

The High Life

In the divorce arena, much has been made lately of the standard of living enjoyed by the (once blissfully enraptured) couple. In most situations, the standard of living experienced by the couple is probably fairly well determined within a reasonable margin of error. Further, other than the typical middle-class concerns as to the near impossibility of maintaining two households as cheaply as one, we have a sense of what the parties should expect going forward. The purpose of this article is to address two areas where the standard of living is greatly complicated by financial factors that distort how the couple has been living. We are not dealing with unreported income – but rather the perhaps more benign issues of debt and gifts.

Let us first address the matter of debt. What with credit cards, home equity lines, and other all too readily accessible sources of funds, there are many examples of families living beyond their means, the living fueled by ever increasing levels of debt. There are probably two ways we can look at the matter of debt – that which tends to be paid off at various times, and that which tends to build up and doesn't get repaid.

As to the former, it is fairly common to see families stretching their resources, going into debt (credit cards are pretty common), but then reaching a point where they start paying down, or at the very least, the debt levels off and they manage to keep the debt approximately constant. At that point they are living, give or take, within their means. If debt reaches a level where it doesn't increase, in all likelihood we have at that point established a "real" or "normal" standard of living, though perhaps one needing to be averaged over a few year period.

However, what about the more dangerous situation – a regular, constant build-up of debt, ongoing and continuing, that is not paid down, that continues to increase – perhaps to the point where the family might even be on the edge of bankruptcy? Where clearly the standard of living has been, and continues to be, artificially inflated by relying on constant infusions of freshly borrowed funds, what need we do, if anything, to adjust those figures to a standard of living that is consistent with the family's actual resources? Do we simply go forward with the standard of living that has been established based on a foundation of ever increasing debt, or need we step that back so that it be within the parameters of what they can actually afford. Is it appropriate to take a position that the standard of living will need to be maintained at the same level as in the past – even though it is obvious that there is not the financial wherewithal to maintain it?

Let us now turn to living beyond one's income based on family largesse. The parties going through the divorce were able to maintain a standard of living in excess of their income, because one or more family members (often parents) provided an ongoing source of revenue. Will that continue – and how can you be sure? Can the parents' long history of being a significant source of funding for the marital standard of living be imputed to this now shattered marital estate going forward? Does it matter if the source of funds was from the chief wage earner's side – in which case someone might make the argument that he/she will continue to be able to provide support for the family as in the past because of the likelihood that past generosity will continue? Is that even remotely allowed, or reasonable? If so, does it then require some form of investigation of the parents' financial resources to determine if they will be able to continue to afford to

make these gifts? Can they possibly be held responsible to continue to make payments? If there are grandchildren involved, do we simply assume something to the effect that “everyone knows the grandparents will continue to be deep pockets?” Would it perhaps be fair to push the envelope, and assume that family will continue to help? Therefore, the support obligation is put at a level in excess of what would be appropriate based on income. This can be potentially a dangerous game, especially if the family source of revenues dries up.

What if the family gifts were from the non-wage earner (or the lower source of income) spouse? Is it appropriate to argue that he/she needs less support from the main wage earner because his/her family will cover the difference? Again, is that in any way a legitimate approach to future support needs? If there are grandchildren involved, does that make a difference in terms of expectations? Do we require only support payments in line with the level of income, and assume that the party being supported will continue to receive gifts?

Let us carry this one step further. What if the lifestyle was funded by the parents and we are now coming to a point where they are old enough, frail enough, ill enough or whatever, that it is reasonable to assume a near term demise. Is it appropriate to assume an inheritance – which in turn would continue to support the lifestyle? Does it matter if you have a copy of the will and the inheritance seems nearly certain; does it matter if you know that the parents are well off? What gives either party the right to insist or expect that this inheritance is a given? What if the parents change their mind, and leave their money to someone else? What if the parents really don’t have that much money? What if the parents suffer a financial reversal? What if the parents don’t follow the script – and instead (gasp) live? Perhaps it would work if a contingency were built into the MSA – along the lines of if an inheritance is received, alimony (child support) will be revisited.

Would it be possible in some way to get the parents, or other source of family gifting, to become part of the divorce litigation – voluntarily or involuntarily? Can the parents be obligated to continue a stream of cash flow to the now broken-up marital unit because of a long past history? Is it possible to make an argument that the poorer of the two spouses somehow entered into, or continued in, this marriage/relationship based on expectations (can we possibly reach as far as representations) of a better lifestyle based on family deep pockets?

Or, was this all a waste, and all that counts is the actual income. Forget debt, forget gifts. Take the income and whack it up – or, get those wild and crazy youngsters (?) to reconcile.
