New Jersey
Family Lawyer

Vol. 33, No. 5 — April 2013

Editor-in-Chief's Column

Alimony Policy: The Missing Element

by Charles F. Vuotto Jr.

There is no question that determining both the length and amount of alimony in New Jersey are fact-sensitive exercises requiring the analysis of 12 specific statutory factors with a 13th catchall factor. Any alimony analysis should not be relegated to formulaic guidelines, which by their very nature will only consider a few factors, such as the income of the parties and the length of the marriage. However, the fact that we may not wish to adopt guidelines or a formula approach does not mean that our law of alimony cannot be improved by providing judges, practitioners, and litigants with greater guidance regarding certain elements of the law, such as duration and modification based upon changed circumstances, cohabitation and retirement.

These concepts were more fully detailed in my column that appeared in the June 2012 edition of this publication.[1] In that column, I proposed that enhanced guidance will provide greater predictability and consistency in alimony awards. These improvements, in turn, will also provide for less costly litigation and more expeditious resolutions.

I submit in this column that another way to provide all concerned with greater guidance is to refine and clearly express the public policy underpinning permanent alimony.

What has happened in New Jersey regarding alimony obligations has become somewhat controversial, either to the supporting spouse or the dependent spouse, especially with regard to the duration of some awards and post-divorce applications to reduce alimony due to changed circumstances, such as unemployment, cohabitation and retirement.[2] For example, standards for reviewing such applications must be revised to recognize that even if unemployment does not last for an appreciable period of time, it may warrant review and relief from an alimony obligation.

Moreover, the standard for relief from alimony payments in the event of cohabitation by the dependent spouse needs to be revised, and a more expansive definition of cohabitation warranting relief must be devised. It is unfair to the former spouse that a dependent spouse and

a paramour, living as if they are married yet acting to keep their finances separate, can defeat a showing of an economic connection that would lead to a modification of the support obligation.

Most importantly, the law must recognize that the world has changed since principles for modification of alimony awards were initially established decades ago. So much of what we rely upon in the doctrine of changed circumstances was created in a world where fewer people cohabited, unemployment was the exception because people had job security, and life expectancy (along with work life expectancy) were significantly shorter than they are today. The problem with the current alimony reform movement is that the reformers equate modernization of the law with a wholesale abandonment of fairness instead of a case-by-case analysis.

One reason for any potential problems with our current alimony law may be an over-emphasis on one factor when awarding alimony (*i.e.*, the requirement to maintain the marital lifestyle). Specifically, when assessing statutory factors in connection with awards, too much emphasis is being placed on marital lifestyle, even though marital lifestyle is one of many factors to be considered. Sometimes it is forgotten that the marital lifestyle is an entitlement to be enjoyed by both spouses. If circumstances do not allow for maintenance of the marital lifestyle by both spouses, then both must be equitably impacted.

The over-emphasis on marital lifestyle when awarding alimony is drawn from case law, not the statute. In *Crews v. Crews*,[3] our Supreme Court "reaffirm[ed] the *Lepis v. Lepis*[4] principle that the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."[5] This obligation of the supporting spouse has been held as recognizing "…a continuing responsibility to contribute to the maintenance of the dependent spouse at the standard of living formerly shared."[6] However, the quintessential question raised by this column is whether this judicially imposed continuing responsibility of the supporting spouse to maintain the dependent spouse at a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse is indeed the proper policy for determining the duration and amount of alimony.

In the recent past, our state's Legislature reacted to judicial decrees in ways that family law practitioners did not see as fair. Recently, the Legislature responded to the judicial enforcement of oral or conduct-based promises to support in the palimony/living together cases by amending the statute of frauds. In order to prevent a potentially harsh outcome in reviewing alimony, a proposal to the Legislature or new case law focusing on different factors may avoid the imposition of alimony guidelines such as are currently being considered. Therefore, prompt attention or reconsideration of the current lifestyle-based policy behind alimony is required.

There are various reasons we could say that permanent alimony or limited duration alimony are awarded. It can be argued that one or more of the following reasons might lend support to an award of either permanent or limited duration alimony:[7]

A. To compensate for domestic services;

B. To compensate for economic and non-economic contributions to the marriage;

C. To reflect the concept of a joint marital partnership;

D. To provide the dependent spouse with the marital standard of living;

E. To reflect compensation for economic 'harm' or diminished earning potential caused to the dependent spouse by the marriage as a result of choices made during the marriage, including children and child-rearing responsibilities;

F. To compensate for the transfer of earning potential during the marriage from the supported spouse to the supporting spouse; and/or

G. To compensate for lost advantages as the result of the focus of parties' efforts on the higher earner's career.

This list is not exhaustive. There is no doubt that other reasons could support an alimony award. One thing is clear; the bench and bar must know the purpose or policy behind alimony before applying the facts of the case to each statutory factor.

It is this writer's opinion that the following policies for awarding alimony most fairly represent the current social and economic realities of society and create an equitable outcome when allocating resources and responsibilities between individuals:

1. To compensate the financially disadvantaged spouse for the economic or other 'harm,' damage, or diminution of earning potential caused by the marriage. This would recognize the situation where the dependent spouse has sacrificed his or her career advancement and earning potential for the marriage, so the goal of alimony should be to restore that person to the level of income he or she would have reached but for the marriage.

2. To compensate the financially disadvantaged spouse for the financial and non-financial contributions to the marriage (and/or other spouse) that benefited the other spouse from a financial perspective, including but not limited to enhanced earning potential, but reduced by the economic or other advantages enjoyed by the financially disadvantaged spouse that he or she would not have been able to enjoy but for the marriage.
3. To support the financially disadvantaged spouse who has become legitimately medically or mentally unable to support him or herself during the marriage at a reasonable standard of living.
4. To avoid the financially disadvantaged spouse from being a public charge.
5. To reflect that the entitlement of a financially disadvantaged spouse to a fair share of the marital standard of living is directly proportional to the length of the marriage.

Before judges, attorneys and litigants can proceed to apply the statutory factors, the reason why alimony in any particular case is sought must be determined. With these policies firmly stated and applied to the facts of a particular case, the court and counsel can then apply the statutory factors in the appropriate context. ■

The author wishes to thank many members of the NJFL Editorial Board for their invaluable input to this column.

Endnotes

1. 33 *NJFL* 1 (June 2012).
2. Perhaps the law should evolve to recognize the right and obligation of both parties to plan for retirement by implementing a new policy presumption in favor of alimony termination at normal retirement age, as defined by the full Social Security age.
3. 64 N.J. 11, 16 (2000).
4. 83 N.J. 139 (1980).
5. The author believes most would acknowledge that but for very few of the very high-end cases, it is nearly impossible for *either* party post-divorce to enjoy a lifestyle reasonably comparable to that enjoyed during the marriage. Further, it should be emphasized that *both* parties are entitled to this; that is, one should not enjoy the marital lifestyle at the expense of the other.
6. *Glass v. Glass*, 366 N.J. Super. 357, 370 (App. Div.), *certif. denied*, 180 N.J. 354 (2004) (*quoting Lepis v. Lepis, supra*, 83 N.J. at 152). *See Crews v. Crews, supra*, 164 N.J. at 16; *Innes v. Innes*, 117 N.J. 496, 503 (1990); *Heinl v. Heinl*, 287 N.J. Super. 337, 344 (App. Div. 1996).
7. The author does not include 'rehabilitative' or 'reimbursement' alimony in this column. The purposes for those two forms of alimony have been clearly and logically defined. Rehabilitative alimony permits a short-term award "from one party in a divorce [to] enable [the] former spouse to complete the preparation necessary for economic self-sufficiency, and ceas[es] when the dependent spouse is in a position of self-support." *Cox,* 335 N.J. Super. at 474-475 (citations omitted). Lastly, reimbursement alimony is awarded to "compensate a spouse who has made financial sacrifices resulting in a reduced standard of living by enabling the other spouse to forego gainful employment while securing an advanced degree or professional license to enhance the parties' future standard of living." *Id.* at 475 (citations omitted).

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Executive Editor's Column

Can Facebook 'Friending' Create the Appearance of Impropriety by a Judge?

by Ronald G. Lieberman

Judges who are Facebook 'friends' with lawyers or litigants should not hear their friends' cases.

Just about everyone reading this column probably knows what Facebook is, and most probably use the social networking website. But for the few who are not familiar with or do not participate in Facebook, users create a home page or profile page, detailing personal information such as interests, hometown, relationship status, employment, and schooling.[1] People can become friends of a user, which allows them to obtain access to one another's profile page subject to the privacy settings.[2] Once users have friended each other, they can see each other's photographs, post on 'walls' with information, read 'status' updates, read and make comments, and view the user's activities.[3] Users are permitted to comment on other users' comments and denote their acceptance of activities or postings by 'liking' a post by way of a click on a thumbs-up icon.[4] Facebook friends can engage in online 'chatting' with each other by sending messages to private inboxes.[5] Friends can also engage in instantaneous messaging.[6]

It appears that each of these actions involves active participation by a friend and provides information above and beyond what a person could otherwise learn from a casual acquaintance. The question becomes, does a judge's friending of a litigant or attorney have the potential to affect the public's confidence in the legal system?

Disqualification of a judge is expressly provided for in court rules. Rule 1:12, "Disqualification and Disability of Judges," deals generally with the disqualification of a judge.

Rule 1:12-1(g) specifically states that a judge shall be disqualified "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Pursuant to Rule 1:12-2, "Disqualification on Party's Motion," "[a]ny party, on motion made to the judge before trial or argument and stating the reasons therefore, may seek that judge's disqualification."

The prohibition against a judge demonstrating impropriety, or even the mere appearance of impropriety, is memorialized in the Code of Judicial Conduct. Canon 2 of the code states that "[a] judge should…act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2 goes on to provide that a judge "should not allow family, social, political, or other relationship to influence the judicial conduct or judgment." The commentary to Canon 2 states that "a judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny." A judge has been informed by the commentary to Canon 2 that he or she "must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

Canon 3, Part C provides that when a judge is performing his or her duties, he or she can be disqualified "in a proceeding in which the judge's impartiality might reasonably be questioned…." A judge must not create or acquiesce in any appearance of impropriety.[7] A judge's motivation in acting in a way that creates or acquiesces in any appearance of impropriety is not the issue; the judge's conduct is the issue.[8] There is no doubt that "rules governing judicial conduct are broadly construed, in keeping with their purpose of maintaining public confidence in the judicial system."[9]

Given those *caveats* and warnings to a judge about avoiding "social…or other relationships" that affect judicial conduct or judgment and a judge being informed that he or she must "accept restrictions on personal conduct," it appears reasonable to require a judge in this state not to friend any litigants or attorneys through Facebook, or else risk disqualification. Even though an attorney who

properly friends a litigant or attorney may be able to do so, a judge is held to a higher standard because of the need to keep the confidence of the public in the unassailable integrity of the Judiciary.

This matter was recently addressed by the American Bar Association (ABA) when the ABA issued Formal Opinion 462 on Feb. 21, 2013, addressing a judge's use of electronic social networking media. The ABA opinion was that "judges must be very thoughtful in their interactions with others, particularly when using ESM [electronic social media]." In issuing that opinion, the ABA stated "[t]here are obvious differences between in-person and digital social interactions." After noting some differences, including that digital social interactions are impersonal, the ABA opinion went on to declare that "[w[hen a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal." That declaration by the ABA led to its formal opinion that judges should disclose on the record an ESM connection with a witness, party, or lawyer appearing before that judge, but "nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual."

The ABA opinion did not define the phrase addressing a judge having "…specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual." A review of what various states have said does not provide clarity in answering the question posed, either.

Facebook friending by judges has created its own issues for the judicial community in other states. In North Carolina, a judge was reprimanded and removed from a case for friending a litigant's attorney during the pendency of a child custody proceeding.[10]

In Florida, a judge was disqualified in a criminal matter because the judge and the prosecutor were Facebook friends during the pendency of the trial, and that action provided the inference that the judge could not be fair and impartial to the other party.[11] The issue of the judge friending the attorney was determined by the Florida court to be an example of the judge's action "reasonably convey[ing] to others the impression that these lawyer 'friends' are in a special position to influence the judge."[12]

Notably, the Florida Code of Judicial Conduct, Canon 2A, provides the following language that is verbatim to the commentary of Canon 2 in New Jersey:

> A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

However, other states are not ready to restrain a judge's Facebook activities to prohibit the friending of an attorney or litigant. An advisory opinion of the Kentucky Judicial Ethics Committee determined that a judge's Facebook friendship with an attorney who might appear before that judge "by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge."[13] That same committee cautioned judges, however, to be "extremely cautious" in their Facebook actions.[14] The level of caution was not defined.

In New York, a judge's friend status with an attorney was likened to "adding the person's contact information into the judge's Rolodex."[15] The Ohio Board of Commissioners on Grievances and Discipline found that a judge's action of friending an attorney was permissible because that attorney "may or may not be a friend in the traditional sense of the word."[16]

So, the unanswered question remains: Is a judge's affirmative action of friending an attorney or a litigant on Facebook an action in this state that might cause a judge's impartiality to be reasonably questioned? This question is salient because in the case of Facebook, people with little in-person interaction may frequently engage in online contact with each other on Facebook.

Case law provides guidance on disqualification of a trial judge. The disposition of a motion for recusal rests in the "sound discretion" of the judge whose recusal is sought.[17] It is unnecessary to prove *actual* prejudice on the part of the court, but rather "the *mere appearance* of bias may require disqualification so long as the belief of unfairness is objectively reasonable."[18]

It is a longstanding maxim of law that "[j]ustice must satisfy the appearance of justice."[19] That standard means a judge must avoid being *perceived* as partial.[20] The

standard of judicial conduct is so high because it is vital "that the integrity and independence of the judiciary may be preserved."[21]

No judge is required to friend anyone on Facebook, so he or she has complete control over whom he or she chooses to associate with online. It is that level of absolute voluntary conduct that distinguishes Facebook friending of an attorney from that attorney being a mere acquaintance or someone with whom the judge had incidental contact. A judge may learn that a litigant or an attorney shares the same likes or dislikes, tastes, sports teams, hobbies, interests, and numerous other bonds in common. Through Facebook, a judge can learn about the friend's traits, news feeds, pages visited, and other information that would not otherwise be placed before a judge, but for that judge's affirmative action in friending the attorney or litigant. This may be enough for the judge to be biased in favor of his or her Facebook friend.

If a judge is friends with an attorney or litigant in a proceeding, there is the potential for the other attorney or litigant to believe the judge exhibits bias toward his or her friends. That potential corroding effect on what should be the public's unflinching belief in the integrity of the judicial system is what lends credence to a finding that a judge's conduct in friending a litigant or attorney should be prohibited even if there is no actual impropriety on the part of the judge.

If there will not be a blanket prohibition on a judge's conduct in friending a litigant or an attorney through Facebook, then a test must be established to formulate a distinction between relationships judges are able to control, as opposed to relationships judges have which come about by incidental contact, such as through common memberships in religious or charitable organizations.

In New Jersey, a judge is prohibited from creating or acquiescing in any appearance of impropriety through his or her conduct. It is the conduct, not the motive, that matters. As frequently occurs with tests and factors, subjectivity comes into play. But, as judges in New Jersey are informed by the canons they voluntarily swear to uphold, judges are expected to make certain sacrifices that would be "burdensome if applied to other citizens."[22] A prohibition on the use of Facebook may be a burden, but it should be one a judge accepts freely and willingly, as the price paid to ensure the confidence of the public in an unbiased judicial system. ■

Endnotes

1. Help Center: Profile, FACEBOOK, http://www.facebook.com/help .
2. Help Center: Profile, FACEBOOK, http://www.facebook.com/help.
3. Help Center: Profile, FACEBOOK, http://www.facebook.com/help.
4. Help Center: Like, FACEBOOK, http://www.facebook.com/help.
5. Help Center: Sending a Message, FACEBOOK, http://www.facebook.com/help.
6. Help Center: Chat Basics, FACEBOOK, http://www.facebook.com/help.
7. *In re Blackmun*, 124 N.J. 547, 551 (1991).
8. *Id*. at 552.
9. *Id*. at 554.
10. *In re Terry*, No. 08-234 (N.C. Jud. Standards Comm'n April 1, 2009).
11. *Domville v. State of Florida*, No. 4D12-556 (Fla. 4th DCA 2012).
12. *Id*. at 2.
13. Ethics Comm. of the Ky. Judiciary, Op. JE-119 (Jan. 20, 2010).
14. *Id*. at 5.
15. N.Y. Comm'n on Judicial Conduct, Op. 08-176 (Jan. 29, 2009).
16. Ohio Bd. of Comm'rs on Grievances & Disciplines, Op. 2010-7 (Dec. 3, 2010).
17. *Chandok v. Chandok*, 406 N.J. Super. 595, 603 (App. Div. 2009).
18. *Id*. at 604-605.
19. *State v. Deutsch*, 34 N.J. 190, 206 (1961).
20. *State v. Tucker*, 264 N.J. Super. 549, 554 (App. Div. 1993), *certif. denied*, 135 N.J. 468 (1994).
21. *State v. Clark*, 191 N.J. 503, 513 (2007).
22. Commentary on Canon 2, Code of Judicial Conduct.

Kennedy v. Dupont: The Consequences of Failure to Act on Retirement Plan Survivorship

by J. Patrick McShane III

Cases abound in which lawyers and/or their clients fail to specifically plan for death. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*[1] presents such a fact pattern and offers an opportunity for reflection on potential state law remedies when compliance with federal law requirements has not occurred. The importance of specific language and action on the part of plan participants, their surviving spouses and attorneys before, during and after marriage becomes evident.

Historical Background/Policy Perspectives

Congress enacted the Employee Retirement Income Security Act (ERISA)[2] in 1974 to protect employee retirement benefits by imposing minimal and standard participating, vesting, funding and plan administration requirements for private employer and union plans. It preempts state laws. Regulation of retirement plans is strictly a federal concern.[3]

Before 1974, pension plan participants could freely assign or alienate both their own interest and survivorship interest in retirement plans. One of the principal protection provisions of ERISA is that benefits under a retirement plan could not be assigned or alienated. ERISA also protected surviving spouses by requiring that survivor benefits from a plan automatically pass to the surviving spouse.[4] The protection under ERISA for a retired plan participant's spouse is that the accrued benefit must be paid in the form of a qualified joint and survivor annuity (QJSA). In the case of a participant who dies before retirement payments start, the form of payment is a qualified pre-retirement survivor annuity (QPSA). These annuity rules apply to pensions/defined benefit plans and can only be waived in writing, signed by both the participant and spouse, in the presence of a notary or plan administrator.[5]

Defined benefit plans are generally pension plans that provide benefits on the basis of a formula or a money purchase pension plan. Defined contribution plans are profit-sharing plans, 401(k)s and the like. The rules also apply to stock bonus plans. If a defined contribution or profit-sharing plan or stock bonus plan provides an annuity, it must provide a QPSA or QJSA; otherwise, defined contribution or stock plans must provide for automatic payment of the participant's vested account balance on the participant's death to the surviving spouse, unless both the participant and spouse agree to the designation of an alternate beneficiary, in a writing signed in the presence of a notary or plan representative.[6]

Unfortunately, ERISA was interpreted to restrict alienation or assignment of benefits even to former spouses by preempting state domestic relation law orders purporting to divide plan benefits.[7] In response, in 1984, the Retirement Equity Act (REA) was adopted to protect former spouses.[8] It is important to understand that the REA provisions permitting plan administrators to recognize domestic relations orders requires those orders to meet very specific requirements in order to be qualified domestic relations orders (QDROs) because QDROs are specific exceptions to the anti-alienation provisions of ERISA.

The rules under ERISA and REA can be distilled to the following:

a) If a married plan participant dies before retirement, the surviving spouse must receive a QPSA in a defined benefit plan or all of the vested plan benefits under a defined contribution plan.
b) Upon retirement, a married plan participant must elect a qualified joint and survivor annuity (QJSA) providing at least fifty (50%) percent of the joint benefit paid for the joint life of the participant and spouse.[9]
c) The QPSA and QJSA referenced in the preceding paragraphs can *only be waived* in

a form signed by *both* the participant and spouse in the presence of a notary or plan representative.[10] The law requires that the participant and spouse must have at least 90 days ending on the annuity starting date to waive the post-retirement survivor annuity. The election to waive can also be revoked during that period.[11]

d) For a divorced participant, his former spouse is treated as a surviving spouse *to the extent* provided in a QDRO. Specifically 29 U.S.C.A. § 1056(d)(3)(F)(i) provides, in relevant part:

To the extent provided in any Qualified Domestic Relations Order...the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of Section 1055 of this title... (Emphasis added)

Remember, Section 1055 established QPSAs and QJSAs for surviving spouses in intact marriages. As the cases develop, keep in mind the "to the extent" language of the statute is crucial in permitting former spouses to qualify as surviving spouses under a QDRO.

e) For single participants, their beneficiary form controls or the provisions of the plan may permit payment to the estate or in certain instances, forfeiture, if there is no provision in the plan providing for the estate or for another beneficiary by default.[12]

Failure to plan or provide forethought can have devastating consequences to surviving spouses, surviving former spouses, children and practitioners. The remainder of this article addresses the complications that can arise:

1) when parties attempt to avoid these rules by a prenuptial agreement.
2) when a critically ill spouse who is separated from his or her spouse unsuccessfully attempts to obtain a divorce before death.
3) where a QDRO is not presented at the time of a divorce and before one is entered death intervenes.
4) when a form is executed by a participant during a failed marriage and that form is never changed by a participant who is unmarried at the time of death.

Each of these situations has spawned unpleasant litigation with unintended consequences.

Death During Marriage/Premarital Planning Attempts Frustrated

The rule is simple, but the possibility for an inequitable result is complex and profound. As stated succinctly in *Hawxhurst v. Hawxhurst*,[13] the rule is:

> The surviving spouse's entitlement to an annuity cannot be waived unless the spouse consents to the designation of an alternate beneficiary in writing and the consent acknowledges the effect of the waiver and is witnessed by a notary public or plan representative. 29 U.S.C.A. Section 1055(c)(1), (2)[14]

In *Hurwitz v. Sher*,[15] before marriage, a prenuptial agreement was entered pursuant to which the wife agreed to forego "any rights to her future husband's property upon his death." The federal courts determined the premarital agreement was insufficient to operate as an effective waiver of the wife's survivorship rights, even though the benefits had been earned as a consequence of long-term employment prior to the marriage and death occurred nine months after the marriage.

In deciding the issue, the trial court, affirmed by the Third Circuit Court of Appeals, correctly pointed out that the wife had not been a 'spouse' when she signed the premarital agreement, and also the premarital agreement did not qualify because it did not include the designation of another beneficiary consented to by both the participant and spouse in writing, acknowledged in the presence of a notary or plan representative as required by federal law and provisions of the plan at issue. For these reasons, courts have routinely rejected claims by surviving children or other estate beneficiaries that benefits are arguably waived under a prenuptial agreement. Recognizing that prenuptial agreement waivers of survivor benefits are ineffective, careful practitioners place provisions such as the following in prenuptial agreements:

1) A requirement that beneficiary designations be executed during the marriage.
2) In the absence of such beneficiary designations executed during the marriage, that to the extent any death benefits are provided to a surviving spouse, the death benefits payable because of the failure to

execute beneficiary designations during the marriage are a credit against any death benefits due under the prenuptial agreement.

Please also note that arguments of ERISA preemption of lifetime distribution or waivers of pensions in premarital agreements by analogy to death event cases have failed (*e.g., Hawxhurst*,[16] and *Savage-Keough v. Keough*).[17]

In *Hawxhurst*, during a five-year marriage, the husband's pension benefits earned during 30 years of employment during his first marriage were rolled into an IRA account. He argued for exclusion of the IRA account when a divorce occurred after about five years of marriage. Because the prenuptial agreement did not specifically exclude such rolled-over benefits, the IRA was deemed subject to equitable distribution. In *Savage-Keough v. Keough*, the husband, who had signed a prenuptial agreement waiving claim to his wife's retirement benefits, sought to include those benefits for equitable distribution. The Appellate Division in both cases pointed out the difference between the preclusion of waiver of survivorship, which is strictly a federal law question, as opposed to distribution of marital property between a husband and a wife upon a divorce, a domestic relations issue that is strictly a matter of state law.[18]

Death Pending Divorce

In a long-term marriage situation, the equities of the strict application of federal law are obvious: The surviving spouse takes the vested benefit of a defined contribution plan and the QPSA of a defined benefit plan. If death occurs following a shorter term or second marriage, the application of federal law is troublesome. Consider the following factual setting:

The husband is age 62 at the time of the marriage, and the wife is age 45. Both parties have one child from a prior marriage. The husband retires four years after the marriage.

Seventeen years after retirement, and 21 years after the marriage, the husband is extremely ill and wishes to divorce his wife. He seeks to preserve his pension survivorship rights for his child by seeking a sequestration order during the pendency of the divorce. That application is denied. His estate (his son from his prior marriage) seeks the death benefit under his pension following the husband's death before a final judgment of divorce is entered and before his deposition can be taken in the divorce action. Those are the facts facing the court in *Groh v. Groh*.[19]

First, the estate argued for the application of *Carr v. Carr*.[20] The court rejected that argument because *Carr* is intended to benefit a spouse widowed during the pendency of the divorce, not the deceased party's estate.[21]

Secondly, the court ruled that ERISA is clear and compels payment of the survivor benefit to the widow. The court cited ERISA's and REA's policy to safeguard the financial security of widows and divorcees. It further cited the anti-alienation provisions of ERISA for the proposition that: "Even during the pendency of a divorce, a plan participant cannot assign or otherwise designate an alternate beneficiary for pension benefits."[22] It rejected the estate's argument that the husband's attempts to sequester the benefit showed an intention to leave a beneficiary other than his current wife. In rejecting that argument, by analogy to *Hurwitz v. Sher*, the *Groh* court stated as follows:

> The Second Circuit affirmed the district court's finding that the prenuptial agreement was not an effective waiver of the surviving spouse's benefit because it did not satisfy the clear and unambiguous statutory requirements for waiver articulated in 29 U.S.C. §1055(c).[23]

Once again, form is substance under ERISA. No proper waiver in the statutory or plan-required form during the marriage, or no divorce QDRO, equals survivorship right to the surviving spouse. There is no exception to the requirement of the proper form where the decedent is still married irrespective of whether a divorce complaint has been filed.

Death After Divorce: Division of Retirement Plans Anticipated But No QDRO Entered

Many times, and in particular when a settlement is reached on the courthouse steps, parties agree to the concept of a domestic relations order division of marital pension rights, but a domestic relations order is not entered.

An example of the importance of the language in a property settlement agreement as it impacts divorce distribution and survivorship rights is presented by *Ross v. Ross*.[24] *Ross* involved a 27-year marriage that ended upon the entry of a final judgment of divorce on Oct. 19, 1993. During the last years of his life, the husband had lived with Gina Ann Chiloro, to whom he was married

immediately following the Oct. 1993 divorce decree. On Nov. 24, 1993, one month after his divorce from Carol Ross and remarriage to Chiloro, he died. The operative provision of the property settlement agreement was as follows:

> Wife shall be entitled to receive one-half (½) of the Husband's pension and/or annuities from Work-O-Lite Co., Inc. and National Lighting Co., Inc. The Wife shall receive the survivor annuity of the pension plans as per the provisions of the plans. It is the intention of the parties that for the purposes of the defined benefit plan and the defined contribution plan, Carol Ross shall be deemed to be the surviving spouse and shall be designated beneficiary for any survivor annuity.[25]

In analyzing the case, the Appellate Division indicated that under ERISA there are only two ways to designate a beneficiary other than one's spouse: waiver by the spouse and entry of a QDRO.[26]

Carol Ross was no longer the spouse by virtue of the entry of the final judgment of divorce. Chiloro was, therefore, entitled to the surviving spouse benefit unless the property settlement agreement was determined to constitute a QDRO. Regarding the Work-O-Lite plan and its successor, in which $427,000 was invested, and after analyzing the requirements of a QDRO, the Appellate Division determined the property settlement agreement was, in fact, a domestic relations order and interpreted the property settlement agreement/QDRO to provide *the entire survivor benefit* to the ex-wife, Carol Ross.

Here, as in *Samaroo, supra*, the application of the "to the extent of" language in the federal statute permitting the ex-spouse to be treated as a surviving spouse becomes particularly important. The property settlement agreement/QDRO in *Ross* provided not only for one-half of the survivor benefit on account of the divorce, but provided that Carol Ross "receive the survivor annuity..." and "...shall be designated beneficiary for any survivor annuity." Thus, she took it all because the language, "[t]o the extent of her interest in the plan" was absent from the property settlement agreement/QDRO. In *Samaroo*, the ex-wife took *nothing* because *no* survivorship was provided in the QDRO.

In *Ross*, there was also an annuity involved with Nationwide, with $270,000 at the time of death, to which the parties' son had been designated beneficiary pursuant to a properly executed form. Setting aside the issue of whether or not the annuity was a 'qualified plan' under ERISA, the Appellate Division indicated that because the property settlement agreement did not specify the Nationwide annuity as a plan to which it applied under the requirements of a QDRO, it did not qualify to properly alienate the benefit to the ex-wife; and the son, therefore, succeeded as beneficiary.[27]

Again, note the importance of specific language. Although the annuity was arguably traceable to Work-O-Lite, the property settlement agreement was not specific enough that it applied to that annuity. Therefore, the property settlement agreement did not qualify as a domestic relations order regarding the Nationwide annuity. The same result applied to two smaller plans from a leasing and trucking company to which Ms. Chiloro obtained the benefits as surviving spouse under ERISA, again because the plans were not referenced in the property settlement agreement by name.[28] Significantly, the identifying data of the parties, such as name and address, were contained in the property settlement agreement the Appellate Division carefully analyzed to meet the requirements of a QDRO.

The court in *Ross* stretched to interpret the property settlement agreement as a QDRO because of its finding that "[n]o federal case has allowed a QDRO to be entered after a participant's death."[29]

With the *Ross* case standing as current New Jersey authority, the importance of entry of a QDRO as quickly as possible is critical. At best, the QDRO should be entered coincident with the divorce and, at worst, as soon thereafter as possible. Although the state law policy of sharing of retirement benefits including a sharing of survivorship rights is laudable, the administration requirements and simplicity of strict compliance with federal law requires a conservative, careful approach and immediate attention to the details and entry of a QDRO.

Death: Single Person

Consider the factual scenario as follows: In Feb. 1978, while married and employed by GE, Peter designates his wife Rachael as beneficiary of his pension plan. In Feb. 1979, they divorce. Peter leaves employment with GE in 1980 and dies unmarried in 1993, with a pension from GE. GE proposes to pay the death benefit to the former spouse, Rachael, under the beneficiary designation in its file. The executor seeks the payment relying

upon the divorce pursuant to which Rachael withdrew her demand for support, equitable distribution and attorney's fees, and arguably waived claim for the pension. In rejecting the argument, Judge Rosemary Higgins-Cass, in *In re Estate of Lanken,*[30] held that because there was no qualifying ERISA waiver and only the existing beneficiary form, under ERISA the payment to the ex-wife, Rachael, was appropriate. Judge Higgins-Cass thereby applied the anti-alienation provisions of ERISA to plan beneficiaries, as well as plan participants, and applied a 'plan document' rule.

Any doubt about the result reached by Judge Higgins-Cass has been eliminated by the United States Supreme Court in *Kennedy v. DuPont*. In *Kennedy*, William Kennedy was a participant in a DuPont savings and investment plan (SIP) and a DuPont pension plan. In 1971, while employed at DuPont, he married Liv Kennedy, and in 1974, he signed a form designating her to take benefits under the SIP pursuant to ERISA. William and his wife divorced in 1994, subject to a decree that she:

> ...is...divested of all right, title, interest and claim in and to any and all sums...the proceeds [from] and any other rights related to any... retirement plan, pension plan or like benefit program existing by reason of [William's] past or present or future employment.[31]

While he had eliminated his ex-wife as beneficiary of the pension by executing the proper form after the divorce, he failed to execute the form designating his daughter as beneficiary of his SIP, which had accumulated to $400,000 by the date of his death in 2001. The Supreme Court held on the basis of the clear provisions of ERISA that the ex-wife took the benefit by virtue of the beneficiary designation, thus clearly establishing the plan document rule. The Supreme Court held that the policy of ERISA was to provide simplicity of administration and avoid the exposure of plan administrators to multiple claims.[32] Thus, the form is substance; the form controls.

However, in Footnote 10 the Supreme Court indicated that it expressed no view on whether the estate could have brought an action in state or federal court to obtain the benefits after they were distributed to the ex-wife/beneficiary.[33]

The Supreme Court's decision was interpreted by Judge Robert Kugler in the District Court of New Jersey in *Estate of William Kensinger v. URL Pharma and Adele Kensinger.*[34] In that case, the decedent was enrolled in an employer-sponsored deferred savings plan in 2000. When he enrolled, he was married to the defendant/wife and had named her the primary beneficiary. In July 2008, the decedent and his wife divorced. The property settlement agreement provided for retirements and pensions as follows:

> The parties mutually agree to waive, release, and relinquish any and all right, title and interest either [party] may have in and to the other's IRA accounts, or any other retirement benefit and deferred savings plan of like kind and character and neither shall make any claim to possession of such property as it is presently titled.

William died intestate in April 2009, nine months post-divorce. As of that date, William's 401(k) plan had a balance of $57,128.

Following *Kennedy*, the court obviously ruled that the wife was the beneficiary. Judge Kugler then precluded the estate's claim against the defendant/wife as recipient of the benefit because "[s]uch a claim would directly undermine one of ERISA's core objections: Providing certainty regarding the final distribution of ERISA benefits."[35] Judge Kugler believed such litigation would redirect uncertainty from plan administrators to beneficiaries he believed was contrary to the policy of protection of survivors evident in ERISA. The anti-alienation policy of ERISA was likewise cited.

On appeal, the Third Circuit reversed on the issue of barring the estate from attempting to recover the funds distributed to the ex-wife. In its analysis of *Kennedy*, the Third Circuit cited cases stating that while the footnote by the Supreme Court may have closed one door of litigation against plan administrators because of its holding that the beneficiary form was binding between any other claimant and the plan administrator, it opened another door of litigation between family and former family members.[36] In overturning Judge Kugler's holding in that case regarding the estate's litigation claims against the ex-wife, the Third Circuit indicated the need for straightforward administration of plans and avoidance of double liability are not implicated in permitting the estate's claim to be made against the ex-wife in state court. The Third Circuit stated that a state court could simply determine the rightful recipient of the plan proceeds as a matter of state contract law.[37]

Again the importance of careful language in the property settlement agreement is brought to the forefront. Note that the language in the *Kensinger* agreement did not specify waiver of survivor beneficiary status. While the intention may have been broad enough, and certainly the permission to litigate the issue implicates that result, it is not certain without the specific language. If there is a risk of a beneficiary designation form not being executed, then the fallback of specific language in the agreement, including reimbursement/turnover of survivor benefits to the estate by the ex-wife, is an available alternative to litigation.

It should also be noted that there is *no* solace in N.J.S.A. 3B:3-14, which provides that, "a divorce or annulment...revokes any revocable...dispositions or appointments of property made by a divorced individual to his former spouse in a governing instrument." That statute is preempted by ERISA as the estate conceded in *Kensinger* before the district court.

Conclusion

Family law practitioners routinely prepare clients for motions, depositions, settlement conferences, and trials. The lesson of *Kennedy* and the cases cited herein is the importance of preparing clients for their file's closure and the rest of their lives. In the area of retirement plan survivorship, the form is substance. If a prenuptial agreement is prepared, follow up to be certain the spousal survivorship waiver forms are executed during the marriage. For divorced spouses, where there is an offset and waiver of retirement plan benefits, make sure to include the survivor beneficiary waivers to preplan for the likelihood the client fails to execute a post-divorce beneficiary designation. Put in the closing checklist the importance of changing retirement plan beneficiaries. Finally, where the plan is divided by qualified domestic relations order, complete the order contemporaneously with the final judgment if possible, and make sure the agreement and order are consistent in their handling of the survivorship rights so the spouse receives his or her share to the extent agreed upon and intended by the parties.

Federal law will not substitute a presumed intention. There is no substitute for proper planning and concise language. ■

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Endnotes

1. *Kennedy v. DuPont*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).
2. 29 U.S.C.A. Section 1001-1453.
3. *Savage-Keough v. Keough*, 373 N.J. Super. 198, 203 (App. Div. 2004).
4. *Ross v. Ross*, 308 N.J. Super. 132, 150 (App. Div. 1998).
5. 29 U.S.C.A. Section 1055.
6. For an excellent summary, see Patrick Purcell and Jennifer Staman, Summary of the Employee Retirement Income Security Act, Congressional Research Service, May 9, 2007, at aging.senate.gov/crs/pension7.pdf, pages 15-17, as to survivorship.
7. *Ross*, 308 N.J. Super. at 150.
8. 98 P.L. 397, 98 Stat. 1451 (1984).
9. 29 U.S.C.A. Section 1055.
10. 29 U.S.C.A. Section 1055(c)(1), (2).
11. Purcell and Staman, *supra*.
12. *See*, for example, *Samaroo v. Samaroo*, 193 F. 3d 185, 187-188 (3d Cir. 1999), which refused to accept or enforce an amended DRO after the participant's death because the QDRO entered at the time of divorce did not provide that the former spouse should receive any survivorship rights. Such an amendment was deemed to require the plan to pay "increased benefits" if the post-death amendment was permitted.
13. 318 N.J. Super. 72, 85 (App. Div. 1998).
14. *Id*. at 85 (*quoting* 29 U.S.C.A. § 1055 (c)(1), (2)).
15. 982 F. 2d 778 (2d Cir. 1992), *cert. denied*, 508 U.S. 912, 113 S. Ct. 2345, 124 L. Ed. 2d 255 (1993).
16. 318 N.J. Super. 72 (App. Div. 1998).

17. 373 N.J. Super. 198 (App. Div. 2004).
18. *Id*. at 209.
19. 288 N.J. Super. 321 (Ch. Div. 1995).
20. 120 N.J. 336 (1990).
21. *Groh, supra*, 288 N.J. Super. at 326.
22. *Id*. at 327 (*citing* 29 U.S.C.A. Section 1056(d)).
23. *Id*. at 328.
24. 308 N.J. Super. 132 (App. Div. 1998).
25. *Id*. at 137.
26. *Id*. at 151.
27. *Id*. at 155-156.
28. *Id*. at 157.
29. *Id*. at 158.
30. 290 N.J. Super. 556 (Ch. Div. 1996).
31. *Kennedy*, 555 U.S. at 289, 129 S. Ct. at 869, 172 L. Ed. 2d at 669.
32. *Id*. at 299-300, 129 S. Ct. at 874-75, 172 L. Ed. 2d at 675.
33. *Id*. at 300, 129 S. Ct. At 875, 172 L. Ed. 2d at 675.
34. 674 F. 3d 131 (3d Cir. 2012).
35. *In re Estate of Kensinger*, 2010 U.S. Dist. LEXIS 116078, #164 (D.N.J. Nov. 1, 2010), *rev'd, Estate of Kensinger v. U.R.L. Pharma, Inc.*, 674 F. 3d 141 (3d Cir 2012).
36. *Kensinger*, 624 F. 3d at 135.
37. *Id*. at 136.

Baby Boomers, Social Security and Divorce

by Marshall A. Morris and Amy L. Miller

Matrimonial practitioners are often met with the divorcing spouse who is seeking, or will be paying, alimony, and his or her retirement is years, if not decades away. However, as the baby boomer generation ages and their "divorce rate is triple that of their parents' generation,"[1] practitioners need to be well-versed in the Social Security system and how Social Security benefits will effect the divorce. Family law practitioners must also consider that the paying spouse's retirement age may be just a few years away, and must make concessions for this inevitable issue in reaching a settlement. Finally, healthcare and the availability of insurance or Medicare must be considered as well.

Retirement Benefits

Many senior couples depend on Social Security benefits in its different iterations to pay for part or all of their personal needs. Social Security through the Social Security Administration[2] was created to be a safety net for eligible American workers and their families when their income is reduced, primarily because of retirement, but also because of disability and death. The American worker who pays into the system becomes eligible to collect benefits when they retire.

The earliest one can elect to take retirement benefits through Social Security is age 62. However, this is at a reduced benefit amount. Alternatively, the retiree can wait to elect the benefits at their full amount at a later age. While this used to be age 65, now, just like tax bracket creep, 'age bracket' creep for the first of the baby boomers means a later retirement in order to receive full benefits. For those born in 1937 or earlier, full retirement age is 65. For those born between 1938 and 1942, the age is 65 plus some additional months, depending upon which year the person was born in between 1938 and 1942. If a person was born between 1943 and 1954—the first wave of baby boomers—full retirement age is 66. A person born between 1955 and 1959 will reach full retirement age at 66 plus additional months, depending upon which year he or she was born in between 1955 and 1959. Finally, those born in 1960 or later reach full retirement age at 67.

Depending upon the birth year, the amount of reduced benefits one may receive at age 62 will vary. For example, individuals born before 1938 who elect early retirement at age 62 will receive 80 percent of their full retirement benefit (as calculated by the Social Security Administration). For baby boomers, electing early retirement at age 62 will yield reduced benefits of 75 percent. Finally, for those born in 1960 or later, early retirement benefits at age 62 is paid at 70 percent.

Baby boomers who want to increase their 'full' retirement benefit amount in order to receive even more retirement benefits can do so by electing to take their benefits at age 70. Of course, one must be able and/or willing to wait until that time to collect benefits. The age of a client or his or her spouse, and the amount of benefits he or she will receive, must be considered when negotiating alimony, and potentially child support and college contribution, as more and more couples are having children later in life.

Also relevant is the effect the Senior Citizens Freedom to Work Act of 2000 has had on an individual's ability to earn. In 2000, the act changed the landscape for all baby boomers, at least for now. Under the act, when a qualified worker has reached full retirement age, the worker is no longer required to report earnings to the system. The act now makes it possible for those attaining full retirement age to earn limitlessly without penalty. More specifically, if a person reaches full retirement age, he or she can continue to work full-time while collecting full benefits under the system, and is not required to advise Social Security that he or she is continuing to work part-time or full-time. Thus, Social Security will not be able to reduce the benefits being received, which are in addition to the income the person continues to earn from his or her employment. However, when the act was enacted in 2000, the U.S. was wealthier. Retirement age requirements, benefit amounts and all of the other aspects of Social Security law will be scrutinized and

most likely be subject to change, as Congress and the 2013 White House wrestle with system insolvency issues and increasing life spans.

Qualified dependents are also eligible to receive benefits through the system. One is deemed a qualified dependent if he or she is a dependent of a qualified worker who has paid into the system. Qualified dependents are eligible to receive benefits based upon the qualified worker's system contribution record.

One type of eligible dependent is a qualified divorced spouse of a qualified worker. To qualify, both the divorced spouse and the ex-spouse worker must be 62 years of age or older. The divorced spouse has to have been married to the qualified worker for at least 10 years, and must also be divorced for at least two years. Also, the divorced spouse can only receive benefits based upon one qualified worker. For example, if Jane is divorced from John, and remarries Bill, she can only receive benefits as a qualified dependent based upon John's work record (assuming she meets all the criteria outlined above, such as they were married for 10 years, divorced for at least two years, etc.), or based upon Bill's work record. She cannot receive benefits as a qualified dependent of both workers. However, the system does allow Jane to choose between John and Bill, based on which qualified worker will yield a higher benefit to her.

The system also allows Jane to choose herself over either John or Bill. If Jane has made her own work contributions into the system, and her contributions and work record would yield a higher benefit to her above receiving benefits as a qualified dependent of John or Bill, then she can, and should, elect her own benefits. The end result is that Jane will be limited to choosing benefits from one individual, whether it is herself, her ex-spouse, or her current spouse.

In addition, the dependent divorced spouse will not be affected by the other party's delay in electing benefits, such as the person who delays collecting benefits until age 70, in order to maximize the amount of retirement benefits. For example, a 62-year-old divorced individual, married for at least 10 years and divorced at least two years from a former spouse, can still receive benefits based upon the Social Security contribution record of the former spouse, irrespective of whether or not the former spouse has retired, or is delaying retirement to full retirement age, or to age 70 for retirement benefit maximization. The former worker spouse has to be eligible to receive retirement benefits and at least 62 years of age. As long as these conditions are met, the non-worker spouse is still able to collect benefits when he or she reaches age 62.

Disability Benefits

When workers become severely disabled they can qualify for disability benefit payments from the system. Disability benefit payments are generally received monthly, the same as retirement benefits. In order for the Social Security Administration to declare a person severely disabled, the worker must be unable to engage in substantially gainful employment activity for at least 12 months, or the condition creating the severe disability will eventually result in death of the worker. Work that generates approximately $1,000 or more of monthly earnings qualifies as a substantially gainful employment activity. Eligibility is not age contingent, only the loss of participation in a substantially gainful employment activity is required.

Just as the divorced spouse can receive retirement benefits from the system if certain criteria are met (married for 10 years, divorced, etc.), the divorced spouse can also be a qualified dependent and receive derivative disability payments. For example, while the qualified dependent ex-spouse, Jane, is normally eligible to receive benefits at age 62, if she is caring for her disabled ex-husband's child who is under the age of 16, then Jane can qualify for benefits prior to retirement age, based upon her ex-husband's work record. However, once the child reaches age 16, Jane's derivative benefits will stop, and will not recommence until she reaches the early retirement age of 62, or her full retirement age.

Survivor Benefits

At death, the dependents of a qualified contributing worker can be eligible for survivor benefits. These benefits can range from approximately 70 percent to as much as 100 percent of the benefits the qualified worker received before death. The same types of dependents that qualify for retirement and disability benefits, including the divorced spouse, qualify for survivor benefits, with some modifications. In general, the widow or widower must be at least 60 years of age, or at least 50 years old if disabled. This age requirement also applies to the divorced widow or widower. The divorced widow or widower must have been married to the qualified contributing worker for a minimum of 10 years. In addition, the divorced widow or widower can be currently married, contingent on the marriage having occurred

after age 50 or 60, whichever is applicable. Finally, a surviving divorced spouse can be eligible for survivor benefits, even though he or she is not otherwise qualified for survivor benefits, as long as the surviving divorced spouse is caring for a child who is under the age of 16, or who was disabled before attaining age 22.

If a client or his or her spouse was previously married and became a widow or widower, this may affect his or her income at a later time, if he or she is eligible for survivor benefits. Also, if a client is seeking attorney services for a prenuptial agreement where the client, or his or her soon-to-be spouse is or will be eligible for survivor benefits, this fact will be relevant in negotiating the terms of the agreement and discussing what income is or will be available to each party.

Healthcare Benefits

Healthcare is one of the country's most important topics of discussion, and is a necessary and often costly expense when discussing a client's, or his or her spouse's, expenses post-divorce and what support is needed to meet those expenses. Thus, it is important to consider what health insurance is available to the client or his or her spouse, and if/when each party will qualify for Medicare benefits if no other insurance is available. These issues may effect whether a party wants to enter into a divorce from bed and board for a period of time until he or she will qualify for Medicare, or it may effect whether to delay the uncontested divorce hearing for a few months (if permitted by the court), if a party is only a few months away from qualifying for Medicare.

Medicare benefits provide four basic coverages: hospital insurance [Part A], which covers hospitals as well as skilled nursing facilities, and for which there is currently no charge for covered individuals; medical insurance [Part B], which covers doctor services and medical supplies, the cost of which requires a monthly premium; Medicare advantage [Part C], for Part B enrollees who elect this managed care alternative to traditional fee-for-service care [Part C is currently subject to change in the new healthcare legislation]; and prescription coverage [Part D], the relatively new drug benefit plan that began in 2006.

Part A hospitalization automatically covers those qualified under the Social Security Medicare system when they reach age 65. The divorced spouse who qualifies for Social Security benefits based upon an ex-spouse's qualified contribution work record can qualify for Part A coverage, and this coverage is free. The divorced spouse can also qualify for Part B coverage, but there is a charge associated with it, which reduces his or her Social Security benefits. Therefore, if a person elects Part B at the same time he or she is receiving Social Security retirement benefits, the benefits paid to that person will be reduced by the amount that is being charged for Part B.

Determination of Medicare coverage is based upon the work record of the former qualified spouse. Certain individuals automatically qualify for the medical coverage benefit (such as a state worker), while others must apply for coverage. An individual automatically qualifying for coverage but not wanting it can elect out of the coverage, but the coverage must be formally declined. A divorced spouse should speak with Social Security Administration personnel when applying for Medicare or retirement benefits.

When discussing a client's or his or her spouse's expenses in the context of Medicare, it is important to remember that there are gaps in the coverage, such as deductibles and co-payments. All Medicare-eligible participants should consider purchasing supplemental insurance coverage to fill in the holes in the Medicare floor. This is important to keep in mind when discussing the cost of insurance and what support is needed to cover those expenses. This is most relevant for the client or his or her spouse who suffers from a number of medical ailments, and therefore incurs significant expenses related to those ailments (the treatment, prescription and over-the-counter medications, etc).

Long-term Care Insurance

Medicare does not provide long-term care insurance. Therefore, depending on the client's or his or her spouse's needs and concerns about his or her future care, obtaining long-term care insurance and the cost may be relevant in discussing the parties' needs and expenses. Although this coverage is now being considered at earlier ages, this type of coverage has not been marketed by insurance companies for very long. In addition, if one spouse is already receiving long-term care during the divorce process but the cost is not covered by the appropriate insurance, it may be necessary to address this within the context of alimony and equitable distribution.

Conclusion

Although family law practitioners are not experts in every area of law, because family law encompasses so many areas of the law, such as taxes, real estate, trusts

and estates, and Social Security, it is important for practitioners to understand and be able to discuss these topics. In representing a client, issues related to his or her income, or the spouse's income, and what benefits are available to him or her through the Social Security Administration, are not only relevant to settling the case, but must be considered in order to provide a full financial picture of the parties. Thus, family law practitioners should ensure they have a basic knowledge of the Social Security system in order to have a meaningful discussion with clients, adversaries, and the court. ■

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Endnotes

1. Ken Gronbach, the author of *Common Census: The Counter-Intuitive Guide to Generational Marketing* (as cited by Helen Trickey in an article posted to the CNN website on Feb. 20, 2006).
2. For questions related to the benefits offered through the Social Security Administration, visit its website at www.ssa.gov.

To File or Not to File

by Abigale M. Stolfe

Locality is not commonly raised as a dispute in the normal course of family law practice. Generally, family law practitioners spend more time hypothesizing, researching, conferencing and litigating issues of custody, alimony/support and equitable distribution. But in those rare and interesting cases where venue is at issue, practitioners defer to Court Rule 5:7-1.[1] But what about those exceptional cases where the issue is jurisdiction between state and federal court?

Take, for example, a resident of New Jersey who seeks to recover from a resident of New York. In that instance, a civil attorney would look to the federal rules regarding diversity of citizenship.[2]

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> 1. Citizens of different States;
> 2. Citizens of a State and citizens or subjects of a foreign State;
> 3. Citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> 4. A foreign state, defined in section 1063(a) of this title [28 USCS 1603(a)], as plaintiff and citizens of a State or of a different States.

Under the federal rules, whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.[3]

At the present time, there is an ease to commuting and travel, and a need to be free to accept employment that requires parents or married persons to live in one state during the work week and at 'home' on the weekends. Given the ease with which clients today can reside in New York and Pennsylvania while maintaining a home in New Jersey, practitioners are now faced with a question of jurisdiction that may need to be the first point of concern in representation. Should claims be filed in the district court under such a rare but probable circumstance?

The short answer is no. The explanation is clearly much longer. When faced with a complaint that has been filed for dissolution or enforcement of a divorce order in the federal court, the practitioner will be required to file a motion to dismiss the complaint for lack of jurisdiction. The following will form the basis of the legal argument and client certification.

It is well established that there is a presumption against federal jurisdiction, and further that the party asserting the federal court's jurisdiction bears the burden of proving it.[4] If a plaintiff is asserting diversity as a basis for jurisdiction, then the plaintiff bears the burden of proving diversity of citizenship exists and ordinarily must prove diversity by a preponderance of the evidence.[5]

For this analysis, citizenship is often described as being synonymous with domicile. A state is an individual's domicile if he or she resides in the state and intends to remain there indefinitely.[6] The following factors should be considered in determining domicile:

1. Voting registration and voting practice;
2. Location of personal and real property;
3. The residence claimed for tax purpose;
4. Place of employment or business;
5. Driver's license and automobile registration; and
6. Payment of taxes.

Assuming the above application, the case would likely be dismissed. But what if the party who works out of state has been estranged from the family and has 'moved' domicile as defined above?

The Supreme Court has long recognized a domestic relations exception to federal diversity jurisdiction.[7] The modern rule, as expressed in *Ankenbrandt*, provides "that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree."[8]

Thus, in *Solomon v. Solomon*, the Third Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction where the plaintiff brought suit in diversity against

her ex-husband seeking money damages for non-support and specific enforcement of an agreement.[9]

Solomon provides a perfect example of the policy concerns behind the application of the domestic relations exception as enunciated in *Ankenbrandt*. Such concerns are regarding the issuance of divorce, alimony and child custody decrees, which often require a court to retain jurisdiction past the completion of the matter and to appoint outside professionals to ensure compliance.[10] Additionally, state court's are better suited for this work as a result of the relationship they maintain with relevant state agencies.[11] Probably more importantly, the court recognized the "special proficiency" of the state court to handle divorce, alimony, and child custody decrees.[12]

In most instances the request to dismiss is filed at the commencement of the action and long before there have been custody and parenting time evaluations, business and cash flow reports or even an ability to sit together for the purposes of mediation. It goes without saying the state court has the resources and programs to provide for parenting time mediation, at no cost, assigning a date to panel the case with a mediator who may resolve the matter in its entirety, and call for a home study when there are allegations concerning the children. Couple the resources of the state with the judge's knowledge of the local professionals, and in some instances the personality of local mediators, who in most cases bring the matter to final conclusion, this personalized service is irreplaceable in the context of divorce, and more importantly the ability of the parties to remove this matter from the courthouse steps with the least amount of controversy and contention.

Should all else fail, and assuming one party has filed a complaint in state court, the case should be dismissed upon application of the *Younger* abstention rule.[13] *Younger* involved a criminal defendant, who was then being prosecuted by the state of California, seeking declaratory relief as to validity of statute. The United States Supreme Court declared that, absent unusual circumstances, a federal court is not permitted to interfere with a pending state criminal prosecution. Since the holding, the Supreme Court has extended the *Younger* abstention rule in the civil context.[14]

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Endnotes

1. N.J. Ct. R. 5:7-1, Pressler & Verniero, 2013 N.J, Court Rules (Gann).
2. 28 U.S.C.A. 1332.
3. Federal Rule Civil Procedure 12(h)(3)
4. *Carteret Savings Bank, FA v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992); *Krasnov v. Dinan*, 465 F.2d 1298, 1301 (3d Cir. 1972).
5. *Id*.
6. *Krasnov v. Dinan*, 465 F.2d 1298, 1301 (3d Cir. 1972).
7. *Ankenbrandt v. Ankenbrandt*, 504 U.S. 689, 693-94 (1992), *citing Barber v. Barber*, 62 U.S. (21 How.) 582 (1859).
8. 504 U.S. at 704.
9. *Solomon v. Solomon*, 516 F.2d 1018, 1021 (3d Cir. 1975).
10. *Ankenbrandt*, 504 U.S. at 703-04.
11. *Id*. at 704.
12. *Id*.
13. *Younger v. Harris*, 401 U.S. 37, 54 (1971).
14. *Middlesex County Ethics Comm. v. Garden State Bar Assn*., 457 U.S. 423 (1982).

International Travel With Minor Children

by Michael A. Weinberg

International travel with minor children can present a myriad of potential issues. These issues can become especially difficult when the child's parents are not married. There exists an established bureaucratic framework that must be confronted for international travel with the child to proceed smoothly.

Passports for Children

Even the seemingly basic issue of obtaining a United States passport for a minor child can be difficult when the child's parents are not married. All children, regardless of age, require a passport to travel internationally.[1] If the child is under the age of 16, the U.S. Department of State requires Form DS-11 to be completed and submitted in person at a designated acceptance facility or passport agency.[2] A copy of the current Form DS-11 can be found on the U.S. Department of State website.[3]

At the time the Form DS-11 is submitted, both parents of the child are required to appear in person to provide proof of the child's citizenship. That proof may include the child's certified United States birth certificate. The parents of the minor child must also submit evidence regarding their relationship with the child, which can also include the same certified birth certificate, so long as both parties' names appear on the document. The parents can also provide an adoption decree, which includes the adoptive parents' names; a court order establishing custody; or a court order establishing guardianship.[4] A previous United States passport will not constitute acceptable proof of the relationship between the parent and the child.[5]

In the event the name of a parent has changed since the issuance of the child's birth certificate (*e.g.*, reversion by a parent to a prior name due to divorce), that parent must also prove evidence of the legal name change since the original documentation was issued.[6] The parents of the minor child must also provide legal identification, such as a previously issued, undamaged United States passport, a naturalization certificate, a valid driver's license, a current government employee ID, or a current military ID.[7]

Family law attorneys will often become involved in the international travel process when two parents, who are either no longer married or were never married, disagree on whether a passport should be issued to their minor child or on the planned international travel itself. When such disagreements occur, a joint appearance by both parents at the passport agency is often not practical. Beyond those instances, there may be other reasons why a parent cannot appear in person, such as death, illness, abandonment, etc. In these types of situations, in addition to completing Form DS-11 as noted above, the parent seeking the passport for the minor child will also need to submit Form DS-3053. A copy of the current Form DS-3053, known as the "Statement of Consent or Special Circumstances: Issuance of a Passport to a Minor under age 16," can be found on the U.S. Department of State website.[8]

In the event that one parent is seeking a passport, and both parents are unable to appear at the passport agency, if the other parent consents, that parent must complete and execute Form DS-3053 in the presence of a notary public. Form DS-3053 also provides a section for the parent seeking the passport to provide a "statement of special circumstances" if they are unable to obtain the consent of the other parent.[9] Indicating that the parent seeking the passport for the child has joint legal custody, but that the other parent refuses to sign Form DS-3053, will generally not be considered a sufficient special circumstance, and the passport application will likely be denied. However, the passport agency will accept a court order providing that international travel by that parent with the child is permitted.[10]

In the event the parent seeking the passport is the sole legal custodian of the child, Form DS-3053 will not be required, so long as that parent is able to provide a court order confirming they are the sole custodian (whose travel is not restricted by the order) or a court order that they are the sole adopting parent.[11]

Special requirements exist for obtaining a passport for a child age 16 or 17. A child who is 16 or 17 years of

age must appear in person at the time the parent's application for the passport is made. The parent or guardian must present photo identification if the minor child does not have identification of his or her own; provide a photocopy of the same identification document that will be presented at the time of application; and establish parental consent for the issuance of the passport.[12]

Many airlines recommend that all documents, such as documentary evidence regarding an individual's relationship to the child, consent forms (*e.g.,* Form DS-3053 or other such notarized statements), and all applicable court orders (*e.g.*, an order permitting international travel with the child and/or an order providing for sole custody of the child) travel with the parent and the child, as many countries have now instituted procedures at entry and exit points to ensure a child is appropriately traveling with a parent.[13]

Hague Convention

If it is believed that unauthorized international travel has occurred, or if a parent is considering whether it is appropriate to consent to the child traveling internationally with the other parent, the concerned parent is encouraged to review information regarding the intended travel destination as it appears on the Department of State website to determine whether any travel advisories or travel alerts to that country are in effect. Prior to providing consent, a concerned parent may also wish to review the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which is a treaty designed to expedite the return of abducted children to their home countries.[14] A current list of convention partners with the United States can be found on the Department of State website.[15] If the country to which the minor child is traveling is not a convention partner with the United States, a parent cannot seek the return of the child under the Hague Convention, and would need to establish a case of international parental child abduction.

Case Law

The fact that a particular country is not a signatory to the Hague Convention has been found, in and of itself, to not constitute a sufficient basis to withhold permission for a child to travel to that country without further evidence. New Jersey has refused to establish a bright-line rule prohibiting international travel with minors to countries that are not signatories to the Hague Convention.[16] In *M. Kamel Abouzahr v. Cristina Matera-Abouzahr*, the Court held that the fear of a parent is not enough to deprive a noncustodial parent of visitation. In so holding, the Court explained that the establishment of a rule that would preclude travel to non-Hague Convention signatory countries "would unnecessarily penalize a law-abiding parent and could conflict with a child's best interest by depriving the child of an opportunity to share his or her family heritage with a parent."[17]

The ability of a parent to retrieve a child from a foreign country, and extradite the wrongdoer parent, in the event that parent improperly retains the child, are 'major factors' for a court to consider in ruling upon an application to permit or restrain international parenting time. However, other factors to consider include, "practices and policies of a foreign nation,…the domicile and roots of the parent seeking such visitation the reason for the visit, the safety and security of the child, the age and attitude of the child to the visit, the relationship between the parents, the propriety and practicality of a bond or other security and the character and integrity of the parent seeking out-of-country visitation as gleaned from past comments and conduct."[18]

Other Protective Measures

The U.S. Department of State has established the Children's Passport Issuance Alert Program (CPIAP), as a mechanism to provide parents advance warning of possible plans for international travel with a child, in the hope of preventing international parental child abduction.[19] This program allows a concerned parent to register their child, under the age of 18, in the CPIAP. All requests for entry of a child into the CPIAP must be in writing and signed. A copy of the current Form DS-3077, titled "Request for Alert Into Children's Passport Issuance Alert Program," can be found on the Department of State Website.[20] Although the request to register a child under the age of 18 in the CPIAP will generally be made by the child's parent, it may also be submitted by law enforcement or a court, or by someone acting on behalf of a parent, such as another family member or an attorney.

If a child has been registered in the CPIAP and an application for that child's passport is submitted, the U.S. Department of State is required to contact and alert the parent or parents. Additionally, an alert is also given to all U.S. passport agencies, as well as U.S. embassies and consulates abroad.[21]

As discussed above, a passport may be issued to a child under 16 without consent of both parents if the applicant for the passport can establish that consent of both parents is not required under federal law. Thus, a court order providing the applying parent with sole custody of the child, or which authorizes the applying parent to travel with the child, would allow the U.S. Department of State to issue the passport without the consent of the other parent, even if the child's name has been entered into the CPIAP.[22]

While a child under the age of 18 with an existing passport can also be registered in the CPIAP, the program does not provide a mechanism to track the use of the passport. Thus, if a parent of a child with an existing passport has concerns that the other parent may abduct the child from the United States, consideration should be given to having that party seek the entry of a court order directing the child's passport be held by the party's attorney or other designee.

Conclusion/Practice Tip

Family law attorneys should be cognizant of not only the current state of the procedural regulations in effect relating to international travel, but also of the relevant case law addressing these issues. It is important for the family law practitioner to advise a client to address all of these issues well in advance of the planned international travel, to try and make the travel preparation as smooth as possible for both parents and the child. ■

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Endnotes

1. 22 C.F.R. §51.28.
2. *Ibid.*; http://travel.state.gov/passport/get/minors/minors_834.html; http: //travel.state.gov/passport/get/forms/ds11/ds11_842.html.
3. http://travel.state.gov/passport/passport_1738.html.
4. 22 C.F.R. §51.28(a)(2).
5. http://travel.state.gov/passport/get/minors/minors_834.
6. 22 C.F.R. §51.28(a)(2); http://travel.state.gov/passport/get/minors/minors_834.
7. 22 C.F.R. §51.28(a)(2).
8. 22 C.F.R. §51.28(a)(3); DS-3053 12-2010; http://travel.state.gov/passport/get/minors/minors_834.html.
9. 22 C.F.R. §51.28(a)(5).
10. 22 C.F.R. §51.28(a)(3).
11. *Ibid.*
12. http://travel.state.gov/passport/get/minors/minors_4313.html; 22 C.F.R. §51.28(b).
13. http://www.usairways.com/en-US/traveltools/special needs/ticketingpolicies/international.html.
14. 42 U.S.C. §§ 11601 to 11610.
15. http://travel.state.gov/abduction/resourses/congressreport/congressreport_1487.html.
16. *M. Kamel Abouzahr v. Cristina Matera-Abouzahr*, 361 N.J. Super. 135 (App. Div. 2003); *MacKinnon v. MacKinnon*, 191 N.J. 240 (2007).
17. *M. Kamel Abouzahr v. Cristina Matera-Abouzahr*, 361 N.J. Super. at 155.
18. *Id.* at 156.
19. http://travel.state.gov/passport/get/minors/minors_4313.html; 22 C.F.R. §51.28(c).
20. http://www.state.gov/documents/organization/80112.pdf.
21. *Ibid.*
22. 22 C.F.R. §51.28(a)(3).