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Family Law

Taking Lifestyle Into Account

Supreme Court ruling requires judges to factor in marital standard of living when awarding alimony

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There is little dispute that the New Jersey Supreme Court's decision in *Crews v. Crews* has raised myriad questions and concerns for the state's family law practitioners and will have a profound impact on their practice.

In *Crews*, the Court held that Family Part judges must make detailed findings of the marital standard of living before alimony is awarded or altered. 164 N.J. 11 (2000). The decision dramatically changes how judges decide such cases by requiring them to explain how they arrived at alimony awards. The Court also gave Family Part judges specific directions on how to make these determinations.

Following the May 31 ruling, in an unprecedented step earlier this summer, the Family Division Practice Committee convened a special session of its general procedures subcommittee to propose the formation of *Crews* questions for study by the full committee.

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This article is intended to contribute to the continuing dialogue about the issues raised and created by the Supreme Court's decision in *Crews*. It is essential that dialogue between bench and bar continue so that the decision can be implemented appropriately and practically.

Crews is not primarily a case about substantive law, but rather it is about procedural law. The decision establishes and requires that specific objective procedures must occur in each and every case where alimony is determined, whether it be contested or uncontested, or an original alimony judgment or subsequent modification of that original alimony award.

The ruling should have no impact on cases to be adjudicated because since 1988 courts always have been required, by statute, to adjudicate and to make factual findings regarding statutory criteria. *Crews* creates rights only to the extent that it confirms an original decree must have had a finding with respect to marital lifestyle.

To the extent that the original adjudication did not make findings about marital lifestyle, or the ability (or disability) of each spouse to maintain a lifestyle reasonably comparable to that style, a litigant who seeks to modify support can demand that the marital lifestyle finding be made. Once lifestyle is found, a court must ascertain whether it will be possible to maintain a reasonably comparable lifestyle, in view of the alimony awarded, or whether an adjustment should be made.

Crews has potential significant impact on cases to be settled, depending on the interpretation followed. In a settled case, where the parties have stipulated that the support agreed to in their agreement enables each of them to live a lifestyle reasonably comparable to the marital lifestyle, must the court elicit through questioning information that identifies the lifestyle beyond the support figure?

If, however, the court believes that additional measures of lifestyle are required beyond the support levels fixed and the income levels articulated, what questions should the court ask? If the parties resolve their case and the court believes (regardless of the status of agreement language) that it must make inquiry to satisfy the requirements of *Crews*, then it might be practical to ask the following:

- Did you prepare case information statements to reflect what you believed were costs necessary for you to maintain a lifestyle reasonable comparable to the marital lifestyle?
- Is the alimony you agreed to, in connection with whatever your anticipation is for the future concerning your

own earnings, sufficient to enable you now to maintain a residence reasonably similar to the marital residence or residences you and your husband (wife) resided in during the marriage

• Is the alimony you agreed to, in connection with whatever your anticipation is for the future concerning your own earnings, sufficient to enable you now to maintain transportation expenses reasonably similar to the transportation expenses you and your husband (wife) had during the marriage.

• Is the alimony you agreed to, in connection with whatever your anticipation is for the future concerning your own earnings, sufficient to enable you now to maintain Schedule C expenses reasonably similar to the Schedule C expenses you and your husband (wife) had during the marriage.

aware that in the future some judge may have to address and find what that lifestyle was and that the cost of doing so may be more expensive, and the determination less accurate, than it would be now; but

5. Nevertheless, they wish to conclude this matter on the terms set forth in the agreement, and to defer the court's determination as to marital lifestyle.

Depending on the court's view of what its responsibilities are under *Crews*, it either may recite as a finding that acknowledgment and stipulation by the parties, or it may determine to ask specific inquiries such as the following:

• Why do you not want me to make a finding concerning what the marital lifestyle is?

• You are aware that if you desire, it is my obligation to conduct inquiry and make a finding as to what the marital lifestyle was and in connection with that finding also determine whether or not the support levels that you have agreed on are sufficient to enable you and your husband to maintain a lifestyle reasonably comparable to the marital lifestyle.

• Knowing that do you elect not to have me make that finding now?

• Do you understand that if either you or your husband come back to court in the future with respect to alimony issues, that a judge will have to, at that time, make a finding as to what the marital lifestyle was before being able to determine and consider any application you or your husband may make with respect to reducing or increasing any aspect of alimony.

• Do you understand further that the cost of any proceeding you may have in the future may very well be increased because of the court's need to go back to the time of your marriage to make a finding concerning lifestyle?

• Do you further understand that to make that finding in the future may be more difficult, time-consuming and possibly inaccurate because of the passage of time and the unavailability of evidence that otherwise would be used by a court to make that finding.

Some proposals have suggested that if the parties come to court indicating that they have not been able to agree about the marital lifestyle or whether the support set enables each to maintain a reasonably comparable lifestyle, the court should ask each party to describe their perspective on what they believe the marital standard of living was.

However, such questioning will only elicit two disparate sets of information about the marital lifestyle. When there is a disagreement, the court will not be able to make a determination concerning the marital lifestyle without a full trial, including, if desired, the submission of experts' proofs. If the court can make no finding about what the marital lifestyle was, what assistance is provided in the future in the event of a modification application at having adduced information at the time of the divorce about each side's divergent perspective on the marital lifestyle?

The solemnity that courts must attach to the process of lifestyle findings must be evaluated in connection with reference to the statutory criteria. Lifestyle is only one factor to be considered; the court in *Crews* reaffirmed that there must be findings of fact regarding all of the statutorily designated criteria.

"An alimony award that lacks consideration of the factors set forth in N.J.S.A. 2A:34-23(b) *is inadequate and one finding* that must be made is the standard of living in the marriage. N.J.S.A. 2A:34-23(b)(4)" (Emphasis added.)

Certainly, trial court cannot be expected to make findings regarding each of the statutory criteria in order to accept the support provisions of an agreement reached by the parties every time an alimony agreement is consid-

What happens when the parties can't agree on what the marital standard of living was? Questioning each party will only elicit two disparate sets of information, and the court will not be able to make a determination without a full trial, including, if desired, the submission of experts' proofs.

These questions certainly would be the "long form" of adducing marital lifestyle information. If there is a stipulation, this would not seem necessary, so long as income foundation information is elicited.

Suppose the parties come to court:

1. Not having stipulated that the support arrangements set in the agreement are sufficient to enable each of them to maintain a lifestyle reasonably comparable to the marital lifestyle; and

2. Advise the court that they have agreed to resolve the matter; and

3. Ask the court not to make any findings about the marital lifestyle because they want to spare themselves the discord and expense of presenting proofs on that issue; and

ered. That would be analogous to requiring the trial court to pass on the fairness and equity of each settlement. The fact this doesn't occur is a reflection that courts allow divorcing individuals to determine for themselves what is fair and equitable. Only if either party asserts that a resolution is not fair and equitable would the court be required to interject itself into that fray and make that determination.

New Jersey public policy always has favored consensual resolution of all disputes, particularly those involving vexatious person problems arising out of matrimonial litigation. See *Peterson v. Peterson*, 85 N.J. 638, 645 (1981); *Smith v. Smith*, 72 N.J. 350, 360 (1977); *Konzelman v. Konzelman*, 158 N.J. 185, 193 (1999). In *Peterson*, the state Supreme Court noted that it would be: "Short-cited and unwise for courts to reject out-of-hand consensual solution to vexatious personal matrimonial problems that have been advanced by the parties themselves."

This policy supports parties being able to conclude a case despite disagreement about whether the support level enables maintenance of a lifestyle reasonably comparable to the marital lifestyle. So long as the factual predicates set forth in the preceding proposed questions are posed, there appears to be no valid state interest or public policy served by preventing the agreement from being concluded without further inquiry. After all, if courts are going to insist on such findings, despite the parties acknowledging disagreement and willingness to go on without findings, then the court cannot limit the evidence that each party may wish to submit.

Expert testimony could be introduced; corroborating witnesses could be presented; and myriad other information and demonstrative evidence could be introduced and would be subject to extensive cross-examination. There seems no good reason for this if there is an appropriate stipulation, even the stipulation is only as to a disagreement concerning the marital lifestyle, and a willingness to defer a judicial resolution of that issue.

Retroactive Application of *Crews*

In cases where there has been no stipulation or finding about the marital lifestyle, some believe that the requirement of *Crews* should be applicable only to cases concluded after Sept. 1, 1988. Any such case where no finding or stipulation was made about the marital lifestyle, or the sufficiency of the alimony award to enable the parties to maintain a reasonably comparable lifestyle, is deficient from a *Crews* perspective. Before any post-judgment application can be decided in such a case, there must be a finding about marital lifestyle.

Before that date, when the statutory alimony criteria were adopted and the court became required to make findings about these criteria, the perception was that the support amount in the parties agreement was a reflection of the marital lifestyle.

In *Lepis v. Lepis*, the New Jersey Supreme Court said

> An increase in support becomes necessary whenever changed circumstances substantially impair the dependant spouse's ability to maintain *the standard of living reflected in the original decree or agreement*. Conversely, a decrease is called for when circumstances render all or a portion of support received unnecessary for maintaining that standard. After finding that the dependant spouse cannot maintain the original standard of living, the court must consider the extent to which the supporting spouse's ability to pay permits modification. 83 N.J. 139, 152-53 (1980) (emphasis added).

In *Turner v. Turner*, the trial court referenced that after a divorce, two people rarely can live as cheaply as one. The court also noted that in a divorce context, both parties usually scale down their style of living. The court stated:

> Our cases are replete with language that a divorced woman is entitled to be maintained in the style of life to which she became accustomed during coverture. *Yet we all know that in the vast majority of cases we hear today that is not possible.* Where the parties were required to spend during coverture practically all of their income, with little or no savings, to maintain a certain living style, it takes no great insight to appreciate that following the divorce neither will have access to the same amount of funds and both will have to scale down their style of living. 158 N.J. Super. 313, 317, 318 (Ch. Div. 1978) (emphasis added).

Moreover, in *Gugliotta v. Gugliotta*, Judge William Dreier, commenting on the policy underpinnings of alimony, said:

> Although these may be some reasons for the award of alimony, a paramount reason exists, viz., 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. 160 N.J. Super. 160, 164 (Ch. Div. 1978) (emphasis added).

Although lifestyle was always a concept used by courts when assessing alimony there was never any obligation before the adoption of the 1988 statute for a court to make specific findings about the issue of lifestyle. The focus was on the needs of the supported spouse, the ability of the supporting spouse to meet those needs and, following *Lepis*, an assessment of the supporting spouse's capacity to contribute to satisfaction of those needs.

However, with the adoption of the statute in 1988, courts were charged with considering and making specific findings about the statutory criteria. Practitioners' focus, therefore, also was more clearly directed to consideration of the statutory criteria when presenting proofs and negotiating agreements. Is it fair then to conclude that pre-criteria statute (Sept. 1, 1988) agreements and adjudications should be construed to assume that the support levels set are an

acknowledgment of the marital lifestyle, and that agreements executed, and adjudications made, after the statute's adoption should not be construed to reflect the marital lifestyle unless that is stated, stipulated or adjudicated?

Although *Innes v. Innes*, 117 N.J. 496 (1990), held that the double-dipping pension amendment from the 1988 statute was applicable to any modification sought after Sept. 1, 1988, of an original order, regardless of when the original order was entered, a similar holding was not made with respect to findings about statutory criteria. Moreover, *Innes* held that the law adopted criteria that supplemented the criteria formerly used to set alimony. See *Innes*, 117 N.J. at 536.

It seems fair, from an administrative perspective, to construe *Crews* to require findings with respect to statutory criteria, only in orders entered after the statutory criteria were effective. The entry of a support award or support agreement, prior to Sept. 1, 1988, that does not specifically reference that the sum is being accepted because of reduced income level at the time of the divorce or other impediment to maintenance of the marital lifestyle, should reasonably be construed to provide the aforesaid agreement is reflective of the marital lifestyle. In the March/April 1990, (Volume X Number 3) issue of the *New Jersey Family Lawyer*, this author wrote an article entitled, "Preparing and Defending the Support Modification Application." The article set forth the following:

> I have seen applications for increased support that are premised in part upon the position that the support levels set in the property settlement agreement at the time of the divorce were artificially low and did not reflect the marital lifestyle because of some extraordinary turn of events shortly before the divorce. I am not impressed with such arguments unless the document sought to be modified contains *prima facie* indication that the support levels and income levels there referred to are not reflective of the income levels attained during the marriage. Absent that specific delineation, the argument that the support level set in the original agreement does not reflect the marital lifestyle in effect asks the court to re-litigate an issue that should have been conclusively determined at the time of the divorce. If that argument is to be preserved for post-judgment contention, then it should be clearly set forth as a contention in the original agreement. Absent that, a court should not allow itself to be manipulated into litigating a claim that should have resolved or preserved earlier.

However, since, in most instances, a supported spouse would be seeking increased support to enable her to maintain the marital lifestyle, and since the purpose of the statute, in part, was, as Justice Daniel O'Hern said, "to bring a non-wager earning spouse up to par with a wage earning spouse," an interpretation of *Crews* that assumed lifestyle was maintained by the support level reached in pre-Sept.1, 1988, agreements probably would work to the disadvantage of the nonwage earning spouse.

Hopefully, this article, and continuing symposia, will contribute to a continuing dialogue about the construction and interpretation of *Crews*, which will facilitate fair and just implementation of the decision. ■