

To Save or Not to Save – That is the Question

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The question addressed in this article is whether and to what extent “savings”ⁱ is a legitimate part of a dependent spouse’s monthly expenses when assessing alimony and child support. To answer this question, we must first determine whether savings is a part of “Marital Lifestyle.” There is little question that “Marital Lifestyle” is a prominent factor intertwined within the Statutes, Rules and case law of this State.ⁱⁱ We are instructed to consider lifestyle at every turn. Although many will correctly argue that “Marital Lifestyle” is not the only factor, it certainly is one of the most significant factors to be considered when a husband and wife divorce. As such, should we ignore savings if savings is a legitimate aspect of “Marital Lifestyle?”

It is instructive to observe how the issue of savings impacts our lives outside of the context of divorce. Savings is the single biggest issue discussed when we consider how we as parents will provide for the education and welfare of our children. We consider savings when we make substantial purchases such as a home, vacation property and life insurance. Every loan application asks for detailed information about savings. Additionally, savings is a major factor in determining how and when we can retire. An allowance for savings is becoming a critical issue as reliance upon Social Security and existing retirement accounts in a declining market becomes more dubious as each day passes. Financial planners advise that we should save at least 10%-15% of our net income.ⁱⁱⁱ The subject of savings has become an important component of financial planning over the past decade. In light of all of the foregoing, one would be hard-pressed to argue that “savings” is not a part of our daily lives.

The inescapable conclusion is that “savings,” in all of its varied forms, is an essential element of lifestyle. As such, it must be appropriately considered when parties divorce.

“Savings” as a line item on the Case Information Statement

In New Jersey, parties are required to file a financial disclosure statement know as a Case Information Statement pursuant to New Jersey Court Rule 5:5-2. Specifically, R. 5:5-2 (a) requires that the Case Information Statement, “...be filed and served in all contested family actions, except summary actions, in which there is any issue as to custody, support, alimony or equitable distribution.” The court rule further provide that the financial disclosure statement must be “filed by each party with the clerk in the county of venue within 20 days after the filing of an Answer or Appearance.” R. 5:5-2(b).

The form of Case Information Statement is explicitly set forth in Appendix V to the New Jersey Court Rules. R. 5:5-2(b). The requirement to set forth the parties' "savings/investments" is explicitly set forth in Schedule C of the Case Information Statement, under "Personal" expenses. By requiring a line item for "savings/investments" one can reasonably infer that the New Jersey Supreme Court believed this information was a part of the marital lifestyle of the parties - and thereby part of appropriate support award.

The majority of other jurisdictions in the nation also require a standard financial disclosure form or its equivalent in matrimonial proceedings.^{iv} However, interestingly, only Arizona has a financial disclosure form, which includes a specific line item for a savings component. Arizona's form requests information on: "Voluntary retirement contributions and savings deductions."

New Jersey Case Authority

Although there is no statutory authority in any jurisdiction, including New Jersey, which requires the Court to consider "savings and investments" when determining the appropriate support provisions in a matrimonial case, there is relevant case law on this issue. Half a century ago, the New Jersey Supreme Court opened the door to consideration of the supported spouse's need to retain reasonable savings after the divorce. *Martindell v. Martindell*, 21 N.J. 341 (1956). In *Martindell*, the New Jersey Supreme Court found,

The costs of living were persistently rising and her living facilities were decreasing with equal persistency. She was obligated to give up her car and to maintain her apartment without domestic help of any kind and she was in no position to replace her furniture which was over twenty years old. She found it impossible to retain *reasonable savings* which she should justly be permitted to accumulate against the day when alimony payments may cease because of her husband's death. (emphasis added)

Id. at 353-354.^v

The New Jersey Supreme Court again addressed the supported spouse's need to retain reasonable savings fifteen years later in the matter of *Capodanno v. Capodanno*, 58 N.J. 113 (1971). In this case, the Court addressed whether the supported spouse's (the wife's) "needs" would be met without support from her husband.^{vi} The New Jersey Supreme Court found that the wife was entitled to receive *pendente lite* support despite the fact that she "was able to support herself by her own means at a level of moderate comfort."^{vii} Specifically the Court stated that the trial court "neglected to consider that she had these same means available when she lived with her husband at which time her

husband maintained the home and provided for food, automobile maintenance, drugs and other expenses.”^{viii} Therefore, she would now have to pay these expenses from “her own earnings”.^{ix} “As a result, she has been forced to give up her vacation trips and deplete her savings since the separation.”^x After considering the wife’s “needs” the Court found she was entitled to support. The court stated,

This amount is necessary in light of her present earnings to maintain her in the pattern of living to which she had become accustomed prior to the separation, and to allow her to retain *reasonable savings to provide for an uncertain future.*
(emphasis added)

Id. at 120.^{xi}

In the case *Hughes v. Hughes*, 311 N.J. Super 15 (App. Div. 1988) the court defined the marital “standard of living” as “the way the couple actually lived....”^{xii} Therefore one could certainly infer that if the parties saved as part of their lifestyle it is an important factor to be considered by a court addressing the issues of support.

In the unpublished opinion of *Wszolek v. Wszolek*, A-2581-97T3 (1999), the Appellate Court recognized the parties’ custom of saving when determining what the defendant/husband’s alimony obligation would be. The Appellate Court remanded the issue of alimony to the trial court stating that:

... the budget that the judge predicted for defendant did not allow her any provision for savings, an opportunity which plaintiff undoubtedly will have.

Id. at 5. The Appellate Court also pointed out the “huge disparity in income” which was “noted by the judge.”^{xiii} The court went on to state that since savings “was their way of life, it is unreasonable to allow plaintiff, but not defendant, to continue that standard.”^{xiv} The issue of alimony was remanded to the trial court.^{xv} Thereby, the court recognized that a critical element of marital lifestyle was savings; therefore, savings were an important aspect to consider when determining the husband’s alimony obligation. Failing to consider the parties’ custom of saving would be to ignore a significant aspect of the parties’ marital lifestyle.

As the New Jersey Supreme Court in *Crews v. Crews*, 164 N.J. 11 (2000), stated:

In summary, the marital standard of living is the measure for assessing initial awards of alimony, as well as for reviewing any motion to modify such awards.

Id. at 35.^{xvi} Therefore, to ignore the parties' custom of saving would deprive the supported spouse of the marital lifestyle. In appropriate circumstances, the marital custom of saving must be considered when establishing the initial alimony award as well as when assessing an application to modify an alimony award.

In the unpublished New Jersey case of *Bookstaber v. Bookstaber*, the Honorable Herbert S. Glickman, Chancery Division, Family Part, (Essex Vicinage), concluded that the level of support to be paid by the husband to the wife would "include an amount for savings."^{xvii} At arriving at this decision, Judge Glickman found "the proofs have established that at least since 1984, this family has been able to accumulate significant savings on an annual basis."^{xviii} This amount for savings specifically included "a factor of 10% for savings in [the] alimony calculation."^{xix}

In the recent Appellate Division case of *Isaacson v. Isaacson*, 2002 WL 362666 (*N.J. Super. A.D.*), the court addressed the issue of future savings in the context of child support. In *Isaacson*, the court stated that,

a true "sharing" in a parent's good fortune may include a potential for *future savings* and securing a child's future. Among appropriate methodologies to provide for future support and "sharing" is the "good fortune trust." *See also Morgan supra*. 13 *Can. J. Fam. L.* at 200-01 (discussing generally the use of such trusts); *See also Thomas C. Quinlen, Planning for the Future*, 2 *Vand. J. Ent. L. & Prac.* 108 (Winter 2000).

Isaacson, supra. at page 9, footnote 6.

Out of State Authority

At least six other jurisdictions have addressed whether the marital custom of savings should be considered when determining the appropriate amount of support. In California, a divorce court determined that the parties' history of saving significant portions of their income constituted part of the marital standard of living, and thus the spousal support order should have provided an amount sufficient to enable the wife to continue to save as she did during the marriage. This court further found that a rule prohibiting consideration of the parties' marital savings history would penalize those who are prudent enough to save during marriage, and would conflict with sound public policy to encourage such savings.^{xx}

In Colorado, a court held that an appropriate rate of savings to meet needs in the event of disaster, to make future major acquisitions such as automobiles and appliances, and for retirement can, and in appropriate cases should, be considered as a living expense when considering award of, or reduction in, maintenance.^{xxi}

One Appellate Court of Florida has held that *in the case of a long-term marriage* where the wife has been supportive of her husband's career, and *there is no indication that the husband will have trouble meeting his identified needs*,^{xxiii} it cannot be said that a trial court abuses discretion in determining that the wife should continue to share in a substantial portion of the earning capacity, which was achieved during the marriage.^{xxiii} Further, the Florida Appellate Court saw no reason why money which was put aside for a couple's security could not be considered to be part of the reasonable lifestyle of the parties in calculating alimony.^{xxiv} However, note *Mallard v. Mallard*, 771 So.2d 1138, 25 Fla. L. Weekly S1040 (Fla. 2000) which disapproved of *Messina* by holding that, in awarding alimony, the court may not factor in speculative post-dissolution savings based upon a marital history of frugality. It should be noted that *Mallard* was the only negative authority located on this topic.

In North Carolina, the Appellate Division found in the matter of *Bryant v. Bryant* that in calculating the parties' expenses,

the trial court may include some amount reflecting the marital pattern of savings. Cunningham v. Cunningham, 345 N.C. 430, 439, 480 S.E.2d, 403, 406 (1997). Given that defendant is still employed and has a comfortable and significantly higher income than plaintiff, who is not working, we do not find the trial court abused its discretion by characterizing the funds reflecting a marital pattern of saving as a reasonable expense in this case.

Bryant v. Bryant, 139 N.C. App. 615, 534 S.E. 2d 230 (2000) at 619.

One year later, the North Carolina Appellate Courts in *Glass v. Glass* confirmed that the court "can properly consider the parties' custom of making regular additions to savings plans as a part of their standard of living in determining the amount and duration of an alimony award..."^{xxv} The Court went on to state that if the marital custom of making regular additions to savings plans were to be excluded, "a spouse could reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans."^{xxvi}

In June of 2000 the North Carolina Court of Appeals, in *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000), remanded the case back to the trial court for failing to consider the marital custom of savings when determining the award of alimony.^{xxvii} Specifically the Appellate Court stated,

"the trial court can properly consider the parties' custom of making regular addition to savings plans *as a part of their standard of living* in determining the amount and duration of

an alimony award.” Glass v. Glass, 131 N.C. App. 784, 789-90, 509 S.E. 2d. 236, 239 (1998). (emphasis added).

Rhew at 472.

The court in *Rhew* concluded that if there is a “custom of regular savings” which is part of the standard of living, this savings must be accounted for in determining an alimony award.^{xxviii}

In 1990, the Appellate Court of Illinois also addressed the issue of savings as part of the marital custom or lifestyle. *In re the Marriage of Margo Krupp*, 207 Ill. App. 3d 779, 566 N.E. 2d 429, 152 Ill.Dec. 742, (1990). In *Krupp*, the supporting spouse sought to modify and decrease his alimony obligation, the court held:

While it is true that neither the statute nor the judgment of dissolution gives the petitioner a vested right to set aside \$2,202.00 per month for savings, the statute does give her the right to an amount which is sufficient to provide her with the means to satisfy her reasonable means. *Future savings were an important part of the marital lifestyle, and we are not prepared to say that the petitioner has lost her right to future security because she is divorced...* we believe the judge exercised reasonable discretion when she manifested her concern for the lesser potential of the wife’s earning ability to secure future savings. (emphasis added)

Id. at 796.^{xxix}

In the Delaware Family Court opinion in *Alzos v. Alzos*, 1994 W.L. 814248 (Del. Fam. cited 1994), the trial Court recognized the parties historical emphasis on savings and investments when considering the amount of alimony to be awarded to the wife.^{xxx} Specifically, the trial court addressed “The Standard of Living Established During the Marriage” and “extensive savings that the couple accumulated”.^{xxxi} The court found that this “extensive saving” was “in and of itself evidence of their standard of living.”^{xxxii}

Calculating the “Savings” Component

A court cannot consider savings as a factor in alimony, child support or equitable distribution unless it is quantified. Quantification of the savings component is tied to the lifestyle analysis. The first step is to determine the net, after-tax income of the parties from all sources for a certain period of time prior to the filing of the Complaint for Divorce, (i.e., usually 3-5 years). The next step is to determine what the parties did with their net income. One method of calculating “savings” is to total the net, after-tax

income and subtract expenses paid therefrom for the same period of time. The difference is “savings”. Sometimes, people make specific contributions to retirement and investment accounts, which can be tracked, quantified and presented as their marital history of savings. Whichever method is chosen, an analysis of net, after-tax income and expenses paid over a certain number of years prior to the termination of the marriage is necessary.

CONCLUSION

Often, upon a divorce, the primary wage earner continues to have the benefits associated with his or her employment, such as retirement plans, and the ability to earn and save in the future. Even in the event that the supported spouse returns to the workforce, his or her capacity to earn often pales in comparison to the primary wage earners’ capacity to earn, with little or no ability to save. There have been numerous articles and studies done on the effect of women after they have been out of the workplace for a considerable amount of time.^{xxxiii} In *Crews*, the court recognized this problem by stating;

Some studies have concluded that the standard of living for a woman decreases 30% after a divorce, while men enjoy a 10% increase in living standards on average. See Peterson, *A Revolution of the Economic Consequences of Divorce* 61 *Am. Soc. Rev.* 528 (1996); Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Divorce*, 22 *Demography* 485 (1985); Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 *J. Marriage & Family* 115 (1984) Those statistics are troubling.

Crews, supra. at 32. Unlike the primary wage earner, unless savings is factored into a dependent spouse’s budget, he or she has to look to the assets received in equitable distribution as well as the alimony award to maintain the marital lifestyle.^{xxxiv}

Undoubtedly, a party’s ability to save is contingent upon not only the support received but also the capital assets received in equitable distribution. Unlike the primary wage earner who continues to draw upon his or her earnings to save for the future, the same ability often does not exist for the supported spouse. Therefore, it is appropriate to focus on a party’s lack of opportunity for savings when addressing whether or not the parties will be able to maintain the marital lifestyle after a divorce.^{xxxv}

The Family Part is a Court of Equity. Equity cannot be achieved if a basic aspect of our daily lives is ignored in the divorce litigation. The ultimate conclusion is that “savings” is a component of lifestyle and, as such, is an appropriate factor when determining the respective budgets of the parties for purposes of support. The extent to which this factor should be considered is, in our opinion, linked to the length of the marriage and the

supporting spouse's ability to contribute to this particular expense item. Certainly, essentials such as shelter, transportation, food, health care and child related expenses should take priority. However, in a long-term marriage where the supporting spouse has the financial ability to pay, alimony and child support should be structured to appropriately consider the standard that the parties set for savings during the marriage.

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ⁱ "Savings" is defined as "thrifty, economical," "something that is saved," and "sums of money saved by economy and laid away." Webster's Encyclopedic Unabridged Dictionary of the English Language 1707 (2nd Edition 1996)

ⁱⁱ N.J.S.A 2A:34-23 (a) (2), N.J.S.A 2A:34-23 (b) (4), and N.J.S.A 2A:34-23.1 (d). See also R. 5:5-2 (a) regarding the Case Information Statement. Additionally, the importance of "Marital Lifestyle" as a factor in divorce has been recently highlighted in the cases of *Crews v. Crews*, 164 N.J. 11 (2000) and *Isaacson v. Isaacson*, 2002 WL 362666 (N.J. Super. A.D.).

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^{iv} The only states which do not require a financial disclosure statement are Alaska, Missouri, South Dakota and Virginia. Although Wyoming requires a standard financial disclosure statement in matters involving children, it does not require such a form in other matters. In Tennessee although a financial affidavit is required, there is no standardized form. Although a pre-trial statement or affidavit is required in Ohio, it does not provide for itemization or identification of expenses.

^v See also Angelo Sarno, Esq., "Savings/Investment as a Component in Awarding Spousal Support" The New Jersey Family Lawyer, Volume XVII, No. 3 pp. 87-90.

^{vi} *Id.* at 118.

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x *Id.*

^{xi} See also "Savings/Investment as a Component in Awarding Spousal Support" at 88.

^{xii} See also Frank A. Louis, Esq., "The Practical Implication of *Crews v. Crews*," 2001 Family Law Symposium, pp. 219-276.

^{xiii} *Id.*

^{xiv} *Id.*

^{xv} *Id.* at 7.

^{xvi} See also N.J.S.A. 2A: 34-23(b).

^{xvii} *Bookstaber v. Bookstaber*, FM-997-94, (June 6, 1996) at 14.

^{xviii} *Id.*

^{xix} *Id.*

^{xx} See also *In re Marriage of Drapeau*, 93 Cal. App. 4th 1086, 114 Cal Rptr.2d 6, 1 Cal. Daily Op.Serv. 9755, 2001 Daily Journal D.A.R. 12, 155.

^{xxi} See also *In re Marriage of Weibel*, 965 P.2d 126, 98 C.J.C.A.R. 4623, (Colo. App. 1998).

^{xxii} It is our opinion that the elements of (1) a long-term marriage and (2) the means availability to meet the identified needs are critical to this analysis.

^{xxiii} Query: Was this a way of having the non-career spouse share in the "Enhanced Earnings" or "Executive Goodwill" of the other spouse?

^{xxiv} *Messina v. Messina*, 676 So.2d 483, 21 Fla. L. Weekly D 1435 (Fla.App. 1Dist. 1996).

^{xxv} *Glass v. Glass*, 131 N.C.App. 784, 509 S.E.2d. 236 (1998) at 789-790.

^{xxvi} *Id.* at 790.

^{xxvii} *Id.* at 472..

^{xxviii} *Id.*

^{xxix} See also Angelo Sarno, Esq., “*Savings/Investment as a Component in Awarding Spousal Support*”, The New Jersey Family Lawyer, Volume XVII, No. 3 pp. 87-90.

^{xxx} Angelo Sarno, Esq., “*Savings/Investment as a Component in Awarding Spousal Support*,” at 88-89.

^{xxxi} *Alzos, supra.* at 7, as cited in “*Savings/Investment as a Component in Awarding Spousal Support*,” at 88-89.

^{xxxii} *Id.*; See also “*Savings/Investment as a Component in Awarding Spousal Support*” at 89.

^{xxxiii} Frank A. Louis, Esq., “*Limited Duration Alimony*”, New Jersey Family Lawyer, Volume XI, Number 6, 133-140 at 139.

^{xxxiv} Frank A. Louis, Esq., “*The Practical Implication of Crews v. Crews*” at 238.

^{xxxv} Frank A. Louis, Esq., “*The Practical Implication of Crews v. Crews*” at 239.