

# Saving/Investing as a Component in Awarding Spousal Support

by Angelo Sarno

In modern day society, middle-class, single wage-earning households are quickly becoming extinct. As a result, there often exists a disparity in income between the husband and the wife which causes the lower wage earner to be dependent upon the spouse with the greater earning ability. This disparity exists even more so in financially advantaged households where one spouse is the sole breadwinner for the family. Consequently, in most cases, a non-dependent spouse has an obligation to provide for the dependent spouse during the marriage, during divorce litigation, and often after the divorce proceedings are complete.

While a bit elementary, a brief background relating to the definitions and purpose of support is necessary to understand the underlying intent behind it. Marital support is the natural and legal duty owed by the non-dependent spouse to the dependent spouse during the course of the marriage.<sup>1</sup> Spousal support consists of both *pendente lite* support and/or alimony. These are largely synonymous terms, the major distinction involving the time each is utilized. *Pendente lite* support is financial maintenance provided by a non-dependant spouse, either voluntarily or under court order, to the dependent spouse during the pendency of the matrimonial action.<sup>2</sup> Alimony is an allowance for support and maintenance which a non-dependant spouse is required to supply to the dependent spouse after the matrimonial action is complete.<sup>3</sup>

The two primary reasons for awarding support and alimony are to permit a dependent spouse to share in the accumulation of the marital assets and to prevent the dependent spouse from becoming a public charge.<sup>4</sup> However, Judge William Dreier, in *Gualiotto v. Gualiotto*,<sup>5</sup> held that a paramount reason is to permit a dependent spouse to share in the economic rewards occasioned by the non-dependant spouse's income level reached as a result of their combined labors both inside and outside the home.

*Pendente lite* support and alimony are largely based upon a dependent party's needs and the non-dependent party's ability to pay.<sup>6</sup> Furthermore, *pendente lite* support and alimony are also based on support and the parties standard of living during the marriage. Its basic purpose relates to the quality of economic life to which one spouse is entitled and then becomes obligated to the other.<sup>7</sup> The objective of support or alimony is the continuation of the standard of living enjoyed by the parties prior to separation and the supporting spouse's obligation is set at the level which will maintain that standard.<sup>8</sup> Needs are not measured merely by the amount of money necessary to maintain the dependent spouse at a level of reasonable comfort, but needs contemplate the amount necessary to maintain the dependent spouse in a manner commensurate with the former marital status.<sup>9</sup>

Thus, one of a matrimonial court's main duties

when awarding spousal support is to gauge any award in accord with the former marital standard of living. Nonetheless, this standard is often deviated from because there is no clear authority in New Jersey which states that a matrimonial court can specifically consider the party's past practice and future ability to save or invest. Often is the case where a dependent spouse loses the financial ability to set aside money for savings or investments, thus enabling her or him from providing for a secure future. Due to an insufficient amount of support or alimony, a dependent spouse is often forced to forego many aspects of the former marital standard of living, i.e., the ability to save or invest for a secure future, unless other assets are depleted to provide an additional source of income.

Consequently, the result is often the same; the dependent spouse is forced to live below the former marital standard of living while in reality the non-dependent spouse gets the financial benefit of the disproportionate award of support or alimony, a result which totally contradicts the concept of spousal support. Alimony is neither punishment to the payor nor reward for the payee, nor should it be a windfall for any party.<sup>10</sup>

Rule 5:5-2(a) provides in pertinent part, that a case information statement (CIS) be filed in all contested family actions in which support and alimony are at issue. Simply, the purpose of the CIS is to give the court and the other party an accurate, complete, comprehensive, portrait of each party's financial information, both presently and during the marriage.<sup>11</sup> Schedule C of the CIS labeled "PERSONAL" (expenses) specifically requires a party to designate an amount they utilize per month for savings/investments.<sup>12</sup> The designation for savings is listed among other line items such as food, home and household supplies, domestic help, children's private school costs, and day care expenses.<sup>13</sup> It could be argued that since the Supreme Court specially designated an amount for savings to be included as financial information for the Court, it just like the other items of Schedule C, should be taken into consideration. For example, the court whenever applicable, specifically includes work-related and qualified child care expenses as a component in a child support award, Why shouldn't the Court do the same with savings when awarding alimony?<sup>14</sup>

It may also be argued that the Supreme Court did not intend to give all the line items listed under Schedule C equal value for support determination purposes. For example, an expense such as day care surely should be considered heavily by a court setting support, while an expense such as toiletries and sundries should be considered less, if at all. However, the fact remains that in certain situations the component of savings/investments has a great financial significance in defining a party's standard of living, and therefore

it should not be overlooked.

While there exists no New Jersey case law directly on point, there are a series of cases which hold that a court may allow sufficient alimony to enable a dependent spouse to accumulate reasonable savings in order to protect against the day when alimony may cease due to the non-dependent spouse's death or changed circumstances.<sup>15</sup>

In *Martindell*,<sup>16</sup> the Court held that a change in circumstances had been established by the wife which justified an increase in alimony. The wife established that she was depleting her assets in order to maintain herself and the children and manage the persistent rise in the cost of living.<sup>17</sup> Examples, such as the wife being forced to sell her automobile, forego domestic help, and a financial inability to replace 20-year-old furniture were cited by the Court.<sup>18</sup> The court further stated that the current support order made it impossible for the wife to retain reasonable savings against the day when alimony payments would cease because of her ex-husband's death.<sup>19</sup>

In *Capodanno*,<sup>20</sup> the Supreme Court reversed the Appellate Division's ruling which held that no separate maintenance (*pendente lite* support) was warranted in the case based on the wife's employment earnings. The Supreme Court's decision centered around the misapplication of the definition of "need" for determining support.<sup>21</sup> The Court stated, "It [Appellate Division] took into account only the fact that the wife was able to support herself by her own means at a level of modest comfort."<sup>22</sup> The Supreme Court's rationale was that the parties had the benefit of two incomes during the marriage to establish the parties marital standard of living; however, now that the wife lost the benefit of the husband's income, she would have to attempt to maintain the same marital standard on her sole earnings, causing a diminution of her resources.<sup>23</sup> The Court cited inequities such as being forced to give up vacations and depletion of existing savings post-separation as examples of deviations from the former marital standard.<sup>24</sup> A total of \$400 per month was awarded as support, and it was reasoned that:

The amount is necessary in light of her present earnings to maintain her in the pattern of living she has become accustomed to prior to separation, and to allow her to retain reasonable savings to provide for an uncertain future. <sup>25</sup> (emphasis added)

The Supreme Court in both *Martindell*<sup>26</sup> and *Capodanno*<sup>27</sup> specifically referenced the dependent spouse's depletion of assets in an attempt to maintain the prior marital standard, inability to vacation, maintain an automobile, employ a housekeeper or save. The Court viewed the foregoing as deviations from the former marital standard of living, and accordingly increased the dependent spouse's alimony in order to compensate the dependent spouse for the inequality. It can be reasoned that if the expenses of vacations, separate automobiles, or housekeepers never existed during the marriage in *Martindell*<sup>28</sup> and *Capodanno*,<sup>29</sup> the Supreme Court would not have allowed the non-depen-

dent spouse to be liable for those expenses after the marriage. However, the Court did allow the expenses to be included as factors, which comprised the former marital standard of living since they existed during the marriage, and adjusted the spousal support accordingly.

The above referenced cases evidence the fact that the Supreme Court of New Jersey, at least in the 1970s, deemed the ability to save an important factor when awarding support and alimony. Although the cases apparently attempt to give a dependent spouse a form of life insurance to ensure support after the death of the non-dependent spouse, the Court's rationale or principle underlying the decisions can be applied to the instant argument: The dependant spouse should be afforded a similar standard of living post-divorce as maintained prior to separation.

Without the matrimonial court significantly considering the savings/investment component when awarding support and alimony, the dependent spouse will often be at a standard of living below that enjoyed during the marriage. The dependent spouse would then be forced to deplete assets in an attempt to regain the former standard. The same exact inequity remedied by the Supreme Court in *Martindell*<sup>30</sup> and *Capodanno*.<sup>31</sup>

Automobile allowances are specifically listed in the family part case information statement under Schedule B, along with vacations and domestic help which are listed with savings/investments under Schedule C.<sup>32</sup> Since the above are all line items listed in the case information statement and the Court increased support due to a dependent spouse's financial inability to maintain an automobile, vacation annually, or employ a housekeeper, it may be asserted that the Court would have ruled similarly if the dependent spouse had established a financial inability to accumulate savings. While the Court in *Martindell*<sup>33</sup> and *Capodanno*<sup>34</sup> did not have before it the issue of awarding support or alimony when significant savings/investments were a significant part of the marital standard of living, it ultimately increased the support and ruled that the dependent spouse should be afforded the ability to save for the uncertain future.

There are at least two jurisdictions which have considered the idea of awarding a savings component in support or alimony. In *Alzos v. Alzos*,<sup>35</sup> the Court reasoned that the dependent spouse could argue that any amount of alimony awarded should include a sufficient figure to enable savings. After hearing testimony at trial and considering all evidence presented, the Court was satisfied that a large portion of the parties' available income was immediately placed into savings and invested rather than expended on durable goods, recreation, or entertainment.<sup>36</sup> In addition to extraordinary savings and investments, the parties each listed a \$300 per month charitable contribution toward their goal of donating 10 percent of their income.<sup>37</sup>

The non-dependent spouse argued that the parties lived a meager lifestyle based primarily on the fact that they never owned new automobiles, and that the non-dependent spouse did all the home and car mainte-

nance for the family.<sup>38</sup> Nonetheless, the Court concluded that the excessive savings and charitable contributions in and of themselves were evidence of the parties' high standard of living.<sup>39</sup> The Court reasoned:

*Husband's position is tenuous because it ignores the fact that the income was available but was spent on more conservative ways. Rather than have luxuries, husband chose to save, but that does not mean that it was wife's preference to live frugally ...*<sup>40</sup> (emphasis added)

The Court held that the dependent spouse could argue that she is entitled to a proportionate amount of alimony to enable her to save, because the parties' standard of living provided for ample savings during the marriage.<sup>41</sup>

Furthermore, in *In Re the Marriage of Margo Krupp*,<sup>42</sup> the non-dependent spouse filed a petition to modify and decrease the award of permanent maintenance based on the changed circumstances of the dependent spouse's unanticipated increased earning ability. The trial court reduced the non-dependent spouse's obligation from \$5,000 to \$2,500 per month, but the non-dependent spouse appealed the decision and the denial of his motion for reconsideration, seeking a complete abatement of his obligation or a further reduction.<sup>43</sup> The Appellate Division affirmed.<sup>44</sup>

At the trial level, the dependent spouse testified that she went back to work after the divorce so that she could "build up money so that later on [she would] have something to live on."<sup>45</sup> It was argued that the money she received from the non-dependent spouse was insufficient to support the lifestyle established during the marriage of 31 years.<sup>46</sup> In addition to numerous other changes in lifestyle, the dependent spouse claimed that she could no longer belong to the East Bank Club, could not afford to replace her eight-year-old automobile, and could no longer travel as the parties once did.<sup>47</sup>

The appellate court stated that the dependent spouse's asset growth of approximately \$70,000 from the time of divorce was properly considered by the lower court.<sup>48</sup> The majority of the increase was due to wise investing, and the court was satisfied that had it not been for the dependent spouse's wise investing, she would have had to deplete her savings in order to maintain the former marital standard of living.<sup>49</sup> It was determined that the dependent spouse saved approximately \$2,202 per month, which was only about a quarter of the amount that the parties set aside for savings and retirement during the final years of the marriage.<sup>50</sup> The court stated.

*While it is true that neither the statute nor the judgment of dissolution gives the petitioner the vested right to set aside \$2,202 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.*<sup>51</sup> (emphasis added)

These two jurisdictions clearly express the court's authority to give a dependent spouse the ability to save for the future if savings were a past part of the marital lifestyle. The trial court in *In Re Margo Krupp*<sup>52</sup> specifically took into consideration the dependent spouse's inability to accumulate future savings as done during the marriage and was affirmed by the Appellate Division. *In Re Margo Krupp*<sup>53</sup> can be interpreted as holding that the dependent spouse does not lose rights or privileges that clearly existed during the marriage simply because the parties are now divorcing. If the practice of savings existed during the marriage, then to some degree it should also exist after the marriage. While it can be noted that in both cases the parties were financially advantaged, or at least maintained a high standard of living, the concept of future savings/investments as a component of alimony can be applied in all applicable cases in various amounts scaled to the parties' income level. At the least, under the right facts and circumstances the New Jersey courts should be persuaded to include an amount for savings when awarding support during the *pendente lite* stage of the litigation because the court has the power to retroactively modify any award at final hearing.<sup>54</sup> Consequently, a court can make an award of alimony which allows future savings and later retroactively modify the support and credit the dependent spouse accordingly, either through motion or at final hearing, if it is established that such an award should not have been entered.

N.J.S.A. 2A:34-23(b) (10)(West 1996) states that a court, when awarding alimony, can consider any other factors which it may deem relevant. Furthermore, family courts are courts of equity, and the law is clear that they may award alimony in divorce actions "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just ...."<sup>55</sup> If the proper foundation is laid a court of equity can order any remedy which will avoid an inequitable result. As such, a family court judge has the authority to consider saving/investing as a component of spousal support when clearly evidenced in the party's marital lifestyle in order to avoid an inequitable outcome to the divorce litigation.

After a divorce, both parties should be left in the same or as similar a financial position as possible; no one party should be placed at a financial advantage at the expense of the other. While it is difficult to balance all the equities, a court should look at a party's future ability to acquire assets. Existing savings and investments acquired during the marriage can easily be equally divided, and the same result should occur for the division of the "ability to save or invest" when such an ability existed during the marriage. With the references to the case information statement, New Jersey case law, New Jersey statutes, foreign jurisdiction case

law, and the general equity principles of the Chancery Division, a court should be persuaded that an award for future savings is legally permissible given the correct facts and circumstances.

Several questions, however, arise if a court does provide for this "ability to save." They include the following:

- Will an award of support with a specific designated amount set aside for savings satisfy appellate review?

- Must a specific amount be set aside each month as savings, or does the spouse have the discretion to spend it as if the entire support figure awarded was straight alimony (forced savings v. discretionary savings)?

- Will accountings be necessary to insure that the amount allotted for savings is actually being set aside?

- Will post-judgment motions be necessary to determine the proper invasion of the savings (loss of employment v. lavish vacations)?

- How will the court treat a changed circumstances upward modification application based on the already increased amount of support awarded?

Regardless of the method utilized or the conditions which should or should not be placed on the support award, the concept of future savings as a component in an award of spousal support is available to the litigant provided the proper facts and circumstances are presented and the attorney is creative enough to argue the point. ■

## Endnotes

1. *Davis v. Davis*, 184 N.J. Super. 430 (App. Div. 1982).
2. *Turi v. Turi*, 34 N.J. Super. 313 (App. Div. 1955).
3. *Davis*, 184 N.J. Super. at 436.
4. *Lynn v. Lynn*, 153 N.J. Super. 377, 382 (Chan. Div. 1977).
5. 160 N.J. Super. 160, 164 (Chan. Div. 1978), *aff'd* 164 N.J. Super. 139 (1978).
6. N.J.S.A. 2A:34-23(b) (1) (West 1996); *See E.g., Nebel v. Nebel*, 99 N.J. Super. 256 (Chan. Div. 1968), *aff'd* 103 N.J. Super. 216 (1968); *Greenberg v. Greenberg*, 126 N.J. Super. 96, 100 (App. Div. 1973); *See also* N.J.S.A. 2A:34-23(b)(2)(10) (West 1996) (other factors include the physical condition of the parties, their social position, separate property and income of the dependent spouse).
7. *Mahoney v. Mahoney*, 91 N.J. 488 (1982).
8. *Koelble v. Koelble*, 261 N.J. Super. 190 (App. Div. 1992).
9. *Capodanno v. Capodanno*, 58 N.J. 112, 118 (1971), *citing* *Martindell v. Martindell*, 21 N.J. 341, 352 (1956).
10. *Aronson v. Aronson*, 245 N.J. Super. 354 (App. Div. 1991).
11. *See* Pressler, Current N.J. Court Rules, Comment R. 5:5-2, *citing* *Rothman v. Rothman*, 65 N.J. 219, 233 (1974).
12. *See* Pressler, Current N.J. Court Rules, App. V — Family Part Case Information Statement.
13. *Id.*
14. *See* Pressler, Current N.J. Court Rules, App. IX-E(E) (1)61(2).
15. *See* *Martindell v. Martindell*, 21 N.J. 341, 345 (1956); *Flicker v. Chenitz*, 55 N.J. Super. 273 (App. Div. 1959), *cert. granted* 30 N.J. 152 (1959), *appeal dismissed by consent* 50 N.J. 566 (1959); *Khalaf v. Khalaf*, 58 N.J. 63 (1971); *Capodanno v. Capodanno*, 58 N.J. 113, 120 (1971); *Grotzky v. Grotzky*, 58 N.J. 354 (1971).
16. 21 N.J. at 352-54
17. *Id.* at 353.
18. *Id.*
19. *Id.* at 354; *See also* *Khalaf*, 58 N.J. at 70.
20. 58 N.J. at 113-14 22.
21. *Id.* at 118.
22. *Id.*
23. *Id.*
24. *Id.*
25. 58 N.J. at 18.
26. *Martindell*, 21 N.J. at 341.
27. *Capodanno*, 58 N.J. at 113.
28. *See supra*. note 28.
29. *See supra*. note 29.
30. *See case cited supra*. note 28.
31. *See case cited supra*. note 29.
32. *See* Pressler, Current N.J. Court Rules, App. V Family Part Case Information Statement.
33. *See case cited supra*. note 28.
34. *See case cited supra*. note 29.
35. 1994 WL 814248, at \*9 (Del. Fam. Ct. Feb. 18, 1994).
36. *Id.* at 8.
37. *Id.*
38. *Id.*
39. 1994 WL 8142481 at \*8.
40. *Id.*
41. *Id.* at \*9.
42. 207 Ill. App. 3d 779, 566 N.E.2d 429 (1990).
43. *Id.* at 782, 566 N.E.2d at 430.
44. *Id.* at 799, 566 N.E.2d at 441.
45. *Id.* at 795, 566 N.E.2d at 439.
46. *Id.*
47. *Id.*
48. *Id.* at 795, 566 N.E.2d at 439.
49. *Id.*
50. *Id.*
51. *Id.* at 796, 566 N.E.2d at 439-40.
52. *See supra*. note 44.
53. *Id.*
54. *See* *Mallamo v. Mallamo*, 280 N.J. Super. 8, 12 (App. Div. 1995).
55. *Cerminara v. Cerminara*, 286 N.J. Super. 448, 458 (App. Div. 1996), *citing with approval* *Innes v. Innes*, 117 N.J. 496, 503 (1990), *quoting* N.J.S.A. 2A:34-23 (West 1996).

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