# MAY A COURT CONSIDER EXPENSES A SPOUSE INCURS FOR A FULLY EMANCIPATED CHILD ON AN INITIAL DETERMINATION OR MODIFICATION OF ALIMONY, OR ARE SUCH EXPENSES BARRED FROM THE ALIMONY ANALYSIS BECAUSE THEY REPRESENT BACK DOOR CHILD SUPPORT?

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## INTRODUCTION

My review of this seemingly narrow and discrete issue not only permitted me to answer the question posed but also to raise fundamental questions concerning how alimony should be calculated. After reviewing my musings, judges and lawyers may now reconsider their prior practice of determining the amount of alimony to be awarded.

Sometimes resolution of a narrow question has broader and more fundamental impact. This may well be such a situation. Parental concerns about children do not end at emancipation. It is a common occurrence for parents to economically assist their children notwithstanding the fact that by any legal definition they are emancipated. The impact of how this issue is resolved goes far beyond the precise question presented. Parental concerns about children do not end at emancipation. Parental assistance might include direct monetary contribution or the payment of various expenses on behalf of the child, rental of an apartment parents purchase which they "rent" at below market rates, or a myriad of other forms of economic assistance. Resolution of this issue in the context of the dependant spouse's payment to an emancipated child goes far beyond the precise question presented.

There are two different scenarios where the issue may arise. The first is during the marriage where this was the parents' practice. The second occurs subsequent to the divorce, a child becomes emancipated and then receives the economic assistance. Further variations might be where the child desperately needs the assistance or, the more likely circumstance, where the assistance is designed to permit the child to enjoy an enhanced standard of living, perhaps one comparable to that enjoyed when "Mommy and Daddy" were paying the bills.

Different arguments may be advanced and it is conceivable the result might differ depending upon the actual scenario. For example, where parents, during the marriage, regularly and routinely provided money to their emancipated children to enhance their lifestyle, this permits the argument to be made that this parental expense is part of the "marital lifestyle". However, for purposes of highlighting the issue, I prefer an alternative hypothetical.

The parties acknowledge at divorce that the alimony the Wife receives is inadequate to maintain the marital lifestyle. Subsequently, as a result of an increase in the Husband's income, the Wife seeks increased alimony to raise her to the "marital lifestyle". In her motion she lists a CIS line item of $2,000.00 for funds paid to her twenty-three year old fully emancipated

son, who was a high school senior at divorce. This hypothetical is more difficult since the expense was not part of the marital lifestyle.

My favorite topics are those where there is a sharp disagreement amongst the people with whom I raise the issue. Literally, there have been an equal and, I might add, fervent division of opinions on this issue. Each side feels it is absolutely correct and that it is inconceivable there could be a contrary result.

**THE STATUTE**

Since alimony is a statutory creation, the analysis inevitably begins with N.J.S.A. 2A:34-23. There are several factors that might be applicable:

1. Actual Need And Ability Of The Parties To Pay.

The dependent spouse would argue payment of these expenses represent an "actual need" particularly since the statute does not limit or define the need as directly linked to the spouse. For example, a charitable contribution does not provide a direct benefit to the dependent spouse but is a permissible expenditure when calculating alimony. The charitable contribution argument is easier if the "need" is to replicate an expense in existence while the marriage was intact.

2. The Standard Of Living Established In The Marriage

And The Likelihood That Each Party Can Maintain A Reasonably Comparable Standard Of Living.

That the standard of living is an alimony factor is hardly surprising to anyone. In the factual scenario where parties expended money on an emancipated child during the marriage, it is easier to advance the argument that such a discretionary expenditure is part of the marital lifestyle. An analysis of the cases reveals that marital lifestyle is best defined as how people actually live. As the Appellate Division said in Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998):

> "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 law has historically not made value judgments on how people spend their money so long as it is an expenditure generally within the broad parameters of the marital partnership. Certainly, there is no longer a dispute concerning savings which is clearly a discretionary expenditure that may not be "necessary" as food or roof expenses are; nonetheless, it is an expenditure that has been recognized legally when calculating alimony. Thus, a prior history of assistance permits the claim to be made that the expense is part of lifestyle and a permissible future expenditure.

3. Any Other Factors Which The Court May Deem Relevant.

The catchall provision is, of course, the most interesting in this analysis. It strongly suggests a legislative determination that courts should have wide and broad discretion when determining the relevant factors for alimony consideration; certainly, this provision suggests the legislature did not intend to limit the alimony consideration to the specific statutory factors set forth above.

This proposition is clear from the language of the statute itself (i.e. "any other factor"), and the history of the inclusion of the stated factors enumerated in N.J.S.A. 2A:34-23. Our Supreme Court has made it clear that in construing a statute, the plain language is considered first. Kimmelman v. Henkels and McCoy, Inc. 108 N.J. 123, 128 (1987); Renz v. Penn Central Corp., 87 N.J. 437, 440 (1981); State v. Butler, 89 N.J. 220, 226 (1982). Guided by that proposition, the language, "any other factor," means, quite simply, any other factor. The legislative history of N.J.S.A. 2A:34-23 is described by Justice O'Hern, who concurred and dissented, in Innes v. Innes, 117 N.J. 496, 535, 538 (1990).

On this subject, one of the first tasks I had in connection with the Family Law Section was to attend a meeting with the New Jersey Commission On Sex Discrimination In Marriage And Family

Law ("Commission") to review and help draft proposed amendments to N.J.S.A. 2A:34-23. The Commission's purpose was to eliminate "inequities in divorce and alimony statute that had worked to the detriment of women, keeping them in economic bondage". Innes at 536. I suggest the full legislative history is not set forth in Innes. Several far more experienced lawyers and I met with Members of the Commission and Senator Littman's staff. They sought our help in drafting a law that was gender neutral but was more than the then existing bare bone statute that simply referenced alimony or equitable distribution. They had made the legislative judgment, premised on policy considerations, that the interests of justice would best be served by having factors in the statute.

The factors were not intended to alter or change the law. Rather, the statute, now far more descriptive, was to be a codification of existing law that would enable non-lawyers to read the statute and have a better understanding of how equitable distribution and alimony were determined. Simply put, the commission staff believed people should be able to understand how and why their lives were being affected.[1] Our task in

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[1] That policy decision is remarkably similar to the rationale for adoption of Rule 5: 5-10 "Notice Of Equitable Distribution". The Family Practice Committee in recommending adoption of the Notice Of Equitable Distribution Rule felt an individual receiving a Divorce Complaint that simply sought

assisting the drafting was not to change or alter the law but to assure the statute accurately reflected the then existing law.

Since it was the Commission On Sex Discrimination, the first task was to remove all gender references which is why our present statutes do not refer to either Husband or Wife; they only speak in gender neutral terms. Yet, if the purpose of the factors were educational and to codify "the law" in one place, why was the catchall language "any other factor" included? Did that go beyond codification or was the Legislature memorializing the rights of judges to consider other factors that may be unique to a case and that a Judge, in the exercise of discretion, would have the right to mold alimony judgment in light of all facts bearing on an alimony award. At this point, what the Legislature specifically intended may well be an interesting intellectual debate, but it does not change the fact that courts under the

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"Equitable Distribution" would not necessarily know how that prayer for relief might effect their lives. How would a lay person know and understand what equitable distribution was? What might happen to someone if they did not answer the Complaint? Thus, before a divorce could be granted against someone who had failed to respond, as a matter of fundamental fairness the Committee believed the impact of equitable distribution had to be explained. Thus, the Rule in the initial formulation required fair notice be given that "equitable distribution" meant your assets, defined in the notice, might be taken away from you. If you then failed to appear, at least you had fair and adequate notice of the consequences. That same concept of notice and fairness led to the expansion of the Rule to include advance notice of the requested alimony as well.

statute have the right to consider factors other than those specifically delineated. As to that, the statute is clear and the judges' right unquestioned. It was a Legislative judgment that once factors were utilized, it would be unfair and imprudent to suggest that there could be no other reason considered for alimony to be awarded. Therefore, from an interpretative position the absence of any language on this issue is not dispositive; rather, it supports the view that if the factor is consistent with the policy authorizing alimony then a court may permissibly consider it in the overall analysis.

**IS SUCH AN AWARD IMPERMISSIBLE CHILD SUPPORT OR PERMISSIBLE ALIMONY?**

Having established a court could consider expenses for an emancipated child, at least in the analytical process, the issue then becomes whether the expenses should be barred because they represent back-door child support and are inconsistent with the reasons why alimony is awarded. Resolution of this issue requires an examination of alimony, what it is and why it is awarded.

Is alimony an entitlement that is earned? Or is it something that is more specifically keyed to a dependent spouse's needs and, if not "needed" then it cannot be awarded? Asking the question almost answers it because alimony as a creature of

statute is determined by a multitude of factors with "needs" only being one. In other words, alimony is a right emanating from not simply the marital partnership but the marriage itself. It is a reflection of what marriage is and the responsibility spouses have to each other. It is neither a reward nor a gift; but rather, it is something that our law requires to be paid and emanates from the nature of the marital relationship itself.

The Husband's position in the hypothetical is clear. He vigorously asserts that by including on expense (direct or indirect) for an emancipated child as a cognizable expense when calculating alimony, the Court would, in effect, impermissibly compel a father to pay support for an emancipated child. He would argue that if the Wife's motion was to compel him to directly pay a child's rent or automobile expenses, it would be denied and there is no substantive difference. Yet, could a Husband argue in an initial or even Post-Judgment modification application that the Wife's saving component, vacation expense, or redecorating expenses were not cognizable alimony items? If, during the marriage, the parties had made a practice of making charitable donations, could the Husband later argue a line item for such contributions would not be considered as a matter of law? Could such an argument be made even if charitable contributions had not regularly been made during the marriage?

Does a supporting spouse have the right to control the types of expenditures a dependent spouse makes? Logically, there is, of course, a reasonableness test. Expenses for criminal activity, gambling, or pathological spending on bottle cap collections might create at least a basis for an argument. But expenditures that directly benefit a child of the marriage cannot be compared to criminal activity, even in a triumph of sophistry. Do ex-husbands or courts have the right to be paternalistic or does our law, or, more precisely, should our law allow for freedom to make individually reasonable decisions? As the Appellate Division said in Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998):

> 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.

It is an elementary principle that in most cases, other than those involving income imputation issues, a significant factor in determining alimony is the cash flow the supporting spouse enjoys. The supported spouse's rights to enjoy the benefits of that cash flow may vary depending upon the facts. For example, the Divorce Study Commission and simple concepts of fairness suggests that a cash flow generated from pre-marital skill or a pre-marital asset is different from cash flow created by marital

effort. The statute itself speaks to the distinction between the two, albeit in the Equitable Distribution section. Nonetheless, as an expression of policy, the legislature added as "a rebuttable presumption each party made a substantial financial or non-financial contribution to the acquisition of income and property while the party was married". N.J.S.A. 2A: 34-23.1. (emphasis added) This language is nothing more than a reaffirmation of the basic principle that marriage is a partnership and that the dependent spouse's non-economic contributions are equally as important as the economic contribution and, reasonably read in conjunction with the Divorce Study Commission's report, recognizes a difference between skill, expertise, and experience created while the parties were married as contrasted with pre-marital development of such skill, expertise and experience.

Thus, in a long term marriage where the presumption is clearly applicable, it is a fair comment that both parties have rights to enjoy the income or cash flow that is presumptively the product of marital effort. If that right exists and there is no other statutory provision that circumscribes or limits that right, what principle of law or fairness permits supporting spouses to determine how dependent spouses spend cash flow to

which they have an inherent policy and statutory right under N.J.S.A. 2A:34-23?

The Statute provides courts with the power and responsibility to determine alimony in light of "the circumstances of the parties and the nature of the case shall render fit, reasonable and just". N.J.S.A. 2A:34-23. The statutory factors are criteria for a court to implement that statutory directive. Reading N.J.S.A. 2A:34-23 and N.J.S.A. 2A:34-231 together which is an appropriate interpretive device, limiting an alimony claim solely to "needs" undermines the fact that alimony is awarded because it has been earned and the other statutory factors must also be considered. Moreover, if we learned anything from Crews v. Crews, 164 N.J. 11 (2000) and Weishaus v. Weishaus, 180 N.J. 131 (2004), it is that no one single factor is determinative. Once earned, the alimony entitlement is created along with a right enabling an individual to enjoy that entitlement as they deem fit - not as their former spouse might direct.

Judge Carchman emphasized in Cox v. Cox, 335 N.J. Super. 465, 479 (App. Div. 2000) an award of alimony validated the principle that marriage was "an adaptive economic and social partnership". This is hardly a new concept. In 1978 in

Gugliotta v. Gugliotta, 160 N.J. Super. 160, 164 (Ch. Div., 1978) aff'd 164 N.J. Super. 139 (App. Div. 1978), the court noted:

> a paramount reason exists, viz., to permit a wife to share in the economic rewards occasioned by her husband's income level (as opposed merely to the assets accumulated) reached as a result of their combined labors inside and outside the home (emphasis added)

This pre-Statute case was the pre-existing law "codified" by the Commission on Sex Discrimination in the statutory factors. See Innes v. Innes, 117 N.J. 496, 505 (1990) ("the Statute sets forth no new position and simply codifies and embodies prior decisions). Gugliotta was cited with approval by both the Supreme Court in Mahoney v. Mahoney, 91 N.J. 488, 505 (1982) and the Appellate Division in D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 368 (App. Div. 1985) and Gugliemo v. Gugliemo, 253 N.J. Super. 531, 543 (App. Div. 1992).

If the cash flow providing the basis for an alimony award is statutorily presumptively the result of the efforts of both parties, what right does someone have to limit how that property right is utilized? Could, for example, spouses file motions objecting to how ex-spouses spent their equitable distribution or their alimony? Certainly a court's response to that would be that it was the recipient spouse's property and the right to determine how to spend the money. Why, if alimony and equitable

distribution are both products of the same partnership, would an ex-spouse have any right to limit how the other spouse utilizes his or her own property.

## IS IT TIME TO REFOCUS ON HOW WE CALCULATE ALIMONY

The analysis, if accepted, has broader implications than providing a guideline and logic to resolve the narrow discrete issue I first presented. Rather, the analysis highlights the nature of alimony and why it is awarded. As emphasized in my writings about Limited Duration Alimony, alimony is not something you receive because you have obtained a marriage license. There is and must be a reason for alimony to be awarded. It is an entitlement earned from what occurred during the marriage. A dependent spouse

may earn the right or entitlement to receive alimony by making direct economic contributions, by considering non-economic factors inherent in the marital partnership or by having sacrificed or adversely affected their own earning capacity as a consequence of the marriage. Any of these, individually or cumulatively, provides the rationale and justification for an alimony award. Thus, alimony is, in essence, a presumptive right to enjoy cash flow created by marital effort. Alimony is and has not been determined solely by reference to needs, as the inclusion of savings as a dependent spouse expense confirms.

The Appellate Division in Glass v. Glass, 366 N.J. Super. 367 (App. Div. 2004) addressed savings and found it to be a relevant consideration to determine alimony as had the Supreme Court in another pre-Statute case. See Khalaf v. Khalaf, 58 N.J. 63 (1971). Additionally, this concept has been reaffirmed by several unreported Appellate Division cases, most notably Lefkon v. Lefkon (Docket A-5951-03T1), which is attached and, which in clear and unmistakable language made clear what many attorneys had been arguing for years: savings is an element of lifestyle. Considering savings as part of the marital lifestyle confirms there are lifestyle components that cannot precisely be quantified. By including savings in the analysis, courts are actually saying extra money above and beyond certain expenses does not "belong" to the person who generated the income. This extra cash flow should fairly be allocated amongst the parties in light of the statutory presumption concerning income, the nature of the marital partnership, and the general policy considerations underpinning all alimony awards. The ability to generate income is the product of marital effort. By including savings in the alimony analysis, courts are directing the parties not only to look at traditional needs, since that is only one statutory factor, but also to examine how the extra money should be treated in light of all the statutory factors.

This analysis may well alter the focus of alimony from the expense side of the equation, i.e. needs, to the generation of income. In a long-term marriage when income generation is actually and presumptively by statute and case law the product of marital effort, courts should not be making independent subjective value judgments on what someone does with cash flow earned. Both spouses, in effect, earn the cash flow; that is the essence not only of the marital partnership but a fundamental precept of our divorce policy. This analysis emphasizes why this particular issue, while interesting on its limited facts, holds, in actuality, substantially broader implications in the alimony calculus. It may well affect how we as lawyers look at the issue of alimony.

The reason savings is an element of lifestyle is because a dependent spouse has some entitlement in the overall cash flow of the supporting spouse that is created by joint marital effort. Interestingly, while the Supreme Court's decision in Weishaus v. Weishaus, 180 N.J. 131, 204 (2004) turned primarily on the procedural issues involved in settling a case and the Supreme Court's concern in minimizing post-judgment litigation there is, nonetheless, language in Weishaus that essentially supports this analysis. In discussing the marital lifestyle the Court cautioned trial courts "not to pass judgment on the parties'

spending habits or to extrapolate a sensible lifestyle based on actual earnings." In other words, as argued in last year's Symposium, marital lifestyle is, in actuality, a measuring stick. The Supreme Court's observation that trial court's are not "to pass judgment" on how people spend their money, may well be an integral part of the answer to the issue presented.

In Gugliemo v. Gugliemo, 253 N.J. Super. 531 (App. Div. 1992) the parties were married for seventeen years with the wife relinquishing employment to become a full time mother and homemaker. The Appellate Division refused to enforce a Property Settlement Agreement that did not fairly grant the Wife an appropriate level of alimony. The Court noted a dependent spouse who "maintains the home while her husband's career advances should share in the rewards of their combined efforts". Gugliemo at 543. The Appellate Division, in clear and compelling language, emphasized the linkage, in the statutory and policy sense, of the Wife's non-economic contributions and her entitlement to share fairly in the cash flow created by the marital partnership. The court held it would not "sanction an Agreement which prohibits a woman devoted to her husband and family from enjoying the fruits of her labor just as they are about to reap". Gugliemo at 543.

In other words, the court was noting Mrs. Gugliemo had a right to share in her husband's cash flow. Again, such reasoning was predicated on the holding that alimony is a right earned by virtue of how the marital partnership functioned. May such rights be circumscribed or limited absent compelling reasons to do so? May a Court determine how a person exercises a fundamental right? Is alimony a property right earned by virtue of the marriage a Court should be loathe to limit or circumscribe?

## CONCLUSION

Returning to the question presented, given the policy considerations involved, the catchall factor in the statute, the right of all alimony recipients to spend money as they deem fit, that alimony is an earned right as long as the amount awarded does not exceed the marital standard prohibited by Crews (incorrectly, I would argue) then a court should not make value judgments on how alimony recipients spends their money. There are elements of an individual's freedom involved. Courts should not be involved in micro-managing people's lives so long as they have an entitlement to the total amount of alimony; hence, it is in my judgment a permissible factor for a court to consider, in the alimony analysis, expenditures made by a parent for an emancipated child.

Hopefully this article will reorient lawyers thinking about alimony, moving the analysis away from a strict needs application to rather an overall policy based evaluation as to a dependent spouse's fair entitlement to share in an income stream (through alimony) he or she helped create. If alimony awards are driven by policy, reflective of what a marriage is and how people must fairly treat each other when that marriage ends (a principle emphasized in Miller v. Miller, 160 N.J. 408, 418 (1999), then courts should not be quibbling about individual decisions people make in their lives as long as they are doing it with money that they have a right to enjoy, both under the statute and because of the policy upon which alimony exists.

Thus, in summary, it appears the better arguments are that so long as the dependent spouse has an entitlement to the cash flow created and that overall cash flow awarded to her by virtue of alimony does not exceed the marital lifestyle, then a court should not make a value judgment regarding how the dependent spouse spends he money. In light of the legal principles discussed herein and the catchall factor in the statutes, I believe an expenditure by a parent for a child is not such an unreasonable expense that a court should not, as a matter of law, say may not be considered. That also does not mean that it automatically is a factor to be added to the Wife's needs.

Rather, it, along with all of the other expenses, can be analyzed in light of the purposes of alimony and the individual facts of a particular case. Simply put, such an expense under either hypothetical presented in this Article, is a legitimate factor for a court to consider to be exercised in the sound discretion of the court.