

**The Impact of Earning Capacity and the  
Investment Theory of Alimony**

**by**

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Most of us today were not practicing law prior to the advent of equitable distribution. We, therefore, tend to forget the purpose of equitable distribution and how it was intended to affect alimony. We have also become mined by the traditions that have developed with the evolution of our case law.

The divorce revolution in the 1960's introduced the concept of no fault divorce and with it the theory of equitable distribution. The purpose was to create equality for women and, as an outgrowth of the feminist movement, greater recognition of the changing society in which increasing numbers of women worked outside of the home and sought equality of treatment. This in turn led to the recognition that women could and should contribute to their own support and ultimately to the presumption that a divorced wife must contribute to her own support even if she never did so during the marriage.

While equitable distribution was intended to relieve the overall strain on alimony by providing for a division of assets based upon the partnership theory of marriage, most women still find themselves in a substantially reduced lifestyle following divorce. Statistics show that the standard of living for divorced women

is 30-40% below the standard of living during the marriage, while men enjoy a standard of living that is 10% better than during the marriage. E.g., Braver, "The Gender Gap in Standard of Living After Divorce: Vanishingly Small?", 33 Fam. L. Q. 111, 116 (1999). The theoretical purpose of alimony is to enable a dependent spouse to maintain the standard of living formerly shared. Innes v. Innes, 117 N.J. 496 (1990); Lepis v. Lepis, 83 N.J. 139 (1980). As a practical matter, however, this rarely occurs in today's society simply because it costs more to maintain two households than it does one. In the vast majority of cases, no one is going to enjoy the marital lifestyle after divorce. For women this reduction in lifestyle is permanent, for men it is often temporary. The gap between the theory and the reality is a failure that we do not adequately adjust for under our existing legal framework. The result is too often the impoverishment of the dependent spouse.

In Lepis, Justice Pashman stated that we need to take a closer look at the ability of the dependent spouse to contribute to her own needs. Lepis, 83 N.J. at 155. This foreshadowed the advent of rehabilitative alimony, which all too often became a tool to limit not only the amount, but the duration, of alimony. Krauskopf, "Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony", 21 Fam. L. Q. 573 (1988). Earning capacity on the part of the dependent spouse came to be recognized as the basis for terminating alimony without regard to whether that capacity bore any relation to the standard of living during the marriage. In New Jersey, as elsewhere, we became enamored by the concept that self-sufficiency at any standard was sufficient. Hill v. Hill, 91 N.J.

506 (1982) has been cited for the proposition that the goal of rehabilitative alimony is to enable a dependent spouse to achieve self-sufficiency without regard to the standard of living during the marriage. The fact that Hill has absolutely nothing to do with this principle has somehow become lost in the shuffle.

Professor Krauskopf cogently analyzed the national trend in which rehabilitative alimony was abused well into the 1980's to create term alimony in relatively long-term marriages and the increasing trend in appellate courts to halt this abuse by recognizing the correlation between the length of the marriage and the standard of living during the marriage. While we may pride ourselves on the belief that New Jersey is a judicially progressive state that produces cutting edge law, in actual fact our appellate courts have been somewhat slow to follow this trend. It is only in the last five years that we have seen a clear body of case law from the Appellate Division (and none yet from the New Jersey Supreme Court) dealing with the inadequacy of rehabilitative alimony in relatively long-term marriages. E.g., Cerminara v. Cerminara, 286 N.J. Super. 448 (App. Div. 1986); Milner v. Milner, 288 N.J. Super. 209 (App. Div. 1996); Hughes v. Hughes, 311 N.J. Super. 15 (App. Div. 1998).

No sooner have we come to a point where rehabilitative alimony is no longer a prevalent means limiting alimony, than we introduce a new danger: limited duration alimony. While this newest form of alimony serves a just and good purpose, its potential for abuse is enormous. The most interesting feature

of limited duration alimony is the introduction of the concept of economic disadvantage as a basis for an alimony award.

Under this theory, an award of alimony should consider the extent to which the dependent spouse has been economically disadvantaged by the marriage. The court considers the circumstances of the parties at the time of the marriage and the extent to which the dependent spouse has either foregone opportunities in favor of the marriage or has suffered disadvantage as a result of the marriage. As stated by one court, "a spouse is 'disadvantaged' who has foregone opportunities or lost advantages as a consequence of the marriage and who has contributed during the marriage to the supporting spouse's increased earning capacity. . . . a valid consideration in awarding spousal support is the balancing of the burdens created by the divorce." Wahlberg v. Wahlberg, 479 N.W.2d 143, 145 (N.D. 1992). And see Van Klootwyk v. Van Klootwyk, 563 N.W.2d 377 (N.D. 1997).

One problem with this theory is how we define the nature of the disadvantage and the dividing line between the entitlement only to limited duration or rehabilitative alimony and permanent alimony. If there is economic disadvantage following a relatively short-term marriage, what separates the limited duration case from the permanent case? Is that not, as the Supreme Court stated in Lynn v. Lynn, 90 N.J. 510, 518 (1982), a fate of the shared enterprise? Or as stated by Judge Dreier in Hughes, a part of the commitment the husband undertook in marrying the wife in the first place? 311 N.J. Super at 33.

Women who are college educated suffer a 4.3% per year reduction in life time earning capacity for every year they are out of the work market while high school educated women suffer a 1.5% reduction per year in life time earning capacity. Mincer and Polachek, "Family Investments and Human Capital: Earnings of Women", Economics of the Family 415 (T. Shultz ed. 1974). This study is by now somewhat dated. However, there is no research to show that these statistics have substantially changed in the last twenty years. The loss of earning capacity is something that in and of itself creates economic disadvantage in all but the most competitive two-career households.

Our approach to alimony, which focuses on the present and prospective earning capacity by the dependent spouse, simply does not deal adequately with the lost potential and the fundamental inability of the lower wage earning spouse to make up for lost opportunity. The longer the marriage and the older the parties are at the time of the divorce, the greater the impact of the lost opportunity. A woman who was married for fourteen years, but is only 34, is in a fundamentally different position from a woman who was married for 14 years and is 45 by the time of the divorce. The older the spouse at the time of the divorce, the less likely it is that she will have the time to develop the skills that were lost by virtue of the marriage. The equitable theory of alimony is intended to mitigate a marital disadvantage that has been created not so much by the divorce itself but rather by the economic roles assumed during the marriage. That role may not have left the more dependent spouse incapable of self-support, but may well have left that spouse in a less advantageous position as a wage earner than that

person would have been had there been no marriage. O'Kelly, "Entitlements to Spousal Support After Divorce", 61 N.Dak.L.Rev. 225, 244-55 (1985).

The problem of disparate future earning potential has two possible resolutions: equitable distribution and alimony. Consider the partnership theory of marriage. Rothman v. Rothman, 65 N.J. 219, 229 (1974) teaches:

[Equitable distribution] gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute.

The equitable distribution statute, N.J.S.A. 2A:34-23.1 specifically lists both earning capacity and contributions to earning power as factors to be considered in equitably distributing assets. In theory at least earning capacity is akin to an asset to be valued and distributed. Mahoney v. Mahoney, 91 N.J. 488, 504 (1982) also reflects this philosophy by noting that courts should compensate in a lengthy marriage for the sacrifice made to earning capacity through the distribution of assets to recognize the parties' different circumstances and earning capacities.

In practice, however, a system has developed in which equitable distribution means equal distribution. While other states, particularly some of the community property states, routinely award the bulk of the community assets to the wife in a relatively short-term marriage based upon the theory that the

husband is more likely to be able to make up the difference down the road, we do not. Absent dissipation of assets or the unequal contribution to the down-payment on the marital residence, judges in New Jersey simply will not distribute assets unevenly. In Dotsko v. Dotsko, 244 N.J. Super. 688 (App. Div. 1990) the trial court was reversed for having the temerity to award a 60/40 split of the assets. Because of this equitable-means-equal approach to the partnership theory, the only realistic offset for disparate earning capacity is alimony.

Yet, consider how we approach alimony. Absent a 30 or 40 year marriage we do not equalize income. Alimony is a needs based analysis in which we give lip service to the standard of living during the marriage but rarely award sufficient alimony to enable the dependent spouse to maintain that lifestyle. We approach an award of alimony from a minimalist approach: how little can we give in order for the dependent spouse to get by? While this attitude is most often driven by the economic reality of our society in which there is rarely enough money to go around, this attitude is so pervasive that we take the same approach even when there is enough money to go around.

If the wife presents a budget of \$3,000 per month and can contribute \$1,500 in earnings, she still has a short-fall of \$1,500. This \$1,500 then becomes the basis of the wife's needs. This number is invariably reduced (say to \$1,000) and the husband may be ordered to pay \$750 of the \$1,000 in reasonable needs, which reduces the gap to \$250. This looks like the husband is paying three-quarters of the gap between income and needs, but in fact he is paying only half of the differential between income and actual expenses. As

dependent spouse, the greater the economic dependency that has been acquired and the greater the obligation to contribute to support of the less fortunate spouse. This is a basic assumption recognized in Lynn v. Lynn, 92 N.J. 510, 518 (1982) ("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.") and Hughes v. Hughes, 311 N.J. Super. 15, 31 (App. Div. 1998) ("Plaintiff's obligation to continue to support defendant is an incident of the commitment he made when he married her. Perhaps because the marriage was of an intermediate length, defendant need not be supported to the standards of the very summit of the parties' lifestyle, but defendant also is not to be case adrift after four years of rehabilitative alimony.").

One of the problems with the partnership theory of marriage is that, under the general theory of partnership once the partnership has been dissolved, the partners have no further continuing obligation to one another. The theory of partnership simply does not provide for alimony which requires periodic future payments and ties the partners to one another indefinitely. Ellman, "The Theory of Alimony", 77 Calif. L. Rev. 1 (1989). The concept that under the partnership theory there should be a separation of the parties and a severance of ties finds support in Moore v. Moore, 114 N.J. 147 (1989) that states a preference for an immediate offset on a pension. This severance theory was also argued before the New Jersey Supreme Court in both Lepis and, more recently, Crews v.



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Crews, A-48,039, to justify termination of support. While the argument was not successful in Lepis, we shall see whether it will work in Crews. The partnership theory has enormous appeal to the payor spouse who wants finality and a visible end in sight. It is, however, inherently unfair to the dependent spouse who has suffered irreparable loss during the marriage.

Achieving some greater parity requires us to focus on the investment theory of alimony. This theory requires closer attention to the investment made by both spouses in the marital enterprise. This is hardly a new concept. Judge Dreier, while still sitting in the trial court, recognized this in Gugliotta v. Gugliotta, 160 N.J. Super. 160, 164 (Ch. Div.), aff'd 164 N.J. Super. 139 (App. Div. 1978):

[A] paramount reason [for alimony is] 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. In the case at bar, the husband, an engineer for the 23 years of the marriage, gradually earned more and accustomed the family to a standard of living suitable to his income, while the wife kept the home and raised the children. Each worked in his and her own way, although only the husband's efforts produced outside income, until the last years of the marriage. The capital assets accumulated during this marriage and divided under the principle of equitable division may have been relatively small, but the parties' standard of living was also as much a part of her efforts as his, and alimony is the vehicle by which the wife is permitted to share in this standard of living after the divorce.

Alimony then becomes an entitlement earned through the investment made with the expectation of financial advantage to the joint venture. See Ellman, supra. If the higher wage earner receives the advantage of this investment following divorce, the dependent spouse has not been adequately compensated for her investment in the marital partnership. This moves away from the partnership

theory with its strict appraisal and division of the partnership assets with the goal of severing future ties. Instead, it focuses on the investment of capital (human or monetary) in the joint enterprise with the expectation of future gain. While many investments do not produce the anticipated gain and everyone suffers a loss, too often the marital investment produces gain to one party with a concomitant loss to the other.

Instead of focusing solely upon the economic *disadvantage* to the dependent spouse, a construct that has a decidedly defensive ring to it, perhaps we need to look more closely at the economic *advantage* acquired by the other spouse. If the wife has sacrificed her own earning capacity for the betterment of the marital enterprise, what advantage has her husband gained as a result? Certainly the distinction is obvious in a marriage in which the wife has stayed home while the husband has worked. However, we see increasing numbers of two-career families where the distinction is more blurred. Where children are a factor, one spouse almost always makes some career sacrifice to be available for the children whether this is a conscious decision to defer or delay a career or the more subtle reduction in earning capacity produced by the need to take time off to care for children who are sick or off from school. Even where children are absent from the equation there is often a conscious or unconscious decision to promote one party's career over the other for the betterment of the combined enterprise. Given ten or more years of this, the lost potential cannot now be made up, even if the lower wage earner can obtain or continue in a fairly lucrative career.

Throughout this process, however, the higher wage-earning spouse has acquired the business acumen, contacts and experience to continue on an increasing career track. Take the case of Robert and Barbara. Barbara, throughout the fourteen years of the marriage, supported Robert's entrepreneurial activities and the progressive growth of his business. At the time of the divorce he was found to earn approximately \$125,000 with an additional \$50,000 in perquisites from the business. However, due to child support and equitable distribution payments, Robert was unable to pay alimony that would allow Barbara to replicate the marital lifestyle and she was found to have the ability to earn only \$26,000. Three years after the divorce, Barbara has a \$26,000 income (assume the alimony has terminated) while Robert now has \$450,000. While Robert will undoubtedly claim that his increased income is a product of his post-divorce efforts, the history indicates that Robert's present ability to earn a substantial income is the product of the acumen and skills acquired during the marriage, to which Barbara contributed. Robert has reaped the benefits of the marital investment while Barbara is probably worse off than she would have been had she never invested in the marriage to begin with.

We have an altogether different situation where Barbara sacrificed to assist Robert's career, say as a college professor, and three years after the divorce Robert changes careers for a start-up venture that turns into the next Microsoft. Then his earnings would have little or nothing to do with the sacrifices made by Barbara that enabled him to achieve his present position but rather reflect post-divorce luck and good fortune. In the former it would seem fair and

equitable to require Robert to share some of his good fortune with the woman who helped him achieve it while it would seem substantially less fair to require him to do so when his present circumstances are unrelated to the efforts of both parties during the marriage.

Assume that Barbara cannot maintain the marital lifestyle on her present income. Is she entitled to seek a return to that lifestyle based solely upon Robert's present circumstances? Martindell v. Martindell, 21 N.J. 341 (1956) says yes: if the husband can seek a decrease should his income go down, fairness requires that the wife can seek an increase if his income goes up. Whether this still holds true awaits the Supreme Court's decision in Crews v. Crews.

The next question is whether Barbara is entitled only to the marital lifestyle or, based upon the fact that Robert's present good fortune is a product of the marital investment, is she entitled to share in a better lifestyle. In today's climate, the answer is probably no. We should not, however, foreclose this opportunity in future. There is case law that supports this argument.

Mahoney, which is the seminal case on reimbursement alimony, contains interesting language which is often overlooked. In Mahoney the parties were married for seven years during which Mr. Mahoney obtained an M.B.A. degree from Wharton. Mrs. Mahoney supported Mr. Mahoney during his graduate education and at the time of the divorce both were earning in the low \$20,000 range. Unstated in the opinion but obvious to all was the fact that Mr. Mahoney

had substantially greater future expectations than did Mrs. Mahoney. In crafting the concept of reimbursement alimony, the Court stated:

[I]t is realistic to recognize that in this case, as supporting spouse has contributed more than mere earnings to her husband with the mutual expectation that both of them—she as well as he—will realize and enjoy material improvements in their marriage as a result of his increased earning capacity. Also the wife has presumably made personal financial sacrifice, resulting in a reduced or lowered standard of living. . . . In effect, through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed, as it were, present consumption and a higher standard of living, for the future prospect of greater support and material benefits. The supporting spouse's sacrifice would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled. The unredressed sacrifices—loss of support and reduction of the standard of living—coupled with the unfairness attendant upon the defeat of the supporting spouse's shared expectation of future advantages, further justify a remedial award. 91 N.J. at 500-01.

This language evidences concern with the impact of future earning capacity, albeit in the context of short-term marriage. However, the impact on a longer term marriage where there has been a sacrifice to the marital enterprise is no less significant and perhaps more so. Why is the wife, who has foregone career opportunities for the greater benefit of the marital enterprise left with a standard of living less than that enjoyed during the marriage and far less than what she would have enjoyed had the marriage endured? Why is she not entitled to a percentage return on her investment, even if it takes her beyond the standard of living during the marriage?

Consider the Appellate Division's opinion in Guglielmo v. Guglielmo, 253 N.J. Super. 531, 543-44 (App. Div. 1992). In that case, the Appellate Division, in

response to the husband's argument that the wife was attempting to improve her lifestyle beyond that enjoyed during the marriage, disagreed stating,

Where a family's expenditures and income had been consistently expanding, the dependent spouse should not be confined to the precise lifestyle enjoyed during the parties' last year together. [The husband'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. The then existing earning potential of the working spouse may be shared by the spouse who kept the home, and that standard of living should be implemented through an adequate alimony award.

This is a very forward-thinking opinion that, unfortunately, has not been widely adopted.

In Konzelman v. Konzelman, 158 N.J. 185, 195 (1999) Justice Handler wrote, "The primary purpose of alimony is to permit the spouse to share in the accumulated marital assets to which he or she contributed." This, at first blush, is a somewhat remarkable statement. In support of this statement Justice Handler cites Mahoney, which does indeed say this. However, Mahoney in turn cites the trial court's opinion in Lynn v. Lynn, 153 N.J. Super. 382 (Ch. Div. 1977), rev'd on other grounds 165 N.J. Super. 328 (App. Div. 1979) and Gugliotta, supra. In Lynn Judge Imbriani opined:

What are the reasons for the granting of alimony? This court finds primarily two. One, to permit the wife, who contributed during marriage to the accumulation of the marital assets, to share therein. And second, to prevent her from becoming a public charge.

Patently, the first reason has essentially vanished with the enactment of N.J.S.A. 2A:34-23 mandating equitable distribution of all assets acquired during the marriage, albeit there will be instances where the contributions of a wife to the marriage cannot feasibly be subject to equitable distribution. For instance, a wife may contribute to the professional development of her husband by working while he attends college and acquires a potential for substantial earnings. In such a case the parties may divorce early

and they may not have acquired significant assets as of the time of a divorce. Surely in those circumstances alimony should be utilized as a device to enable the wife to share equitably in what she has contributed to the marriage. (Emphasis added.)

The Mahoney court also opined that earning capacity was relevant to determination of ability to pay and even though the enhanced earning potential provided by a degree or license is not property for purposes of distribution, it is clearly a factor for the court to determine in fixing alimony.

Taken in context, Justice Handler's comment is then no so remarkable. Although the phrasing may be questionable, it seems that the intent was to recognize the inherent contribution to earning capacity which underlies the need for alimony based on the investment theory. We need to recognize the effect that earning capacity has on both parties, both at the time of the divorce and subsequently. This requires us to focus not merely upon what the dependent spouse can contribute to her own support but the extent to which the supporting spouse has been advantaged by the investment and sacrifice of the dependent spouse. The disproportionate rate of return on the marital investment should be subject to compensation either under equitable distribution of assets or reimbursement of future return on investment under alimony.