New Jersey
Family Lawyer

Vol. 41, No. 5 — September 2023

Chair's Column

Gratitude, Goals and Hopeful Guidance for the Year Ahead

By Megan S. Murray

On May 18, I was honored to be sworn in as the Chair of the Family Law Section of the New Jersey State Bar Association. My swearing-in was an event I will never forget. I sincerely thank the many colleagues, friends and family who have supported me and without whom I would not currently be the Chair of the Family Law Section.

I am extremely lucky to be following directly in the footsteps of some phenomenal past Chairs who have gone out of their way to mentor me and answer all of the many questions I have had during my years as an Officer and in the months leading up to my swearing in. Sheryl Seiden, Derek Freed and Robin Bogan, thank you for the countless hours you have taken out of your own lives to help me. I am also extremely fortunate to have fellow Officers who are a dream team. Jeff Fiorello, Cheryl Connors, Christine Fitzgerald and Bobby Epstein, thank you for having my back.

I have big shoes to fill, and I will use my best efforts to make improvements to the practice of Family Law as your Chair.

One of my primary goals this year is to see through the effectuation of a change to Rule 1:38-3, such that Family Part pleadings, motions and other records submitted to the court are deemed confidential. There is not a public interest in having a family's issues available for public consumption and review. The issues in the family part are personal and the release of certain information in these cases could have a tremendously detrimental impact on litigants, their children, their extended family members and friends.

Lizanne Ceconi previously worked as Chair of a Committee on FLEC which drafted proposed language that would, in fact, provide for the confidentiality of all family part records. Jeralyn Lawrence has written to Judge Grant, providing him with this language and the basis for our request for a Rule Change. I have re-appointed Lizanne as Chair of an ongo-

ing committee to work toward the goal of ensuring that the proposed language is adopted and that family part records are no longer accessible to the public.

I also intend to more formally address the ongoing debate of virtual versus in-person appearances. Most of us remain polarized on this issue. However, we must recognize that there are benefits to both options and be open to discussing the key question—whether one option versus the other ultimately has a greater impact on getting cases resolved. I, personally, love the cost savings to my client and the time savings to me that virtual appearances offer. At the same time, virtual appearances in certain instances have resulted in lower rates of settlement. I heard resoundingly from the judges at the February FLEC Bench/Bar conference that the rate of cases settling at Early Settlement Panels went down significantly once ESPs turned virtual. If the clients are saving time and cost in the short run only to face additional litigation costs due to non-resolution of their case in the long run, that's a problem. I have formed a committee to address this issue head-on and to provide a report on how the various options available serve as potential benefits or detriments to attorneys, clients and the resolution of family part cases.[1]

I will also work with the Young Lawyer Subcommittee Co-Chairs, Michelle Wortmann and Lauren Sharp, to cultivate an eagerness among those beginning their careers in family law to become invested in the Section and the opportunities it affords to make beneficial changes to this practice. I hope that members of this Section will attend the Young Lawyer events this year and meet the amazing attorneys who are making their way up the ranks.

I am also extraordinarily lucky this year, as I have Tim McGoughran, our friend and fellow family law attorney, at the helm of the entire New Jersey State Bar Association. I look forward to working with Tim, as we navigate together through the year of M&M.

Finally, I am working with State Bar with the hopes of having our annual retreat 2024 in Costa Rica. While I can't make any promises just yet, I certainly hope that next March we will be eating, drinking and, most certainly dancing on the beach with the monkeys, iguanas and sloths cheering us on.

I take the practice of family law extremely seriously. We, as family practitioners, must remember the importance of what we do and the impact we can have on people's lives. We are in a position to help people going through one of the hardest times in their lives. It is a profession that allows us to interact with people on a daily basis and to provide them assistance when they may think that no one else is on their side and that they have no hope for a bright future.

However, this is also an extremely difficult practice. Every day we deal with clients who want us to tell them what they want to hear and who argue with us when we have the courage to tell them what they need to hear. We deal with clients who want us to use bad faith practices to outplay our adversary and who tell us we're weak or "on the defensive" when we refuse to do so. And we deal with clients who want us to project the anger they have for their spouse onto our adversaries.

In the face of these challenges, I say that it is the best attorney who tells their client what they need to hear, even if they don't want to hear it. I say that it is the best attorney who wins a case through knowledge of the law and hard work, not through manipulation, bullying and bad faith practices. I say it is the best attorney who extends a hand to their adversary, notwithstanding the poor relationship which may exist between the clients. I say that it is the best attorney who refuses to sacrifice their own integrity, even if it means disagreeing with a client, even if it means losing the client.

We can help people. We can improve this practice. We can make changes for the better. I certainly hope that I can make changes for the betterment of this Section during my year as Chair.

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Endnotes

1 I recommend that everyone read prior articles submitted to the *New Jersey Family Lawyer* relevant to this issue, to wit: Early Settlement Panel – In Person, Virtual or Hybrid: *by Jeralyn L. Lawrence and Charles F. Vuotto, Jr.*; and Get Dressed and Get Back to Court: *by Brian Schwartz and Christopher R. Musulin*

Executive Editor's Column

Disability Compensation is Available to Pay Alimony

By Ronald G. Lieberman

There are numerous questions about support that come to light when a payor is a veteran who receives Veterans' Affairs (VA) disability benefits/compensation in lieu of military retired pay. Until Nov. 17, 2022, one of those open questions was whether a portion of VA disability compensation could be garnished to pay alimony or child support. We now know the answer is "yes," based on the decision from the United States Court of Appeals, Federal Circuit, in *Rhone v. McDonough*.[1] Before we explore that decision, however, we need to take a step back to obtain a better understanding of VA disability compensation.

The federal government's VA website defines VA disability compensation as a "monthly tax-free payment to Veterans who got sick or injured while serving in the military and to Veterans whose service made an existing condition worse."[2] Within the divorce context, when a veteran receives VA disability benefits after waiving disposable retired pay (i.e., pension monies), those benefits cannot be equitably distributed. As was recently held by the Appellate Division in *Fattore v. Fattore*,[3] a judge in a post-divorce context can treat the waived pension benefits as a change in circumstance warranting an initial award of alimony and/or an alimony modification for the spouse who lost their share of their ex-spouse's military pension. *Fattore*, however, did not address whether those VA disability benefits could be garnished to pay alimony. As noted above, the *Rhone* decision answered that question in the affirmative. The scenario in that case was as outlined below.

In *Rhone*, a veteran retired due to physical disabilities and after waiving his military retired pay received a portion of his pension as VA disability compensation.[4] Since the veteran had a preexisting alimony obligation at the time of his waiver, a state court judge deemed available to pay alimony a portion of his pension.[5] Once the veteran was informed the Department of Veterans Affairs would begin withholding a percentage of his VA disability compensation to pay his preexisting alimony obligation, he argued that VA disability benefits were not subject to garnishment.[6]

After 20 years of litigation in the Veterans Court, a decision was made that the VA legally garnished the veteran's VA disability compensation pursuant to state law.[7] The veteran appealed, leading to the decision by the *Rhone* Court affirming the lower court's decision that the VA was permitted by federal statute to withhold VA disability compensation to pay alimony.[8] In so holding, the federal court noted how the Uniformed Services Former Spouses' Protection Act (USFSPA)[9] permits a garnishment of military retired pay for support purposes.[10] Applying the statute to VA disability compensation, the *Rhone* Court held the source of payment of alimony was not limited solely to disposable retired pay, but also VA disability compensation.[11]

In finding that VA disability benefits could be garnished to pay for alimony, the *Rhone* Court held the USFSPA did not conflict with any federal case law[12] previously exempting VA disability benefits from division as community property or in equitable distribution.[13] As a result, VA disability compensation could be garnished to pay for alimony when the veteran waived a portion of his disposable retired pay to receive disability compensation.[14]

Since alimony, child support, and garnishment for payment of each of them are "creature[s] of state law" states are to determine if VA disability benefits are exempt from garnishment.[15] New Jersey does not have such an exemption from garnishment, and given the equitable bend and public policy in New Jersey detailed in *Fattore*, which favors trying to make a former spouse whole after disposable retired pay is waived in favor of VA disability benefits, there is no reason to believe a judge would preclude a payor's VA disability compensation from garnishment for payment of their alimony obligation.

A forward-thinking practitioner, armed with *Rhone*, should consider adding language into any settlement agreement stating any future VA disability compensation from a veteran-payor will be garnished for payment of alimony or child support. ■

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Endnotes

1. 53 F.th 656 (2022).
2. va.gov/disability (last viewed June 25, 2023).
3. 458 N.J. Super. 75 (App. Div. 2019).
4. *Rhone, supra*, 53 F. 4th at 658.
5. *Ibid.*
6. *Id.* at 659.
7. *Ibid.*
8. *Id.* at 660.
9. 10 U.S.C. Sec. 1408 (2023).
10. *Id.* at 660-61.
11. *Id.* at 661.
12. *McCarty v. McCarty*, 453 U.S. 210 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); *Howell v. Howell*, 518 U.S. 214 (2017).
13. *Id.* at 661.
14. *Id.* at 662-63.
15. *Id.* at 663.

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A Case for Gap Alimony

By Frank A. Louis

New Jersey's alimony statute does not address how alimony duration should be calculated when limited duration alimony is inappropriate, and the marriage is less than 20 years in duration. Such cases should now be characterized as "gap marriages," with "gap alimony" awarded based on the statutory factors and existing principles governing alimony, and not by an impermissible formula approach.

While there are many issues arising from the amendments to N.J.S.A. 2A:34-23 concerning alimony, the central issue presently causing debate is how duration in certain marriages should be calculated. What are the factors that should be considered in determining duration in a marriage of less than 20 years and where limited duration alimony is not applicable? There is nothing in the case law, the statute, or the public policy that would authorize alimony in these circumstances to be some automatic percentage of the years the parties were married. The statute is explicit: if the parties were married for more than 20 years, then it would be open durational subject to exceptions; an alimony award would not be fixed in time. Limited duration alimony also does not have any statutory formulaic calculation that determines duration of an award, yet nonetheless, the case law is clear that limited duration alimony has a limited purpose: it is for short marriages. Judge Philip S. Carchman (ret.) made that clear in *Cox v. Cox,*[1] when he emphasized that limited duration alimony was intended to address the circumstances where the marriage was of short duration such that permanent alimony is not appropriate. *Cox* confirms two critical points: (1) limited duration alimony is for marriages of short duration; and (2) it was not to be awarded if permanent alimony was appropriate. The statute did not specifically establish any standards, let alone formulas, providing guidance to determine alimony duration for marriages of less than 20 years which did not qualify for limited duration alimony. At the same time, the statute did not vary, modify, or alter limited duration alimony. The standards for awards of limited duration alimony today are the same as they were before the new statute but, in practice, are now consistently ignored. Limited duration before and after the statutory amendment was only appropriate in short marriages. Limited duration alimony is now used as an all-encompassing and expansive label for marriages of less than 20 years, completely unrelated to and, in many cases, directly opposed to, the original purpose of limited duration alimony. The Legislature did not change limited duration alimony–the lawyers did. Limited duration alimony did not magically become expansive. Simply put, if limited duration alimony was inappropriate before based on the duration of the marriage, it similarly is inappropriate now. This article will address the standards to be applied in calculating alimony in those cases that are inappropriate for limited duration alimony, but the parties were not married 20 years and open durational alimony is not available.

The Proposal for Gap Alimony for Gap Marriages

In cases where neither limited duration alimony nor open durational alimony is appropriate, the marriages fall within the "statutory gap." Since the statute did not specifically identify or address these "gap marriages," the proper legal analysis may well be more focused if a label is established for marriages which are neither limited duration nor open durational. Since there is a "gap" in the statute, characterizing these intermediate marriages as "gap marriages," and the alimony awarded as "gap alimony," seems appropriate and such an approach focuses the analysis where it belongs: on the facts of the case. It will require courts and lawyers to focus on the reasons why alimony should be a particular duration, requiring cases to be decided on the facts applied to the statutory factors.

"Gap alimony" would apply when a court finds limited duration alimony to be inappropriate and where the parties had not been married for 20 years. In developing standards for "gap alimony," the focus should be as it always is with alimony: on the reasons why alimony should be awarded. It is not a coupon attached to a license to be clipped once a complaint for divorce is filed. It is a policy-driven remedial award related to what transpired during the marriage, assuring that when a marriage ends, spouses treat each other fairly. Alimony is

not an automatic benefit attached to a marriage license. It is the unique facts of each individual case and the interrelationship with equitable distribution which coalesce to construct an alimony award that is fair, economically realistic, and furthers the policy of granting alimony to a dependent spouse. The duration of "gap alimony" requires linking the facts of a particular marriage to the traditional reasons alimony is awarded. There is no simple formula, nor should there be. A calculator does not determine alimony–facts do.

The statutory factors, viewed through the prism of public policy and applied to the facts of the case, will create fair alimony awards. In doing so, there must be an explicit rejection of "rules of thumb" used subrosa by judges and lawyers in settlement, which have consistently and universally been rejected by the courts as being improper and without statutory authorization; nonetheless, they survived. New rules of thumb are being developed which are equally inappropriate and without statutory support, and which ignore the reasons alimony is awarded. A formulaic approach to "gap alimony" eliminates the role lawyers have in the process, diminishes the central role marriage has in our society, and is inherently unfair, generally prejudicing the rights of a dependent spouse. Most importantly, a formula replaces a comprehensive analysis of the statutory factors and rests on the premise that facts have little relevance in an alimony determination. It is like arguing a car does not need an engine, or a paratrooper has no need for a parachute.

What cannot be the test is some standardless application of a percentage of duration. Such application will not create a fair and equitable result and effectively negates, if not ignores, the factors in N.J.S.A. 2A:34-23 which are mandated to be considered ("the court shall consider and assess evidence with respect to all relevant statutory factors").[2] The analysis should focus on the actual economic reality of the particular "gap marriage" at issue. One 15-year marriage may result in an 11-year award, yet another an award of 15 years, and yet another no alimony at all. Alimony is a fact-sensitive analysis.

Rejection of a formulaic approach mirrors the arguments made at the 2018 annual convention by Judge Thomas P. Zampino (ret.) and Mark H. Sobel, who emphasized that the current practice of determining the length of alimony in a non-open durational case should not automatically be some percentage of the number of years the parties were married. As they succinctly put it, 18 does not mean nine or 12. Duration is only one statutory factor; it is not determinative. As Judge Lawrence R. Jones (ret.) has emphasized, it is facts, not abstract legal principles, that determine the results. The facts, applied to the statutory factors, and viewed through the prism of public policy, is how alimony should be determined.[3] This article builds on the arguments others have already made.

Analysis of the Statute Itself

As with any issue addressing alimony, the analysis begins with the statute. Alimony, after all, is a creature of statute: Is there anything in the statutory language or the construct of the statute itself that supports alimony being awarded pursuant to a formula or "rule of thumb"? Most importantly, the statute did not change prior law governing these interim or "gap marriages." Clearly, there is no statutory justification for what was a permanent alimony, all of the sudden be transformed to a limited duration case. There is no place in a justice system for extrajudicial, statutory unauthorized formulaic approach to determine alimony. Any such claim is created out of a whole cloth for reasons of simplicity. The statutory factors are designed to achieve a fair result–not a simple one. The statutory factors are:

1. The actual need and ability of the parties to pay;
2. The duration of the marriage or civil union;
3. The age, physical and emotional health of the parties;
4. The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other;
5. The earning capacities, educational levels, vocational skills, and employability of the parties;
6. The length of absence from the job market of the party seeking maintenance;
7. The parental responsibilities for the children;
8. The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
9. The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
10. The equitable distribution of property ordered and any payouts on equitable distribution, directly or

indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11. The income available to either party through investment of any assets held by that party;
12. The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;
13. The nature, amount and length of pendente lite support paid, if any; and
14. Any other factors which the court may deem relevant.

In each case where the court is asked to make an award of alimony, the court shall consider and assess evidence with respect to all relevant statutory factors. If the court determines that certain factors are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. No factor shall be elevated in importance over any other factor unless the court finds otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard.[4]

The reason all 14 factors are to be considered is to focus the analysis on the facts. That emphasizes that duration of the marriage is not the factor, but only a factor. The statute directs all factors "shall" be considered. This is not what is presently happening.

The Divorce Study Commission which recommended adoption of limited duration alimony noted:

> Providing the power to award limited duration alimony, subject to safeguards and only after an analysis of carefully crafted statutory factors, will permit the courts to mold their decision making to the facts presented without the artificial constraints now presented by only having the options of awarding rehabilitative alimony, permanent alimony or no alimony at all.[5]

The commission's language about molding the decision to the facts is the essential point this article is attempting to make.

There is nothing in the legislative history to suggest that when the "alimony reform" statute was passed there was any intention to change what had been previously a permanent alimony case, other than the clear prescription that alimony could not be awarded for longer than the marriage itself. An alimony cap prohibiting alimony being paid in a duration longer than the parties were married is not the same as a 16-year marriage being capped at eight years of alimony through "rules of thumb."

It would be a rewriting of the statute to conclude duration of alimony in "gap marriages" be treated as some newly created subcategory of limited duration alimony. Of critical importance is the legislative history, which illustrates the exact opposite. That history as relayed by both Jeralyn L. Lawrence and Brian M. Schwartz in their respective articles is that the reformers wanted duration in "gap marriages" be formulaic, i.e., that duration of alimony in an 18-year marriage would be some percentage of the number of years.[6] That specific proposal was rejected by the Legislature. The lawyers who so effectively opposed the reformers may have won the battle–but lost the war. Every day, alimony in "gap marriages" is calculated by a formula, unrelated to the facts of the case; precisely what the reformers demanded and the Legislature rejected.

Limited Duration Alimony

An examination of why we have limited duration alimony makes it abundantly clear that the expansive use of limited duration alimony is unwarranted. Limited duration alimony was recommended by the commission. The author was the New Jersey State Bar Association's representative to the commission. The statute mirrored the proposal advanced by the author in a September 1991 limited duration alimony article.[7] The commission observed it was appropriate to add to rehabilitative or permanent alimony a third alimony type which "would address the factual circumstances that are represented in some of the cases that are heard in the Family Part."[8] The commission found these cases "involve a marriage of short duration where permanent or rehabilitative alimony would be inappropriate or inapplicable but where, nonetheless, economic assistance for a limited period of time would be just."[9] The commission noted, which the Appellate Division in *Cox v. Cox* cited with approval, that limited duration alimony was "singularly inappropriate in long marriages."[10] A marriage of "short duration" is not any marriage less than 20 years.

Because of a fear limited duration alimony would eliminate permanent alimony, the commission recommended, and the Legislature adopted, procedural safeguards before limited duration alimony could be awarded; a finding had to be made permanent alimony was not warranted. That protection has now been eviscerated. Of singular importance in understanding limited duration alimony was the commission's intent which reflected a primary reason alimony is awarded:

> …the Commission's intent is to direct the court to focus upon the economic impact of the marriage on the parties by examining whether employment opportunities were lost or career opportunities delayed. In addition the court would inquire into any advantages obtained by either spouse by the equitable distribution award. All these must be inter-related with all relevant economic factors in determining any economic dependency that might exist between the parties was created by the marriage or was the product of the parties' disparate skills and educational opportunities, unrelated to anything that happened during the marriage. The court's inquiry would focus not on the fact the parties were married but upon the impact of the marriage and child-rearing responsibilities on the parties.[11]

The seminal, and still most important decision on limited duration alimony, if not any alimony case, was the opinion of Judge Carchman in *Cox*. The court quoted at length not only from the commission but from the author's prior writings.[12] Judge Carchman emphasized the distinction between limited duration alimony and a permanent alimony award. Limited duration alimony provides "an equitable and proper remedy" where permanent alimony is inappropriate; but it was never intended to be awarded in anything other than a short marriage.[13]

Yet, that fundamental precept about limited duration alimony is now being ignored, as it expands beyond anything legislatively contemplated. Lawyers accepting a percentage of what previously would have been a permanent alimony case have modified, if not bastardized, the statute. In doing so, they inadvertently undercut, if not ignore, one of the primary considerations in an award of limited duration alimony: the economic impact of the marriage on the dependent spouse.[14]

In *Cox*, the Appellate Division emphasized that the dividing line between permanent and limited duration alimony was duration when "all other statutory factors were in equipoise."[15] Duration had a direct impact on the parties and should be a significant factor. Frequently, in a long-term marriage, the earning capacity of the dependent spouse "decreases proportionately with the length of the marriage as the homemaker's education, skills and job experience become outmoded."[16] The commission further observed the "longer the marriage, the more likely it is that the homemaker's earning capacity would become permanently diminished," meanwhile noting that "the homemaker's spouse has reaped the benefits of having a family yet devoting all of his (or her) productive hours to an increase in earning capacity."[17] This is a classic application of applying the principle motivating factor of the limited duration alimony statute to the facts of the case: what was the economic impact of the marriage on the parties explains the focus on duration. The analysis must focus not on the number of years of the marriage, but on the impact of those years on both spouses. As the commission emphasized, "the court's inquiry would focus not on the fact that the parties were married but upon the impact of the marriage and child-rearing responsibilities on the parties."[18] A critical point is how the marriage affected each party's earning capacity. In many marriages the payor's capacity is enhanced and the payee's diminished.

This policy imperative is equally applicable in "gap alimony." It is a fact-sensitive analysis and provides the path to the correct result. The duration of the marriage may well have impacted the earning capacities of one, or both, spouses. Analyzing the economic impact of the marriage on each spouse is therefore critical in selecting alimony duration, as is an analysis of the interrelationship of equitable distribution to a fair award, a principle embedded in the DNA of alimony law.[19] It is the lawyer's responsibility not to blithely accept some percentage of a marriage when it is not a short marriage and limited duration alimony is not appropriate.

If the economic impact of the marriage in a "gap marriage" was so significant that it would have a long-term adverse impact on the dependent spouse, then what public policy consideration warrants an award for only a percentage of the length of the marriage? As long ago as in *Gugliotta v. Gugliotta*, there was a linkage between the economic dependency created by the marriage and the right of a spouse to share in the economic success reflected by the supporting spouse's income level.[20] In the traditional marriage where the parties start with nothing, that should be a significant factor warranting an award of "gap alimony" to the full permissible length. Conversely, an equitable distribution award may well impact the analysis. If a dependent spouse receives equitable distribution they could never have received by virtue of their own individualized educational background, skill, expertise, or financial circumstances, then such an award was the product of the marriage–and a benefit, suggesting a shorter term.

A fair and policy-driven analysis is how the marriage impacted a spouse; if that impact was beneficial in that a large equitable distribution award is received, that fact should shorten duration of "gap alimony." But that outcome is fact-based; it is not a formulaic approach. Another example that could impact alimony duration in a "gap marriage" is whether the lifestyle was supported based on the supporting spouse's premarital skill and expertise. If so, the marital partnership did not create a spouse's earning capacity and the right to enjoy the marital lifestyle was not earned. Alternatively, when the partnership created an earning capacity benefitting the supporting spouse suggests an economic reason to expand the number of years alimony is paid and if a payee's capacity was adversely affected, that is also a factor extending the duration. A dependent spouse's health might also warrant "gap alimony" be extended through the full permissible term. Responsibilities for a child which impacts a dependent spouse's earning capacity might also be another factor to be considered. These examples emphasize that the focus should always be on the facts; facts determine whether the alimony policy warrants a longer or shorter term. What the law cannot be is some formula that suggests or requires some percentage of gap alimony, without a detailed analysis of how the facts of the case interrelate with each statutory factor. Not all marriages are the same.

Summary

The present practice of taking some portion of the marriage's duration is simply unfair, not warranted by the statute or the public policy on which alimony is based. Given that the statute never addressed these "gap marriages," if the analysis suggests that permanent alimony would have been awarded there is nothing in the new statute suggesting nor any public policy warranting that the alimony should now be shorter. If it would have been permanent before, it should now be open durational, subject to the length of marriage cap. The statute did not change the law or public policy. What is happening now is an abrogation of a lawyer's responsibility to apply the facts to the law using the statutory factors. ■

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Endnotes

1. 335 N.J. Super. 465 (App. Div. 2000).
2. N.J.S.A. 2A:34-23(b).
3. See Clementi v. Clementi, 434 N.J. Super. 529 (Ch. Div. 2013) and Gilligan v. Gilligan, 428 N.J. Super. 69 (Ch. Div. 2012).
4. N.J.S.A. 2A:34-23(b)(emphasis added).
5. Report of the Commission to Study the Law of Divorce at 37 (April 18, 1995), *citation to be provided.* (emphasis added).
6. Lawrence, Jeralyn L., *The Policy Considerations Behind the Revised Alimony Statute*, N.J.L.J., October 27, 2014; Schwartz, Brian M., *The Unauthorized, Unofficial Legislative History of the New Jersey Alimony Reform*, 36 No. 6 N.J. Fam. Law. 19 (June 2016); Lawrence, Jeralyn L., *The Impact of Retirement on Alimony Pursuant to N.J.S.A. 2A:34-23(i)*, 38 No. 6 N.J. Fam. Law. 18 (Dec. 2018); Lawrence, Jeralyn L., *N.J.S.A. 2A:34-23: An Analysis of New Jersey Statutory Law and Case-Law Precedent on Alimony* (2019) (Family Law Symposium).
7. See 11 No. 6 N.J. Fam. Law. (Sept. 1991) (cited in Cox v. Cox, 335 N.J. Super. 45 (App. Div. 2000)).
8. Commission report, *supra* note 4, at 34-35.
9. *Id.* at 35 (emphasis added).
10. *Id.* at 38. See also *Cox* at 482.
11. Commission report, *supra* note 4, at 37 (emphasis added).
12. *See Cox*.
13. *Id.* at 476.
14. *Id.* at 481.
15. *Id.* at 483.
16. Commission report, *supra* note 4, at 34.
17. *Id.* (citing Krauskopf, "Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony," 21 Fam. L. Quarterly 573 (Winter 1988)). The article was also cited by Judge Carchman in *Cox*, at 482.
18. *Id.* at 37.
19. See *Rothman v. Rothman*, 65 N.J. 219 (1974).
20. 160 N.J. Super. 160, 164 (Ch. Div. 1987), aff'd 164 N.J. Super. 139 (App. Div. 1978).

Commentary

A Proposal to Calculate Alimony

By Frank A. Louis

Over the course of 40 years of the NJSBA Family Law Symposium, there have been innumerable articles, arguments and debates on alimony. Yet, those discussions have focused on the policy-driven analysis of why alimony is awarded, as opposed to exactly how it is to be calculated. Despite clear case law to the contrary, there is an existing practice, certainly among lawyers, and I believe among members of the bench, although *sub rosa,* to use a formula to calculate alimony. The case law is crystal clear formulas are not to be used. As the Appellate Division in *S.W. v. G.M.* noted in rejecting formulas:

> To be clear, N.J.S.A. 2A:34-23(b)(4) does not signal the Legislature intended income equalization or a formulaic application in alimony cases, even where the parties spent the entirety of their income. Had the Legislature intended alimony be calculated through use of a formula, there would be no need for the statutory requirement that the trial court address all the statutory factors. The Legislature declined to adopt a formulaic approach to the calculation of alimony. See Assemb. 845, 216th Leg., 2014 Sess. (N.J. 2014) (declining to enact legislation computing the duration of alimony based upon a set percentage).[1]

They are improper; yet, on a daily basis, these rejected and impermissible formulas are used to determine alimony. The primary reason formulas are used is because there is a lack of clarity by the bench and bar as to how alimony is to be determined. A formula is simple, albeit improper. Formulas are impermissible not only because they are not authorized by case law or the statute, but because they do not consider the statutory factors governing alimony or many material facts in a case. Alimony is therefore determined by only looking at income–not every other fact that is present. Divorces are not all the same. A fair result requires a factual analysis–not a calculation which ignores the facts.

Divorce is unique. The only place a citizen can obtain one is by filing in court. A litigant has no other options. Therefore, the judicial system owes more to a litigant than a formulaic approach which, by definition, only considers one set of the facts–and none of the statutory factors. The system, and those who participate in it, owe more to the litigants. This is not workers' compensation court. We elevate fairness and equity based on the facts of each case as the essence, if not the formation, of the system; yet, simultaneously, formulas are used that deny fairness or equity by refusing to consider the facts.

A statutory scheme is to be applied, not ignored. Lawyers apply facts, not close their eyes to them. Lady Justice is blindfolded to assure justice is equally applied, not so that justice is determined by being blind to the facts. If lawyers abdicate their responsibilities to their clients to apply the statute, and consider all the facts, then we should simply petition the Legislature to do what the payors interest groups wanted in the new alimony statute: eliminate judicial discretion from the analysis and impose formulas. This, I note parenthetically, would logically ultimately eliminate the need for lawyers. After all, you do not need a law degree to use a calculator.

Yet, the proposal advanced by this article is not designed to protect lawyers, but to assure that a system of justice is just. No litigant is entitled to more than that–yet, no litigant should ever have to accept less. Litigants have the right to have their lives decided by the law and the facts of their case–not a system which ignores both the facts and the law.

Aside from the fact that a formula is entirely unrelated to the statutory factors which legislatively, and as a matter of law, are mandatory factors to be considered, there appears to be no agreed-upon formula. I have heard of use of different percentages depending where in the state you are, or even of differences within individual counties. It is somewhere between 20% or 25% of the

difference between the parties' gross earnings; thus, a formula is being used statewide which is not only legally impermissible but inconsistently applied, entirely unrelated to any of the economic realities created by facts, let alone the statutory factors.

This is not a new issue. The Bar has opposed alimony guidelines for 40 years. When raised in the Family Part Practice Committee, it never saw the light of day. The great irony is that the Bar Association, led by Jeralyn L. Lawrence, fought the good fight when the alimony statute was amended. The Bar defeated those who demanded a statute with a formula to determine alimony. While it appeared lawyers won that battle, it is equally clear that we may well have lost the war–and lawyers are the reason why. As Pogo once said: "We have met the enemy and he is us." Formulas, or rules of thumb, should not be used not because the law says they should not, and not because they are unrelated to the statute. Formulas should not be used because they create a result that has nothing to do with prevailing legal standards or facts of a particular case and, thus, are inherently unfair. A person getting a divorce should have their case decided by the facts of the case–not by some formulaic analysis that considers only some of the facts and ignores all others.

This article will address an actual methodology to be used to assist in calculating alimony, while at the same time establishing factors, when present, that might impact the range of alimony the proposed methodology provides. If spouses have a duty to act in good faith and deal fairly with their spouse when they divorce – principles now embedded in our law, then it is hard to understand how a proposal that requires, if not compels, the most critical issue in many cases be determined by the facts is not consistent with that duty.[2] Just as there should not be some routine, automatic percentage in determining the allocation of the value of a closely held corporation to the non-titled spouse in equitable distribution, the facts should determine the result.[3] Citizens who must come to court to obtain a divorce are entitled to a system that has integrity and makes individualized decisions–not determine critical issues by using a calculator.

We have a similar problem with equitable distribution, where there appears to be a rule of thumb that a non-titled spouse receives 35% of the value of a closely held business. At an early Symposium I addressed this very issue at some length, noting determination of an allocable percentage should not be based upon a formula, as there are multiple facts which should impact the fairness and economic reality of the percentage. Facts dictate results, as the following illustrates. *Orgler v. Orgler* holds that where the latent tax considerations are speculative (not reasonably being incurred), those consequences should not be subtracted.[4] However, in light of the statutory factor relating to tax considerations, and the Supreme Court's observation that legitimate tax considerations should be considered, *Orgler* teaches us these latent tax consequences nonetheless should be considered in the fairness of the distribution, i.e., in the percentage the non-titled spouse should receive.[5] Indeed, the *Orgler* court emphasized that consideration of hypothetical taxes "has an important place in the equitable distribution process."[6]

The importance of implementing the *Orgler* fairness imperative is illustrated by the following examples which turn on the facts involving identical businesses. If one business has a value of $1,000,000 and a tax basis of zero, and the other identical business has a value of $1,000,000 and a tax basis of $999,999, an objective application of *N.J.S.A.* 2A:34-23 would mean there would be a different percentage allocated to the non-titled spouse despite each business having the same value, for a simple reason: the tax consequences are materially different. Similarly, if the titled owner of a business, also valued at $1,000,000, is 40 years old, and another identical business valued at $1,000,000 has an owner who is 63 years old and who planned to retire at 67, a fair distribution should consider the statutory factor of age.[7] In economic terms, the 40-year-old would continue to receive the benefits of the goodwill for 25-plus years, while the older owner would only receive the benefits for four years, and the tax consequences created by a sale at 67 might no longer "be speculative." If tax consequences are not speculative, they can be subtracted from the value in lieu of being a factor in determining the percentages. In this example, even if not subtracted, the tax consequences for the 63-year-old warrant a lower percentage to the non-titled spouse. In determining the value to the owner which is then shared with the spouse, the actual future benefits should impact the result–not some unauthorized rule of thumb. Alimony requires the same analysis of the facts.

A Procedure to Reach a Fair and Equitable Alimony Award

What is the most cost effective and practical way to develop a mechanism that allows lawyers, in small or

large cases, to establish an alimony range? That range is the first step. The second step requires consideration of the facts of the case. Important elements in determining alimony should be need and ability to pay, which factors are then juxtaposed in an analysis of all the remaining statutory factors, although no one single factor can be given greater weight than any others under the statute. To determine ability to pay and need, critical to any fair analysis, the following facts need to be determined:

1. How much net (after tax) cash flow will the payee and the payor have?
2. What are the reasonable expenses of the payee and the payor?

The optimum way to reach a fair decision is to have this analysis completed before alimony is determined. This outcome can be achieved by preparing a chart (the first step) with different amounts of alimony, ranging from an amount everyone agrees is too low, to an amount everyone agrees is too high. While others may differ, it is my view that alimony should not result, absent extraordinary circumstances, in an equalization of income.[8]

The fairness of an alimony award using this approach becomes evident by examination of the chart below. The fair amount is somewhere in the range of the chart, but as explained later, the chart is not determinative. I have used in preparing this chart income figures that are routinely seen: the husband payor having an income of $150,000 a year and the wife payee having an income of $50,000 a year.

ALIMONY ASSUMPTIONS

HUSBAND – PAYOR							
Income	$150,000	$150,000	$150,000	$150,000	$150,000	$150,000	$150,000
Less Taxes:							
Federal (18%)	($27,000)	($27,000)	($27,000)	($27,000)	($27,000)	($27,000)	($27,000)
NJ (5%)	($7,500)	($7,500)	($7,500)	($7,500)	($7,500)	($7,500)	($7,500)
FICA (7.65%)	($11,475)	($11,475)	($11,475)	($11,475)	($11,475)	($11,475)	($11,475)
SUI	($175)	($175)	($175)	($175)	($175)	($175)	($175)
After Tax Cash Flow	$103,850	$103,850	$103,850	$103,850	$103,850	$103,850	$103,850
Alimony	($50,000)	($45,000)	($40,000)	($35,000)	($30,000)	($25,000)	($20,000)
Net Cash Flow	**$53,850**	**$58,850**	**$63,850**	**$68,850**	**$73,850**	**$78,850**	**$83,850**

WIFE – RECIPIENT							
Income	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000
Less Taxes:							
Federal (8%)	($4,000)	($4,000)	($4,000)	($4,000)	($4,000)	($4,000)	($4,000)
NJ (3%)	($1,500)	($1,500)	($1,500)	($1,500)	($1,500)	($1,500)	($1,500)
FICA (7.65%)	($3,825)	($3,825)	($3,825)	($3,825)	($3,825)	($3,825)	($3,825)
SUI	($175)	($175)	($175)	($175)	($175)	($175)	($175)
After Tax Cash Flow	$40,500	$40,500	$40,500	$40,500	$40,500	$40,500	$40,500
Alimony	$50,000	$45,000	$40,000	$35,000	$30,000	$25,000	$20,000
Net Cash Flow	**$90,500**	**$85,500**	**$80,500**	**$75,500**	**$70,500**	**$65,500**	**$60,500**

The purpose of the chart is to provide guidance at least to a range of possible alimony awards. That range must then be juxtaposed with each party's needs. By using the chart, you can quantify the net dollars each party would have after payment of different amounts of alimony, to be compared to their needs. If one party has substantially more money than their needs and the other does not, that would be a factor that, in a long-term marriage, might suggest an adjustment in the alimony.

With the chart, you have a narrow range of the appropriate alimony award. That range would then be analyzed by applying the law the facts, using the statute as a prism for refinement and determination of the ultimate amount (step two). Specifically, you would now apply the actual statutory factors to determine the final amount, or phrased another way, the decision ultimately would be made after considering the facts of the case.

Factors That Would Impact Determination of the Ultimate Alimony Amount From the Chart

Since the purpose of this article is to provide a general methodology as opposed to a more substantive review, I will only outline bullet points I believe should be considered in refining and determining the ultimate alimony amount. They are as follows:

1. The loss or diminishment of the payee's earning capacity created by the marriage. The focus here should be on the impact of children on the alimony recipient's earning capacity. There is no greater manifestation of the impact of the marriage on the parties than the children, who change everything.
2. The loss of employment or an advantageous opportunity as a consequence of the marriage.
3. The payee helped create or maintain the payor's earning capacity, as opposed to and distinct from the payor's earning capacity having already been established before the marriage. This may be a particularly important factor in a second marriage. Keep in mind there is a statutory presumption that each party created the marital income and assets.[9]
4. The payee's right or need for a savings component, which is a particularly fact-sensitive analysis.
5. Enjoyment of an elevated lifestyle that the payee would not have been able to enjoy based on their personal financial circumstances. It is frequently argued an elevated lifestyle creates some right to increased alimony. That may or not be true depending upon the facts. If you analyze the impact of the marriage on the parties, the enjoyment of a particular lifestyle may not be a positive factor in determining alimony, but a negative one. If the impact of the marriage on the payee was beneficial in that they enjoyed a lifestyle they never otherwise would have been able to enjoy; that should not create a right to a certain alimony amount, but should be a limiting factor in determining the amount.
6. It is clear there is a direct linkage between equitable distribution and alimony, which is why equitable distribution must be determined first. What cash flow from assets and the duration of the cash flow is the payee receiving? A disproportionate equitable distribution award or allocating debt to one party should be a factor in analyzing the chart.
7. A physical or emotional condition impacting the payee's need or ability to generate income. This condition need not have developed or occurred during the marriage. In fact, most of the factors apply based on the facts in existence at trial–not whether they occurred during the marriage. Likewise, the factor may be premarital, since the statutory factor does not refer to health as something that occurred during the marriage. Health is relevant in determining the impact on the receipt of alimony, whether the condition pre-existed the marriage or not.
8. The loss of child support during the alimony term. In most cases, alimony and child support are determined globally, and they are interrelated, since most litigants focus on the total amount received. Yet, if the child support is only to be paid for a limited period of time and then either stepped down or eliminated, that is a change in circumstances that should be addressed in the agreement and may be a factor in determining the amount of alimony to be received.
9. How the parental responsibility to pay for college has been determined. This issue requires careful draftsmanship. If a college expense is going to be incurred by the parties within a short period of time, the failure to address it in the agreement could mean you have a change in circumstances requiring a return to court. Conversely, this future anticipated expense should be a factor in determining both parties' ability to pay and needs. Otherwise, the likelihood of post-judgment litigation is sharply increased.
10. Any extraordinary expenses or debt obligations, particularly if related to an asset retained pursuant

to the agreement. Will the asset generate, in the near future, cash flow, or is it an asset that requires a financial contribution to be maintained? These real economic facts should impact alimony.

11. The loss of a pre-existing alimony claim which terminated upon the payee's remarriage.

I previously noted that alimony should not be determined by a calculator, but by an analysis of the facts and the law. By first determining at least a narrow range of alimony from the chart (step one), which I acknowledge is inherently subjective, and then refining the range by application of the actual facts (step two), a fairer result based on the law can be reached. While this process is not perfect, it is at least consistent with the legal framework, and the entitlement to alimony or the obligation to make an alimony payment is now determined by an application of the facts to the statutory factors viewed through the prism of what is economically realistic. It is fairer, more realistic economically, and based on law rather than a formulaic approach. The chart is part of the process; it does not dictate the result, but acts as a guide in ultimately reaching a result which, in the final analysis, is determined by the statutory factors applied to the facts of each case. ■

Frank A. Louis is a partner with Greenbaum, Rowe, Smith & Davis, LLP and is a former Chair of the Family Law section, the New Jersey State Bar Association's representative to the Divorce Study Commission and the fourth lawyer to receive the Tischler Award.

Endnotes

1. 462 N.J. Super. 522, 533 (App. Div. 2020) (emphasis added).
2. See *Fattore v. Fattore*, 458 N.J. Super. 75, 88 (App. Div. 2019).
3. See *Clementi v. Clementi*, 434 N.J. Super. 529 (App. Div. 2013); *Gilligan v. Gilligan*, 428 N.J. Super. 69, 76 (Ch. Div. 2012) ("Our law is not to be applied in the abstract, but must be considered in light of the facts in an individual case.").
4. 237 N.J. Super. 342 (1989). *Orgler* cited an article the author presented at the Family Law Symposium, emphasizing how the Symposium is not simply an educational exercise but an opportunity to change the law. Louis, Frank A., *Consideration of Theoretical Tax Consequences in Equitable Distribution,* 8 N.J. Fam. Law 153, 157 (1989).
5. See *Painter v. Painter*, 65 N.J. 196, 212-13 (1971) and *Dugan v. Dugan*, 92 N.J. 423, 441 (1983).
6. *Orgler* at 356.
7. N.J.S.A. 2A:34-23.1(b).
8. See S.W. v. G.M., 462 N.J. Super. 522, 533 (App. Div. 2020).
9. N.J.S.A. 2A:34-23.1.

Meet the 2023-24 Family Law Section Executive Committee Officers

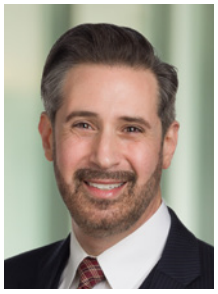
Megan S. Murray - Chair

Megan S. Murray is the founding partner of The Family Law Offices of Megan S. Murray. She is also a Fellow of the American Academy of Matrimonial Lawyers and an affiliate of the Matrimonial Lawyer's Alliance, whose membership is limited to 50 family law practitioners in New Jersey. Megan is Certified by the Supreme Court of New Jersey as a Matrimonial Attorney. Megan has been named a Super Lawyer by *New Jersey Monthly*. Since 2019, Megan has also been selected each year for inclusion in Best Lawyers of America, ranking her among the top 5% of practitioners in the nation.

Before becoming an Officer of the Family Law Section, Megan served as the Co-Chair of the Legislative Subcommittee of the Family Law Section. Megan is a member of the Middlesex County Bar Association and the Monmouth County Bar Association. She previously served for two years as Co-Chair for the Monmouth County Family Law Committee. She is a managing editor for *New Jersey Family Lawyer*. She has also been selected by *New Jersey Monthly*, *Super Lawyers Edition*, as a Super Lawyer. In 2012, she received the Martin Goldin Award for her dedication to the practice of family law.

Megan co-authored the book entitled *Divorce in New Jersey*. She has also been published regarding matrimonial matters in multiple publications, including but not limited to, the *New Jersey Law Journal, Middlesex Advocate, New Jersey Lawyer,* and *New Jersey Family Lawyer*. She has also spoken at numerous seminars across the state on issues relating to the practice of family law, including speaking on multiple occasions at the annual Family Law Symposium and the New Jersey State Bar Association's Annual Meeting. Moreover, she has appeared as a guest speaker on *Inside the Law* radio show on several occasions.

Jeffrey Fiorello - Chair Elect



Jeffrey Fiorello is a partner in Cohn Lifland Pearlman Hermann & Knopf LLP in Saddle Brook and concentrates his practice in family law mediation, assisting parties in the amicable resolution of their issues concerning custody and parenting time, spousal and child support, college contributions, distribution of assets and debts, and related issues. He has also handled family law litigation, domestic violence, civil litigation and appeals.

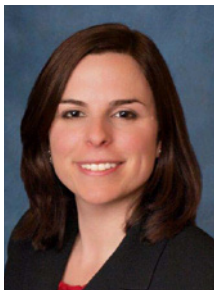
Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Jeffrey is a Trustee and Past President of the Passaic County Bar Association. He is Past Chair of the Association's Family Law and CLE Sections, and the Association's Activities and Social Committee. Jeffrey is a Past Chair of the Association's LGBT Sectionand previously served as the Chair of the NJSBA's CLE Advisory Board, and Chair of the Legislative Committee, for which he continues to serve as a member. He is also on the NJSBA's MAP Committee and Contract Review Committee, and previously served on the Nominating Committee. Jeffrey served as a Trustee on the NJSBA for six years from 2016 – 2022.

Jeffrey also served on the District XI Ethics Committee. He is a former member and Barrister of the Northern New Jersey Family Law American Inn of Court and the recipient of several honors, including being selected as the 2014 Professional Lawyer of the Year, Passaic County, by the New Jersey Commission on Professionalism in the Law and as the 2015 Passaic County

Distinguished Family Law Practitioner of the Year.

Jeffrey received his B.A., *cum laude*, from Rutgers University and his J.D. from Seton Hall University School of Law. He was Judicial Clerk to the Honorable Ralph L. DeLuccia and the Honorable Carol Weaver McCracken, Superior Court of New Jersey (Passaic County).

Cheryl Connors - 1st Vice Chair



Cheryl E. Connors is a partner with the law firm of Tonneman & Connors, LLC located in Eatontown. She is a member of the Solo and Small-Firm Section of the New Jersey State Bar Association. Cheryl served on the New Jersey Supreme Court Family Practice Committee from 2017 through 2023. In 2016, she appeared before the New Jersey Supreme Court on behalf of the New Jersey State Bar Association in the matter of *In re Adoption of a Child by J.E.V.* She is also a member of the Monmouth Bar Association, Middlesex County Bar Association, and Collaborative Divorce Professionals of New Jersey.

Cheryl serves as a Matrimonial Early Settlement Panelist in Middlesex County, an Intensive Settlement Panelist in Monmouth County and as an Associate Managing Editor on *New Jersey Family Lawyer* and is a frequent author and lecturer on the topic of family law. She was selected for inclusion in the New Jersey Super Lawyers®-Rising Stars list in 2011-2019 and New Jersey Super Lawyers® list in 2020-2023 and received the Martin S. Goldin Family Law Award in 2013 from the Middlesex County Bar Association.

From 2005-2006, Cheryl served as a judicial clerk for the Honorable Barry T. Albin, Associate Justice of the Supreme Court of New Jersey. She graduated from Cornell University with her Bachelor of Arts degree, with distinction in all subjects, and from Seton Hall University School of Law, *magna cum laude*. While attending Seton Hall University School of Law, she received a full scholarship as a Law Chancellor Scholar, was a senior member of the Seton Hall Law Review and received the Raymond del Tufo, Jr. Award.

Christine Fitzgerald - Treasurer

Christine C. Fitzgerald is a partner at Seiden Family Law, LLC. She is certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey and is a Fellow in the American Academy of Matrimonial Lawyers (AAML), as well as a member of the Board of Managers for its New Jersey chapter.

After graduating from Seton Hall University and receiving her Juris Doctorate from New York Law School, Christine served as a judicial law clerk to the Honorable Thomas P. Zampino, J.S.C. (retired) of the Superior Court of New Jersey in Essex County. After her clerkship, Christine entered private practice, further honing her experience and legal skills at several prominent family law firms in Bergen, Hudson and Morris counties before joining Seiden Family Law. Christine is admitted to practice in New Jersey, New York, and before the Supreme Court of the United States and U.S. District Court of New Jersey.

In 2019, she was honored as the 2018 Family Lawyer of the Year by the Hudson County Bar Association and Hudson County Bar Foundation.

Demonstrating her commitment to the field of family law, Christine serves as an active member of the legal community of New Jersey. Since 2011, she has been a member of FLEC of the NJSBA, where she previously served as Co-Chair of the Legislative Committee and the Hudson County Liaison among being selected to serve on various other subcommittees. She is also the Second Vice President of the Hudson County Bar Association and Co-Chair of its Family Law Committee. In addition to being involved with the Bar Associations, Christine is also a former Chair of the Supreme Court of New Jersey's District VI Ethics Committee. Christine is an Early Settlement Panelist for Bergen County. Christine was appointed by the

President of the NSJBA to serve on the Ethics Diversionary Program Committee and Amicus Committee as well as the Putting Lawyer's First Task Force. Christine previously served as the General Counsel of NJSBA.

Robert Epstein - Secretary

Robert A. Epstein is a partner with Manzi Epstein Lomurro & DeCataldo, LLC, which has offices in Montclair and Hoboken. Focusing his practice exclusively on family law, Robert was an active member of the Family Law Executive Committee for several years prior to being on the Committee's Board of Officers. On behalf of the New Jersey State Bar Association, Robert has also testified before the Senate Judiciary Committee and Assembly Judiciary Committee regarding several pieces of new and pending family law legislation. Robert is also a panelist for the Matrimonial Early Settlement Program in Essex and Passaic Counties and is an Associate Editor for and contributor to the *New Jersey Family Lawyer* publication.

A frequent speaker and writer on various topics of family law, Robert has presented several times at the Family Law Symposium, Hot Tips Seminar, State Bar Convention, and many other State Bar and ICLE seminars. He is also a member of the New Jersey Association for Justice, Matrimonial Committee. Robert has been involved in numerous published and unpublished Appellate Division matters including, but not limited to, *Barr v. Barr* and *Parish v. Parish*.

A Long Island native, Robert received his *Juris Doctor* from St. John's University School of Law, *cum laude*, and his Bachelor of Science from Binghamton University's School of Management. Before jumping down the rabbit hole of family law, Robert worked in advertising as an Account Executive at McCann Erickson Worldwide.

Derek M. Freed - Immediate Past Chair

Derek M. Freed is a member of the law firm of Ulrichsen Rosen & Freed LLC in Pennington. He concentrates his practice in matrimonial and family law. He is a matrimonial early settlement panelist in Mercer County and Somerset County. Derek served as a member of the Executive Committee for the Family Law Section of the New Jersey State Bar Association from 2009-2010 and again from 2011 to the present.

He has lectured for the Institute for Continuing Legal Education, the New Jersey State Bar Association, the New Jersey Association for Justice, and the Mercer County Bar Association with respect to family law-related matters. He was a co-author of the New Jersey State Bar Association's *amicus curiae* brief to the New Jersey Supreme Court on the matter of *Gnall v. Gnall, Bisbing v. Bisbing*, and *Cardali v. Cardali*. He has testified before the New Jersey Supreme Court on behalf of the New Jersey State Bar Association on proposed changes to the Court Rules affecting parenting coordination. He is presently an associate managing editor of *New Jersey Family Lawyer* and has had several articles published there.

Derek received his J.D. from Rutgers, the State University of New Jersey, with honors, and his B.A. from the College of William & Mary in Virginia.

The Ukraine War and Trial Delays

By Mark E. Sullivan

Since the third week in February 2022, the United States Department of Defense has deployed thousands of servicemembers to help in the defense of Ukraine against an attack denominated by the President of Russia, Vladimir Putin, as a Russian "special military operation."[1] Air Force squadrons, Navy ships, Army artillery units, drones, munitions, surveillance aircraft, and brigade combat teams have all been tapped as part of the first-ever North Atlantic Treaty Organization (NATO) Response Force. In addition, President Joe Biden announced in June 2022 that the Pentagon would be establishing a permanent station for Army's V Corps Headquarters Forward Command Post in Poland and a rotational brigade combat team in Romania.[2]

There are undoubtedly pending civil and administrative proceedings involving servicemembers (SMs). Practitioners need to know how to ask for a temporary delay of the case during a deployment (or any period during which the SM is unavailable due to assigned duties) to preserve the *status quo* while the SM is not available.

This means procuring a "stay of proceedings" to suspend the case when servicemembers appear before courts or administrative agencies. The Servicemembers Civil Relief Act (SCRA)[3], tells how to request and obtain a stay of proceedings. There are four elements needed to obtain an automatic, mandatory stay. The statute requires a letter or other communication:

1. with facts showing how military duties materially affect the SM's ability to appear, and
2. stating a date when he will be available.[4]

The Act also requires a letter or other communication from the SM's commanding officer stating that:

3. the SM's current military duty prevents his appearance, and
4. military leave is not presently authorized for the SM.[5]

A stay may be issued on the tribunal's own motion,[6] and it must be issued upon application of the SM if the above four elements are established.[7]

There is no specific document required for obtaining a stay. A petition, application or motion will suffice. The request can also be in the form of a letter to the court or an affidavit.

Preparing a stay request is not difficult, but there are two issues worth keeping in mind:

A. Follow the statute. In a 2006 Kansas case, the trial court denied a stay to a Marine corporal due to his failure to provide a statement as to how his current military duties materially affected his ability to appear, and information as to when he would be available to appear. In addition, he did not provide a statement from his commanding officer stating that his current military duty prevented his appearance, and that military leave was not authorized. The Kansas Supreme Court upheld the ruling [8]

B. Provide persuasive details. Avoid reciting the bare elements of the statute. Give facts and details. Fill in specifics as to military duties and how they impair the SM's ability to appear or participate in the proceedings. This is also true for the commander's communication.

The tribunal can grant an initial stay of at least 90 days, and it may also allow an additional stay.[9] More information can be found in "A Judge's Guide to the Servicemembers Civil Relief Act," at www.nclamp.gov > Publications > Additional Resources. The United States Department of Defense has responded to the "special military operation" conducted by Russia in Ukraine since the third week in February 2022 by deploying thousands of servicemembers in support of the beleaguered nation.[10] Undoubtedly some of the SMs will be involved in civil cases and administrative proceedings. Some servicemembers may ask the tribunal for a "freeze" of the case during their deployment to preserve the *status quo.*

The "freeze" is properly called a "stay of proceedings," and is requested under the Servicemembers Civil Relief Act (SCRA).[11] The first part of this article tells how to request and obtain a stay of proceedings.

Can a request for a stay of proceedings be refused? Does the tribunal have the authority to deny the SM's application for a stay of proceedings while they are deployed and unavailable for participation in the litigation?

The answer is YES. There are two principal ways to block a stay request.

The first method is to show that the application does not comply with the statute's requirements. The request for a stay of proceedings may be rejected if it fails to address one or more elements outlined in the statute.[12] In a 2013 Alaska case, a Superior Court judge denied a request for a stay because evidence was lacking about military duties precluding the SM from participation in the case, and there was no communication from his commanding officer. The Alaska Supreme Court upheld the ruling.[13]

A second approach could involve misconduct by the SM. For example, SMs who fail to comply with the rules and orders of the court may face stay request denials. In a 1994 North Carolina case, an Army officer received several stays of proceedings due to his military duties during the Persian Gulf War. He had a private attorney, he failed to comply with court discovery orders, and he continued to request additional stays from the court. In desperation, the judge finally denied his request for yet another stay of proceedings in light of his inequitable behavior, and the state court of appeals affirmed.[14]

Withholding important information from the other party or the court can also lead to a stay request denial. When a party applying for a stay has acted inequitably, most courts will refuse to consider the stay request based on the doctrine of "the sword and the shield." The doctrine provides that the SCRA is intended to be used as a *shield* to protect the rights of the servicemember and not as a *sword* to defeat the rights of others.[15] *Equitable conduct and fair play* are the keys to successful use of the SCRA in slowing down civil proceedings.

A stay request by the other side pursuant to the SCRA is not necessarily a "slam-dunk." There are tools available to respond to the request and in asking the tribunal to issue a denial. More information on the stay request and its essential elements may be found in "A Judge's Guide to the Servicemembers Civil Relief Act," at www.nclamp.gov > Publications > Additional Resources.

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Endnotes

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2. npr.org/2022/06/29/1108536666/biden-is-boosting-u-s-troops-in-europe-because-of-russias-war-in-ukraine.
3 50 U.S.C. Sec. 3901 *et seq.* (2023).
4. 50 U.S.C. Sec. 3932(b)(2).
5. *Id.*
6. *Id. at Sec. 3932(b)(1).*
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8. *In re Marriage of Bradley*, 137 P.3d 1030 (Kan. 2006).
9. 50 U.S.C. Sec. 3931(b)(1) and (d).
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11. 50 U.S.C. Sec. 3901 et seq. (2023).
12. 50 U.S.C. Sec. 3932 (b)(2),
13. *Childs v. Childs*, 310 P.3d 955 (Alaska 2013).
14. *Judkins v. Judkins*, 113 N.C. App. 734 (1994).
15. *See, e.g., Luckes v. Luckes*, 71 N.W.2d 850, 853 (Minn. 1955) ("The relief act of 1940 . . . was enacted to give the soldier-litigant a shield for defense and not a sword for attack.").

Avoiding Malpractice Claims in Matrimonial Actions

By Mark Biel

A decade ago I drafted an article with suggestions as to how to avoid malpractice claims.[1] As a result of material case precedent, Rules of Court, and statutory modifications this publication provides an update.

It purports to share with you my experiences as both a matrimonial litigator and a defense expert witness in legal malpractice cases. In addressing measures which each matrimonial practitioner should take to substantially reduce the risk of a malpractice claim, it seems appropriate to provide at least an abbreviated primer regarding the legal malpractice standards.

In order to succeed on a claim for legal malpractice a claimant must satisfy the following requisite elements: (1) The existence of an attorney-client relationship creating a duty of care upon the attorney; (2) breach of such duty; (3) proximate causation of damages sustained; and (4) actual damages.[2] The general rule in this state is: "An attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal malpractice."[3]

Succinctly stated, an attorney is obligated to exercise that degree of knowledge, care and skill necessary to the practice of one's profession in which others similarly situated or ordinarily possess and are obligated to exercise reasonable and ordinary care and diligence in the use of that skill and in the application of their knowledge to the client's cause.[4] What constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform.[5] Fundamentally, an attorney has a duty to the client to pursue the client's interest diligently and with the highest degree of fidelity and good faith.[6]

Matrimonial cases are fraught with potential malpractice claims, often driven by the emotional residue of a failed marriage and a litigation result below the expectations of the litigant, making the divorce lawyer a new target.[7] In my judgment, there are five acts of omission which form the greatest exposure to a malpractice claim asserted against a matrimonial lawyer:

1. Failure to properly communicate with your client.
2. Failure to document your file.
3. Failure to complete legal responsibilities.
4. Failure to draft clear, understandable agreement clauses.
5. Failure to explain in detail within an agreement the underlying bases for the substantive provisions particularly when they represent a compromise.

If the matrimonial attorney adheres to the suggestions set forth herein you should likely minimize the chance of being sued for malpractice. Should you still be sued for malpractice, the fact that you fulfilled all of your duties and responsibilities to your client will greatly limit potential liability. Here are my suggestions:

A. Make Sure a Retainer Agreement in Accordance With R.5:3-5(A) and (B) is Executed

There is a specific rule in family actions requiring a retainer agreement which not only must have annexed to it a "Statement of Client's Rights and Responsibilities" but a description of legal services; limitation of what legal services will not be provided; billable rates; the effect of counsel fee awards; methodology of billing; and the right of an attorney to withdraw from representation.[8] Make sure you advise your client in writing to read the agreement carefully and not to execute it before all questions respecting that agreement are answered to the satisfaction of the client.

It is always best to have your prospective client take the retainer agreement with a covering letter to review it privately outside of your office. In this fashion an attorney can never be accused of pressing the client to sign it and remit an immediate retainer. Proceeding in that manner will allow you to avoid the allegation that you harassed your client to enter into a fee agreement.

B. Disarm Your Client of Unrealistic Expectations

In most cases, even during the initial interview you should get a feeling as to whether your client is willing to listen to you and generally accept your advice or whether the client has their own scorched earth agenda. You must set the tone at the outset of the case. While you certainly

should welcome the input of your client as the client has come to you for your advice and generally speaking will follow it, if the demands of the client are unreasonable don't take the case. The client married three years demanding an Open Durational Alimony result is going to be a problem. A client who by work schedule cannot possibly parent the children equally but is making that demand is going to be a problem. If you can't reason with such individuals you are best advised not to represent them.

Remember that just as *RPC* 3.3 requires candor with the tribunal, *RPC* 1.4 (c) mandates that a lawyer is to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Accordingly, you have an obligation as an attorney to educate the client and to clearly express your opinion to the client with respect to those results which are palpable and inevitable.

C. Bill Monthly With Enclosed Statements

While *R*. 5:3-5(a) requires that bills are to be rendered no less frequently than once every 90 days, that's far too long a gap between bills. Send your bills out monthly, generally at the beginning of the month. Make sure you have a billing system from which the client can understand your bills including all disbursements from your trust account and what remains on account. Make sure the billing is detailed. If you speak with your client don't just enter "phone conference with client." Instead take the time to indicate the nature of the conference.

When the account is substantially depleted, request in writing supplemental or replenishment retainers which provision should be part of your written retainer agreement. Putting aside the fact that you want to be paid for your services in a timely fashion, a formal and timely billing methodology enhances the professionalism of the attorney/client relationship.

D. Communicate With the Client

Your client should receive in a timely fashion a copy of every pleading, transmittal letter and document. If there is voluminous discovery in the case and it becomes too time consuming or expensive to replicate a copy of everything for the client, make sure that you advise the client in writing to appear in your office to review every document if the client wishes to do so. Once that task has been completed, confirm it in writing. Conversely you may receive it through email with attachments and that can easily be sent and should be reciprocally emailed to your client.

Additionally, part of the communication process includes the prompt return of client's telephone calls and responding to client's emails. Make sure you retain in your file the proof of such responses to avoid any assertion by a former client that communication was either untimely or non-existent.

In acting in this fashion you are complying with RPC 1 .4(b) *Communication* that: "A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information."

E. Comply With All Discovery

Matrimonial cases involve the execution of a Case Management Order (CMO) setting the parameters of discovery. Don't ever assume that your case is going to be expeditiously settled so that you can shortcut discovery. What if it isn't settled and the case proceeds on a litigation track and you are out of time with respect to discovery compliance? What if you then ask your adversary and/or the court for an extension and you are denied? If the case is then tried and evidence is barred for failure to comply with discovery you are setting yourself up for big problems.

Accordingly, whether the discovery involves Interrogatories; Notices to Produce; Requests for Admissions; depositions; authorizations; or subpoenas make sure you stay on task. The same imperative should apply to appraisals. If you are not using a joint appraiser to value real estate, for example, make sure the appraisals on behalf of your client are timely completed. If your client needs to advance the fees make sure you follow up in writing advising your client that if the fee for the appraiser is not advanced by a certain date the appraisal will not be completed and it will be the fault of the client. Of course, a properly crafted retainer agreement should provide that all such costs are to be advanced by the client.

However, your responsibility is not just to make sure your client complies with discovery but that there is compliance with the discovery you have requested from the other side on behalf of your client. Make sure you calendar the date when discovery is due and if it is not received bring that to the attention of opposing counsel. If the discovery is submitted and is incomplete and contains responses such as "to be supplied," follow up since you if you face a trial, need that information and don't have it, you may be barred. You have a remedy to press for compliance under *R*.4:23-5. It is your responsibility to do so.

F. Never Settle a Case Without Completed and Signed Case Information Statements (CIS) of Each of the Parties With Tax Returns and Income Information

To the extent that the parties are anxious to bring early closure to their case without engaging in any discovery you can certainly protect yourself with waiver language in the settlement agreement. Nonetheless, under the predicates of *Crews v. Crews*[9] and *Weishaus v. Weishaus*[10] it is not enough to simply reference the incomes of the parties for purposes of calculating alimony and/or child support in the settlement agreement. Each of the parties should, at a minimum, complete and execute a CIS to which there should be appended the last year's tax returns and, if applicable, contemporary pay stubs. Make sure, of course, that your client has reviewed the other spouse's CIS and acknowledged its general accuracy.

The following language is suggested to be placed in the property settlement agreement when the parties eschew formal discovery:

> While the parties have elected not to engage in formal discovery in settling their case, they represent herein that each party has executed a Case Information Statement; that each party had the opportunity to review the other party's CIS and that each accepts the representations set forth therein as accurate.

This language, coupled with the general waiver of discovery language in the agreement, significantly insulates the matrimonial attorney from an argument later raised by a former client that you blindly accepted financial representations from the other side without any documentation whatsoever; that those representations, with hindsight, proved to be untrue; and that you never even complied with the predicates of *Weishaus* requiring some benchmarks to be established in the event of a subsequent *Lepis* application.

G. Do Not Ever Blindly Accept Valuation Numbers Which Neither You nor Your Client Have the Ability to Either Verify or at Least Ballpark as Accurate

Suppose you find yourself representing a client whose spouse has a controlling interest in a successful manufacturing company. Assume further that the case involves a long-term marriage and the company is subject to equitable distribution. The business has provided an upper-middle class lifestyle for the parties. The business-owner spouse in his CIS asserts that the value of his interest in the business is "only" $500,000 based upon discussions with his business accountant.

Without a forensic evaluation, how do you know his business interest in the company isn't worth $5 million? Suppose you settle the case based upon a stipulated $500,000 value and two years later the same business interest is sold for $5 million? If the asset appears to be significant, you just cannot stipulate to a value without creating substantial legal exposure. Depending on the complexity of the business you may not need an extremely detailed forensic evaluation replete with final report as opposed to a preliminary evaluation establishing at least a range of values, but you do need a forensic report. In some instances a joint valuation as opposed to separate valuations may suffice.

In any event, do not allow your client and ultimately yourself to be bullied by a controlling spouse who refuses to advance the costs or otherwise to eschews obtaining a valuation. If ultimately a motion has to be filed for forensic fees, so be it. If your client is so intimidated, however, that they don't want to accept your advice to engage an accounting expert than in order to protect yourself, you must seriously consider getting out of the case.

If, however, you elect to remain in the case, at a minimum there are two things you need to do. First, make sure you have written to your client and advised as to your recommendation of obtaining a forensic accountant and the specific danger of not doing so. Second, make sure that the marital settlement agreement contains language similar to the following:

> Defendant has represented that the value of his interest in XYZ Manufacturing Co. is $500,000. Plaintiff has been advised by her attorney that he is unable to verify such value and has accordingly strongly recommended in writing that Plaintiff engage an independent forensic accountant to value said business. Against counsel's advice, Plaintiff has elected to stipulate to said $500,000 as the value of XYZ Manufacturing Co. and reiterates herein his (or her) waiver of the right to obtain an independent forensic evaluation.

All of that said, I do not suggest that every asset requires a forensic evaluation, particularly when the

value is obviously limited and the cost of litigation is paramount. Sometimes it makes sense to stipulate a value of a small, marginally successful business particularly when both parties are aware of the business operation; there is no cash component; and there are no meaningful business perquisites. In such instances, there is small likelihood of intangible value to the business and the need for forensic evaluation may well be unnecessary. Similarly, ballparking the values of garden variety real estate properties or used business equipment may also be appropriate. But when the value of an asset not under the control of your client is one which may have substantial value, insist upon a forensic valuation even in the face of protestation by your client.

H. Withdrawing From the Case

If you find yourself in a problematic position with your client particularly because the client:

1. Is not honoring financial responsibilities under the retainer agreement; or
2. Is not cooperating in providing requested information necessary to process the case; or
3. Is greatly at variance with you as to how the matter should be resolved, don't stay in the case.

The applicable rule to consider is *R.*5:3-5(e) *Withdrawal from Representation*. Be mindful of the fact that an attorney can withdraw, 90 days or more prior to the scheduled trial date. Within 90 days of trial an attorney may only withdraw by leave of court on motion and notice to all parties. Please note that the rule has also been held to apply to a post-judgment proceeding involving a plenary hearing.[11] Accordingly, the earlier you move the more likely you will be successful. This is also applicable to post-judgment motions involving a plenary hearing.

Once you are out of the case make sure that your successor counsel receives your file timely and in good order. In no event should you withhold your file until the fee balance is paid. Retain a copy of everything you transfer to successor counsel. Even if you trust successor counsel to retain the file in good order should you need it in the future, at a minimum, retain every piece of correspondence between yourself and the client.

I. Settling the Limited Duration Alimony Case

N.J.S.A. 2A:34-23(c) provides:

> For marriages or civil unions less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union. Determination of the length and amount of alimony shall be made by the court pursuant to considerations of all of the statutory factors… In addition to those factors, the Court shall also consider the practical impact of the parties with the need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled with neither party having a greater entitlement thereto."

In crafting a property settlement agreement where support is settled on a limited durational alimony basis, don't simply set forth a one-line provision as to the amount and duration of alimony. If it is, for example, a seven-year term, and there is a viable argument for a lesser term or even a greater term including open durational alimony, set forth specifically how it is that the parties and counsel arrived at the compromise. Further acknowledge that if the matter is litigated both the amount and duration might be different, either greater or less, and indicate clearly that the parties understand that and waive their right to court determination. If there is a "game plan" for the supported spouse to improve their earning capacity, set forth the specifics of that game plan as related to you by your client. Please note that *N.J.S.A.* 2A:34-23(c) contains a provision:

> In determining the length of the term, the court shall consider the length of time it would reasonably take to improve his or her earning capacity to a level where Limited Durational Alimony is no longer appropriate.

It makes sense to address this in certain agreements. The greater the description as to how the alimony calculus was reached the more protection you are afforded as matrimonial counsel.

An example of the kind of language which may be appropriate follows:

> The parties have agreed and stipulated that alimony paid by Husband to Wife represents bargained for Limited Duration Alimony. Each

of the parties through the negotiations leading to the settlement of this case have maintained disparate positions. For example, Husband's position has been that the alimony to be paid, if any, should be for a lesser duration and amount. Wife's position has been that it should be for a greater duration and in a greater amount. Both parties have compromised their positions in an effort to resolve their case. Each of the parties has been advised by their attorneys that pursuant to N.J.S.A. 2A:34-23 and New Jersey case precedent an award of alimony for limited duration may otherwise be modified based upon either changed circumstances or upon the nonoccurrence of circumstances that a court found would occur at the time of the award. The parties have also been advised that in such event the court has the authority to modify the amount of such alimony in the future although the court could not modify the length of the term except in unusual circumstances. The parties have been advised that in the event this case had been tried the court would have evaluated all of the statutory factors which they have discussed with their attorney. They have also discussed with their attorney the type of circumstances which could potentially result in a modification in the amount of alimony as well as the unusual circumstances that could potentially result in a modification of the length of the alimony.

J. The Danger of an Anti-Lepis Provision Particularly in a Permanent Alimony Case

Lepis v. Lepis[12] and its progeny provide that alimony may potentially be modified based upon changed circumstances. Similarly, *N.J.S.A.* 2A:34:23 provides:

> An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the non-occurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.

N.J.S.A. 2A:34-23 also provides:

> [p]ending any matrimonial action or dissolution of a civil union brought in this state or elsewhere or after judgment of divorce or dissolution…the court may make such order as to the alimony or maintenance of the party…as the circumstances of the party and the nature of the case rendered fit, reasonable and just…Orders so made may be revisited and altered by the court from time to time as circumstances may require.

The Alimony Reform Act of 2014 provides other grounds for modification. *N.J.S.A.* 2A:34-23(k) addresses post-judgment modification of alimony by a non-self-employed party base upon statutory factors therein. *N.J.S.A.* 2A:34-23(l) addresses such modification by self-employed parties. The right to avail yourself of such provisions may be waived by anti-*Lepis* clauses.

As a matrimonial attorney you may find yourself in a position to negotiate so-called anti-*Lepis* provisions either for the supporting or the supported spouse. For example the supported spouse may be willing to agree to alimony for a certain term of years but urges that there be no modification even if the supporting spouse's income drops. On the other hand, the supporting spouse may ask for a similar provision because they want a fixed number and don't want to be involved in subsequent court applications in the event it is asserted that their income has changed or for any other reason.

While the appropriateness of anti-*Lepis* provisions may be both obvious and without much risk when alimony is being provided short term, when the length of the term is more extensive or, in the case of permanent alimony, without specific termination date, the provisions become more problematic. What happens if the supporting spouse is involuntarily terminated? What happens if the supporting spouse's income does drop dramatically and payments become impossible? What happens if the supporting spouse becomes ill and unemployable? What happens if the supported spouse doubles or triples their income?

While there well may be a time and place for an anti-*Lepis* provision be mindful of the risks and, most importantly, make sure that these risks are identified as a compromise in the property settlement agreement and that you have a letter in your file to your client outlining those risks. Also make sure that your client is advised in writing that if the matter is litigated anti-*Lepis* provisions are unat-

tainable since they will not be awarded by a court.

The reason for this approach is obvious. If there is a substantial change in circumstances which make compliance either unattainable or arguably unjustifiable, your former client is going to look to you and ask why you "allowed" such provision to be placed in the agreement. In terms of protecting yourself, consider language in the settlement agreement as follows:

> In settling their case each of the parties has expressed their desire and reaffirms that desire herein to bring finality to this litigation including avoidance of any post-judgment applications. They accordingly agree that irrespective of any change of circumstances the parties, including by description but not limitation any increase or decrease in the income levels, assets or liabilities of either of the parties, neither party shall seek an upward or downward modification of the limited duration alimony set herein, either as to the length of alimony or the amount of alimony. In settling their case, the parties understand that each has waived the right to present testimony respecting the occurrence of circumstances in the future which would have impacted the court's decision in deciding the length and amount of alimony including testimony respecting a time frame for Wife increasing or improving her earning capacity. The parties, in light of the totality of all of the circumstances involved in the settlement of this case including a desire to avoid post-judgment litigation, reaffirm their desire that the support provisions contained in this agreement shall be non-modifiable during and at the expiration of the term set forth herein regardless of any future developments, whether anticipated or unanticipated, which might occur. All of the principles expressed hereinabove, including the right to seek modification under cases such as Lepis v. Lepis and its progeny have been fully explained to each of the parties by their respective attorneys and each of the parties nonetheless acknowledges that the waivers contained herein are to be considered final, unconditional and irrevocable."

Finally, advise your client in writing that anti-*Lepis* provisions are not etched in granite. A court, post judgment, can still overlook them if circumstances indicate that enforcement would be unreasonable.[13]

K. Alimony Buyouts

Generally speaking, alimony buyouts occur in one of two ways: (1) At the time the case is being settled; or (2) on a post-judgment basis as one client starts to approach retirement age. The practice tip here is not to negotiate an alimony buyout without the assistance of a forensic accountant. Alimony buyouts involve an amalgam of several issues including calculating a prospective termination date; consideration of the present-day value of a lump sum payment which involves some discount; and a calculation of the buyout being a tax-free buyout rather than implicating the normal alimony provisions of IRC Sections 71 and 215, if alimony is being paid prior to an agreement executed prior to Dec. 31, 2018. Have the analysis outlined in writing by a forensic accountant. You are then protecting yourself from a later assertion that the buyout was too high or the buyout was too low.

If a buyout is being considered and you represent the supported spouse, provide a letter to your client confirming both the benefits and risks involved in such buyout. Remember that in a post-judgment buyout, the likelihood is that the parties will not be testifying in court as to their understanding of the agreement. Accordingly, your best chance of protecting yourself if the client runs out of money in the future and seeks to blame you is through a letter which has laid everything out in detail. The letter should include language which indicates that the client has weighed and considered all of the benefits and all of the risks including the potential that the supporting spouse may be employed beyond the date upon which the buyout calculations are based but nonetheless agrees to assume those risks to trade certainty for uncertainty. Have the client acknowledge and agree to the terms of the letter in writing.

L. Resolving the Retirement Case

Most attorneys are aware of the Alimony Reform Act of 2014 which established a rebuttable presumption allowing an obligor to terminate alimony upon reaching full retirement age. Specifically for obligors born between 1955 and 1959 the full retirement age pursuant to the Social Security Administration is between 66 and two months and 66 and 10 months. For obligors born in 1960 or later the full retirement age is 67. There are still factors extant in the statute that can provide the ability to overcome that presumption.[14]

However this usually occurs when the obligee receives a letter that that the obligor is approaching full retirement age, wishes to retire and wishes to terminate alimony. What must first be understood is that if the obligor continues working in the same position there is no right to terminate alimony since it is only upon actual retirement. As counsel for the obligee you must obtain proof of the retirement.

However, because the rebuttable presumption as indicated may be overcome by statutory factors, what normally occurs is a buyout settlement. That is very different from the discussion of an alimony buyout when a matrimonial settlement agreement is being negotiated. In this case the likelihood is that the obligor has been paying alimony for a significant number of years and this issue is accordingly addressed on a post-judgment basis.

What is most critical and often overlooked is what happens if the obligor has been making a substantial income and paying substantial alimony for many years stops working for a very abbreviated period of time and after the post-judgment matter is settled shortly thereafter obtains another substantial position, perhaps in the same field or perhaps in a different field but at least one where alimony would be appropriate.

The point to be made is that in representing the obligee you must provide a provision in the order that indicates that if the obligor obtains new employment and earns a certain level and does so within a certain period of time (perhaps three years or five years) the alimony would be revisited and each party reserves their rights to address the issue at that time. In representing the obligee make sure that the obligor annually is required to provide proof of his earned income. Such provisions are critical and let me indicate why.

Suppose hypothetically the obligor has been earning $300,000 a year and hypothetically been paying $7,500 per month or $90,000 per year in alimony. Assume on behalf of the obligee you agree to an alimony termination upon the obligor's retirement, followed only by six months later that individual getting a new high-paying job where alimony would clearly be appropriate. If you don't cover that possibility and it occurs, you have set yourself up for a malpractice claim, so make it a prime component of the negotiation.

Consider language as follows:

> In the event that Defendant is employed in a Position of Employment as defined herein during the period of three (3) years from the entry of this consent order, he shall advise Plaintiff of same in writing. In that event Plaintiff may make an application with the court to have the alimony waiver set forth herein vacated and alimony reestablished in an amount to be agreed upon by the parties or determined by the Court. For purposes of this paragraph of this Consent Order the term "Position of Employment" shall be defined as an employment position, working as an independent contractor, working as a consultant and/or employee in any other capacity wherein Defendant earns (amount to be inserted) gross or more annually as reflected on a W-2, 1099, K-1, or otherwise."

M. Open Duration Alimony With a Termination Date

This is an area fraught with danger. *N.J.S.A.*2A:34-23(j) provides a rebuttable presumption that alimony shall terminate upon the obligor attaining full retirement age although there are provisions that the rebuttable presumption may be overcome under certain circumstances. Under the statute "Full Retirement Age" is defined to mean the age which a person is eligible to receive full retirement benefits under Section 216 of the Federal Social Security Act (42 U.S.C. section 416).

Often you will find the attorney for the payor wanting to negotiate in the matrimonial settlement agreement an automatic termination date of alimony when their client reaches full-age Social Security. When I represent the supported spouse I never agree to such a term to be placed in an agreement. Let's assume your payee client has never worked in a long-term marriage and the payor has a substantial six-figure income and open durational alimony is clearly appropriate.

Assume further that the parties are both 55 years of age and full-age Social Security is around age 67.

How do you know what the circumstances are going to be 12 years down the road? Maybe the payor will retire and doesn't engage in any other employment in which event based upon the statutory factors each party can address them and determine whether it is appropriate for the rebuttable presumption to have been met or if there is an issue some relatively nominal buyout can be effectuated. However, suppose the payor is not retiring at all and is making approximately the same level of income and,

perhaps even a substantially greater level of income. If that occurs and you have been the attorney representing the payee and alimony automatically terminates you may well be setting yourself up for a malpractice claim.

Don't put yourself in that position for such exposure. Simply indicate the parties will revisit that based upon the law when the time comes. That is not to say that there may not be circumstances when a termination date when the payor attains that age at the time the MSA is executed cannot be negotiated so long as there is a substantial tradeoff for that consideration which must be detailed in the agreement. All of that is fact-sensitive but the advice in most cases is not to agree to an automatic termination date.

N. Alimony and Equitable Distribution Tradeoffs

Sometimes in the settlement negotiation process there are discussions involving payment of a lesser amount and/or duration of alimony in exchange for a disproportionate division of marital assets. A potential big mistake as an attorney is to fail to describe the dynamics of those tradeoffs in a matrimonial settlement agreement. Be detailed and be specific in the agreement. For example, if the supported spouse is receiving all of the equity in the marital home in exchange for a reduced quantum of alimony and/or a lesser term of alimony, describe specifically what equity the supported spouse would have potentially received if the matter were litigated and describe specifically what the supported spouse is now actually receiving.

The same is true with respect to the disproportional distribution of any other assets as well as any other considerations that play a part in arriving at the alimony calculus. As is the case with alimony buyouts, if the tradeoffs are significant, always use the services of a forensic accountant. The following is an example of descriptive language:

> The parties have had the marital home appraised through a joint appraisal and there is stipulated equity in the marital home of $1,000,000. Wife has been advised that she has an entitlement to 50 percent of the equity in said home. She has discussed with counsel the potential range of her alimony entitlement both as to quantum and duration and has received and reviewed with counsel a report from the forensic accountant showing the upper level of the aggregate award after adjusting for tax consequences and present-day value calculation to be $800,000 and the lower level of the award to be approximately $600,000. Nonetheless, wife has elected to receive all of the equity in the marital home, i.e., an additional $500,000 in exchange for an unconditional and unequivocal waiver of alimony. She acknowledges her desire to resolve the case on this basis notwithstanding that her overall financial award will be less than that which her attorney and forensic accountant have calculated based upon her attorney's recommendation as to the likely range of an alimony award. She desires to do this for the following reasons: (1) her desire to retain the real estate as a potential appreciating asset; (2) her ability to sell the asset and receive lump sum proceeds should she desire to do so; (3) the likelihood that all or substantially all of the proceeds of sale would be net of tax; and (4) her desire to trade certainty for uncertainty since alimony would terminate in the event of her remarriage and could potentially be modified or eliminated in the event of her permanent cohabitation.

Make sure both in the terms of the Settlement Agreement and your correspondence to your client there is documentation that this is a decision made by the client with full knowledge and understanding.

O. Obtaining Deferred Equitable Distribution Security

As a general proposition while child support and alimony is not dischargeable in bankruptcy, even with language in a matrimonial settlement agreement arguably protecting a deferred equitable distribution payout against bankruptcy discharge the provisions may not be enforceable and your client, as the recipient, may have to become involved in bankruptcy proceedings as an unsecured creditor. Accordingly, if part of the settlement involves deferred equitable distribution and there is available security, insist that it be provided. It may take one of several forms: a mortgage against the property; stock pledge agreement with respect to corporate assets; the escrowing of stock or liquid cash accounts; or the withholding of a deed transfer until all equitable distribution payments are made.

It's not always about bankruptcy either. Even without

bankruptcy an obligor can simply stop paying, asserting a dearth of cash flow to make the payments. You want to avoid the assertion by your former client that they are left unprotected and you should have done something at the time of the divorce to provide protection while it was available.

P. Deferred Equitable Distribution When There is No Available Security

Sometimes you may have a case where your client is entitled to a certain amount of equitable distribution but because of a dearth of distributable assets the distribution needs to be deferred and paid over time. What if there is no viable security to protect that payment stream?

In such event there will always be risks placed upon the prospective recipient and the biggest risk is that the payor may seek relief in bankruptcy including a discharge from the deferred equitable distribution obligation. Keep in mind that while alimony and child support are not dischargeable, in bankruptcy equitable distribution (a topic well beyond the scope of this article) has the potential of being discharged. The same may be true not only with respect to the settlement of deferred equitable distribution of assets but with respect to the payor assuming certain credit card liabilities and potential tax deficiencies as part of the overall settlement of equitable distribution.

While provisions in a property settlement agreement cannot insure non-dischargeability, you can best protect your client by tying in the concepts of deferred equitable distribution and indemnification with their relationship to the support and maintenance of the payee's family. While I always suggest you advise your client, if they are the supported spouse, in writing as to the possibility that a bankruptcy may not provide absolute protection, I do suggest using some language in a property settlement agreement as follows:

> Husband represents and warrants to Wife that he has no present intention to file a petition in bankruptcy and agrees to the extent he may later decide to do so, he will not seek to discharge any of his obligations to Wife hereunder and that this Agreement shall remain in full force and effect. Husband further recognizes and agrees that Wife requires the income stream from the deferred equitable distribution payout by Husband to Wife pursuant to the terms of this Agreement in order to appropriately support herself and the children of the marriage, notwithstanding that for purposes of this Agreement same has been denominated as equitable distribution. In the event this matter had been litigated to a conclusion, Wife's position would have been that assets should have been sold or, alternatively, Husband should have borrowed funds in order to accommodate the amount due to Wife which is now being paid through a deferred equitable distribution schedule. If such alternative result had occurred she would have had funds necessary to properly support herself and the children but as an accommodation to Husband has agreed to accept a deferred equitable distribution with each party expressing their understanding that the timely payment pursuant to the schedule is necessary for appropriate support and maintenance. Husband acknowledges Wife's financial circumstances at the time of the settlement and ratifies herein the need for him to timely pay all deferred equitable distribution payments for wife and the children to be appropriately supported.
>
> This agreement also contains indemnification provisions whereby Husband has indemnified Wife from: (a) any responsibility for certain credit card obligations which are identified in this agreement and (b) any responsibility for deficiencies, including interest, penalties and professional fees in the event of an audit with respect to any previously filed joint state and federal income tax returns of the parties. The parties confirm their understanding herein that there is an interrelationship between these indemnification provisions and the appropriate support and maintenance of Wife and the children such that these indemnifications shall likewise not be dischargeable in bankruptcy in the event of such filing by Husband since the indemnification provisions represent support provisions designed to enable Wife to meet a necessary budget in order to maintain an appropriate standard of living for herself and the children. The parties have specifically examined and considered with their respective attorneys the decisions of *Gianakas v. Gianakas*, 917 F.2d. 749 (3d. Cir. 1990) and *Schorr v. Schorr*, 341 N.J. Super. 132 (App. Div. 2001) and have incorporated the reasoning of such cases herein. These

provisions specifically express the intent of each of the parties at the time of settlement of this case; the financial circumstances of the parties at the time of the settlement; and the reasons for the deferred equitable distribution payout and the indemnification provisions.

(PRACTICE HINT: These provisions clarify the need for recipient/spouse to receive deferred equitable distribution payments for support purposes and the language tracks the touchstones of Gianakas as reaffirmed by the New Jersey Appellate Division in Schorr. The provisions also underscore the need for the continued viability of the indemnification provisions both with respect to credit card debt and income taxes in the event of a bankruptcy proceeding.)

Q. Make Sure Downward Deviations From the Child Support Guidelines are Documented by Child-Related Considerations

Do not ever state in a marital settlement agreement that child support is waived or will be paid below the guidelines unless there is language in the agreement supporting that result based upon specific child-related considerations. These considerations may include such concepts as carrying a substantial mortgage in order to maintain an existing home for the benefit of the children and their stability or, for example, the agreement requires the payment of some other substantial child related, expenses for which the payor might not otherwise be responsible.

It is fundamental that the right to child support belongs to the child and may not be waived by a custodial parent.[15] Even an explicit waiver agreement cannot vitiate a child's right to support.[16] That fundamental doctrine has been reiterated time and again by our courts.[17] Also note that *Appendix 1X-A, Consideration and the Use of Child Support Guidelines* provides that the use of the guidelines are to be applied as a rebutttable presumption establishing a child support order, further indicating that the guidelines must be applied in all actions in which child support is being determined. The Appendix further provides: *Deviating from the Child Support Guidelines*: "If support guidelines are not applied in a specific case or the guidelines-based award is adjusted, the reason for the deviation and the amount of the guidelines-based award (before any adjustment) must be specified in writing on the guidelines worksheet or in the support order." Additionally *R*.5:6(a) indicates that the guidelines may be modified and disregarded by the court only "where good cause is shown.". Accordingly, make sure that such deviation is well documented in the agreement.

R. Assuring Client's Understanding of Arbitration Limitations

When the parties agree to arbitration which generally takes place under the Uniform Arbitration Act, *N.J.S.A.*2A:23B-1 *et. seq.* they are required to answer a questionnaire form and review Appendix XXIX-B. This must be filed with the court pursuant to *R*.5:1-5(b(1). While the documents indicate clearly that scope of Appellate review is very limited, it is necessary that you have a very specific discussion with your client. It may be that one of the reasons the client desires binding arbitration is they fear that the adversary will drag the matter out interminably and wants the case to end with no appeal. Conversely it may be that your client, if aggrieved by the decision, thinks there is a right of appeal and if it is not abundantly clear the client will blame you for not properly explaining it. If the appeal is going to be very limited, take the time to explain it to your client above and beyond the Appendix but memorialize it in a specific letter of explanation to your client.

Conversely it should be kept in mind that the statute does provide the right to expand the scope of Appellate review but only if it is preserved in the agreement to arbitrate or the consent order to arbitrate. Otherwise it will be waived.

An argument can be made that the most appropriate way to protect yourself is to preserve that right of appeal with language as follows:

> In accordance with N.J.S.A. 2A:23B-4c, the parties have agreed to expand the scope of appellate review of the terms of the arbitrator's confirmed award that has been incorporated into a final judgment of divorce. The parties agree that the specific terms of any final judgment of divorce containing the confirmed arbitrator's award may be appealed to the Appellate Division on the same basis as if the Trial Court had decided those terms as opposed to the arbitrator. The parties further agree that Part II of the New Jersey Rules of Court shall apply to any appeal of a judgment containing a confirmed arbitrator's award, and the Appellate Division shall employ the normal standard of review that is utilized when review-

ing a Family Part Judge's decision in the context of resolving the appeal. Accordingly, once a judgment confirming the arbitrator's award has been entered, in accordance with R.2:4-1(a), both parties shall have 45 days to appeal the terms of the Judgment to the Appellate Division.

While this language is not always appropriate, it should always be considered if there is vacillation by your client as to what their rights would be in the event of an unfavorable decision.

S. Putting the Case Through

If your case is settled on the day it is scheduled for Srial or presented to the early settlement panel and has any degree of complexity, do not place the settlement on the record and have your client testify. If ultimately your client is dissatisfied with the settlement the client will then assert that you pressured them into settling. Take your notes and prepare a marial settlement agreement (or final judgment with stipulations), have your client review it, and then put the case through when the emotions have cooled and the client has had the opportunity to review everything in your office.

We understand that in response to *Entress v. Entress*,[18] the Supreme Court adopted *R*.5:5-9 which permits a settlement to be placed on the record and a judgment entered orally with a contemporaneous written final judgment entered either in the form set forth in Appendix XXV of the rule or in another form as consented to by the parties. If the written judgment is in the form provided by the Appendix, it is to be submitted as an amended final judgment of divorce within 10 days. Don't read that rule as requiring you to place the stipulations on the record and have a judgment entered on the day of an MESP or trial. The rule simply provides a methodology, not a mandate.

That said, other than the most simplistic of cases, have your client present to testify under oath (in conformity with the terms of a properly drafted agreement) that it is entered into freely and voluntarily without duress or coercion; without influence of any substances; with a full knowledge and understanding of all of the terms and provisions; and that the client is satisfied with the legal services provided. If there are specific tradeoff terms as discussed above take the time to reference those terms in the examination of your client, obtaining the assent of your client on the record.

T. Draft Every Settlement Provision Agreement With Clarity

Every provision in the agreement should be drafted devoid of ambiguity or multiple interpretation. Whether the agreement has been drafted by your adversary or yourself, read it carefully and always ask yourself this question: "If you or another lawyer looked at the provisions several years later in a post judgment context, would they be readily understood and subject to only one interpretation?" If you cannot answer that question affirmatively, then the draft language should be modified and clarified. When there are formulas involved, don't hesitate to illustrate with hypotheticals and examples. I have seen too many agreements devoid of illustrations which would have had the effect of clarifying the terms well into the future.

U. Life Insurance

In most cases, spousal support and/or child support protection is provided by life insurance policies. As a matrimonial attorney, protect yourself against an assertion that you should have implemented and monitored this protection with a provision such as:

> Wife (or husband) specifically understands and acknowledges that her attorneys have no responsibility and will not be monitoring the status of life insurance coverage to be maintained by husband pursuant to the terms of this Agreement, Wife accepting this responsibility as her own. Wife further specifically understands and acknowledges that her attorneys will not be reviewing any of Husband's life insurance applications to confirm the accuracy of the representations made therein, Wife accepting this responsibility as her own.

V. End-of-the-Case Checklist

One of the most important things to be done and one of the obligations often overlooked by the matrimonial attorney is to make sure that every task necessary to conclude the case is accomplished. Prepare your own checklist and provide it to your client and, if necessary, to opposing counsel. Do not close the file until everything on that list is accomplished. Very often at a minimum that may mean the preparation, execution and filing of transfer deeds; preparation, execution and

filing of IRC 408(d)(6) rollover orders, qualified domestic relations orders (QDROs) or domestic relations orders (DROs). In addition to making sure such orders are executed and filed with the court make sure they are filed with the implementing company or governmental agency and further make sure that you have received a letter from the appropriate entity acknowledging receipt of the order and confirming that it is in appropriate form for implementation.

Conclusion

If you follow these recommendations, they will dramatically reduce the risk of a successful malpractice claim. Keep in mind that the Supreme Court ruling in *Saffer v. Willoughby*[19] has provided an incentive for plaintiffs' attorneys to bring legal malpractice actions. That case provides that "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting a legal malpractice action."[20] While you can't prevent the action from being asserted, you can certainly minimize the risk of a successful claim and, in some instances, even defeat the claim in a summary judgment proceeding. ■

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Endnotes

1. Biel, "Avoiding Malpractice Claims in Matrimonial Actions" *New Jersey Family Lawyer*, Vol. 34 No 3, December 2013.
2. *Jerista v. Murray*, 185 N.J. 175, 190-191 (2005) (quoting *McGrogan v. Till*, 167 N.J. 414,425 (2001); *Sommers v. McKinley* 287 N.J. Super. 1, 9-10 (App. Div. 1996); *Albright v. Burns*, 206 NJ. Super 625, 632 (App. Div. 1986); *Conklin v. Hannoch Weisman*, 145 N.J. 395, 416 (1996)
3. *2175 Lemoine Avenue v. Finco, Inc.*, 272 N.J. Super. 478,497 (App. Div. 1994). See also *Gautam v. DeLuca*, 215 N.J. Super. 388, 397 (App. Div. 1987) *cert. den.* 109 N.J.39 (1987).
4. *St. Pius X House of Retreat v. Diocese of Camden*, 88 N.J. 571, 588 (1982); *Taylor v. Shephard,* 136 N.J. Super 85, 90 (App. Div. 1975) aff'd o.b. 70 N.J. 93 (1976)
5. *St. Pius X, supra* at 588. Cf. *Ziegelheim v. Apollo*, 128 N.J. 250, 260 (1992); *Levine v. Wiss and Co.*, 97 N.J. 242,246 (1984)
6. *Matter of Yetman*, 113 N.J .556, 562 (1989); *Matter of Stein*, 97 N.J. 550, 563 (1984)
7. This is based on the author's 50 years of experience. Many of the malpractice complaints are simply brought to try to recoup fees. New Jersey statistics demonstrate that a very high percentage of malpractice cases are in the family law field.
8. *R.* 5:3-5(a}(1-9}
9. *Crews v. Crews*, 164 N.J. 11 (2000)
10. *Weishaus v. Weishaus,* 180 N.J. 2004)
11. *Luedtke v. Shobert*, 242 N.J. Super 202, 211-12 (App. Div. 2011)
12. *Lepis v. Lepis*, 83 N.J. 139, 146 (1980)
13. *Morris v. Morris*, 263 N.J. Super 237, 2450246 (App. Div. 1993)
14. If there was already a final alimony order or written agreement established prior to the effective date of the ADA, that is, September 10, 2014, there is no presumption but still a basis for a "good faith" application.
15. *L.V. v. R. S.* , 347 N.J. Super. 33, 41 (App. Div. 2002); *Martinetti v. Hickman*, 261 N.J. Super 508, 512 (App Div. 1993); *Savarese v. Corcoran*, 311 N.J. Super. 240, 246 (Ch. Div. 1997) aff'd 311 N.J. Super. 182 (App. Div. 1998)
16. *Kopak v. Polzer*, 4 N.J. 327, 333 (1950); *Martinetti supra*. at 512
17. *Gotlib v. Gotlib*, 399 N.J. Super. 295, 305 (App. Div 2008)
18. *Entress v. Entress* 376 N.J. Super. 125 (App Div. 2005)
19. *Saffer v. Willoughby*, 143 N.J. 256 (1996)
20. *Id.* at 272.

New Jersey Pension Practice: Rules for the Military Case

By Mark E. Sullivan

How to divide military retirement benefits is essential knowledge for the New Jersey family law practitioner. With military personnel at Joint Base McGuire-Dix-Lakehurst and Picatinny Arsenal, as well as in college ROTC units and at armed services recruiting offices, lawyers need to know the rules which govern acceptance or rejection by the retired pay center. The necessary information and skills for both sides of the issue involve how to advocate for the servicemember or retiree, and for the nonmilitary spouse, and how to draft the military pension division order.[1]

This article will explore the Uniformed Services Former Spouses' Protection Act (USFSPA),[2] basic rules for division of military retirement benefits, with illustrations from reported trial-level and appellate cases, the Survivor Benefit Plan,[3] disability issues, and resources to help the lawyer facing one of these cases.[4] Also shown below are the places where attorneys can find resources which clarify these issues, allowing them to guide their clients in decision-making and submit pension division orders which will be honored by the retired pay centers.

Drafting Directives for Pension Division[5]

About 95% of all domestic cases are settled, with only 5% going to trial; whether on the litigation track or in negotiations, the lawyer needs to know is how to word the military pension division order, or MPDO, which is used to implement the court's ruling on division of retirement benefits.[6] There are essential elements and clauses which are required to allow garnishment of uniformed services retired pay by the retired pay center which process MPDOs. Here are the rules and restrictions:

1. **"Sweet Home Alabama."** The power of a court to divide a military pension is limited to those cases where the military member or retiree is domiciled in the state, the member has consented to the jurisdiction of the court, or the member resides in the court's jurisdiction (other than because of military assignment). Thus if Navy Commander John Doe has his "sweet home" in Alabama, the courts of New Jersey could not divide it based on domicile. The judge could, however, allocate a part of it to Jane Doe, his wife (or soon-to-be ex-wife) if John has consented to the court's jurisdiction over the property of the marriage, such as with a general appearance.[7] The court could also divide the pension if John were living in New Jersey to be near relatives but was assigned to a nearby base in another state; in this case, CDR John Doe would be living in New Jersey (but not on account of military assignment orders) and thus subject to pension division here. The order dividing the pension must specify the basis for exercise of division.
2. **Garnishment.** To get garnishment from the appropriate retired pay center,[8] the former spouse must serve an order on the center which shows that the parties have been married for at least 10 years during 10 years of creditable service in the military.[9] The 10 years of marriage is measured from "wedding bells" to divorce date; it doesn't matter when the parties separated from each other.[10]
3. **Servicemembers Civil Relief Act (SCRA).** The SCRA, found at Chapter 50 of Title 50, U.S. Code, contains certain rights for members of the military that must be observed by the court if the pension is to be divided and the order honored by the retired pay center.[11] These include protections for the member if the other side tries to obtain a default judgment[12] and the right to request and obtain a stay of proceedings.[13] The order dividing the pension must state that the SCRA has been observed.
4. **Long (and Short) Division.** With retirements from active duty, there are four methods for division of retired pay.[14] A *set dollar clause* in the order might state, "John Doe will pay Jane Doe $500 monthly as pension division."[15] A *percentage division clause* would read, for example, "Jane will be paid 10% of John's monthly retired pay." This clause is usually employed when John has already retired and thus all the numbers for the coverture fraction are known.

A *formula clause* would be used if John were still on active duty when the divorce occurred. Such a clause employs the "time rule" for expressing the coverture fraction,[16] and it might say: "Jane is to receive 50% of John's retired pay times 240 months of marriage during service divided by John's total service when he retires" Finally, there's the *hypothetical clause*, which is used when the court or the parties want to take a snapshot of John's retired pay earned as of the date of separation or other classification date. It could be written: "Jane is to receive 50% of John's retired pay times 240 months of marriage during service divided by John's total service at the date of classification, that is, ___ months, with his retired pay calculated as if he had retired as a commander (O-5) with 22 years of creditable service on [date]. His HIGH-3 pay (average of his highest three years of continuous compensation) as of the above date is $_____ monthly."

5. **Guard/Reserve Pension Division.** The division of a Guard/Reserve retirement yields two variations on the above rules. The first, a retired pay center rule, is that the division of the pension of a drilling member of the Guard or Reserve must be expressed in terms of retirement points when a *formula clause* is employed.[17] Thus for Master Sgt. Roberta Roe in the New Jersey Army National Guard, the coverture fraction could not be "244 marital months divided by total months of service upon retirement." It would need to be written as, for example, "1235 retirement points divided by total retirement points."[18]

   The second variation is calculating the coverture fraction when the member, Roberta Roe, has stopped drilling. Depending on how much creditable service occurred during the marriage, it may be possible to obtain different results by calculating the fraction with months and with points. The different results can be used to argue for a percentage that favors one's client. The retired pay center, if presented with an otherwise acceptable pension order, will not inquire into how the percentage was obtained. In Roberta's case, for example, the coverture fraction according to the "time rule" might be 90% based on months of marital pension service divided by total pension service (e.g., $\frac{270 \text{ months of marital pension service}}{300 \text{ months of total pension service}}$), whereas if retirement points were used and she had four years of active duty preceding the marriage at 365 points each year, the fraction might be $\frac{2100 \text{ marital retirement points}}{2800 \text{ total retirement points}}$ which is only 75% for coverture. This awareness of alternative calculations can make a substantial difference for the client.

6. **"The Big Freeze."** When a divorce is granted after Dec. 23, 2016, and the servicemember is not yet receiving retired pay, the Frozen Benefit Rule applies.[19] This means that the maximum amount which may be divided with the nonmilitary spouse is the hypothetical retired pay of the servicemember as if the retirement had occurred on the divorce date. The instrument tendered to the retired pay center to divide the pension must contain two data points as of the divorce date: the member's retired pay base (often called the "High-3" since it is the average of the highest three years of base pay) and the member's years of service (or retirement points for those in the National Guard or Reserves).[20] The order will be rejected without these two elements.

Dealing with Death – The Survivor Benefit Plan

1. **What's the Survivor Benefit Plan?** When the former spouse is the first one to die, the entire retirement check is restored to the retiree. To deal with the possibility that the member or retiree will die before the spouse or former spouse, Congress enacted the Survivor Benefit Plan (SBP) to allow the continuation of payments. It is an annuity which continues the stream of income to the designated beneficiary; there can be no pension payments after the death of the member or retiree. A military retiree may *elect former spouse coverage* for an ex-spouse who had *spouse coverage* before the divorce.
2. **How does it work?** The Survivor Benefit Plan pays 55% of the selected base amount to the beneficiary. The premium (see below) is paid upon retirement by deduction from the pension which is paid to the servicemember. SBP coverage is effectuated for a former spouse through a voluntary election by the member or retiree, or through an order and election form sent to the retired pay center.[21] The base amount may be anything from full retired pay down to $300 per month. Once elected, the base cannot be changed. The pay center will not allocate the cost of SBP coverage between the parties, although they can accomplish this cost-shifting by agreeing to one paying the other, or by adjusting the percent of the nonmilitary spouse to account for the SBP premium.

3. **What are the disadvantages?** SBP can be seen as expensive because in a retirement from active duty, former-spouse coverage costs 6.5% of the base amount, and it can be 7-10% for maximum coverage in Guard/Reserve cases. SBP is suspended for the former spouse if they remarry before age 55. And it cannot be subdivided between past and present spouses.
4. **What are the deadlines?** Since "spouse coverage" ends upon divorce, the member or retiree needs to make a former-spouse election, and it must be done within one year of divorce.[22] Both parties would sign the election, which is made on DD Form 2656-10. An election filed by the retiree is effective upon receipt by the pay center.[23] If the member is required to provide SBP coverage and doesn't do so, the former spouse may still obtain coverage by serving on the retired pay center a written request for coverage. This "deemed election" (done on DD Form 2656-10) must be signed by the former spouse and received by the retired pay center *within one year of the order providing for SBP coverage*.[24]
5. **Choose It or Lose It.** For the lawyer representing the nonmilitary spouse, there should be no assumptions as to the court's being aware of the existence of this survivor annuity and the steps necessary to preserve it as "former-spouse coverage."[25] Be sure to educate the court as to what it is, what it costs, and why the client needs it to be included in the divorce decree or court order. The attorney must specifically request that the court order the member or retiree to select SBP coverage for the former spouse. Missing out on SBP coverage can be a disaster; "Choose It or Lose It" should be the watchwords here.

   A different motto, "Silence is Golden," applies for the retiree or servicemember who wants to avoid this payment. If the court doesn't address SBP coverage and enters an order or incorporated separation agreement dealing with division of military retirement benefits, then SBP can be avoided or else retained for a future spouse.[26]

Dealing with Disability

The military retirement system involves potential interplay between the election of VA disability payments and the receipt of military retired pay. The receipt of VA disability compensation often means a dollar-for-dollar waiver of retired pay.[27] Courts cannot divide VA disability compensation (although disability benefits *are* usually subject to consideration in support cases and – for military retirees – VA disability compensation can be garnished for family support payments). When the retiree has a VA disability rating of less than 50%, the election of VA payments means a reduction of the pension. Thus the nonmilitary spouse's share is reduced due to the unilateral action of retiree.

The initial remedy in New Jersey was for the trial court to enter a ruling which required the retiree to reimburse the spouse for any amount lost due to the "VA waiver."[28] This option was foreclosed, however, through a 2017 U.S. Supreme Court case, *Howell v. Howell*, which barred judges from ordering such a pay-back remedy.[29] The *Howell* opinion recognized, however, that courts could take into account the contingency that some of the military pension might be waived in evaluating the marital assets or in calculating (or recalculating) the need for spousal support. This means that the remedies for the VA waiver outlined in the 1995 *Torwich* case,[30] or the reopening of spousal support, as set out in the *Fattore* case,[31] are still in play.

The usual approach for the nonmilitary spouse is to negotiate a contractual indemnification clause in the marital settlement agreement.[32] This would require the member or retiree to reimburse the former spouse for any reduction in retired pay due to disability. The wording might be, "If anything reduces the amount due to the former spouse, such as disability payments, then the retiree will promptly reimburse the former spouse for any amount by which her portion is decreased." Counsel may want to include language covering consequential damages, not just the monthly payment reduction. And consideration should be given to requiring the reimbursement to be made as compensatory spousal support, which would have the advantages of being garnishable from any source of government payments (such as VA disability compensation, Combat-Related Special Compensation, and Social Security disability pay) and also being tax-free.

Conclusion

Handling a military pension case is never easy. It requires hard work and diligence to find the issues and follow through with protecting the client. Just knowing what documents to request and analyze, and how to get them if the other side fails to produce them, can be a headache for the trial lawyer.[33] Having competent co-counsel is often a necessity, as the rules and regulations appear to be confusing, illogical, complex, and inconsistent. The insights in this article may help judges and practitioners alike to handle the next military pension case.

A retired Army Reserve JAG colonel, Mark E. Sullivan practices family law in Raleigh, North Carolina. He is the author of The Military Divorce Handbook (Am. Bar Assn., 3rd 2019) and the author of numerous military family law resources on the internet. He often serves as a consultant regarding military divorce and pension division issues.

Endnotes

1. Military retired pay, as with other pension assets and plans, may be divided or allocated by the court as part of equitable distribution. *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977). This is true even if the pension is not yet vested or matured at the time of division. *Whitfield v. Whitfield*, 222 N.J. Super. 36, 535 A. 2d 986 (App. Div. 1987).
2. 10 U.S.C. § 1408. USFSPA is an enabling act which allows states to divide pensions but does not require it.
3. 10 U.S.C. 1447 *et seq.*
4. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) explains how military pensions work, how to divide them, and the rules about the Survivor Benefit Plan. Look up "DODFMR" on any search engine to fine the Regulation.
5. See *Getting Pension Division Orders Honored by the Retired Pay Center*, a Silent Partner info-letter containing a complete list of all the rules, restrictions and requirements for a valid military pension division order (MPDO) which will be accepted by the retired pay center; it is located at the website for the North Carolina State Bar's military committee, www.nclamp.gov at "Publications."
6. Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* Journal of Empirical Legal Studies, Volume 6, Issue 1, 111, 112, March 2009.
7. In a 2012 case, the retiree made a late objection to the court's division of his Coast Guard pension, and the Appellate Division ruled that he had consented to jurisdiction and was bound by collateral estoppel, since he didn't appeal the initial order. *Womer v. Poling*, Docket No. A-4502-10T1, 2012 N.J. Super. Unpub. LEXIS 2276 (N.J. Super. App. Div., October 10, 2012).
8. The Defense Finance and Accounting Service (DFAS) in Cleveland, Ohio processes court orders for Army, Navy, Air Force and Marine Corps cases, while the Coast Guard Pay and Personnel Office in Topeka, Kansas processes paperwork for that service, and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. As used in this article, "military" means the uniformed services set out above in this note.
9. 10 U.S.C. 1408 (d)(2). This is an enforcement rule, not a rule as to pension division eligibility. The former spouse is still eligible to claim pension division if there is not a 10/10 overlap of the marriage and creditable service.
10. In *Womer v. Poling*, Docket No. A-4502-10T1, 2012 N.J. Super. Unpub. LEXIS 2276 (N.J. Super. App. Div., October 10, 2012), the judge ordered a fixed dollar amount for the nonmilitary spouse after the ex-husband had retired from the Coast Guard, and imposed a penalty of $100 per day for non-payment of the ex-wife's share of the pension, apparently not recognizing the ability to obtain direct-pay garnishment from the retired pay center.
11. 10 U.S.C. 1408 (b)(1)(D)
12. 50 U.S.C. 3931.
13. 50 U.S.C. 3932.
14. For details, see the Silent Partner, *Military Pension Division: Guidance for Lawyers*, at www.nclamp.gov at "Publications."
15. The set dollar amount clause does not allow for future COLAs (or cost-of-living adjustments). Courts must be careful in writing the award and cautious in granting a set dollar amount for this reason. The New Jersey Supreme Court has ruled that ordinary cost-of-living adjustments to a pension are an integral part of the pension benefit to which the parties' joint efforts contributed, and they subject to equitable distribution. *Moore v. Moore*, 114 N.J. 147, 151, 553 A.2d 20 (1989). For a case involving the court's setting a fixed dollar amount for the pension share of the nonmilitary spouse, see *Womer v. Poling*, Docket No. A-4502-10T1, 2012 N.J. Super. Unpub. LEXIS 2276 (N.J. Super. App. Div., October 10, 2012).
16. The "time-rule" formula involves the coverture fraction, of which the numerator is the length of time of creditable service during the marriage, and the denominator is the total time of creditable pension service. This fraction is then usually divided in half to reflect the division of the pension benefits attributable to the marriage. *Faulkner v.*

Faulkner, 361 N.J. Super. 158, 824 A.2d 283, 288 (App. Div. 2003); *Menake v. Menake*, 348 N.J. Super. 442, 452, 792 A.2d 448, 455 (App. Div. 2002); *Whitfield v. Whitfield*, 222 N.J. Super. 36, 48, 535 A. 2d 986 (App. Div. 1987).

17. DoDFMR Vol.7B, ch. 29, ¶ 6.7.1.
18. In a 2019 case, the parties had agreed on division of the military pension according to the "time rule" terms set out in *Marx v. Marx*, 265 N.J. Super. 418, 627 A.2d 691 (Ch. Div. 1993), but later the court entered a pension division order which calculated the spouse's share according to a coverture fraction expressed in retirement points instead of time. The Appellate Division reversed the lower order, saying that parties' agreement and state law required use of the time rule. The case involved a pension which was in pay status, not the expectation of a still-serving member, and it failed to recognize that the retired pay centers *require* that any formula containing an unknown denominator be expressed in terms of retirement points. *Felton v. Felton*, DOCKET NO. A-4433-17T4, 2019, N.J. Super. Unpub. LEXIS 1810 (N.J. Super. App. Div., August 23, 2019).
19. 10 U.S.C. 1408 (a)(4)(B).
20. For details, see the five Silent Partner info-letters on the Frozen Benefit Rule at www.nclamp.gov at "Publications."
21. *See, e.g.*, *Smith v. Smith*, Docket No. A-0956-13T1, 2015 N.J. Super. Unpub. LEXIS 2109 at *3 and *18 (N.J. Super. App. Div., September 1, 2015)
22. 10 U.S.C. § 1448(b)(3)(A)(iii).
23. 10 U.S.C. § 1448(b)(3)(E).
24. 10 U.S.C. § 1450(f)(3)(C). This is done using DD Form 2656-10.
25. For a case involving division of a Coast Guard pension in which there was no indication of the court's awareness of the existence of the Survivor Benefit Plan, see *Womer v. Poling*, Docket No. A-4502-10T1, 2012 N.J. Super. Unpub. LEXIS 2276 (N.J. Super. App. Div., October 10, 2012).
26. For strategies to avoid SBP coverage, see the Silent Partner, *Defending Against SBP*, at www.nclamp.gov at "Publications."
27. 38 U.S.C. 5304-5305.
28. *Whitfield v. Whitfield*, 373 N.J. Super 573, 862 A.2d 1187 (App. Div. 2004).
29. *Howell v. Howell*, 137 S.Ct. 1400 (2017).
30. Husband's election of VA disability compensation, and the resulting waiver of military retired pay, had a substantial and detrimental impact on the wife's equitable distribution. These actions constituted exception and compelling circumstances which justified the trial court's increasing the wife's percent share of the husband's military pension or making some other adjustment to the equitable distribution of property. *Torwich v. Torwich*, 282 N.J. Super. 524, 660 A. 2d 1214 (App. Div. 1995). See also *Whitfield v. Whitfield*, 373 N.J. Super. 573, 862 A. 2d 1187 (App. Div. 2004) (court could have awarded wife an increased portion of husband's pension, or given her other adjustment of equitable distribution to compensate for her loss of pension money). Care must be taken, however, not to make the percent adjustment *exactly equal* to the amount of money lost by the spouse.
31. The trial court initially ordered the former husband to indemnify his ex-wife due to the "VA waiver," but declined to order alimony since the parties' 1997 judgment of divorce contained an alimony waiver. Both parties appealed. The Appellate Division reversed the indemnification order in light of the *Howell* case, but it also held that the court is free to treat this pension waiver as a change in circumstances, so as to allow the award of spousal support to the nonmilitary spouse, even if there was a waiver of alimony) or modify an existing spousal support award. *Fattore v. Fattore*, 458 N.J. Super 75, 203 A.3d 151 (App. Div., 2019).
32. For details, read *Scouting the Terrain*, *The Servicemember's Strategy*, *The Spouse's Strategy* and *CRDP and CRSC* – The *Evil Twins*, and *The Death of Indemnification,* three Silent Partner info-letters at www.nclamp.gov at "Publications."
33. If a document cannot be obtained through the discovery process or with the signed release of the member or retiree, then the attorney should obtain it from the appropriate agency, office or department, such as DFAS, the Public Health Service, the Reserve headquarters or (in a National Guard case) the state adjutant general's office, by submitting a court order or a subpoena which has been signed by a judge. For a list of documents which can help explain entitlements, benefits and payments, see the Silent Partner info-letter, *Docs for Division*, at www.nclamp.gov at "Publications."

Military Pension Division and the 10/10 Rule: Five Tips

By Mark E. Sullivan

When family law practitioners encounter a military divorce case, one of the first issues that arises is something called the "10/10 Rule" – or the requirement that 10 years of marriage must overlap with 10 years of service, and that this overlap affects the division of military retire pay. This article will provide some answers.

Tip #1 – Know What the "10/10 Rule" Is

To obtain garnishment payments from the retired pay of a servicemember (SM), the former spouse (FS) must meet the requirements of the "10/10 Rule." This means that John Doe, the soon-to-be-ex-spouse of Jane Doe, must have been married to her for at least 10 years during which he served at least 10 years toward eligibility for retired pay.[1]

Note that, for purposes of the Rule, the *termination of marriage* occurs at the date of divorce or dissolution. It does not mean the date of separation, date of filing the case, or date of irretrievable breakdown of the marriage. It does not even mean the date of a decree of legal separation. Only the termination of the marital relationship by means of a decree or a judgment of final divorce will mark the end of the marriage for the "10/10 Rule".

Why is the Rule important, and for whom does it matter? The accepted wisdom has usually been this: The retired pay center[2] will only garnish retired pay as property division when the "10/10 Rule" has been met, and the former spouse is the one who needs the garnishment to ensure monthly payments. Without it, they would be left with unreliable enforcement methods under state law.

But it is also *the SM/retiree* who needs the pension-share garnishment. For John Doe, pension payments to Jane Doe from the retired pay center mean that he will be able to exclude Jane Doe's share from his taxable income. The share paid to each party is reported as taxable income by the center to the IRS, which issues each party a Form 1099-R each January. There is no income-exclusion guarantee for John without a garnishment from the retired pay center, so both parties would benefit from the 10/10 Rule.

Tip #2 – Know What the "10/10 Rule" is Not

Note that the "10/10 Rule" is not a *jurisdictional requirement* for dividing military pensions. Contrary to the "barracks rumors" which circulate in the civilian bar, there is no limitation on the number of years of marriage overlapping military service as a prerequisite to military pension division. A military pension may be divided by court order whether the marriage has lasted for 30 years, 30 months, or 30 days during military service. Rather, this time requirement is a prerequisite to *enforcement through the retired pay center.*[3] Garnishment of retired pay as a payment mechanism is only available if the "10/10 Rule" is obeyed; otherwise, the FS is left with only state court remedies (e.g., contempt of court).

Tip #3 – How to Avoid the "10/10" Trap

When the terminating event is the SM's retirement, there is no way to avoid the problem of "no garnishment." Courts do not have the power to order a SM to continue serving until the "10/10 Rule's" requirements are met.

When divorce is the terminating event, however, there may be *room to maneuver.* Delay of the divorce is often an option. The court may continue the divorce hearing when discovery is pending; counsel for the spouse may make use of legitimate discovery as to marital assets and debts, the SM's income (including pay and other entitlements), and domicile. In one case handled by the author, the wife was able to put off the divorce hearing for over 18 months and eventually obtain pension-share garnishment. Instead of filings for the sole purpose of delay – which would be unethical – the efforts focused on discovery and documents, so as to determine whether the husband-SM was indeed a legal resident of North Carolina.

Tip #4 – Present-Value Set-off

When there is other property of equivalent value, it may be possible to value the marital share of the military pension and then do a set-off against that property. The valuation would involve an estimate of John Doe's

retired pay, future increases due to COLAs (cost-of-living adjustments), projections about John's life expectancy, and a discount rate. This could be done by a CPA, economist or actuary.

The problem in most cases, however, is that there is no other property with a value similar to that of the military pension. This retirement annuity could start as early age 38 and last for another 40 years or more, depending on life-expectancy tables and estimates. The value could be half a million dollars or more.[4]

Tip #5 – Garnishment of Spousal Support

When there has been no waiver of spousal support, another option is open to Jane Doe in her settlement negotiations. A garnishment for alimony through the retired pay center does not require "10/10 Rule" compliance. The center will comply with a court order for pension garnishment (for spousal support, as opposed to property division) with less than a 10/10 overlap of marriage and military service.

In addition, there is no requirement that the payments be expressed in terms of a fixed dollar amount. The center will accept an order that states "John Doe will pay 30% of his disposable retired pay to Jane Doe as spousal support," which means that there will be automatic adjustments for COLAs each December. A flat dollar award captures no COLAs.

Finally, the tax consequences of such a negotiated settlement favor Jane, the former spouse. Instead of taxable monthly payments as pension division, Jane receives tax-free alimony payments. The Tax Cuts and Jobs Act made spousal support payments non-taxable for the recipient.[5] The parties may want to take this into account in setting the amount or percent of the pension going to the former spouse in the military divorce settlement. ■

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Endnotes

1. 10 U.S.C. § 1408(d)(2).
2. This is the Defense Finance and Accounting Service for the Army, Navy, Air Force and Marine Corps. The Coast Guard Pay and Personnel Center services retired pay for members of the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.
3. *See, e.g.*, *Michel v. Michel*, 286 Ga. 892, 692 S.E.2d 381 (2010); *In re* Marriage of Gurganus & Gurganus, 34 Kan. App. 2d 713, 718–19; 124 P.3d 92 (2005); *Stotler v. Wood*, 687 A.2d 636, 637 n.2 (Me. 1996); *Metzger v. Metzger*, 369 Pa. Super. 17, 534 A.2d 1057, 1059 (Pa. Super. Ct. 1987); *Carranza v. Carranza*, 765 S.W.2d 32, 33–34 (Ky. Ct. App. 1989); and *Cook v. Cook*, 18 Va. App. 726, 446 S.E.2d 894, 896 (1994).
4. *See, e.g.*, *Cunningham v. Cunningham*, 173 N.C. App. 641, 619 S.E.2d 593 (2005) (remanding case for presentation of husband's valuation of military pension; wife's presented a value of about $560,000 for the pension of a Marine Corps lieutenant colonel).
5. The Tax Cuts and Jobs Act of 2017 changed the tax treatment of alimony payments. This affects the exclusion of these spousal support payments (26 U.S.C. § 62(a) and § 215) and the inclusion of such payments in a taxpayer's income (26 U.S.C. § 71). The change impacts those who have a divorce or separation instrument (as defined by 26 U.S.C. § 71(b)(2)) executed after December 31, 2018. A special rule deals with taxpayers who have an existing (pre-2019) divorce or separation decree that is legally modified; the new rules do not apply to that modified decree unless the modification expressly provides that the new rules shall apply.