

## Lifestyle cases

(1)

As the second district said in *Jones v. Jones*, 28 So.3d 229 (Fla. 2d DCA 2010):

“... [T]he Joneses, as a single family unit, lived a modest, middle-class lifestyle. No matter what judgment a trial judge fashions in this case, the two family units created by the divorce cannot maintain the same lifestyle. Like many Floridians in these difficult economic times, the Joneses almost cannot afford to divorce.”

(2) As the court said in *Marsh v. Marsh*, 533 So.2d 366, 367-368 (Fla. 5<sup>th</sup> DCA 1989):

“The problem may be the common one that, before dissolution of the marriage, by incurring debt, the family lived beyond its economic means and that, after the marriage is dissolved, to live separately and to maintain two households, will cost even more.”

(3)

Under the facts of this case, the wife’s need for alimony cannot be determined by making “marital lifestyle” a “ ‘super factor’ trumping all other factors in awarding alimony.” *Jaffy v. Jaffy*, 965 So.2d 825 at 828 (Fla. 4<sup>th</sup> DCA 2007) *citing Nichols v. Nichols*, 907 So.2d 620 at 623 (Fla. 4<sup>th</sup> DCA 2005). To paraphrase the opinion in *Jaffy*, “when a high standard of living has been possible only [by living at the edge of their means or beyond their means] awarding permanent alimony fixed at that standard could have a pernicious effect. Doing so rewards extravagance and encourages lifetime profligacy while discouraging correction, legitimizes waste, and perverts the basic purpose of alimony - providing assistance for those who are unable to support themselves. Fixing alimony at a profligate standard of living is to turn alimony into a lottery.” *Id.* at 827, 828.

The temporary record supports a finding that the husband and the wife still want things they cannot afford, but, as the court said in *Jaffy*, alimony is based on a “need” test, not a “desire or want test.” *Id.* at 828.

The comments by Justice Farmer in *Hillier v. Iglesias*, 901 So.2d 947 beginning at 949 (Fla. 4<sup>th</sup> DCA 2005) are instructive on the question of marital lifestyle and its importance as a factor in determining a spouse’s need for financial support:

“I note that the statute [§61.08] directs the court to consider all relevant factors but does not specify any listed factor as always relevant. I also note that the statute does not make any of these factors more important than another. Nor does the statute stipulate that any particular factor is always dispositive.

This listing of relevant economic factors was added to the statute in 1978 and was obviously part of the statute at the time *Canakar* was decided in 1980. In amending the statute the legislature did not adopt a statutory standard for determining when to award alimony. In short, the legislature did not intend to overturn the line of cases (cited in the majority opinion) holding that the purpose of alimony is to provide the necessities of life to a needy former spouse. It is clear that the statute does not modify the foundation facts for all alimony awards, namely need and ability.

From the actual text employed in these statutory factors, I think it is clear that the standard-of-living factor is obviously not applicable in every case. For example, in a marriage of modest assets and income with only one spouse having income, it would be absurd to think the paying spouse could maintain two households at the same standard of living after the dissolution. Dividing a standard of living on a \$50,000 annual income into two new households does not result in the two halves each remaining at the \$50,000 level. Clearly the standard-of-living factor must be intended to apply only when equity would make it so.

If the standard-of-living is not a super - or omnipresent - factor in setting the amount of alimony, it must have only a case specific, and more limited purpose. I think its intended use was to avoid having alimony set at bare subsistence levels when the standard of living during marriage was significantly better and the payor has the ability to pay more than minimum wage, so to speak. The middle class professional, as well as the wealthy plutocrat, who exposes the spouse to a standard during marriage beyond the mere necessities of life should be required to do better than mere subsistence with alimony. The purpose of the standard-of-living factor, therefore, is not to equalize the post marital lifestyle. Instead it is intended to avoid allowing the payor who makes enough to get away with mere subsistence.

Beyond that concept I do not believe the standard-of-living factor has much, if anything at all, to do with setting the amount of alimony in many cases. I do not think it is even relevant to do equity where both former spouses have annual earnings in the upper 10% of all incomes in this country. And I certainly do not agree, as the former wife argues here, that it is an imperative requirement in maintaining alimony long after the recipient has attained the income level she enjoys. *Cf. Kahn v. Kahn*, 78 So.2d 367, 368 (Fla.1955) (We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.”).

The temporary record demonstrates that this is a case in which it is now impossible to approximate the marital lifestyle, so the lifestyle cannot trump the other factors and especially not a finding of actual need.

(4)

Both spouses are required by law to “apply such talent as [he or she] may possess to mak[e] [his or her own way]” and “[T]he basic purpose of alimony [is to] provid[e] assistance for those who are unable to support themselves.” *Kahn v. Kahn*, 78 So.2d 367, 368 (Fla.1955).

The wife is able to work and provide somewhat for herself but even if she uses her best efforts she cannot duplicate the standard of living that the parties’ enjoyed when living together. Neither can the husband.

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encourages lifetime profligacy while discouraging correction, legitimizes waste, and perverts the basic purpose of alimony - providing assistance for those who are unable to support themselves. Fixing alimony at a profligate standard of living is to turn alimony into a lottery.” *Id.* at 827, 828.

The husband and the wife may want things and a standard of living they cannot afford, but, as the court said in *Jaffy*, alimony is based on a “*need*” test, not a “*desire* or *want* test.” *Id.* at 828.