FAMILY LAW

Crews requires new procedures

Standard of living assessment key at outset

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While some believe *Crews* has elevated the standard of living above the other 12 statutory factors the court must consider in awarding alimony under *N.J.S.A.* 2A:34-23, alimony has always been driven by consideration of the standard of living during the marriage. The purpose of alimony has always been to allow a dependent spouse to maintain the standard of living during the marriage. The fact that we have lost sight of this fundamental principle over the years is a product of the increasing complexity of the law of alimony and changing nature of our society.

Crews requires that a finding or, in an uncontested case, a statement be made at the time of the initial judgment as to the standard of living during the marriage.

Admittedly, matrimonial attorneys generally have not spent too much time on the standard-of-living issues, but this is not because the law of alimony does not require it. It is because in the vast majority of cases, neither party will be able to sustain the standard of living once shared. It simply takes more to maintain two households than it does to maintain one. Once there is recognition that the standard of living formerly shared is an unreachable goal for both parties, practitioners and judges look to needs and ability to pay. How much does the dependent spouse need to meet her budget, how much can be trimmed off that budget and how much can the supporting spouse pay without substantially impairing his ability to support himself?

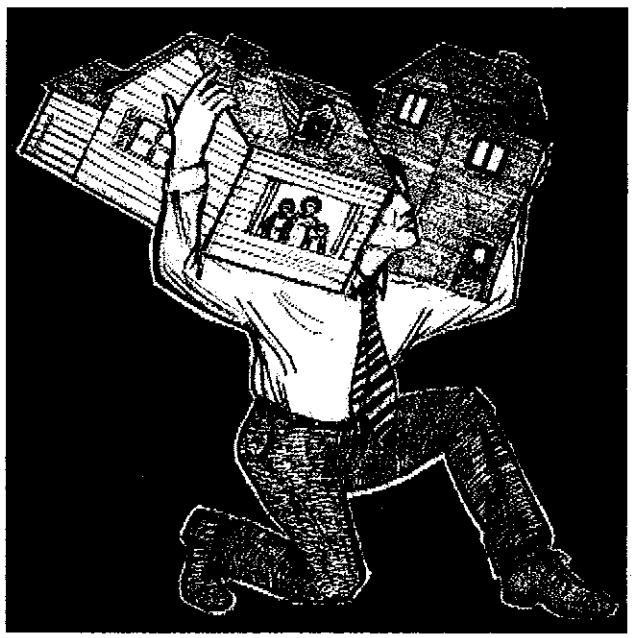
What has grown out of this reality-based approach to alimony is an increasing tendency to simply ignore the standard of living during the marriage. Judges and lawyers begin and end with the needs-based analysis and all too often start as early as the initial *pendente lite* application with a minimalist attitude that requires reducing a dependent spouse's budget to the bare minimum. This sets the tone for the litigation and often drives the final number. Unfortunately, this often overlooks the marital lifestyle. This is what happened to Barbara Crews and to many other dependent spouses in this state. It is this pervasive attitude that has led to the impoverishment of the dependent spouse. The true import of *Crews* is the clear policy statement by our Supreme Court that seeks to prevent this injustice.

While practitioners frequently minimize the marital lifestyle at the time of the initial divorce, when the parties get to the post-judgment application for an increase, the inability to maintain the standard of living during the marriage becomes the driving issue. They set forth the standard of living during the marriage and go on to explain why the dependent spouse cannot maintain that standard on what he or she received at the time of the divorce. This requires not only an exhaustive analysis of why the dependent spouse received inadequate alimony in the initial decree but also an analysis of the marital lifestyle that may be impaired by the inability to provide proofs on this issue many years after the fact.

Dale E. Console argued the case for Barbara Crews. She is a fellow of the American Academy of Matrimonial Lawyers and a certified matrimonial law attorney. Her office is in the Princeton area.

Initial statement

Crews requires that a finding or, in an uncontested case, a statement be made at the time of the initial judgment as to the standard of living during the marriage. The purpose not only is to provide a roadmap for modification, but also to ensure the standard of living during the marriage is not completely ignored in the initial judgment. This is a mandate by the Supreme Court not only to judges, but to lawyers as well. Quite frankly, since *Crews* did not change the law on alimony, matrimonial attorneys probably should have been doing this all along. The fact that we have not been doing this merely requires a shift in how attorneys approach alimony issues.



Illustrations by Larry Nanton

A *Crews* application is not necessarily appropriate in the average case in which neither party will be able to maintain a standard of living comparable to the former marital lifestyle.

Crews was an extraordinary case. Aside from its specific facts, we simply do not see that many cases in which the dependent spouse received such inadequate alimony *and* the supporting spouse has undergone such a dramatic improvement in his own financial circumstances. The true *Crews* application largely applies to the RAIDS (recently acquired income deficiency syndrome) situation in which the supporting spouse (legitimately or not) has suffered a severe decline in income prior to the divorce necessitating a much reduced standard for the dependent spouse and has managed post-divorce to return to or exceed the standard of living formerly shared. Most of us would agree that in these situations, the dependent spouse should and ought to be permitted to seek an increase in support.

A *Crews* application is not necessarily appropriate in the average case in which neither party will be able to maintain a standard of living comparable to the former marital lifestyle. The mere fact that the supporting spouse has received some increase in income does not mean the dependent spouse is necessarily entitled to an increase in support. The dependent spouse is entitled only to that increase if there is an ability to pay without simultaneously impairing the supporting spouse's ability to maintain a reasonably comparable lifestyle.

I disagree with those who believe one can defer the *Crews* findings. A deferral would involve a statement that the parties are unable to agree on the standard of living during the marriage and agree to put off that determination to a later date. Most family court judges will not accept a deferral, a fact that may be of substantially greater importance than the intellectual issue of whether or not it is possible to disagree with the law in this state. If a judge won't accept it, you can't do it. Rather than spend the time trying to get out of this mandate, it's better to try and figure out what attorneys must do to satisfy the requirements of *Crews*.

The ruling requires merely a benchmark against which a future application for modification can be measured. In the majority of cases, the parties can fairly agree to a large extent about the standard of living during the marriage. One of the lessons of *Crews* is the necessity of a case information statement in every case. Clients should be asked initially to prepare a budget that shows the standard of living during the marriage. If the present lifestyle is not the same, there should be a separate budget showing the current expenses. When comparing the parties' case information statements, there usually is not a huge disparity. Admittedly there are problems in cases where there is unreported income, but those cases generally are not uncontested.

Dale E. Console

A properly drafted case information statement provides a fairly reliable indication of marital lifestyle. "Properly" means avoiding wildly inflated budgets in an effort to gain advantage; this only promotes litigation. Most seasoned practitioners have developed a fairly good eye when it comes to what the average family lives on given their income bracket. When we see something unusual, we ask for verification of the expense. Most families have some savings (even if only the employment-related 401(k) plan) and some debt structure. We know that there is something wrong with a budget that exceeds the combined gross income, but does not have a substantial debt service.

Challenge

Determining what the parties spent during the marriage is not the difficult task. The challenging issue is how to define what each party requires to maintain a reasonably comparable lifestyle. If the parties and their two children lived on a combined net income of $100,000, does each party require $100,000 to maintain a reasonably comparable lifestyle? Do we need to factor out the children's expenses? How do we then cope with the fact that the alimony is considered in determining child support? How does inflation impact the ability of each party to maintain a reasonably comparable lifestyle? These are not issues we are accustomed to confronting, but they are ones that may become increasingly important as we begin to define the implications of *Crews*.

One of the disturbing by-products of *Crews* is the extent to which judges feel compelled to hold hearings and make findings in uncontested cases. In some counties, judges are holding 45-minute hearings on uncontested cases. In other counties, judges are requiring both parties to appear on uncontested cases in which there was not even a request for alimony in the complaint and the agreement contains a waiver of alimony with an anti-*Lepis* clause. This makes no sense and is more than a little scary. I agree with those who say that once a judge starts to take testimony, we have to question how much is enough. If your client says the parties took a vacation every year to Europe, you might draw certain inferences about the marital

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FAMILY LAW

Domestic violence:
Recent rulings underscore issues

By Evelyn Apgar

Springfield family lawyer Elliot H. Gourvitz says two recent New Jersey decisions underscore the need for better laws, counseling and education to convince women of their legal rights when they're abused.

One case involved a woman who refused to testify after her neighbors called the police when they heard her husband's threats and yells.

In the other case, the Camden County court made it easier for plaintiffs in a domestic violence case to dismiss a final restraining order.

Gourvitz will discuss these developments during a forum in Atlantic City Friday, Sept. 29, sponsored by the New Jersey chapter of the American Academy of Matrimonial Lawyers.

He said some women are so intimidated by their partner that they deny they've been harmed, even when the effects of their abuse are evident.

That was apparently the situation in *Wildoner v. Borough of Ramsey.*

The high court held a borough police officer acted in the line of duty when he arrested and lodged a domestic violence complaint against a husband, even though the wife didn't want to press charges.

Also at issue was whether there was probable cause to arrest the husband on domestic violence grounds when the wife refused to testify after neighbors told police they heard the husband's threats.

Elliot H. Gourvitz

Gourvitz compares the behavior of abused women who deny an apparent problem to the so-called Stockholm syndrome, named for an incident in the Swedish capital in which bank robbers held hostages who later sided with their captors, rather than the police.

When a woman in a domestic violence situation takes her partner's side, she "loses all sense of self," Gourvitz said.

In the other ruling, *I.J. v. I.S.*, the trial judge held that plaintiff-victims in a domestic violence matter have the right to dismiss a civil action since they have the power to institute it.

Previously, Gourvitz said, such litigants had to "go through a lot of rigmarole" if they wanted to get a restraining order lifted.

Also, he noted, the ruling permits a victim to ask a judge other than the one who heard the original case to obtain a dismissal of the order.

The court held that since the judge who issued the initial restraining order may no longer serve in family court, be involved in a proceeding that can't be interrupted or is on vacation, "any family court judge may dismiss a restraining order if there is a 'complete' record adequate to demonstrate the plaintiff understands these points and the request to dismiss is made voluntarily and without coercion."

Gourvitz also will discuss A-293, a bill sponsored by Assemblywoman Nia H. Gill (D-Essex) that would make it a crime of contempt to knowingly violate any provision of an order entered under the Prevention of Domestic Violence Act of 1991 or any provision of a valid restraining order from another jurisdiction.

Splitting marital assets

The nitty-gritty of evaluations

By Evelyn Apgar

Jim and Jane are married, and Jim works for his father's business.

Five years after the couple married, the father dies, leaving the operation to Jim. Jane has no part in the business.

A decade goes by and the couple divorces.

When the marital assets are divided, how much of the $100,000 business is Jane entitled to?

That's the kind of question Moorestown certified public accountant Stanton Meltzer will discuss Thursday, Sept. 28, during an Atlantic City forum sponsored by the New Jersey chapter of the American Academy of Matrimonial Lawyers.

In this instance, according to Meltzer, Jane could contest only $50,000 of the value of the business because Jim would receive half its value outright since he inherited the operation.

How much Jane ultimately would receive, of course, would be up to the judge.

Scheduled to speak on "Economic Evaluation of Mom-and-Pop Businesses and Small Professional Practices," Meltzer has been evaluating divorcing couples' assets since 1972 and averages about 100 cases a year.

He said it's imperative for divorce lawyers to hire an accountant to place a value on a couple's assets; not doing so could leave an attorney vulnerable to a malpractice suit.

In most situations, both parties hire their own accountants to value the marital assets, he noted, adding fewer than 5 percent of couples are still amicable enough to agree to accept the valuation of just one accountant to save on expert fees.

Meltzer said his fees range up to $25,000 for evaluating assets worth between $500,000 and $1 million.

As for difficult evaluations, he pointed to the mom-and-pop grocery store, bakery or pizzeria, where the issue is whether there's enough money in the business to make the process worthwhile for both divorcing parties and the accountants.

He said unearthing unreported income may have unanticipated consequences. That's because when an accountant tells a judge that a divorcing party has not reported some income to the IRS, the jurist is obligated to notify the agency.

Meltzer will speak at 4 p.m. at the Hilton Hotel in Atlantic City.

Crews control:
Coping with procedure

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lifestyle. However, if your client adds that they always flew on the Concorde and stayed at five-star hotels such as the Hassler and the George V, you might draw a different inference. If your client fails to state the details, will this come back to bite him or her on a post-judgment application? Maybe. Do we want to run that risk?

The entire purpose of settling a case is to allow litigants to control their destiny. By allowing a judge to take testimony on an issue of this importance, we have taken this decision out of the litigants' hands. Aside from the fact that we now have to order the transcript of every uncontested divorce for future reference, this leave-it-to-a-judge scenario to make "findings" on the standard of living during the marriage may not be exactly what your client anticipated from a hearing. The Supreme Court was clear that the parties can stipulate as to the standard of living. The moral here is: Do it and put it in the agreement. But what do you have to put in the agreement?

An exhaustive analysis of the marital lifestyle is not required in the agreement and certainly should not open the door to findings by a court on the standard of living. While *Crews* should not apply in cases where there is a waiver of alimony but only to those in which there is an existing alimony obligation that may be subject to modification, there are judges who believe *Crews* applies in all cases. In cases in which there hasn't even been a request for alimony, the waiver of alimony should include reference to the budget in the case information statement (preferably attached to the agreement) and a statement that each party represents they are satisfied they can maintain a reasonably comparable lifestyle.

Agreements

Where there is an alimony obligation and the parties are able to agree that the alimony paid is sufficient to maintain the marital lifestyle, the agreement need only recite this fact, coupled with the agreed upon budget. Where there have been trade-offs in the settlement such as excess equitable distribution, the agreement must specify what precisely the deal is and how it will impact the alimony award. In limited-duration alimony cases and possibly in some permanent alimony cases, the agreement must provide whether the marital lifestyle is the applicable standard or whether some other standard governs. In these cases, the agreement should be carefully structured to define the nature of the alimony obligation, the operating assumptions and the expectations of the parties.

If the agreed upon alimony is not sufficient to maintain the marital lifestyle, the agreement must reflect the marital lifestyle and must recognize that neither party will be able to sustain a reasonably comparable lifestyle. It is prudent in these situations to provide for the circumstances in which an increase may be sought by the dependent spouse. In the long run, alimony increases will be treated in a manner similar to child support increases. Thus, we should start to build provisions into agreements for automatic increases or provisions limiting an application to increase alimony to set income/inflationary thresholds.

Lepis proof

One of the more problematic aspects of *Crews* is the strict adherence to the *Lepis* burdens of proof. The dependent spouse must still make a *prima facie* showing of changed circumstances before the supporting spouse must provide discovery into his financial circumstances. Under *Crews*, the fact that the original alimony award was insufficient to maintain the marital lifestyle is, in and of itself, a *prima facie* showing. This may well lead to any number of applications by dependent spouses who did not receive a marital lifestyle award under the original decree and will spends thousands of dollars attempting to obtain financial disclosure from the former spouse only to discover the supporting spouse does not have the financial ability to pay additional alimony without impairing his ability to maintain a reasonably comparable lifestyle.

To avoid this, the agreement should provide for the periodic exchange of financial information. While many may argue this is an invasion of privacy, the rule against disclosure of financial information has been substantially eroded by the child support guidelines and the three-year review of child support as well as by the requirement under *Walles v. Walles*, 295 N.J. Super. 478, of periodic disclosure when alimony has been reduced due to a decline in the supporting spouse's income. It may also be prudent, in those cases in which neither party will be able to maintain the marital lifestyle, to provide that the dependent spouse is not entitled to an increase unless the supporting spouse's income has increased by a certain percentage or a fixed number.

There is no question that attorneys have to rethink how to approach uncontested divorce agreements and the issue of how to define what is necessary to characterize a reasonably comparable lifestyle. Until we better define some of the issues raised by the application of *Crews*, we are in for some stormy times. In the long run, however, we will be able to define the standards that apply and we will, without a doubt, better serve our clients by so doing.