Rethinking the Issue of Savings

by

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The concept of savings as a component of alimony has come to find fairly wide acceptance by the Family bench and bar. Interestingly, there is very little published case law on this issue. The question of savings is generally viewed within the context of the marital lifestyle. The reason for this is unclear in light of the dearth of case law governing this issue, however, it may have developed in this way simply because there is a line item on Schedule C of the Case Information Statement for savings. Under this rationale, if there were marital lifestyle expenditures for savings, a dependent spouse should be entitled to continue that as part of the marital lifestyle.

The only recent case on this issue is the unpublished Appellate Division decision in Wszolek v. Wszolek (A-281-97T3, decided September 2, 1999). The facts involve a long-term marriage in which the parties did not have children and lived a very meager lifestyle. While they engage in a lifestyle commensurate with the husband's income, they did save. The

wife was awarded inadequate alimony and no counsel fees. The Appellate Division reversed both issues. The Court stated:

> [T]he budget that the judge predicted for defendant did not allow her any provision for savings, an opportunity which plaintiff undoubtedly will have. The judge clearly pointed out how little the parties spent on home comforts, travel or entertainment. The one thing they apparently did was to save their money. If that was their way of life, it is unreasonable to allow plaintiff, but not defendant, to continue that standard. Given the 'huge disparity of income' noted by the judge, defendant's lack of any retirement benefits, and the defendant's limited earnings potential, she is entitled to alimony at a level that would enable her to continue the standard of living both 'enjoyed' during the marriage.

This recognizes the principles stated in both Hughes v. Hughes, 311 N.J.Super. 15 (App. Div. 1998) and Weishaus v. Weishaus, 360 N.J.Super. 281 (App. Div. 2003), modif'd, 180 N.J. 131 (2004): standard of living is based upon how the parties actually lived and provided there is an ability to pay, a dependent spouse is entitled to continue that lifestyle. This also recognizes a second principle that is more often overlooked. N.J.S.A. 2A:34-23(b) speaks not only about the standard of living during the marriage but "the likelihood that each party can maintain a *reasonably comparable* standard of living." Alimony, properly viewed, is more than the minimum needed to sustain basic needs and looks to an equitable sharing of the available resources. This is especially true following a long-

term marriage. Since the statute also talks about the opportunities available to the parties to acquire assets in the future, it is inherently unfair that one party is given this opportunity while the other is not.

The question of savings is not limit to whether the parties had a separate account denoted as "savings". Plainly anyone who has a pension and/or 401(k) has a savings component. While the previously accumulated amount is equitably distributed, this does not dispose of the future ability to save. The ability to acquire future assets is still important. As a sub-issue, this also goes to pendente lite savings. It is unfair to permit the wage-earning party to continue to set aside retirement savings pendente lite if the nonwage-earning spouse is not given some room for savings. This is especially true where the retirement assets are then distributed as of the date of the complaint with the wage-earning spouse retaining the post-complaint accumulation. If the nonwage-earning spouse is not entitled to accumulate savings pendente lite and therefore preserve the status quo while the other party is permitted to do so, why do we not then divide the pension as of the date of the final hearing?

Savings is an extremely fact sensitive issue and depends on the parties' history, the assets available for equitable distribution, alimony and the particular needs of the individuals involved. One of the

important criteria in arguing for savings is the position of the parties in life. As a general rule, people allocate their available income differently depending upon age and status. A young couple in their twenties without children may spend their money on entertainment and travel. Once they have children, they start putting money aside for college. Eventually, they also start planning for retirement. Someone who is 28 and been married for five years is probably not a strong candidate for a savings component. Someone in their fifties with limited income and without a pension or substantial savings must start putting funds aside.

Savings should also consider the expectations of the parties. The fact that the parties did not set aside funds for their future needs does not mean that they are not entitled to this. Take, for example the couple who divorce following a long-term marriage in which their efforts have been directed towards the college education of their three children. Their lifestyle has been meager and their excess income has been directed towards the expenses of the children for a number of years. At the time of the divorce, the husband argues that the marital lifestyle was meager, they did not accumulate savings and therefore the wife is only entitled to alimony to sustain that lifestyle. A strict analysis based on marital lifestyle might well limit the amount paid to the wife while allowing the husband to

retain all of the excess income previously devoted to the college expenses of the children. If it was the expectation of the parties to start accumulating funds for the future once the children completed their education, then the mere intervention of a divorce should not preclude the right of the dependent spouse to share in that expectation. Alimony, particularly following a long-term marriage, should be considered with an eye towards the future since it is the potential towards which the parties worked and the expectation that matters; where both parties have sacrificed for a common goal it is unfair to deprive one spouse of the expected benefits just as they are about to be reaped. Guglielmo v. Gugliemo, 253 N.J.Super. 531 (App. Div. 1992).

The function of savings is much more than a mere line item on the Case Information Statement to be calculated on the basis of marital lifestyle expenditures. The traditional view of savings was to permit the dependent spouse to acquire sufficient assets to provide adequate support in the future when alimony would terminate due to the death of the payor or other changed circumstances. E.g., Khalaf v. Khalaf, 58 N.J. 63, 70 (1971); Capodanno v. Capodanno, 58 N.J. 113, 120 (1971); Martindell v. Martindell, 21 N.J. 344, 354 (1956); Flicker v. Chenitz, 55 N.J.Super. 273 (App. Div. 1959). This view has also found recent support in Glass v.

Glass, 366 N.J.Super. 357 (App. Div.), certif. den. 180 N.J 354 (2004). In denying the husband's request to terminate alimony, Judge Carchman wrote, albeit in dicta, that an agreement to pay permanent alimony was not rendered unfair by the modest income of the supported spouse that allowed her to save for her future. This was particularly true where the supporting spouse could afford the limited sums being paid without any fiscal limitation. Id. at 379.

The traditional view has been somewhat modified as the provision of life insurance for the dependent spouse has become more prevalent. However, life insurance should not be regarded as a replacement for savings. Generally the amount of life insurance provided is only to cover the amount of alimony payable until retirement of some specified cut-off date. It is not utilized to cover any expenses after that time.

Consider the dependent spouse in her early fifties who has limited earning potential and who is not receiving significant equitable distribution. She is either receiving a share of a pension that is not substantial or has waived the pension for other assets such as the marital residence. The alimony she receives plus her imputed income will not be sufficient to maintain her lifestyle and her husband will most likely retire at age 65 or 66. As part of the alimony calculation, the court has imputed

a Miller rate of return on her investable assets and included that amount in the calculation of needs.

Alimony is a stationary number in an inflationary economy. While there are built in cost of living increases for child support, alimony is almost never adjusted for inflation but requires a motion based on changed circumstances. Over the past 10-15 years inflation has averaged 3.7%; over the last 25 years it has averaged 5.6%. Given these rates, the cost of living increases as follows:

Time	3.7%	5.6%
Today	$100,000	$100,000
In 10 years	$143,809	$172,440
In 20 years	$206,812	$297,357
In 25 years	$297,415	$512,267

Put slightly differently, the purchasing power of money of today's dollars will decline as follows:

Time	3.7%	5.6%
Today	$100,000	$100,000
In 10 years	$ 69,536	$ 57,991
In 20 years	$ 48,353	$ 33,630
in 25 years	$ 40,321	$ 25,610

Thus, in ten years the cost of buying the same item will increase by half while the value of $1 in savings today will only be worth $.69 in ten years. Since alimony, which is essentially fixed income, does not keep pace with

inflation, a dependent spouse is faced inevitably with long-term impoverishment. The logical solution is to provide sufficient room for savings to hedge against inflation. This is rarely done on the principle that equitable distribution will take care of the difference. This is both unfair and incorrect.

To begin with, this argument assumes that the dependent spouse will spend her equitable distribution to meet her expenses at some point. There is, however, no requirement that a dependent spouse need spend the principal of her equitable distribution. The Supreme Court in Innes v Innes, 117 N.J. 496, 513 (1990) stated clearly that the principal of an equitably distributed asset is not income for purposes of calculating alimony although the interest generated therefrom is available for this purpose. Accord Aronson v. Aronson, 245 N.J.Super. 354 (App. Div. 1991). This position also finds support in Flach v. Flach, 256 N.J.Super. 333 (Ch. Div. 1992). There Judge Krafte determined that the capital appreciation received in the sale of real estate that had been equitably distributed was not income for purposes of determining alimony. "Therefore, this court holds that, on an alimony modification application, *all* previously equitably distributed assets and *all* assets acquired with, by or through equitably distributed assets, when repaid, are not to be

deemed to be income for the purpose of determining alimony as that is actually the return of principal, although all *income* generated by that principal is to be considered."

There is an inherent lack of fairness in requiring the dependent spouse to spend the principal of her equitable distribution when the payor spouse is not obligated to spend his share of equitable distribution. The statute, as well as the previously cited case law, does permit consideration of income generated by an equitably distributed asset for purposes of determining alimony. N.J.S.A. 2A:34-23(b)(11). It is worth noting, however, that N.J.S.A. 2A:34-23 specifically states that where a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated by that asset for purposes of determining alimony. The statute does not mandate the expenditure of the interest income but merely states that it is a factor for consideration along with the other twelve factors.

Unfortunately, this situation is compounded by the tendency towards blind obedience to Miller v. Miller, 160 N.J. 408 (1999) by imputing income to all investments. Miller is both misunderstood and misapplied in most circumstances. Nothing in Miller either obligates the

imputation of income in all cases nor does it apply to the dependent spouse.

Miller emanated out of the husband's application to decrease an alimony award based on changed circumstances. The husband had been employed at Merrill Lynch as the manager of Municipal Markets until his involuntary termination. While he claimed changed circumstances following the loss of his employment, his net worth was $6.5 million and, of this amount, $4.5 million was liquid. He claimed that the income from his investments was $137,500 per year. The trial court accepted his argument, refused to impute income to his investments and reduced his alimony obligation from $200,000 per year to $50,000. The Appellate Division affirmed.

The Supreme Court concluded that the five-year average rate of return on Moody's Composite Index for A Rated corporate bonds should be imputed to Mr. Miller's portfolio. The primary reason for the five-year average was that Mr. Miller by that time had five years' arrears at issue. In reaching this conclusion, the Supreme Court was very clear that the quest before it was to determine the supporting spouse's ability to pay. The Court reiterated:

> In an application brought by a supporting spouse for a downward modification in alimony, such as the present case, the central issue is the supporting spouse's ability to pay. A supporting spouse's potential to generate income is a significant factor to consider when determining his or her ability to pay alimony.

Id. at 420 (citations omitted; emphasis added). The Court also stressed the Mr. Miller had "sophisticated employment skills" available to him which he could utilize to make more productive use of his investment portfolio and likened the value of his investment skills to the value of tenor Luciano Pavarotti's voice. The Court compared Mr. Miller's minimal return on his investments to voluntary under- or unemployment of a supporting spouse to whom income will be imputed. Given the availability to Mr. Miller of substantial capital and the apparent under-utilization of his investment skills in terms of generating income, the Supreme Court found it reasonable to impute income to Mr. Miller "in the present case." Id. at 424 (emphasis added). In finding that Mr. Miller could obtain a higher yield on his portfolio, the Court stated that "doing so would not require that [Mr. Miller] deplete his considerable principal; it only means that [Mr. Miller] could invest his principal differently in higher yield investment options available to him." Id. at 423.

The holding in Miller does not create a blanket rule that income equivalent to the five year average Moody rate should be applied to both the supporting and supported spouse. Interestingly, the Supreme Court did not require or even suggest that the same rate should be applied to the $1 million in liquid assets owned by Mrs. Miller. There are sharp distinctions between the obligations of a supporting spouse and the needs of the supported spouse. The issues presented in Miller are substantially different than those presented when dealing with the needs of a dependent spouse. There are broad policy considerations that come into play when dealing with the obligations of a payor for the protection of a dependent spouse and children do not apply when it is the needs and ability of the supported spouse to maintain herself that is at issue. Nothing in Miller mandates blanket application of the principles there stated to the dependent spouse.

The issue should not revolve solely on the supporting spouse's ability to pay but rather the needs of the dependent spouse. Those needs are not limited to her present budget. Under N.J.S.A. 2A:34-23, the factors to be considered in fixing alimony include:

> (4) The standard of living established during the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;

(8) . . . . and the opportunity for <u>future acquisitions of capital assets and income.</u>

(emphasis added). The statutory criteria require the court to look at both the *present and future circumstances* of the parties when analyzing an alimony issue. Present need is, therefore, only one consideration. The court must also look to the long-term ability to maintain a reasonably comparable lifestyle in the future and the ability to acquire assets and income. The prevailing tendency to "Millerize" all investments and use the income generated to defray current expenses overlooks the long-term impact of inflation and the ability to provide for future needs. This also leads to gross disparity between the parties where there the husband has substantially greater income: while the wife is expected to use the interest generated by her assets, the husband has sufficient resources to continue saving for the future and reinvesting the income generated by his share of the assets.

Blanket application of <u>Miller</u> and treatment of savings solely as a marital lifestyle expenditure also ignores the realities of life. The theory that a spouse should be required to expend the interest income generated by equitably distributed assets does not consider either the ability to save for the future of the impact of inflation on future needs. Spending all of

the income generated does not allow for any growth. Thus if there is a fund of $1,000,000 which generates $73,000 in gross income and all of that income is spent on current living expenses for a period of ten years, at the end of that time the principal is still $1,000,000. However, due to inflation at historical rates, what was worth $1,000,000 today will have the purchasing power of $695,000 in another ten years and $483,000 in twenty years. Not only is the person spending the interest not gaining for the future, that person is actually losing the present value of the investment over time.

The retirement projection attached to this article provides an illustration of these issues. In that particular case the wife was 54 years old and was found to have budgetary needs of $6,500 per month net. She received $840,000 as equitable distribution that was then invested in 2% money market funds. The basic assumptions were that the alimony would terminate when the wife was 62 and she would most likely cease working at that time. Assuming a 3% rate of inflation, the chart shows her needs at that time and continuing thereafter. If she reinvested all of the income at the Miller rate of 7.3%, she would spend all of her equitable distribution by the time she is 86. At 2% investment she would spend all of the principal by age 71. While not included in the chart, if she were

required to spend all of the income generated, the principal would be exhausted in less than 8 years.

Another problem with Miller is the failure to consider the investment strategies of the parties and the tax consequences of changing those strategies. Assume that the parties have held investment assets during the course of the marriage similar to those of Mr. Miller. Thus, they invested with an eye towards long-term growth rather then short-term income. Shouldn't both parties be permitted to continue that pattern? Does the court have the authority to dictate the manner in which people will invest their money? Imputing income to a dependent spouse's assets is often more than an exercise in number crunching. In many cases, a dependent spouse is required to use those funds to meet expenses. However, in order to generate the income that is included in her ability to meet her expenses, a dependent spouse may be required to sell her investments in order to generate the income needed. This incurs capital gains that diminish the principal and the future rate of return.

There is an equally alarming tendency to impute income to non-income producing assets based on Stiffler v. Stiffler, 304 N.J.Super. 96 (Ch. Div. 1997). There the supporting spouse invested inherited funds in a house and then claimed an inability to pay support. In that case the

husband had received inter vivos gifts (loosely termed inheritance) that had been in income generating accounts that had been used by the parties during the marriage. After the complaint for divorce was filed the parties sold the marital residence for $230,000 and divided the proceeds. Mr. Stiffler took his share of the proceeds and his entire inheritance of $394,000 and purchased a $495,000 home with no mortgage. He then took the position that he did not have sufficient income to pay his substantial support obligations to his wife of more than 20 years.

Judge Fisher concluded that Mr. Stiffler was not entitled to deprive his wife of the support to which she was otherwise entitled by investing income-producing assets in a home that was substantially larger and more expensive than the marital residence. He did however note that Mr. Stiffler was entitled to a house of comparable value to the former marital home and the use of inherited funds to purchase such a home was appropriate. He imputed income only to the amount that was in excess of the value of the marital residence.

Stiffler, like Miller, is a case of limited application. The solution was based on a unique set of facts and was not intended as a blanket rule to be applied in all cases. It has nothing to do with the needs of a dependent spouse and should not be used for such a proposition.

Arguing for a savings component is fact sensitive and may require some sophisticated retirement planning and analysis of future needs as well as investment strategies for long-term planning. It is entirely possible to argue that some portion of assets available for equitable distribution should be used to defray current expenses and the rest utilized to provide for the future. It may also be advisable to argue for the expectation that the parties are entitled to leave something for their children and should not be required to spend all of their assets due to poor planning in a divorce.

It is equally important to make a realistic determination of exactly what the parties will have at the end of the divorce. In reviewing the potential amount available for investment, we tend to look at the gross numbers available for equitable distribution without consideration of tax consequences or debt. This is an issue discussed in Wszolek. There the trial court found that the wife would have approximately $250,000 by way of equitable distribution to invest. The judge did not deduct her debt (including counsel fees) from this amount. The Appellate Division remanded for consideration of contribution to the counsel fees and the impact on the amount available for investment. In settling cases, it is important to consider the actual amount of debt that will be paid from the

assets being distributed. In trials this may be a major issue. The assets are frequently taken from the Case Information Statement and conclusions about alimony are reached based upon the listed assets available for distribution. The impact of counsel fees (on both parties) is simply not considered and certainly should be. For example, the court concludes that the wife will have $350,000 in cash assets for investment that will generate income for either current expenses or savings and utilizes this number in setting support. If the wife has a $100,000 bill for legal and expert fees, she is actually going to have $250,000 and the amount generated will be correspondingly lower. While it may be difficult to quantify since applications for fees produce varying results, certainly the total amount that is due should be factored into summation for consideration in the overall distribution.

The long-term impact of divorce on a dependent spouse is often overlooked in favor of the immediate issues of need. While the issue of savings will not come into play in every case, we need to rethink our approach to this issue in those cases where it is appropriate. The long-term economic impact of divorce is just as important as the short-term and may have a substantially greater detrimental impact on the dependent spouse. Concepts of fair dealing and some fair distribution of

resources require more attention to the issues of future need and the ability to meet those needs. This article is intended to raise some of the issues and the arguments that can and should be made. The extent to which it is feasible or even appropriate depends upon the individual facts of the case and the ability to craft a solution that is reasonable in the circumstances.

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RETIREMENT CAPITAL PROJECTION

Age	$6,500 Needed per mo. @ 3.00%	Income Sources: Soc Sec incr. @ 2.0%	Pensions	Other mo. income or (Exp)	Surplus or (shortage) per/month	Present: $840,000 plus $0 per/mo @ 7.30%	Revised: $840,000 plus $ 0 per/mo @ 2.00%
54						901,320	856,800
55						967,116	873,936
56						1,037,716	891,415
57						1,113,469	909,243
58						1,194,752	927,428
59						1,281,969	945,976
60						1,375,553	964,896
61						1,475,968	984,194
62	8,234				(8,234)	1,477,693	903,094
63	8,481				(8,481)	1,476,363	817,348
64	8,735				(8,735)	1,471,660	726,773
65	8,998				(8,998)	1,463,239	631,178
66	9,267	1,015			(8,253)	1,463,792	542,787
67	9,545	1,035			(8,511)	1,461,066	449,473
68	9,832	1,056			(8,776)	1,454,721	351,041
69	10,127	1,077			(9,050)	1,444,387	247,289
70	10,431	1,098			(9,332)	1,429,663	138,007
71	10,744	1,120			(9,623)	1,410,119	22,978
72	11,066	1,143			(9,923)	1,385,286	
73	11,398	1,165			(10,232)	1,354,660	
74	11,740	1,189			(10,551)	1,317,696	
75	12,092	1,213			(10,879)	1,273,805	
76	12,455	1,237			(11,218)	1,222,352	
77	12,828	1,262			(11,567)	1,162,649	
78	13,213	1,287			(11,926)	1,093,958	
79	13,610	1,312			(12,297)	1,015,480	
80	14,018	1,339			(12,679)	926,354	
81	14,438	1,366			(13,073)	825,651	
82	14,872	1,393			(13,479)	712,372	
83	15,318	1,421			(13,897)	585,437	
84	15,777	1,449			(14,328)	443,686	
85	16,251	1,478			(14,772)	285,865	
86	16,738	1,508			(15,230)	110,626	
87	17,240	1,538			(15,702)		
88	17,757	1,569			(16,189)		
89	18,290	1,600			(16,690)		
90	18,839	1,632			(17,207)		
91	19,404	1,665			(17,739)		
92	19,986	1,698			(18,288)		
93	20,586	1,732			(18,854)		
94	21,203	1,766			(19,437)		
95	21,839	1,802			(20,038)		
96	22,495	1,838			(20,657)		
97	23,169	1,875			(21,295)		
98	23,864	1,912			(21,952)		