

AN ANALYSIS OF COX vs. COX:  
HOW TO DETERMINE  
WHETHER PERMANENT OR LIMITED  
DURATION ALIMONY IS APPROPRIATE

Frank A. Louis, Esq.  
January 26, 2002

## INTRODUCTION

"Limited duration alimony accommodates the marital partnership by "recognizing in certain marriages that a permanent alimony Order - or no alimony award at all - is an injustice and the law must provide sufficient flexibility to enter Orders fulfilling not only the statutory directives but fundamental purposes of alimony" Frank A. Louis, Limited Duration Alimony, 11 N.J. Fam. Law 133 (1991) cited in Cox v. Cox, 335 N.J. Super. 465 (App. Div. 2000)

This is the fourth article I have written on the issue of alimony being awarded for a fixed period of time, initially known as "term alimony" now Limited Duration but the first since passage of the statute. This article will attempt to provide insight into the development of the Limited Duration Alimony statute, ("LDA") thus assisting in the analysis of when a case warrants a permanent support or alimony for a fixed period. The Limited Duration Alimony statute emanated from the Divorce Study Commission whose report is attached. The ultimate legislation passed contained additional language not recommended by the Commission. This article will also attempt to provide some guidance what that language means and how it became part of the statute. To date, only one case has addressed the concept of limited duration alimony. Appropriately, the article will

commence with an analysis of Judge Carchman's important and well reasoned decision in Cox v. Cox, 335 N.J. Super. 465 (App. Div. 2000).

### THE COX DECISION

In Cox the Appellate Division, for the first time, interpreted the Limited Duration Alimony statute, yet, it's significance extends beyond its interpretation since Judge Carchman broadly discussed alimony and provided insight into what alimony is and why it is awarded. As such, Cox becomes essential reading for any matrimonial practitioner, particularly given the categorization and discussion of the various types of alimony.

The parties in Cox were married in 1977 and had one child who was a college student when the case was decided. In 1996 the parties separated, thus the viable portion of the marriage was approximately 19 years. Mr. Cox was employed as a crane operator earning approximately \$120,000.00 a year. Mrs. Cox was a new lawyer and given that status the trial court found Mrs. Cox's earning capacity to be particularly important, if not determinative. When their child completed first grade, Mrs. Cox had returned to work where she was employed at various part-time jobs earning approximately \$13,000.00 to \$14,000.00 a year. Her employment was motivated by the economic need for additional income. These jobs neither enhanced or created any particular earning capacity for Mrs. Cox.

In 1989 (some 12 years after the marriage) Mrs. Cox returned

to college, obtained her degree in 1995 and graduated law school in 1998. She incurred approximately \$100,000.00 in debt to finance her education. Upon graduation she served as a judicial clerk earning \$30,000.00 a year but was unsuccessful in her first attempt to pass the bar exam. Ultimately, she secured employment at a law firm earning \$33,000.00 a year. While it was not part of the trial court's consideration, by the Appellate argument, Mrs. Cox had failed the bar exam on two occasions and lost her employment with the law firm. While Mr. Cox had a substantial income, the trial testimony was that he worked approximately 80 to 90 hours a week. As a result, he claimed the "mental and physical stress" of his employment was affecting his health.

The trial court factually found that this was a "long term" marriage and that a substantial disparity existed between the parties' income; nonetheless, she ordered limited duration alimony of \$200.00 a week for 5 years reasoning that time period would be sufficient to "enable the plaintiff to establish herself as an attorney". In her findings the court noted Mrs. Cox's "capacity for lucrative employment". Cox at 472. The \$100,000.00 debt was not discussed by the Appellate Division in their summary of the trial court's decision.

Plaintiff appealed arguing the trial court had erred

primarily contending this was a permanent alimony case and LDA was inappropriate. The Appellate Division preliminarily reviewed the concept of alimony but then in very important language, discussed the distinctions between permanent, limited duration and rehabilitative alimony. The court correctly noted rehabilitative alimony was intended to be a "short term award" to enable one spouse "to complete the preparation necessary for economic self-sufficiency" citing Hill v. Hill, 91 N.J. 506, 509 (1982) and Millner v. Millner, 288 N.J. Super. 209, 213 (App. Div. 1996). Judge Carchman then noted that rehabilitative alimony was an appropriate remedy where a spouse gave up or postponed their education to support the household and required either a lump sum or a short term award to achieve economic self sufficiency emphasizing that its purpose was to "enhance and improve the earning capacity of the economically dependent spouse" citing an earlier article. I had written Cox at 475.; Frank A. Louis, Esq. Limited Duration Alimony, 11 N.J. Family Lawyer 133, 135 (1991).

The Court also noted that rehabilitative alimony was not necessarily an exclusive remedy and given its limited purpose might well be coupled with a permanent alimony award citing Hughes v. Hughes, N.J. Super. 15, 31 (App. Div. 1989). This observation is critically important in understanding the purpose

of a rehabilitative alimony award and how it differs from payments made under the LDA statute. The purpose of limited duration and permanent alimony was not to enhance or, in the Appellate Division's language, to "facilitate the earning capacity" of the dependent spouse. Cox at 476<sup>1</sup>. LDA has broader and more fundamental goals as will be discussed at greater length hereafter.

Limited Duration Alimony should require courts to focus on the true purpose of rehabilitative alimony and then make appropriate findings; an understanding of the distinction between the two concepts will avoid the problems that have occurred in the past. See Carter v. Carter, 318 N.J. Super. 34 (App. Div. 1999). The term "rehabilitative" in rehabilitative alimony has a purpose; it is linked to the enhancement of earning capacity and as such is a fundamentally different concept than either limited duration or permanent alimony which serve for broader legal and societal goals. This is precisely why a spouse may receive both, since they have different goals and purposes. There would be no

---

<sup>1</sup> In criticizing Arnold v. Arnold, 167 N.J. Super. 478 (App. Div. 1979) the Supreme Court in Lepis anticipated Cox noting the need for "careful and explicit fact finding on the earning ability of the dependent spouse". Lepis at 155, n.9.

logic in permitting a spouse to receive both rehabilitative and limited duration alimony if the purposes sought to be served by both were the same; since they are distinctly different they may, and frequently should, be awarded. Importantly, given the limited goal of rehabilitative alimony it does not automatically terminate upon a spouse's remarriage unlike limited duration and permanent alimony which simply emphasizes further that they are distinctly different remedies.

In contrast, limited duration and permanent alimony are in some respects similar a point Cox emphasized; they are variants of what we understand to be "traditional" alimony. Cox at 479. As Cox emphasized, LDA recognizes that "marriage is an adaptive economic and social partnership" and an LDA award "validates that principle". Cox at 479. In interpreting the Limited Duration Alimony statute the court at some length examined the legislative history. The Limited Duration Alimony statute emanated from the Commission to Study Divorce upon which this author served ("Commission"). The Commission not only recommended there be a statutory modification to permit judges to award alimony for limited periods of time, but also proposed various statutory factors to be considered in any LDA award. Yet, unfortunately, while the statute was enacted it was without the factors the

Commission recommended. Nonetheless, the Appellate Division properly noted the Commission Report provided "the template" for interpreting the legislation. That report included factors which would have provided the framework for any alimony analysis as the existing factors do. Cox now suggests and permits the factors suggested by the Commission to be part of any alimony analysis. They supplement the factors already in the statute.

In reaching their conclusions the Commission relied on the limited duration alimony article I had previously written. A comparison of the article and the Commission's report finds that the principles and policy considerations (and in some respects the language) in both are virtually identical. While the Commission felt it was necessary, if not essential, to provide Judges with the additional statutory remedy to award alimony for a limited period of time, it was greatly concerned that such an option might adversely and unfairly effect dependent spouses by Courts ordering limited alimony when permanent alimony was otherwise appropriate. This concern was noted in several portions of the Commission's report, most notably at the end, where the Commission wrote:

"Limited duration alimony is not intended to be a replacement for permanent alimony where the length of the marriage and the

contributions made by the dependent spouse is significant. In particular, it is singularly inappropriate in long marriages. It is, therefore, the clear and unequivocal view of the Commission that such term alimony should be limited to shorter marriages and not be ordered in long term marriages."

(emphasis added)

On page 46 of their report the Commission cautioned that while granting courts power to award limited duration alimony would permit a molding decisions to the facts, it would only recommend it "subject to safeguards and only after an analysis of carefully crafted statutory factors." Commission at page 46. One of the "safeguards" in the legislation is that the court first be required to find that permanent alimony was not warranted. In other words, to avoid the danger of a court awarding alimony for a limited period of time in lieu of permanent alimony the Commission and the Legislature established a statutory safeguard that mandated specific findings explaining why permanent alimony was not appropriate. This is a tool for lawyers to protect dependent spouses from gender biased decisions, or the view that permanent alimony should not be awarded merely because the spouse was "able to be employed" or was "self sufficient", neither of which is the statutory standard for permanent alimony awards.

With this backdrop of policy concerns the Appellate

Division in Cox reversed the trial court ruling awarding LDA in a marriage of 19 years where the husband was earning \$120,000.00 (albeit after working extraordinary hours) and a spouse earning \$33,000.00 who had deferred her career and suffered an economic loss as a result. The Cox trial decision was the nightmare scenario for the Commission since a dependent spouse entitled to a permanent award did not receive what the law clearly mandated. The Appellate Division decision, in clear and unequivocal terms, not only reaffirmed why limited duration was wholly inappropriate, but emphasized the linkage between the length of alimony and the policy considerations justifying an alimony award. This linkage of policy to law is a bedrock principle that every lawyer must appreciate in any alimony case. It emphasizes the view expressed in the initial article I wrote that alimony is granted not merely because a spouse has a marriage license, but rather because of what occurred during the marriage. Marriage by itself does not create an alimony obligation or entitlement; it is what occurred during the marriage economically to the parties that is determinative. As the Commission report emphasized courts must "focus upon the economic impact of the marriage on the parties", Commission Report cited in Cox at 481, which is, simply put, the essence of alimony. It is the effect of the

marriage on the parties, not the fact that they were married that should be the primary focus of both courts and attorneys. This analysis will determine whether someone should receive alimony and for how long.

As Cox emphasized in considering alimony applications under the new statutory scheme, judges should bear in mind that an award of limited duration alimony must reflect the underlying policy considerations which distinguish this type of alimony from rehabilitative and reimbursement alimony. The latter two types represent forms of limited spousal support for specified purposes; once the purpose is achieved, entitlement to that form of alimony ceases.

"Permanent and limited duration alimony, by contrast, reflect the important policy of recognizing that marriage is an adaptive, economic and social partnership, and an award of either validates that principle."  
Cox at 479. (emphasis added)

There is not and should not be a bright line rule that a marriage of a particular duration automatically results in permanent alimony. Rather, there must be an examination of the policy considerations why alimony is awarded and a linkage to and a molding of a particular case's facts, including duration, to those considerations.

Certainly, any alimony analysis commences with N.J.S.A. 2A:34-23 which initially focuses the court's attention on the "circumstances of the parties and the nature of the case". See N.J.S.A. 2A:34-23. This basic yet fundamental principle was reaffirmed by the Supreme Court in Lynn v. Lynn, 91 N.J. 510 (1982) where the Supreme Court noted "the length of the marriage" and the "amount or duration of alimony do not correlate in any mathematical formula". Lynn at 518. What Lynn was attempting to emphasize was that duration by itself is not determinative; rather, even in a short marriage if as a consequence of what occurred during the marriage an economic need and entitlement was established then notwithstanding the short duration permanent alimony might be appropriate. Similarly, in a longer term marriage, if the marriage did not adversely impact on the parties' economic circumstances then perhaps the mere length of the marriage in and of itself would not create an obligation to pay permanent alimony.

Similar thoughts were expressed in the landmark Lepis decision, Lepis v. Lepis, 83 N.J. 139, 155 (1980), where the court linked duration to the "extent of actual economic dependency". Actual economic dependency was not an absolute phrase since there may truly be an economic dependency in a very

short marriage. In such a case while there may well be a need for alimony, there would be no entitlement or, more precisely, no policy considerations mandating alimony be paid. When Justice Pashman used the term "actual economic dependency", I believe he meant an economic dependency that was entitled to legal protection; it created a right to receive alimony when the facts warranted the entitlement. Need alone, unaccompanied by a legal entitlement, should not receive judicial recognition.

Alimony, by its nature, is inherently fact sensitive. Suggestions contained in Hughes, implying that length alone is or should be determinative represents an evisceration of the reasons alimony is awarded, promotes a superficial analysis and ignores the necessity for careful and detailed factual findings Lepis, the statute and Rule 1:7-4 require; moreover, any such language in Hughes taken in isolation is directly contrary to the suggestion in Lynn and Lepis that the "amount and duration of alimony" are related to what has occurred during the marriage. New Jersey's statutory scheme and public policy stands in stark contrast to those who suggest that alimony is susceptible to guidelines or absolute rules of thumb. Only when a court weighs all of the relevant economic factors arising from the parties' marital relationship can there be an appropriate melding of law,

policy, justice and fairness.

There is an understandable and perhaps predictable desire on the part of litigants, attorneys and courts to attempt to categorize marriages as either "long" or "short" term, suggesting such a definition is somehow determinative on whether an alimony award should be permanent or not. In fact, even the Divorce Study Commission Report utilized similar language suggesting in an effort to avoid courts abusing limited duration alimony by emphasizing, without definitions, that LDA was inappropriate in a "long term" marriage.

Professor Krauskopf in her oft quoted article Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, Family Law Quarterly, Volume XXI, No. 4, Winter 1998, (cited in my earlier article, relied on by the Divorce Study Commission and noted in Cox) did an analysis of alimony and duration and concluded that a short term marriage was less than ten years, a medium length ten to twenty years and long term over twenty years. Krauskopf at page 580, n. 35. These efforts at categorization are in reality counter-productive; they ignore the responsibility of the courts to make needed factual findings. Such findings are necessary for not only reviewing a trial court's reasoning, but the necessity for "careful and explicit fact findings", suggested by Lepis at

155 n. 9 whenever alimony limited in time is suggested, have an even more fundamental purpose. When a court makes detailed factual findings it permits a refinement of it's reasoning. It effectively requires the court to base its decision on the statutory factors which precisely is what the Legislature mandated. It is for that reason that lawyers must key their presentation to the statutory factors since that, as well, will permit linkage to be made to the statutory requirements so conclusions on how long alimony should be paid or the type of alimony to be awarded is made for the right reasons.

The proponent of an LDA award should also consider broader based policy considerations which may well resonate with a court. In one of the early alimony cases Turi v. Turi. 34 N.J. Super. 313 (App. Div. 1955) the Court noted that one of the factors to be considered in alimony was the "interest of the state". There are broader based policy arguments to support limited in time alimony which are in two broad categories; first, there are clear systemic advantages and secondly, societal benefits. Systemically, given the limited ability to modify the advocate would contend a carefully crafted LDA award, particularly one keyed to future equitable distribution events or predictable occurrences (i.e., retirement), will reduce the number of post-judgment

modification motions. In a system burdened with modification motions any judgment which has the potential to limit such applications, has, the advocate will contend, a systemic benefit. It is reasonably certain since judges generally dislike post-judgment modifications (they inevitably are commenced with motions) it is an argument that may receive a receptive ear.

Moreover, it may be argued that any judgment that establishes certainty permits the parties to make plans or adjustments in their own lives. Instead of simply awaiting the next battery of motions, litigants may reasonably rely on a judicial determination and plan their lives with certainty not uncertainty. Such a goal, as Professor Krauskopf emphasized, facilitates the "separation and independence of the ex-spouses from one another", which she considered to be a "healthy" goal. Krauskopf at 582. She also recognized the certainty provided for the obligor which eased "economic and family planning for the future." Krauskopf at 582.

The interest of the state discussed in Turi may also be advanced as a significant broader based societal benefit of limited duration alimony. Society benefits from individuals who are productive economically since that is how an economy grows and remains vibrant. A party who is required to be an active

economic participant will, the advocate will contend, make actual contributions to the broader based societal economic development. This is particularly true if a limited duration alimony award is coupled with some enhancement of the dependent spouse's earning capacity which further suggests a broader based economic benefit. Any advocate of limited duration alimony should not ignore these arguments since, at a minimum, they provide additional findings a court can make which may withstand appellate scrutiny even if the Appellate Court does not find them in and of itself persuasive. It demonstrates a thoughtful analysis of issues that Appellate Courts like to see and increases the likelihood of an affirmance, a point itself which gently should be made to the Court.

Nonetheless, duration is particularly important not only for legitimate economic reasons and those factors contained in the statute, but as a practical matter because judges tend to focus on duration more than any other factor although that emphasis is not statutorily authorized. Professor Krauskopf, however, has noted at least four factors that should be considered when discussing duration:

1. The longer the marriage, the more both parties have contributed to that jointly maintained standard of living.

2. The longer the marriage, the more both

parties have set that standard of living as their own measure of reasonable needs.

3. The longer the marriage, the more homemaker's earning capacity decreases, making either that earning capacity or mere employability unrealistic as a measure of reasonable needs.

4. The longer the marriage, the more homemaker's full responsibility for the home decreased the homemaker's earning capacity and simultaneously benefitted the other spouse by allowing him to have a family and yet devote all productive hours to increasing his earning capacity. Krauskopf at 586.

Those who have heard me lecture previously on alimony may remember my contention that a short marriage, coupled with an absence of adverse economic impact on the dependent spouse, notwithstanding an elevated standard of living does not create a legally protectable right to have that standard of living continued, i.e., there is no policy, and hence no legal reason, for an entitlement to be created to permit that standard to be maintained.

If parties marry and an elevated lifestyle is maintained by an income stream from assets or from earned income that was unrelated to marital effort, then the mere fact that the income stream permitted the spouses to live an enhanced lifestyle does not mean that lifestyle is entitled to any legal protection. Why

should it be? Lifestyle is a factor but entitlement is critical and determinative. A professional with an established reputation, skill and expertise that translates into an elevated income which permits a certain lifestyle to be enjoyed but which emanates from a pre-marital asset unrelated to marital effort, coupled with the absence of any economic detriment to the dependent spouse should have no responsibility to provide that lifestyle merely because of a marriage license. Only when the lifestyle is entitled to some form of legal protection should that lifestyle continue. If, however, on the same set of facts the dependent spouse relinquished a significant economic advantage, i.e., deferred or lost their career, relinquished assets, sold a home which could not be replaced those are all factors that might bear not only on the length of a limited duration award or even rise into the level of establishing a permanent obligation. Those sacrifices created the reason or the factual predicates, all bottomed on policy considerations, for the entitlement to exist.

#### COMMISSION FACTORS

The Commission identified a series of factors above and beyond the more traditional ones presently embodied in the statute to be considered in any alimony analyses. They are set forth as

follows (the numbers are from the Commission Report):

8. The economic impact on the parties of the child-rearing responsibilities for children of the marriage.

9. The distribution of property acquired during the marriage and the ability of either spouse to have acquired such assets without the marriage.

10. The fairness of either spouse enjoying a standard of living comparable to that enjoyed during the marriage, given the parties' financial and non-financial contributions to the development, maintenance and acquisition of income or assets which supported the marital lifestyle.

11. Whether the parties were economically advantaged or disadvantaged by the marriage.

13. The use and dissipation during the marriage of the parties' pre-marital assets.

15. The sale of the marital assets and the availability of the proceeds for the parties' use.

16. The time in which the spouse seeking support can reasonably be expected to improve earning capacity to a level where alimony of limited duration is no longer appropriate.

A discussion of each highlights the linkage between policy and development of law although Factor II is discussed throughout and

for which there is no separate portion.

#### 8. THE ECONOMIC IMPACT ON THE PARTIES OF CHILD-REARING RESPONSIBILITIES FOR THE CHILDREN OF THE MARRIAGE

One of the most underutilized if not ignored arguments is the impact of children on the custodial parents economic circumstances and earning capacity. This is a point emphasized in my limited duration alimony article where it was noted that:

"The responsibilities of raising children and the consequent absence from the market place result in immeasurable economic loss to the custodial parent. At least one commentator has argued that a woman's disadvantaged position in the labor market is not caused by discrimination, but because of family responsibility. It is argued that children depress women's wages for three reasons: (1) child-bearing frequently leads to interruption in employment, which affect experience and training; (2) because of the responsibilities of parenthood, women, frequently not the primary wager, are forced to find jobs compatible with the responsibilities of being both homemaker and a parent; and (3) women who have a disproportionate share of homework and childcare responsibilities are forced to make sacrifices in their employment, such as more frequent absences and time off which adversely affects their advancement." Citing Fuchs, Women's Quest for Economic Equality, 3 J. Econ. Persp. 25, 33-38 (1989) Louis, Limited Duration Alimony, NJFL, September, 1991 at p. 138.

In my earlier article it was also noted that the custodial parent frequently restricts their job, hours, limit the geographic range

of employment options and forego opportunities for advancement they can be available for homemaking and childcare services all in an attempt to accommodate their spouses employment. Louis at 138.

The primary responsibility of raising a child also frequently results in career interruption. Career success is frequently the product of hard work and development of skill and expertise in a particular area. When development of one's career is interrupted by child-rearing, not only is the custodial parent less marketable, but the foundational years of developing the skills, expertise, contacts that are translatable to an enhanced earning capacity are lost. These are precisely the factors the Commission was focusing upon in this factor. In presentation of cases lawyers must emphasize where clients would have been but for the marriage and the responsibilities of the marital relationship. Mrs. Cox, for example, had she started her career when she was first married might well have been a partner by the time of the divorce, not a new associate in a law firm earning \$33,000.00 a year. The late commencement of her career, the types of jobs she had did nothing to enhance her capabilities. The jobs she took were necessitated by family responsibility created by her marriage. The initial decision in Cox should have

recognized these sacrifices as having an economic impact on Mrs. Cox thus creating an entitlement to receive economic assistance from her husband, i.e., alimony on a permanent basis, since her economic loss clearly was substantial and of a permanent nature.

The law must recognize that allocation of marital responsibilities in the traditional family is designed to maximize the Husband's earning capacity. This is done by permitting, generally, the primary wage earner to spend time developing their employment and acquire income and assets for the family. In fact, one observer has concluded that married men have higher life carrying earnings and live longer healthier lives than unmarried men. See Landes, Economics Of Alimony, 7 J. Legal Stud. 35, 40 (1978).

Custodial parents (frequently women) subordinate their own career development when confronted with the reality that their Husband's advancement required geographic moves. They frequently evaluate potential educational investments in light of their expected primary role as wife and mother, rather than as the primary wage earner. See Benninger and Smith, "Career Opportunity Cost: A Factor In Spousal Support Determination", Family Law Quarterly, Volume XVI, #3, Fall, 1982. These decisions frequently result in dependent spouses, even if they

re-enter the labor force, requiring them to do so as part-time workers receiving the few employee benefits such as health care, pensions, or vacation time. The absence of pensions is also an issue that should carefully be considered by counsel in the analysis of whether savings is an appropriate alimony factor. See Benninger and Smith at pg. 206.

These factors frequently result in the supporting spouse obtaining the benefit of their increased earning power obtained and developed during the marriage while there is a simultaneous burden imposed on the dependent spouse of the lost opportunity cost of years spent in the non-labor market. These realistic societal and economic factors explain the statistical reliability of the studies referred to by the Supreme Court in Crews emphasizing why after a divorce the Husband's life style increases but the dependent spouses' lifestyles decreases.

**9. THE DISTRIBUTION OF PROPERTY ACQUIRED DURING THE MARRIAGE AND THE ABILITY OF EITHER SPOUSE TO HAVE ACQUIRED SUCH ASSETS THROUGHOUT THE MARRIAGE.**

This factor focuses the court's attention on whether there really was an economic loss occasioned by the marriage. In many cases after a marriage of short to moderate length a spouse receives significant equitable distribution far beyond what that

spouse might have earned absent the marriage. That allocable share of assets may not have been the direct product of marital effort but, in reality, was created by the pre-marital skill of the other spouse. Similarly, a spouse who was unable to be employed because of health considerations nonetheless may at the end of the marriage receive significant asset distribution and be economically benefitted by the marriage and what the marital partnership achieved. A supporting spouse can always argue that at the end of the marriage the spouse receives several hundred thousand dollars in equitable distribution from the sale of assets, pension rollovers or distributions of liquid assets which far exceed what that person reasonably could have acquired in their own right based on their skill, education and aptitude as of the marriage. Thus, this is a factor that suggests permanent alimony may not be appropriate and that limited duration becomes a more viable option for the Court. This is not an unusual occurrence. Lawyers frequently ignore the financial benefits received by virtue of the marriage without linking those benefits to the alimony issue. Traditionally, there has always been a linkage between equitable distribution and alimony, see generally, Rothman v. Rothman, 65 N.J. 219, 234 (1974) and it may, depending on the facts, not only be an issue of asset

percentage distribution but alimony as well.

There is an interesting portion of the Divorce Study Commission Report which suggested that before any alimony would be awarded equitable distribution of marital property should first be used to compensate the potential alimony recipient for their financial and non-financial contributions to the marriage. While I believe that portion of the Report perhaps went too far, it is, nonetheless in the "template" of the statute. While it may not result in elimination of alimony it may spell the difference between a permanent or a limited duration award. The Commission's language was intended to address the situation where if a court could disproportionately divide the assets, that might obviate the entitlement to alimony. That report language can, however, be linked to this factor to either argue initially because of the award, or even as a consequence of some disproportionate division of the assets; that alimony should not be awarded.

The limited duration alimony statute permits creative lawyering linking the overall distributive scheme to alimony. The creative lawyer will frequently link some future event, which will free up liquidity such as the sale of a home, to be a logical alimony termination point. Prior to the LDA statute it

was generally believed courts were without authority to order alimony for a limited duration, however, that wasn't entirely true. In Weber v. Weber, 211 N.J. Super. 533, 537 (App. Div.) the Appellate Division reasoned it may well be appropriate to end alimony at some future event, which in most cases would be the sale of a house. In Weber, the Court noted "an award of alimony should be limited in duration only if it is rehabilitative in nature or if there are other circumstances indicating that alimony should terminate at a fixed time in the future".

(emphasis added) Weber at 537. Cases where there is a deferred distribution of a house to assure children graduate high school may well provide the appropriate factual scenario to argue that upon sale and receipt of the proceeds (which may well ignore the need to obtain a replacement home for the dependent spouse) creates a circumstance where the court can make the requisite findings the statute contemplates suggesting why permanent alimony would not be appropriate.

10. THE FAIRNESS OF EITHER SPOUSE ENJOYING A STANDARD OF LIVING COMPARABLE TO THAT ENJOYED DURING THE MARRIAGE GIVEN THE PARTIES' FINANCIAL AND NON-FINANCIAL CONTRIBUTIONS TO THE DEVELOPMENT, MAINTENANCE AND ACQUISITION OF INCOME OR ASSETS WHICH SUPPORTED THE MARITAL LIFESTYLE.

This factor highlights the entitlement question and directs

the court's attention to the source of the funds utilized to maintain the marital lifestyle and whether they were the product of marital effort or whether the parties were economically advantaged or disadvantaged by the marriage. Essentially this is the fundamental distinction between limited duration and permanency. The greater the economic disadvantage by the dependent spouse, the stronger the argument is for permanency. The greater the degree of economic advantage the dependent spouse received, the greater the argument for LDA or no alimony. Conversely, when the supporting spouse was economically advantaged, i.e., permitted to develop their career or enhance their skill, expertise or obtain benefits by virtue of employment over time those are all factors that reasonably bear on making the decision of whether a case was permanent or not.

One commentator succinctly observed that "the wife increases her husband's earning capacity at the expense of her own".

Goldfarb, Marital Partnership And The Case for Permanent Alimony, Alimony, New Strategies For Pursuit And Defense (Sec. of Family Law, ABA) at p. 49 cited in Louis, at 139. This principle was also acknowledged by the Appellate Division in Weiss v. Weiss, 226 N.J. Super. 282, 290 (App Div. 1988) where the Court noted:

"Plaintiff contributed to defendant's

business as a homemaker and as a caretaker of their child thereby enabling her husband to work 60 hours per week, and she also worked part-time in the business herself. These efforts entitle her to share in any enhancement in the value of defendant's interest in the business which occurred during the marriage." (emphasis added)

That excerpt recognizes the duality of the husband's business being enhanced by virtue of the wife assuming certain family responsibility, primarily child-rearing, while simultaneously causing a diminution of the wife's earning capacity since being a mother, while perhaps the most important role a person can have, is not granted remunerative status in the workplace. This factor in and of itself is important, but more important from the standpoint of how that property was used during the marriage. For example, was the property part of the parties' lifestyle, thus their lifestyle was enhanced or supported by an asset that was unrelated to the marital partnership's efforts.

13. THE USE AND DISSIPATION DURING THE MARRIAGE OF THE PARTIES' PRE-MARITAL ASSETS.

There are frequently cases where one spouse has significant premarital assets, yet over the course of the marriage to maintain the lifestyle they are expended or diminished. While certainly a clear equitable distribution factor it is a factor to be considered, although far less important than the others

discussed, on whether an alimony award should be permanent or of limited duration.

WHAT DOES "UNUSUAL CIRCUMSTANCES" MEAN?

A question frequently raised concerning the Limited Duration Alimony statute is what was the legislative intent was in the provision that permitted modification of the "amount" but not the "length of the term" except in unusual circumstances". The genesis of this language is neither contained in the Divorce Study Commission Report or the sponsor's statement. The only reference in the Commission Report is the recommendation that the legislation would permit modification pursuant "to the case law governing modification of the permanent alimony awards" (i.e. Lepis) but that the length of the term "could not" change. The Commission recommendations, like matrimonial cases, were the product of negotiation and compromise. Without understanding that basic reality this language cannot fully be understood. As a member of the Commission and a proponent of the Limited Duration Alimony statute, it was my hope to see the Commission recommend Legislation granting Courts the power to award limited duration alimony to be separate and distinct in it's purpose from rehabilitative alimony. It was (and is) my view that LDA should be subject to the Lepis changed circumstance standard. I am in

essential agreement with Justice Pashman's view that spousal support agreements should only be enforceable to the extent they remain fair and equitable. Thus , to the extent something occurred during the agreed upon or ordered term that rendered continuing enforcement of the amount or the term no longer fair and equitable, a Court should have the power to modify limited duration alimony. The Commission did not entirely agree.

There were members of the Commission who, while willing to go along with the concept of alimony limited in time, felt that neither the amount nor the term should be modified believing LDA, as concept, was more akin to the concept of bargained for term alimony. "Term alimony" was not a judicially created device, but a creative negotiated resolution of problems confronted by lawyers in cases where instinctively counsel and the parties knew a permanent award would be inappropriate, but that it would also be an injustice to award no alimony. Yet, term alimony as a concept had never been defined by case law or legislation. In my own mind it was always subject to Lepis, absent language or bargained for consideration that precluded modification. Nonetheless, there was a view and perception by many, including some on the Commission, that term alimony meant that the award, both as to the amount and duration, could not be subject to

modification. They sought to incorporate that belief in the Commission's recommendation. Hence, confronted with these two disparate positions, to achieve the greater good, a compromise was reached. Limited duration alimony was to be recommended, but was to be subject to Lepis only during the term, but that the term itself could not be modified.

Simultaneously with the drafting of the Report the Financial Aspects of Divorce Sub-Committee attempted to draft the proposed legislation. A policy determination was later made that the Commission would submit a report and leave drafting the actual legislation to the Office of Legislative Services. In reviewing the initial draft statutes the Sub-Committee prepared, the language that the term could not be modified except in "unusual circumstances" was not included. This reflected the belief of those who wanted limited duration alimony to be subject to Lepis. Yet, a more flexible approach was never adopted by the entire Commission. The final report included the language that the term could not be modified at all. Then, in the final compromise, language permitting modification of the term, but only in "unusual circumstances", was added by the Legislature. The "unusual circumstance" language did not emanate from the Commission itself which had recommended there be no modification

in the term. There is no guidance in the sponsor's statement what "unusual circumstances" meant. My own belief, given the history, is that it represented a further compromise between the disparate views between those who supported LDA being entirely subject to Lepis and those who wanted a firm and unequivocal non-modifiable term. Like a tie, this legislative compromise probably satisfied no one but, nonetheless, compromises frequently do not. How, then, should the term "unusual circumstances" be interpreted. Some guidance can be gleaned from the other portion of the statute which did emanate directly from the Commission's Report. In determining the length of the term a court was to consider the time it would "reasonably take" for the alimony recipient to improve their earning capacity to a level where LDA was "no longer appropriate". Similarly, this language which was in the original draft statute, and ultimately included in N.J.S.A. 2A:34-23, was not in the Divorce Study Commission Report. The report provided for dual grounds of modification: either changed circumstances, i.e., the traditional Lepis standard or "the non-occurrence of circumstances that the court found would occur at the time of the award" which I interpret to be some change in baseline assumptions used in determining the amount and duration. In other words, if a Court concluded a

person would receive a certain level of equitable distribution from the sale of assets or would achieve a certain income level after time and either of these assumptions did not occur, then the court would have the right to modify the amount paid during the term. A substantial argument exists that this language is nothing more than a re-statement of the Lepis standard where a Court, or the parties themselves, have delineated the assumptions pursuant to which the agreement or the award was made. There is no real substantive difference between the concept of changed circumstances, i.e., a change from what was assumed to occur and the "non-occurrence" circumstances standard in the statute. Essentially, they are the same.

With this history it is reasonable to conclude the language "unusual circumstances" means something more than a traditional Lepis change in circumstances. A term may be extended, but only if the grounds justifying such an extension are of a greater consequence than what has traditionally been accepted as: (a) a change in circumstances; or (b) a change in the assumptions pursuant to which the original alimony award was made. Notwithstanding my personal disagreement, the "unusual circumstance" standard seems to require some higher burden to modify the term since the statute clearly provided that the amount during the

term could be modified for what is traditionally known as Lepis reasons, a fact confirmed not only by the literal language of the statute, the Commission Report and the draft bills. To extend the term "unusual circumstances" must be found and which requires, in all probability, a burden somewhere between Lepis and unconscionability.

#### IMPACT OF PRE-MARITAL COHABITATION

An interesting issue that arises in the alimony analyses is the impact of premarital cohabitation. If you represent the supporting spouse and are confronted with a contention the parties' cohabitation should be considered on the issue of duration it must be argued vigorously that alimony, unlike a palimony claim, arises from the marital as opposed to the parties' personal relationship. Any adoption of a legal principle that equates the parties' personal relationship with a relationship is effectively a re-writing of the statute and constitutes judicial legislation. Contrary, it would be argued, to sound practice and public policy considerations. The advocate would then assert that if the Legislature intended to diminish the "sanctity" of the marital relationship and extend the statutory rights created by N.J.S.A. 2A:34-23 it could have revised the statute either in 1988 or when the time the limited

duration alimony statute was passed. In each instance the Legislature, the argument continues, chose not to do so and thus a Court should not by judicial fiat do that which the Legislature chose not to do.

The argument would further rely on specific portions of the statute. Specifically, the reference to the standard of living is limited to the standard "established" in the marriage. The advocate would argue it does not say "before" the marriage, nor does it mention the parties' "relationship". The argument would continue and emphasize that the statute is intended to recognize and fairly address the consequences created by a divorce emanating from the parties' marital relationship. Since marriage is an institution central to our values and morals, any legal principle that undermines marriage and elevates cohabitation to a statutorily protected right ignores or vitiates the importance of marriage to society. It should not be undertaken absent a clear legislative directive.

In contrast, the supporting spouse would argue that the public policy accurately summarized by the Supreme Court in Miller v. Miller 160 N.J. 408, 418 (1999) that is the fundamental public and statutory purpose of assuring fairness and equity in the dissolution of marriages that a Court, when a marriage ends,

must consider all relevant facts that bear on the fairness of an alimony award. Just as a Court would consider the physical health of a party at divorce, even if the health problem arose prior to the marriage, it must consider the economic impact of the parties' overall relationship to determine what is fair. Moreover, a law must reflect the societal reality since people live together before marriage. In fact, such cohabitation in many instances results in poorly matched people not getting married or marriages that last longer because people have a better understanding of their future spouses after cohabitation. The advocate would thus argue any policy that would undermine cohabitation would, therefore, in effect, undermine marriage itself and be counter-productive. The advocate would further argue that if such a stark, harsh legal principle were adopted a relationship of 25 years followed by a marriage of 5 would probably not result in an award of permanency when, as a matter of fairness and justice, particularly if children were involved, alimony would otherwise be appropriate given the economic impact on the dependent spouse. Finally, it would be fundamentally unfair to ignore the impact of the parties' relationship on an ultimate judicial decision. Justice is best served when a Court analyzes all relevant facts, not only certain ones.

### THE BRIGHT, ARTICULATE DEPENDENT SPOUSE

The argument is frequently made that the supported spouse is bright, intelligent, articulate, marketable, and did well in school. Therefore, the supporting spouse contends alimony is not needed because that person is highly employable. While it may be true that someone who is bright, intelligent and articulate has marketable attributes, if that person has been out of workplace for years, relinquished career opportunities and deferred educational options the more accurate and correct analysis is not that these attributes obviates the need for alimony, but rather were it not for the sacrifices made during the marriage how far this bright, intelligent, articulate person would have gone and to what degree would their earning capability have developed. It is for that reason that a client's hopes, dreams and aspirations, absent the marriage, should be explored with counsel. The articulate client, as opposed to having a minimal entitlement to alimony arguably has a far greater right because greater sacrifices were made for the marital relationship.

### THE IMPACT OF AGE

At a previous symposium, I reviewed the relationship between age and factors relating to both alimony and equitable distribution. Age would seem to be a particularly critical issue in determining the dividing line between limited duration and permanency. It is predictable that there will be judicial resistance to requiring young people in relatively short marriages where the adverse economic impact on the dependent spouse is not significant, to direct an alimony award that may continue for twenty-five years.

Therefore, the younger the parties, the greater the desirability of disproportionately dividing the equitable distribution in lieu of making an award of permanency. Such an approach would permit a Court to make the requisite findings under the LDA statute, justifying a conclusion that permanency was not required on the facts of the case. That disproportionate division of assets may be coupled with an award of limited duration alimony or rehabilitative alimony, or both. The extent of the economic detriment and the degree to which the supporting spouse's earning capacity was created, maintained, or enhanced during the marriage, would be the critical factors logically effecting the Court's determination as to what degree to

disproportionately divide the assets and whether to include a LDA or rehabilitative component and, if so, the degree thereof. My instincts, if not common sense, seemingly suggest that age, perhaps more than any other factor, may be most determinative in selecting the dividing line between permanency and limited duration alimony. Certainly, it has been considered as such by the Appellate Division in at least one case.

The Appellate Division in Heinl v. Heinl, 287 N.J. Super. 337, 346 (App. Div. 1996) specifically noted the relationship of age to the duration of a support obligation. In Heinl, the parties were married in November, 1984 and separated in July, 1992, a period of seven years and eight months, facts specifically by the Appellate division. Mrs. Heinl was 34 years old. In reversing the trial judge's opinion for inadequate findings of fact and conclusions of law under Rule 1:7-4, Judge Kleiner noted that although the trial judge noted duration had been considered, "the Court failed to fully articulate why a relatively short marital life required an award of permanent alimony rather than an award or rehabilitative alimony". Heinl at 346. Heinl preceded not only Carter, but more importantly the limited duration alimony statute. The need to explain why permanency was appropriate was "particularly important" in cases

where the alimony or recipient was "of a relatively young age". Heinl at 346. This criticism, while veiled by the requirements of R.1:7-4, was a clear message expressing the court's concern that if the parties are young there must be substantial reasons to require alimony be paid for a long period. The Court reasoned there was linkage between age and the future ability to obtain employment noting the distinction between someone who had been out of the work force for many years.

That observation on earning capacity is particularly significant and is a critical statement that should be utilized by counsel to argue the Appellate Division recognized the difficulty of re-establishing an earning capacity if one has been out of the work force for years. To justify this language, the Court relied upon Capodano v. Capodano, 58 N.J. 113, 119-120 (1971), a pre-statute alimony case involving a lengthy marriage where the wife was 56 and Skribner v. Skribner, 153 N.J. Super. 374, 376 (Ch. Div. 1977). Skribner involved a short marriage where the Court refused alimony to a 40 year old wife, thus emphasizing the importance of not only duration but its relationship to age.

Heinl emphasizes two critical points involving duration, particularly since the Appellate Division relied upon the Supreme

Court's decision in Lynn where the Court emphasized the absence of any mathematical correlation between the length of the marriage and the proper "amount or duration" of alimony. Lynn v. Lynn, 91 N.J. 510, 517-518 (1982). Thus, Lynn, Heinl, and the statutory factor of age, must be viewed in one overall analysis directing counsel's attention to the necessity of arguing not simply that this is a permanent alimony case because of the duration of the marriage, and the parties' age, but emphasizing, in as much detail as possible, what the impact of that duration had on the parties. The greater that impact, the more likely there should be an alimony obligation imposed without a fixed termination date and the loss of an earning capacity because of age (or any other reason) should not only be emphasized, but done so with references to the precedents discussed herein.

### DRAFTING HINTS

If it has been determined that as part of a settlement the dependent spouse is to receive alimony for a fixed period of years, there are several different options, each with varying legal significance, to be considered. The agreement for a term raises as many issues as it resolves. Now that the Limited Duration alimony ("LDA") statute exists, in addition to LDA, parties can agree upon rehabilitative alimony or what I will characterize as non-modifiable term alimony, i.e. not statutorily based LDA support.

There are significant differences between the three. The first two are subject to modification and are statutory based. Non-modifiable term alimony is a contractually bargained for creation which, in virtually all instances, will provide for an enforceable support provision which cannot be modified either during or at the end of the term, if that is what the parties include in their agreement. Bargained for term is, in effect, an anti-Lepis provision with consideration which precludes modification. It is designed to avoid the modification risks that are associated with statutory alimony.

Rehabilitative alimony is discussed elsewhere in this article, but it's fundamental weakness from the standpoint of the

payor is the absence of both finality and certainty, since it is subject to modification at the end of the period. In representing the payor it is prudent to avoid any linkage to the statute and emphasize the bargained for nature of the provision i.e., I gave up something to obtain non-modifiability. In that way any modification issues would be determined by the contract negotiated by the parties - not the statute or the cases which otherwise permit modification. Any interpretation should be done through the prism of estoppel. Thus, under such bargained for term, any modification right that must exist under the LDA statute or under case law interpreting rehabilitative alimony statutes are essentially irrelevant; the parties' rights, duties and obligations are defined by the contract they signed and relied upon - not statutory provisions which otherwise would apply. This point must be made crystal clear in the agreement.

There are three essential points to negotiate; first, whether the alimony obligation irrevocably ends at the end of the term; secondly, whether there should be modification during the term; and finally what is the impact of remarriage/cohabitation during the term. Yet, a provision that provides for non-modifiability during and at the end of the term, does not automatically addresses cohabitation issues. Thus, it is subject to Gayet.

#### SPOUSAL SUPPORT (Term Alimony)

4.1 The parties acknowledge that a significant dispute prior to the entry of this Agreement was their conflicting views on whether the Husband was entitled to a fixed termination date as to his alimony obligation. In consideration of the terms and provisions of the overall agreement memorialized herein, the parties have agreed that the Husband's alimony obligation shall end \_\_\_\_\_ years from the effective date of this Agreement. The alimony obligation shall be construed as bargained for non-modifiable term. It shall not be construed as statutory limited duration ("LDA") alimony. The "unusual circumstance" language of the LDA statute shall not apply to the bargained for term alimony agreed upon herein. It is the agreement of the parties, which the Wife reaffirms, that the alimony termination shall not be modifiable. Both parties acknowledge the Husband has altered his position, both on equitable distribution and the amount and duration of alimony, in reliance upon the Wife's representations that alimony, both during and at the end of the term, shall not be modifiable. The Wife further acknowledges that but for her promise concerning non-modifiability the Husband would not have altered his prior position as to the amount of both alimony and equitable distribution to be paid to the Wife.

4.2 Notwithstanding any language contained in Lepis or its progeny the alimony termination at the end of the agreed upon term shall be non-modifiable as shall the amount of alimony to be paid during the term. This non-modifiability provision shall be and is irrevocable regardless of any circumstances that might occur in the future, foreseeable or not. Specifically, the Wife waives any rights that exist under Lepis and its progeny to later argue that subsequent changes in circumstances (of whatever nature, type or extent) render the non-modifiable provisions of this Agreement either unfair, inequitable or unenforceable. It is the specific agreement of the parties, upon which the Husband is relying, to incorporate concepts of collateral estoppel to prevent and preclude the Wife from seeking modification of any portion of the alimony provision (amount or duration). Had the Wife not made such warranties the Husband would not have agreed to obligate himself to the economic responsibilities imposed upon him by this Agreement.

4.3 The parties further acknowledge that normally the Lepis decision provides certain rights enabling alimony to be modified either at the end of or during the term. The parties have further been advised that the Morris decision suggests that in certain circumstances what is commonly known as a Lepis waiver

may be subject to modification. Notwithstanding the existence of such legal principle the parties have expressly bargained to preclude any language in either Lepis or Morris (or any other case decided or to be decided) from applying to the non-modifiability provisions set forth herein. The parties have stipulated and agreed that those principles or any similar principles shall not be applied at any time in the future (regardless of the circumstances that might occur, foreseeable or not) to allow or permit any change to the non-modifiability provisions expressly bargained for and relied upon herein by the Husband. The parties have expressly bargained for and have agreed to incorporate the language and rationale of the Avirett decision, notwithstanding the parties' recognition the decision has been over-ruled.

4.4 The Wife acknowledges that, given her earning capability and the assets received by her hereunder, that she shall not be economically dependent upon the Husband either now or in the future and can maintain herself a standard of living she deems fair and equitable, even if different than she enjoyed during the marriage. She further acknowledges the parties have expressly considered the protection afforded the Wife in the future by the transfer to her of the retirement funds in waiving

whatever Lepis rights that may otherwise exist. The parties have also expressly considered all of the adverse possible effects that could occur to the Wife including the loss of her employment, the inability to find employment, health risks, changes in custody, the possible impact of inflation, market risks associated with assets transferred to her, and further reaffirm the binding and irrevocable nature of the non-modifiability provisions set forth herein. This provision shall not be subject to modifiability, even if there are substantial and dramatic increases in changes in the Husband's income or overall financial circumstances, regardless of the source, nature, scope, or duration of those changes, and whether they are foreseeable or not.