. Plaintiff is employed [\*\*1056] as a full-time sales person, whose income potential is limited, for which she [\*\*\*8] presently receives \$ 14,721.00, and has to contribute for her own and a portion of their child's medical insurance coverage. Defendant, who apparently has experienced some lean years, economically, has greater income potential, and presently earns in excess of \$ 55,000.00, even with a separate existing child support obligation of \$ 25.00 per week. <sup>4</sup> The plaintiff has submitted her Case Information Statement (CIS), in which she alleges total monthly expenses in the approximate amount of \$ 2,795.00. Having reviewed this CIS, the court finds that plaintiff has reasonable monthly expenses of \$ 2,351.00. Defendant alleges on his CIS that he has monthly expenses for himself and his personal residence of \$ 1,964.50. The court finds that after certain reasonable deductions from this amount, defendant has reasonable monthly expenses of \$ 1,500.00. Therefore, it [\*630] is clear that the plaintiff has some degree of shortfall in her monthly net income vis a vis her reasonable expenses, and that the defendant has some degree of surplus.

2. The duration of the marriage. The parties were married for nine (9) years at the time of their separation, but had apparently lived together for six [\*\*\*9] (6) additional years, for a total of fifteen (15) years. See, <u>Mc Gee v. Mc Gee, 277 N.J.</u> Super. 1, 14, 648 A.2d 1128 (App.Div.1994); Heinl, supra, at 348,671 A.2d 147.

3. The age, physical and emotional health of the parties. Plaintiff is forty (40) years of age and defendant is thirty-seven (37) years of age. Both

appeared at trial in reasonable physical and emotional good health.

4. The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living. It is undisputed that the "standard of living" during the entire relationship of these parties has substantially been defined by the defendant's progression in income. While it would be impossible under the facts of this case for these parties to truly maintain the status quo as to their, now, separate living arrangements, given their income potential, the burden would have to be more equalized to offer the possibility of even a reasonably comparable standard of living for both. Simply stated, an annual salary of \$ 14,000.00, with limited possibility for growth, cannot be equated to an income of \$ 56,000.00 per annum, with potential for growth, and maintain [\*\*\*10] for the parties the reality of any "reasonably comparable standard of living."

5. The earning capacities, educational levels, vocational skills, and employability of the parties. The factual background earlier discussed, clearly demonstrates the present superior position of the defendant, at least in terms of earning capacity, vocational skills and employability.

6. The length of absence from the job market and the custodial responsibilities of the party seeking maintenance. It cannot be seriously disputed that as an adult, the plaintiff has largely been absent from the job market, and during the marriage had the significant custodial responsibilities for the parties' child, now age eleven (11).

7. 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. It is also clear, as discussed, that the significant financial contributions to the marriage were made by the defendant, with the plaintiff's contribution of a non-financial nature largely limited to those of the homemaker and caregiver for the [\*\*\*11] parties' child. She rendered these services [\*\*1057] during the marriage, as apparently was the parties' understanding, during a time when if she were solely responsible for her own maintenance, she would have had to lay the foundation for her future financial security. At her present age, the plaintiff

<sup>&</sup>lt;sup>4</sup> It is also noted that the parties share certain living and medical expenses, proportional to their respective incomesplaintiff paying 20% and defendant paying 80%.

must, perhaps, begin such preparation, having essentially had no career or significant prior training or education. <sup>5</sup>

[\*631] It must be acknowledged that the cited statute sets forth the same [\*\*\*12] factors for a court to "award permanent or rehabilitative alimony or both to either party." N.J.S.A. 2A:34-23(b). Indeed, the utilization of the word "both" in the context of the 1988 amendment, which formally recognized, legislatively, that rehabilitative alimony may be available to parties, offers the rare, yet intriguing, possibility that even a party capable of retraining under a temporary alimony scenario might still be entitled to some permanent alimony to finally maintain a comparable standard of living as experienced during the marriage.<sup>6</sup>

[\*\*\*13] The utilization of the same statutory factors, and their juxtaposition together, for determining both rehabilitative and permanent alimony cannot be considered an idle coincidence. <u>Chase Manhattan Bank</u> <u>v. Josephson, 135 N.J. 209, 638 A.2d 1301 (1994)</u>; <u>Zimmerman v. Municipal Clerk of Berkeley Tp., 201 N.J.</u> <u>Super. 363, 493 A.2d 62 (App.Div.1985)</u>.

In <u>Mc Gee v. Mc Gee, supra</u>, the parties began their relationship in 1981, from which point the plaintiff financially supported the defendant, the defendant having given up her job. In 1983, the parties moved in together, became engaged and cohabitated, except for a 1984 separation, through their marriage in 1989, and until 1991. The defendant argued to the trial court that this was a permanent alimony case. To the contrary, the plaintiff argued it was not an alimony case at all.

[\*632] In conclusory language, the trial court ordered

<sup>6</sup> In <u>Milner v. Milner, 288 N.J. Super. 209, 672 A.2d 206</u> (<u>App.Div.1996</u>), the rehabilitative alimony was converted to a permanent alimony award due to the inability of the plaintiff to achieve economic self-sufficiency. However, it is suggested that the statutory language is somewhat broader and may be utilized through a combination of alimony approaches to achieve, finally, economic self-sufficiency, recognizing that rehabilitative alimony may only be of limited but nevertheless some use in achieving that goal. six months of rehabilitative alimony at \$ 750.00 per month. In reversing the lower court's decision, the Appellate Division remanded the matter for full consideration of both the issues of rehabilitative and permanent alimony, stating:

While this was not a lengthy marriage, "[t]he extent [\*\*\*14] of actual economic dependency, not one's status as a wife [or husband] must determine the duration of support as well as its amount." HN5  $\hat{\mathbf{T}}$  Courts must consider the duration of the marriage in awarding alimony. N.J.S.A. 2A:34-23. However, the length of the marriage and the proper amount or duration of alimony do not correlate in mathematical formula. any Where the circumstances of the parties divurge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune--the fate of their shared enterprise. [Lynn v. Lynn, 91 N.J. 510, 517-18, 453 A.2d 539]

### [<u>McGee v. McGee, supra, 277 N.J. Super. at 14,</u> <u>648 A.2d 1128</u>.<sup>7</sup>]

[\*\*\*15] In <u>Heinl v. Heinl, supra, 287 N.J. Super. 337, 671 A.2d 147</u>, the parties separated after a marriage of eight (8) years. Plaintiff, a high school graduate, was also a graduate of [\*\*1058] a secretarial school, and worked full-time prior to the birth of the parties' older child, and had recently returned to such part-time employment. Plaintiff was thirty-five years of age. The trial court determined, again largely in conclusory fashion, that the plaintiff was entitled to permanent alimony in the amount of \$ 125.00 per week. In reversing the trial court's decision, the Appellate Division stated:

... Although we note that the defendant here did not urge the trial court to award rehabilitative alimony, defendant did urge that alimony in any form should be denied. In rejecting defendant's position, the

<sup>&</sup>lt;sup>5</sup> There is little to be factored into this analysis as to the issue of alimony in terms of the limited equitable distribution between the parties, principally consisting of the sale of the marital residence. Moreover, as earlier noted, the defendant is presently responsible for 80% of the roof expenses pursuant to *pendente lite* order in this matter.

<sup>&</sup>lt;sup>7</sup> The parties in *McGee* has an overall relationship of shorter duration than those in the present matter. However, defendant may argue that while Mrs. McGee was a fifty-seven-year-old woman with "mild medical problems," *Id. at 5, 648 A.2d 1128,* the present plaintiff is a forty-year-old woman with no denoted health problems. Although Mrs. McGee graduated from high school, the subsequent employment of both women was sporadic and temporary. However, as will be discussed further, the present plaintiff, unlike Mrs. McGee, is seeking only rehabilitative alimony.

judge was therefore obligated to fully articulate his reasons for granting permanent alimony. That reasoning process necessitates a consideration of rehabilitative alimony, and where appropriate, an articulation of reasons for rejection of rehabilitative alimony and an award of permanent alimony. *McGee, supra, 277 N.J. Super. at 14, 648 A.2d* <u>1128</u>.

### [\*633] [*Id. at 348, 671 A.2d 147.*]

The issue discussed in [\*\*\*16] *McGee* and *Heinl* goes beyond the duty of the trial court to made findings of fact and articulate reasons for the conclusions it reaches. *R. 1:7-4.* The trial court is required, more significantly, to evaluate the alimony issue on the basis of both a rehabilitative term and a permanent award, or even if alimony should be awarded at all.

This is not to suggest in the instant case that an award of permanent alimony would be inappropriate. Plaintiff's limited education and employment experience, as well as the limited potential of her present employment, argues for such an award arising from a long-standing economically dependent relationship. Even her age, given that she might be at the outer limits of a training or education curve, supports such an award. Under *McGee* and *Heinl,* the court would certainly have to consider such an award.<sup>8</sup>

[\*\*\*17] Yet, plaintiff has finally chosen at trial to waive a claim for permanent alimony, unlike the recipient party in *McGee* and *Heinl.* <u>HN6</u>[] It is certainly her right to knowingly and voluntarily waive various claims for relief. *Petrillo v. Bachenberg, 263 N.J. Super.* 472, 623 A.2d 272, certif. granted 134 N.J. 566, 636 A.2d 523, aff'd. 139 N.J. 472, 655 A.2d 1354 (1995); Teltsher v. City of Orange, 7 N.J. Tax 287 (1985).

This brings the discussion to another factor to be considered in determining as to the alimony issue under N.J.S.A. 2A:34-23(b)--"any other factors which the court

may deem relevant." <u>HN7</u>[•] Ultimately, the court must decide, as to the issue of a possible alimony [\*634] award, what would be "fit, reasonable, and just." <u>N.J.S.A. 2A:34-23</u>. However, in reaching its conclusion, the court must consider all relevant factors.

In the category of "relevant factors" must be the reasons, freely and persuasively presented, as to what a party is seeking through an award of alimony. At trial, the plaintiff acknowledged in her testimony that while she possessed "no skills that are going to get me anywhere," nevertheless she repeatedly stressed that it was important for her, personally, **[\*\*\*18]** "to better my life ... not to be on the street." Rarely is the expression to be independent of spousal support heard in an action for alimony.

Should the court give substance and meaning to such sentiments? Where there is a reasonable basis, the court has concluded that this factor should be given the same consideration as any other factor. Defendant argues, however, that plaintiff's sentiments are not worthy of consideration, that she has no plan for rehabilitation, and that her goals, at best, are speculative and are only designed to gain, improperly, temporary financial support.

[\*\*1059] Nevertheless, if the situation is that hopeless, if the plaintiff is truly incapable of retraining, and her future income will mirror her present, does it not make the case, as discussed, for an award of permanent alimony? Otherwise, how do we achieve the essential purpose of continuing the standard of living, as closely as possible, that the parties enjoyed prior to their separation? <u>Mahoney v. Mahoney, supra, 91 N.J. at 501-02, 453 A.2d 527</u>.

Successful rehabilitative alimony can establish, maintain or restore the pride of economic self-sufficiency and relieve the paying spouse of a financial burden that [\*\*\*19] otherwise may be permanent. Public policy may also be served to avoid a party becoming a public charge. Indeed, alimony should continue only so long and in such amount as is necessary to reasonably maintain the standard of living the parties might have continued to enjoy in an intact relationship, wherein each made his or her respective financial and nonfinancial contributions.

[\*635] This, finally, brings the discussion to the last  $\underline{HN8}$  [ ] factor to be considered in determining as to an alimony award under <u>N.J.S.A. 2A:34-23(b)</u>--"[t]he time and expense necessary to acquire sufficient education

<sup>&</sup>lt;sup>8</sup> Defendant may argue that the plaintiff having waived at trial a permanent alimony claim, any further consideration of that issue would be unwarranted. This ignored the court's ultimate jurisdiction to determine under <u>N.J.S.A. 2A:34-23</u>, an alimony award that would be, indeed, "fit, reasonable and just." Moreover, depending upon the proofs developed at trial, the result would be no different than that provided for under **R. 4:9-2**, as to permitted pleading amendments conforming to the evidence presented. Here, however, the complaint sought unspecified alimony.

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." This is uniquely a factor to be considered in evaluating and determining an award of rehabilitative alimony.

Plaintiff is not a high school graduate. She has failed twice on her own in recent years to achieve her GED certificate. It can not seriously be argued that her present sales position offers her the realistic prospect of either substantial economic or long-term security. It is as much a factor [\*\*\*20] of the future standing of her employer as her own ability to stand for long hours.

Her plan, as she testified, is to enroll in a program provided by Brookdale Community College, which program has two features. The first involves the taking of a basic skills test to determine what remedial courses she may need to complete to then successfully take her GED exam. Once having completed the first phase, then she would be enrolled in a non-degree program for twenty-three credits to receive a certificate of office assistant, which would train her in modern office procedures as a secretary, a position that she has sporadically, rudimentary previously held, with knowledge. No cost figures, if any, were presented as to the first phase. Each credit hour of the second phase would be charged at \$ 85.00 per hour. No time frame was presented as to the completion schedule of the first phase, and she stated there would be approximately six credit courses for the second phase that she would like to take at the rate of one course per semester in order not to conflict with her full-time employment needs and parental responsibilities.

Defendant would argue that there is no guarantee that even if plaintiff [\*\*\*21] was to complete this program, that she would then achieve employment that is more financially rewarding. Defendant [\*636] would also contend that if the rehabilitative alimony did not achieve the desired result, it could "open the door" to a possible permanent alimony award. See, <u>Milner, supra.</u> However, these concerns truly beg the question, when we have a situation here that, on the facts, can now support an award of permanent alimony. The court has concluded that on balance, the plaintiff has presented a reasonable plan to attempt financial independence.

However, that is not to say that there are no flaws in plaintiff's request. She seeks an award of rehabilitative alimony of \$ 250.00 per week for seven (7) years, but provides the court with no credible evidence to support

such an extended award.

Nevertheless, the court has concluded that for the reasons already discussed, under the relevant statutory factors to be considered, an award of rehabilitative alimony is appropriate in this case. Even if it achieves only permanent employment at the same salary level as present, it may lessen the need for future applications for modification based upon "changed circumstances." It [\*\*\*22] is in the interests of both parties to attempt this goal, and is as realistic, perhaps, as seeking employment in the field of fine arts, at age fifty-five, [\*\*1060] armed only with a masters in fine arts degree. *Milner, supra.* 

However, the court has reviewed the temporary support award as requested by the plaintiff. Plaintiff claims monthly expenses for her and the child for whom she is the custodial parent, of \$ 2,795.00, to which the court has made what it feels are reasonable adjustments to reduce the monthly expenses to \$ 2,351.00. Factoring in plaintiff's net monthly salary of \$ 898.70, it would leave a monthly deficit of \$ 1,452.30, or \$ 337.74 per week. The court has concluded that a weekly spousal support award of \$ 250.00, coupled with child support in the amount of \$ 118.84, would be appropriate in this case. <sup>9</sup> This would also leave the defendant with a weekly **[\*637]** net of \$ 395.00, which would meet his reasonable weekly expenses of \$ 348.84.

[\*\*\*23] As to the duration of this alimony award, there is no reason why the plaintiff could not complete her GED requirements and achieve the desired office assistant certificate in eight regular semesters, while seeking, simultaneously, appropriate employment, whether or not she is aided in placement by the program in which she participates. Finally, her failure to undertake and complete the program diligently and in good faith would be a factor in evaluating any future permanent alimony application base upon "changed circumstances."

Therefore, plaintiff is awarded rehabilitative alimony in the amount of \$ 250.00 per week for a period of four years from the date of entry of a finalized order in this matter.

**End of Document** 

<sup>&</sup>lt;sup>9</sup>The court has separately calculated child support in accordance with the established Child Support Guidelines, appearing as Appendix IX of the Rules of Court.

## Lepis v. Lepis

Supreme Court of New Jersey January 7, 1980, Argued ; June 11, 1980, Decided

A-64

Reporter

83 N.J. 139 \*; 416 A.2d 45 \*\*; 1980 N.J. LEXIS 1357 \*\*\*

CABRINI B. LEPIS, PLAINTIFF-RESPONDENT, v. JAMES G. LEPIS, DEFENDANT-APPELLANT

**Prior History:** [\*\*\*1] On certification to the Superior Court, Appellate Division.

## **Core Terms**

modification, spouse's, equitable, alimony, modify, divorce, discovery, marital, spousal, decree, facie, flexible, postjudgment, impair

distribution, alimony, child custody, and child support, seeking an increase of defendant's support obligation. After the trial court denied plaintiff's motion, the appellate division reversed and remanded with directions to require defendant to produce his tax returns to provide the trial court with information regarding his actual earnings. Defendant challenged the appellate division's order. In affirming, the court concluded that where plaintiff alleged with specificity the increases in her needs as well as the children's needs caused by inflation and the rising cost of supporting growing children and where such changes were not temporary in nature, inquiry was warranted to determine whether plaintiff's ability to maintain herself and the children had been substantially impaired. Because plaintiff made a prima facie showing that a modification of defendant's support obligation was necessary, defendant was properly required to disclose evidence of his income.

## Case Summary

### **Procedural Posture**

Defendant husband challenged the order of the New Jersey Superior Court, Appellate Division, that reversed the trial court's denial of plaintiff wife's motion for an increase of defendant's spousal and child support obligations and remanded with instructions that defendant be required to produce information regarding his earnings.

### Outcome

The court affirmed the appellate division judgment reversing the trial court's denial of plaintiff wife's motion to increase defendant husband's spousal and child support obligations and remanding.

### LexisNexis® Headnotes

### Overview

Plaintiff wife moved to modify the support and alimony provisions of the agreement entered into with defendant husband at the time of divorce that governed property

Family Law > ... > Spousal Support > Modification & Termination > General Overview Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

<u>*HN1*</u>[**\***] Spousal Support, Modification & Termination

See N.J. Stat. Ann. § 2A:34-23.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN2</u>[**\***] Modification & Termination, Changed Circumstances

As a result of the authority provided under <u>N.J. Stat.</u> <u>Ann. § 2A:34-23</u>, alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of changed circumstances.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

<u>HN3</u>[📩] Spousal Support, Modification & Termination

Apart from its statutory authority, a trial court may exercise its highly flexible remedial powers to enforce the terms of interspousal support agreements to the extent that they are just and equitable, and the trial court is vested with the authority to modify such agreements upon a showing of changed circumstances.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN4</u>[**\***] Marital Termination & Spousal Support, Spousal Support

Support payments are intimately related to equitable distribution and trial judges should have the utmost leeway and flexibility in determining what is just and equitable in making allocations of marital assets.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

### <u>HN5</u>[<mark>太</mark>] Spousal Support, Modification & Termination

The extent of the change in circumstances, whether urged by plaintiff or defendant, shall be the same regardless of whether the support payments being questioned were determined consensually or by judicial decree. In each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements.

Civil Procedure > Settlements > Settlement Agreements > Modification of Agreements

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

# <u>*HN6*</u> Settlement Agreements, Modification of Agreements

Consensual agreements and judicial decrees should be subject to the same standard of changed circumstances.

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Enforcement > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN7</u>[📩] Modification & Termination, Changed Circumstances

Trial courts possess the flexible power of equity to enforce spousal support agreements only to the extent that they are fair and equitable. Similarly, the terms of such agreements should receive continued enforcement without modification only so long as they remain fair and equitable. The equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > Child Support > Support Obligations > General Overview

# <u>HN8</u>[**\***] Marital Termination & Spousal Support, Spousal Support

The supporting spouse's obligation is mainly determined by the quality of economic life during the marriage, not bare survival. The needs of the dependent spouse and children contemplate their continued maintenance at the standard of living they had become accustomed to prior to the separation.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Property Rights > Characterization > Separate Property

# <u>HN9</u> Marital Termination & Spousal Support, Spousal Support

The amount is not fixed solely 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.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

<u>HN10</u> Spousal Support, Modification & Termination

Courts have recognized certain changed circumstances that warrant modification in a variety of settings, including (1) an increase in the cost of living; (2) increase or decrease in the supporting spouse's income; (3) illness, disability, or infirmity arising after the original judgment; (4) the dependent spouse's loss of a house or apartment, (5) the dependent spouse's cohabitation with another, (6) subsequent employment by the dependent spouse; and (7) changes in federal income tax law. Courts have consistently rejected requests for modification based on circumstances that are only temporary or that are expected but have not yet occurred.

Family Law > ... > Support Obligations > Modification > General Overview

### HN11[] Support Obligations, Modification

When children are involved, an increase in their needs-whether occasioned by maturation, the rising cost of living, or more unusual events--has been held to justify an increase in support by a financially able parent. Their emancipation and employment, however, may warrant a reduction in their support.

Family Law > ... > Support Obligations > Modification > Changed Circumstances

Family Law > Child Support > General Overview

Family Law > Child Support > Support Obligations > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Obligations > General Overview

### <u>HN12</u> Modification, Changed Circumstances

Changed circumstances are not limited in scope to

events that were unforeseeable at the time of divorce. This is particularly obvious in cases involving modification of child support orders, where maturation justifies an increase in support by a financially able parent. See, The supporting spouse has a continuing obligation to contribute to the maintenance of the dependent spouse at the standard of living formerly shared. So long as this duty continues, objective notions of foreseeability--what the parties or the court could have foreseen--are all but irrelevant.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

# <u>HN13</u> Spousal Support, Modification & Termination

The proper criteria are whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change. An increase in support becomes necessary whenever changed circumstances substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement. Conversely, decrease is called а for when circumstances render all or a portion of support received unnecessary for maintaining that standard. After finding that the dependent spouse cannot maintain the original standard of living, the court must consider the extent to which the supporting spouse's ability to pay permits modification.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

# <u>HN14</u> Spousal Support, Modification & Termination

If the existing support arrangement has provided for the circumstances alleged as changed, it would not ordinarily be equitable and fair to grant modification.

Family Law > ... > Spousal Support > Modification &

Termination > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

## <u>HN15</u> Spousal Support, Modification & Termination

As a practical matter, spousal agreements have great potential for ensuring the desired degree of stability in support arrangements. Such agreements have traditionally been more comprehensive and particularized than court orders and thus more carefully tailored to the peculiar circumstances of the parties' lives. In view of the current economic conditions and the changing social structure of the family, particularly with regard to women's roles, courts should make greater efforts to provide in advance for change. This would enhance the stability of judicially fashioned arrangements and make unnecessary a return to court.

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

# <u>HN16</u> Dissolution & Divorce, Property Distribution

The power to distribute property equitably should be exercised to relieve the strain of total reliance on support payments for financial security. Courts have refused to consider an alimony award in isolation; the earnings received from investments funded by an equitable distribution award have been considered when determining the adequacy of the dependent spouse's income. As a result of the equitable distribution, parties will have available a substantial capital fund to invest in order to produce additional income.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

# <u>HN17</u>[📩] Spousal Support, Modification & Termination

A close look should be taken at the supported spouse's ability to contribute to his or her own maintenance, both at the time of the original judgment and on applications for modification. The fact that the New Jersey alimony and support statute is phrased without reference to gender will accomplish little if judicial decision making continues to employ sexist stereotypes. The extent of actual economic dependency, not one's status as a wife, must determine the duration of support as well as its amount.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

# <u>HN18</u> Equal Protection, Nature & Scope of Protection

The constitutional guarantee of the equal protection of the laws precludes the grounding of the law of domestic relations in the old notion that generally it is the man's primary responsibility to provide a home and its essentials. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. The law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that provided women with security in exchange for economic dependence and discrimination. This does not mean that relative economic dependence--when proven--is irrelevant to the determination of support obligations, but a court of equity cannot rely on antiquated presumptions; gender is no longer a permissible proxy for economic need. The need for support must be assessed with a view towards the earning capacity of the individual woman in the marketplace.

Family Law > ... > Support Obligations > Modification > Best Interests of Child

Family Law > Child Support > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

Family Law > Child Support > Taxation

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Changed Circumstances

Family Law > ... > Spousal Support > Modification & Termination > Need

### HN19

The party seeking modification has the burden of showing such changed circumstances as would warrant relief from the support or maintenance provisions involved. A prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. When the movant is seeking modification of an alimony award, must demonstrate that that partv changed circumstances have substantially impaired the ability to support himself or herself. This requires full disclosure of the dependent spouse's financial status, including tax returns. When the movant is seeking modification of child support, the guiding principle is the best interests of the children. A prima facie showing would then require a demonstration that the child's needs have increased to an extent for which the original arrangement does not provide.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Tax Law > ... > Income Taxes > Individuals, Estates & Trusts > General Overview

Family Law > ... > Support Obligations > Modification > General Overview <u>HN20</u>[📩] Spousal Support, Modification & Termination

Only after the movant has made a prima facie showing should the respondent's ability to pay become a factor for the court to consider. Therefore, once a prima facie case is established, tax returns or other financial information should be ordered. While individuals have a legitimate interest in the confidentiality of their income tax returns, the movant may be unable to prove that modification is warranted without access to such reliable indicia of the supporting spouse's financial ability. Similarly, without knowledge of the financial status of both parties, the court will be unable to make an informed determination as to what, in light of all the circumstances, is equitable and fair. Discovery and inspection of income tax returns should only be permitted for good cause. Because financial ability of the supporting spouse may be crucial to the proper disposition of a motion for modification, a prima facie showing of changed circumstances meets this good cause standard.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Support Obligations > Modification > General Overview

# <u>HN21</u>[📩] Spousal Support, Modification & Termination

Although equity demands that spouses be afforded an opportunity to seek modification, the opportunity need not include a hearing when the material facts are not in genuine dispute. A party must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary. Without such a standard, courts would be obligated to hold hearings on every modification application.

Family Law > ... > Support Obligations > Modification > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > ... > Spousal Support > Modification & Termination > Need

### **HN22** Support Obligations, Modification

While the supported spouse need not completely deplete savings to qualify for increased support, neither can that spouse be permitted unilaterally to designate her funds for the children's college education. This is so particularly in light of defendant's obligation under the agreement to pay for the expense of higher education. Any contention that the defendant will not perform this duty must be rejected as premature. When and if such college expenses arise and defendant fails to fulfill his obligation, a court is free to order defendant to make the required payments.

Family Law > ... > Support Obligations > Modification > Best Interests of Child

Family Law > Child Support > Support Obligations > General Overview

### HN23

While the children are entitled to a determination based on their best interests, both parents have a duty to support them.

**Counsel:** Gary N. Skoloff argued the cause for appellant (*Skoloff & Wolfe*, attorneys).

John E. Finnerty argued the cause for respondent.

**Judges:** For affirmance -- Chief Justice Wilentz and Justices Sullivan, Pashman, Clifford, Schreiber and Pollock. For reversal -- None. The opinion of the Court was delivered by Pashman, J.

**Opinion by:** PASHMAN

### Opinion

[\*142] [\*\*47] Long after the bonds of matrimony are dissolved, courts of equity are frequently called upon to reassess the persisting [\*143] obligations of financial support. This case presents for review the standards and procedures for modifying support and maintenance arrangements after a final judgment of divorce.

The parties were married in 1961 and had three children. After a period of marital discord, on January 8, 1974, the wife obtained from the Superior Court, Chancery Division, a judgment of divorce on grounds of desertion. The court incorporated as part of the judgment a detailed agreement governing property distribution, alimony, child custody and support.

Under the terms of the agreement, the wife retained all the household items [\*\*\*2] and "any and all other tangible personal property" located at the marital home. She received title to the marital home and the husband's two-year old automobile. Upon entry of a final judgment of divorce and judicial ratification of the agreement, the husband would make a single payment of \$ 22,000 "in settlement of the Wife's claim to her right for equitable distribution and any other support claims of the Wife now or at any time in the future except as provided herein."

The agreement permitted the wife to retain custody of the children and provided flexible visitation provisions. The husband agreed to pay \$ 120 per week for alimony and \$ 210 per week for child support -- \$ 70 per week for each unemancipated child. A child's attendance at college, business or trade school would not terminate support payments. The husband was obligated to maintain health insurance for the wife until her death or remarriage and for each child until emancipated. He was also responsible for all necessary medical, dental and prescription drug expenses of the children and for the wife's medical, dental and prescription drug expenses in excess of \$ 50 per illness. The husband promised to pay all [\*\*\*3] expenses for four years of college or professional education for each child. If a child lived away at school, child support would be reduced by some "appropriate" amount.

**[\*144]** Looking to future uncertainties, the agreement sought to remove some of them from consideration if questions regarding modification arose. It specified that the presence or absence of separate earnings by the wife, or changes in the husband's income, would be

irrelevant to a decision to alter or halt the husband's payments. The agreement also contained a provision governing modification by consent:

This Agreement shall not be varied, modified or annulled by the Husband or the Wife except by written instrument voluntarily executed and acknowledged by both.

On February 1, 1978, plaintiff moved to modify the support and alimony provisions of the agreement. She sought increased support for herself and the three children, a single, additional payment of \$ 1,500 for [\*\*48] household repairs and furniture, and counsel fees. Plaintiff also sought production of defendant's 1976 and 1977 income tax returns before a hearing on the modification motion. The trial court denied the motion without [\*\*\*4] requiring defendant to disclose actual earnings. Plaintiff's request for counsel fees was also denied.

Plaintiff appealed from these rulings to the Appellate Division on April 19, 1978. On the following day she filed a notice of motion for rehearing of her motion for modification. Defendant responded by filing a notice of cross-motion for counsel fees and costs on the ground that plaintiff's motion for rehearing was frivolous. The trial court denied a rehearing, noting that by virtue of the pending appeal the court lacked jurisdiction to grant it. Because the application for a rehearing was clearly without merit, the court granted defendant's crossmotion for counsel fees. Plaintiff sought review in the Appellate Division of this second determination which was consolidated with her earlier appeal.

In an unreported opinion, the Appellate Division reversed the trial court's dispositions. The court held that "[o]nly after the discovery process is complete should the former wife's application for increased alimony and child support be determined." **[\*145]** The Appellate Division concluded that refusing discovery of defendant's income despite plaintiff's showing of increased **[\*\*\*5]** need "effectively denied her any opportunity to prove changed circumstances \* \* \*." Since the court viewed plaintiff's application as requiring further examination, it held that the award of counsel fees was premature. It therefore vacated the trial court's orders and remanded the cause with directions to order production of all tax returns of defendant since 1973.

This Court granted defendant's petition for certification. *81 N.J. 281 (1979).* We now affirm. Before addressing whether the summary rejection of plaintiff's claims was proper, we first discuss the effect of a consensual agreement upon the court's power to modify obligations of support and maintenance. Secondly, we examine generally what constitutes "changed circumstances" so as to warrant a modification of those obligations. We then consider the procedures that a court should employ when passing upon a modification petition -- particularly the allocation of the burdens of proof and the conditions for compelling production of tax returns. Finally, we apply the results of this analysis to the facts of the present case.

I

#### Modification of Spousal Agreements

The equitable power of the courts to modify alimony [\*\*\*6] and support orders at any time is specifically recognized by <u>N.J.S.A. 2A:34-23</u>:

**HN1** Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. \* \* \* Orders so made may be revised and altered by the court from time to time as circumstances may require.

[\*146] <u>HN2</u> As a result of this judicial authority, alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of "changed circumstances." <u>Chalmers v. Chalmers, 65</u> <u>N.J. 186, 192 (1974)</u>; <u>Martindell v. Martindell, 21 N.J.</u> <u>341, 352-353 (1956)</u>; <u>Boorstein v. Boorstein, 142</u> <u>N.J.Eq. 135</u> (E & A 1948); <u>Parmly v. Parmly, 125</u> <u>N.J.Eq. 545, 548-549</u> (E & A 1939).

Divorcing [\*\*\*7] spouses have often attempted to temper the flexibility of the court's power to modify with greater predictability by entering into separation agreements. In the past, such agreements have had significant [\*\*49] and varying impact on the availability of post-judgment modification. Specific performance of spousal support agreements was once thought to be barred by the flexible approach to modification embodied in *N.J.S.A.* 2A:34-23. Apfelbaum v.

Apfelbaum, 111 N.J.Eq. 529 (E & A 1932). Although not specifically enforceable, such agreements could be regarded by the court as relevant to the issue of support, and could be incorporated in a divorce decree. "The fact that [a] court took over the terms of the contract did not impair the power of the court to alter such provisions to accord with the equity of unfolding circumstance." <u>Corbin v. Mathews, 129 N.J.Eq. 549, 554</u> (E & A 1941). The agreement was said to merge into the divorce decree, thereby losing its contractual nature. <u>Id. at 553; Schluter v. Schluter, 23 N.J. Super.</u> 409, 416 (App.Div.1952), certif. den., 11 N.J. 583 (1953).

The rule against specific enforcement was later rejected [\*\*\*8] by this Court in Schlemm v. Schlemm, 31 N.J. 557 (1960). That decision recognized that HN3 apart from its statutory authority, the Superior Court may exercise its "highly flexible" remedial powers to enforce the terms of interspousal support agreements "to the extent that they are just and equitable." Id. at 581-582. Later decisions continued to recognize the courts' power to modify such agreements "upon a showing of changed circumstances." Berkowitz v. Berkowitz, 55 N.J. 564, 569 (1970); see [\*147] Gulick v. Gulick, 113 N.J. Super. 366, 370 (Ch.Div.1971). The rule which developed, however, required that "[a] far greater showing of changed circumstances must be made before the court can modify a separation agreement than need be shown to warrant the court amending an order for alimony or support." Schiff v. Schiff, 116 N.J. Super. 546, 561 (App.Div.1971), certif. den. 60 N.J. 139 (1972). Applying the "same standard that is applied by courts of equity to the specific enforcement of contracts in other fields[,]" the Appellate Division in Schiff held that modification of a spousal required showing of changed agreement а circumstances "such [\*\*\*9] as to convince the court that to enforce the agreement would be unconscionable." 116 N.J. Super. at 561 (emphasis supplied). "Subsequent events which should have been in contemplation of the parties as possible contingencies when they entered into the contract [would] not excuse performance." Id. Although this standard was never expressly adopted by the Supreme Court, it has been followed by lower courts. <sup>1</sup> See, e.g., Skillman v. Skillman, 136 N.J. Super. 348 (App.Div.1975); Edelman v. Edelman, 124 N.J. Super. 198 (Ch.Div.1973).

<sup>&</sup>lt;sup>1</sup> The *Schiff* rule, however, was not extended to modification of child support provisions. See <u>*Clayton v. Muth, 144 N.J.*</u> <u>*Super. 491 (Ch.Div.1976).*</u>

In <u>Smith v. Smith, 72 N.J. 350 (1977)</u>, this Court considered whether the Schiff standard applied when the trial court was effecting equitable distribution of marital property pursuant to <u>N.J.S.A. 2A:34-23</u>. Noting that <u>HN4</u>[] "support payments are intimately related to equitable distribution" [\*\*\*10] and that "trial judges should have the utmost leeway and flexibility in determining what is just and equitable in making allocations of marital assets," we disapproved of the Schiff rule:

Henceforth <u>HN5</u> T] the extent of the change in circumstances, whether urged by plaintiff or defendant, shall be the same, regardless of whether the support **[\*148]** payments being questioned were determined consensually or by judicial decree. In each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements. [72 N.J. at 360]

The rule announced in Smith is fully applicable when post-judgment modification. considerina Consensual agreements and judicial decrees should be subject to the same standard of "changed circumstances." Initially it might appear that this rule [\*\*50] would diminish the advantages of separation and property settlement agreements, since they would provide no greater certainty or stability than a judicial determination. However, granting a greater degree of permanence to negotiated agreements would tend to make them a riskier [\*\*\*11] arrangement for spouses who are likely to be harmed by changed circumstances. Typically, they have been spouses who are economically dependent; they generally have been wives with custody of children. Often consensual agreements would not be in their best interests if only "unconscionable" circumstances would warrant modification.<sup>2</sup> As we recognized in rejecting Schiff, contract principles have little place in the law of

#### domestic relations. See Smith, 72 N.J. at 360.

[\*\*\*12] When we first upheld the specific enforceability of spousal agreements in Schlemm, we relied on HN7  $\hat{\mathbf{T}}$  the flexible power of equity to enforce such agreements only to the extent that they were fair and equitable. Similarly, the terms of such agreements [\*149] should receive continued enforcement without modification only so long as they remain fair and equitable. The equitable authority of a court to modify support obligations in response to changed circumstances, regardless of their source, cannot be restricted. Smith, 72 N.J. at 360; Berkowitz, 55 N.J. at 569; Schlemm, 31 N.J. at 581; Parmly, 125 N.J.Eq. at 548. We therefore find no reason to distinguish between judicial decrees and consensual agreements when "changed circumstances" call for the modification of either.

II

#### "Changed Circumstances"

The parties here disagree over what constitutes "changed circumstances" sufficient to justify modification of alimony and child support. Plaintiff claims that her detailed demonstration of the increased needs resulting from maturation of the children and severe inflation justifies discovery of defendant's tax returns. Such needs [\*\*\*13] increased and her husband's substantiated ability to pay would, according to plaintiff, constitute "changed circumstances" warranting upward modification of alimony and child support. Defendant responds that an increase in the cost of living and the "normal wear and tear" alleged here does not even entitle plaintiff to discovery of his present earnings. He argues that the increase in need alleged, even if coupled with proof of his increased ability to pay, would not constitute "changed circumstances." According to defendant, plaintiff's position and the Appellate Division disposition are contrary to prior caselaw and will result an avalanche of unwarranted petitions for in modification.

The frequency with which courts are called upon to modify awards needs make or support no The lack of uniformity in their documentation. approaches and predictability in their decisions is similarly widely recognized. See generally Note, "Modification [\*150] of Spousal Support: A Survey of a Confusing Area of the Law," 17 J.Fam.Law 711 (1979). In part, the inability to predict dispositions is responsible for the volume of modification motions. The solution to the problem of predictability would [\*\*\*14] be a just

<sup>&</sup>lt;sup>2</sup>Commentators have addressed similar arguments to the *Schiff* rule of unconscionability. See Skoloff, "*Schiff*-Unconscionable Obstacle to Matrimonial Settlements," 99 *N.J.L.J.* 553 (1976) ("The undue burden placed on counsel as well as the parties by this *Schiff* requirement is itself unconscionable. \* \* \* The result: \* \* \*." Id. at 553-566); Meth, "Matrimonial Arbitration," 99 *N.J.L.J.* 409 (1976) (noting that the impossibility of providing for every future contingency made "*Schiff* seem like a voice from a very ivory tower." *Id.*).

accommodation of the power of the courts to adjust support obligations with the desirable features of stable arrangements and spousal cooperation. We conclude such an accommodation is possible through an approach linking the notion of "changed circumstances" to the initial support determination, be it judicial or consensual. This case presents an appropriate opportunity for us to clarify the proper set of coordinated standards.

### [\*\***51**] A

#### The Elements of "Changed Circumstances"

**HN8** The supporting spouse's obligation is mainly determined by the quality of economic life during the marriage, not bare survival. The needs of the dependent spouse and children "contemplate their continued maintenance at the standard of living they had become accustomed to prior to the separation." *Khalaf v. Khalaf, 58 N.J. 63, 69 (1971)*; see *Bonanno v. Bonanno, 4 N.J. 268, 274 (1950)*.<sup>3</sup>

**HN9**[**↑**] The amount is not fixed *solely* 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 [\*\*\*15] 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. [Bonanno, 4 N.J. at 274 (quoting Dietrick v. Dietrick, 88 N.J.Eq. 560, 561-562 (E & A 1917)]

[\*151] In accordance with this general principle, <u>HN10</u>[ **?**] courts have recognized "changed circumstances" that warrant modification in a variety of settings. Some of them include

(1) an increase in the cost of living, see <u>Martindell</u>, <u>21 N.J. at 353</u>;

(2) increase or decrease in the supporting spouse's

income, <u>Martindell, 21 N.J. at 355; Traudt v. Traudt,</u> <u>116 [\*\*\*16] N.J.Eq. 75</u> (E & A 1934); <u>Acheson v.</u> <u>Acheson, 24 N.J.Misc. 133 (Ch.1946);</u>

(3) illness, disability or infirmity arising after the original judgment, *e.g., <u>Kirshbaum v. Kirshbaum,</u>* <u>129 N.J.Eq. 429</u> (E & A 1941); <u>Limpert v. Limpert,</u> <u>119 N.J. Super. 438 (App.Div.1972)</u>; see <u>Ostrow v.</u> <u>Ostrow, 59 N.J. Super. 299, 305-306</u> (App.Div.1960);

(4) the dependent spouse's loss of a house or apartment, <u>Jackson v. Jackson, 140 N.J.Eq. 124</u> (E & A 1947); <u>McLeod v. McLeod, 131 N.J.Eq. 44</u> (E & A 1942);

(5) the dependent spouse's cohabitation with another, <sup>4</sup> <u>Wertlake v. Wertlake, 137 N.J. Super.</u> <u>476 (App.Div.1975); Garlinger v. Garlinger, 137</u> <u>N.J. Super. 56 (App.Div.1975); Eames v. Eames,</u> <u>153 N.J. Super. 99 (Ch.Div.1976); Grossman v.</u> <u>Grossman, 128 N.J. Super. 193 (Ch.Div.1974);</u>

(6) subsequent employment by the dependent spouse, <u>Ramhorst v. Ramhorst, 138 N.J.Eq. 523</u> (E & A 1946); <u>Kavanagh v. Kavanagh, 134 N.J.Eq. 358</u> (E & A 1944), see also <u>Lavene v. Lavene, 162</u> <u>N.J. Super. 187, 203 (Ch.Div.1978)</u>; and

(7) changes in federal income tax law, <u>Acheson</u>, <u>supra</u>.

Courts [\*\*\*17] have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred. <u>Bonanno, supra;</u> <u>McDonald v. McDonald, 6</u> <u>N.J. Super. 11 (App.Div.1949);</u> <u>Sassman v. Sassman, 1</u> <u>N.J. Super. 306 (App.Div.1949)</u>.

HN11 [1] When children are involved, an increase in

<sup>&</sup>lt;sup>3</sup>These cases actually phrased this entitlement in terms of what a husband owes a wife. As we will discuss below, this is no longer a sound statement of contemporary domestic relations law. See *infra* at 156.

<sup>&</sup>lt;sup>4</sup> If the dependent spouse remarries, the court must modify any order or judgment to eliminate the alimony obligation on application by the supporting spouse, <u>N.J.S.A. 2A:34-25</u>; see <u>Sharpe v. Sharpe, 109 N.J. Super. 410 (Ch.Div. 1970)</u>.

their needs -- whether occasioned by maturation, the rising cost of living or more [\*\*52] unusual events -has been held to justify an increase in support by a financially able parent, see <u>Shaw v. Shaw, 138 N.J.</u> <u>Super. 436 (App.Div.1976); Testut v. Testut, 34 N.J.</u> <u>Super. 95 [\*152] (App.Div.1955); Clayton v. Muth, 144</u> <u>N.J. Super. 491 (Ch.Div.1976)</u>. Their emancipation and employment may warrant reduction [\*\*\*18] in their support, see, e.g., <u>Kavanagh v. Kavanagh, supra</u>; <u>Rufner v. Rufner, 131 N.J.Eq. 193</u> (E & A 1942); see also Grotsky v. Grotsky, 58 N.J. 354 (1971).

This review of New Jersey decisions <sup>5</sup> reveals the factors that a court of equity must assess when determining whether the former marital standard of living is being maintained. When support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard. The decision to modify child support requires a similar examination of the child's needs and the relative abilities of the spouses to supply them.

Our analysis makes clear that [\*\*\*19] HN12 "changed circumstances" are not limited in scope to events that were unforeseeable at the time of divorce. This is particularly obvious in cases involving modification of child support orders, where maturation is cited as justifying an increase in support by a financially able parent. See, e.g., Shaw v. Shaw, supra. The supporting spouse has a continuing obligation to contribute to the maintenance of the dependent spouse at the standard of living formerly shared. So long as this duty continues, objective notions of foreseeability -what the parties or the court could or should have foreseen -- are all but irrelevant. HN13 The proper criteria are whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change. An increase in support becomes necessary whenever changed circumstances [\*153] substantially impair the dependent spouse's ability to maintain the standard of living reflected in the original decree or agreement. a decrease is Conversely, called for when circumstances render all or a portion of support received unnecessary for maintaining that standard. After finding that the dependent spouse cannot maintain [\*\*\*20] the original standard of living, the court must consider the extent to which the supporting spouse's ability to pay permits modification.

**HN14** If the existing support arrangement has in fact provided for the circumstances alleged as "changed," it would not ordinarily be "equitable and fair," Smith, 72 *N.J. at 360*, to grant modification. For example, although a spouse cannot maintain the marital standard of living on the support payments received, this would not ordinarily warrant modification if it were shown that a single large cash payment made at the time of divorce was included with the express intention of meeting the rising cost of living. <sup>6</sup> In other cases, the equitable distribution award -- which we have recognized is intimately related to support, id. -- might have been devised to provide a hedge against inflation. The same might be true with respect to child support. A lump sum payment or a trust established for the benefit of the children could be shown to have been designed to cover the certain eventuality of increasing needs.

### [\*\*\***21]** B

Judicial Provision for Changed Circumstances

**HN15** As a practical matter, spousal agreements have great potential for ensuring the desired degree of stability in support arrangements. [\*\*53] See, *e.g., Petersen v. Petersen, 172 N.J. Super. 304* (*App.Div.1980*); *DeGraaff v. DeGraaff, 163 N.J. Super.* 578 [\*154] (*App.Div.1978*). Such agreements have traditionally been more comprehensive and particularized than court orders, and thus more carefully tailored to the peculiar circumstances of the parties' lives. <sup>7</sup> In view of the current economic conditions and

<sup>&</sup>lt;sup>5</sup>Caselaw in other jurisdictions is in substantial accord. See <u>24 Am.Jur.2d</u>, <u>Divorce and Separation</u>, <u>§§</u> 665-690, <u>844-850</u> (1966); Annot., **89 A.L.R.2d 7 (1963)**; Annot., **18 A.L.R.2d 10** (1951).

<sup>&</sup>lt;sup>6</sup>Of course under the standard for modification stated in *Smith*, should such a provision later prove inadequate, the court is free to require greater support if it is warranted in the light of prevailing circumstances. See 72 *N.J. at 360*.

<sup>&</sup>lt;sup>7</sup> For examples of separation and property settlement agreements, see G. Skoloff, *Family Law Practice* 330-349 (1976 ed.); 11 D. Herr, *New Jersey Practice -- Marriage, Divorce and Separation* § 789 (3d ed. 1963) and § 793.7 (Supp.1978). See also <u>Berkowitz, 55 N.J. at 569-570</u>. In that case the parties provided that on the wife's remarriage the husband would convey his interest in the residence to the wife in return for cancellation of his obligations regarding it. They also made financial arrangements for the children's

the changing social structure of the family -- particularly with regard to women's roles, cf. Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) -- courts, too, should make greater efforts to provide in advance for change. This would enhance the stability of judicially fashioned arrangements and make unnecessary a HN16 The power to distribute return to court. property equitably should be exercised to relieve the strain of total reliance on support payments for financial security. See Rothman v. Rothman, 65 N.J. 219, 229 (1974); see also Smith, 72 N.J. at 360; [\*\*\*22] Painter v. Painter, 65 N.J. 196, 218 (1974). Courts have refused to consider an alimony award in isolation; the earnings received from investments funded by an equitable distribution award have been considered when determining the adequacy of the dependent spouse's income. Esposito v. Esposito, 158 N.J. Super. 285, 300 (App.Div.1978). "As a result of the equitable distribution plaintiff will have available a substantial capital fund to invest in order to produce additional income." Lavene v. Lavene, 162 N.J. Super. at 203.

### [\*\*\*23] <u>HN17</u>[**个**]

[\*155] A closer look should also be taken at the supported spouse's ability to contribute to his or her own maintenance, both at the time of the original judgment and on applications for modification. <sup>8</sup> [\*\*\*24] The fact that our State's alimony and support statute is phrased without reference to gender, *N.J.S.A. 2A:34-23*, will accomplish little if judicial decision making continues to employ sexist stereotypes. The extent of actual economic dependency, not one's status as a wife, must determine the duration of support as well as its amount. See *Lavene, 162 N.J. Super. at 203*; *Turner v. Turner, 158 N.J. Super. 313 (Ch.Div.1978)* (court reviewed purpose of alimony and, based on the equitable distribution award and the wife's anticipated earning

attendance at college away from home and a consequent reduction in child support. The court therefore denied the husband's motion for reduction of child support on grounds of the wife's remarriage: "[A]II of the alleged 'changed circumstances' were envisioned by the parties and *dealt with* specifically in the Agreement." <u>Id. at 570</u> (emphasis supplied).

<sup>8</sup> At times courts have found it necessary to assess the *supporting* spouse's ability to pay without regard to current earnings to determine fair and equitable support. See, *e.g.,* <u>Hess v. Hess, 134 N.J.Eq. 360</u> (E & A 1944). The same should be done when the *supported* spouse's earning potential is an issue.

capacity, awarded alimony only for 18 months). 9

[\*\*\*25] Not only the realities of the marketplace, but also HN18 [1] the constitutional [1156] guarantee of [\*\*54] "the equal protection of the laws," U.S.Const., Amend. XIV, compels this approach. It is no longer permissible to ground the law of domestic relations in the "old notio[n]' that 'generally it is the man's primary responsibility to provide a home and its essentials." Orr v. Orr, 440 U.S. at 279-280, 99 S.Ct. at 1112, 59 L.Ed.2d at 319 (quoting Stanton v. Stanton, 421 U.S. 7, 10, 95 S.Ct. 1373, 1375, 43 L.Ed.2d 688, 692 (1975)). "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." Orr, 440 U.S. at 280, 99 S.Ct. at 1112, 59 L.Ed.2d at 319 (quoting Stanton, 421 U.S. at 14-15, 95 S.Ct. at 1377-1378); see Taylor v. Louisiana, 419 U.S. 522, 535 n.17, 95 S.Ct. 692, 700 n.17, 42 L.Ed.2d 690 (1975); Craig v. Boren, 429 U.S. 190, 198, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that [\*\*\*26] provided women with security in exchange for economic dependence and discrimination. This does not mean that relative economic dependence -- when proven -- is irrelevant to the determination of support obligations. But a court of equity cannot rely on antiguated presumptions; gender is no longer a permissible proxy for economic need. See Orr, 440 U.S. at 281, 99 S.Ct. at 1112, 59 L.Ed.2d at 320. The need for support must be assessed with a view towards the earning capacity of the individual

<sup>9</sup> In <u>Arnold v. Arnold, 167 N.J. Super. 478 (App.Div.1979)</u>, the Appellate Division concluded that in the absence of unusual facts, automatic cutoff dates for alimony should be avoided. While we disapprove of the general approach in *Arnold*, the trial court in that case made no investigation of the nature of the wife's employment potential, and for this reason the 30-month limitation was justifiably seen as arbitrary. Careful and explicit factfinding on the earning ability of the dependent spouse is of paramount importance in such cases.

We do not share the view that only unusual cases will warrant the "rehabilitative alimony" approach. We note that other states permit such awards. See, e.g., § Fla.Stat.Ann. 61.08 (West Supp.1979); Haw.Rev.Stat.Ann. § 580-47 (Supp.1979). See also Cal.Civ.Code § 4806 (Supp.1980) (court may withhold support allowance to a party who is "earning his or her own livelihood"); Ind.Code Ann. § 31-1-11.5-9 (Burns 1979) (prohibiting maintenance of party unless he or she is physically or mentally incapable of supporting himself or herself).

woman in the marketplace.

Careful consideration of all these factors at the time of divorce and at the time modification is sought will eventually reduce the necessity for otherwise wellfounded postjudgment applications. It may also lessen the need for plenary hearings on modification motions. We are confident that any increased expenditure of judicial time necessitated by this expanded inquiry will be more than offset by savings from a reduced need for modification hearings.

### [\*157] |||

#### Procedural Guidelines

The parties here disagree on the proper procedure for courts to follow on modification motions. In particular they dispute both the necessity and the [\*\*\*27] elements of a *prima facie* showing of changed circumstances prior to discovery of the respondent's financial status. We therefore think it appropriate to explain procedures to be followed in the postjudgment setting.

HN19 The party seeking modification has the burden of showing such "changed circumstances" as would warrant relief from the support or maintenance provisions involved. Martindell, 21 N.J. at 353. A prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. When the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself. This requires full disclosure of the dependent spouse's financial status, including tax returns. When the movant is seeking modification of child support, the guiding principle is the "best interests of the children." See Hallberg v. Hallberg, 113 N.J. Super. 205, 209 (App.Div.1971); Clayton v. Muth, 144 N.J. Super. at 493. A prima facie showing would then require a demonstration that the child's needs have increased to an extent [\*\*\*28] for which the original arrangement does not provide.

**HN20** [1] Only after the movant has made this *prima facie* showing should the respondent's ability to pay become a factor for the court to consider. Therefore, once a *prima facie* case is established, tax returns or other financial information should be ordered. We recognize that individuals have a legitimate interest in the confidentiality of their income tax returns. However, without access to such reliable indicia of the supporting

spouse's financial ability, the movant may be unable to prove that [\*158] modification is warranted. Similarly, without knowledge of the financial status of both parties, the court will be unable to make an informed determination as to "what, in light of all [\*\*55] the [circumstances] is equitable and fair." Smith, 72 N.J. at 360. Courts have recognized that discovery and inspection of income tax returns should only be permitted for good cause. <sup>10</sup> See <u>DeGraaff v. DeGraaff</u>, 163 N.J. Super. 578 (App.Div.1978); see also Ullmann v. Hartford Fire Ins. Co., 87 N.J. Super. 409 (App.Div.1965); Finnegan v. Coll, 59 N.J. Super. 353 (Law Div. 1960). Because financial [\*\*\*29] ability of the supporting spouse may be crucial to the proper disposition of a motion for modification, we conclude that a prima facie showing of changed circumstances meets this good cause standard. We also recognize, however, that the financial information of other individuals may be necessarily involved, as where the supporting spouse has remarried and filed joint returns with the new spouse. In such circumstances the court should follow the procedure outlined by the court in DeGraaff: the trial judge should examine the tax return in camera and excise irrelevant matters before giving the return to the plaintiff. 163 N.J. Super. at 583.

[\*\*\*30] [\*159] Once the above steps have been completed, the court must decide whether to hold a hearing. <u>HN21</u> [] Although equity demands that spouses be afforded an opportunity to seek modification, the opportunity need not include a hearing when the material facts are not in genuine dispute. We therefore hold that a party must clearly demonstrate the

<sup>10</sup> *R.* 4:79-5 provides:

Interrogatories as to all issues in all matrimonial actions may be served by any party as of course pursuant to R. 4:17. All other discovery in matrimonial actions shall be permitted only by leave of court for good cause shown.

On its face this rule would appear to require good cause for the production of tax returns. However, *R*. 4:17 provides that the interrogatories may include a request for a copy of any paper. As the Comment to that rule observes, income tax returns, although pieces of paper, are not routinely discoverable. See Pressler, *Current N.J. Court Rules*, Comment *R*. 4:17 at 703 (1980). The Comment to *R*. 4:79-5 also notes that in the context of a matrimonial dispute, discovery can easily be subject to "abuse as a device by which one spouse harasses the other." *Id.* at 982. For these reasons we agree that discovery of income tax returns on motions for modification of support is not desirable without a *prima facie* showing of changed circumstances. existence of a genuine issue as to a material fact before a hearing is necessary. See <u>Shaw v. Shaw, 138 N.J.</u> <u>Super. at 440</u>; <u>Hallberg v. Hallberg, 113 N.J. Super. at</u> <u>208</u>; <u>Tancredi v. Tancredi, 101 N.J. Super. 259, 262</u> (<u>App.Div.1968</u>). Without such a standard, courts would be obligated to hold hearings on every modification application. The application of the equitable principles we have outlined does not require elaborate procedures in every case. Courts should be free to exercise their discretion to prevent unnecessary duplication of proofs and arguments. The volume of postjudgment litigation provides additional, practical support for this approach.

In determining whether a material fact is in dispute, a court should rely on the supporting documents and affidavits of the parties. Conclusory allegations would, of [\*\*\*31] course, be disregarded. Only statements to which a party could testify should be considered. Thus, if the sole dispute centered around the supporting spouse's earnings, the disclosure of income tax returns might render a hearing unnecessary.

IV

#### The Present Motion for Modification

Applying the foregoing standards and guidelines to the facts of this case, we conclude that the Appellate Division was correct in reversing the trial court's denial of plaintiff's motion and directing production of defendant's tax returns. Plaintiff has alleged with specificity the increases in her own and her children's needs caused by substantial inflation and the rising cost of supporting growing children. These changes in circumstances **[\*160]** will apparently continue. They clearly warrant court inquiry into whether plaintiff's ability to maintain herself and her children has been substantially impaired.

[\*\*56] By reason of plaintiff's *prima facie* showing, defendant should be required to disclose the requested evidence of his income, subject to the protections outlined above. See *supra at 55*. On remand, the trial court must then determine, among other things, whether [\*\*\*32] the earlier agreement, as incorporated in the divorce judgment, provided for the present circumstances. Since the record clearly discloses genuine disputes as to material facts other than defendant's earnings, a hearing will be necessary.

As defendant points out, the agreement provided that the increased income of either spouse "shall not be a consideration to change or modify the support and maintenance payments for the Wife or the Wife and children." This might appear to be a valid accommodation of contingencies which otherwise would support modification based on "changed circumstances" -- the wife's post-divorce employment or an increase in the husband's earnings. But as we have stated, the court is not bound by such provisions. It should scrutinize carefully the dependent spouse's ability to contribute to her own and her children's maintenance. The court must determine whether there has been substantial impairment of their ability to maintain the standard of living to which they are entitled.

Plaintiff, who was a teacher before her marriage, holds a Master's degree in Speech Communication and is continuing her education towards earning a Ph.D. She contends, however, that [\*\*\*33] she has been unable to find substantial employment to bridge the gap between needs and expenses, and that employment in positions for which she is substantially overqualified would diminish her self image or esteem. Defendant asserts that plaintiff has unreasonably restricted her choice of employment fields. He points out that plaintiff's background and age and the children's maturity and attendance in school make her [\*161] failure to find full-time employment while continuing her education unreasonable. These disputes must be addressed by the trial court on remand.

Defendant alleges that a \$ 22,000 lump sum payment to plaintiff incorporated in their agreement should be recognized as the agreed means for covering the increased needs which plaintiff alleges -- especially with respect to repairs to her present home. Whether this amount should be so considered is a question of fact for the court. HN22 [1] While the supported spouse need not completely deplete savings to qualify for increased support, see Capodanno v. Capodanno, 58 N.J. 113, 118 (1971); Khalaf, 58 N.J. at 70; Martindell, 21 N.J. at 354, neither can that spouse be permitted unilaterally to designate [\*\*\*34] her funds, as plaintiff attempts to do here, for the children's college education. This is so particularly in light of defendant's obligation under the agreement to pay for the expense of higher education. Any contention that the defendant will not perform this duty must be rejected as premature. When and if such college expenses arise and defendant fails to fulfill his obligation, a court is free to order defendant to make the required payments. 12

<sup>&</sup>lt;sup>12</sup> If circumstances have changed in such a way that requiring defendant to pay for college would no longer be equitable and fair, the court also remains free to alter the prior arrangement.

It appears that no provision has been made for any increase in the support necessary for growing children. On remand, the court therefore must determine whether the best interests of the children require greater support, to what extent the defendant is obligated to provide for [\*\*\*35] their increased needs and whether he has the financial ability to do so. HN23 [7] While the children are entitled to a determination based on their best interests, both parents have a duty to support them. Ionno v. Ionno, 148 N.J. Super. 259, 261-262 (App.Div.1977); Shanley v. Nuzzo, 160 N.J. Super. 436, 441-442 (J&D R.Ct.1978). Accordingly, the entire [\*162] amount of increased need is not necessarily to be assessed against defendant, unless the children's needs cannot otherwise be met. See <u>Clayton [\*\*57] v.</u> Muth, 144 N.J. Super. at 496.

Finally, we agree with the Appellate Division that a determination regarding an award of counsel fees should await resolution of these issues on remand.

For the foregoing reasons, the judgment of the Appellate Division is affirmed. The matter is remanded for further proceedings in accordance with this opinion.

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See <u>Rufner v. Rufner, 131 N.J.Eq. at 196</u>; see also <u>Khalaf, 58</u> <u>N.J. at 71-72</u>.

<u>S.W. v. G.M.</u>

Superior Court of New Jersey, Appellate Division January 29, 2020, Argued; February 24, 2020, Decided DOCKET NO. A-1278-18T3

Reporter

462 N.J. Super. 522 \*; 228 A.3d 226 \*\*; 2020 N.J. Super. LEXIS 22 \*\*\*; 2020 WL 874735

S.W., Plaintiff-Respondent, v. G.M.<sup>1</sup>, Defendant-Appellant.

**Judges:** Before Judges Whipple, Gooden Brown, and Mawla.

**Subsequent History:** [\*\*\*1] Approved for Publication February 24, 2020.

Opinion by: MAWLA

Zakarin, on the brief).

**Prior History:** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-2163-11.

<u>S.W. v. G.W., 2018 N.J. Super. Unpub. LEXIS 378</u> (App.Div., Feb. 20, 2018)

# **Core Terms**

lifestyle, alimony, marital, marriage, budget, calculate, spouse, retirement, duration, spent

**Counsel:** Brian G. Paul argued the cause for appellant (Szaferman, Lakind, Blumstein & Blader, PC, attorneys; Brian G. Paul, of counsel and on the briefs).

Jeffrey P. Weinstein argued the cause for respondent (*Weinstein Lindemann & Weinstein*, attorneys; *Jeffrey P. Weinstein*, of counsel and on the brief; *Rachel* 

# Opinion

[\*\*228] [\*526] The opinion of the court was delivered by

MAWLA, J.A.D.

This matter returns after we reversed and remanded portions of a final judgment of divorce, directing the trial judge "to articulate, numerically, his findings regarding **[\*\*229]** the marital lifestyle" for alimony purposes. <u>S.W.</u> <u>v. G.W., No. A-4063-14, 2018 N.J. Super. Unpub.</u> <u>LEXIS 378, \*41 (App. Div. Feb. 20, 2018)</u>. We also stated "[t]o the extent the determination upon remand necessitates a review of the life insurance award, the trial judge should also adjust the insurance amount plaintiff [S.W.] is required to maintain, if appropriate." 2018 N.J. Super. Unpub. LEXIS 378 at \*47.

Following the remand, the trial judge considered written submissions from the parties and entered an August **[\*\*\*2]** 27, 2018 order amending the judgment of divorce, increasing defendant G.W.'s alimony without enumerating the marital lifestyle. On November 9, 2018, the judge denied defendant's motion for reconsideration and reduced the life insurance amount he previously found appropriate to secure plaintiff's alimony obligation.

<sup>&</sup>lt;sup>1</sup> We use initials to protect the parties' privacy interests. See R. 1:38-3(d).

Defendant appeals from both orders. Because the judge did not numerically calculate the marital lifestyle, we reverse and remand.

We set forth the facts adduced at trial in greater detail in our prior decision. To summarize, the parties were in a long-term marriage, which produced three children, all of whom are emancipated. **[\*527]** Both parties are college educated. Defendant ceased her employment decades ago following the birth of the parties' first child. Plaintiff was the sole breadwinner as a Senior Managing Director of a boutique restructuring firm, Zolfo Cooper (ZC).

Plaintiff's aggregate compensation was capped at \$2,000,000 per year. His income ebbed and flowed with ZC's fortunes, exceeding the cap in several years and declining far below it in others. We found no abuse of discretion and upheld the trial judge's calculation of plaintiff's net income at \$1,313,000 per year [\*\*\*3] by averaging the five years of earnings prior to the complaint.<sup>2</sup>

We also upheld the trial judge's description of the parties' lifestyle recounting the following:

The parties lived a wealthy lifestyle and did not save. At the time of trial, the parties had no retirement accounts because [they] had been liquidated to fund the marital lifestyle. The parties purchased a marital residence in 1986 and a residence on Cape Cod in 1998. According to the testimony, the judge concluded both residences "were renovated and enlarged on an almost constant basis." The improvements were financed through mortgage refinancing of both homes.

The parties owned twelve boats during the marriage including sailboats and three Boston Whalers. Plaintiff's Case Information Statement (CIS) nearest the date of complaint set forth monthly expenses of \$80,853 and defendant's CIS indicated those expenses were \$92,147 per month. The parties' children attended private schools, including exclusive boarding schools for high school. The children's educational and activity fees and expenses were funded by plaintiff's income and

student loans. The family enjoyed the benefits of country club, dinner club, and yacht club memberships. [\*\*\*4] Plaintiff's CIS articulated a family vacation budget of \$60,000 and defendant \$150,000 per year. Defendant spent \$100,000 per year on a photography hobby.

Even though defendant estimated the family spent between \$1,000,000 and **[\*\*230]** \$1,500,000 annually, defendant maintained plaintiff had secreted funds from the marriage. The trial judge concluded defendant had not proved a dissipation because she had admitted all of plaintiff's income was used to pay the marital expenses. The judge found "[t]he overwhelming evidence is that these parties both lived an incredibly profligate lifestyle as evidenced by both parties['] [CISs]. . . . In short, it was a budget without any apparent restraints."

### [\*528] [S.W., 2018 N.J. Super. Unpub. LEXIS 378 at \*4-6.]

We recited the trial judge's reasoning for awarding alimony:

The trial judge awarded defendant permanent alimony utilizing the version of <u>N.J.S.A. 2A:34-23(b)</u> that existed before its amendment in September 2014....

The judge determined permanent alimony was supported by the majority of the statutory factors. He concluded the marriage was of an "extremely long duration" and "the parties lived a relatively opulent, and certainly an upper income lifestyle. Their lifestyle consumed the entirety of [plaintiff's] [\*\*\*5] income." He found:

the goal of "maintaining the lifestyle" is more of a goal than a reality. In the case of [defendant,] her most recent CIS shows that her lifestyle has decreased from \$92,352 to \$27,042 per month. Without even beginning to analyze these figures for credibility purposes, it is clear that she has had to "sacrifice" her prior lifestyle during the course of this litigation, and will have to do so going forward.

The judge found plaintiff's ability to maintain the lifestyle going forward was facilitated by "an extremely generous expense account." Thus, the judge found plaintiff would "have more flexibility" in maintaining the lifestyle than defendant who would be dependent on alimony alone. Conversely, the judge found the equitable distribution award

<sup>&</sup>lt;sup>2</sup>Contrary to defendant's assertion on this appeal, our conclusion that the trial judge did not abuse his discretion in averaging plaintiff's income was not a declaration the income determination was immune to modification or a change in circumstances. Neither we nor the trial judge made such a statement.

supported the alimony amount awarded because defendant would receive at least \$750,000 from her share of ZC to invest "while [plaintiff] will likely someday have the ability to be bought out upon retirement."

The judge found defendant could earn no money because she had been "out of the workforce for decades." The judge found that plaintiff and his partners had reduced their draw from \$850,000 to \$450,000 per year each. He determined [\*\*\*6] plaintiff's income fluctuated dramatically because the "bonus can vary relatively wildly." However, the judge determined there was never a year where plaintiff's income fell below \$1,000,000.

The judge ordered the alimony payable at a rate of \$22,000 per month from plaintiff's draw and \$186,000 per year payable from the bonus for a total yearly obligation of \$450,000. The judge made alimony taxable to defendant and tax deductible to plaintiff. The judge ordered plaintiff to maintain life insurance of \$4,000,000 to secure his alimony obligation.

### [S.W., 2018 N.J. Super. Unpub. LEXIS 378 at \*19-22.]

We reversed the alimony determination and, as related to the issues now raised on this appeal, stated:

Although the judge's descriptive findings regarding the lifestyle were adequate, we are unable to correlate his findings regarding the parties' expenditures with the alimony award. Indeed, the judge ordered plaintiff to pay defendant permanent alimony of \$450,000 per year based on an income of \$1,313,000, but without a numerical finding of lifestyle, we are unable to determine how the alimony figure was derived. For these reasons, we reverse the alimony **[\*\*231]** award and remand for the trial judge to make a numerical finding of **[\*\*\*7]** the marital lifestyle and then explain whether and how the alimony award meets it.

## [S.W., 2018 N.J. Super. Unpub. LEXIS 378 at \*42-43.]

[\*529] In the August 27, 2018 order, the trial judge increased alimony to \$36,792 per month, and credited defendant's pendente lite support based on the increase. In his November 9, 2018 order the judge reduced plaintiff's life insurance obligation from \$4 million to \$2.2 million.

As to alimony the judge reasoned as follows:

[Defendant] testified that the marital lifestyle was approximately \$700,000 at one time, and then later went to range from one million to one and a half million dollars. Defendant's CIS[] dated September 1, 2011[,] claimed monthly expenditures of \$92,147, which, according to her, had only decreased to \$90.142 after separation. In contrast, [p]laintiff's CIS, filed with the court on January 8, 2013, indicated marital lifestyle of \$80,853, and postseparation expenses for him of \$63,540. However, this latter number included pendente lite support as well as considerable expenses for the children. Moreover, [plaintiff] complained that the preseparation lifestyle number was inflated by [defendant] "overspend(ing) on extravagancies", giving an example of her spending \$120,000 [\*\*\*8] on a photography habit.

By 2014, the number submitted by the parties had significantly. Defendant's CIS, as changed submitted on May 23, 2014, indicated a monthly lifestyle amount of \$27,042. Plaintiff's CIS, as filed with the court on May 21, 2014, indicated an amount of \$57,579, including the then current pendente lite support amount of \$22,000, as well as \$12,500 for the children's school costs. Taking away these two amounts would represent a current lifestyle for [plaintiff], as of the time of filing, of approximately \$23,000. However, as previously noted, at the time of this court's initial decision, [plaintiff's] lifestyle was supported by his expense account at [ZC].

The court, in reviewing [d]efendant's final CIS prior to trial, finds same to be credible. The court is also satisfied that the expenditures contained therein do not represent true numbers of the lifestyle enjoyed during the marriage. That is not to say that the court accepts [p]laintiff's argument that the court can assign a number that represents the actual lifestyle during the marriage. As the court has previously found, the parties lived a lifestyle which completely subsumed [plaintiff's] income. There is simply [\*\*\*9] no way to return both parties to that exorbitant lifestyle. However, [defendant's] CIS omits numerous spending categories that should be accounted for to achieve a lifestyle somewhat commensurate with the marital lifestyle.

At this point, the judge added back to defendant's current lifestyle budget amounts representing some CIS schedule B and C line item expenses he determined

were reasonable to include in her budget. We do not repeat this aspect of the findings because the judge's starting point was defendant's current budget, as opposed to the marital lifestyle. At the conclusion of the exercise, **[\*530]** the judge stated "[b]ased upon the foregoing, the court determines defendant's actual monthly need is \$36,792."

On reconsideration, the judge reiterated his reasoning regarding the alimony and did not elaborate further on the issue of marital lifestyle. Regarding life insurance, relying on plaintiff's certification, which defendant disputed, the judge explained his reasoning as follows:

[\*\*232] And, finally, there's this issue of the . . . insurance necessary. Of course, the insurance is necessary as a surety against the payment of the alimony. [A]pparently [plaintiff] has a three-million dollar policy, [\*\*\*10] I'm told in the papers. And the argument is that at least . . . [\$]2.2 million should be guaranteed to [defendant] going forward, and that is based on the alimony amount that the [c]ourt has calculated spread over a five-year term.

At which point he will presumably, at least potentially, reach an age of good faith retirement. That . . . argument does resonate with the [c]ourt. I did omit it from my decision, so I will order that \$2.2 million be the surety amount through life insurance . . . to protect [defendant's] interests . . . .

I.

In reviewing an alimony award, we typically defer to the trial judge's findings and reverse only where there is an abuse of discretion. See <u>Overbay v. Overbay, 376 N.J.</u> <u>Super. 99, 106, 869 A.2d 435 (App. Div. 2005)</u>. We likewise review the denial of reconsideration for an abuse of discretion. <u>Cummings v. Bahr, 295 N.J. Super.</u> <u>374, 389, 685 A.2d 60 (App. Div. 1996)</u>. However, where the issue is a mistake of law, our review is de novo. <u>S.D. v. M.J.R., 415 N.J. Super. 417, 430, 2 A.3d</u> <u>412 (App. Div. 2010)</u> (citing <u>Manalapan Realty, LP v.</u> <u>Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658</u> <u>A.2d 1230 (1995)</u>).

Defendant argues the trial judge set alimony based on her pendente lite budget, which was far below the marital lifestyle. She argues the judge disregarded our instructions to find the numerical lifestyle and explain whether, and how, the alimony met it. Defendant argues the judge should have used the budget for the intact family and then set a post-divorce budget [\*\*\*11] for

her. She also asserts the *Mallamo* <sup>3</sup> credit was erroneous due to the improper **[\*531]** lifestyle analysis. She argues the judge reduced the life insurance death benefit for alimony by improperly speculating plaintiff would retire at the full social security age. Defendant urges we exercise original jurisdiction to finally decide these issues.

II.

The importance of finding the marital lifestyle cannot be overstated. It is at once the fixed foundation upon which alimony is first calculated and the fulcrum by which it may be adjusted when there are changed circumstances in the years following the initial award.

Alimony is an "economic right that arises out of the marital relationship and provides the dependent spouse with 'a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage."" <u>Mani v. Mani, 183 N.J. 70, 80, 869 A.2d 904 (2005)</u> (quoting <u>Stiffler v. Stiffler, 304 N.J. Super. 96, 99, 698 A.2d 549 (Ch. Div. 1997)</u>). . . . "The basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation." <u>Innes v. Innes, 117 N.J. 496, 503, 569 A.2d 770 (1990)</u> (citing <u>Mahoney v. Mahoney, 91 N.J. 488, 501-02, 453 A.2d 527 (1982)</u>).

## [Quinn v. Quinn, 225 N.J. 34, 48, 137 A.3d 423 (2016).]

The goal in fixing an 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 [\*\*\*12] the marriage." <u>Crews v. Crews, 164 N.J. 11, 16, [\*\*233]</u> 751 A.2d 524 (2000). "The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, . . . [or] limited themselves to their earned income," <u>Glass v. Glass, 366 N.J. Super. 357, 371, 841 A.2d 451</u> (quoting <u>Hughes v. Hughes, 311 N.J. Super. 15, 34, 709 A.2d 261 (App. Div. 1998))</u>, or if they chose to accumulate savings. <u>Lombardi v. Lombardi, 447 N.J. Super. 26, 36-37, 145 A.3d 709 (App. Div. 2016)</u>.

In contested divorce actions, once a finding is made concerning the standard of living enjoyed by the

<sup>&</sup>lt;sup>3</sup> <u>Mallamo v. Mallamo, 280 N.J. Super. 8, 654 A.2d 474 (App. Div. 1995)</u>.

parties during the marriage, the court should review the adequacy and reasonableness of the support award against this finding. That must be done even in situations of reduced circumstances, when the one spouse's income, or both spouses' incomes in combination, do not permit the divorcing couple to live [\*532] in separate households in a lifestyle reasonably comparable to the one they enjoyed while living together during the marriage.

#### Crews, 164 N.J. at 26.

In *Hughes*, the parties spent more than they earned and relied on borrowing and parental support to meet the marital lifestyle. <u>311 N.J. Super. at 34</u>. The trial judge discounted these additional funds and determined the lifestyle using only the family's earned income, which the judge termed the "real" standard of living. *Ibid*.We held "[t]he judge . . . confused two concepts. The standard of living during the marriage is [\*\*\*13] the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income." *Ibid*.

In many cases, parties live above their means or spend their earnings and assets to meet expenses. In such instances, a finding of the marital lifestyle must consider what the parties spent during the marriage and not merely offer a nod to a bygone, unattainable lifestyle. In this case, the trial judge overlooked the lessons from *Crews* and *Hughes* and our instruction to find, numerically, the marital lifestyle. To the extent *Crews* and *Hughes* implicitly required that marital lifestyle be determined numerically, we now explicitly state a finding of marital lifestyle must be made by explaining the characteristics of the lifestyle and quantifying it.

In a contested case, a trial judge may calculate the marital lifestyle utilizing the testimony, the CISs required by *Rule 5:5-2*, expert analysis, if it is available, and other evidence in the record. The judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle utilizing any combination of the presentations.

Here, the trial judge [\*\*\*14] disregarded the marital budget altogether and instead supplemented defendant's current budget with some expenses she once enjoyed during the marriage. This methodology is problematic because it ignored the judge's own findings that the marital lifestyle "subsumed" the entirety of [\*533] plaintiff's earnings. By application of this logic, if the judge determined the net yearly income was \$1,520,268<sup>4</sup> or \$126,689 per month, the alimony award allotted defendant disposable income of  $36,792^5$  and plaintiff \$89,897 [\*\*234] per month without explanation. This was a misapplication of law because it ignored *Crews* and *N.J.S.A.* 2A:34-23(b)(4), which requires a judge consider "[t]he standard of living established in the marriage . . . and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other."

To be clear, <u>N.J.S.A. 2A:34-23(b)(4)</u> does not signal the Legislature intended income equalization or a formulaic application in alimony cases, even where the parties spent the entirety of their income. Had the Legislature intended alimony be calculated through use of a formula, there would be no need for the statutory requirement that the trial court [\*\*\*15] address all the statutory factors. The Legislature declined to adopt a formulaic approach to the calculation of alimony. See Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage).

The portion of the marital budget attributable to a party is likewise not subject to a formula. Contained in most marital budgets are expenses, which may not be associated with either the alimony payor or payee, including those associated with children who have since emancipated or whose expenses are met by an asset or a third-party source having no bearing on alimony. There are also circumstances where an expense is unrelated to either the payor [\*534] or the payee but is met by that party on behalf of a child. And, as is the case here with defendant's photography hobby, there are expenses which only one party incurred during the marriage. Therefore, after finding the marital lifestyle, a judge must attribute the expenses that pertain to the supported spouse. Only then may the judge consider the supported spouse's ability to contribute to his or her own expenses and the amount of alimony necessary to meet the uncovered sum. [\*\*\*16] Crews, 164 N.J. at

<sup>&</sup>lt;sup>4</sup>On remand, the trial judge adjusted his finding of the net yearly income from \$1,313,000 to \$1,520,270. Notably, the record reflects expenditures near the adjusted income figure. In evidence was a marital lifestyle analysis plaintiff commissioned, reflecting expenditures of \$1,600,104.

<sup>&</sup>lt;sup>5</sup>This figure excluded substantial expense line items enjoyed during the marriage according to both parties' CISs, namely, a second home, boats, and domestic help. Indeed, plaintiff's CIS nearest the trial date reflected a marital lifestyle of \$946,548 and defendant's CIS reflected \$1,109,988 per year.

#### <u>32-33</u>.

For these reasons, we again reverse and remand the alimony computation and direct the judge to numerically determine the marital lifestyle and apportion it. Because we have remanded the alimony computation, we do not address the *Mallamo* credits, as they too will be adjusted based on the new alimony award.

III.

The reversal of the alimony award also requires that we reverse and remand the life insurance determination for reconsideration. The judge relied on <u>N.J.S.A. 2A:34-23(j)(1)</u>, which states: "There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age." The judge determined the \$2.2 million coverage amount by multiplying the alimony by five years, at which point plaintiff would reach the full social security age.

A determination of the proper amount of life insurance coverage for a support obligation requires a consideration of many variables. Where a party is insurable and able to pay the necessary premiums, a life insurance death benefit should neither only meet a beneficiary's bare needs, nor be a windfall. In the former case, unexpected changes in circumstances can leave a beneficiary with unmet needs, whereas the latter condition [\*\*\*17] exposes a payor's estate to obligations he or she never had during the marriage.

[\*\*235] In the alimony context, "once the amount of the obligation is established, the present value (or more correctly, the continuing [\*535] present value as the obligation decreases) should be determined." Lawrence J. Cutler & Robert J. Durst, *Life Insurance As a Security Vehicle In Dissolution Cases*, 12 J. Am. Acad. Matrim. Law 155, 161 (1994). Online present value calculators simplify the ability to perform this calculation. *See, e.g.*, MSN, *Present Value*, Microsoft News, https://www.msn.com/en-

us/money/tools/timevalueofmoney/.

The present-day value methodology is appropriate where there is a "known future quantity" of an obligation. *Ibid*.Where the alimony obligation is not readily quantifiable because the duration of the obligation is unknown, a trial judge may utilize an obligor's life expectancy to determine the duration of the obligation if it is reasonable to do so. Life Expectancies for All Races & Both Sexes, Pressler & Verniero, *Current N.J. Court Rules*, Appendix I-A, www.gannlaw.com.

Additionally, a reduction in the amount of security as the obligation is satisfied is an appropriate means of assuring alimony is secured but not subject to a windfall. [\*\*\*18] See Claffey v. Claffey, 360 N.J. Super. 240, 264-65, 822 A.2d 630 (App. Div. 2003) (stating "it is perfectly reasonable to provide for the periodic reduction or review of the amount of . . . required security to reflect the diminishing need for it as the parties age, or circumstances otherwise change."); see also Lawrence J. Cutler & Robert J. Durst, Life Insurance As a Security Vehicle In Dissolution Cases, 12 J. Am. Acad. Matrim. Law at 161 (endorsing a declining death benefit). In some cases, where the obligation has the potential to extend beyond an assumed end date because of a change in circumstances, or where a presumption of termination has been rebutted, it may be appropriate to decrease the death benefit in smaller increments or not at all.

In alimony contexts, determining whether to use life expectancy or the presumptive retirement age, and a fixed or declining amount of security will depend on the circumstances of each case and is a matter of judicial discretion. Here, there was no testimony, and only a disputed assertion regarding plaintiff's **[\*536]** potential retirement at the full social security age. Additionally, because the alimony award is of an open duration and may not necessarily terminate when plaintiff reaches the full social security age, the methodology we have set forth will **[\*\*\*19]** provide the trial judge with enough flexibility to determine the extent and amount of life insurance needed.

IV.

Finally, we decline to exercise original jurisdiction to adjudicate this appeal. We "may exercise . . . original jurisdiction as is necessary to the complete determination of any matter on review." R. 2:10-5. "In determining whether to exercise original jurisdiction, an appellate court not only must weigh considerations of efficiency and the public interest that militate in favor of bringing a dispute to a conclusion, but also must evaluate whether the record is adequate to permit the court to conduct its review." Price v. Himeji, LLC, 214 N.J. 263, 295, 69 A.3d 575 (2013). "Despite the utility of the original-jurisdiction authority, it is clear that resort thereto by the appellate court is ordinarily inappropriate when fact-finding or further fact-finding is necessary in order to resolve the matter." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:10-5 (2020) (citing Price, 214 N.J. at 294-95).

The trial judge should resolve the remaining disputes

because having heard the [\*\*236] case and considered the testimony he has a "feel of the case." <u>Cesare v.</u> <u>Cesare, 154 N.J. 394, 411-13, 713 A.2d 390 (1998)</u>. Further testimony may or may not be required to complete the remand. We are confident the trial judge will adjudicate the remaining [\*\*\*20] issues fairly and the matter should be left to him.

Reversed and remanded. We do not retain jurisdiction.

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# Hughes v. Hughes

Superior Court of New Jersey, Appellate Division March 31, 1998, Argued ; April 29, 1998, Decided A-123-96T2

#### Reporter

311 N.J. Super. 15 \*; 709 A.2d 261 \*\*; 1998 N.J. Super. LEXIS 194 \*\*\*

DANIEL J. HUGHES, PLAINTIFF-RESPONDENT, v. MARIANNE S. HUGHES, DEFENDANT-APPELLANT.

**Subsequent History:** [\*\*\*1] Approved for Publication May 1, 1998. As Corrected July 6, 1998.

**Prior History:** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County.

# **Core Terms**

alimony, marriage, partnership, rehabilitative, mortgage, daughter, equitable, lifestyle, divorce, permanent, valuation, shopping, card, trip, foreclosure, shareholder, guidelines, borrowing, temporary, vacations, duration, greatly, music

# **Case Summary**

### **Procedural Posture**

Defendant wife appealed from the economic provisions of her divorce from plaintiff husband from the Superior Court of Burlington County (New Jersey).

### Overview

Plaintiff husband and defendant wife married and had one child. After almost 10 years of marriage, plaintiff filed for divorce alleging extreme cruelty, and defendant filed a counterclaim. The trial court held that defendant should be given the ability to finish her education but ordered rehabilitative alimony only. Defendant was also directed to transfer her interest in the marital home to plaintiff. On appeal, defendant asserted that the trial court was biased against her. The court found that the record showed no hint of bias expressed or shown toward either party. Defendant also argued that plaintiff's business was greatly undervalued. The court did not find any error in the trial court's acceptance of an expert's valuation if the business. However, the court found that there were inadequate findings of plaintiff's partnership assets. The court also found that the amount of support established by the trial court was insufficient as compared to previous standard of living. Additionally, the court held that plaintiff would be responsible for credit card debt if he was the one who caused the substantial debt. The judgment was affirmed in part, reversed in part, and remanded.

### Outcome

The trial court's judgment involving the economic provisions of defendant wife's divorce from plaintiff husband was affirmed in part because certain findings were proper. The judgment was reversed in part and remanded because provisions related to child support, alimony, and credit card debt required additional findings.

# LexisNexis® Headnotes

is favored, where appropriate.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Child Support > General Overview

Family Law > Child Support > Support Obligations > General Overview

Family Law > ... > Support Obligations > Types > Temporary Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Temporary Support

# <u>HN4</u>[<mark>太</mark>] Spousal Support, Modification & Termination

The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income. A payor may be required to resort to savings or credit in order not to reduce alimony or child support for a temporary setback in income. This is especially so when the couple made the same decision while their marriage was intact.

**Counsel:** Barry D. Szaferman, argued the cause for appellant (Szaferman, Lakind, Blumstein, Watter & Blader, attorneys; Mr. Szaferman, of counsel, Jennifer Weisberg Millner, on the brief).

*David E. Ferguson,* argued the cause for respondent (*David E. Ferguson & Associates,* attorneys; *Mr. Ferguson,* on the brief).

**Judges:** Before Judges DREIER, KEEFE and PAUL G. LEVY. The opinion of the court was delivered by DREIER, P.J.A.D.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Child Support > Support Obligations > General Overview

# <u>HN1</u>[📩] Spousal Support, Modification & Termination

The standard of living to be enjoyed by the parties' child should reflect the obligor's financial status.

Family Law > ... > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

<u>HN2</u>[**\***] Spousal Support, Modification & Termination

Where the supported party prior to the marriage had lived at a lower standard of living than the supporting party and was elevated to the latter's standard of living during the marriage, self-support does not mean returning the supported party to the reduced premarital standard of living, unless the various factors set forth in *N.J. Stat. Ann. § 2A:34-23b* call for such a conclusion.

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

# HN3[

Rehabilitative alimony in addition to permanent alimony

**Opinion by:** DREIER, P.J.A.D.

# Opinion

[\*19] [\*\*262] The opinion of the court was delivered by

DREIER, P.J.A.D.

Defendant, Marianne S. Hughes, appeals from the economic provisions of the parties' judgment of divorce. Plaintiff, Daniel J. Hughes, and defendant were married on June 11, 1983. They have one child, a daughter, born May 22, 1984. Approximately three months after the parties' tenth anniversary, plaintiff filed for divorce alleging extreme cruelty, and defendant filed a counterclaim. The divorce was entered on the basis [\*\*\*2] of an eighteen-month separation. The trial judge resolved various economic motions in a pendente lite order and established temporary support of \$ 3000 per month for defendant and \$ 1000 per month child support. The judge, however, declined to order either party to pay overdue mortgage payments [\*\*263] during the pendency of the divorce proceedings, stating that he was attempting to pressure the parties to sell the marital home. The \$ 4300 per month mortgage payments were greater than the amounts defendant was receiving, and she contended that she could not make the payments. Plaintiff stopped making payments on the mortgage in January 1995. Defendant therefore accumulated what she could from the support payments and held these mortgage funds separately while she attempted to [\*20] negotiate with the mortgagee for a partial settlement so that she could remain in the home. By the time of the divorce trial, defendant had accumulated \$ 14,000, \$ 12,000 of which was kept in a bag in her house. She was, however, unable to resolve the mortgage payment issue with the bank, which had placed the home in foreclosure.

The judge tried the case commencing September 1995, and concluding on three days in March [\*\*\*3] and April 1996. Although the judgment of divorce was signed August 2, 1996, the final order for custody, visitation and equitable distribution was not executed until October 1, 1996.

Prior to the parties' marriage in 1983, defendant had

worked as a waitress while earning credits towards a music education degree at the Boston Conservatory of Music. Plaintiff was a commercial real estate agent at Coldwell Banker, earning \$ 230,000 a year. He induced defendant to quit her job and obtain a real estate license. For a short time she worked as a residential real estate agent, but then quit before the parties' child was born in 1984. In October 1987, plaintiff left his job and, with two partners, formed Metro Commercial Real Estate, Inc., a corporation that functioned as a leasing agent for retail space. Initially, plaintiff owned only fifty percent of the company, but in 1990 he bought out his partners' interests and became Metro's sole shareholder. His income with Metro was initially far less than it had been with Coldwell Banker, plaintiff having received only \$ 50,000 in the first year of Metro's operation. However, in subsequent years the business improved, so that in 1993 his adjusted [\*\*\*4] gross income increased to \$ 118,405; and in 1994 his adjusted gross income equalled \$ 248,000, which included a salary of \$ 114,511 with an additional nonrecurring capital gain of \$ 74,000 from selling his share in two real estate endeavors.<sup>1</sup>

[\*21] The parties' lifestyle reflected plaintiff's financial prosperity. They lived in an eleven-room house with an in-ground swimming pool and had occasional domestic help. Plaintiff purchased an Audi for defendant and a Mercedes for himself. They enjoyed vacations to Disney World, Florida hotels and the Caribbean, and sailing trips to Maine, Nantucket and Newport. They dined at restaurants regularly and provided their daughter with violin, acting, gymnastics, horseback riding and skating lessons.

Although defendant initially [\*\*\*5] did some work at Metro, plaintiff asked her to stop, and she became a fulltime homemaker. She did, however, make a loan of \$ 5000 to begin a property management arm of Metro. Shortly after their daughter was born, plaintiff was treated for an alcohol abuse problem, and while he was hospitalized, the household bills and mortgage fell into arrears. They survived this period with the assistance of relatives, savings, loans and defendant's management of their finances. Similarly, during the real estate recession of the late 1980's they underwent another brief period of financial difficulty. However, they

<sup>&</sup>lt;sup>1</sup>The two interests that plaintiff sold involved a partnership, Sharon Hill Limited Partnership (actually Sharon Hill Chester Pike, LP), and SL-Parkway Corporation which present a problem in equitable distribution that will be discussed *infra*.

maintained their lifestyle by borrowing money from plaintiff's corporation. They would then repay the money to the corporation by borrowing money on their credit cards. At the time of the parties' separation in July 1993, the outstanding credit card debt was approximately \$ 73,000. The financial problems allegedly worsened after the separation, but defendant contends these were problems in appearance only, as is discussed *infra*. In April 1994, plaintiff owed \$ 20,412 to the corporation, and by March 1996 this debt increased to \$ 116,260. He attributed the debt to payment of \$ 28,000 [\*\*\*6] in federal and state taxes, \$ 14,000 in interest payments, \$ 70,000 [\*\*264] in marital debt that was paid, and his current living expenses.

Because of their mounting debts, the parties agreed to sell the marital home. It was originally listed for \$ 475,000, with the price **[\*22]** gradually lowered so that at the time of trial it was listed at \$ 399,000. Some offers were received but negotiations broke down because of the parties' dispute concerning the condition of the house, and no agreement of sale was ever executed. Defendant did not wish to lower the listing price any more, and plaintiff countered by refusing to pay the \$ 4300 mortgage payments as of January 1995. As noted earlier, defendant's attempt to settle with the mortgagee was rejected.

Plaintiff's style of living still includes vacations, such as sailing excursions, trips to the New Jersey shore, skiing trips to the Poconos and Colorado, and a trip to San Francisco. He pays \$ 1600 per month for a townhouse where he has domestic help, and he contributes \$ 3000 for his daughter's summer camp, sports recreation, and theater lessons. Defendant, on the other hand, has greatly cut back her living expenses and has incurred debt to her family [\*\*\*7] and friends. She has no domestic help, maintaining the house herself. In the eighteen months prior to trial, her entertainment had consisted of seeing two movies, window shopping at a mall, and an occasional meal at a restaurant. Her vacations were one overnight trip to Cape May, a twonight trip to Lake George and excursions into New York City.

The parties obtained joint custody of their daughter, with defendant designated as the primary caretaker. Defendant does not dispute the characterization that plaintiff is the daughter's caretaker forty percent of time while she is responsible sixty percent of the time.

The trial judge agreed that defendant should be given the ability to finish her education and become a vocal instructor as she had intended prior to her marriage. <sup>2</sup> The judge, however, placed great emphasis on the length of the marriage, the age of the **[\*23]** parties and their physical and emotional health. He ordered rehabilitative alimony only, to be paid in the amount of \$ 3000 per month for eighteen months retroactive to May 1, 1996, and thereafter at \$ 2000 per month for thirty months, basing this sum upon an imputed income to defendant of \$ 1000 per month. Thus, the total **[\*\*\*8]** period for which defendant would receive alimony was four years. The court also ordered plaintiff to provide life insurance in the amount of \$ 200,000 with defendant as the beneficiary until the alimony obligations ceased and an additional policy for \$ 500,000 with the child as the beneficiary until emancipated.

Defendant was directed to transfer her interest in the marital home to plaintiff who was to remain solely responsible for deficiencies in the foreclosure action. At the time of the trial there was approximately \$ 390,000 owed to the mortgage company (including late fees, back interest, legal fees and foreclosure fees), and as noted earlier, the last listing on the house was for \$ 399,000. Plaintiff, however, was given all tax benefits relating [\*\*\*9] to the ownership of the property.

The parties were permitted to keep their own IRAs in the approximate amount of \$ 5000 each, and certain Service Care Center stocks were divided equally between the parties. Defendant kept her Audi, with a value of \$ 3000, and her jewelry, which was valued at \$ 11,000. She also retained the \$ 14,000 which she had saved to attempt to settle with the bank on the mortgage. An income tax refund was divided one-third to plaintiff and two-thirds to defendant. A \$ 91,000 note from plaintiff's former partners was awarded solely to plaintiff as an offset against amounts that defendant owed plaintiff for the payment of 1994 taxes. Defendant's \$ 45,500 interest in this note approximately balanced the \$ 45,000 due from defendant for taxes, and the judge therefore let plaintiff retain the note payments he had received since the complaint was filed. This will be discussed infra.

The parties had agreed that a joint expert could value plaintiff's business. Although defendant [\*\*265] disputed the valuation when it was presented at trial,

<sup>&</sup>lt;sup>2</sup> Plaintiff was ordered to pay defendant's educational costs with a limit of \$ 5500 per semester and \$ 400 per credit hour for her master's degree. Defendant contests this limit, but we do not find it unreasonable, if the other errors are corrected on remand.

she presented no contrary expert. She again **[\*24]** contends here that the value should be considerably higher than the \$ 115,000 determined **[\*\*\*10]** by the joint expert. From this she was given a credit of \$ 57,500 from which was deducted the value of the Audi and jewelry (\$ 14,000), leaving her a net amount of \$ 43,500. The judge refused to divide plaintiff's interests in Sharon Hill Limited Partnership and SL-Parkway Corporation, and further concluded that defendant was responsible for thirty-five percent of the \$ 115,432 outstanding debt, thus reducing the net amount to be awarded to her to \$ 3000. There were some additional credits to which she was entitled, raising the net amount due to her to \$ 5000. Plaintiff was additionally ordered to pay \$ 12,000 for defendant's attorney's fees.

#### Ι.

Defendant raises seven points on this appeal, some with subpoints. She first asserts that the court was biased against her and argues globally that the net effect of the distribution was that plaintiff retained the house, which he was suddenly able to redeem from foreclosure and on which he could keep up the mortgage payments. He also retained his business, which generates sufficient funds for him to pay the various debts, portions of which although initially allocated to defendant, had been set off against her share in the value [\*\*\*11] of the business, leaving her a mere \$ 3000. As a result, defendant has been forced to live at a greatly reduced lifestyle with minimal temporary alimony, while plaintiff has not appreciably changed his standard of living.

From these facts and expressions the judge made at the time he refused to order plaintiff to keep up the mortgage payments in addition to the pendente lite alimony, defendant concluded that the judge had exhibited bias. The judge, however, explained why he had attempted to force the parties to sell the house, and our view of the record shows no hint of bias expressed or shown toward either party. This is not to say that we agree with the various aspects of this award, or even that they are sustainable, **[\*25]** but only that the judge's decision, as explained by him was free of bias or prejudice.

This case is totally unlike <u>Greenberg v. Greenberg, 126</u> <u>N.J. Super. 96, 312 A.2d 878 (App.Div.1973)</u> or <u>Monte</u> <u>v. Monte, 212 N.J. Super. 557, 515 A.2d 1233</u> (<u>App.Div.1986</u>), cited by defendant. The judge made no naked conclusions here, but set forth his factual findings in regard to custody, alimony and equitable distribution. He provided a rationale for his decision [\*\*\*12] in a comprehensive twenty-page opinion. The single expression by the judge, that defendant might be more to blame for the foreclosure because she had failed to pay the mortgage using the monies given by plaintiff, was incorrect in that she certainly could not make a \$ 4300 payment from the \$ 4000 she was receiving and still have funds available to feed, cloth and provide for miscellaneous expenses for herself and daughter during this period. Despite our disagreement, we in no way challenge the judge's good faith.

*II.* 

Defendant next urges that Metro was greatly undervalued for the purpose of this award. Specifically, she points to an asset of the corporation, a shopping center catalog, which she contends itself was worth in excess of \$ 100,000. We note that although plaintiff had bragged that this catalog was an excellent selling tool and that it had cost \$ 100,000 to develop, its independent worth was negligible. It required constant updating and was merely a compendium of outstanding available property. It was one vehicle that permitted plaintiff to earn his substantial income from the business. The business, however, did not necessarily have any great intrinsic value. It was [\*\*\*13] more of a personal service corporation whose value was dependent on plaintiff's services which generated the firm's income.

Although defendant challenged the expert's valuation, the court was free to accept it, as it did. The parties had stipulated to the joint expert's qualifications and defendant provided no expert testimony to refute the joint expert's conclusions. In making his [\*26] evaluation the expert used the criteria specified in Revenue Ruling 59-60, 1959-1 [\*\*266] C.B. 237. After analyzing the eight factors, he applied two methodologies to determine the value of the business, rejecting an excess earning method which yielded under \$ 70,000, but accepting the capitalization of earnings method which yielded \$ 115,000. Had he given independent value to the catalog of shopping centers, it merely would have brought the excess earnings value closer to the capitalization value that he had used. Therefore, on the facts in this record, we cannot say that the judge erred in accepting the expert's valuation.

Defendant next challenges the judge's failure to include the Sharon Hill and SL-Parkway assets as proper subjects for equitable distribution. Defendant contended that during the **[\*\*\*14]** parties' marriage they contributed \$ 64,000 for their interest in Sharon Hill Limited Partnership, and she had been told by plaintiff that these interests would be part of their retirement. Plaintiff agrees that he became a shareholder in the limited partnership prior to filing the divorce complaint, but he contends the partnership did not own assets until after the complaint was filed. He explained that he did not purchase his interest, rather it was given to him in consideration for his contribution as a real estate expert in finding tenants for the shopping center after the partnership acquired it.

We find that this explanation did not remove the partnership interest as an equitably distributable asset. If the partnership's plans to purchase the shopping center were put in place, and plaintiff had agreed to provide the service of finding tenants, the interest in the partnership may have had substantial value at the time the complaint was filed. When the other parties to the agreement may have advanced their funds to purchase the shopping center made no difference to the interest of plaintiff. If the agreements to fund the partnership were in place, plaintiff owned his percentage [\*\*\*15] whether this advance was made the day following the filing of the complaint or five years later.

[\*27] There might be some adjustment of this value depending upon whether plaintiff had additional services to perform for which he would not be compensated. If his future services were to be compensated by commissions, and his efforts finding the tenants were to be paid by the partnership when he performed, then the full value of his partnership interest should have been included for equitable distribution. If on the other hand he received this interest in lieu of future commissions, then it might be equitable to reduce the value of his interest in the partnership by the reasonable value of those commissions, because defendant would have no right to share in plaintiff's future income, at least for equitable distribution purposes. Given plaintiff's future active involvement in the partnership's business, the interest should probably have been awarded to him, with a suitable monetary award to defendant. Valentino v. Valentino, 309 N.J. Super. 334, 338-339, 707 A.2d 168 (App.Div.1998) (involving a gas station, a premarital asset of the husband enhanced by the parties' [\*\*\*16] efforts, where the wife was given ten percent of the value).

Unfortunately, there were inadequate findings on this issue, and the matter concerning this partnership must be considered on remand. We note that defendant's claim of a \$ 64,000 loan to the Sharon Hill Limited Partnership was answered by plaintiff's assertion that the loan actually was for Metro and was later repaid. We cannot determine whether this loan was shown as an asset of Metro when the valuation was made by the joint expert. If it was not, then, of course, the valuation of Metro should have increased by \$ 64,000 and defendant would be due one-half of this value.

As to SL-Parkway Corporation, plaintiff contended he was not a shareholder but merely a property manager.<sup>3</sup> The judge [\*\*267] did [\*28] not sufficiently resolve this issue, but it should be analyzed in the same manner as the partnership. If plaintiff was actually an owner and was paid separately for his property manager duties, then his ownership interest should be valued. If he was an owner, but the property manager duties were the consideration for his being given the interest, then a reasonable value of his income for these duties should be deducted from the value [\*\*\*17] of the partnership interest.

At oral [\*\*\*18] argument before us, plaintiff claimed that it would be unfair to insert defendant as a limited partner or as an owner of the close corporation, and in fact such outside ownership might violate either the partnership agreement or a shareholder agreement. If the interests have been sold as claimed by plaintiff, the issue is moot, because a monetary adjustment is all that is needed. <sup>4</sup> If

<sup>&</sup>lt;sup>3</sup> Plaintiff asserts that he became a shareholder September 21, 1993, one day after the divorce complaint was filed. It is difficult for us to believe that this was coincidence or that there had not been a previous agreement, prior to the filing of the complaint, that plaintiff would be given his interest in the corporation on this date. We cannot lose sight of the fact that the Family Part is a court of equity. Furthermore, under Pascale v. Pascale, 140 N.J. 583, 609, 660 A.2d 485 (1995) and Landwehr v. Landwehr, 111 N.J. 491, 504, 545 A.2d 738 (1988), a party seeking exclusion of an asset has the burden of establishing its immunity from equitable distribution. Plaintiff presented no proofs concerning the state of his agreements concerning the corporation prior to the filing of the complaint other than the shareholder agreement itself. Until the underlying facts were unearthed, he had denied he was a shareholder and claimed merely to be a property manager.

<sup>&</sup>lt;sup>4</sup> Plaintiff's claims that the partnership and corporation interests had no value are belied by the record which reveals that in 1994 plaintiff sold his shares in Sharon Hill and SL-Parkway for \$ 74,000.

not, as stated to counsel and restated here, this distribution issue presents no real impediment. Of course, it would be better to value the interest and give defendant her share up front, but such valuation is often difficult. We have treated this issue in other situations where a party has been precluded by law from being a shareholder, but the uncertain nature of the investment required a division in kind rather than a valuation and a cash offset. The judge need not order, for example, that defendant be made a limited partner to the extent of some percentage of plaintiff's interest in the Sharon Hill partnership. He could merely direct that defendant is entitled to her share of any periodic distributions that plaintiff may receive from the [\*29] partnership and her share of the total consideration received [\*\*\*19] in the event of a sale or exchange of plaintiff's interest. A copy of the court order can be given to the partnership, or an assignment of proceeds filed so that plaintiff will not suffer any adverse tax consequences and payments may be made directly by the partnership to defendant. A qualified accountant or tax attorney could provide the proper vehicle for accomplishing this result.

#### IV.

Under defendant's next point she claims that the amount of child support established by the court was insufficient. We agree with defendant under the laws that existed at the time of the decree, and perhaps more so today. Plaintiff's weekly income was over two and one-half times the maximum in the child support guidelines which were then capped at \$ 1000 per week. At \$ 1000 the guidelines would have awarded between \$ 193 [\*\*\*20] and \$ 214 per week, and then would have supplemented this amount with additional support based upon the remaining family income applying the factors set forth in N.J.S.A. 2A:34-23. The judge, however, supplemented the baseline amount by only \$ 18.55. We determine that the judge inadequately weighed the factors in determining the child's needs, in particular the obvious upper-middle-class standard that had been set by her parents, plaintiff's \$ 11,000 per month salary as compared to defendant's unemployment, and the disparity of the earning potential of each parent. N.J.S.A. 2A:34-23a(1) to (4). See Pascale v. Pascale, supra, 140 N.J. at 594, 660 A.2d 485; Dunne v. Dunne, 209 N.J. Super. 559. 566-67. 508 A.2d 273 (App.Div.1986).

The judge's conclusions that the child support and alimony (which will be separately discussed, *infra*) awarded would not seriously impair both defendant's and the child's current standard of living is simply unsupported by this record, unless by this standard of living the court meant the greatly reduced standard that defendant had been forced to endure while this case proceeded. This in no way reflected the upper-middleclass standard [\*\*\*21] that [\*30] the parties had set [\*\*268] during their marriage. Even if we were not to order, as we do, an increase in alimony as to amount and duration, HN1 (1) the standard of living to be enjoyed by the parties' daughter should reflect plaintiff's financial status. See Lepis v. Lepis, 83 N.J. 139, 152, 416 A.2d 45 (1980); Dunne v. Dunne, 209 N.J. Super. at 567, 508 A.2d 273. The fact that defendant might be incidentally benefitted by the better housing, food, vacations or other attributes of the child's lifestyle is of no moment. Walton v. Visgil, 248 N.J. Super. 642, 650, 591 A.2d 1018 (App.Div. 1991); Zazzo v. Zazzo, 245 N.J. Super. 124, 131, 584 A.2d 281 (App.Div.1990), certif. denied, 126 N.J. 321, 598 A.2d 881 (1991). We also note that the judge assumed that plaintiff would continue to provide for the amenities formerly enjoyed by his daughter, yet these payments were not directed by the court. We see a significant problem in plaintiff paying directly for these enhancements, with defendant unable to do so in the event that plaintiff halts payments. This problem overlaps both the alimony and child support issues, and should be recognized by the trial judge on remand.

Because we are [\*\*\*22] remanding this issue for reconsideration, we see no reason why the trial judge should not resort to the amended guidelines now contained in Appendix IX-F to the Rules of Court. Under these guidelines, plaintiff would be required to pay between \$ 415 and \$ 417 per week, approximately \$ 182 per week more than that which defendant now receives as child support. The judge, of course, will use these guidelines for general guidance in establishing a new amount for child support.

#### V.

One of defendant's principal challenges to the judgment relates to the alimony award. Defendant contends that she was entitled to permanent alimony; the court was in error in evaluating plaintiff's ability to pay; the judge's decision concerning alimony was punitive towards her; and the court committed error when it set the amount of rehabilitative alimony, requiring plaintiff **[\*31]** to pay only a portion of defendant's educational costs. We treat these separate objections generally, without answering them one by one.

There is no question that the amount of alimony will vary depending upon the standard of living of the parties during the marriage. Lepis v. Lepis, supra, 83 N.J. at 150, 416 A.2d 45. Bare survival [\*\*\*23] is not the proper standard, it is the quality of the economic life during the marriage that determines alimony. Ibid. Rehabilitative alimony differs in that it is payable for a specific time period, ceasing when the dependent spouse is in a position of self-support. Weber v. Weber, 268 N.J. Super. 64, 71, 632 A.2d 857 (App.Div.1993). But again, self-support does not mean a subsistence level. HN2 ] Where the supported party prior to the marriage had lived at a lower standard of living than the supporting party and was elevated to the latter's standard of living during the marriage, self-support does not mean returning the supported party to the reduced premarital standard of living, unless the various factors set forth in N.J.S.A. 2A:34-23b call for such a conclusion.

In this case, the judge stressed that he considered this to be a short-term marriage, justifying the brief and minimal amount of alimony, even considering the even briefer period of slightly increased rehabilitation. First, we take issue with a ten-year marriage being considered a short-term marriage. By today's standards, it is not. We must look at the particular facts of this case. Before the parties [\*\*\*24] married, defendant was working towards her degree to become a music teacher. She then quit and became a residential real estate salesperson for a short period of time, after marrying a man with an income well in excess of \$ 230,000 per year. For ten years, through good times and bad, after he changed his business and she survived his problems with alcoholism, the parties were at the verge of plaintiff resuming his former income, but this time with plaintiff as the owner of a business rather than as a salaried employee. His present earning ability and business acumen were evident through the personal real [\*32] estate deals he was able to negotiate as well as his skills as a broker.

[\*\*269] We find no fault with the judge having determined that, with a daughter entering her teens, defendant was able to resume training in her formerly chosen field and become a music teacher. During the training period she well could earn the \$ 1000 per month attributed to her by the judge. Upon completion of her training, however, as a woman in her mid-forties and at the entry level in her profession, we doubt that she would initially earn more than \$ 25,000-\$ 30,000 annually, but there should be some proof concerning [\*\*\*25] what she might expect. Rehabilitative alimony for the interim period until she

was employed full-time was certainly called for, but the amounts were not commensurate with plaintiff's ability to pay, the parties' former style of living, and defendant's needs.

Another error we see is that the rehabilitative alimony was in lieu of, rather than in addition to permanent alimony. <u>HN3</u> Rehabilitative alimony in addition to permanent alimony is favored, where appropriate. See <u>Kulakowski v. Kulakowski, 191 N.J. Super. 609, 611-12, 468 A.2d 733 (Ch.Div.1982); Turner v. Turner, 158 N.J. Super. 313, 318-19, 385 A.2d 1280 (Ch.Div.1978); see also Lepis v. Lepis, supra, 83 N.J. at 155, 416 A.2d 45. The rejection of the sole remedy of rehabilitative alimony as suggested in <u>Arnold v. Arnold, 167 N.J. Super. 478, 481, 401 A.2d 261 (App.Div.1979)</u> in Lepis <u>v. Lepis, 83 N.J. at 155 n. 9, 416 A.2d 45</u> is also instructive. The granting of rehabilitative alimony does not mean that permanent alimony must be rejected.</u>

This is not a case such as <u>Skribner v. Skribner, 153 N.J.</u> <u>Super. 374, 379 A.2d 1044 (Ch.Div.1977)</u>, where the marriage lasted for approximately a year and a half, [\*\*\*26] or like <u>D'Arc v. D'Arc, 164 N.J. Super. 226, 238,</u> <u>395 A.2d 1270 (Ch.Div.1978)</u>, certif. denied, 85 N.J. 487, 427 A.2d 579 (1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2049, 68 L. Ed. 2d 350 (1981), where the marriage was of three and a half year's duration, and where the husband, a doctor, sought alimony. There, permanent alimony was properly withheld.

[\*33] There are few, if any, cases of an intermediate length marriage where this issue is discussed. The Court in Lynn v. Lynn, 91 N.J. 510, 453 A.2d 539 (1982), explained that "the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula. Where the circumstances of the parties diverge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune--the fate of their shared enterprise." Id. at 518, 453 A.2d 539. Lavene v. Lavene, 162 N.J. Super. 187, 392 A.2d 621 (Ch.Div.1978) is also apposite. There the court noted that "this is not a situation where the marriage is one of extremely long duration, nor one in which plaintiff has geared her whole lifestyle to rearing [\*\*\*27] a family." Id. at 203, 392 A.2d 621. In Lavene, the court recognized the principle of rehabilitative alimony by citing Turner, supra, and then determined that the amount of permanent alimony would be reduced because of the shorter term marriage, but not excluded. Ibid. In the case before us, there was also a marriage, "in which [the wife] has geared her

whole lifestyle to rearing a family." Ibid.

Defendant is perfectly willing to follow the dictates of *Lepis* and provide for herself to the limits of her ability. After doing so, however, she should not be relegated to the position she would have been in if she continued to wait on tables and finally had obtained her education as a music teacher. Plaintiff's obligation to continue to support defendant is an incident of the commitment he made when he married her. Perhaps because the marriage was of an intermediate length, defendant need not be supported to the standards of the very summit of the parties' lifestyle, but defendant also is not to be cast adrift after four years of rehabilitative alimony.

On remand, the trial judge should reconsider this issue with a view that defendant is to receive permanent alimony, but [\*\*\*28] perhaps at some reduced rate to reflect a marriage of this medium length. The rehabilitative alimony ordered should be blended into such an award so that once her capacity to earn income is established, [\*34] defendant's lifestyle can be maintained, perhaps not at the full level of plaintiff's, but somewhat reflective of how the parties lived during their marriage.

[\*\*270] As to the question of the standard set during the marriage, the judge distinguished between the standard at which the parties actually lived and that which he determined they should have lived, what he called the "real" standard of living, without resort to excessive borrowing. The judge here confused two concepts. HN4 [1] The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income. The parties here apparently determined that plaintiff was able to earn well in excess of \$ 200,000 per year as an employee. They then started their own business and ran through some unstable financial periods during the temporary downturn in the real estate market. During this time they chose not to change the way they lived, [\*\*\*29] even though it put them in debt, because they apparently realized that once the real estate market recovered, plaintiff would most probably resume his former income, enabling them to repay their debt without having had to change their standard of living. We have held payor spouses to this standard in many cases where there have been temporary setbacks in a business or even a change in careers. See Lynn v. Lynn, 165 N.J. Super. 328, 340-41, 398 A.2d 141 (App.Div.), certif. denied, 81 N.J. 52, 404 A.2d 1152 (1979) (relating to child support); see also Arribi v.

Arribi, 186 N.J. Super. 116, 118, 451 A.2d 969 (App.Div.1982). In Lynn we required that a payor resort to savings or credit in order not to reduce alimony or child support for a temporary setback in income. This is especially so when the couple made the same decision while their marriage was intact. <u>165 N.J. Super. at 341-42, 398 A.2d 141</u>. Here we note that in setting the standards for the two spouses, the judge stated that defendant was to exist on support that would have kept her at the reduced level the couple would have had without borrowing, while the judge recognized in his opinion that plaintiff would most probably [\*\*\*30] be able to [\*35] resume the higher standard of living at which the couple had actually lived during their marriage. We disagree with this approach.

The plaintiff's actual earnings may, of course, be considered, but not in the context of determining the standard of living that the parties had enjoyed during their marriage. The point of considering current earnings is to determine whether he is able to support defendant to the level enjoyed during the marriage (or to such somewhat reduced level, as we noted in our earlier discussion concerning the duration of the marriage). This evaluation is no different from that which the court usually makes to determine the gap that must be breached by alimony in accordance with the standards of *Lepis*. Thrown into this equation is the additional factor of child support, namely, how the alimony affects the child and how the child support may affect

Also, the court must consider that the alimony is deductible to plaintiff and is taxable to defendant. We see no discussion of this factor in the court's opinion, other than to consider plaintiff's after-tax income, without reference to an alimony deduction. When the amounts are considered, **[\*\*\*31]** the court should look at the benefits and burdens, net of taxes.

#### VI.

Defendant next asserts that there was error in determining her responsibility for thirty-five percent of the credit card debt. She contends that a portion of the \$73,332 credit card debt as of December 1993 was attributable in large measure to the business, and was already considered in reducing the value of the business. It also was attributable to plaintiff's personal post-divorce expenditures. She further asserts that from plaintiff's \$248,000 gross adjusted income he failed to pay the credit card debt so that she would have to share

in it, and instead he spent his income on personal items such as furniture, clothing, stereo equipment, computers, vacations and a \$ 150,000 loan to his brother. Thus, she says, it is inequitable that any portion of this debt **[\*36]** should fall upon her. She argues that the judge did not distinguish the various transactions comprising the credit card indebtedness. The same argument can be made concerning the debt in plaintiff's draw account from his business which totalled \$ 42,100.

[\*\*271] Defendant was assessed thirty-five percent of the combined debt of \$ 115,432, or a total of \$ 40,500. [\*\*\*32] Our view of this record raises serious doubt in our minds concerning her responsibility for thirty-five percent of this debt, which appears to be an arbitrary figure set without reference to plaintiff's actual financial circumstances. If, in fact, plaintiff made a substantial loan to his brother (this obligation was apparently not the subject of equitable distribution) and bought substantial capital items with the money that he earned, and then ran up the debt to reduce his equitable division responsibilities, he, not defendant, should be charged with this debt. <sup>5</sup> With a gross income of over two hundred thousand dollars, we frankly cannot understand how the minimal payment which he was required to pay defendant could have caused this debt. If he chose to use his earned income for other purposes and to run up substantial debt, the obligation, except for some possible minimal amounts, should be his, not defendant's.

#### [\*\*\*33] VII.

Defendant lastly claims that she should not have been held responsible for fifty percent of the income tax liability for 1994-95. The judge held that defendant was entitled to half of the **[\*37]** repayment of the \$ 91,000 note, but refused to order its distribution because it was offset by defendant's responsibility for half the taxes. We can understand defendant's responsibility for some portion of the taxes, but the fifty percent assessment appears unreasonable. There is no question that defendant did not receive the benefit of one-half of plaintiff's income during this period. Thus we see no basis for her being required to pay one-half of the taxes, otherwise she would be required to pay a substantial portion of the taxes on the income that plaintiff alone enjoyed. On remand, the court should establish a ratio based upon defendant's participation in plaintiff's income, and only that portion of the taxes should be assessed to her.

#### VIII.

The judgment of divorce is reversed in part and affirmed in part as stated in this opinion. The matter is remanded for reconsideration on the various points noted herein. Because there may be some brief additional discovery required, and [\*\*\*34] because of our recognition of the scheduling difficulties, we request the trial judge to set this matter down for an immediate hearing for the reconsideration of pendente lite alimony and child support and for an order directing any payments to defendant that can be adequately assessed prior to the plenary hearing. We do not retain jurisdiction.

<sup>&</sup>lt;sup>5</sup> In fact, on cross-examination when defendant's attorney questioned plaintiff to identify what portions of the credit card debt was actually marital debt, plaintiff stated:

Well there's nothing specifically here that says, you know, borrowed to pay marital debt, but there's about \$ 70,000 in credit cards which are--were borrowed, you know, during the marriage and I continued to make those payments every month.... And I guess the only other thing would be marital debt would be the money that I borrowed to give to my wife to pay the mortgage which she didn't pay.

As noted earlier, the court-ordered payments to defendant were clearly insufficient to pay the mortgage, except possibly to the extent of the \$ 14,000 she saved by substantially reducing her standard of living.

**End of Document** 

# Lombardi v. Lombardi

Superior Court of New Jersey, Appellate Division March 1, 2016, Argued; September 12, 2016, Decided DOCKET NO. A-3624-13T1

Reporter

447 N.J. Super. 26 \*; 145 A.3d 709 \*\*; 2016 N.J. Super. LEXIS 123 \*\*\*

LISA LOMBARDI, PLAINTIFF-APPELLANT/CROSS-RESPONDENT, v. ANTHONY A. LOMBARDI, DEFENDANT-RESPONDENT/CROSS-APPELLANT.

**Subsequent History:** [\*\*\*1] Approved for Publication as Redacted September 12, 2016.

Certification denied by <u>Lombardi v. Lombardi, 2016</u> N.J. LEXIS 1369 (N.J., Dec. 6, 2016)

Motion granted by, in part, Costs and fees proceeding at Lombardi v. Lombardi, 2017 N.J. LEXIS 264 (N.J., Mar. 7, 2017)

**Prior History:** On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FM-11-113-11.

Lombardi v. Lombardi, 2016 N.J. Super. Unpub. LEXIS 2071 (App.Div., Sept. 12, 2016)

### Overview

HOLDINGS: [1]-The court held that regular savings must be considered in a determination of alimony, even when there is no need to create savings to protect the future payment of alimony; [2]-As a result, in a case wherein the parties relied on only a fraction of their household income to pay their monthly expenses and regularly saved the balance during the course of their marriage, the trial court erred by failing to include the accumulation of reasonable savings in the alimony amount awarded to plaintiff to protect her against the loss of alimony.

#### Outcome

Judgment vacated; case remanded to trial court for further proceedings.

# LexisNexis® Headnotes

# **Core Terms**

savings, alimony, lifestyle, marital, spouse, marriage, equitable, budget, vacations, monthly, accumulate, retirement, regular

# **Case Summary**

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

# <u>HN1</u>[**\***] Spousal Support, Procedures

It is well-established that the accumulation of reasonable savings should be included in alimony to

protect the supported spouse against the loss of alimony.

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

# HN2[1] Spousal Support, Procedures

Regular savings must be considered in a determination of alimony, even when there is no need to create savings to protect the future payment of alimony.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

#### **HN3** Standards of Review, De Novo Review

The appellate court's review of the Family Part's determination in dissolution matters is limited. The appellate court accords deference to decisions of the Family Part based on its expertise in matrimonial matters. The appellate court will not disturb its decisions if they are supported by substantial credible evidence and are consistent with applicable law. That standard applies equally to its decisions regarding alimony, equitable distribution, and counsel fees. However, the appellate court owes no special deference to the court's legal conclusions.

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

HN4[1] Spousal Support, Procedures

Alimony is authorized by <u>N.J.S.A. § 2A:34-23</u> and is governed by the factors enumerated in <u>N.J.S.A. §</u> <u>2A:34-23(b)</u>. It exists to permit one spouse to share in the economic rewards occasioned by the other's income level, as opposed merely to the assets accumulated, reached as a result of their combined labors, inside and outside the home. Alimony is neither a punishment for the payor nor a reward for the payee. It is a right arising out of the marriage relationship to continue to live according to the economic standard established during the marriage. Alimony relates to support and standard of living; it involves the quality of economic life to which one spouse is entitled, which then becomes the obligation of the other.

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

# <u>HN5</u>[ ] Spousal Support, Procedures

A proper alimony award assists the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage. A judge awarding alimony must methodically consider all evidence to assure the award is fit, reasonable and just to both parties, *N.J.S.A.* § 2A:34-23, and properly balances each party's needs, the finite marital resources, and the parties' desires to commence their separate futures, *N.J.S.A.* § 2A:34-23(c). The goal of alimony is to assist the supported spouse in achieving a lifestyle reasonably comparable to the one enjoyed during the marriage. The importance of establishing the standard of living experienced during the marriage cannot be overstated. It is the touchstone for the initial alimony award.

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

### **<u>HN6</u>**[**±**] Spousal Support, Procedures

In determining the marital lifestyle, the trial court looks at various elements including the marital residence, vacation home, cars owned or leased, typical travel and vacations each year, schools, special lessons, and camps for the children, entertainment, such as theater, concerts, dining out, household help, and other personal services. The ultimate determination must be based not only on the amounts expended, but also what is equitable. An appropriate rate of savings can, and in the appropriate case should, be considered as a living expense when considering an award of maintenance. Thus, the court can take into account the marital standard of living and allow the supported spouse to save for the future. That is particularly true when the supporting spouse can afford any amount paid to the supported spouse.

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

Family Law > ... > Spousal Support > Obligations > Reimbursement Support

Family Law > ... > Spousal Support > Obligations > Rehabilitative Support

#### **<u>HN7</u>** Spousal Support, Procedures

A spouse's need for savings has long been recognized as a component of alimony, that allows for the accumulation of reasonable savings to protect the supported spouse against the day when alimony payments may cease because of the death of the supporting spouse or change in circumstances. Savings have been used for such security in lieu of directing the supporting spouse to keep a life insurance policy or establish a trust. In short, savings has been a relevant and appropriate factor to be considered in the establishment of a reasonable and equitable alimony award because the amount of support awarded is subject to review and modification upon a showing of a change of circumstances, which could result in the supported spouse being incapable of supporting himself or herself. However, the protection of income being derived through alimony is not the only reason why a supported spouse requires savings, especially where regular savings have been part of the established marital lifestyle. An appropriate rate of savings to meet needs in the event of a disaster, to make future major acquisitions such as automobiles and appliances, and

for retirement can, and in the appropriate case should, be considered as a living expense when considering an award of alimony.

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

### HN8[ ] Spousal Support, Obligations

The most appropriate case in which to include a savings component is where the parties' lifestyle included regular savings. Because it is the manner in which the parties use their income that is determinative when establishing a marital lifestyle, there is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations. The use of family income for either purpose over the course of a long-term marriage requires the court to consider how the money is spent in determining the parties' lifestyle, regardless of whether it was saved or spent on expensive purchases. The fact that the payment of the support ultimately is protected by life insurance or other financial tools, does not make the consideration of the savings component any less appropriate.

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

### HN9[1] Spousal Support, Obligations

The New Jersey Supreme Court has recognized the need to consider regular savings in determining a marital lifestyle by including a line item for monthly savings in Schedule C of the case information statement parties must file in family matters. *R. 5:5-2.* While the original case information statement form did not include a line item for savings, it was changed two years after implementation to add or subtract certain budget items so that the form would more closely track a family's actual expenses. The Supreme Court's Committee on Family Division Practice recommended a savings and investments item, reasoning that although such a line

might be viewed as subject to abuse, it would still appear appropriate because in many households savings and investments represent a fundamental portion of an ongoing budget. The Court has adopted that recommendation and, as stated in R. 5:5-2(e), the revised form is required in all actions involving alimony, and copies must be preserved by the parties as evidence of the marital standard of living at the time the award was made. R. 5:5-2(e)(3).

Family Law > ... > Property Distribution > Equitable Distribution > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

# <u>*HN10*</u> Property Distribution, Equitable Distribution

Equitable distribution determinations are intended to be in addition to, and not as substitutes for, alimony awards, which are awarded to provide for the maintenance of the marital lifestyle post-dissolution. Moreover, it is not equitable to require a plaintiff to rely solely on the assets she received through equitable distribution to support the standard of living while the defendant is not confronted with the same burden. As expressed under the alimony statute's current version, the court must recognize that neither party has a greater entitlement to that standard of living than the other. *N.J.S.A.* § 2A:34-23(b)(4).

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

# **<u>HN11</u>** Spousal Support, Obligations

The Superior Court of New Jersey, Appellate Division holds that the Family Part must in its assessment of a marital lifestyle give due consideration to evidence of regular savings adhered to by the parties during the marriage, even if there is no concern about protecting an alimony award from future modification or cessation upon the death of the supporting spouse. The court recognizes that the majority of other jurisdictions have not extended their courts' consideration of the savings component of an alimony award to the extent the court does, but it believes the result is equitable, and consistent with <u>N.J.S.A. § 2A:34-23</u>. The court's holding is limited to the establishment of alimony.

Family Law > ... > Spousal Support > Obligations > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Procedures

### HN12[ Spousal Support, Obligations

The Superior Court of New Jersey, Appellate Division cautions that a court is equally obligated to consider the marital lifestyle and the financial situation of the parties post-divorce as set forth in <u>N.J.S.A. § 2A:34-23</u> and no factor should be elevated in importance over any other factor unless the court finds otherwise, in which case the court should make specific written findings of fact and conclusions of law in that regard. <u>N.J.S.A. § 2A:34-23</u>

**Counsel:** *Mark H. Sobel* argued the cause for appellant/cross-respondent (*Greenbaum, Rowe, Smith, & Davis LLP*, attorneys; *Mr. Sobel*, of counsel and on the brief; *Lisa B. DiPasqua*, on the briefs).

*Brian G. Paul* argued the cause for respondent/crossappellant (*Szaferman, Lakind, Blumstein & Blader, P.C.*, and *Stark & Stark*, attorneys; *Mr. Paul*, of counsel and on the briefs).

**Judges:** Before Judges ESPINOSA, ROTHSTADT, and CURRIER. The opinion of the court was delivered by ROTHSTADT, J.A.D.

**Opinion by: ROTHSTADT** 

# Opinion

[\*29] [\*\*711] The opinion of the court was delivered by

#### ROTHSTADT, J.A.D.

This appeal requires us to address the calculation of alimony where the parties relied on only a fraction of their household income to pay their monthly expenses and regularly saved the balance during the course of their marriage. HN1 [7] It is well-established that the accumulation of reasonable savings should be included in alimony to protect the supported spouse against the loss of alimony. See Jacobitti v. Jacobitti, 135 N.J. 571, 582, 641 A.2d 535 (1994); Martindell v. Martindell, 21 N.J. 341, 354, 122 A.2d 352 (1956); Davis v. Davis, 184 N.J. Super. 430, 437, 446 A.2d 540 (App.Div.1982). In this case, we consider whether the parties' history of regular savings as part of their marital lifestyle [\*\*\*2] requires the inclusion of savings as a component of alimony even when the need to protect the supported spouse does not exist.

The Family Part found that the monthly savings were part of the marital lifestyle, but excluded the amount from its calculation of alimony because savings were not necessary to ensure future payment of alimony. We disagree with the court's decision and hold that <u>HN2</u>[] regular savings must be considered in a determination of [\*30] alimony, even when there is no need to create savings to protect the future payment of alimony.

Both plaintiff Lisa Lombardi and defendant Anthony A. Lombardi appeal from portions of their final judgment of divorce (FJOD), entered after a twenty-eight day trial. Plaintiff challenges the court's alimony award based upon its rejection of the savings element despite it being undisputed that during the course of the marriage [\*\*712] the parties "established [a] practice of savings" that was "the largest component of [their] marital lifestyle." As to child support, she claims the court's "allocation . . . of the children's expenses [does] not allow [them] to share in their father's economic good fortune." Plaintiff also challenges the court's equitable distribution [\*\*\*3] of two accounts, and its denial of her request for counsel fees and costs. Defendant avers that the FJOD should be affirmed in all respects, but argues that, "in the event any portion of [it] is reversed and remanded," the court's failure to provide him with a credit for "the active appreciation" of the funds in one of the two accounts disputed by plaintiff warrants reversal.

We have considered the parties' arguments in light of

the record and our review of the applicable legal principles. We vacate and remand for reconsideration of the determinations as to alimony, child support, the equitable distribution of the two subject accounts, and counsel fees and costs.

Ι.

The parties began dating in college, and married in May 1990, three years after their graduation. Three children were born of the marriage, now ages twenty, eighteen, and fifteen. Plaintiff filed a complaint for divorce on August 2, 2010, and the court entered the FJOD on March 7, 2014.

At the time of the FJOD's entry, the parties were fortyeight-years-old and healthy, and defendant was employed full-time. Plaintiff, who holds a bachelor's degree in marketing, previously worked as the vice president of desktop publishing at [\*\*\*4] Bear Stearns, reaching a salary of \$80,000 per year, when the parties [\*31] agreed that she would leave the workforce to become a full-time homemaker after the birth of their first child. As the children grew older, plaintiff obtained a certification as a fitness instructor and now teaches classes part-time at local fitness clubs for a gross income of approximately \$10,000 per year. She is the children's parent of primary residence and continues to reside in the marital home.

Defendant has a bachelor's degree in finance, a master's degree in business administration, and is a chartered financial analyst. During the course of the marriage, he worked for a number of investment firms as an analyst or portfolio manager. He accepted a position with his current employer in 2004, at a base salary of \$250,000 with a \$1,125,000 guaranteed bonus for two years, and is now a vice president, senior portfolio manager. He was paid total compensation ranging from \$1,087,000 to \$2,275,000 during the five years immediately preceding the filing of the divorce complaint.

Despite defendant's substantial earnings, the parties routinely saved the better part of his salary. The portion of his earnings used for the [\*\*\*5] family's expenses allowed them to enjoy a comfortable, but not extravagant, standard of living. The decision to not "live a very lavish lifestyle" was the result of the parties' shared desire to budget most of their income during the marriage. According to plaintiff, after watching her parents struggle financially as a result of unreimbursed health care expenses, she wanted to ensure that she had enough saved for her and defendant's care as they

grew older so that they could still pay for their children's college education and "live comfortably" after retirement without the need to "worry" about finances or "change [the family's] lifestyle." According to defendant, although he was still working, they saved so that he could retire at forty-five, when the family would have accumulated \$5 million in assets, a sum sufficient to generate enough annual income to meet **[\*\*713]** the family's needs at their current lifestyle.

[\*32] The parties spent \$22,900 per month in order to maintain their lifestyle, exclusive of savings and gifts to the children. Plaintiff estimated that the parties saved approximately \$67,000 per month. Consistent with their lifestyle choice, they did not often buy extravagant clothing [\*\*\*6] or dine at expensive restaurants. Defendant drove a BMW and then a Camaro, while plaintiff drove a Buick Enclave. The family usually spent vacations locally, in New York's Catskill Mountains or in Cape May, and sometimes took ski vacations during the children's winter break. They never hired domestic help or sent the children to daycare.

In addition to their savings, which totaled approximately \$4.18 million at the time of the FJOD,<sup>1</sup> the parties owned the marital home. They established and funded college savings accounts for all three children, and avoided debt for the most part - at the time of the divorce complaint, they had a mortgage on the marital home, a lease on one car, and a loan on another.

The parties eventually settled issues of custody and parenting time, agreed that plaintiff would be entitled to an award of permanent alimony, although they disputed the amount, and to an equal division of the marital estate by equitable distribution, except as to one joint account and another account opened by defendant in his own name. They also did not resolve their claims for [\*\*\*7] counsel fees and costs. These remaining issues were addressed during the parties' twenty-eight day trial that began in December 2011 and concluded in 2014 when the court placed its oral decision on the record over the course of four days.

The court entered the FJOD and the parties filed their respective appeals from certain provisions thereof.

II.

HN3[1] Our review of the Family Part's determination in dissolution matters is limited. We accord deference to

decisions of the [\*33] Family Part based on its expertise in matrimonial matters. See Cesare v. Cesare, 154 N.J. 394, 412, 713 A.2d 390 (1998). We will not disturb its decisions if they are supported by substantial credible evidence and are consistent with applicable law. Ibid.; see also Gnall v. Gnall, 222 N.J. 414, 428, 119 A.3d 891 (2015). This standard applies equally to its decisions regarding alimony, see J.E.V. v. K.V., 426 N.J. Super. 475, 485, 45 A.3d 1001 (App.Div.2012), child support, see J.B. v. W.B., 215 N.J. 305, 325-26, 73 A.3d 405 (2013), equitable distribution, see La Sala v. La Sala, 335 N.J. Super. 1, 6, 760 A.2d 1122 (App.Div.2000), certif. denied, 167 N.J. 630, 772 A.2d 932 (2001), and counsel fees. See Williams v. Williams, 59 N.J. 229, 233, 281 A.2d 273 (1971); Barr v. Barr, 418 N.J. Super. 18, 46, 11 A.3d 875 (App.Div.2011). However, we owe no special deference to the court's legal conclusions. See D.W. v. R.W., 212 N.J. 232, 245-46, 52 A.3d 1043 (2012).

III.

#### Α.

We begin our review by addressing the trial court's alimony award. According to plaintiff, she required \$16,291 per month to support herself and the three children at a standard of living comparable to that enjoyed during the marriage, exclusive of savings. She sought an [\*\*\*8] additional \$30,000 [\*\*714] per month for savings.<sup>2</sup> Plaintiff requested an award of child support in the amount of \$5000 per month and a requirement that defendant be solely responsible for paying certain expenses for the children, such as [\*34] extracurricular activities, tutoring, summer camps, cars, and auto insurance.

After considering the evidence, the court established a permanent award of monthly alimony in the amount of \$7600, without including an amount for savings, even though it found it was a component of the marital

<sup>&</sup>lt;sup>1</sup> The parties also held another joint account and retirement accounts that they agreed should be divided equally.

<sup>&</sup>lt;sup>2</sup> Plaintiff's forensic accounting expert testified that the parties had habitually saved an average of \$67,000 per month during the final years of the marriage. He estimated that, even at the \$30,000 per month plaintiff was requesting as a savings component of alimony, she would be able to save \$228,000 per year after taxes, while defendant would be able to save \$705,000. At that rate, in fifteen years, when the parties would both be sixty-one-years-old, plaintiff and defendant would have accumulated approximately \$3,960,000 and \$12,043,000, respectively, assuming a three percent rate of return on investment compounded monthly.

lifestyle. It determined that plaintiff required [\*\*\*9] alimony to meet her needs at the marital standard of living, which the court characterized as a "modest middle-class lifestyle," and found that the parties did not dispute the monthly amount needed to meet plaintiff and the children's expenses. The court concluded that plaintiff's proposed budget, without savings, for herself and the children was largely reasonable and consistent with the evidence, and approved a monthly budget of \$14,516, excluding savings. After deducting the \$5000 it was awarding in child support, the \$3610 monthly aftertax income it estimated could be generated by investment of plaintiff's equitable distribution share, and the \$583 after-tax monthly earnings from her part-time work, the court found plaintiff would require another \$5323 to meet her budget. Accounting for taxes, the court concluded that the gross award of \$7600 per month would cover the shortfall. The court then determined that defendant earned a sufficient amount to cover plaintiff's budget, including the requested savings component, and his own expenses.

In reaching its decision, the court observed that each party would have the benefit of half of the roughly \$5.5 million marital estate after equitable [\*\*\*10] distribution, providing a significant opportunity for investment and saving for unanticipated expenses, although defendant's considerable income and earning potential conferred on him a greater opportunity than plaintiff. Moreover, the children's college expenses were already provided for in amply-funded custodial accounts, and defendant was responsible for maintaining the children's medical, dental, and vision coverage and paying all uncovered costs over \$250 per child per year. Finally, the parties had no debt, and plaintiff, the parent of [\*35] primary residence, would retain the marital residence unencumbered by a mortgage.<sup>3</sup>

As for the savings issue, the court observed that the parties' "earning[s] exceeded consumption by approximately \$87,000 per month on average." It noted that those savings could be understood as a "component of lifestyle" in the sense that the parties had habitually saved the better part of their income during the marriage, whether, as defendant claimed, to provide for an early retirement or, as plaintiff testified, to enhance [\*\*\*11] the couple's economic security more broadly, and lived a generally frugal lifestyle as a result. Nonetheless, the court concluded that including savings

as a component of an alimony award was only warranted to the extent it was necessary [\*\*715] to ensure a dependent spouse's economic security in the face of a later modification or cessation of support, which were not issues here. However, it identified factors it found allowed plaintiff to accumulate savings through means other than increased alimony, though not to the extent the parties saved during the marriage. It cited to, among other factors, some "overlap" in the alimony and child support budgets, plaintiff's right to claim the children as exemptions for tax purposes, and "her ability to work and retain earnings to use for savings . . . because of the maturation of the children . . . such that she would have more time to spend working if she chose to do so." The court stated:

Furthermore, from a budget standpoint the plaintiff will have no obligation for any college expense, no obligation for any unreimbursed medical or health expense, all extracurricular activities are covered by the above-guideline . . . award, and if she chose to [\*\*\*12] work more that she would be protected against any claim that her alimony should be reduced or that she has lesser need. [(Emphasis added).]

Also, the court noted that defendant had been ordered to maintain a life insurance policy to secure his obligation to plaintiff and the children in case of his death, and determined defendant's **[\*36]** substantial assets and income therefrom made it unlikely he would obtain a modification of his support obligation in the future.

The court concluded by summarizing its reasons for not including a savings component in its alimony calculation:

The [c]ourt finds that a permissible savings component which it elected not to do or not to include was because there are potentials for [plaintiff] to accumulate, earn, and otherwise be protected from a reduction by virtue of, one, reasons having to do with the current budget and the room in the budget to still save, the ability to work more without worry about a reduction in alimony, the investment opportunity that might enhance the return on the over \$2 million that she will receive, the life insurance to protect against the death of the defendant, and the likelihood of a continued appreciation and increase in assets and earnings [\*\*\*13] that . . . would protect her against any arbitrary . . . reduction in alimony based upon

<sup>&</sup>lt;sup>3</sup> Defendant paid off the mortgage in full from a joint account during the litigation. According to plaintiff, he did so without her knowledge or consent.

early retirement or otherwise.

Β.

Plaintiff argues the court erred in excluding a savings component from the alimony award because, among other reasons, the award permitted defendant to continue to enjoy the marital standard of living but deprived plaintiff of the same opportunity. She argues her position is supported by the fact that, although the case information statement form required by our courts did not initially include savings as a budget category, that category has since been added, reflecting the courts' view that savings is a fundamental element of the family lifestyle that must be accounted for in a support award. We agree.

HN4[1] Alimony is authorized by N.J.S.A. 2A:34-23 and is governed by the factors enumerated in N.J.S.A. 2A:34-23(b).<sup>4</sup> It exists to "permit [one spouse] to share in the economic rewards occasioned by [the other's] income level (as opposed merely to the assets accumulated), reached as a result of their combined labors, inside and outside the home." Gugliotta v. Gugliotta, [\*\*716] 160 N.J. Super. 160, 164, 388 A.2d 1338 (Ch.Div.), aff'd, 164 N.J. Super. 139, [\*37] 395 A.2d 901 (App.Div.1978); see also Konzelman v. Konzelman, 158 N.J. 185, 195, 729 A.2d 7 (1999). "[A]limony is neither a punishment for the payor nor a reward for the payee. . . . It is a right arising out of the marriage relationship to continue to [\*\*\*14] live according to the economic standard established during the marriage . . . . " Aronson v. Aronson, 245 N.J. Super. 354, 364, 585 A.2d 956 (App.Div.1991). "Alimony relates to support and standard of living; it involves the quality of economic life to which one spouse is entitled, which then becomes the obligation of the other." Gnall, supra. 222 N.J. at 429. 119 A.3d 891.

**HNS** A proper alimony award "assist[s] the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Tannen v. Tannen, 416 N.J. Super. 248, 260, 3 A.3d 1229 (App.Div.2010) (quoting Steneken v. Steneken, 183 N.J. 290, 299, 873 A.2d 501 (2005)), aff'd o.b., 208 N.J. 409, 31 A.3d 621 (2011). "[A] judge awarding alimony must methodically consider all evidence to

assure the award is 'fit, reasonable and just' to both parties, <u>N.J.S.A. 2A:34-23</u>, and properly balances each party's needs, the finite marital resources, and the parties' desires to commence their separate futures, <u>N.J.S.A. 2A:34-23(c)</u>." <u>Gnall v. Gnall, 432 N.J. Super.</u> <u>129, 149, 74 A.3d 58 (App.Div.2013)</u>, rev'd on other grounds, <u>222 N.J. 414, 119 A.3d 891 (2015)</u>.

The goal of alimony is to assist the supported spouse in achieving a lifestyle "reasonably comparable" to the one enjoyed during the marriage. *Steneken, supra, 183 N.J. at 299*; see also <u>Crews v. Crews, 164 N.J. 11, 17, 751</u> <u>A.2d 524 (2000)</u>; <u>Cox v. Cox, 335 N.J. Super. 465, 473, 762 A.2d 1040 (App.Div.2000)</u>. "The importance of establishing the standard of [\*\*\*15] living experienced during the marriage cannot be overstated." <u>Crews, supra, 164 N.J. at 16, 751 A.2d 524</u>. It is the "touchstone for the initial alimony award." *Ibid.* 

**HN6** In determining the marital lifestyle, the trial court looks at various elements including "the marital residence, vacation home, cars owned or leased, typical travel and vacations each year, **[\*38]** schools, special lessons, and camps for [the] children, entertainment (such as theater, concerts, dining out), household help, and other personal services." Weishaus v. Weishaus, 360 N.J. Super. 281, 290-91, 822 A.2d 656 (App.Div.2003), rev'd in part on other grounds, <u>180 N.J.</u> <u>131, 849 A.2d 171 (2004)</u>. The ultimate determination must be based not only on the amounts expended, but also what is equitable. <u>Glass v. Glass, 366 N.J. Super.</u> <u>357, 372, 841 A.2d 451 (App.Div.)</u>, certif. denied, 180 N.J. 354, 851 A.2d 648 (2004).

"[A]n appropriate rate of savings . . . can, and in the appropriate case should, be considered as a living expense when considering an award of . . . maintenance." *Id. 366 N.J. Super. at 378, 841 A.2d 451* (second alteration in original) (quoting *In re Marriage of Weibel, 965 P.2d 126, 129-30 (Colo.App.1998)*). Thus, the court can take into account the marital standard of living and allow the supported spouse to save for the future. *See id. 366 N.J. Super. at 379, 841 A.2d 451*; see also Capodanno v. Capodanno, 58 N.J. 113, 120, 275 A.2d 441 (1971). This is particularly true when the supporting spouse can afford any amount paid to the supported spouse. *Glass, supra, 366 N.J. Super. at 379, 841 A.2d 451*.

**HN7** A spouse's need for savings has long been recognized as a component of alimony, see <u>Martindell,</u> <u>supra, 21 N.J. at 354, 122 A.2d 352</u>, that allows for the accumulation of [\*\*\*16] "reasonable savings to protect

<sup>&</sup>lt;sup>4</sup> Several significant aspects of the statute were amended effective after the entry of the FJOD. *L.* 2014, *c.* 42, § 1 (effective Sept. 10, 2014). None of the amendments, however, impacts the trial court's decision or ours in this case.

[the supported spouse] against the day when [\*\*717] alimony payments may cease because of [the death of the supporting spouse] or change in circumstances." Davis, supra, 184 N.J. Super. at 437, 446 A.2d 540 (quoting Khalaf v. Khalaf, 58 N.J. 63, 70, 275 A.2d 132 (1971)). Savings have been used for such security in lieu of directing the supporting spouse to keep a life insurance policy or establish a trust. See Jacobitti, supra, 135 N.J. at 582, 641 A.2d 535 (upholding an order to create a trust in lieu of life insurance to ensure "continuing alimony payments for the life of the dependent spouse"); Davis, supra, 184 N.J. Super. at 436-40, 446 A.2d 540 (upholding an order directing the supporting spouse to obtain and designate the dependent spouse as the beneficiary of a life insurance [\*39] policy). In short, savings has been a relevant and appropriate factor to be considered in the establishment of a reasonable and equitable alimony award because the amount of support awarded is subject to review and modification upon a showing of a change of circumstances, which could result in the supported spouse being incapable of supporting himself or herself. See Davis, supra, 184 N.J. Super. at 437, 446 A.2d 540.

However, the protection of income being derived through alimony is not the only reason why a supported spouse requires savings, especially where regular savings have been part of the established marital lifestyle. "[\*\*\*17] [A]n appropriate rate of savings to meet needs in the event of a disaster, to make future major acquisitions such as automobiles and appliances, and for retirement can, and in the appropriate case should, be considered as a living expense when considering an award of . . . [alimony]." <u>Weibel, supra, 965 P.2d at 129-30</u>; see also <u>Glass, supra, 366 N.J.</u> <u>Super. at 378, 841 A.2d 451</u>.

HN8 [ ] The most "appropriate case" in which to include a savings component is where the parties' lifestyle included regular savings. Because it is the manner in which the parties use their income that is determinative when establishing a marital lifestyle, see Weishaus, supra, 180 N.J. at 145, 849 A.2d 171, there is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations. The use of family income for either purpose over the course of a long-term marriage requires the court to consider how the money is spent in determining the parties' lifestyle, regardless of whether it was saved or spent on expensive purchases. The fact that the payment of the support ultimately is protected by life insurance or other financial

tools, does not make the consideration of the savings component any less appropriate.

HN9[1] The Supreme Court [\*\*\*18] has recognized the need to consider regular savings in determining a marital lifestyle by including a line item for monthly savings in Schedule C of the case information statement [\*40] parties must file in family matters.<sup>5</sup> See R. 5:5-2; see also Family Part Case Information Statement, Pressler & Verniero, Current N.J. Court Rules, Appendix V(D) to R. 5:5-2 (2016). While the original case information statement form did not include a line item for savings, it was changed two years after implementation to add or subtract certain budget items so that the form would "more closely track [a family's] actual expenses." Report of the Supreme Court [\*\*718] Committee on Family Division Practice, 118 N.J.L.J. 117, 130-31 (July 24, 1986). The Supreme Court's Committee on Family Division Practice recommended a "savings and investments" item, reasoning that "[a]lthough such a line might be viewed as subject to abuse, [it] would still appear appropriate because in many households savings and investments represent a fundamental portion of an ongoing budget." Id. at 131. The Court adopted that recommendation and, as stated in Rule 5:5-2(e), the revised form is required in all actions involving alimony, and copies must be preserved by the parties as evidence of the marital standard of [\*\*\*19] living at the time the award was made. R. 5:5-2(e)(3).

We reject defendant's assertion that the court correctly addressed the savings component through equitable distribution of the parties' accounts. The argument runs afoul of the rule that <u>HN10</u> "equitable distribution determinations are intended to be in addition to, and not as substitutes for, alimony awards," which are awarded to provide for the maintenance of the marital lifestyle post-dissolution. *Steneken, supra, 183 N.J. at 299, 873 A.2d 501.* Moreover, it is not equitable to require plaintiff to rely solely on the assets she received through equitable distribution to support the standard of living while defendant is not confronted with the same burden. As expressed under the alimony statute's current version, the court must recognize that "neither party ha[s] a [\*41] greater entitlement to that standard of

<sup>&</sup>lt;sup>5</sup> While deciding an unrelated issue in an earlier case, we also signaled our recognition of a trial court's need to properly consider the savings component. See <u>Tannen, supra, 416 N.J.</u> <u>Super. at 277, 3 A.3d 1229</u> (finding judge's consideration of lifestyle inadequate because he did not consider savings component, among other factors, as part of parties' lifestyle).

living than the other." N.J.S.A. 2A:34-23(b)(4).

**HN11** We therefore hold that the Family Part must in its assessment [\*\*\*20] of a marital lifestyle give due consideration to evidence of regular savings adhered to by the parties during the marriage, even if there is no concern about protecting an alimony award from future modification or cessation upon the death of the supporting spouse.<sup>6</sup> We recognize that the majority of other jurisdictions have not extended their courts' consideration of the savings component of an alimony award to the extent we do today, see <u>Glass, supra, 366</u> <u>N.J. Super. at 377-78, 841 A.2d 451</u> (surveying cases awarding retirement savings as part of alimony award), but we believe the result is equitable, see <u>id. 366 N.J.</u> <u>Super. at 372, 841 A.2d 451</u>, and consistent with our statute.

Having said that, <u>HN12</u> [] we caution that a court is equally obligated to consider the marital lifestyle and the financial situation of the parties post-divorce as set forth in the statute, and "[n]o factor sh[ould] be elevated in importance over any other factor unless the court finds otherwise, in which case the court sh[ould] make specific written findings of fact and conclusions of law in that regard." <u>N.J.S.A. 2A:34-23(b)</u>.

We [\*\*\*21] recognize that the court attempted to identify areas through which plaintiff might be able to save money at some level, but the court's suggestions did not amount to a consideration of savings as part of the parties' standard of living, especially where there was no dispute that the parties saved the lion's share of the family's income or that defendant had the ability to continue to fund such savings. We are therefore constrained to vacate the alimony award and remand for further consideration by the Family Part consistent with our holding today, with the understanding that we [\*42] intimate no suggestion as to the outcome of that reconsideration by the court.

[At the direction of the court, the discussion of the other issues in this **[\*\*719]** appeal at sections IV, V and VI has been omitted from the published version of the opinion.]

VII.

In sum, the trial court's awards of alimony, equitable

distribution, child support, counsel fees and costs are vacated and remanded for further proceedings consistent with our decision. We do not retain jurisdiction.

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<sup>&</sup>lt;sup>6</sup> Our holding is limited to the establishment of alimony. We do not decide in this opinion the extent to which the savings component should be considered upon a change in circumstances, such as the payor spouse's retirement.