

The components of marital lifestyle

Courts have left room for creative lawyering in these uncharted waters

By Mark H. Sobel

"We dined at Le Cirque."

"Yeah, we went there once when my company paid the bill."

"I never had a budget."

"She just continued to buy things on credit, if that's her version of not having a budget."

As matrimonial practitioners we have all heard some or all of these statements. They all have some semblance of truth and oftentimes are merely opposing perceptions of the same events from two very different perspectives.

While these statements often were relegated to initial certifications regarding *pendente lite* support with little pervasive effect on the final outcome at trial, such "marital lifestyle" statements become critical components of matrimonial litigation with the advent of *Crews v. Crews*, 164 N.J. 11 (2000).

In its recent decisions the Supreme Court has, either intentionally or unintentionally, limited certain areas of imaginative lawyering. However, it also has provided new avenues for creative and effective advocacy — and lifestyle analysis is the most recent.

The ebb and flow of seemingly critical issues in divorce litigation over recent years has run the gamut. For example:

- The proper valuation date for assets depending on their active or passive nature. *Bednar v. Bednar*, 193 N.J. Super. 330

- The inclusion or exclusion of certain assets subject to equitable distribution based on date of acquisition, i.e., stock options, vested and

unvested retirement or pension benefits. *Pascale v. Pascale*, 140 N.J. 583.

- The ability to obtain some form of alimony other than the all or nothing permanent versus no alimony standard. *Cox v. Cox*, 335 N.J. Super. 465.

- The valuation of closely held businesses, replacing fair market value with fair value. *Brown v. Brown*, 335 N.J. Super. 465.

Now, in an effort to prognosticate future familial needs based on the past and existing lifestyle of the family, a lifestyle analysis commensurate with the marital standard of living as set forth in *Crews* has become a critical component of each matrimonial action.

Marital lifestyle

Let's start with the simple — or not-so-simple — question. What is marital lifestyle? In its most basic form, it is how the parties lived. But that is not a static concept. Parties live differently as their marriage evolves. Hopefully it is in an ever-expanding capacity to provide for themselves and their children as income increases. Unfortunately, in current economic circumstances that is not necessarily so.

One thing is absolutely clear — marital lifestyle is not a singular concept but a multifaceted one that, in reality, is a continuum of events over the course of a marriage. Legitimate questions that may be raised are: How did the parties live during the last year of marriage, an average of the last 5 years of marriage, or an evolution of the entire marriage?

Is there an analysis of the fact that the party had certain visions as to what they wanted to do in the future, i.e., early retirement, a shift in jobs, or a commitment to future charitable work?

Is there an analysis of the fact that a couple with young children envisioned a one-parent work force for a limited period of time and thereafter a two-parent work force?

Is there an accumulation of debt, similar to *Hughes v. Hughes*, 311 N.J. Super. 33, and *Lynn v. Lynn*, 165 N.J. Super. 328, with the belief that as income increases in the future, that debt can be eliminated?

Marital lifestyle is most likely all or any of these. While we are now instructed that marital lifestyle forms an element of a matrimonial case and, in fact, a crucial determinative for purposes of alimony and support, the factual parameters for its calculation are not specifically articulated in existing case law.

Thus, this is a fertile ground for effective and imaginative lawyering. This uncharted landscape will only be mapped out by specific cases articulating specific positions regarding specific factual predicates.

However, some of these already exist in isolated instances and should certainly form a portion of the arsenal of effective advocacy. Two significant cases bearing on lifestyle analysis are *Bookstaber v. Bookstaber*, FM-997-94, and *Miller v. Miller*, 160 N.J. 408.

In *Bookstaber*, an unreported trial court opinion, Judge Herbert Glickman carefully articulates that an intact family's determination to provide significant amounts for savings and/or gifting can, in and of itself, establish a requirement for post-divorce support, which incorporates the continuity of such actions. The case dealt with a couple who, according to religious beliefs, contributed a tithe of 10 percent of their earnings on an annual basis. In addition, significant savings were accumulated by the parties based on income and expenses during the marital years.

Investments

The court determined that in calculating the appropriate amount of alimony, both charitable giving and substantial savings were parts of the marital lifestyle and appropriately should be incorporated into any support award.

On the other end of the spectrum, in *Miller* it was argued that calculation of appropriate support could not be predicated on the actual post-judgment income of the husband since the husband had chosen to place large portions of his portfolio into long-term growth investments that provided little current yield.

While that may or may not have been the actual lifestyle determination during the marriage — counsel should investigate the consensual investment strategies incorporated by the parties during discovery — it was determined by the Supreme Court that a "fair" rate of return on all investments would be imputed in order to calculate the amount available for support payment.

With *Crews* providing a green light for a full-blown examination and investigation of marital lifestyle, those same forensic accountants who discussed minority discounts, key man discounts and fair market value of businesses now (with perhaps time on their hands as a result of *Brown*) can focus attention on a comprehensive financial analysis of the parties' marital lifestyle during the marriage.

The language in *Crews* broadening this area provides the opportunity, but not the

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necessary requirements, for probative evidence on the subject. As a result, here are suggested areas of inquiry that should be part of each lawyer's analysis.

Review all the budgetary items on the Case Information Statement (CIS), including both monetary components and subject areas. For example, since the CIS contains a savings component, a clear argument can be made that savings is a justifiable component of a marital lifestyle. Similarly, there are other CIS categories to examine that may be argued are *prima facie* valid lifestyle elements.

Obtain assistance from a forensic accountant to evaluate the income and expenses of the family, the tracing of payments throughout the marriage. In addition, the expert should provide an accurate cash-flow analysis. This can deviate tremendously from the reported tax position of the parties. It is imperative that the court be provided the information as to what funds are actually available to be spent and what funds have been spent, rather than what has been the taxable income of the family.

Don't stop there. There are numerous other experts who should be consulted in this area. An economist can project into the future such specific costs as college and retirement, as well as other needs of the litigants such as specific educational business-related costs like attending art school or technical training. In addition, there are myriad other experts who can speak to the issue of lifestyle, the parties' projected lifestyle and the benefits derived. Psychologists and psychiatrists can impart information regarding the benefits or detriments in having a parent at home after school or, more frequently, not at all with children of certain ages.

While attorneys often think of vocational experts, they often overlook expert testimony on the value of leisure time. Included within such analysis should be the anticipation for more leisure time and its effect on income and how, during the marriage, more or less leisure time has actually existed. Such time has an economic effect in the same way a determination regarding the investment selection in *Miller* had an economic effect on the amounts available for payment of support. This short list is meant to promote thought outside the box.

Although expert testimony is important, fact testimony should not be overlooked. Expand the factual discovery to others with knowledge about the marital lifestyle who can corroborate or contradict allegations. Relatives who can speak about the spending and lending patterns of the individuals should be examined. Friends who may have traveled with the individuals also should be considered.

Certainly, any individuals who have had an important contact with the marital unit regarding financing — whether through mortgage and refinancing applications, purchases of businesses or real estate — should be contacted. Oftentimes the utilization of actual funds for those

Continued on page A9

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endeavors do not coincide with the tax returns submitted or financial statements provided. These are useful tools to accurately determine the actual lifestyle of the parties during the marriage and prior to its dissolution.

Lifestyle before 'end'

An analysis of marital lifestyle would be incomplete if the examination did not include the lifestyle before the "real" end of the marriage. Such a date often has nothing to do with the filing date of the complaint for divorce. An examination of any alteration in the lifestyle of the parties before and after the relationship was faltering or terminated in the parties' minds should be part of the examination.

After *Crews*, the Appellate Division has had the opportunity to examine marital lifestyle in the context of post-judgment applications where the income has increased significantly and a request for increased child support (increases in alimony not being appropriate under such circumstances) was addressed to the court.

In *Isaacson v. Isaacson*, 348 N.J. Super. 560 and *Loro v. Colliano*, 354 N.J. Super. 212, Appellate Judge Philip Carchman authored two opinions which intelligently and insightfully addressed the often conflicting tensions between increased income, lifestyle and proper parenting.

In both *Isaacson* and *Loro* there were substantial post-judgment increases in the payor spouses' income resulting in a "change of circumstances" that allowed an increase in child support, as the children are entitled to benefit from such increased good fortune, even subsequent to a divorce. The questions involved amount and determination of the appropriate lifestyle.

The clear implication of those decisions is that even though significantly increased amounts could be paid, they should not be if to provide luxuries or extravagances that do not conform to what most would fashion a reasonable lifestyle commensurate with the children's ages. As the *Isaacson* court said: "... (The dominate guideline for consideration is the reasonable needs of the children, which must be addressed in the context of the standard of living of the parties." In analyzing that requirement, the court continued:

"Determining a child's needs in these unusual financial circumstances presents unique problems. First, a balance must be struck between reasonable needs, which reflect lifestyle opportunities, while at the same time precluding an inappropriate windfall to the child or even in some cases infringing on the legitimate right of either parent to determine the appropriate lifestyle of child."

This latter consideration involves a careful balancing of interests reflecting that a child's entitlement to share in a parent's good fortune does not deprive either parent of the right to participate in the development of an appropriate value system for a child. This is a critical tension that may develop between competing parents.

The court then stated: "Needs is a relative factor in an appropriate upbringing of a child and a reflection of the lifestyle of the parents." Perhaps in its most pervasive comment, the court concluded: "Practitioners dealing with situations such as this sometimes refer to the 'Three-Pony Rule'. That is, no child, no matter how wealthy the parents, needs to be provided more than three ponies."

Imparting values

Thus, with a lifestyle analysis comes the commensurate requirement that neither parent be permitted or required to abdicate their parental responsibilities regarding the values to be imparted to their children. Simply because an expense can be afforded does not mean one should be provided. Conversely, where there is a child with unique opportunities and unique abilities, the ability to pay for those must be a component of the lifestyle of those parties going forward.

In *Loro* the court was required to deal with what the parties termed "non-essential" items for the child and whether they were appropriate for the child's lifestyle. The court said, "... We conclude that the judge was obligated to consider plaintiff's request for additional non-essential items. In considering these matters, the judge must determine if the primary recipient of the benefit is plaintiff or the child and whether the benefit to the plaintiff is 'primary' or 'incidental'. ... A different result may ensue with regard to other demands where the primary beneficiary appears to be plaintiff rather than the child."

It is interesting to note in this case the judge determined that non-essential items, such as Philadelphia Flyer tickets and a cell phone, were appropriate for the child, as the primary beneficiary was the child with only incidental benefit to the supported spouse.

Thus, in a lifestyle analysis it is now important to emphasize, especially if representing the dependent spouse, the lifestyle of the children and their ever-increasing needs projected forward and anticipated lifestyle developments that can serve as a springboard for future post-judgment applications, even if not awarded at trial.

Economics

Lifestyle analysis also should take into consideration the economic foundation for the Child Support Guidelines. While the case may or may not be a child support guidelines case, the underpinnings of those guidelines provide the percentages of income normally allocated for fixed and variable expenses.

The economic underpinning of that guideline analysis illustrates the shifting nature of those percentages, especially as disposable income increases. As a result, it would be prudent to examine on a percentage basis the family's historical expenditure of funds in these general categories as a percentage of its disposable income and/or cash flow.

The presentation of proofs at trial could then include under a lifestyle analysis an examination of the historic percentages of disposable income that were utilized for the children as opposed to the parents. It may be a situation in which the parents have subjugated their personal needs for those of the children, whether the needs were what one would consider obvious and important, i.e., medical needs or, perhaps less important but meaningful in that particular context, athletic lessons or sleep-away camp.

Regardless of the determination, if there has been a precedent to use a

substantial percentage of disposable income for the children's betterment, that should be presented as part of the marital lifestyle analysis.

Lifestyle in the context of divorce litigation in New Jersey is very similar to pornography in the context of First Amendment litigation. Everyone seems to believe they know what it is but no one can articulate it. As a result, it is imperative to provide factual testimony on lifestyle, expert testimony on lifestyle and specific documented proofs exhibiting the actual lifestyle of the parties throughout their marriage.

Moving target

Marital lifestyle is a moving target and that should be emphasized to the court. While numerous snapshots of lifestyle can be examined, it is the larger picture incorporating all those snapshots that appropriately defines the parties' marital lifestyle. That picture must be painted by the attorney in order to portray what is necessary and appropriate for support purposes so as to achieve payments that continue the marital lifestyle absent clear proofs of an inability of total income for such payments. In that case, it should be clearly emphasized that both parties must have a diminution in their lifestyle rather than just, as often occurs, the payee spouse.

It is difficult to accept that the same income that supported the marital lifestyle of an intact marital partnership, once severed, can still support the exact same lifestyle for both parties in separate habitations. Conceptually, if the lifestyle of the parties utilized all of their available resources (even if they didn't spend them but saved a significant portion) it is difficult to conceive that the exact same lifestyle can be achieved in two separate environments.

Only through a comprehensive and forward-reaching analysis of lifestyle can a fair adjudication of the parties' economic needs be both envisioned and effected.

Such a result can only be achieved if, as the Supreme Court now has provided, an in-depth analysis of marital lifestyle is presented to the trial court. This is not a simple task; it requires an examination of many forms of income and expenses, as well as myriad voluntary financial and non-financial determinations. All of those should be examined in order to present to the court what the parties envisioned and endeavored to achieve by virtue of their marital partnership. It is an activity that both requires and rewards imaginative advocacy.

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