New Jersey Family Lawyer

Inside this issue

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

Social Security Benefits/Analysis—Don't Ignore It in Your 'Gray' Divorce

by Cynthia Ann Brassington and Francis C. Thomas

Baby boomers are retiring today and divorces among Americans are on the rise. According to the Pew Research Center, the divorce rate for people 65 and older has "roughly tripled since 1990, reaching six people per 1,000 married persons in 2015."[1] With the increase of these 'gray' divorces, it is imperative that family law practitioners have a general understanding of Social Security benefits and how they affect clients on support-related matters.

Decisions regarding Social Security (SS) can be extremely complicated. There are thousands of rules, thousands of additional codicils to clarify the rules, annual changes, and recent legislation—the Bipartisan Budget Act of 2015 (BBA)—which drastically modified the planning landscape. Each day over 10,000 baby boomers reach retirement age and many other individuals of pre-retirement age make critical choices impacting their potential SS benefits. These decisions involve when to claim benefits, what kind of benefit to request, and when to marry, divorce, or remarry. It is essential that the family law practitioner consider the value of SS when evaluating alimony. This article provides an overview of the SS benefits to assist the family law practitioner to better advise his or her clients in understanding the financial impact of divorce, alimony, and remarriage.

How are the SS Benefits Calculated?

It is imperative for the family law practitioner to understand the significance of full retirement age (FRA), a client's earnings record, and benefit options. The obligee must receive an accurate analysis of their 'need' and the payment obligation of the obligor in their analysis of their ability to 'pay.'[2] SS is a valuable resource providing 90 percent of the cash flow for one-third of the retirees, including up to 28 percent of the cash flow for high-income retirees.

How does Social Security work? To receive retirement income, a worker who is born after 1928, must have at least 40 quarters of coverage (QC) credited to his or her work history,[3] with a maximum of four quarters per year. Credits are a function of dollars earned and *not* calendar quarters worked. The QC requires that the worker earn at least the equal required minimum, which is adjusted annually for inflation.[4] In 2018, the worker must have earned $1,320 per quarter, or $5,280 for the year.[5]

The Social Security Administration (SSA) calculates a worker's benefits using a multipart formula that first converts annual income earned over a worker's career into today's dollars. The annual income used is the lower of what the worker earned for the year or the maximum Social Security base wage for that year. The maximum SS base, which adjusts annually, is $128,400 in 2018. The SSA selects and totals the 35 highest inflation-adjusted yearly earnings. The sum is divided by 420 (35 years times 12 months per year). The result is the average indexed monthly earnings (AIME), which is used to calculate the primary insurance amount (PIA). The PIA is the monthly benefit a worker will receive at full retirement age. The benefit formula is progressive (low earners receive a greater proportion of the pre-retirement income) with three tiers. The first $885 of PIA is multiplied by 90 percent, the next chunk up to $5,336 is multiplied at 32 percent, and the amount over $5,336 up to the annual maximum is multiplied by 15 percent. In 2018 the PIA is $2,788.

Full retirement age is based on the worker's year of birth. If the individual is born before 1938, he or she reaches full retirement age at 65. Individuals born between 1943 and 1954 reach full retirement age at 66. The following table reflects full retirement age for persons born after 1954:

1955	66 years and 2 months
1956	66 years and 4 months
1957	66 years and 6 months
1958	66 years and 8 months
1959	66 years and 10 months
1960 and forward	67 years

Understanding the credits is one part of understand-

ing Social Security. The amount of the Social Security benefit that will be received by an individual varies not only by their individual work history, but also by the work history of their spouse, and when they take the benefit. For example, an individual who is eligible for full retirement at age 66 can elect to take a reduced benefit as early as age 62. If an individual who would reach full retirement age at age 66 takes his or her benefit at age 62, the reduction is 25 percent. The chart below shows the earliest age to claim benefits the maximum reduction for filing early.

Age when you claim spousal benefit
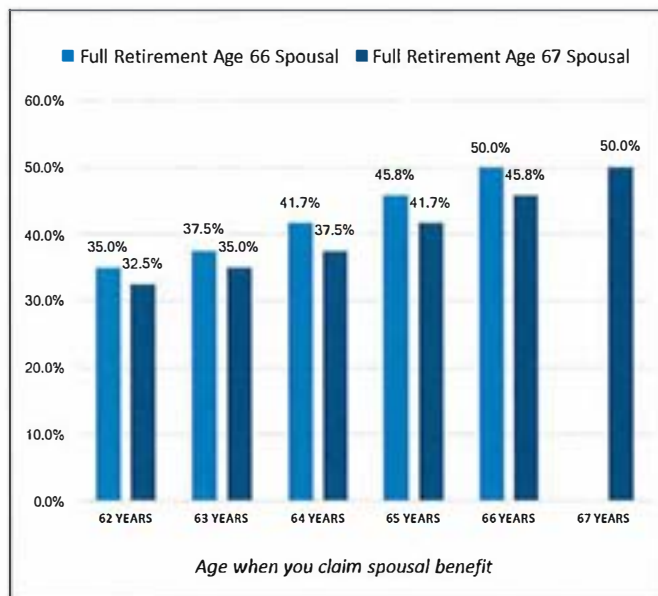
It is recommended that counsel and/or his or her client obtain a copy of their SS statement of benefits by visiting the website at www.ssa.gov/myaccount. Taking SS benefits before FRA results in a reduced benefit, while delaying retirement beyond FRA up to age 70 increases the benefit, as the worker accrues a delayed retirement credit (DRC).[6] By way of example, by delaying collecting SS post FRA, the worker accrues a DRC for each month until reaching age 70. The DRC is 2/3 percent per month or eight percent per year (not compounded). For those born from 1943 to 1954, forgoing benefits until age 70 increases worker benefits and survivor benefits by 32 percent. The life expectancy for a 66-year-old male is 84.5 years, with the life expectancy for a 66-year-old female being 86.9 years. As such, the deferral of benefits can have a substantial impact over the recipient's lifetime. There is no advantage to waiting to commence benefits beyond age 70, as the PIA does not increase beyond age 70.[7] The decision when to commence collecting SS benefits is a function of a great many variables. The most important factors are sufficient retirement assets and life expectancy. The current PIA maximum SS at age 70 is $3,698 per month.

Eligibility for Spousal Benefits

Married and qualified divorced individuals are eligible for benefits based upon their own records, as well as spousal and survivor benefits. If claimed at FRA, spousal benefits are equal to 50 percent of the PIA of the worker, and survivor benefits can be equal to whatever the worker was collecting at the time of death. As previously stated, the PIA is basically the worker's FRA benefit amount. A current spouse needs to be married for at least one year to qualify for spousal benefits, and the worker needs to have filed for benefits. In order for an ex-spouse to qualify for spousal benefits, they must be unmarried, their ex-spouse needs to be eligible for retirement benefits or disability benefits, the marriage needs to have lasted for at least 10 consecutive years, and they must have been divorced for a least two or more years or the ex must have filed for retirement or disability benefits. Survivor and ex-spouse survivor benefits can start at age 60 or at age 50 if disabled. For survivor benefits the ex-spouse needs to be unmarried unless the remarriage was after age 60.[8]

SS has created a strong motivation to stay married for the required 10 years. If a client is close to the 10-year mark, it may assist both parties by delaying the finalization of the divorce until the marriage goes beyond 10 years in duration. If the former spouse claims his or her Social Security benefit before reaching full retirement age, at age 62 for example, and the worker spouse has not yet reached full retirement age, it will reduce the spousal benefit by the actuarial reductions from the 50 percent share if he or she has not reached full retirement age.

Deeming and the Bipartisan Act (BBA) of 2015

'Deeming' is another obstacle for individuals filing for worker and spousal benefits before FRA. This rule requires a claimant to collect the higher of the benefits based upon their own record or eligible spousal benefits. This means that a spouse or ex-spouse cannot file a restricted application to collect spousal benefits while their own worker benefits grow via DRCs. Deeming originally only applied to recipients age 62 to FRA. However, the BBA of 2015 extended the deeming rule from FRA to age 70 for individuals who had not attained age 62 by Jan. 1, 2016.

Another aspect of the new law (for those individuals not grandfathered under the prior law) is that a current spouse can collect spousal benefits only if his or her spouse applies and collects worker benefits. If the working spouse is at FRA and attained age 62 by Jan. 1, 2016 (not subject to deeming rule since reaching FRA), they have the option to collect worker's benefits based upon their own record or spousal benefits. Choosing the latter option requires filing what is called a 'restricted application' and permits their own worker benefits to grow via the DRCs. Spousal benefits do not increase by DRCs and they do *not* increase by the worker's DRCs. Therefore, they should be taken no later than FRA. 'File and collect' has replaced 'file and suspend' since the passage of the BBA 2015. Workers who filed and suspended prior to April 30, 2016, are grandfathered. Understanding the implications of spousal benefits is extremely important in order to maximize benefits.

The *Panetta* Offset

There are workers employed in government positions who do not pay into the Social Security System, such as federal workers employed in the Civil Service Retirement System (CSRS), hired in 1983 or before, and police officers of some municipalities, for example. When representing these clients, consider including in the marital settlement agreement the anticipated offset that may arise upon full retirement for both parties, if one of the parties will receive SS benefits. For example, assume the parties are in a long-term marriage, and the husband is employed by Atlantic City as a police officer. He has an excellent pension and does not pay into SS, and there is no question that his defined benefit plan is completely marital. Further assume that his wife is employed in a job with no pension and she pays into SS. Both parties are 58, and the husband retires. He commences collecting his pension, now in pay status. The wife continues to work. The parties divorce when they are both 60, and a domestic relations order (DRO) is entered that provides the wife receives 50 percent of the coverture fraction of the husband's defined benefit plan pension.[9] The wife was born in 1954 and, therefore, she is eligible for FRA at age 66. Here is the inequity: The husband has 50 percent of his pension; the wife has 50 percent of the husband's pension *and* 100 percent of her SS benefits upon her retirement at age 66. Therefore, the wife has greater retirement benefits than the husband.

In these cases, the SS benefit may be offset by the pension by a formula. This is the issue that arose in *Panetta v. Panetta,* wherein the plaintiff-husband, Anthony Panetta, was employed in the private sector for 19 years and then went to work for the federal government in 1977.[10] He had retired and was receiving both a federal pension and $530 a month in SS benefits. The defendant-wife, Carolyn Panetta, was not yet retired, employed in the private sector for the length of the marriage and earned SS benefits. The parties had included in their judgment of divorce the following language: "It is understood by the parties that the evaluation of plaintiff's pension reflects an adjustment for imputed SS benefits as it is a civil service pension. This reduced valuation shall be utilized for division of plaintiff's pension and the application of a Qualified Domestic Relations Order unless New Jersey Courts dictate law to the contrary prior to plaintiff's retirement."[11]

In *Panetta*, the appellate court held that the valuation date for an individual's SS benefit, like a federal pension, cannot be determined at the time of separation or at the time the final judgment of divorce is signed. Both benefits are variable, and are contingent upon many factors, such as age, salary, mortality, and years of service. Therefore, the proper time to value a federal pension on the one hand, and SS benefits on the other hand, is at the time the parties begin to receive the benefits. Just as in calculating the coverture fraction for a defined benefit plan "actual retirement benefit is multiplied by the coverture fraction and divided by two."[12] The court held that since "the plaintiff contributed to SS during the marriage, the defendant who did not, was entitled to an offset against her share of his federal pension."[13] Therefore, "[i]n calculating the amount of the offset, the *Marx* formula is applied to the private employee's actual SS benefit based upon her lifetime earnings. That amount is then deducted from her share of the federal employee's pension."[14] The offset is not calculated until the recipient commences to receive the SS benefit.[15]

Panetta had an additional complication in that the plaintiff-husband received $530 per month in SS benefits. The appellate court held, "[t]he fairest and most equitable means is to deduct plaintiff's actual SS benefit, $530 per month, from the defendant's actual SS 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. In other words, the partial participant's actual SS 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." [16]

In the unpublished case *Arce v. Agosto*, the appellate court denied the application of a former police officer to offset the former wife's share of his pension against the marital share of her SS benefits.[17] The parties' agreement was silent on whether there should be an offset. In denying the former husband the relief, the appellate court relied on New Jersey courts having "long espoused a policy favoring the use of consensual agreements to resolve marital controversies." Consequently, absent 'unconscionability, fraud, or overreaching in negotiations of the settlement,' a trial court has 'no legal or equitable basis' to alter matrimonial agreements."[18]

Conclusion

This article points out fundamentals in dealing with a 'gray' divorce, which include: 1) current spouses need to be married for nine months to collect survivor benefits; 2) one year to collect spousal benefits; 3) ex-spouses need to be married for at least 10 years to collect spousal and survivor benefits; 4) an ex-spouse cannot be re-married when applying for spousal benefits on the record of a previous spouse; remarriage before the age of 60 disqualifies an ex-spouse from collecting survivor benefits on a former spouse's record; and 5) always include the *Panetta* offset in marital settlement agreements where one spouse has a pension and did not pay into SS and one spouse did pay into SS, to insure that the parties' division of these benefits is equitable.

Finally, it may be helpful to have an experienced SS expert advising the practitioner and client in addressing the factors under N.J.S.A. 2A:34-23(b). This article is an introduction and does not replace utilizing a SS expert. Within SS, there are exceptions upon exceptions not stated herein.[19]

Cynthia Brassington is a partner in the law firm of Brassington Family Law, P.C., located in Linwood.

Endnotes

1. Renee Stepler, Led by Baby Boomers, divorce rates climb for America's 50+ Population. March 9, 2017.
2. N.J.S.A. 2A:34-23(b)(1).
3. 42 U.S.C. § 414(a)(2).
4. 42 U.S.C. § 413(a)(2)(A).
5. Social Security Benefits Planner, https://www.ssa.gov/planners/credits.html.
6. 42 U.S.C. § 402(w).
7. https://www.ssa.gov/cgi-bin/longevity.cgi.
8. 42 U.S.C. § 416(d)(1).
9. *Marx v. Marx*, 265 N.J. Super. 418, 428 (Ch. Div. 1993) defined the formula to allocate a defined benefit plan:
   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.

10. *Panetta v. Panetta*, 370 N.J. Super. 486 (App. Div. 2004).
11. *Panetta*, 370 N.J. Super. at 491-492.
12. *Panetta*, 370 N.J. Super. at 496.
13. *Panetta*, 370 N.J. Super. at 499.
14. *Ibid.*
15. *Ibid.*
16. *Panetta*, 370 N.J. Super. at 500. The plaintiff-husband was denied the offset because he failed to comply with the parties' agreement, memorialized in their Sept. 22, 1998, consent order. He failed to designate his former wife as the survivor beneficiary, and not his former wife as they had agreed, irrevocably precluding her from that benefit.
17. *Arce v. Agosto*, T-1891-13T4 (App. Div. 2014).
18. *Arce* at *11.
19. The *Policy Operation Manual* for SS is online at https://secure.ssa.gov/apps10.