

Alimony: Law, Policy, Practice and Presentation

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

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

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

There is no area of the law in which as much discretion is lodged

as practice in the family part. Our skills as advocates are challenged to make real the family dynamic we present to the court. One day we may appear before the court asking that a 10-year marriage result in rehabilitative alimony only, while the next day we may appear for the other side in another 10-year marriage advocating permanent support. We maintain credibility with the court only if we bring to life the distinctions in each family that justify the seemingly disparate results advocated.

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

ALIMONY: BASIC THEORY AND THE JUDICIAL ATTITUDE

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

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

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

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

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

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

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

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

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

the facts of each case you present to the court.

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

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

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

This serves two purposes. First, the client will be a better witness because he or she will not be as nervous and he or she will expect the questions and respond appropriately. Second, you will continue to learn information from your

client that will assist you in presentation at trial. Never put a witness—your client or a third party—on the stand and ask a question for which you do not know the answer. Clients do not always know what facts are important. They frequently need to be told!

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

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

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

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

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

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

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

Try to think in terms of the factu-

al basis of conclusions rather than simply the conclusion itself.

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

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

ACTUAL NEED AND ABILITY OF THE PARTIES TO PAY

It is important to present a net/net disposable income analysis. Have an accountant perform a calculation that demonstrates the after-tax impact on each party in terms of available disposable income as a result of the implemen-

tation of various permutations and combinations of alimony and child support awards. Alternatively, provide the court with an analysis using one of the many software programs available. Compare which party is above or beneath budget based upon this net/net analysis. If there is a nonsensical demand for alimony and support, chart mathematically what the impact will be.

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

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

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

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

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

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

If you represent the paying spouse, you must make clear that your client has his or her own

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

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

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

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

ABILITY TO PAY AND RELATIONSHIPS WITH CHILDREN

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

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

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

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

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

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

...because no two cases are exactly alike (*Bonanno v. Bonanno*, 4 N.J. 268, 274 (1950), neither bright-line tests or hard and fast rules should be imposed when imputing a reasonable rate of return any more than when determining an appropriate award of alimony. See, e.g. N.J.S.A. 2A:34-23(b)(13) (requiring a court to consider, in addition to twelve enumerated factors, [a]ny other factors which the court may deem relevant"; *Kingsdorf*

v. Kingsdorf, 351 N.J. Super. 144, 157 (App. Div. 2002) ("[A] court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied." (quoting *Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999); *Habble v. Habble*, 99 N.J. Eq. 53, 56 (Ch. Div. 1926) (A particular method for determining alimony "is only a guide, and not a hard and fast rule. Each case must be separately judged according to the circumstances.") See also, *Alston v. Alston*, 331 Md. 496, 629 (1993) ("[N]o hard and fast rule can be laid down and ... each case must depend upon its own circumstances to insure that equity be accomplished."); *Tracey v. Tracey*, 328 Md. 380 (1992) ("[E]quity requires sensitivity to the merits of each individual case without the imposition of bright-line tests").⁹

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

DURATION OF THE MARRIAGE

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

The authors agree, but believe the

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

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

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

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

the court also opined that “perhaps because the marriage was of an intermediate length, defendant need not be supported in the standards of the very summit of the parties’ lifestyle...”¹²

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

Justice Morris Pashman said:

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

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

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

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

Moreover, in *Carter*, the appellate court particularly was concerned that the trial judge had not considered the duration of the marriage factor when converting rehabilitative alimony into permanent alimony. The court noted that the parties had been married only approximately nine years before separation, and that it was “not clear

from those facts that an award of permanent alimony would have been considered appropriate *ab initio*.”¹⁶

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

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

THE AGE, PHYSICAL AND EMOTIONAL HEALTH OF THE PARTIES

As stated in discussion of the prior criteria, the age of the parties at the end of the marriage is as least as important as its length. A woman at the end of an eight-year marriage who is 46 is in a far different posi-

tion than a woman at the end of the eight-year marriage who is 32, with no parenting responsibilities.

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

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

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

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

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

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

where the judge said, for a unanimous panel:

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

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

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

expenditures, corporate perks, expense accounts, vacations, recreational patterns, purchases, etc.

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

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

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

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

definitions.

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

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

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

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

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

stated:

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

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

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

The marital lifestyle is a measuring stick to ascertain the appropriate quantum of support, *after analyzing the other statutory criteria*, including the supported spouse’s ability to contribute to that support. In *Carter*, the appellate panel emphasized again the need to relate

the alimony award made to the standard of living of the parties during the marriage.³⁰

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

How does one best present proofs of lifestyle? The more precise and documentary your proofs, the more comfortable the trial court will be in adopting your client’s position. Consequently, obtain the records that were utilized by the family to spend money for pertinent times prior to the separation, e.g., checking accounts, credit cards, check registers. To deter arguments that you are cherry-picking for a particular time period, talk with your client about pertinent years and levels of spending, and select different time periods. Make sure you get records for all accounts that are used. This requires careful review with your accountant, you, and your client. Do not double-count transfers. Have an accountant prepare a report based upon a review of the expenditures (credit cards, cancelled checks, or whatever payment methodology was used) in categories that track CIS line items. If there were one-time capital improvement expenses, or extraordinary expenses for other reasons, they should be identified and highlighted separately. If there are large cash expenditures and there are questions about the appropriateness of these expenditures (drugs, glomming cash for a war chest, etc.) these too should be quantified and identified, and summaries prepared with and without inclusion of this as part of the day-in/day-out

lifestyle. If it is alleged that a post-separation or a post-divorce enhanced lifestyle has been manipulated, your trial exhibits should reflect charts or blow-ups comparing what is sought with what used to be. For economic reasons, you may not be able to employ all these investigative or time-sensitive techniques in every case, but the concepts can be carried over to some degree in any case, and utilized to organize your proofs.

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

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

Is this corporate or business

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

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

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

The trial court conducted the hearing pursuant to the remand instruction and terminated alimony based upon its finding of marital lifestyle, concluding that the wife could maintain the lifestyle without alimony. The trial judge concluded there were no equities that weighed in favor of not terminating the husband's alimony obligation

because the wife failed to show that she gave any form of consideration in exchange for a guarantee of support to make reducing or terminating alimony inequitable.

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

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

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

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

If earning capacity is an issue, you need to retain employment and vocational experts to evaluate the actual capacity to earn of the party

in question. If questions of under-employment arise, we have guidance from the Appellate Division regarding the appropriateness of findings about being voluntarily under-employed.

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

Judge Robert Fall stated:

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

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

Judge Fall stated:

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

annum rate in October, 1996. This was a significant salary reduction, clearly constituting change circumstances. Defendant also lost the benefit of employer-supplied automobile expenses allowance, health insurance, and life and disability insurance. He was able to defer filing his modification motion until July 1997, because he received a termination benefit, and had reduced his weekly contribution to the extraordinary expenses of the children from \$140 to \$71.³⁸

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

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

Can one reasonably argue now,

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

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

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

REHABILITATIVE ALIMONY FACTORS

The following factors are collectively referred to as rehabilitative alimony factors in this article,

because they pertain to the calculus of weighing permanent as opposed to rehabilitative alimony.

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

The basic premise of an award of rehabilitative rather than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment, at some future date, as stated in *Wass*.³⁹ As the court said in *Wass*:

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

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

cluded in *Hughes*:

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

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

REVIEW OF REHABILITATIVE ALIMONY AGREEMENTS

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

We consider the statutory mandate that the court make specific findings on rehabilitative alimony as a clear direction to the Family Part that it must adhere to the statutory requirement in every case, *whether contested or uncontested, including those cases*

which result in a settlement on the day of trial or during a trial. We previously stressed the importance of adherence to the statutory admonition in our discussion in *Cerminara v. Cerminara*. We adhere to our view that N.J.S.A. 2A:34-23(b) must be addressed in every dissolution proceeding where rehabilitative alimony will be paid subsequent to the dissolution of a marriage. (Emphasis supplied).⁴⁵

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

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

The *Carter* court believed that if there is a "probing inquiry" at the

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

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

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

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

THE EQUITABLE DISTRIBUTION OF PROPERTY ORDERED AND ANY PAYOUTS ON EQUITABLE DISTRIBUTION, DIRECTLY OR INDIRECTLY, OUT OF CURRENT INCOME, TO THE EXTENT THIS CONSIDERATION IS REASONABLE, JUST AND FAIR

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

As stated in *Esposito*:

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

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

Although lifestyle may be created by gifts and borrowings, it is more than just income earned. The decision of *Miller*⁴⁹ remains the benchmark decision in calculating appro-

priate rates of return and considerations of risk with regard to invested assets. However, in *Overbay*,⁵⁰ the Appellate Division held that by strictly adhering to the standard set forth in *Miller*, the ex-wife was deprived of an opportunity to control her investment options. The court indicated that such factors as the advice of the ex-wife's financial planner, her age, her serious health problems, her limited employment income, her aversion to risk and her stated desire to preserve capital, the manner in which her assets had been invested during marriage, the historical rate of return, or availability of appropriate alternative investment options, should be considered.

FAULT

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

Moreover, *Calbi* concluded that the wife's criminal beating of the parties' child, and his resultant death, did not disqualify her *per se* from continuing to receive alimony.⁵² It found the conduct not egregious because the wife was under the influence of alcohol, there was no evidence of premeditation and the injured that resulted in the child's death was extremely rare. The court concluded that the suspension of the husband's alimony payments and vacation of arrears that accrued following the child's

death was justified because the court never conducted a hearing to determine whether the child's death affected the husband's ability to pay alimony.

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

ANTI-LEPIS CLAUSES

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

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

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

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

The court suggested:

A wife might agree to give up half of the support to which she might have been entitled, or to accept reduced equitable distribution, in exchange for a guaranteed payment to be made, irrespective of her husband’s finances or her own future good fortune. Their agreement is not based on her need or his ability to pay; they have set standards other than need and ability. If the husband accepts the benefits of this agreement, he also must ordinarily accept its burdens. If the payments which he expected to equal a third of his income later equal half or even two-thirds of his income, he can no more complain than could the wife if the husband’s original income had doubled so that the expected thirty percent burden was reduced to fifteen percent. If, however, these hypothetical spouses failed to include a physical disability provision (which was included in the case before us) and the husband became completely disabled with meager income, barely able to cover his uncompensated hospital costs, would a court of equity require that the income be paid to the ex-wife and the medical treatment not be rendered to the husband? Of course not. The agreed-upon support

would no longer be “warranted in the light of prevailing circumstances.”

We have used extreme examples here, but we have applied *Lepis* principles, without the usual need-based *Lepis* guidelines. *Lepis* recognized the parties’ standards as they may be reasonably enforced. The result is that modifications are permitted, but only where the failure to modify would be unreasonable or unjust.⁶⁰

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

CONCLUSION

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

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

ties of the human dynamics about which we ask them to make decisions. ■

ENDNOTES

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

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

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