New Jersey Family Lawyer

Vol. 36, No. 3 - December 2015

Inside this issue

Chair's Column
Rethinking Co-Parenting: My Brief Experiment 1
by Amanda S. Trigg

Editor-in-Chief's Column
Referencing Criminal Action in a Family Law Matter 4
by Charles F. Vuotto Jr.

Executive Editor's Column
An Observation on Credibility: Impeachment of a Witness on One or More Conflicting Case Information Statements 7
by Ronald G. Lieberman

The Foundations of Qualified Domestic Relations Orders 9
by Cynthia Ann Brassington, Allison J. Fried and Lois S. Fried

May It Please the Court, or Not: Obtaining Oral Argument after *Palombi* 17
by Rosanne S. DeTorres and Caitlin DeGuilo Toker

21st Century Parentage Law: Why Marriage Equality Has Not Solved Parentage Dilemmas for LGBT Parents 20
by Debra E. Guston

What Constitutes Corroboration in Child Sexual Abuse Cases? 26
by Victoria D. Miranda

What is Included in Child Support under the Child Support Guidelines? 34
by William J. Rudnik

Family Law Section Editorial Board

Editor-in-Chief
Charles F. Vuotto Jr.

Executive Editor
Ronald G. Lieberman

Editor-in-Chief Emeritus
Lee M. Hymerling
Mark H. Sobel

Associate Managing Editors
Cheryl Connors
Derek Freed
Judith A. Hartz
Megan S. Murray
Amanda Trigg
Michael Weinberg

Senior Editors
Jane R. Altman
John E. Finnerty Jr
Beatrice Kandell
Jeralyn L. Lawrence
Jennifer Lazor
J. Patrick McShane III
Jennifer W. Millner
William M. Schreiber
Richard Sevrin
Michael J. Stanton
Andrea Beth White

Emeritus
Mark Biel
Cary B. Cheifetz
Frank A. Louis
John P. Paone Jr.
Richard Russell

Associate Editors
Andrea Joy B. Albrecht
Cassie Ansello
Thomas DeCataldo
Carmen Diaz-Duncan
Joseph DiPiazza
Robert Epstein
Kimber Gallo
Marisa Lepore Hovanec
Heather C. Keith
Stephanie L. Lomurro
Carrie Lumi
Marla Marinucci
Amy L. Miller
Lisa Parker
Jey Rajaraman
Amanda Ribustello
Alexandra K. Rigden
Thomas Roberto
Daniel Serviss
Abigale M. Stolfe
Kristi Terranova
Sandra Starr Uretsky
Elizabeth M. Vinhal
Katrina Vitale
Debra S. Weisberg

Family Law Section Executive Committee Officers

Chair
Amanda S. Trigg

Chair Elect
Timothy F. McGoughran

1st Vice Chair
Stephanie Frangos Hagan

2nd Vice Chair
Michael Weinberg

Secretary
Sheryl J. Seiden

Immediate Past Chair
Jeralyn L. Lawrence

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

The Foundations of Qualified Domestic Relations Orders

by Cynthia Ann Brassington, Allison J. Fried and Lois S. Fried

Retirement accounts remain a central focus of almost every divorce case, and are sometimes the only significant asset subject to equitable distribution. Therefore, the time to start addressing the qualified domestic relations order (QDRO) is at the first consultation with your client. Ideally, the terms of the distribution should be resolved early in the process, as the goal is to have the drafted QDRO ready before the terms of the settlement are placed on the record, in the marital settlement agreement, or in a divorce decree with stipulations. Therefore, if there is a retirement account, the first analysis is whether you need a QDRO. Always include the cost of the expert to draft the QDRO in your retainer, and never use an old QDRO believing you can modify it. Retirement plans are like snowflakes; they are all different, and each has its own requirements. Your expert will have your QDRO preapproved by the plan administrator, if possible, and you will avoid major headaches down the road.

It is also imperative that every time your client has an interest in a retirement plan you obtain the employee benefit handbook for each plan. It is crucial that your client understand the terms of the plan, and how an order will affect the benefits paid to both parties.

This article will address both defined contribution plans (IRAs, 401(k)s, deferred compensation plans, tax-sheltered annuities, union annuities, etc.) and defined benefit plans (pensions). An easy way to distinguish between defined contribution plans and defined benefit plans is: With a defined contribution plan your client can see an account balance based on accumulated investments and investment experience, while with a defined benefit plan the benefit is generally expressed as an estimated monthly allowance based on the terms of the plan. Remember, however, that every plan is different in terms of when and in what form the benefit will be paid.

Is the Defined Contribution Retirement Account Part of a Qualified Plan?

If the defined contribution retirement account is an individual retirement account (IRA), you technically do not need a QDRO. IRAs are not 'qualified;' they are not subject to the Employee Retirement Income Security Act (ERISA). IRAs have their own challenges, and it is important to understand the distinction between a qualified plan and a plan that is not qualified, like an IRA or a 'top hat' plan.[1]

Under Section 408(d)(6) of the Internal Revenue Code (IRC), an IRA can only be divided upon divorce or legal separation (including, in New Jersey, a divorce from bed and board). On the other hand, a qualified defined contribution plan can be divided *pendente lite*, as Section 206(d)(3) of ERISA provides that payments under a QDRO are available to a spouse as well as a former spouse, child, or other dependent of a participant.

Another important distinction between a qualified plan and an IRA is the tax penalty. Both an IRA and a qualified plan, such as a 401(k), may be divided with a rollover incident to a divorce with deferred tax consequences and no penalty. With both, the alternate payee must include in taxable income any portion of the assigned share that is not rolled over. The plan should withhold 20 percent of the distribution for federal income tax, which in many cases will not be sufficient. Unless state withholding is requested, none will be made. The alternate payee, if under age 59 ½, also incurs an additional 10 percent tax penalty if the distribution comes from an IRA, unless one of the exceptions applies.[2] However, the alternate payee incurs no tax penalty if the distribution comes directly from a qualified plan pursuant to a QDRO.[3] This is an important distinction, and affects your client's bottom line.

Suppose a party transfers the retirement savings from a qualified retirement account to a non-qualified retirement account; for example, due to a change in employment the retirement account is transferred from a 401(k), an employer-sponsored qualified plan, to an IRA during the

pendente lite period. The special tax treatment of a distribution under a QDRO is lost and the 10 percent penalty could result. Keep an eye on the retirement benefits *pendente lite* and negotiate the division of the retirement accounts with specificity before you finalize the terms of the divorce. It should be noted that some IRA custodians will require an order that they term a 'QDRO,' but using an order to divide a non-qualified plan, such as an IRA, will not change the tax treatment of the distribution.

Always Be Specific in the Terms of Your Agreement to Protect the Alternate Payee

Regardless of whether you are dividing a defined benefit plan or a defined contribution plan, it is imperative that the factual foundation of the division of the retirement account is clearly stated on the record and incorporated into your marital settlement agreement or divorce decree with stipulations. You should:

1. Include the name of the participant and the alternate payee;
2. Designate the amount or percentage of the participant's benefits to be paid to the alternate payee;[4]
3. Specify the number of payments to the alternate payee or the period to which the order applies;
4. Designate each plan subject to equitable distribution specifically by name, and include any successor plan;
5. Properly identify the instrument that will be utilized to divide the benefit. For example, with a 401(k), 403(b), profit-sharing, tax-deferred annuity, etc., you will utilize a QDRO. However, a federal civil service employee's thrift savings plan utilizes a retirement benefits court order (RBCO). Always confirm with your expert what instrument is required by your plan before you place the terms of your agreement on the record, in the marital settlement agreement, or divorce decree with stipulations.

Neglecting to reference a specific plan in the marital settlement agreement or divorce decree with stipulations can have dire consequences for a potential alternate payee. For example, in the matter of *Ross v. Ross*, Mr. Ross separated from his wife and moved in with his girlfriend years before the finalization of the divorce.[5] Attached to the judgment, upon finalization, was an agreement stating that Mrs. Ross was to prepare QDROs to effectuate the division of retirement accounts. Mr. Ross remarried right after the divorce, and named his new wife as the beneficiary of his defined benefit plan, defined contribution plan, and an annuity contract. He died one month later. Mrs. Ross moved for entry of QDROs, or for the agreement to be deemed a QDRO for all three entitlements. The agreement named one plan with enough specificity for the court to determine that the agreement satisfied the QDRO requirement that an order must designate each plan to which the order applies, but not the others. Thus, Mrs. Ross received her share of the plan identified in the agreement, but not her share of the two other entitlements that were not referred to in the agreement, and to which the new Mrs. Ross had been named the beneficiary.

Always include in your agreement, whether in writing or on the record, that the value of the defined contribution plan subject to equitable distribution shall be adjusted for income experience to the date of distribution. If you represent the participant and the market goes down, your client will be protected, as the alternate payee will share the results of the decline in the market. On the other hand, if the market goes up and you represent the alternate payee, your client will have the benefit of the increase when the distribution occurs. Also remember, not all plans allow for an immediate distribution. In some cases it can be years before an alternate payee may apply for the assigned portion of the account.

If there is a chance there is a loan against the account, that possibility should be addressed in your agreement. While the participant is always responsible for the repayment of the loan, the alternate payee can receive less from the plan if the loan is considered marital. Accordingly, when the account consists of $100,000 of mutual funds and a $20,000 loan, the agreement should make it clear whether the alternate payee who is receiving 50 percent of the account will receive $60,000 (50 percent of the gross balance) or $50,000 (50 percent of the account balance net of the loan). In addition, it is not unusual for the assigned amount to be adjusted by any number of credits or offsets. When the account is increasing or decreasing in value due to investment experience, the date of the adjustment for the offset (*e.g.*, as of the date of complaint or as of the date of transfer) could make a material difference in the amount that is ultimately transferred.

For a Defined Benefit Plan, Should the Order be a Separate Interest Order or a Shared Interest Order?

When a participant is not yet in pay status and a defined benefit plan is governed by ERISA, a QDRO can be drafted to be a separate interest order or a shared

interest order. Your agreement should specify whether the order is to be a separate interest or shared interest and include the relevant dates for the coverture fraction.

What is the Difference Between a Separate Interest Order and Shared Interest Order?

A separate interest order carves out from the participant's benefit a separate benefit for the alternate payee. This means that the alternate payee has options in terms of when to start collecting a benefit (as early as the participant's earliest retirement age under a plan) and what form of benefit to collect. With a shared interest order, when the alternate payee collects a benefit and in what form is dictated by the participant's choice, because each of the participant's checks is literally shared with the alternate payee.

Perhaps the distinction between separate interest orders and shared interest orders the practitioner should be most mindful of is the measuring life. The measuring life for a separate interest order is the alternate payee's life. This means that the benefit will be actuarially adjusted so the alternate payee collects for his or her lifetime. The measuring life for a shared interest order is the participant's life, meaning the benefit the alternate payee collects terminates upon the participant's death. However, if the participant is not yet in pay status, a shared interest order can still allow the alternate payee to collect a benefit after the participant's death, with the provision of a qualified joint and survivor annuity. The downside of a qualified joint and survivor annuity is that the benefit that is being divided will be reduced so the same benefit that was going to be paid for only the participant's lifetime will instead be paid for the lives of the participant and alternate payee. The majority of the time this reduction cannot be subtracted only from the alternate payee's share of the benefit. Instead, the benefits of both the participant and the alternate payee would be reduced so the alternate payee could collect a benefit after the participant's death.

When a participant is in pay status, a plan has already actuarially determined the participant's benefit. Generally, the plan will not at that point carve out a separate interest for the alternate payee because the participant's benefit has already begun to be paid based only on the participant's lifetime. For that reason, usually only a shared interest order is available when the participant is already in pay status. Almost always, when a participant has elected a form of benefit at commencement, this election will be irrevocable. If a participant did not elect for a spouse or former spouse to be a survivor upon retirement, that option in all likelihood will not be available via the QDRO.

As every plan has its own rules, it is imperative that the practitioner, especially if representing the alternate payee, learn the intricacies of the particular plan. For example, if a participant is already collecting a benefit at the time of divorce, some plans will remove the former spouse as the participant's surviving spouse, even if the participant elected a survivor option at retirement. This is most often seen in pensions sponsored by unions. If the alternate payee is no longer a surviving spouse, and a qualified joint and survivor annuity is also not available via the QDRO, then the alternate payee's attorney needs another method for the client to be protected after the participant's death. If the pension is already in pay status, one way to do that would be through life insurance with a declining amount of coverage.

Pre-retirement survivor annuities are available under both separate and shared interest orders for plans governed by ERISA. ERISA requires a retirement plan to allow a survivor to collect a benefit should the participant die before entering pay status.[6] While there is often quibbling about who is responsible for the reduction in benefit caused by providing a qualified *post*-retirement joint and survivor annuity, almost always there is no need to make that determination with a qualified *pre*-retirement survivor annuity (QPSA), since in most plans there is no cost to the participant associated with the QPSA.

In most cases, a separate interest order will maximize the benefits for both the participant and the alternate payee. When could a shared interest order be advantageous for a participant not yet in pay status? With a shared interest order, if the alternate payee predeceases the participant, the alternate payee's benefit reverts to the participant. If a participant were much younger than an alternate payee, or if the alternate payee were in ill health, then a shared interest order should be considered because of the high likelihood of the alternate payee predeceasing the participant. If the alternate payee did predecease the participant, the participant then would become whole upon the alternate payee's death. With a separate interest order, the alternate payee's benefit is sometimes forfeited if the alternate payee predeceases the participant before benefit commencement, and is always forfeited or paid to an elected survivor upon the alternate payee's death after benefit commencement.

Go to Index

From the perspective of the attorney for the alternate payee, a separate interest order usually should be favored because there is no need for a reduction for a survivor benefit and the alternate payee will have ultimate control over when the benefit will commence and in what form. Because a participant may be motivated by the potential to be made whole by outliving the former spouse, and the alternate payee may be motivated by being able to collect for life, the type of order to use should be specified in the parties' agreement rather than left open for potential litigation when the order is drafted. Whether the order is a separate interest order or a shared interest order, and what, if any, survivor benefits are to be provided, should be addressed in the parties' agreement, along with if the alternate payee is entitled to a share of cost-of-living adjustments and early-retirement subsidies/supplements paid to the participant.

How Does this Work in Layman's Terms?

Assume a benefit is 60 percent marital and the participant's benefit is $1,000 per month at the participant's earliest retirement age, which is 55 under the participant's plan, and $2,000 per month at the participant's normal retirement age, which is 65 under the participant's plan. Also assume the alternate payee and participant are the same age. If a separate interest order is entered and the alternate payee decides to collect at the participant's age 55, the alternate payee's benefit would be $300 per month, because that is 50 percent of the martial portion of the benefit (the marital portion being 60 percent of $1,000) on the alternate payee's benefit commencement date, actuarially adjusted for payment over the alternate payee's lifetime. If the alternate payee is a female, the actuarial tables will show that she should live longer than the participant. Therefore, the $300 per month would have to be reduced so the amount that would have been collected had the participant collected for life beginning at age 55 would be equivalent to what the alternate payee would collect beginning at participant's age 55 until her death.

Suppose the reduced amount is $250 per month. The alternate payee could collect $250 per month at the participant's age 55, regardless of when the participant elects to commence benefits, or the alternate payee's age at benefit commencement. If the participant waited to commence benefits until the participant's normal retirement age under the plan and did not earn further service under the plan, the participant would receive $2,000 per month, less the 30 percent assigned to the alternate payee, or $1,400.

If the parties divorce after the participant has opted to commence benefits at the earliest retirement age under the plan, in all likelihood a shared interest order would be required. If that order assigned the alternate payee half of the marital portion of the benefit, the alternate payee would be assigned $300 per month, but that $300 per month would terminate upon the earlier of the death of the participant or the death of the alternate payee.

How Do Defined Benefit Plans Not Governed by ERISA Differ from ERISA-Governed Plans, and What Points about Them Should be Addressed in an Agreement?

Retirement entitlements through the military, the federal government, and the government of the state of New Jersey have their own rules for how a domestic relations order is able to be drafted. Government plans do not need to comply with ERISA. This means that such plans are not required to provide pre-retirement survivor annuities, and pensions for state of New Jersey employees do not allow a beneficiary to collect a survivor benefit should a participant die before retirement. Another distinction between these plans and the ERISA-governed plans is that the alternate payee must commence benefits at the time the participant commences benefits.

For the state of New Jersey retirement systems, employees and employers contribute to a retirement system in order to ensure sufficient funding of the retirement systems. The employee's contributions are not voluntary, and the amount contributed is usually set by law. The contributions are usually deducted from pay before federal taxes. The most a beneficiary can receive should a participant die before commencing benefits is a return of the contributions with interest. A former spouse can be named as a beneficiary for these contributions on a beneficiary form completed after the date of divorce. However, under the Police and Firemen's Retirement System (PFRS) and the State Police Retirement System (SPRS) the designation is moot unless there is no statutory survivor. For post-death retirement benefits, again PFRS and SPRS are distinct. Survivor benefits under PFRS and SPRS are statutory and cannot be paid to a former spouse. All other retirement systems allow a former spouse to be named as a survivor under the available survivor options. It should also be noted that life insurance is available to members of the state of

New Jersey retirement systems and there is no restriction on who can be named a beneficiary, but the amount of coverage decreases dramatically after retirement.

In addition to addressing the return of contributions and naming of a survivor, the parties' agreement should detail whether the alternate payee would be entitled to cost-of-living adjustments, should they return. It should not include a provision about who is responsible for the cost of the survivor benefit because the state will not allocate the deduction solely to one party; the only option is for the deduction to come 'off the top' before the entitlement is divided, meaning the deduction is shared *pro rata*. If the intent is for the alternate payee to be responsible for the cost of the survivor benefit, the only way to accomplish this is by adjusting the benefit the alternate payee will collect for the cost of the survivor benefit. The problem with this method, though, is the cost can only be known when the participant is ready to retire.

Orders for military members differ slightly depending on whether the plan participant is active duty or a reservist. A reservist's length of service is measured in points, while an active-duty participant's length of service is measured in months. Defense Financing and Accounting Services (DFAS) requires that a military member have 10 years of service overlapped with 10 years of marriage (the 10/10 rule) for it to pay a benefit directly to the alternate payee for equitable distribution. This does not apply if the benefit is paid for alimony or child support. Without DFAS's direct payment, the participant would need to pay the alternate payee a portion of each retirement check, and the participant would also be responsible for the taxes on the entire benefit. For marriages that do not satisfy the 10/10 rule, the practitioner may be wise to value the pension and offset it against another available asset.

To be a survivor for the military Survivor Benefit Plan (SBP), a former spouse must be elected by the participant or deemed to be the survivor within one year of the first mention of survivor benefits, whether in a marital settlement agreement or a subsequent order. To assure there will be a survivor benefit, a practitioner should use both methods of electing a survivor by having the alternate payee make a deemed election and ordering the participant to name the alternate payee a survivor. A survivor benefit elected before a divorce is revoked upon divorce so parties must be mindful of changing the SBP coverage to former spouse SBP coverage. Reservists have the opportunity to elect SBP coverage when they are notified they are retirement-eligible (by way of the 20-year letter) or decline coverage until retirement. If a reservist defers the SBP coverage and dies before reaching retirement age, then a survivor benefit will not be payable. The alternate payee's representative should thus incorporate into the agreement that the reservist cannot decline SBP coverage until retirement. A current spouse cannot be a survivor under the SBP if a former spouse is already elected, and vice versa, so timeliness is key to preserving the SBP coverage.

As with the state of New Jersey retirement systems, military pensions will not allocate the cost of the survivor benefit between parties, so they will share the cost *pro rata*. The cost is set by statute. If an alternate payee collecting the SBP remarries before age 55, then the entitlement to the alternate payee ends but can resume if that marriage later ends in divorce or death. In addition to the survivor issues, an agreement for a military pension should address the method for calculating the alternate payee's benefit and the cost-of-living adjustments. The military requires that no more than 50 percent of the pension be assigned in equitable distribution to the former spouse through DFAS.

Orders for federal government employees are the most flexible of the government plans. The amount of the survivor benefit, if any, and from whose portion of the benefit the cost of the survivor benefit will be deducted, should be addressed in the parties' agreement, as well as: 1) cost-of-living adjustments; 2) whether the participant should be able to withdraw contributions (thereby forfeiting the pension for both parties); and 3) what should occur if the alternate payee dies (options include reversion of the benefit to the participant, payment to the alternate payee's estate, and payment to children of the marriage).

Federal employees who entered covered service on and after Jan. 1, 1987, are enrolled in FERS (Federal Employees Retirement System). Before Jan. 1, 1987, employees were enrolled in CSRS (Civil Service Retirement System), but later had the option of converting to FERS. Like PFRS and SPRS, CSRS usually does not withhold for Social Security (more on this below). The maximum former spouse survivor annuity under CSRS is 55 percent, but is 50 percent under FERS. Like the military SBP, a former spouse's survivor benefit will terminate if the former spouse remarries before age 55 unless that marriage ends in divorce, annulment, or death. A divorce nullifies a survivor benefit that was previously elected. Additionally, there can be more than one survivor under FERS and CSRS, but the total survivor benefit elected may not exceed the maximum 55 percent of the benefit

Go to Index

under CSRS, or the maximum 50 percent of the benefit under FERS. A practitioner should also be aware that the alternate payee must have survivor benefits to maintain coverage under the FEHB (Federal Employees Health Benefits) program after the participant's death.

What Happens If the Participant Becomes Disabled?

Avallone v. Avallone recognized that sometimes a disability retirement allowance has one component that represents a retirement allowance, thereby making it subject to equitable distribution to the extent attributable to marital efforts, and another component that represents compensation for disability, which belongs to the disabled spouse alone.[7] For the state of New Jersey retirement systems, the Division of Pensions and Benefits cannot distinguish each component for the court. So, in *Sternesky v. Salcie-Sternesky*, the court devised a formula to identify the retirement component versus the disability component by isolating the ordinary retirement allowance from the excess representing compensation for a disabling injury.[8] For a PFRS accidental disability benefit for a participant not yet eligible for ordinary retirement, the formula is to multiply the ordinary retirement allowance at 20 years of service by a fraction with a numerator equaling service during the marriage and a denominator equaling 20 years. A representative for a PFRS participant who is not yet eligible for ordinary retirement may want to address a potential disability in an agreement to ensure the alternate payee does not share in the entire disability pension. *Sternesky* applied to a PFRS participant with an accidental disability benefit. How *Sternesky* applies to the other retirement systems and ordinary disability benefits has not yet been addressed by the courts.

Disability under private pension plans is not much clearer, because each plan is unique. Some private pension plans offer a disability benefit for a certain period of time that will turn into the regular retirement benefit at the participant's normal retirement age. Others will allow a benefit to be computed based solely on longevity. This is plan-dependent, and the practitioner can attempt to address a possible disability scenario in an agreement or a QDRO. But when a disability actually arises, the QDRO as written may not capture the parties' true intent. A practitioner may need to enter a revised order at that time, so the alternate payee is not sharing in the benefit attributable solely to the disability.

Post-Complaint Issues: Social Security and the Effect of Post-Divorce Efforts on a Defined Benefit Plan

There are some employees who are not subject to deductions for the Federal Insurance Contributions Act (FICA or Social Security) who will therefore receive no Social Security benefits based on that employment. This includes some participants in the Police and Firemen's Retirement System, as well as the Civil Service Retirement System (but not the Federal Employees' Retirement System). This exclusion will result in an inequitable distribution of pension benefits, as the alternate payee will receive the assigned portion of the participant's government pension in equitable distribution and will also receive a Social Security benefit in which the participant (government employee) cannot share.[9] The appellate court addressed this inequity in the case of *Panetta v. Panetta*, where the husband, a federal employee, had a small Social Security benefit earned prior to his CSRS employment and the wife had worked in the private sector throughout the marriage.[10] Specifically, the *Panetta* court provided that:

> We are, nevertheless, left with the question of how to balance the benefits earned by a spouse who participated in social security all of her working life with those of a spouse who participated for only a portion of his working life. The fairest and most equitable means is to deduct plaintiff's actual social security benefit... from defendant's actual social security benefit when she begins to collect it, and then offset the remainder, subject to the *Marx* formula, against defendant's share of plaintiff's pension.[11] In other words, the partial participant's actual social security benefit is deducted from the full participant's benefit and the remainder, subject to the *Marx* formula, is offset against the full participant's share of the partial participant's pension.[12]

To accomplish that which is prescribed in *Panetta*, the practitioner should provide in the settlement agreement that the parties will enter into an amended order with full disclosure of their respective retirement benefits and Social Security benefits upon retirement. If an order for a plan with this issue is filed before the parties are collecting their pensions and Social Security, include in the order that an amended order will be executed and

submitted to recalculate the alternate payee's share of the government employee's defined benefit plan in an equitable fashion pursuant to *Panetta*.

Another issue is the participant's post-divorce efforts in increasing the pension, exclusive of marital efforts. For example, assume that after the divorce the employee went back to school, earned a master's degree, and as a result of these post-dissolution efforts the pension payment was $5,000 per month instead of the $3,000 per month the participant would have received absent those post-divorce efforts. Is the alternate payee entitled to share in the $2,000 per month differential? If the employee spouse can show the increase in the pension is due to post-dissolution efforts that were exclusive of the joint efforts of the marital enterprise, then the answer could be no.

In the matter of *Barr v. Barr*, the Appellate Division held:

> [T]here are some extraordinary post-judgment increases that may be proven to be attributable to post-dissolution efforts of the employee-spouse and not dependent on the prior joint efforts of the parties during the marriage. In such instances, these sums must be excluded from equitable distribution and the application of the coverture fraction may be insufficient to accomplish this purpose.[13]

The Appellate Division again addressed the issue of 'post-divorce enhancing factors' in the matter of *Krupinski v. Krupinski*, where the participant returned to school and, as a result of his post-dissolution education, significantly increased his pension benefit.[14] He argued his alimony should be terminated at his retirement because, by reason of his post-divorce efforts, the alternate payee enjoyed an enhanced pension. The appellate court ruled that if he were to succeed in his application to terminate alimony, he would need to prove his post-divorce efforts enhanced the value of his overall pension benefits.[15] Therefore, if bringing this application to the court or opposing such an application, remember that it is the participant's burden to prove the post-dissolution efforts enhanced the pension benefits, keeping in mind that "simply put, future benefits should not be paid in present dollars without a discount and present benefits should not be discounted to the value of past dollars."[16] In other words, the plan participant must consider that a portion of the increased benefit represents inflationary increases and, therefore, must make a compelling argument to quantify the portion that does not.

In conclusion, the equitable distribution of retirement benefits is complicated and case law is evolving. This warrants counsel's full attention to the terms of any retirement plan that is being divided, since the terms of the order could have a material effect on what the participant gives up and what the alternate payee receives. ■

Cynthia Ann Brassington is in solo practice in Linwood. Allison J. Fried is with the Northfield accounting firm of Capaldi, Reynolds & Pelosi, P.A. Lois S. Fried is a partner at Capaldi, Reynolds & Pelosi, P.A.

Endnotes

1. A top hat plan is a plan that is unfunded and is maintained by the employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA §§ 201(2),(301)(a)(2), and 401(a)(1).
2. The exceptions to this 10 percent penalty are for early distributions from an IRA that are: 1) made to a beneficiary or estate on account of the IRA owner's death; 2) made on account of disability; 3) made as part of a series of substantially equal periodic payments for life (or life expectancy) or the joint lives (or joint life expectancies) of the IRA owner and the IRA owner's designated beneficiary; 4) qualified first-time homebuyer distributions; 5) not in excess of the IRA owner's qualified higher education expenses; 6) not in excess of certain medical insurance premiums paid while unemployed; 7) not in excess of unreimbursed medical expenses that are more than a certain percentage of the IRA owner's adjusted gross income; 8) due to an IRS levy; or 9) a qualified reservist distribution. *See* IRS Topic 557 at irs.gov/taxtopics/tc557.html.
3. IRC § 72(t)(2)(C).

4. When the parties divide a defined benefit plan, reference the coverture fraction. The numerator of the fraction is the number of months the parties were married, calculated from the date of the marriage or plan participation, if later, to the date of the filing of the complaint for divorce. The denominator of the fraction is the number of months of employment through the alternate payee's commencement date. For example, the parties were married while the participant was covered by the plan for 15 years, which is 180 months, and the participant was employed for 25 years, which is 300 months. Therefore, the coverture fraction is 60 percent and the alternate payee is awarded 30 percent if the marital portion is divided equally.
5. 308 N.J. Super. 132 (App. Div. 1998).
6. ERISA § 205.
7. 275 N.J. Super. 576 (App. Div. 1994).
8. 396 N.J. Super. 290 (App. Div. 2007).
9. The government pension offset will reduce the amount of Social Security spouse's benefits by two-thirds of the amount of the government pension being received.
10. 370, N.J. Super. 486, 499 (App. Div. 2004).
11. 1. The total accrued benefit is to be determined when plaintiff is permitted to move her share of the benefit to pay status pursuant to the plan requirements; 2. The plan administrator is to determine the coverture fraction and multiply the total accrued benefit by the coverture fraction; 3. The product of the total accrued benefit times the coverture fraction is to be divided in half in accordance with plaintiff's equitable share. Plaintiff's form of the qualified domestic relations order shall be entered. *Marx v. Marx*, 265 N.J. Super. 418, 428 (Ch. Div. 1993).
12. *Panetta*, *supra*, at 500.
13. 418 N.J. Super. 18, 41 (App. Div. 2011).
14. 437 N.J. Super. 159 (App. Div. 2014).
15. Notably, Mr. Krupinski also had to prove that the enhanced portion of the pension was income to his former wife and that as a result of the additional income, his former spouse would still be able to have a lifestyle equal to or better than that which she enjoyed during the marriage without the alimony payment. This is so the pension would not be both an asset subject to equitable distribution and income pursuant to 2A:34-23(b), which provides, "when a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony."
16. *Risoldi v. Risoldi*, 320 N.J. Super. 524, 545-546 (App. Div. 1999).