



Continuing Legal Education Course

Divorce

“Helping Clients Move on with Financial Stability”

Philadelphia VIP presents this CLE training in
partnership with Duane Morris LLP.

April 17, 2019

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About Philadelphia VIP

Mission Statement: VIP promotes equal justice for the poor by providing civil legal services not otherwise available, collaborating with other legal services organizations, and promoting a culture of volunteerism by educating and exposing attorneys and law students to issues of poverty.

Philadelphia VIP is the hub of pro bono legal services in Philadelphia. For the past thirty-five years, we have provided legal services for low-income residents and families facing civil legal problems that threaten their basic human needs and closest personal relationships.

VIP, through its volunteers and staff, serves more than 3,500 individuals and families yearly who could not afford attorneys and whose cases could not or would not be handled by other public interest organizations. We are the agency of last resort for the majority of our clients.

Our clients are among the poorest in the City and region and their numbers are growing. To be eligible for our services a client's income must be at or below 200% of the federal poverty guidelines. Thus, our *most financially secure* clients earn approximately \$24,000, while a family of 4 lives on \$51,000.

VIP serves a multi-lingual population, principally Spanish speaking, but increasingly we see clients who speak Russian, Creole (Haitians), Chinese, Vietnamese and Cambodian, a reflection of growing and changing immigration patterns in the Greater Philadelphia area.

VIP handles civil matters that are non-fee generating and for which there is no right to counsel. Our caseload has four priority areas:

- Maintaining family income (child support, employment/wage claims, tax issues, disability)
- Preventing homelessness (mortgage foreclosure, landlord/tenant appeals, public housing evictions, probate, tangled title, consumer debt, litigation defense)
- Supporting family stability (child custody, adoption/guardianship, special education and school discipline, name change and immigration issues); and
- Promoting community economic development.

The majority of VIP's cases are referred to us from our partner organizations, Community Legal Services and Philadelphia Legal Assistance; an additional number come from specialized legal services organizations throughout Philadelphia.

In stark terms, VIP is the agency of last resort for many low-income individuals and families who face critical legal problems that affect their basic needs.

Biographies

Mary Cushing Doherty, Esq.

Ms. Doherty, is a partner and member of the Management Committee for the Norristown/Doylestown, Pennsylvania law firm, High Swartz LLP. Ms. Doherty was the 1999 to 2000 chair of the Family Law Section of the Pennsylvania Bar Association; former co-chair of the Family Law Committee of the Montgomery Bar Association; former Chair of the Family Law Section of the Philadelphia Bar Association; and a member of the American Bar Association Family Law Section for over 30 years.

Ms. Doherty was the 2006 to 2007 President of the Pennsylvania Chapter, American Academy of Matrimonial Lawyers (AAML), and recently completed her role as Chapter Representative for Pennsylvania to the AAML Board of Governors. She currently serves as a Co-Chair of the AAML Legislation Committee. She has served as an advocate for the Pennsylvania Bar Association addressing Pennsylvania family law legislation. In 2012, Ms. Doherty received the Lynette Norton Award from the Pennsylvania Bar Association Women in the Profession Committee and was one of the Legal Intelligencer's Women of the Year. In 2009 she was one of the Women of Distinction (Philadelphia Business Journal) and in 2006 she was the recipient of the Margaret Richardson Award from the Montgomery Bar Association. Ms. Doherty has served on the Domestic Relations Advisory Committee, Pennsylvania Joint State Government Commission since 1994. She sat on the Board of the Pennsylvania Bar Institute from 1992 to 1998. Ms. Doherty served the Supreme Court of Pennsylvania as Chair of the Pennsylvania Review and Certifying Board from 2007 to 2013.

She is a frequent lecturer and author in the field of family law and has served as course planner for programs sponsored by the Pennsylvania Bar Institute, Pennsylvania Bar Association and Montgomery Bar Association. She recently published her article "Romantic Premarital Agreements" in the AAML Journal, Volume 29, 2016. In May, 2017 LexisNexis plans to publish its book on Pennsylvania Family Law Practice co-authored by Ms. Doherty.

Michael E. Fingerman, Esquire

Mr. Fingerman is the principal in the Law Offices of Michael E. Fingerman, 714 N. Bethlehem Pike, Suite 301, Lower Gwynedd, Pa. 19002. E-mail: MFingerman@MFingerman.com. The firm's practice is limited to arbitrations, mediations, and consultations/agreements. Mr. Fingerman is a Fellow of the American Academy of Matrimonial Lawyers and the 1996-97 President of the Pennsylvania Chapter of the AAML. He is a past Chair of the Philadelphia Bar Family Law Section (1983), member of the Executive Committee of the Pennsylvania Bar Family Law Section, and has served as both an appointed and elected member of the Board of Governors of the Philadelphia Bar Association.

He also is the Founder and Co- Course Planner of the bi-annual Philadelphia County Domestic Relations Practice course begun in 1983. Mr. Fingerman has been listed for over twenty-five (25) years in the Best Lawyers in America, and was named Philadelphia's Attorney of the Year twice - The Family Law Attorney of the Year in 2010, and the Family Law-Mediation Attorney of the Year in 2013. He also practices and is certified as an Arbitrator by the American Academy of Matrimonial Lawyers, and has likely acted as an Arbitrator in more matrimonial matters than any other attorney in the Commonwealth of Pennsylvania. Mr. Fingerman is also certified as a Mediator by the Academy of Family Mediators. He has authored numerous articles, and is a frequent lecturer, both locally and nationally, on all aspects of matrimonial law. In addition, Mr. Fingerman has served as a member of the Board of Editors of the Journal of the American Academy of Matrimonial Lawyers (Issue Editor of the Vol. 17 - 2001 issue on High Asset/High Income Cases), and an Adjunct Professor in Family Law for the Temple University School of Law, Continuing Legal Education Department and the Paralegal Institute.

Mr. Fingerman was the 2001 President of the Board of Philadelphia VIP, the pro bono program of the Philadelphia Bar Association, and has been a recipient of numerous VIP Chancellor's Awards and the Justice William J. Brennan Award for his pro bono representation. Mr. Fingerman received his B.A. from Emory University in 1974 and his J.D. from Villanova Law School in 1977.

Frequently Asked Volunteer Questions

Q: What happens after I accept a VIP case?

A: After accepting a VIP case you will be sent a VIP referral email, all information included in the VIP file about the case and the VIP representation agreement. At this same time, your client will receive a letter with your name, address and phone number, and the request that they contact you within 7 days. You will receive a copy of this letter. At the first meeting you and the client should sign the VIP representation agreement. *The scope of representation should be filled in carefully, so that you and the client are clear about any limitations on your services.* (Contact VIP's Managing Attorney if you have any questions about the extent of your representation.) Keep the original in your file, give a copy to your client and send a copy to VIP.

Q: What if my client does not contact me?

A: Your client may fail to follow through for several reasons. Your client may not be able to read or understand the letter, may not have received the letter or may have other more pressing problems. If your client does not call you within a few days of your receipt of the VIP letter, try to call the client. If after 10 days your client has not contacted you, and you cannot reach them by telephone, write your client stating that if you do not hear from them within 5 days, VIP will close their file. After 5 days, if your client still has not contacted you, call or write VIP, describing your attempts to contact the client. Under most circumstances, VIP will close the case, and another client can be referred to you.

Q: What if my client doesn't have a telephone?

A: Contacting a client who doesn't have a telephone can be challenging. We recommend that you send your client a letter asking the client to call you at a specific time on a specific date and time. If your client calls while you are on another line or away from your desk, ask your assistant to suggest a time for your client to call back. After your client reaches you, ask them for the telephone number of a neighbor, relative, and/or employer where you can leave a message if necessary. Another way that you can keep in touch with a client who doesn't have a telephone is to schedule weekly telephone "appointments". (For example, the client would call you every Friday at 1:00 p.m.) By keeping "appointments" you will have the opportunity to communicate information to the client.

Q: What if my client does not keep our appointments?

A: Terminating representation of a client due to his/her failure to cooperate is left up to the discretion of the volunteer. Some clients are simply uncooperative, while other clients have personal problems or impairments that interfere with their ability to keep appointments. Address this problem with your client and make it clear that without his/her cooperation you will be unable to help him/her. If, after the discussion, the situation continues, you should contact VIP's Managing Attorney and discuss closing the case.

Q: What if my client doesn't speak English?

A: If you are not fluent in the primary language of your client, VIP can arrange a volunteer to translate. Our pool of volunteers is limited, however, so we request that you first draw on your firm's resources. If your firm is unable to arrange an interpreter, please contact VIP and we will assist you. If the client speaks Spanish, VIP has Spanish-speaking staff members who have already translated many forms into Spanish. It is a good idea to ask your client for the telephone number of a friend, neighbor or relative of the client who can communicate with both of you. If you plan to relay confidential information through the client's interpreter, you should discuss this with your client.

Additional steps must be taken with the Court if your client does not speak English. If a hearing has been scheduled, you should contact the Court to inform the Court that your client will need an interpreter. In addition to the Court's interpreter who interprets the proceedings, you may want to have an interpreter with you at counsel table, so that you can communicate confidentially with your client during the proceedings. This interpreter is not provided by the Court. If you are submitting any documents that are not in English, the documents must be translated and the translation must be certified. VIP can provide information on how to certify the translation.

Q: What if I am fluent in a foreign language and would like to volunteer to interpret for other volunteers?

A: VIP is always in need of volunteers with proficiency in foreign languages. We generally need interpreters who speak Spanish, Russian, French or Vietnamese. Whatever foreign languages you speak, however, please contact VIP because we may have a client who needs your help.

Q: What if there are costs associated with my representation?

A: VIP will cover certain costs only if approval is obtained from VIP before the cost is incurred. The costs encountered most often are:

- Photocopying medical records - You should first write the doctor and/or hospital and request that the fee be waived. If the doctor refuses, you should ask the client if he/she has the money to pay for the expense. If they do not, VIP may pay to obtain the records if VIP approves the cost before it is incurred.
- Filing fees - The client should qualify for In Forma Pauperis (IFP) status. An IFP petition must be filed with the Court. If the client's IFP petition is denied, the client must pay the filing fees unless VIP determines that the denial was unjustified. VIP has copies of IFP petitions and can explain to you the procedure for filing an IFP.
- VIP determines whether or not to cover litigation expenses on a case-by-case basis. If you would like VIP to cover a cost that is not listed above, please contact VIP's Managing Attorney or Executive Director before incurring any expense.

Q: What if I determine that my case lacks merit?

A: You should not represent a client if you believe the case is not meritorious. Even if you do not represent your client, you provide a valuable service by explaining the situation to your client, advising your client of available options, and suggesting ways to avoid the problem in the future. If you are not sure of the merits of the case, call VIP and discuss the matter with the Managing Attorney or the Executive Director.

Q: What do I do when my case is finished?

A: You should write a letter to VIP stating the outcome of the case, estimating the number of hours you spent on the case, and indicating whether you are available to take another case.

The VIP staff can be reached for questions and assistance at (215) 523-9550, fax (215) 564-0845. Todd W. Nothstein is the staff attorney responsible for supporting our family law volunteers. You may contact him directly at tnothstein@phillyvip.org, or 215-523-9554.

Thank You for Volunteering!

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An Introduction to a VIP Divorce

Divorce is currently among our areas of highest need at Philadelphia VIP. Due to a lack of volunteers, VIP had to close intake of divorce cases for most of 2018. Only recently have we been able to reopen intake of equitable distribution cases. We now limit our cases to those that do not involve the distribution of a retirement account because those are among the more time consuming case for our volunteers.

Divorce presents numerous obstacles to the pro se litigant that most attorneys can manage with ease. The process is replete with waiting periods, and even the simplest divorces require multiple pleadings. Attorneys, however, are accustomed to managing such procedures. Meanwhile, failure to establish a clear date of separation and protect one's interest in a marital estate creates the risk that marital assets may be poorly managed by an opposing spouse. Additional marital debts may accrue in the absence of a clean break. A long separation without an equitable distribution may also give one party the perfect opportunity to conceal assets. In short, legal representation can mean the difference between financial stability and a descent into poverty after a marriage falls apart.

That's where you come in as a VIP volunteer attorney. You can help balance the scales for VIP clients as they navigate divorce. To support you in this task, this introduction outlines divorce in a step-by-step fashion to create a general roadmap.

Steps to Divorce in Philadelphia

Divorce in Pennsylvania is governed by 23 Pa. C.S. § 3301 *et seq.* Related rules of civil procedure are found at Pa. R.C.P. 1920.1 *et seq.* This introduction only addresses no-fault divorce. While fault grounds still exist, they are rarely used. A no-fault divorce can be obtained on the basis of 23 Pa. C.S. § 3301 (c), or on the basis of 23 Pa. C.S. §3301 (d). A §3301(c) divorce requires mutual consent of the parties. For a § 3301 (d) divorce the marriage must be irretrievably broken, and the parties must have lived separate and apart for one year. In equitable distribution cases discovery may be conducted without leave of court. See Pa. R.C.P. 1930.5. VIP can provide you with sample interrogatories if needed. Below are the steps of each type of no-fault divorce from the Plaintiff's perspective. **We recommend that your complaint plead both § 3301(c) and § 3301(d).** We begin with § 3301(d) as the more complex of the two types. Note that claims for alimony pendente lite, spousal support, and child support may no longer be included as counts in a divorce complaint. See Pa. R.C.P. 1920.31(a)(2)

§ 3301(d) Steps for a divorce with Equitable Distribution

1. File and Serve The Divorce Complaint and All Accompanying Documents. Philadelphia Family Court does not offer e-filing. File in person at the clerk's office on the 11th floor of 1501 Arch St. For divorce you will need an original and four copies plus another redacted copy to comply with the Pennsylvania Courts' public access policy. **VIP can provide you with sample complaints, and most of the forms you may need.** Consult Pa. R.C.P. 1920.4; 1930.4, and Phila. D.R.R 1920.4(c) for guidance on service. You may serve an

unrepresented defendant by including an acceptance of service form for them to sign, and filing it along with an affidavit wherein your client avers that the signature belongs to the opposing spouse. See Phila. D.R.R 1920.4(c). **Here is a checklist for what must be filed and served along with a complaint for divorce:**

- Praecipe to Proceed In Forma Pauperis (IFP)
- Notice to Defend
- Counseling Notice (must be second page)
- Original Client Verification (signed and dated.)
- Domestic Relations Information Sheet (no copies—attach one to the original) complaint only.
- If the parties have been separated for the requisite period at the time of filing, your client may sign a § 3301 (d) Affidavit stating the date of separation to file and serve with the complaint. If the necessary period of separation has yet not passed, the client must wait until it has passed to file the affidavit.
- A blank counter-affidavit form must accompany a §3301(d) affidavit to be signed and filed if the defendant so chooses.
- You may send the defendant a waiver form asking them to waive the requirement that you provide a notice of intent to file a praecipe to transmit the record for approval of grounds. However, you cannot file the waiver until 20 days after service of the §3301(d) affidavit and form counter-affidavit. This can spare the parties a twenty-day waiting period in the future.

Note: When a claim for equitable distribution is raised in a complaint, the parties must file inventories describing marital assets and liabilities, non-marital property, and property transferred during the past three years before economic issues can be resolved in step 6. When a party serves an inventory and expense statement, the responding party has 20 days to file and serve his or her own inventory and expense statement. See Pa. R.C.P. 1920.33

2. File Affidavit of Service or Proof of Service within 30 days (or 90 days outside the Commonwealth). If the defendant signs an acceptance of service, you must file it along with an affidavit of signature wherein your client attests that the signature is that of the opposing spouse. See Pa. R.C.P 1920.4; Phila. D.R.R 1920.4(c). An affidavit of signature is also required when service is completed by registered mail. For proof of service required in cases of personal service consult Pa. R.C.P. 1930.4.

3. Defendant May File a Counter-Affidavit, Answer, and Counterclaim. If defendant's counter-affidavit disputes whether the necessary period of separation has elapsed, the case will be listed for a master's hearing on grounds for divorce. Defendants may also raise their own economic issues via a counterclaim. Allow the defendant **20 days** to respond to the complaint.

4. File Notice of Intent to File Praecept to Transmit Record for Approval of Grounds If Necessary. If the opposing party did not execute waivers of the notice of intent, it must be filed and served **20 days** before a praecipe to transmit (Step 5) may be filed. Note that a different form of the notice of intent is required depending on whether the opposing party is represented or unrepresented. Be sure to include the § 3301 (d) counter-affidavit form with the notice of intent. See VIP's website, or ask VIP staff for the appropriate form.

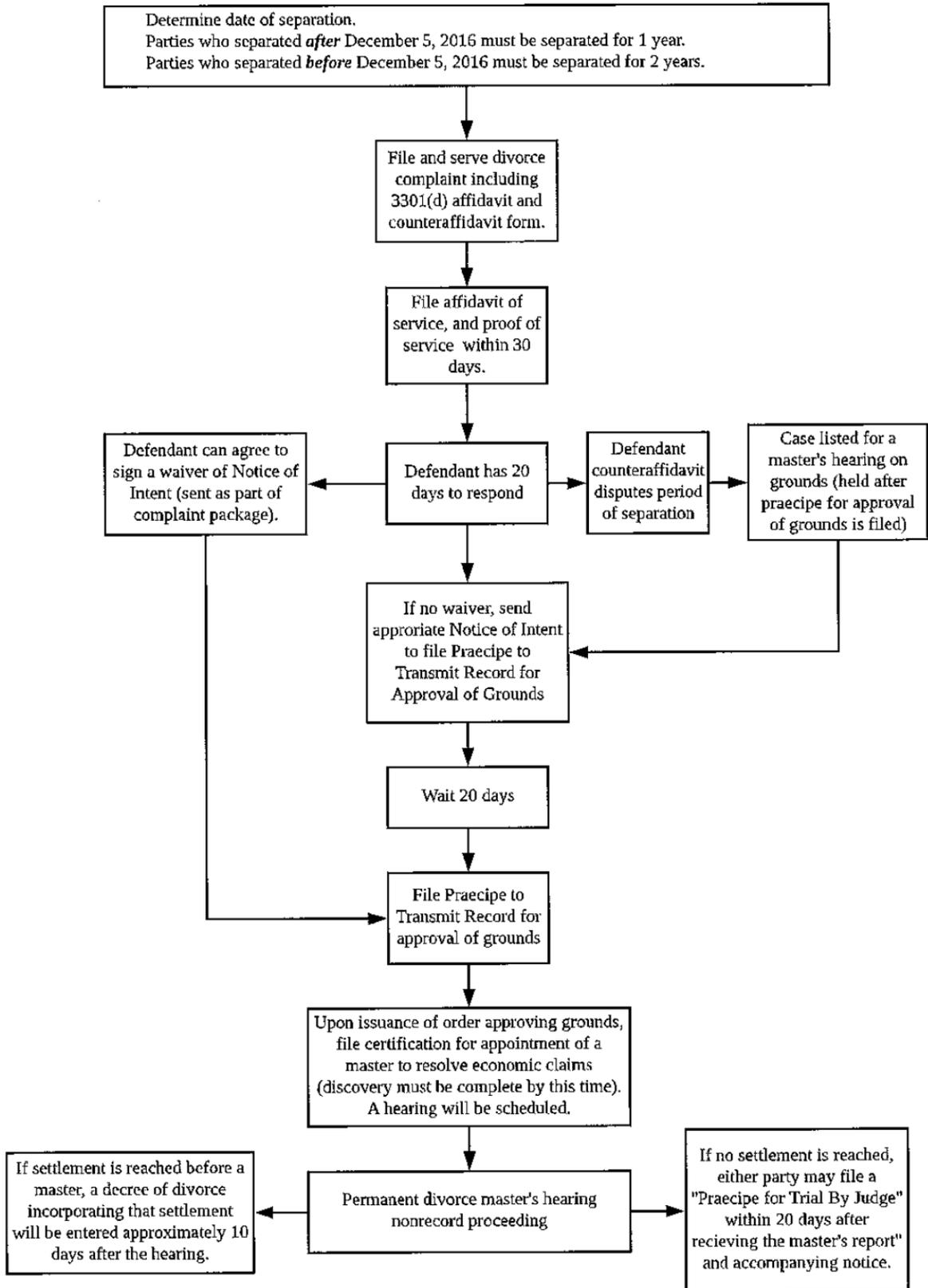
5. File Praecept to Transmit Record for Approval Of Grounds.

6. Upon Issuance of an Order Approving Grounds, File A Certification for The Appointment of A Master to Resolve Economic Claims. If the inventory and expense statement has been filed, discovery is complete, and grounds have been approved, you may seek the appointment of a master. The Master will conduct a hearing for resolution of economic claims. An inventory of marital property and expense statement must be attached to this certification. See Pa. R.C.P. 1920.33.

7. Resolve the Case Before a Permanent Master. At least 30 days before the hearing date, notices are sent to counsel of record, and to any unrepresented party. All hearings are held on the 13th floor of 1501 Arch Street. At least 10 days before the scheduled hearing date, each party must file a **comprehensive prehearing memorandum accompanied by supporting documentation.** Equitable distribution proceedings before the master are non-record, and usually proceed in a settlement conference mode. If a settlement is reached, the master usually will prepare the property settlement agreement for the parties to sign that same day. A decree in divorce incorporating the agreement will then be entered approximately 10 days thereafter. If no settlement is reached, the master will set a deadline, often through the entry of an administrative order, for the submission of any additional documentation that may be required for a relisting of the case or for the preparation of the master's report. If a report is required, copies of it are mailed to counsel of record and to each party. In accordance with the notice that accompanies any such report, within 20 days following the date of that notice, either party may file a "Praecipe for Trial by Judge."

The next page provides a visual representation of the steps just described.

Simplified Timeline for a § 3301 (d) Divorce with Economic Issues



§ 3301(c) Divorce Steps

1. File and Serve the Divorce Complaint and All Accompanying Documents. File and serve the complaint including Notice to Defend, Counseling Notice, Verification, and Domestic Relations Information Sheet. Defendant may file a counterclaim to protect economic interests. Discovery may be conducted without leave of court in equitable distribution cases. Both parties must file inventories of marital assets and liabilities before economic claims can be resolved before a master.

2. File Affidavit of Service or Proof of Service Within 30 Days (or 90 days outside the Commonwealth). See Pa. R.C.P 1920.4, 1930.4; Phila. D.R.R 1920.4(c).

3. Both Parties Execute and File Affidavits of Consent **90 Days** After Service of The Complaint. VIP can provide you with the appropriate form.

4. File Notice of Intent to File Praecipe to Transmit Record for Approval of Grounds. If the parties did not execute waivers of the notice of intent, it must be filed and served 20 days before a praecipe to transmit may be filed. Note that a different form of the notice of intent is required depending on whether the opposing party is represented or unrepresented.

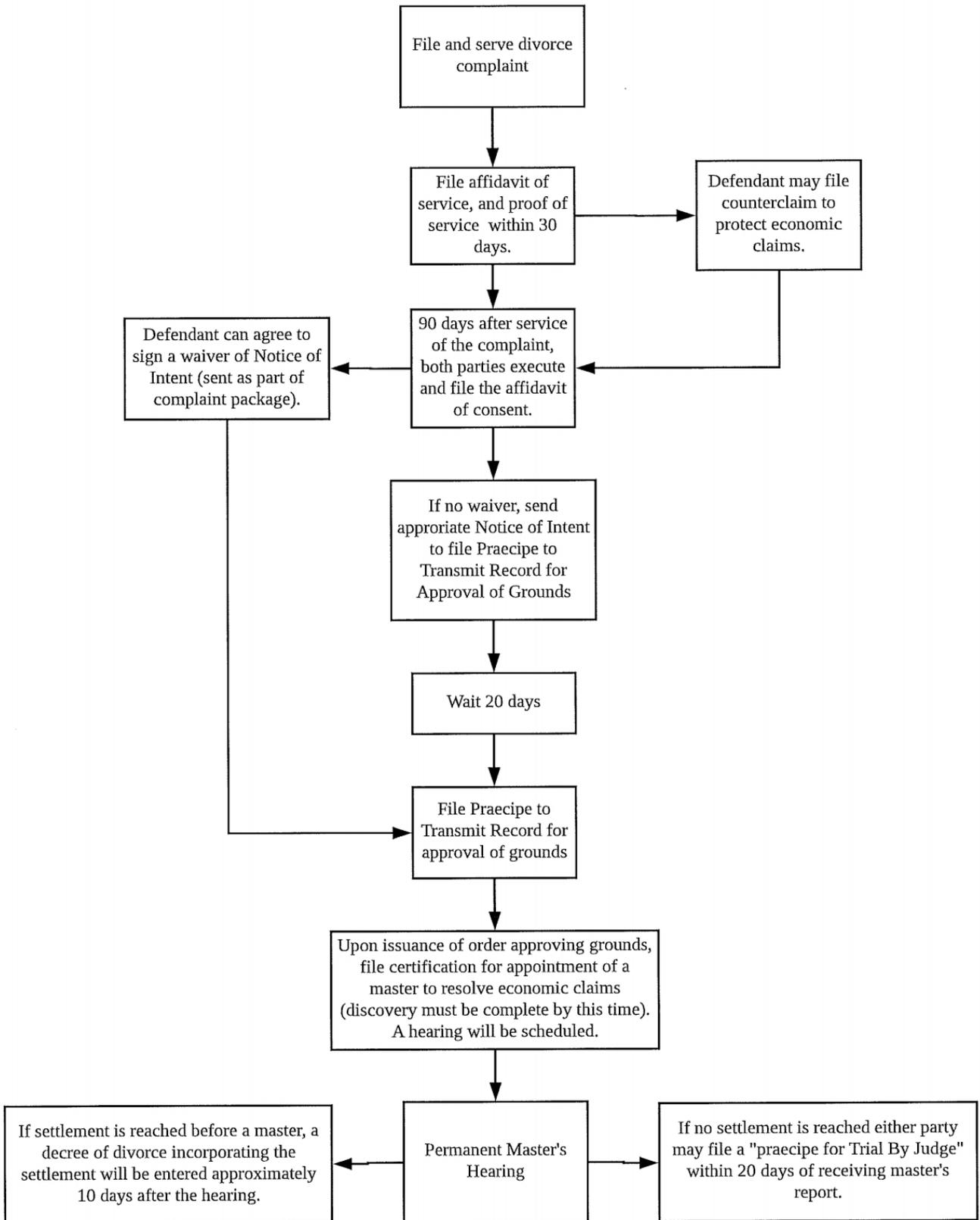
5. File Praecipe to Transmit Record for Approval of Grounds.

6. Upon Issuance of an Order Approving Grounds, File a Certification for the Appointment of a Master to Resolve Economic Claims. If discovery is complete, and grounds have been approved, you may seek the appointment of a master.

7. Resolve The Case Before a Permanent Master. As described in more detail above, a property settlement may be entered at the masters hearing and a decree in divorce issued soon thereafter. If no settlement is reached the master will prepare a report and the parties can seek a trial before a judge.

The next page provides a visual representation of the steps just described.

Simplified Timeline for a § 3301 (c) Consent Divorce with Economic Issues



EQUITABLE DISTRIBUTION OF MARITAL PROPERTY¹

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I. INTRODUCTION

A. AUTHORITY

Typically, spousal disputes over marital property involve hundreds of thousands of dollars, if not millions. This explains why the division of property may be the most hotly contested issue in divorce litigation. Modest net worth cases may be litigated as vigorously as high net worth cases. Litigants who are embroiled in the emotional turmoil of divorce sometimes find it difficult to make rational decisions or recognize the consequences of their actions. In these situations, the family law attorney may act as a legal consultant, adviser, counselor, and guide.

Equitable distribution proceedings require the family law attorney to draw upon a wide range of knowledge and expertise. The division of property touches on many areas of the law, including real estate, taxation, corporate governance, employee benefits, estates and trusts, and bankruptcy (to name a few). Additionally, equitable distribution requires a basic familiarity with the principles of accounting, appraisal, investing, and business finance.

Even when the spouses are not congenial with each other, an equitable distribution proceeding need not be bellicose. It is not constructive to cast the spouses as a righteous victim or devilish villain. Since memory, perception and honesty affect credibility, it seems unlikely that everything one's client says is completely true and accurate. Emotion affects perception and memory. Some litigants may have consulted with friends, family members or acquaintances who have shared bitter war stories, legal misconceptions, "urban legends," or irrelevant information. Some are influenced by members of the extended family or "significant others" who have animosity toward the former spouse. For these reasons, the demeanor of the family law attorney is nearly as important as his/her expertise.

In Pennsylvania, the primary sources of the law pertaining to equitable distribution of marital property are:

1. **Pennsylvania Domestic Relations Code (*"the Divorce Code"*), 23 Pa.C.S. § 3101 et seq.**
 - a. Legislative findings and intent, 23 Pa.C.S. § 3102
 - b. Jurisdiction and venue, 23 Pa.C.S. § 3104
 - c. Equitable distribution of marital property, 23 Pa.C.S. § 3501 et

seq.

- d. Effect of agreements, 23 Pa.C.S. § 3105
- e. Premarital agreements, 23 Pa.C.S. § 3106
- f. Bifurcation, 23 Pa.C.S. §3323(c.1)(new)
- g. Death of a party, 23 Pa.C.S. § 3323 (d.1)
- h. Equitypower of Divorce Court, 23 Pa.C.S. § 3323(f)
- i. Grounds established, 23 Pa.C.S. § 3323(g)
- j. Counsel fees, 23 Pa.C.S. § 3702

2. Pennsylvania Rules of Civil Procedure, 42 Pa.C.S.

- a. Equitable distribution of marital property, Pa.R.C.P. 1920.1 et seq.
- b. Domestic Relations Actions, generally, Pa.R.C.P. 1930.1 et seq.

3. Internal Revenue Code (“IRC”), 26 U.S.C. § 1

- a. Transfers of property between spouses, IRC § 1041; Reg. § 1.1041- 1T(d).
- b. Sale of principal residence, IRC § 121
- c. Transfer of interest in qualified retirement assets, IRC § 408(d)(6)

4. Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 et seq.

- a. Domestic relations exception to the non-alienation rule, ERISA § 401(a)(13)(B)
- b. Qualified Domestic Relations Orders, ERISA § 414(p)

5. Bankruptcy Code, 11 U.S.C. § 101 et seq.

- a. Automatic stay, 11 U.S.C. § 362
- b. Exemptions from discharge, 11 U.S.C. § 522(d). 523(a)(5), 523(a)(15)
- c. Property of the estate, 11 U.S.C. § 541(a)(5)(B)
- d. Preferences, 11 U.S.C. § 547(c)(7)
- e. Priority of support obligations, 11 U.S.C. § 507(a)(7)

B. JURISDICTION

1. Generally

- a. At least one of the parties must have been a resident for six months or more prior to the commencement of the divorce action. 23 Pa.C.S. § 3104(b).
- b. Consent. A nonresident spouse may submit to the jurisdiction of the Pennsylvania court by appearing generally or filing pleadings in the divorce action. *Paalvast v. Disarro*, 758 A.2d 192 (Pa.Super. 2000), *Bem v. Bem*, 463 A.2d 16 (Pa.Super. 1983).
- c. Long arm. Where there are sufficient contacts as to extend long arm jurisdiction to the person of the defendant, the court may adjudicate the economic claims as well as the divorce. *Wagner v. Wagner*, 768 A.2d 1112 (Pa.Super.2001).
- d. Bifurcation. A party cannot request equitable distribution of marital property if such claim was not raised prior to the entry of a bifurcated divorce decree. 23 Pa.C.S. § 3503; *Melton v. Melton*, 831 A.2d 646 (Pa.Super. 2003); *Justice v. Justice*, 612 A.2d 1354 (Pa.Super. 1992), *appeal denied*, 533 Pa. 635, 621 A.2d 581 (1993); *Bastion v. Bastion*, 472 A.2d 226 (Pa.Super. 1984). The 2004 amendments to the Divorce Code have imposed statutory criteria for bifurcation, requiring the moving party to show “compelling circumstances” and that “sufficient economic protections have been provided...” 23 Pa.C.S. § 3323(c.1). Additionally, the trial court must explain its reasoning for granting bifurcation on the record, either prior to the entry of the bifurcation order or in the bifurcation order itself. *Brian v. Brian*, 872 A.2d 843 (Pa.Super. 2005).
- e. Military personnel. Domicile of military personnel is presumed not to change from time of enlistment, unless there is clear and convincing evidence of an intent to establish a new domicile elsewhere. *Milam v. Milam*, 677 A.2d 1207 (Pa.Super. 1996); *Bernhard v. Bernhard*, 668 A.2d 546 (Pa.Super. 1995).
- f. Under the Uniformed Services Former Spouses’ Protection Act, the courts may not exercise jurisdiction to distribute a non-resident military member’s retirement pay in a divorce action unless the member consents to the personal jurisdiction of the court. *Wagner v. Wagner*, 768 A.2d 1112 (Pa.Super.2001).
- g. Minimum contacts. In *Gaboury v. Gaboury*, 988 A.2d 672 (Pa.

Super. 2009), *petition for allowance of appeal denied*, 606 Pa. 672, 996 A.2d 492 (2010), the appellate court affirmed the trial court's determination that Pennsylvania had personal jurisdiction over the divorce, but not over equitable distribution. The parties had met online, married in Pennsylvania, and moved to Wisconsin. Wife moved to Pennsylvania after the separation. Husband continued to live in the marital residence in Wisconsin, and made no trips to Pennsylvania. The trial court could not exercise jurisdiction over Husband for the purposes of equitable distribution.

2. Appeals

- a. An order of court sustaining personal jurisdiction is an interlocutory order appealable as of right under Pa.R.A.P. 311(b) if the plaintiff, petitioner or party benefiting from the order files within ten days an election deeming the order as final or the trial court states in the order that a substantial issue of venue is presented.

3. Divisible Divorce

- a. Generally, a court which does not have personal jurisdiction over the defendant may enter a decree of marital dissolution but may not adjudicate economic claims in divorce. *Stambaugh v. Stambaugh*, 458 Pa. 147, 329 A.2d 483 (Pa. 1974).
- b. However, where divorce was entered in a foreign jurisdiction after execution of a marital settlement agreement in Pennsylvania, the Pennsylvania court had jurisdiction over economic claims. *Polito v. Polito*, 655 A.2d 587 (Pa.Super. 1995).

4. Abatement/Death of a Party

- f. If one of the parties dies after the decree of divorce has been entered, but prior to the final determination of the property rights, the personal representative of the deceased party shall be substituted as a party, as provided by law, and the action shall continue. 23 Pa. C.S. §3323(d)
- g. Pursuant to §3323(d.1), in the event that one party dies during the course of the divorce proceedings, and no decree of divorce has been entered and grounds have been established as provided in §3323(g), the parties' economic rights and obligations shall be determined under this section rather than under the statutory provisions relating to decedents, estates, and fiduciaries
- h. Grounds are established as follows: (1) Under §3301(a) or (b)

when the court adopts the master's report, or makes its own findings that grounds for divorce exist; (2) Under §3301(c), when both parties have filed affidavits of consent; and (3) Under §3301(d) when an affidavit has been filed or, if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken, and the parties have lived separate and apart for at least one (1) year at the time of the filing of the affidavit . If no decree has been entered, or no grounds have been established, the action abates. Upon abatement, the parties' property rights are governed by the Probate Estates and Fiduciaries Code; and the divorce court has no jurisdiction.

i. In a case where a spouse died after grounds for divorce were established, the trial court lacked jurisdiction to enter a divorce decree *nunc pro tunc* but the divorce action did not abate. *Taper v. Taper*, 939 A.2d 969 (Pa.Super. 2007) (holding that a Pennsylvania domestic relations statute providing for posthumous property division did not provide the court with jurisdiction to enter a posthumous divorce); *Yelenic v. Clark*, 922 A.2d 935 (Pa.Super. 2007).

j. Life insurance. Pursuant to §3503(d), the court may direct the continued maintenance and beneficiary designations of the existing policies insuring the life or health of either party if the policies are originally purchased during the marriage, and were owned by (or in the control of) either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

Questions: Are life insurance proceeds a marital asset? Does the divorce court have jurisdiction over such property in equitable distribution? The answer is: probably not. A life insurance policy is not like a pension plan or an annuity. Life insurance benefits can only be received after a person's death.

k. Alimony. Under §3703, if the party receiving alimony dies, the right to receive alimony ceases. If the party paying alimony dies, the obligation to pay alimony ceases unless otherwise indicated in the parties' agreement, or in a court order.

C. VENUE

1. **Generally**

a. A divorce action may be brought in the county

- (1) where the defendant resides
- (2) where the plaintiff resides, if the defendant is out of county or if, within six months of separation, the defendant agrees
- (3) of last matrimonial domicile, if the plaintiff has continually resided there; or where either party resides if neither party resides in the county of last marital domicile or six months has elapsed since separation. 23 Pa.C.S. § 3104(e)

2. Economic Claims

- a. Claims in divorce may be brought in the county
 - (1) in which the plaintiff or defendant resides; or
 - (2) upon which the parties have agreed
 - (i) in a writing attached to the complaint; or
 - (ii) by participating in the proceeding Pa.R.C.P. 1920.2

(Note: Subpart (b) of Pa.R.C.P. 1920.2 might be designated as the “Cameron County Revenue Rule,” since it protects the right of parties to bring actions in a county where neither party resides.)

3. Appeals

- a. An order transferring venue to another court is an interlocutory order appealable as of right. Pa.R.A.P. 311(c). If an appeal is not filed within thirty (30) days of the order transferring venue, the issue is waived. Pa.R.A.P. 311(g)(ii).
- b. An order of court sustaining venue is an interlocutory order appealable as of right under Pa.R.A.P. 311(b) if the plaintiff, petitioner or party benefiting from the order files within ten days an election deeming the order as final or the trial court states in the order that a substantial issue of venue is presented.

4. Raising the Issue of Venue

- a. A claim of improper venue must be raised in preliminary objections to the divorce complaint or it will be deemed waived. Knopf v. Knopf, 2100 Pa. Super. 123, 24 A.3d 405 (2011)

D. PROCEDURE.

The Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 1920.1 et seq., set forth

the procedure for prosecuting and defending a claim for equitable distribution of marital property. However, the procedures are very different in each county, so it is absolutely necessary to review the local rules.

1. Generally

Generally, the first step in an equitable distribution proceeding is raising the claim. Next, the parties must file Inventories describing the marital property and liabilities, nonmarital property, and property transferred within three (3) years prior to the commencement of the action. Discovery may be taken by the parties at any time after the claim for equitable distribution has been raised. When discovery is complete and the grounds for divorce are ripe, the court may appoint a master or schedule a bench trial to hear evidence. The parties are required to file pretrial statements describing their witnesses and evidence, and in most counties there is a settlement conference or pretrial conference prior to the hearing. If the claims are heard by a master, there is an opportunity to file exceptions, which may trigger an argument or de novo hearing before a judge. Finally, the equitable distribution decree will be issued simultaneously with the decree in divorce.

- a. Raising a claim. A claim for equitable distribution may be raised by the plaintiff in the Complaint in Divorce or by the defendant as a counterclaim, Pa.R.C.P. 1920.15(a). Alternatively, the defendant may file a separate petition raising claims after the divorce action has been commenced but before the decree in divorce has been entered. Pa.R.C.P. 1920.15(b). Rule 1920.33 (a) now includes the *NOTE* that parties and attorneys are required to follow Pa.R.C.P. 1930.1(b) if providing confidential information subject to the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*.
- b. A claim for equitable distribution may not be raised for the first time after the decree in divorce has been entered. 23 Pa.C.S. § 3503; *Melton v. Melton*, 831 A.2d 646 (Pa.Super. 2003); *Justice v. Justice*, 612 A.2d 1354 (Pa.Super. 1992), *appeal denied*, 533 Pa. 635, 621 A.2d 581 (1993); *Bastion v. Bastion*, 472 A.2d 226 (Pa.Super. 1984).
- c. However, where both parties have filed inventories and conducted discovery in contemplation of equitable distribution, the failure to raise claims will not preclude the trial court from conducting equitable distribution upon the petition of a party to appoint a master less than 30 days after entry of a divorce decree. *Lowers v. Lowers*, 911 A.2d 553 (Pa.Super.2006) .
- d. Inventories. The parties are required to file inventories listing the marital property and liabilities, nonmarital property, and property

transferred within three (3) years prior to the commencement of the action. 23 Pa.C.S. § 3505(b); Pa.R.C.P. 1920.33. The prior rule which required the parties to list the value of each item has been rescinded. However, in many counties, it is encouraged.

[VIP Note: Within 20 days of service of the moving party's inventory, the non-moving party shall file an inventory. A party may not file a motion for the appointment of a master or a request for court action regarding equitable division until at least 30 days following the filing of that party's inventory. Pa.R.C.P. 1920.33]

- e. Discovery. Discovery is available without leave of court in equitable distribution matters. 23 Pa.C.S. § 3505(c); Pa.R.C.P. 1930.5.
- f. Pretrial Statements. No later than sixty (60) days prior to the bench trial or master's hearing, or other such time as directed by the judge or master, the parties are required to file pretrial statements. The pretrial statements must describe the assets and their values, all potential witnesses (including expert witnesses), all exhibits (including expert reports), the parties' income and expenses, the value of retirement benefits, an itemization of counsel fees, a description of tangible personal property, a list of marital debts and their values, and a proposed economic resolution. Pa.R.C.P. 1920.33.
- g. A party who fails to file a pretrial statement as required by Pa.R.C.P. 1920.33(b) shall be barred from offering any testimony or evidence in support of or in opposition to claims for the matters not covered therein. Pa.R.C.P. 1920.33(d)(1).
- h. Hearing. The parties' claims for equitable distribution may be heard by the trial judge, Pa.R.C.P. 1920.52, or by a master, Pa.R.C.P. 1920.51, 1920.54, 1920.55-1, 1920.55-2, 1920.55-3. In those jurisdictions where testimony is taken by a master, it is critically important for lawyers to familiarize themselves with local rules governing hearing procedures, or else run the risk of prejudicing their clients' interests. See *DelCamp v. DelCamp*, 881 A.2d 853 (Pa.Super. 2005)(exceptions from master's recommendation dismissed for failure to file transcript within ten days under local rules).
- i. Finality. Generally, a decree of equitable distribution is a final order, which is not modifiable after thirty (30) days has elapsed, unless there is evidence of intrinsic fraud or new evidence which will sustain an attack on the validity of the decree. 23 Pa.C.S. § 3332; 42 Pa.C.S. § 5505. However, modification of equitable distribution decrees is not unheard of. See, e.g., *Marra v. Marra*, 831 A.2d 1133 (Pa.Super. 2003)(equitable

distribution decree modified to include marital property recovered from fraudulent transfers); *Lowenschuss v. Lowenschuss*, 683 A.2d 1214 (Pa.Super. 1996)(restating equitable distribution decree as a QDRO to preserve nonemployee spouse's interests in bankruptcy of employee spouse); *Romeo v. Romeo*, 611 A.2d 1325 (Pa.Super. 1992)(post-decree change in circumstances warranted modification of divorce decree adopting master's recommendation, from which no exceptions were taken); *Wiggins v. Wiggins*, 2008 WL 2973964, 4 Pa. D. & C. 5th 118 (Bucks C.C.P., 2008) (Husband not permitted to revisit equitable distribution after he learned of the existence of a prenuptial agreement even though he had requested the agreement from Wife as part of the initial divorce proceedings).

E. INJUNCTIVE AND EXTRAORDINARY RELIEF

1. Ne exeat/Injunctive Order

- a. The court is authorized to enter an injunction to prevent the removal, disposal, alienation, dissipation, or encumbrance of marital assets. 23 Pa.C.S. § 3505(a); Pa.R.C.P. 1920.43; *Lazovitz v. Lazovitz*, 453 A.2d 615 (Pa.Super. 1982).
- b. Where a spouse caused a marital business to repay a shareholder loan to herself, her action was not a clear violation of an injunctive order which prohibited paying personal expenses from the business. (The injunctive order was written by the parties.) *Bold v. Bold*, 939 A.2d 892 (Pa.Super.2007).

2. Petitions to freeze

- a. Where there is concern that the spouse who has possession or control over a marital asset may dissipate that asset, a petition to freeze assets can be filed. The primary goal of freezing an asset is to insure that the asset will be intact and available for equitable distribution.
- b. 23 Pa. C.S.A. § 3323(f) provides as follows: "In all matrimonial cases, the Court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or effectuate the purposes of this Act, and may grant such other relief or remedy as equity and justice require against either party . . ."
- c. 23 Pa. C.S.A. § 3505(a) states as follows: "Where it appears to the Court that a party is about to leave the jurisdiction of the Court or is about to remove property of that party from the jurisdiction of

the Court or is about to dispose of, alienate, encumber property in order to defeat equitable distribution, alimony *pendente lite*, alimony, child and spousal support or a similar award, an injunction may be issued to prevent the removal or disposition and the property may be attached as prescribed by general rules.”

- d. Pa. R.C.P. 1920.43(a) provides as follows: “At any time after the filing of the Complaint, on Petition setting forth facts entitling the party to relief, the Court may, upon such terms and conditions as it deems just, including the filing of security,
- (1) issue preliminary or special injunctions necessary to prevent the removal, disposition, alienation or encumbering of real or personal property in accordance with Rule 1531 (a), (b), (c), (d), or (e); or
 - (2) order the seizure or attachment of real or personal property;
 - (3) grant other appropriate relief.”

3. Exclusive possession

- a. The court may award temporary possession of the marital home to one of the parties during the pendency of the divorce action. 23 Pa.C.S. § 3502(c); *Laczkowski v. Laczkowski*, 496 A.2d 56 (Pa.Super. 1985); *Uhler v. Uhler*, 41 Pa.D.& C.3d 3 (1985), affirmed, 626 A.2d 656 (Pa.Super. 1991).
- b. An order awarding exclusive possession of the marital residence is interlocutory and not immediately appealable. *Shazes v. Baltuskonis*, 519 A.2d 514 (Pa.Super.1987).

4. Maintenance of Insurance or Retirement Benefits.

- a. The court may direct a spouse to purchase or maintain life insurance policies or health insurance coverage for the benefit of the other spouse. 23 Pa.C.S. § 3502(d); Pa.R.C.P. 1920.43. Similarly, the court may direct a party to maintain the beneficiary designations of retirement benefits. *Titler v. SERS*, 768 A.2d 899 (Pa.Cmwlth. 2001).

5. Constructive Trust

- a. The court is authorized to impose a constructive trust over marital assets having a fair market value of \$1,000.00 or more that are omitted from the final distribution of property if such assets were not disclosed in the parties’ inventories. 23 Pa.C.S. § 3505(d); *Major v. Major*, 518 A.2d 1267 (Pa.Super. 1986); *Creeks v. Creeks*, 619 A.2d 754 (Pa.Super. 1993); but see *Smith v. Smith*, 749 A.2d

921 (Pa.Super. 2000).

6. Fraudulent Conveyance

- a. The court is authorized to avoid transfers or encumbrances of marital property to third persons who paid wholly inadequate consideration. 23 Pa.C.S. § 3505(e); Pa.R.C.P. 1920.43(b); *Lindsey v. Lindsey*, 492 A.2d 396 (Pa.Super.1985).

7. Execution of Real Estate Listing Agreement.

- a. The court is authorized to direct a spouse to execute a real estate listing agreement for the sale of marital property. *McMahon v. McMahon*, 706 A.2d 350 (Pa.Super.1998).

8. Stay of Sheriff's Sale

- a. Trial court is authorized to stay sheriff's sale of marital real estate, which had been executed upon by municipal authority for unpaid real estate taxes. *City of Easton v. Marra*, 862 A.2d 170 (Pa.Cmwlth. 2005).

II. IDENTIFICATION OF MARITAL PROPERTY

A. GENERALLY

1. Time of Acquisition

- a. "Marital property" means all property acquired by either party during the marriage prior to the date of final separation. 23 Pa.C.S. §3501(a).
- b. Marital property includes property acquired prior to the effective date of the Domestic Relations Code (eff. 4/2/1980). *Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982).
- c. It is the time of acquisition, and not title, which determines the nature of property in equitable distribution. 23 Pa.C.S. § 3501(b); *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Fidelity Bank v. Carroll*, 610 A.2d 481 (Pa.Super. 1992).
- d. Property which has not been "acquired" by a spouse prior to separation (such as expectancies under a will, or trust corpus or income over which a spouse has no power of withdrawal) is not marital property. *Oaks v. Cooper*, 536 Pa. 134, 638 A.2d 208 (1994) (expectancies); *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992) (trust).
- e. There is a presumption that real and personal property acquired

by either party during the marriage is marital property, unless it is proven by a preponderance of evidence that the property is excluded under §3501(a). 23 Pa.C.S. § 3501(b); *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Sutliff v. Sutliff*, 518 Pa. 378, 543 A.2d 534 (1988); *Wilhelm v. Wilhelm*, 657 A.2d 34 (Pa.Super. 1995); *Mackalica v. Mackalica*, 716 A.2d 653 (Pa.Super. 1998).

- f. There is a rebuttable presumption that the date when a complaint in divorce is filed is the latest possible date of separation. 23 Pa.C.S. § 3103 (amended 2004).
- g. The date of separation is generally the date when parties began to live separate and apart, which is defined as a “complete cessation of cohabitation, whether living in the same residence or not.” 23 Pa.C.S. § 3301(3); see II.B.3. below. See also *Powers v. Lancaster*, C.C.P. Centre County, No. 1994-1612 (C.C.P. March 15, 2010)(Wife’s Petition for Bifurcation granted and Petition for Divorce granted where couple lived in separate parts of the house and had not had sex for over two years); *Dinsmore v. Dinsmore*, 110 PDDR 60 (Pa. C.P. April 12, 2010)(“The essential element of the phrase ‘separate and apart’ is the existence of separate lives, not merely separate beds.”)

2. Increase or Decrease in Value of Nonmarital Property.

- a. See 1(C). below.

3. Third Party Interests

- a. The divorce court does not have jurisdiction to exercise control over property which is owned by a third party. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006); *Oaks v. Cooper*, 536 Pa. 134. 638 A.2d 208 (1994); cf. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super. 1988).
- b. However, the divorce court may avoid a fraudulent conveyance of property to a third party who paid wholly inadequate consideration. 23 Pa.C.S. § 3505(d).
- c. Moreover, the court may find that a spouse has beneficial ownership of a property which is titled in the name of a “straw man” but was acquired from marital sources. *Liciardello v. Liciardello*, 570 A.2d 1062 (Pa.Super. 1990); *Fitzpatrick v. Fitzpatrick*, 547 A.2d 362 (Pa.Super. 1988); *Wolf v. Wolf*, 514 A.2d 901 (Pa.Super. 1986).
- d. Additionally, the court may stay a sheriff’s sale of property previously owned by a divorcing party, in which either party

may have an interest as marital property, pending resolution of the economic claims in divorce. *City of Easton v. Marra*, 862 A.2d 170 (Pa.Super. 2004).

- e. A spouse's contribution to the improvement of property owned by a third party will not cause a third party's property to transmute into marital property. *Bolze v. Bolze*, 629 A.2d 1031 (Pa.Super. 1992).
- f. Property owned by a spouse and his new wife as tenants by the entireties cannot be garnished to satisfy obligations to a former wife. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006).
- g. Trial court lacked power to join a third party defendant *sua sponte* without service of original process and personal jurisdiction over the third party defendant. *Mayer v. Garman*, 912 A.2d 762 (Pa.2006).

B. EXCLUSIONS FROM MARITAL PROPERTY

1. Pre-marital Property

- a. Property acquired prior to the date of marriage is excluded from marital property. 23 Pa.C.S. § 3501(a)(1); *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000). Premarital property which is exchanged for new property during marriage retains its nonmarital nature unless it is re-titled in joint names. 23 Pa.C.S. § 3501(a)(1); *Downey v. Downey*, 582 A.2d 674 (Pa.Super. 1990).
- b. Property acquired prior to marriage and titled in the name of an individual spouse is excluded from marital property even though both spouses contributed to its acquisition. *Bower v. Bower*, 531 Pa. 54, 611 A.2d 181 (1992).
- c. The increase in value of premarital property from the date of marriage to the date of separation is subject to equitable distribution. 23 Pa.C.S. § 3501; see A.2., "Increase in Value of Nonmarital Property," above.

2. Gifts and Inheritance Received during Coverture

- a. Generally. Property which is acquired by gift, bequest, devise, or descent by an individual spouse is excluded from marital property. 23 Pa.C.S. § 3501(a)(3). Property acquired in exchange for gifted or inherited property is excluded from equitable distribution. *Winters v. Winters*, 512 A.2d 1211 (Pa.Super. 1986).

- b. Gifts and inheritance which are acquired by the spouses jointly are marital property. *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).
- c. There is a presumption that gifts or inheritance which are re-titled in joint names are intended to be gifts to the marriage, which are marital property. See Section II. E., “Transmutation,” below.
- d. Gifts between Spouses. Gifts between spouses are marital property subject to equitable distribution. Note: The Domestic Relations Code was amended in 1988 to provide that gifts are marital property. Previously, inter-spousal gifts were excluded from the marital estate. The 1988 amendment was intended to legislatively overrule *Semasek v. Semasek*, 509 Pa. 282, 502 A.2d 109 (1985).
- e. Conditional Gifts. Generally, the engagement ring is given as a gift conditional upon the promise to marry. When the parties are married, the condition is met, and the gift becomes absolute. The law of this Commonwealth does not provide whether the gift is “acquired” when the ring was given prior to marriage (which would make the ring non-marital) or upon the occurrence of the condition (which would make the ring marital).

3. Post-separation Property

- a. Property acquired by a spouse after the date of separation is excluded from marital property. 23 Pa.C.S. § 3501(a)(4); *Kohl v. Kohl*, 564 A.2d 222 (Pa.Super. 1989). For instance, a spouse’s wages and salaries which are earned after separation are non-marital property.
- b. However, property acquired after separation in exchange for marital property (or through the joint contributions of the parties) may be marital property. *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa.Super. 1993); *Schmidt v. Krug*, 624 A.2d 183 (Pa.Super.1993).
- c. Parties may be separated even though they continued to reside in the same household, so long as there has been a “physical and financial separation,” and an intent to dissolve the marriage has been manifested by behavior or communication. *Sinha v. Sinha*, 526 A.2d 765 (Pa.1987); *Frey v. Frey*, 821 A.2d 623 (Pa.Super.2003); *Mackay v. Mackey*. 545 A.2d 362 (Pa.Super.1988); cf. *McCoy v. McCoy*, 888 A.2d 906 (Pa.Super.2005). Note that parties may not, by agreement,

preserve a separation date while they are attempting to reconcile. *Britton v. Britton*, 582 A.2d 1335 (Pa.Super.1990).

- d. Lottery proceeds received after separation were marital property because tickets were acquired prior to separation. *Nuhfer v. Nuhfer*, 599 A.2d 1348 (Pa.Super. 1991).
- e. Post-separation capital appreciation of investment accounts, and similar post-separation increases in value of joint property, may be considered as marital property subject to equitable distribution or income subject to an alimony obligation, but not both (which would constitute impermissible “double dipping”). *Berry v. Berry*, 898 A.2d 110 (Pa.Super. 2006)(partnership capital account); *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148, 156 (1995)(professional goodwill); *Diament v. Diament*, 816 A.2d 256,277 (Pa.Super. 2003)(advance of marital assets); *Miller v. Miller*, 783 A.2d 832 (Pa.Super. 2001)(proceeds from sale of marital property); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super. 1998)(retained earnings of a business); cf. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1 989)(pension in pay status). Note that “double dipping” does not occur where the income stream is counted as income for support purposes prior to its valuation for equitable distribution purposes (i.e. pension annuity counted as income for APL, and then present-valued for equitable distribution) or, perhaps, where income streams are counted as income for *child* support purposes. See *Berry v. Berry*, 898 A.2d 110 (Pa.Super. 2006)(severance pay).
- f. Post-separation COLA’s that were accrued without any effort or contribution by Husband were considered marital property subject to distribution. *MacDougall v. MacDougall*, 2012 Pa. Super. 83, 49 A.3d 890 (2012).

4. Property Excluded by Agreement

- a. Property acquired prior to or during marriage may be excluded from marital property by prenuptial or postnuptial agreement. 23 Pa.C.S. § 3106 (enacted 2004), § 3501(a)(2); *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162, 165 (1990); *Williamson v. Williamson*, 586 A.2d 967 (Pa.Super. 1991)(prenuptial agreement); *Laudig v. Laudig*, 624 A.2d 651 (Pa.Super. 1993)(post-nuptial agreement); *Ratarsky v. Ratarsky*, 557 A.2d 23 (Pa.Super. 1989)(marital settlement agreement); *Laub v. Laub*, 505 A.2d 290 (Pa.Super. 1986).
- b. The burden of proof to set aside a premarital agreement shall be upon the party who challenges the agreement. 23 Pa.C.S. § 3106(a). To prevail, the challenging party must prove by clear and convincing evidence that:

- (1) the party did not execute the agreement voluntarily; or
- (2) the party, before execution of the agreement:
 - i. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and
 - ii. did not voluntarily and expressly waive, in writing, any right to disclosure; and
 - iii. did not have any adequate personal knowledge of the property or financial obligations of the other party.

23 Pa.C.S. § 3106 (enacted 2004)

- c. Note that § 3106 applies only to agreements executed prior to the date of marriage (not post-nuptial agreements). 23 Pa.C.S. §3106(b).
- d. The appellate courts have upheld premarital agreements under all but the most extreme circumstances. *Stoner v. Stoner*, 819 A.2d 529 (Pa.2003); *Simeone v. Simeone*, 581 A.2d 162 (Pa.1990); *Stackhouse v. Zaretsky*, 900 A.2d 383 (Pa.Super.2006); *Paroly v. Paroly*, 876 A.2d 1061 (Pa.Super.2005); *Sabad v. Fessenden*, 825 A.2d 682 (Pa.Super.2003); *Busch v. Busch*, 732 A.2d 1274 (Pa.Super.1999); *Cooper v. Oakes*, 629 A.2d 944 (Pa.Super.1993); *Hamilton v. Hamilton*, 591 A.2d 720 (Pa.Super.1991).
- e. The increase in value of marital property also may be excluded from the distributable marital estate by agreement. *Bianchi v. Bianchi*, 859 A.2d 511 (Pa.Super. 2004)(increase in value of pension).

1. Awards and Settlements

- a. Premarital or post-separation. A judgment or settlement of a claim that arose prior to marriage or after separation is excluded from marital property, regardless of when payment was made. 23 Pa.C.S. § 3501(a)(8).
- b. During coverture. Post-separation payments of a judgment or settlement of a claim that arose during coverture are generally marital property subject to equitable distribution. *Kozich v. Kozich*, 580 A.2d 390 (Pa.Super.1990).
- c. Presumptions. Settlement proceeds received during coverture are presumed marital unless the recipient can prove that the claim arose prior to marriage. *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999).

- d. Note: Subsection (8) of § 3501(a) was added in 1988 to reverse the Superior Court's decision in *Hurley v. Hurley*, 492 A.2d 439 (Pa.Super. 1985), which held that settlements or awards are acquired when the proceeds are received.

2. Property Disposed During Coverture

- a. Property which is sold, granted, conveyed or otherwise disposed of in good faith and for value prior to separation is excluded from marital property. 23 Pa.C.S. § 3501(a)(5).
- b. In other words, the divorce court generally will not conduct a forensic examination of the financial dealings of an intact family unless there is conspicuous dissipation or wasting.
- c. However, where a party liquidates or disposes of marital property after separation, such property shall be included in the marital estate as an advance to the party who liquidated or disposed of such property. *Lowry v. Lowry*, 544 A.2d 972 (Pa.Super. 1988).

3. Disability and Certain Veterans Benefits.

- a. Not all disability payments are excluded from marital property. *Drake v. Drake*, 725 A.2d 717 (Pa.1999); *Kozich v. Kozich*, 580 A.2d 390 (Pa.Super.1990).
- b. A disability benefit will generally be excluded from the definition of marital property and will qualify as a marital asset only when it cannot be separated from other proceeds that form part of the marital estate. *Cioffi v. Cioffi*, 885 A.2d 45 (Pa.Super. 2005). VA disability benefits are generally excluded from marital property. 23 Pa.C.S. § 3501(a)(6); *Carney v. Carney*, 673 A.2d 367 (Pa.Super. 1996). But see *Hayward v. Hayward*, 868 A.2d 554 (Pa.Super. 2005)(Husband was bound by his agreement to pay 50% of the marital portion of his military and civil retirement benefits, even though it may have to be paid from other available funds).

4. Children's Custodial Funds

- a. Children's UTMA/UGMA custodial funds are within the jurisdiction of the Orphans Court Division, not Family Division. *Sebastianelli v. Sebastianelli*, 876 A.2d 431 (Pa.Super. 2005).

5. Other

- a. A decedent's remains were not property to be divided in equitable distribution. The authority to dispose of a decedent's

remains are governed by the PEF Code, but the court may have the power to assign such authority as an ancillary claim in divorce. *Kulp v. Kulp*, 920 A.2d 867 (Pa.Super.2007).

C. INCREASE OR DECREASE IN VALUE OF SEPARATE PROPERTY

1. **2005 Divorce Code Amendments**

- a. In addition to property acquired during coverture, the marital estate also includes the increase in value of:
 - (3) Premarital property and proceeds from the sale or exchange thereof, 23 Pa.C.S. §3501(a); and
 - (4) Property acquired by gift (except between spouses), bequest, devise or descent and proceeds from the sale or exchange thereof, 23 Pa.C.S. § 3501(a).
- b. The increase in value is measured from the date of marriage or acquisition, whichever is later, until the date of separation or equitable distribution, whichever results in a lesser increase. 23 Pa.C.S. § 3501(a.1). Note: the offset is mandatory not discretionary. In a case of first impression regarding the interpretation of § 3501(a), the Superior Court held that the amount of payment from Husband to Wife should have been based on the value of Husband's pre-marital home at the time of separation, and not at the time of the hearing. *Biese v. Biese*, 970 A.2d 892 (Pa. Super. 2009).
- c. Any decrease in the value of separate property shall be offset against an increase in the value of separate property of that same party. Decreases in the value of one party's separate property shall neither reduce the value of that party's marital property nor affect any increase in value of the other party's property. 23 Pa.C.S. § 3501(a.1)
- d. Unlike some jurisdictions that distinguish between active and passive depreciation of separate assets, Pennsylvania considers all appreciation in the value of separate assets to be marital property, regardless of whether such appreciation results from inflation, market forces, or the contributions and efforts of one spouse. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super.1988); *Anthony v. Anthony*, 514 A.2d 91 (1986).
- e. 23 Pa.C.S. § 3501(a.1), enacted in 2005, codified and clarified the state of the law prior to the enactment of the amendment. See *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996);

comment to 23 Pa.C.S. § 3501(a.1).

f. See III.C. below.

2. Prior to 2005 Amendments

- a. The increase in value of nonmarital property from the date of marriage or date of acquisition, whichever is later, to the date of separation is subject to equitable distribution. 23 Pa.C.S. § 3501; *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000)(increase in value of stocks); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987) (increase in value of retirement account); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987) (increase in value of business); *McCloskey v. McCloskey*, 514 A.2d 1389 (Pa.Super. 1986)(increase in value of real estate); *Anthony v. Anthony*, 514 A.2d 91 (Pa.Super. 1986).

D. LIABILITIES

1. Secured Debts and Mortgages

- a. Property to the extent to which it has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation is subject to equitable distribution. 23 Pa.C.S. § 3501(a)(7).
- b. The divorce court has authority to allocate marital debts in equitable distribution. *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super.1996).

2. Unsecured Debts

- a. Unsecured debts incurred prior to separation are included in the marital estate, whether they are titled jointly or in the name of an individual spouse. *Duff v. Duff*, 510 Pa. 251, 507 A.2d 371 (1986) (tax liability); *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005); *Hicks v. Kubit*, 758 A.2d 202 (Pa.Super. 2000) (educational loan).

E. TRANSMUTATION

1. Generally

- a. Where a spouse has contributed nonmarital property into a joint account or conveyed an asset into joint title, there is a presumption of a gift to the marriage, which converts the nonmarital property into marital property. *Carney v. Carney*, 673 A.2d 367 (Pa.Super. 1996); *Lowry v. Lowry*, 544 A.2d 382 (Pa.Super. 1988); *Gruver v. Gruver*, 539 A.2d 395 (Pa.Super. 1988);

Brown v. Brown, 507 A.2d 1223 (Pa.Super. 1986); *Bold v. Bold*, 516 A.2d 741 (Pa.Super. 1986); *Madden v. Madden*, 486 A.2d 401 (Pa.Super. 1984).

2. **Commingling**

- a. During coverture. Where nonmarital property is sold and the proceeds are commingled with marital funds to acquire new property, the newly acquired property is marital property. *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).
- b. After separation. Generally, where a spouse contributes to a marital account from his or her post-separation income, such contributions are not transmuted into marital property. *Oaks v. Cooper*, 536 Pa. 134, 638 A.2d 208 (1994). For instance, a spouse's post-separation contributions to a defined contribution retirement plan are excluded from marital property, even though the retirement plan itself is marital property.

F. TRACING

1. **Generally**

- a. See *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995).
- b. Premarital funds of a party which were comingled with marital funds could be identified as separate property and excluded from the marital estate only if they could be traced to the satisfaction of the factfinder. *Busse v. Busse*, 921 A.2d 1248 (Pa.Super. 2007) *Winters v. Winters*, 355 Pa.Super. 64, 512 A.2d 1211, 1215-1216 (1986).
- c. Stock issued after separation for business operated as a proprietorship prior to separation is marital property. *Nagel v. Nagle*, 799 A.2d 812 (Pa.Super. 2002).
- d. Tax refund retained the same nonmarital character as the income from which it was derived. *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super. 1995).

G. DOUBLE DIPPING

1. **Generally**

- a. If an income-producing asset has been awarded to a party in equitable distribution, the same asset cannot be counted as a source of income from which alimony or support may be paid. *Johnson v. Berry v. Berry*, 898 A.2d 110 (Pa.Super. 2006); *Miller v. Miller*, 783 A.2d 832 (Pa.Super. 2001)(proceeds from sale of marital property); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super.

1998)(retained earnings of a business); *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006)(pension in pay status), *affirmed*, 927 A.2d 663 (Pa.Super. 2007); cf. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1989)(pension in pay status).

- b. Retained earnings of a business that accrued during the pendency of a support order which was based on the pass-through income of the same business cannot be included in the marital estate. *Rohrer v. Rohrer*, 715 A.2d 463, 465 (Pa. Super. 1998).
- c. Money earned prior to the marital separation (a refund of a partner's capital account upon termination) was marital property which cannot be counted as income for support purposes, while money acquired after separation (a severance payment) was not marital property and could be counted as income for support. *Berry v. Berry*, 898 A.2d 110 (Pa.Super.2006).
- d. Proceeds from the sale of marital assets could not be counted as income for child support purposes. *Miller v. Miller*, 783 A.2d 832 (Pa. Super. 2001).
- e. Pension in pay status, which had been previously divided in equitable distribution, could not be counted as income for alimony purposes in modification proceeding. *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006), *affirmed*, 927 A.2d 663 (Pa. Super. 2007).
- f. Pension in pay status, which had NOT been previously divided in equitable distribution, could be counted as income during alimony modification proceeding. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1989).

III. VALUATION OF MARITAL PROPERTY

A. DATE OF VALUATION

1. Generally

- a. The date for valuation of marital property is generally the date of trial or distribution, not date of separation. *Sutliff v. Sutliff*, 518 Pa. 378, 543 A.2d 534 (1988); *Holland v. Holland*, 588 A.2d 58 (Pa.Super. 1991); *Miller v. Miller*, 577 A.2d 205 (Pa.Super. 1990). However, the proper date for identifying marital property is date of separation. *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993). The date of separation is presumptively not

later than the date when the complaint in divorce was served. 23 Pa.C.S. §3103; *McCoy v. McCoy*, 888 A.2d 906 (Pa.Super. 2005).

2. Retirement Plans

- a. The date for valuation of a spouse's defined contribution retirement plan and IRA was date of distribution, not date of separation, where post-separation increases in value were due to capital appreciation and investment gains rather than the employee spouse's contributions. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Gordon v. Gordon*, 647 A.2d 530 (Pa.Super. 1994).

3. Date of separation

- a. It may be more equitable to value marital assets at date of separation in situations where one spouse consumes or dissipates marital assets following separation without other spouse's consent. *Nagle v. Nagle*, 799 A.2d 812 (Pa.Super. 2002); *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Benson v. Benson*, 624 A.2d 644 (Pa.Super. 1993). The trial court is free to select a valuation date that works economic justice between the parties. *Fishman v. Fishman*, 805 A.2d 576 (Pa.Super. 2002); *McNaughton v. McNaughton*, 603 A.2d 646 (Pa.Super. 1992).

4. Post-Separation Enhancement

- a. Marital property may be valued as of the date of separation (or, at least, a date earlier than date of trial) if the value of such property was substantially enhanced by the unilateral efforts or contributions of one of the spouses. *Diamond v. Diamond*, 519 A.2d 1012 (Pa.Super.1986); *Adelstein v. Adelstein*, 553 A.2d 436 (1989).

B. METHOD OF VALUATION

1. Generally

- a. The Divorce Code does not contain a specific method for valuing marital assets (except, perhaps, defined benefit retirement annuities; see 23 Pa.C.S. § 3501(c)). The trial court may consider estimates, inventories, records of purchase price, and appraisals submitted by the parties, and the court is free to accept all, none or portions of the testimony regarding value. *Verholek v. Verholek*, 741 A.2d 792 (Pa.Super. 1999); *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).

- b. Trial court acted within its discretion by averaging the values given by the parties' appraisers. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super. 1988).

2. Encumbrances

- a. Generally, marital assets are valued net of any loans or other secured liabilities which attach to such properties. See, e.g., *Schenk v. Schenk*, 880 A.2d 633 (Pa. Super.2005).

3. Fair Market Value

- a. The measure of value in most divorce cases is "fair market value" rather than acquisition value, book value, or replacement value.
- b. Fair market value is the price paid by a willing buyer to a willing seller, in an arms' length transaction, where neither is under compulsion to buy nor to sell and both have reasonable knowledge of the relevant facts. Rev.Rul. 59-60.
- c. Acquisition value is the purchase price.
- d. Book value is generally equal to the acquisition value minus depreciation.
- e. Replacement value is the cost of replacing an asset.

C. INCREASE OR DECREASE IN VALUE OF SEPARATE PROPERTY

1. See II.C. above.

2. Date for measuring increase in value

- a. The starting point for measuring increase in value of non-marital property is the date of marriage or acquisition, whichever is later. The ending point is the date of separation or distribution, whichever results in a lesser increase in value. 23 Pa.C.S. § 3501(a.1)(codifying and clarifying existing law as of January 2005); *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).
- b. Any decrease in the value of separate property shall be offset against an increase in the value of separate property of that same party. Decreases in the value of one party's separate property shall neither reduce the value of that party's marital property nor affect any increase in value of the other party's property. 23 Pa.C.S. § 3501(a.1); see III. C.2. below.
- c. The increase in value of nonmarital property from the date of marriage or date of acquisition, whichever is later, to the date

of separation is subject to equitable distribution. *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000)(increase in value of stocks); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987) (increase in value of retirement account); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987) (increase in value of business); *McCloskey v. McCloskey*, 514 A.2d 1389 (Pa.Super. 1986)(increase in value of real estate); *Anthony v. Anthony*, 514 A.2d 91 (Pa.Super. 1986).

- d. Post-separation growth of the increase in value is not marital property. *Ling v. Ling*, 658 A.2d 805 (Pa.Super. 1995).
- e. There is a rebuttable presumption that the date when a complaint in divorce is filed is the latest possible date of separation. 23 Pa.C.S. § 3103 (amended 2004).

3. Decrease in Value

- a. A decline in the value of nonmarital property may not be offset against any increase in the value of the other party or against the value of the marital estate. 23 Pa.C.S. §3501(a.1); *Winters v. Winters*, 512 A.2d 1211 (Pa.Super.1986).
- b. Note that one spouse may attempt to disqualify the other spouse from offsetting his/her unreasonable consumption or waste of his/her nonmarital assets (or as the comment to 3501(a.1.) describes it, "'malicious' consumption") against the increase in value of his/her nonmarital property. Comment to 23 Pa.C.S. § 3501(a.1)

4. Reconciliation/Remarriage

- a. Where parties were divorced and remarried, pension benefits earned from date of divorce until date of marriage were not included in marital property. *Smith v. Smith*, 749 A.2d 921 (Pa.Super.2000).

D. SPECIAL VALUATION ISSUES

1. Retirement benefits

- a. Generally, the portions of a retirement plan which are earned prior to marriage and after separation are nonmarital property. Benefits earned during the marriage prior to separation, regardless of whether they were vested on the date of separation, are marital property. *Verdile v. Verdile*, 536 A.2d 1364 (Pa.Super.1988); *Major v. Major*, 518 A.2d 1267

(Pa.Super. 1986).

Note that the Supreme Court's decision in *Berrington v. Berrington*, 534 Pa. 393, 633 A.2d 589 (1993), which was previously the guiding polestar of pension cases, has been overruled by the 2005 Divorce Code Amendments. See, Comment to 23 Pa.C.S. § 3501(c).

- b. Defined Contribution Plans. A defined contribution retirement plan (such as a 401(k) plan, Keogh, or profit sharing plan) is generally valued as of the date of distribution, except to the extent that an employee spouse and/or his/her employer made contributions to the retirement plan after separation. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Schneeman v. Schneeman*, 615 A.2d 1369 (Pa.Super. 1992). Post-separation increases that are attributable to the employee spouse's contributions are nonmarital, but investment gains and appreciation are marital property.
- c. Defined Benefit Plans. The accrued benefit of a defined benefit retirement plan is marital property subject to equitable distribution. The identification of the marital component of a defined benefit pension depends, to some extent, on the method of distribution chosen: immediate offset ("buyout") or deferred distribution (QDRO). 23 Pa.C.S. § 3501(c). The wording of the statute may require judicial interpretation, as it is not entirely clear if there is a difference between the participant's "total" accrued benefit (to be divided by deferred distribution, § 3501(c)(1)) and his/her accrued benefit "as of a date as close to the time of trial as reasonably possible" (immediate offset, § 3501(c)(2)). The subtle difference in wording suggests that the accrued benefit in deferred distribution cases will be greater, as will the denominator of the coverture fraction.
- d. Immediate offset ("buyout"). Where immediate offset is chosen as the method of distribution a defined benefit pension, the marital component is equal to the accrued benefit as of a date as close to trial as reasonably possible, multiplied by a coverture fraction. The numerator is the number of months of plan participation from the later of the date of marriage or date of participation to the earlier of the date of separation or date of employment termination. The denominator is the number of months during which the participant worked to earn the accrued benefit, up to the date as close to trial as reasonably possible. 23 Pa.C.S. § 3501(c)(2).
- e. Deferred distribution (QDRO). Where deferred distribution is selected, the marital component is equal to the accrued benefit

as of the participant's actual retirement date. The numerator is the number of months of plan participation from the later of the date of marriage or date of participation to the earlier of the date of separation or date of employment termination. The denominator is the number of months during which the participant worked to earn the accrued benefit, up to the participant's retirement date. 23 Pa.C.S. § 3501(c)(1).

- f. Post-separation Enhancements. Post-separation enhancement of the retirement plan, cost of living allowances, and other increases that are not attributable to the employee's efforts or contributions should be included in the marital component. *Meyer v. Meyer*, 749 A.2d 917 (Pa.2000); *Brown v. Brown*, 690 A.2d 700 (Pa.1997). Where a participant in an SERS municipal pension plan elected to increase his contributions prospectively and thereby enhance his benefits both prospectively and retrospectively, the Supreme Court held that the retrospective enhanced benefits were marital property. *Smith v. Smith*, 938 A.2d 246 (Pa.2007), *reversing*, 881 A.2d 855 (Pa.Super.2005).
- g. Survivor Benefit. Where the participant has elected a joint and survivor form of payment and cannot change his/her election (e.g., the pension has commenced in pay status), the survivor benefit under a defined benefit plan which is in pay status is a separate and distinct benefit which must be valued for equitable distribution. *Palladino v. Palladino*, 713 A.2d 676 (Pa.Super. 1998). But note that ERISA-governed pensions may be divided by a "separate- interest" QDRO, which eliminates the need to determine the value of the survivor benefit if the pension is not in pay status. See *Keller v. Keller*, 760 A.2d 22 (Pa.Super. 2000).
- h. Social Security Offset. Where a spouse (such as a government employee or railroad employee) does not participate in Social Security, the value of his or her municipal or federal retirement plan should be reduced by an amount equal to the Social Security OASDI benefit that he or she would receive if he or she did participate. *Rimel v. Rimel*, 913 A.2d 289 (Pa.Super.2006); *Cohenour v. Cohenour*, 696 A.2d 201 (Pa.Super. 1997); *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa.Super. 1990). However, no offset is required where neither spouse participates in Social Security. *McClain v. McClain*, 693 A.2d 1355 (Pa.Super. 1997).
- i. State employee retirement benefits. State Employees' Retirement System (SERS) covers members of the General Assembly, the Department of Education, Penn State or state-owned educational institutions, community colleges, and

several independent commissions and boards. 71 Pa. C.S., Section 5102. Public School Retirement System (PSERS) covers employees of public schools, including charter schools. 24 Pa. C.S., Section 8101, *et seq.* The statutory provisions controlling each system are similar, but are not identical. They are both defined benefit plans.

2. Business Interests

- a. Book Value. Book value is defined as the value of the assets (usually at acquisition price plus improvements minus accumulated depreciation) minus liabilities. “Adjusted book value” often means that capital assets are listed at appraised value instead of depreciated acquisition value.
- b. Goodwill. Theoretically, goodwill is defined as the positive reputation of a business. Practically speaking, the purchase price of a business often exceeds its book value (assets minus liabilities); the difference is placed in the generic category of “goodwill”. An advantageous location, capital structure, or relationship with customers and/or suppliers may contribute to goodwill. When determining the value of a business for equitable distribution purposes, the court must consider whether the intangible goodwill value is transferable to a third party purchaser. In the case of a professional practice (such as a medical or dental practice), goodwill might be attributable to the skill and reputation of the professional. Such “personal goodwill” is generally non-transferable. Goodwill which is transferable to a third party purchaser is often referred to as “enterprise goodwill.” See *Butler v. Butler*, 541 Pa. 3364, 663 A.2d 148 (1995); *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992).
- c. Personal Goodwill. If the goodwill attached to a spouse’s business is wholly personal and inalienable, then it cannot be actually realized and may not be included in the value for equitable distribution purposes. *Fexa v. Fexa*, 578 A.2d 1314 (Pa.Super. 1990). Goodwill attributable to business location and customer lists (even in a professional practice operated by a sole practitioner) is not personal goodwill and may be assigned a value for equitable distribution purposes. *Smith v. Smith*, 881 A.2d 855 (Pa.Super. 2005).
- d. Cases.

CASE	TYPE OF BUSINESS	FACTORS CONSIDERED
Beasley 518 A.2d 545 (1986)	Law Firm	Sole proprietor

DeMasi 530 A.2d 871 (1987)	Medical practice	50% shareholder Specialization in rheumatology
Buckl 542 A.2d 65 (1988)	Architectural firm	50% partner Partnership
Fexa 578 A.2d 1314 (1990)	Dental practice	Enduring business with numerous transfers of partnership
McCabe 575 A.2d 87 (1990)	Law firm	Enduring business with numerous transfers of partnership
Butler 621 A.2d 659 (1993) 663 A.2d 148 (1995)	Accounting practice	Partnership agreement contained a fixed dollar amount for exiting partners
Gaydos 693 A.2d 1368 (1997)	Dental practice	Sole proprietorship
Baker 881 A.2d 855 (Pa.Super. 2005)	Veterinary Practice	Sole proprietorship – purchased for \$200K
Brody 758 A.2d 1274 (2000)	Medical Practice	
Berry 898 A.2d 1100 (2006)	Partnership	
Fishman 805 A.2d 576 (2002)	Accounting Firm	
Naddeo 626 A.,2d 608 (1993)	Law Practice	
Perlberger 626 A.2d 1186 (1992)	Law Practice	

- e. Shareholder Agreements. Where the shareholder agreement specifies a formula for determining the fair market value of a shareholder's interest, such agreement might be controlling. *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148 (1995); *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Buckl v. Buckl*, 542 A.2d 65 (Pa.Super. 1988).

2. Professional Degrees and Licenses

- a. Professional degrees and licenses are considered in the context of earning capacity but are not marital property subject to equitable distribution. *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Lehmicke v. Lehmicke*, 489 A.2d 782 (Pa.Super. 1985).

3. Stock Options

- a. Stock options which were earned during the marriage prior to separation are marital property and must be valued, even if the options are unvested. *Fisher v. Fisher*, 564 Pa. 586, 769 A.2d 1165 (2001); *MacAleer v. MacAleer*, 725 A.2d 829 (Pa.Super. 1999).
- b. Where the market price of the stock does not exceed the exercise price (strike price), the options may have no immediate value. An actuarial analysis, known as the “Black-Scholes” method, has been developed to determine the value of unexercised stock options, which method has been judicially adopted by at least one county. See *Dearlove v. Genzyme Transgenics Corp.*, 70 Pa.D. & C.4th 314 (Phila.Co. 2004).
- c. A coverture fraction may be applied to determine the marital component of stock options.

4. Trusts

- a. The increase in value of a beneficiary’s interest in an irrevocable trust (of which she was not grantor) was not marital property except to the extent that the beneficiary actually received income or acquired the right to exercise control over trust corpus. *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992).
- b. A trust beneficiary’s future interest in a testamentary trust established by his grandfather was vested even if a condition precedent (the death of the beneficiary’s father) must occur before the actual passing of the property to the beneficiary. The increase in value of a beneficiary’s future interest (which would be a non- marital gift or bequest) is not within the statutory definition of marital property. *Anzalone v. Anzalone*, 835 A.2d 773 (Pa.Super. 2003); *McGinley v. McGinley*, 565 A.2d 1220 (Pa.Super. 1989).
- c. A grantor/spouse’s reversionary interest in a grantor retained annuity trust (GRAT) was marital property subject to equitable distribution, notwithstanding a post-nuptial agreement which excluded from marital property any assets contained in the

GRAT. *Kennedy v. Kennedy*, 865 A.2d 878 (Pa.Super. 2005). The GRAT was funded by the grantor spouse with stock of a business corporation created during the marriage of Husband and Wife; some of the stock was retained in the trust for the benefit of the parties' children, while the rest reverted to Husband over a three- year period.

E. ASSOCIATED TAX LIABILITIES AND TRANSACTIONAL COSTS

1. Tax Liabilities

- a. Pursuant to the 2005 Divorce Code Amendments, any potential tax liabilities (such as income taxes or capital gains taxes that might be incurred upon the sale of the asset) and/or transfer expenses which might be associated with a marital asset must be considered, regardless of whether those costs may be "immediate and certain." 23 Pa.C.S. § 3501(a.10). Generally, transfers of property between spouses in connection with a divorce do not trigger taxable events, except where the equitable distribution decree requires the sale or liquidation of marital assets. IRC §1041.
- b. Previously, the case law provided that tax consequences and transfer costs were not to be considered unless the taxable event were certain to occur as a result of the divorce and the amount of tax could be reasonably predicted. *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988); *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993)(environmental liability associated with removal of fuel storage tanks).
- c. Certain marital assets contain built-in tax liabilities (e.g., pensions and stock portfolios) and transfer costs (e.g., real estate) which must be considered vis-à-vis other marital assets (like cash) which are after-tax assets. For a more in-depth discussion, see PBI's *Tax Consequences in Divorce*, PBI 2005-4128.
- d. For significant changes to corporate and individual tax liabilities, see the Savran Benson article and chart on the 2018 Tax Cuts and Jobs Act (TCJA) which became effective January 1, 2018. Note the change in business taxes will also impact business valuations based on projected earnings, net of taxes.

2. Tax Ramifications and Costs in Equitable Distribution

- a. In *Balicki v. Balicki*, 4 A.3d 654 (Pa. Super. 2010), the Superior

Court concluded that indefinite tax ramifications and costs of sale are to be considered in equitable distribution. The decision noted the factors that should be assessed in deciding whether an adjustment should be made for indefinite tax impact and costs of sale. 23 Pa. C.S.A., Sections 3502 (a)(10.1) and (10.2).

- b. As to the facts of the case, it was held as follows: where the trial court properly considered the tax ramifications and sale costs that would be incurred if Husband sold his interest in a family-owned business, the trial court also properly considered the tax consequences of an alimony award to Wife even though this was not raised by either party on exceptions.
- c. The Superior Court affirmed the trial court's determination to make a downward adjustment of Wife's share of the marital estate from 65% to 60%. This was based on Husband's voluntary payment of all of the college expenses for the parties' two children. The decision was also based on the fact that during the parties' separation, Husband paid other debts while Wife accumulated savings during the same period..

IV. ***EQUITABLE DISTRIBUTION OF MARITAL PROPERTY***

A. STATUTORY CRITERIA

1. **Generally**

- a. The distribution method codified in the Domestic Relations Code is known as a "dual classification" equitable distribution scheme. Marital property is divided between the parties in such proportions as the trial court deems fit, while nonmarital property is retained by the spouse who owns it. This scheme differs from the "all property" equitable distribution scheme, in which both all property is divided, or the "community property" scheme, in which community property is divided equally. The statutory criteria for equitable distribution of marital property are set forth at 23 Pa.C.S. § 3502(a)(1) – (11).
- b. The Domestic Relations Code does not dictate the weight to be placed on each of the criteria, which is within the sole discretion of the trial court. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).
- c. The trial court may divide the marital property in any such proportions as it deems appropriate to effectuate economic

justice between the spouses and may consider each marital asset independently, applying a different percentage to each asset. 23 Pa.C.S. § 3502 (a).

- d. There is no presumption of an equal 50/50 distribution of marital property. In fact, the trial court may not use 50/50 as a starting point for its analysis, which amounts to the same thing as a presumption. *Fratangelo v. Fratangelo*, 520 A.2d 1195 (Pa.Super. 1987).

2. The “Statistical Data” factors – § 3502(a)(1), (2) and (3).

- a. Length of marriage. There is a dearth of case law to interpret this factor, but some judges and practitioners subscribe to the following theory: In the course of a lengthy marriage, it is perhaps more likely that the spouses have sacrificed other financial opportunities, contributed most or all of their separate estates and efforts, and intertwined their financial affairs with each other. *Wang v. Feng*, 888 A.2d 882 (Pa.Super. 2005). On the other hand, after a brief marriage, the spouses’ financial affairs may not have been closely intertwined, they may not have sacrificed other financial opportunities, or they may not have made substantial contributions to the marital enterprise. In cases of short marital duration, the court should endeavor to restore the parties to their original financial positions. In cases of lengthy marital duration, a more equal division of assets is warranted.
- b. Prior marriages. Again, the case law is moribund, but theories abound: Perhaps assets which were subject to equitable distribution in a prior divorce should not be subject to “double jeopardy” in a subsequent divorce. Or, perhaps, a party who has been previously divorced should be aware of the need to protect his or her assets through the use of a prenuptial agreement, asset titling, or other means. A better theory: a spouse who has contributed to the care of children born to a spouse’s prior union should be entitled to some consideration.
- c. Age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties. Most of these criteria speak to economic factors, which are discussed below. The judges and practitioners might also consider the parties’ proximity to retirement age. Upon retirement, many parties cease to earn income and begin to consume their savings and assets. If both parties are approaching retirement age, particularly after a lengthy

marriage, perhaps the equitable distribution of assets should be crafted to equalize income and assets. *Teodorski v. Teodorski*, 857 A.2d 194 (Pa.Super. 2004)(trial court did not err in ordering a 50/50 split, finding that the economic situation between the two parties at the time of husband’s retirement would likely be very similar in terms of monthly incomes).

3. The “Prospects for Recovery” Factors – § 3502(a)(3), (5) and (8).

- a. Opportunity for future acquisition of capital income and assets. One of the stated goals of the Domestic Relations Code is “to mitigate the harm to spouses and their children caused by the legal dissolution of the marriage.” When divorce occurs, the marital enterprise is severed into two economic units, each of which must be capable of supporting one of the spouses, preferably without financial ties to each other or public assistance. Thus, in dividing marital property, the trial court must consider the relative economic circumstances of the parties and consider each spouse’s ability to recover from the adverse economic consequences of divorce. See, e.g., *Ressler v. Ressler*, 644 A.2d 753 (Pa.Super. 1994); *Hayward v. Hayward*, 630 A.2d 1275 (Pa.Super. 1993).
- b. Age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties. Where there is a significant disparity between the parties’ incomes, earning capacities and employability, the lesser-earning spouse may require a greater share of the marital property. See, e.g., *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Lowry v. Lowry*, 544 A.2d 927 (Pa.Super. 1988).
- c. Separate Estate/Gifts/Inheritance/Family Resources. While the trial court may not divide the spouse’s separate property, it may award a smaller share of marital property to a spouse who has the benefit of a substantial separate estate. *McGinley v. McGinley*, 565 A.2d 1220 (Pa.Super. 1989).

4. The “Contribution” Factors - §3502(a)(4) and (7).

- a. Contribution of Premarital Assets. A spouse who contributes his or her premarital assets to the marital estate may be entitled to credit for his or her contributions in the division of marital property. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).
- b. Wage-earner Contributions. In dividing marital property, the trial court must consider each of the spouse’s contributions to the acquisition, preservation, appreciation and depreciation of

the marital estate. *Mercatell v. Mercatell*, 854 A.2d 609 (Pa.Super. 2004). However, a spouse's status as breadwinner did not entitle him to more favorable treatment in equitable distribution. *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987).

- c. Homemaker Contributions. The contribution of a homemaker is equally as important as that of the breadwinner. *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987); *Pascoe v. Pascoe*, 133 Pitt. L.J. 142 (1985). However, where the wife did not contribute substantially to the husband's business, the trial court did not err by awarding the entire value of the business to the husband. *Williamson v. Williamson*, 586 A.2d 967 (Pa.Super.1991).
- d. Contributions to Career of Other Spouse (§ 3502(a)(4)). A spouse's contribution to the education, training or career advancement of the other spouse may be considered in dividing the marital estate. *Bold v. Bold*, 524 Pa. 487, 574 A.2d 552 (1990); *Lehmicke v. Lehmicke*, 489 A.2d 782 (Pa.Super. 1985); cf. *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005).
- e. Dissipation. The trial court may also consider a spouse's conduct which results in a dissipation of the marital estate. *Twill v. Twill*, 664 A.2d 1020 (Pa.Super. 1995); *Beener v. Beener*, 619 A.2d 713 (Pa.Super. 1992).

5. The "Standard of Living" Factors - § 3502(a)(6), (9) and (10).

- a. Although the statutory criteria require the trial court to consider the standard of living established during the marriage, the courts have recognized that it may be impossible or inappropriate to maintain that standard of living after divorce. *Viles v. Viles*, 610 A.2d 988 (Pa.Super. 1992).
- b. The parties' incomes, earning capacity, employability and benefits may be a significant factor in determining the appropriate distribution of marital property. *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987); However, an "income equalizing" approach may not be appropriate. *Powell v. Powell*, 577 A.2d 576 (Pa.Super. 1990).

6. The "Costs of Transfer" Factor - § 3502(a)(10.1), (10.2)

- a. Pursuant to the 2005 Divorce Code Amendments, any potential tax liabilities (such as income taxes or capital gains taxes that might be incurred upon the sale of the asset) and/or transfer expenses which might be associated with a marital asset must be

considered, regardless of whether those costs may be “immediate and certain.”

- b. Previously, the case law provided that tax consequences and transfer costs were not to be considered unless the taxable event were certain to occur as a result of the divorce and the amount of tax could be reasonably predicted. *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988).
- c. Certain marital assets contain built-in tax liabilities (e.g., pensions and stock portfolios) and transfer costs (e.g., real estate) which must be considered vis-à-vis other marital assets (like cash) which are after-tax assets. For a more in-depth discussion, see PBI’s *Slicing Up the Pie, Property Distribution in Pennsylvania: published 2016, 3rd Edition, PBI Press Book #7582*.
- d. Marital Misconduct
 - a. Marital misconduct, such as infidelity, abandonment, or abusive conduct, is not relevant to the division of marital property. 23 Pa.C.S. § 3502(a); *Smith v. Smith*, 749 A.2d 921 (Pa.Super.2000); *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa.Super. 1993).
 - b. Certain types of misconduct, such as excessive drinking or gambling, may have economic consequences which are relevant to the issue of dissipation of marital assets.

B. EFFECT OF AGREEMENTS.

1. Pre- and Post-nuptial Agreements

- a. The parties may by written agreement predetermine the proportion of each party’s distribution, method of distribution, or other relevant details. For instance, the parties may agree that marital property will be divided equally upon divorce. 23 Pa.C.S. § 3105, 3106; 3502(a)(2).
- b. A post-February 1, 1988 marital settlement agreement is enforceable as a court order even if the agreement was not explicitly incorporated or merged into a decree in divorce, and even if the complaint in divorce did not include a claim for equitable distribution. *Annechino v. Joire*, 2008 WL 786755 (Pa.Super.2008).

C. METHOD OF DISTRIBUTION

1. Generally

- a. The trial court generally determines the percentage of the

marital estate to be awarded to each of the parties, based upon the statutory criteria, and then proceeds to assign individual assets to each of the parties to effectuate the overall percentage. The court usually does not divide each individual asset between the parties. See, e.g., *Osiat v. Cook*, 803 A.2d 209 (Pa.Super. 2002).

- b. The court may distribute marital assets in kind or compel a sale or liquidation of some or all of the marital assets. *Nagle v. Nagle*, 799 A.2d 812 (Pa.Super. 2002); *Gill v. Gill*, 677 A.2d 1214 (Pa.Super.1996); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990).

2. Defined Benefit Retirement Plans

- a. A defined benefit retirement plan is essentially a promise by the employer to pay an annuity to its employees, as determined under a unit benefit formula based on the employee's salary and years of service, commencing on the date of his or her retirement. Unlike a defined contribution plan, there is no account which can be divided in equitable distribution. There are two alternative methods of dividing a defined benefit retirement plan: (a) immediate offset; or (b) deferred distribution.
- b. Immediate Offset. If there are sufficient assets in the marital estate, the employee spouse may retain his or her entire pension, and the non-employee may be compensated with other marital assets. To accomplish this type of distribution, it is necessary to determine the actuarial present value of the pension. The immediate offset method is the preferred method of distributing pension benefits. Comment to 23 Pa.C.S. § 3501; *DeMarco v. DeMarco*, 787 A.2d 1072 (Pa.Super. 2001); *Miller v. Miller*, 617 A.2d 375 (Pa.Super.1993); *Elhaji v. Elhaji*, 605 A.2d 1268 (Pa.Super. 1993); *Lyons v. Lyons*, 585 A.2d 42 (Pa.Super. 1991); *Lowry v. Lowry*, 544 A.2d 972 (Pa.Super. 1988); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987).
- c. Deferred Distribution. Often, there are insufficient marital assets to effectuate an immediate offset distribution of pension benefits. Instead, the trial court may enter a Qualified Domestic Relations Order ("QDRO") to divide the pension benefits when they are received after the employee's spouse's retirement. Under the deferred distribution method, it is not necessary or appropriate to determine the actuarial present value of the pension. *Brown v. Brown*, 547 Pa. 360, 690 A.2d 900 (1997); *Berrington v. Berrington*, 534 Pa. 393, 633 A.2d 589 (1993);

Elhadj v. Elhadj, 605 A.2d 1268 (Pa.Super. 1993); *Endy v. Endy*, 603 A.2d 641 (Pa.Super. 1992); *Lyons v. Lyons*, 585 A.2d 42 (Pa.Super.1991); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990); *Flynn v. Flynn*, 491 A.2d 156 (Pa.Super. 1985); *King v. King*, 481 A.2d 913 (Pa.Super. 1984).

D. CREDITS

1. Fair Rental Value of Marital Residence

- a. Generally. A party who is excluded from possession of the marital residence during separation may be entitled to a credit equal to one-half of the fair rental value of the marital residence, reduced by the spouse-in-possession's payments toward the mortgage loan, real estate taxes, insurance, and maintenance. *Ressler v. Ressler*, 644 A.2d 753 (Pa.Super. 1994); *Schmidt v. Krug*, 624 A.2d 183 (Pa.Super. 1993); *Beener v. Beener*, 619 A.2d 713 (Pa.Super. 1992); *Trembach v. Trembach*, 615 A.2d 33 (Pa.Super. 1992); *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).
- b. However, the fair rental value credit is within the trial court's discretion and is not mandatory. *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super. 1995); *Gordon v. Gordon*, 647 A.2d 530 (Pa.Super. 1994), reversed on other grounds, 545 Pa. 391, 681 A.2d 732; *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993).
- c. In *Lee v. Lee*, 978 A.2d 380 (Pa. Super. 2009), the Superior Court held that the calculation of fair rental credit is discretionary. In that case, Husband was denied credit during the period of a Protection from Abuse (PFA) order.

2. Diminishing Credit for Contributions by a Spouse

- a. A spouse who contributes his or her nonmarital assets to the marital estate may be entitled to a "diminishing credit" for his or her contributions in the division of marital property. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).
- b. In *Sergi*, the Honorable Lawrence W. Kaplan of Allegheny County held that the credit for a party's contribution of nonmarital assets would diminish over a period of twenty years, such that the most recent contributions would be mostly reimbursed while older contributions would not be reimbursed.

3. Credit for Post-separation Payment of Liabilities

- a. A spouse is entitled to full credit for his or her post-separation payment of joint debts if the payment is made

from marital funds. *Duff v. Duff*, 510 Pa. 251, 507 A.2d 371 (1986); *Grandovic v. Grandovic*, 564 A.2d 960 (Pa.Super. 1989).

- b. The trial court may grant full credit, partial credit, or no credit at all for his or her post-separation payments of joint debts if the payment is made voluntarily from his or her income or separate assets. *Diament v. Diament*, 2003 WL 152836 (Pa.Super. 2003); *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Jayne v. Jayne*, 663 A.2d 169 (Pa.Super. 1995); *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Schneeman v. Schneeman*, 615 A.2d 1369 (Pa.Super. 1992).

4. Credit for Payment of Business Debt

- a. In *M.P. v. J.P.*, 110 PDDR 74 (Lycoming C.C.P. May 24, 2010), the court held that Husband was not entitled to a credit of the business's unpaid rent as the parties' Property Settlement Agreement did not specifically state that he was entitled to such credit.

E. EQUITABLE REIMBURSEMENT.

1. Generally

- a. Where the marital estate is insufficient or illiquid, the trial court may order one spouse to pay installment payments to compensate the other spouse for his or her share of marital property. This type of installment payment is not alimony, but is known as "equitable reimbursement." *Wang v. Feng*, 888 A.2d 882 (Pa.Super. 2005); *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005); *Twillia v. Twilla*, 664 A.2d 1020 (Pa.Super. 1995); *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990); *Zullo v. Zullo*, 576 A.2d 1070 (Pa.Super. 1990); *Wayda v. Wayda*, 576 A.2d 1060 (Pa.Super. 1990).
- b. Trial court may not garnish proceeds from the sale of property owned jointly by husband and his new wife to collect equitable reimbursement payments owed to former wife. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super. 2006).
- c. Trial court acted within its discretion by awarding 60% of the value of a business to the non-owner spouse via equitable reimbursement payments. *Dalrymple v. Kilishek*, 920 A.2d 1275 (Pa.Super. 2007).

F. OTHER RECENT DEVELOPMENTS

1. **Appropriate Allocation of Marital Estate When One Party is Disabled**

- a. *McCambridge v. McCambridge*, 110 PDDRR 105 (Centre Co. C.C.P. August 19, 2010): Wife was entitled to 65% of the marital estate because of her disability, and due to the fact that she was responsible for the primary care of the two minor children from her first marriage.

2. **Allocation of Marital Debt**

- a. *Schleiden v. Schleiden*, 110 PDDRR 106 (Centre Co, C.C.P. August 23, 2010): The trial court can allocate a negative balance of the marital estate solely to one party if that party was responsible for creating such a negative balance.

3. **Refinance of Marital Residence**

- a. *Carter v. Williams*, 110 PDDRR 90 (Allegheny Co. C.C.P., July 8, 2010): Master erred in failing to give Wife a deadline to complete the refinancing/ sale of the marital residence.

4. **Allocation of Marital Estate Due to Age and Health of Parties**

- a. *Coopersmith-Fredman v. Fredman*, 110 PDDRR 77 (Centre Co. C.C.P., May 17, 2010): Husband was entitled to 29% of the marital assets held in Wife's name and 29% of the increase in value of Wife's separate property because he was unable to continue to generate significant income because of his age and health.

V. **MISCELLANEOUS.**

A. INCOME TAX CONSEQUENCES

1. **Retirement Accounts and Pensions**

- a. Pursuant to the Employee Retirement Income Security Act of 1975 ("ERISA"), most private employer-sponsored retirement accounts and pensions are tax-deferred. Employees and their employers contribute pre-tax dollars, and the capital gains and dividends are not recognized as income until the employee withdraws funds from the account or receives annuity payments.

- b. A transfer between spouses of an interest in an ERISA-governed retirement plan does not trigger a taxable event if the transfer is made pursuant to a Qualified Domestic Relations Order. IRC § 408(d), 414(p).
- c. Most federal and municipal retirement plans, which are not governed by ERISA, have similar procedures for transferring interests without triggering a taxable event.
- d. Transfers between spouses of an interest in an Individual Retirement Account (“IRA”) may be made without triggering a taxable event.

B. APPEALS

1. Exceptions

- a. Although it is not technically an “appeal,” exceptions are the procedure by which the trial court may review and modify the recommendation of a master in equitable distribution. In some counties, the trial court renders its decision after reading briefs and hearing oral argument. In other counties, the trial court conducts a de novo hearing. Pa.R.C.P. 1920.
- b. The master’s report, while entitled to great weight, is not binding upon the trial court. *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993), reversed in part and affirmed in part, 541 Pa. 364, 663 A.2d 364; *Trembach v. Trembach*, 615 A.2d 33 (Pa.Super. 1992).
- c. The abuse of discretion standard which is applicable to appeals does not apply to the trial court’s review of a master’s report.
- d. Failure to comply with local rules which do not conflict with the statewide rules of procedure may result in dismissal of a party’s exceptions. *Delcamp v. Delcamp*, 881 A.2d 853 (Pa.Super. 2005). Issues not raised on exceptions are deemed waived in subsequent proceedings. *Sebastianelli v. Sebastianelli*, 876 A.2d 431 (Pa.Super. 2005).

2. Appellate Courts

- a. The standard of review under which the appellate courts review a decree of equitable distribution is the “abuse of discretion” standard. *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Fielding v. Fielding*, 685 A.2d 178 (Pa.Super. 1996). Such decrees will not be disturbed on appeal unless the trial court failed to follow the proper legal procedures or misapplied the

law. *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).

- b. Matters of credibility are within the sound discretion of the trial court. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995).

C. ENFORCEMENT

1. Orders

- a. Forfeiture of a spouse's interest in a pension was not an appropriate remedy to sanction her failure to file a timely Qualified Domestic Relations Order as required by the equitable distribution decree. *Prol v. Prol*, 935 A.2d 547 (Pa.Super.2007).

2. Agreements

- a. A marital settlement agreement is enforceable to the same degree and utilizing the same remedies and sanctions, as a court order. 23 Pa.C.S. § 3105(a).
- b. A post-February 1, 1988 marital settlement agreement is enforceable as a court order even if the agreement was not explicitly incorporated or merged into a decree in divorce, and even if the complaint in divorce did not include a claim for equitable distribution. *Annechino v. Joire*, 936 A.2d 121(Pa.Super.2008).
- c. Enforcement of a party's contractual obligations to maintain life insurance policy, satisfy credit card debt, and pay lump sum in exchange for property retained by other party were not barred by four year statute of limitations, as the property settlement agreement created continuing obligations. *Crispo v. Schweitzer Crispo*, 909 A.2d 308 (Pa.Super.2006.)

3. Equitable Reimbursement

- a. Trial court may not garnish proceeds from the sale of property owned jointly by husband and his new wife to collect equitable reimbursement payments owed to former wife. *Johnson v. Johnson*, 908 A.2d 290(Pa.Super.2006).

D. BANKRUPTCY

1. Dischargeability of Equitable Distribution Claims

- a. BAPCA – 2005 Bankruptcy Code Amendments. As a result of the 2005 Amendments to the Bankruptcy Code, property settlement obligations arising in divorce are not dischargeable in Chapter 7 and Chapter 11 bankruptcies. Equitable distribution obligations and support obligations have been

lumped together as high- priority, non-dischargeable “domestic support obligations.” Bankruptcy Code § 1328(a); § 507(a)(i).

- b. Pre-Amendment Law. Pursuant to § 523(a)(15) of the Bankruptcy Code, claims against a debtor in bankruptcy arising from a divorce decree or settlement agreement were non-dischargeable in bankruptcy unless the obligation would create a financial hardship for the debtor or the benefit that the debtor would receive from discharge outweighs the detriment that the non-debtor spouse would suffer. *In re Shreffler*, 319 B.R. 113(Bankr.W.D.Pa.2004).

2018 Tax Law Changes

Tax Changes for Family Lawyers²

I. Changes to Individual Income Taxation

A. Brackets

1. There are still 7
2. Highest tax is 37% versus 39.6%
3. “marriage penalty” is leveled out some – where if you were single you would be in a lower bracket, now, these have brought the MFJ and Single brackets for the same income at a closer level
4. See two charts of side by side
5. Capital Gains bracket changes
 - a) 0% for most of the income below 12% tax bracket
 - b) 15% into the 35% bracket
 - c) 20% for part of the 35% tax bracket and over (used to be just the top bracket)
6. Expires 2025

B. Standard deductions

1. Significant increases - nearly doubled!
2. Brackets
 - a) MFJ and SS - \$24k
 - b) HOH \$18k
 - c) Single \$12k

C. Itemized Deductions

1. Pease limitations to itemized deductions are gone
2. Mortgage Interest Limit
 - a) New indebtedness deduction limited to \$750k

² This outline was updated February 25, 2019. It was prepared by Savran Benson LLP, which reserves the right to update the outline as additional clarification and information on the new tax laws becomes available. Reprinted here with permission of Savran Benson LLP.

- b) No HELOC deductions were part of the original act, however the IRS has since clarified that if they were used as part of the acquisition indebtedness or for major renovations they are still deductible, however they are subject to the total indebtedness above.
 - c) You can have a second home, but can only deduct mortgage interest on houses totaling debt of \$750k.
 - d) May change how individuals feel about the cost of a second home
 - e) May change equity resolution of using equity in house to buy out spouse
 - f) Interest Tracing Rules on LOC still apply?
3. \$10,000 State, Local, and Real Estate Tax Deduction Cap (Yes, Local, State and Real Estate all limited to \$10k COMBINED!)
- a) All brackets except \$5k for MFS

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Tax Changes for Family Lawyers

- b) State reactions
 - 1) CA is trying to make the deduction charity (CA Excellence Fund)
 - 2) NY is suggesting converting the state taxes to employer deductible payroll taxes
 - 3) Likely will affect many in AMT tax and possibly eliminate the need for it for most
 - 4. Charity – will people start giving less and only take the standard deduction?
 - a) Allowed for up to 60% of AGI (previously 50%)
 - b) No deduction allowed for college or university donation made if the donation gives the donor the right to purchase tickets or seating at an athletic event (Previously able to deduct 80% of what was paid).
 - c) May see more donor advised funds to bunch charity which may be a marital asset
 - 5. Medical expense threshold is reduced back to 7.5% (for 2017 and 2018 only)
 - 6. No Miscellaneous Itemized Deductions (Investment fees, Employee Business Expenses, Tax Prep fees)
 - a) Form 2106 is no longer applicable
 - 1) Taxpayer better reducing compensation and have employer pay these expenses although some employers may not get the benefit.
 - b) Schedule E offset for Partners – unclear yet if this is gone or not
 - c) Considerations
 - 1) accounting and lawyer fees taken against business income instead
 - 2) accounting and lawyer fees related to divorce – can any be capitalized against an asset to use as basis for future sale? Need to more specifically track details of tasks
 - 7. Casualty Loss – presidential declared disasters only
 - a) If tax payer has a personal casualty loss gain they may deduct personal casualty losses not attributable to federal declared disaster loss in the amount equal to no more than the personal casualty loss gain.
 - 8. Moving expenses - suspended through tax year 2025 but is still available for members of US Military who move pursuant to a military order.
- D. Dependency Exemptions
- 1. No personal exemptions going forward (suspended to year 2025)
 - 2. No more fights over exemptions, however, HOH and Credits become an issue

Tax Changes for Family Lawyers

E. Credits

1. Child credit – increases to \$2k from \$1k.
2. Rules (age, relationship, support, dependent, citizenship, residence)
 - a) Child would be under 17 years (16 years and younger at the end of the tax year)
 - b) Child must be your son, daughter, stepchild, foster child, brother, sister, stepbrother, stepsister, or a descendant of any of these individuals (grandchild, niece, nephew); adopted child is considered your own child
 - c) Child must not have provided more than half of their own support
 - d) Must be able to claim the child as your dependent (no explanation as to what this is referencing but seems to be the old personal exemption and HOH rules)
 - e) Child must be a U.S Citizen, U.S. National, or U.S. resident alien and you must provide a valid SSN for the child by the tax return due date
 - f) The child must have lived with you for more than half of the tax year (some exceptions apply)
3. Maximum amount refundable is \$1,400 (in prior years this tax was only nonrefundable); this means if there is no tax liability a parent still can get back \$1,400
4. Phaseout substantially increased from \$75,000 to \$200,000 (single filers) and from \$110,000 to \$400,000 (married filing jointly).
 - a) No credit available if MFJ is over \$440k and all others at \$240k
5. Not indexed for inflation
6. Must provide a Social security number for each child to get credit of \$2k (although still eligible for \$500 credit even without social security)
 - a. Will there be abuse of this deduction like what took place on personal exemptions before social security numbers were required? (many pets and fictitious individuals were claimed)
7. Nonchild dependents (i.e. parents or a child over 17)
 6. \$500 nonrefundable credit allowed
8. Form 8332 – still applies
 - b)

F. Child tax Credit vs. HOH vs. Exemptions

1. HOH

- a) You must have paid more than half the cost of keeping up your home for the year
- b) Dependent Child living with you? Must have a qualifying dependent living with you for more than half the year (temporary absences such as school are allowed)
- c) Marital Status?

Tax Changes for Family Lawyers

- 1) Married - must have lived apart for the last 6 months of the year and have a dependent
 - 2) Legally Separated – based on state rules (not available in PA)
 - 3) Divorced – you do not have to have lived apart for the last 6 months of the year
 - d) Allows you to use standard deduction regardless of what your spouse uses; Standard deduction is higher for HOH than single
 - e) Exemptions do not affect this status as you do not have to take an exemption to get it. However, some of the rules are very similar.
- G. Kiddie tax has changed
1. Does not use parents' income but estate/tax rates now on unearned income
 2. No longer waiting to finish parents' return
- H. 529 Plan expansion
1. Now \$10,000 per year can be used for private school
 2. Will this change cause depletion of 529 plans and less willingness to pay for private school in support?
- I. Gift/Estate changes
1. Gift annual exclusion up to \$15,000
 2. Estate tax exemption doubled
 - a) Single up to \$10.98M
 - b) Married up to \$21.96M
 3. Basis step up did not change at date of death (they wanted to eliminate it)
- J. Alimony
1. Payor can no longer deduct alimony in agreements after 12/31/18.
 2. This modifies a rule passed by Congress in 1942
 3. Divorce or separation instrument is defined as; (A) a decree of divorce or separated maintenance or a written instrument incident to such a decree. (B) a written separation agreement. (C) a decree but not (A) requiring a spouse to make payments for the support or maintenance of the other spouse.
 4. Modifications – can still have language if noted as using the old rules, but how will this hold up and is it defined by state on what a modification is?
 1. Any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification
 5. Higher overall taxes for a divorced/divorcing couple.

Tax Changes for Family Lawyers

- a) APL period even more costly.
6. Will it cause problems in negotiations and cause less support? Is it better to reduce by the tax arbitrage?
7. How will states react? Will laws be changed on calculations of support? What is PA doing?
8. No more specific language needed in writing support agreements to ensure the agreement meets IRC Section 71 so that alimony can be deductible.
9. Will there be a rush at the end of 2018 for settlement?
10. What happens if the federal rule changes back to deductible again?
11. No more alimony recapture
12. Allocation of support payments between child support and alimony no longer required.

a. Drafting Clauses

1. Sample Clauses

- a. Current support agreements final
- b. Current APL agreements- any different
- c. Modified agreements after 1/1/19
 - i. modification must expressly provide that the amendments made by code section apply to modifications
- d. New agreements after 1/1/19 – do you address if alimony laws change?

b. Effect of Tax Law on Signed Agreements

1. Pre and Post nups

- a. New ones – make sure you put in language for future changes
- b. How are past ones affected if not in pay status
 - i. Revisit with clients and inform them of how the pre/post nup is affected?

2. What constitutes a “divorce or separation agreement” under the tax code versus legal contracts?

3. What happens if there is a ruling at end of 2018, however it is appealed?

4. At what point in 2018 do you start approaching the case as if there is no alimony.

K. How does this affect support and net asset calculations?

1. May be less willing to pay the house expenses if not receiving a tax benefit

2. Need to understand the tax changes better before applying

a) Overall we are seeing less taxes being paid

b) See chart with sample comparisons of 2017 to 2018 for individuals

Outline updated as of 2/25/19 and subject to further updates as regulations and further guidance are



Tax Changes for Family Lawyers

c) Business calculations are tricky for credits

II. Changes to Business Taxation

A. C Corp Tax rate now 21% when before it was tiered with businesses over \$10M at 35%

B. Passthrough Business Deduction (Also called qualified business income deduction) (See Chart)

1. Deduction is on personal return not on the entity return so each individual will need to do their own calculation

- a) Applied business by business if a personal owns multiple businesses
- b) Below the line deduction – meaning not for AGI but for taxable income (included where itemized/standard deductions are usually taken – replacing personal exemption line)
- c) Amounts will be noted on the K-1 to be used for the calculation

2. Done in lieu of changing the passthrough rates

3. The lawmakers estimate that the top rate would be 29.6% if you were able to use this deduction ($37\% \times 80\% = 29.6\%$)

4. Applies to a Qualified Passthrough (not a C Corp) – where you get a K-1 or report on Schedule C:

- a) Sole Proprietorship
- b) Partnership
- c) LLC
- d) S Corp
- e) Trusts and Grantor Trust income

5. Passthroughs in estates and trusts receive benefits as well

6. Two business type categories that are treated differently after certain income level

- a) Specified Service Business
- b) Other

7. Specified Service Business (SSB) defined as follows

- a) Health (doctors, dentists)
- b) Law
- c) Accounting
- d) Actuarial
- e) Performing arts
- f) Consulting
- g) Athletics
- h) Financial services
- i) Brokerage services
- j) Business in which the principal asset is the reputation or skill of one or more of its employees or owners

Outline updated as of 2/25/19 and subject to further updates as regulations and further guidance are

Tax Changes for Family Lawyers

- k) Businesses involving the performance of services that consist of investing and investment management trading or dealing in securities, partnership interests or commodities.
 - l) Exception and purposely excluded: Engineers and Architects
8. Qualified Business income (QBI) is generally Net income of the business but excludes:
- a) Reasonable compensation in S Corp, which is mandatory
 - b) Guaranteed payments
 - c) Investment Income
9. There are limitations and the purpose is to:
- a) Eliminate SSB deductions if earnings exceed a certain amount
 - b) Restrict the 20% limitation on higher income earnings of other entities
10. General rule: You can reduce taxable income for 20% of QBI but that is only for lower income earners and as mentioned there are limitations
11. Limitation on Deduction means:
- a) Deduction for Lower of
 - 1) 20% of QBI, OR
 - 2) The greater of 50% of Wages or 2.5% of original basis plus 25% of wages
 - b) Limitation for Professional Services- Threshold is 2018 amount. Indexed in 2019.
 - 2) SSB deduction is phased out at *taxable* income of \$415,000 for MFJ and \$207,500 for single
 - i. Phaseout begins at \$315, 000 for MFJ and \$157,500 for single, HOH, and MFS
 - c) Real estate owners will rely on the 2.5% rule since real property rentals do not normally have W-2 wages.
12. How to calculate (see chart for further explanation):
- a) What is the taxable income?
 - 1) Taxable income <\$315k MFJ? (or \$157,500 Single) THEN Deduct 20% of QBI – on all types of businesses
 - 2) Taxable income >\$315k but <\$415k MFJ? (>\$157,500 but <\$207,500?)
 - i. “Other Business”? THEN limitation rule is phased in
 - ii. Specified Service Business?
 - a. Phase out of 20% deduction between \$315k and \$415k income
 - b. Phased in W-2 limitation for the rest
 - 3) Taxable income >\$415k? (>\$207,500)

Tax Changes for Family Lawyers

- i. "Other Business"? THEN limitation rule is in place
- ii. Specified Service Business? THEN No deduction

13. After the deduction amount is calculated, there is one overall limitation that still must be applied. The amount is reduced by the Lesser of:

- a) The combined "qualified business income" of the taxpayer or
- b) 20% of the excess of taxable income minus the sum of any net capital gain

14. Examples

a) Phase out for SSB:

1) Facts

- Single
- Taxable Income = \$200k
- QBI = \$100k
- W2 Wages = \$90k
- Type = SSB

2) Calculate limitation amounts

- $\$200k - 157,500 = 42,500$. Divide by \$50,000 phase out period = 85%
- $100\% - 85\% = 15\% = \text{limitation}$
- $15\% \text{ of } \$100k = \$15k$ and $15\% \text{ of } \$90k = \$13,500$

3) Calculate deduction

- $20\% \times \$15k = \$3k$ while $50\% \text{ of } \$13,500 = \$6,500$
- Answer = \$3k deduction

b) Manufacturing Example within limits with Payroll

1) Facts

- Manufacturing business sole proprietor
- Machines for \$100k purchased and placed in service
- No employees
- Net income = \$375,000

2) Calculation is Lesser of

- Net income = 20% of \$375k = \$75k OR
- Greater of
 - Limitation is greater of 50% of Wages ($0 \times 50\% = 0$) OR the sum of 25% of W-2 wages ($25\% \times 0 = 0$) plus 2.5% of the adjusted bases of the machine immediately after acquisition ($\$100,000 \times 2.5\% = 2,500$).
- The limit is the lower of \$2,500 or \$75,000

Tax Changes for Family Lawyers

3) Therefore \$2,500 is deductible so taxable income is \$372,500

c) Personal Services Example below threshold

1) Facts

- Doctor is sole proprietor and married
- Machines of \$50k purchased and placed in service
- \$75k salary to employees
- Net Income of \$250k

2) Calculation:

- Net income = 20% of \$250k = \$50k
- Stop there because you do not have to do the other calculations!

3) Therefore \$50,000 is deductible so taxable income is \$200,000

C. S-Corp to C-Corp Conversion – will there be a lot?

1. C Corp tax rate (21%), Dividend tax rate (15%), Medicare tax rate (3.8%), Total (39.8%), still higher than highest marginal rate of 37%. No change. Also PA state tax on C corporations is 9.99%.

D. Other Business Changes

1. Interest Expense Limitation – limited to 30% of adjusted income (essentially EBITDA) for all businesses with gross receipts greater than \$25M. Real estate can elect out for less generous depreciation.

- Excess carryover is allowed on personal return with limitations - It is a carryover for 5 years against excess business income but only from that activity. More carryovers to track as assets.
- The provision is turning out to be a nightmare of complexity.

2. Meals and Entertainment

- Entertainment no longer allowed
- Meals for convenience of employer subject to 50% and then in 2026 completely eliminated
- Need to look at K-1 nondeductible expenses more closely for support purposes; business will likely still pay but now may be easier to identify on tax return rather than general ledger
- What does it do to expenses for those in the entertainment industry?

3. Other fringe benefits

- No fringe benefits are allowed as a deduction on the business return
- Incomes on-premises athletic facility, transportation fringe, and any others except if they are included as a taxable fringe benefit to the employee



Tax Changes for Family Lawyers

4. Bonus Depreciation - Applies 100% post 9/27/17 acquisition/placed in service.
Will skew income even more with larger up-front deductions.
 - a) Section 179 property taxpayer may expense increases to 1 million and phase out threshold increase to 2.5 million. Effective for year beginning after 12/31/17
 - b) Removes requirement that original use of the qualified property commences with the tax payer.
 - c) Cost Segregations
 - d) Leasehold Improvements. Still 15 years but new definition on what is included.
5. Excess Employee Compensation – publicly held corporations
 - a) Excess of \$1M not deductible
 - b) Applicable to covered employee
 - 1) Principal executive officer
 - 2) Principal financial officer
 - 3) Next three highest paid officers after the prior two
 - 4) Any person who was a covered employee after tax year 12/31/16
6. Domestic Production deduction was eliminated.
7. Corporate AMT repealed
8. Carried Interest
 - a) Share of the profits of an investment paid to the investment manager in excess of the amount that the manager contributes to the partnership, specifically in alternative investments i.e., private equity and hedge funds. It is a performance fee rewarding the manager for enhancing performance.
 - b) Private equity firms probably not affected as much because they tend to hold onto assets longer. More likely to hit hedge funds or real estate
 - c) 3 Year Hold Period for Long Term Gains for Carried Interest
 - d) IRS Clarification in March stating that S Corps are subject to the holding period as well (previously only partnerships)
9. Net Operating Loss (NOL)
 - a) Carryback election is repealed in 2017 for ALL years going forward
 - b) Automatic carryforward of remaining but only 80% is allowed
 - c) Limit to \$500k (MFJ) and \$250k (Single) per year after netting against current allowable income
 - 1) Even in a year of the company ending
 - 2) Problem in situations where company ends earlier in year and bonuses are paid out.

Outline updated as of 2/25/19 and subject to further updates as regulations and further guidance are

- d) Example:
 - 1) Business current loss passthrough of \$1.25 M
 - 2) Other gross income of \$1.5 M (could be another business, dividends, etc)
 - 3) Net result is taxable income of \$1M, \$500K loss used, \$750K NOL carryover (but only \$600k (80%) is allowed to be used)
 - e) NOLs follow the business owner in division of marital estate
10. Qualified Opportunity Zones

ALIMONY

Alimony

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I. Alimony is:

"An Order for support granted by this or any other state to a spouse or former spouse in conjunction with a Decree granting divorce or annulment." 23 Pa.C.S. §3103. An award of alimony must be consistent with the purpose of the divorce legislation, to "effectuate economic justice between the parties." 23 Pa. C.S. §3102(a)(6).

"Following divorce, alimony provides a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution. Teodorski v. Teodorski, 2004 PA Super 313, 857 A.2d 194, 200 (Pa. Super. 2004) (citation omitted). An award of alimony should be made to either party only if the trial court finds that it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life. Stammerro v. Stammerro, 2005 PA Super 424, 889 A.2d 1251, 1259, Pa. Super. 2005). "The purpose of alimony is not to reward one party and punish the other, but rather to ensure that the reasonable needs of the person who is unable to support herself through appropriate employment are met." Miller v. Miller, 1999 PA Super 347, 744 A.2d 778, 788 (Pa. Super. 1999) (citation omitted).

"Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay." Teodorski 857 A.2d at 200 (citation omitted). An award of alimony may be reversed where there is an apparent abuse of discretion or there is insufficient evidence to support the award. Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995). Balicki v. Balicki, 2010 PA Super 134, 4 A.3d 654, 659 (Pa. 2010)" Kent v. Kent 2011 Pa. Super. 55 (March 18, 2011).

To be distinguished from:

Spousal Support: "Care, maintenance, and financial assistance." 23 Pa. C.S. §3103, 23 Pa. C.S. §4302.

Alimony Pendente Lite: "An Order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding." 23 Pa. C.S. §3103.

Alimony rights are created in the Pennsylvania Divorce Code: "Where a Divorce Decree has been entered, the Court may allow alimony, as it deems reasonable, to either party,

only if it finds alimony is necessary." 23 Pa. C.S. §3701(a). "Pennsylvania Alimony Statute, 23 Pa. C.S. Section 3701 is intended to provide for economic justice according to actual needs and the ability of the parties to pay" Baker v. Baker, 861A.2d 298, (Pa. Super. 2004).

Note that the 1988 amendments to the Divorce Code specifically eliminate any threshold requirement implied by the original legislation and several cases. A spouse does not have to first show need and an inability to support himself or herself to be considered for alimony.

Spousal support guidelines do not set basis for alimony: Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d 1314 (1990).

The claim for alimony must be raised prior to entry of the divorce decree! In Melton v. Melton, 831 A.2d 646 (Pa. Super. 2003), the Superior Court vacated an alimony award to the wife, because she had not petitioned for, or claimed, alimony during the pendency of the divorce proceedings. The Superior Court also held that the trial court lacked the power to grant a claim for alimony *nunc pro tunc*. However, because the trial court had fashioned an economic distribution award relying on alimony, the entire case was remanded for further consideration, but without any provision for alimony. Obviously, the right to alimony may be waived in a premarital agreement. Stackhouse v. Zaretsky 900A.2d 383, (Pa. Super. 2006).

However, in Bingaman v. Bingaman, 980 A.2d 155, (Pa. Super. 2009), the Superior Court vacated a divorce decree because the trial court did not properly preserve alimony.

The final trial court order accepting the Master's Recommendation clearly stated: "The claim for alimony is preserved." However, husband's praecipe to transmit did not list any related claims pending, and the final decree was silent as to the alimony claim. 71 days after the divorce was entered, wife filed to vacate the decree.

Relying on 23 Pa. C.S. Section 3332, which provides that a motion to open or vacate a divorce decree may be filed within five years if extrinsic fraud exists on the face of the record, the Superior Court held that the record clearly showed the preservation of the alimony claim for future review.

II. Purpose of Alimony:

"The Court in ordering alimony shall determine the duration of the Order, which may be for a definite or indefinite period of time which is reasonable under the circumstances." 23 Pa. C.S. §3701(c).

"The purpose of alimony is not to award one party and punish the other, but rather to insure that the reasonable needs of the person who is unable to support himself or

herself through appropriate employment, are met. In determining the nature, amount, duration and manner of all payment of alimony, the court must consider all relevant factors, including those statutorily prescribed for at 23 Pa. C.S. Section 3701. Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay." Isralsky v. Isralsky, 824 A.2d 1178, 1188, (Pa. Super. 2003).

Rehabilitative - provide regular income to a dependent former spouse while he or she obtains skills necessary to obtain employment to support himself or herself. McNulty v. McNulty, 347 Pa. Super. 363, 500 A.2d 876 (1985); Barrett v. Barrett, 418 Pa. Super. 334, 614 A.2d 299 (1992); Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995); Miller v. Miller, 744 A.2d 778 (Pa. Super. 1999).

Permanent -to provide lifelong income to a former spouse who will always be unable support himself or herself following divorce. Terriberry v. Terriberry, 357 Pa. Super. 384, 516 A.2d 33 (1986); Gill v. Gill, 450 Pa. Super. 611, 677 A.2d 1214 (1996) - \$2,700.00 per month until age 65. Morschhauser v. Morschhauser, 357 Pa. Super. 339, 516 A.2d 10 (1986). Schneeman v. Schneeman, 420 Pa. Super. 65, 615 A.2d 1369 (1992); Lawson v. Lawson, 940 A.2d 444, (Pa. Super. 2007). In Smith v. Smith, 904 A.2d 15, (Pa. Super. 2006), wife, age 62, awarded permanent alimony until she reached eligibility to draw upon husband's Social Security.

Compensatory - also known as "equitable reimbursement" to compensate former spouse for his or her contribution to the education or training of the other spouse if there are insufficient assets in equitable distribution to provide economic justice. Bold v. Bold, 524 Pa. 487, 574 A.2d 552 (1990); Hodge v. Hodge, 513 Pa. 264, 520 A.2d 15 (1986) Twilla v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995). Equitable reimbursement can also be applied to equitable distribution in cases where insufficient income exists to fully compensate a spouse for his or her contributions. In Wang v. Feng, 888 A.2d 882, (Pa. Super. 2005) the court awarded wife 100% of the marital estate to reimburse her for the substantial sacrifices she made while husband obtained advanced degrees. The Superior Court in Dalrymple v. Kilishek, 920 A.2d 1275 (Pa. Super. 2007) awarded wife equitable reimbursement payments based on 60% of the value of a marital business dissipated by husband following separation. The Superior Court Opinion does not provide the amount or length of the payments.

The Superior Court has disapproved the use of alimony as a device for funding an insurance policy to protect a spouse's share of a pension divided in equitable distribution. DeMarco v. DeMarco, 787 A.2d 354 (Pa. Super. 2001). The trial court had ordered Husband to Pay Wife \$100 per month alimony for 20 years so that Wife could purchase a life insurance policy on Husband's life, because Husband's pension did not allow a survivor's annuity. The Superior Court considered this a double award, noting that if Husband died toward the end of the 20-year period, Wife would receive a windfall in addition to her share of the monthly pension.

In Pennsylvania, alimony is a secondary economic remedy to be considered after equitable distribution. See Nemoto v. Nemoto, 423 Pa. Super. 269, 620 A.2d 1216 (1993); Grandovic v. Grandovic, 387 Pa. Super. 619, 564 A.2d 960 (1989). Twillia v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995); Moran v. Moran, 839 A.2d 1091 (Pa. Super. 2003). But see Gill v. Gill, 450 Pa. Super. 611, 677 A.2d 1214 (1996) in which the court approved equitable distribution of 38% to wife, who receives \$2,700.00 per month alimony until age 65.

III. Factors considered in awarding alimony:

23 Pa. C.S. §3701(b). The court must explain its award of alimony in light of these factors. See DeMarco, supra., Anderson v. Anderson, 882 A.2d 824 (Pa. Super. 2003).

“(1) The relative earnings and earning capacity of the parties.” In Edelstein v. Edelstein, 399 Pa. Super. 536, 582 A.2d 1074 (1990), the Court approved alimony of \$4,000.00 per month for ten years, based in part on husband's income of \$90,000.00 per month as an ophthalmologist, and wife's complete inability to work. See also Harasym v. Harasym, 418 Pa. Super. 486, 614 A.2d 742 (1992). Wife assigned an earning capacity of \$20,000.00 -

\$25,000.00 per year based on projected earnings as a teacher or secretary. Witcher v. Witcher, 433 Pa. Super. 14, 639 A.2d 1187 (1994). In Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997); husband earned \$40,000.00 per year, wife age 50, \$9,000.00; the court approved alimony of \$400.00 per month until deferred pension distribution begins. Alimony denied in Hicks v. Kubit, 758 A.2d 202 (Pa. Super. 2000): Parties had comparable earning capacities.

“(2) The ages and the physical, mental, and emotional conditions of the parties.” Miller v. Miller, 352 Pa. Super. 432, 508 A.2d 550 (1986), Hicks, supra. “Alimony denied as wife is young and healthy and holds an associates degree” Schenk vs. Schenk, 880 A.2d 633 (Pa. Super. 2005); see also Lawson v. Lawson, supra., wife, age 33, awarded permanent alimony following stroke. Wife awarded alimony until she qualified for social security (11 years) Balicki v. Balicki, 4 A.3rd 654, (Pa. Super. 2010)

“(3) The sources of income of both parties, including but not limited to medical, retirement insurance, or other benefits.” Diamond v. Diamond, 360 Pa. Super. 101, 519 A.2d 1012 (1987), appeal denied 516 Pa. 633, 533 A.2d 92 (1988): Wife denied alimony where she would have \$30,000.00 annual income from equitable distribution award. In Brody v. Brody, 758 A. 2d 1274 (Pa. Super. 2000), the court affirmed the denial of alimony to wife even though husband was an anesthesiologist who grossed over \$400,000.00 per year. In a strange explanation, the court noted that wife was capable of working in her father's business!

“(4) The expectancies and inheritances of the parties.” See Anderson v. Anderson, 822

A. 2d 824 (Pa. Super. 2003) in which the Superior Court approved an alimony award to wife of \$109.62 per week for a period of five years. The court noted that husband stood to inherit a vacation home from his parents. In Gates v. Gates, 933 A.2d 102, Pa. Super. 2007, the court held that the income to be generated from husband's substantial trust fund could be considered in determining the amount of alimony which husband could afford.

"(5) The duration of the marriage." Many cases speak to long-term spouses needing assistance following divorce. See Smith v. Smith, 904 A.2d 15 (Pa. Super 2006), permanent alimony awarded after five-year marriage. 11 years of alimony for 26 years marriage: Balicki v. Balicki 4 A.3d 654 (Pa. Super. 2010). But see Dyer v. Dyer, 370 Pa. Super. 377, 536 A.2d 453 (1988) for alimony in short term marriage. There, husband had lottery winnings income of over \$100,000.00 per year while wife had only Social Security Disability of \$368.00 per month. Alimony denied in Hicks, supra, - four-year marriage; no children of the marriage. Alimony also denied in Schenk v. Schenk, 880 A.2d 633 (Pa. Super. 2005) – three-year marriage, wife received APL for two years. In Gates, \$4,000.00 per month awarded after 10-year marriage. See Teodorski v. Teodorski, 857 A.2d 194 (Pa. Super. 2004), for a good review of length of marriage cases. In Lawson, supra, permanent alimony awarded to disabled wife even though marriage lasted only four years. two-year marriage – no alimony: Biese v. Biese, 979 A.2d 892 (Pa. Super. 2009).

"(6) The contribution by one party to the education, training, or increased earning power of the other party." See Bold, Hodge, supra. In Baker v. Baker, 861 A.2d 298 (Pa. Super. 2004) the court approved alimony of \$400.00 per month for three years to wife who made significant contributions while husband attended veterinary school.

"(7) The extent to which the earning power, expenses, or financial obligations of a party will be affectedly reason of serving as the custodian of a minor child." Perlberger v. Perlberger, 426 Pa. Super. 245, 626 A.2d 1186 (1993): Alimony of \$30,420.00 per year for ten years awarded to wife who was custodian of child in second grade; child will be a senior in high school at termination of alimony. By contrast, husband did not have to pay alimony to wife in Teodorski v. Teodorski, 857 A.2d 194 (Pa. Super. 2004) because he had custody of the parties' two minor children. Even though father had primary residential custody of the parties' child, the fact that mother would be watching the child during the day was considered as a significant factor. See Gates, supra.

"(8) The standard of living of the parties established during the marriage." Edelstein, supra also states that the recipient spouse should enjoy the lifestyle that a substantial income can provide - the court will not allow the independent spouse to merely accumulate assets at the expense of the dependent spouse: "The standard of living to which she is entitled is one reasonably supportable by the income and station in life of

the parties, irrespective of the frugal inclination of the husband." See also Perlberger and Dyer, supra, and Sutcliffe v. Sutcliffe, 339 Pa. Super. 523,489 A.2d 764 (1985) aff'd and remanded, 515 Pa. Super. 39, 528 A.2d 1318 (1986). But contrast with Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d 1314 (1990) - alimony of \$100.00 per week replaced spousal support of \$501.00 per week: no obligation on part of supporting spouse to see that the dependant spouse's lifestyle remains unchanged after divorce. Also, husband's post divorce alimony payments will not affect his ability to maintain a standard of living maintained during marriage: Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997).

"(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment. " This factor is among the most important! The modern trend is for alimony to provide a transition cushion for the dependent spouse during retraining. In Barrett v. Barrett, supra; the Superior Court disapproved alimony of \$400.00 per month for ten years, stating that a college education can be completed in four years. See also Ruth v. Ruth, 316 Pa. Super. 282, 462 A.2d 1351 (1983) -\$400.00 per month for two years; Bickley v. Bickley, 301 Pa. Super. 396, 447 A.2d 1025 (1982) -two years alimony so that wife could finish graduate school. Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995) - two years alimony to pursue retraining -Practice Pointer – make sure at trial you establish your client's future plans and all costs of returning to school. Call as witnesses vocational rehabilitation experts and college admissions officers.

In Smith v. Smith, 904 A.2d 15, (Pa. Super. 2006), wife, who had tenth grade education, and worked part time as a K-Mart cashier earning \$6.50 per hour, awarded permanent alimony.

"(10) The relative assets and liabilities of the parties." This section coordinates with factor 16, infra. In Perlberger, supra, the court noted that husband's other post divorce expenses such as child support of \$33,000.00 per year, college costs of \$24,000.00 per year and life insurance premiums are important considerations.

"(11) The property brought into the marriage by either party."

"(12) The contribution of a spouse as a homemaker." Another important factor - courts are quick to recognize that the spouse who stays at home should be afforded reasonable opportunity to start a new career. In Baker v. Baker, 425 Pa. Super. 237, 624 A.2d 655 (1993), the Superior Court reversed the denial of alimony to wife who spent 30 years as homemaker. See also Schneeman, supra; Mazzei v. Mazzei, 331 Pa. Super. 432,480 A.2d 1111 (1984) Geyer v. Geyer, 310 Pa. Super. 456, 456 A.2d 1025 (1983), Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997).

"(13) The relative needs of the parties." In McCabe v. McCabe, 374 Pa. Super. 451, 543 A.2d 558 (1988), appeal denied 520 Pa. 606, 553 A.2d 968 (1988). Wife awarded

\$65,000.00 per year based on the needs created by the parties' lifestyle during the marriage. (Equitable distribution award reversed by the Pennsylvania Supreme Court, 525 Pa. 25, 575 A.2d 87 (1990). In Middelton v. Middelton, 812 A.2d 1241 (Pa. Super. 2002), an award of alimony for six months was approved to supplement wife's income while the marital residence was listed for sale. The Superior Court in Dalrymple v. Kilishek, supra, specifically approved the reduction of alimony from \$666.00 per month as recommended by the Master, to \$152.00 per month as issued by the trial court following review. The Superior Court rejected the concept that alimony is to be used to equalize the parties' monthly incomes, but must be considered only to supplement a recipient's income to meet reasonable needs.

Alimony reduced by trial court because wife overstated needs for clothing and IRA contribution. Wife had received APL for three years during the pendency of the divorce, which presumably provided funds for her work wardrobe, and the award to her of almost \$170,000.00 in retirement assets negated her need for additional retirement funds. Balicki v. Balicki, supra.

"(14) The marital misconduct of either of the parties during the marriage." The marital misconduct of either of the parties from the date of final separation shall not be considered by the Court in its determinations relative to alimony; except that the Court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under Section 6102 (relating to definitions).

In Miller v. Miller, 744 A.2d 778 (Pa. Super. 1999) the court found that wife's attraction to a friend could be construed as minimal marital misconduct, but not significant enough to warrant consideration by the court.

"(15) The Federal, State and local tax ramifications of the alimony award." Balicki v. Balicki, 4 A.3d 654 (Pa. Super. 2010), Cunningham v. Cunningham, 378 Pa. Super. 280, 548 A.2d 611 (1988). Although decided before the 1988 amendments, Cunningham states that depreciation and depletion will be added back in considering income for alimony. But see Labar v. Labar, 731 A.2d 1252 (Pa. 1999).

Also, the tax consequences of the alimony award must be taken into consideration. "we hold that an amount of an alimony award should be established taking into consideration the actual post-tax net income of the payor under the award. This actual post-tax net income would be determined by taking into consideration the decreased tax liability due to the tax deductible alimony. In coming to this conclusion, we are simply applying well established law: '... it is clear that a spouse's present expendable income, potential earning power, and property and financial resources rather than his net income, determine the reasonableness of a support order.' Commonwealth ex rel. Re David v. David, 380 A.2d 398 at 400, 251 Pa. Super.

103 (Pa. Super. 1977). "" as cited in Diament v. Diament, 816 A.2d 256 (Pa. Super. 2003) at 280, 281. See also Smith v. Smith, 904 A.2d 15 (Pa. Super. 2006).

Danger: The Superior Court has also held that an alimony award must be fashioned according to the Internal Revenue Code and IRS regulations if it is intended by the court to be tax deductible to the payor and taxable income to the payee. In Isralsky v. Isralsky, 824 A.2d 1178 (Pa. Super. 2003), trial court had ordered husband to pay alimony until the youngest child graduated from high school or turned 18. This provision clearly violates Internal Revenue Code Section 71 which states that to be deductible, the payment must not be contingent upon an event associated with a child (such as attaining a specific age, marrying, dieing, or leaving school). The court remanded the alimony award back for consideration for amendment to comply with the deductibility requirements. See also Gates, supra.

"(16) Whether the party seeking alimony lacks sufficient property, including but not limited to property distributed under Chapter 35, to provide for the parties' reasonable needs." Alimony awarded where assets insufficient: Endy v. Endy, 412 Pa. Super. 398, 603 A.2d 641 (1992). Baker, supra. Distribution of substantial marital assets justifies lower or shorter alimony award: Perlberger, supra, (Mrs. Perlberger received 2/3 of marital estate); Harasym, supra. Diamond, supra.; O'Callaghan v. O'Callaghan, 530 Pa. 176, 607 A.2d 735 (1992). In Tagnani v. Tagnani, 439 Pa. Super. 596, 654 A.2d 1136 (1995) the Superior Court approved the trial court's reduction of alimony from \$2,000.00 per month recommended by the Master to \$750.00 per month based on wife's equitable distribution award. In Cohenour v. Cohenour, the wife received permanent alimony of \$400.00 per month in addition to 50% of a deferred pension and 70% of remaining marital assets.

Alimony denied in Brody, supra, because wife received 55% of marital estate.

"(17) Whether the party seeking alimony is incapable of self-support through appropriate employment." In Lawson, supra, husband ordered to pay permanent alimony of \$500.00 per month, even though wife, because of disability, was entitled to complete care through public assistance.

IV. Cohabitation as bar to alimony:

"No Petitioner shall be entitled to receive any award of alimony where such Petitioner has entered into cohabitation with a person of the opposite sex who is not a member of the Petitioner's immediate family within the degrees of consanguinity subsequent to the divorce pursuant to which alimony being sought." Pa. C.S. §3706.

Moran v. Moran, 839 A.2d 1091 (2003), provides the classic example of cohabitation as a bar to alimony. At trial, husband presented the testimony of two private investigators to prove that wife had cohabitated subsequent to the parties' separation.

Wife admitted the post separation affair, but argued that the relationship had terminated prior to the Master's recommendation. The court refused to accept wife's theory that she became re-eligible for alimony by terminating the cohabitation prior to the economic trial.

The court held in Lobaugh v. Lobaugh, 753 A.2d 839 (Pa. Super. 2000), that wife's relationship in her home with a companion did constitute cohabitation even though she asserted she was merely providing a home for a sick friend and his son. The evidence showed that the wife and her friend shared the same bedroom and that the friend had made financial contribution to the home. This case also seems to hold that once cohabitation occurs, all future alimony is waived, even if the cohabitation ceases.

This prohibition is not as absolute as it seems! First, it's always possible for the parties to agree that cohabitation will not bar continuation of alimony – for example there may be important tax reasons and other trade-offs. Also, unless cohabitation termination is specifically written into a Marital Settlement Agreement alimony will not terminate regardless of cohabitation. See Van Kirk v. Van Kirk, 336 Pa. Super. 502, 485 A.2d 1194 (1984), Woodings v. Woodings, 411 Pa. Super. 406, 601 A.2d 854 (1992); Brower v. Brower, 413 Pa. Super. 48, 604 A.2d 726 (1992). McMahan v. McMahan 417 Pa. Super. 592, 612 A.2d 1360 (1992). Jackson v. Culp, 400 Pa. Super. 519, 583 A.2d 1236 (1990).

In Miller v. Miller, 352 Pa. Super. 432, 508 A.2d 550 (1986), the Court found that former wife was not cohabitating so as to terminate alimony although she admitted regular weekend sexual liaisons with her boyfriend. They maintained separated bank accounts, both had separate residences, and they did not commingle income or assets.

Also, see Twilla v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995) in which the Superior court approves a monthly award under the theory "equitable reimbursement" where the recipient admits cohabitation.

And in a modern twist to the cohabitation theme, the Superior Court has held that cohabitation with a member of the same sex can cause alimony to terminate if the agreement is ambiguous. Parol evidence is admissible to determine the intentions of the parties. Kripp v. Kripp, 578 Pa. 82, 849 A.2d 1159 (2004). Practice Pointer: Be sure to add same sex termination language to your agreement!

v. Is it really alimony?

Generally, alimony takes the form of a periodic payment from one former spouse to another, such as a fixed amount per month. However, parties can label almost any type of financial assistance, such as a mortgage payment, alimony. Consider in negotiations the tax, bankruptcy, and enforcement advantages and disadvantages of using the term alimony to describe the assignment of a continuing obligation.

But beware!

In D'Huy v. D'Huy, 390 Pa. Super. 509, 568 A.2d 1289 (1990), the Superior Court held that a periodic payment over 10 years, specifically designated as alimony by the parties in a Marital Settlement Agreement, was really a long-term buyout of property interests. The Court held that the payment would therefore not terminate upon remarriage of the recipient. See also Kohn v. Kohn, 242 Pa. Super. 435, 364 A.2d 350 (1976).

In Twilla, supra, the Superior Court found that the trial court intended the \$200.00 per monthly payments to be equitable reimbursement, and therefore, although labeled alimony, the payments would not be terminated under 23 Pa. C.S. §3706. Similarly, a periodic payment made to former spouse may not be considered as alimony if funds are intended to be applied to marital bills assumed by the recipient. In Zullo v. Zullo, 395 Pa. Super. 113, 576 A.2d 1070 (1990), the Court said that it would ignore artificial labels such as alimony, and look at the true reason for the payments in deciding termination and enforceability. In Johnson v. Johnson, 864 A.2d 1224 (Pa. Super. 2004), the trial court was chastised for labeling payments as alimony when the stream was clearly intended as equitable reimbursement. Husband was denied special relief to modify payments.

But Wagoner v. Wagoner, 538 Pa. 265, 648 A.2d 299 (1994) points out that "alimony" can also be reduced when it is a substitute for equitable distribution, if the distribution scheme becomes inoperative by change in circumstances.

At the time of divorce, Mr. Wagoner was making \$5,000.00 per month as a Ground Flight Engineer for Pan Am. He was ordered to pay \$1,000.00 per month alimony for 6 years. Nine months later Pan Am was out of business and Mr. Wagoner's income dropped to \$300.00 per week unemployment and \$750.00 per month retirement. He was 57 years old with arthritis in both knees and no chance of better employment. The Superior Court affirmed the trial court's refusal to a decrease under Section 3701, remarking that the alimony was part of overall scheme of distribution.

The Supreme Court reversed, holding that the refusal to allow modification was unreasonable and an abuse of discretion. The court characterized the payments as an offset to husband's pension, as alimony in the nature of additional financial assistance to wife. Since distribution and alimony had been decided only nine months before, and the pension still remained intact, the court remanded the whole case back for re-examination. The Supreme Court also noted that husband should have proceeded with a Petition for Specific Relief under Pa. R.C.P. 1920.43 rather than a Petition to Modify Alimony.

The equitable distribution to alimony theory was specifically rejected by the Superior Court in In Re Trust Agreement of John H. Ware, 814 A.2d 725, (Pa. Super. 2002). In this case, Mr. Ware argued that his commitment under a property settlement agreement should be considered alimony because it would be reduced by 25% should his ex-wife die. Mr. Ware was attempting to force a trust fund to make the payments for him as support, because the principal of the trust could not be invaded for ordinary debts. The court specifically refused

to re-label the obligation as alimony, in part because the property settlement agreement specifically stated that the obligation was equitable distribution.

VI. Enforcement and collectability of alimony:

Alimony which is part of a Marital Settlement Agreement may be enforced by a suit on the underlying contract, or by applying 23 Pa. C.S. §3105:

"(a) Enforcement -A party to an agreement regarding matters within the jurisdiction of the Court under this act, whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this act to enforce the agreement has been an order of the court except as provided to the contrary in the agreement. "

It then follows that the remedies afforded in 23 Pa. C.S. §3502(e) are available:

"(e) Powers of the Court - if, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this section, or with the terms of an agreement as entered into between the parties, after hearing, the court may, in addition to any other remedy available under this act, in order to effect compliance with its order:

- (1) enter judgment;
- (2) authorize the taking and seizure of the goods and chattels and collection of rents and profits of the real and personal, tangible and intangible property of the party;
- (3) award interest on unpaid installments;
- (4) order and direct the transfer or sale of any property required in order to compel with the court's order;
- (5) require security to insure future payments in compliance with the court's order; See Nucci v. Nucci 355 Pa. Super. 549, 513 A.2d 1059 (1986).
- (6) issue attachment proceedings, directed to the Sheriff or other proper officer or the county, directing that the person named as having failed to comply with the court order be brought before the court, at such time as the court may direct. If the court finds, after hearing, that the person willfully failed to comply with the court order, it may deem the person in civil contempt of court and, in its discretion, make an appropriate order, including, but not limited to, commitment of the

person to the county jail for a period not to exceed six months;

- (7) award counsel fees and costs;
- (8) attach wages; or
- (9) find the party in contempt, however, wage attachment and contempt are not permitted to enforce an alimony provision of a pre-1988 Marital Settlement Agreement unless specifically authorized in the Agreement. Other enforcement remedies of Section 3105(a) are available. Sorace v. Sorace, 440 Pa. Super. 75, 655 A.2d 125 (1995). In Espenshade v. Espenshade, 729 A.2d 1239 (Pa. Super. 1999) husband held in contempt even though he and wife had a sham addendum to their agreement to decrease the alimony payment so that husband could finance a house. The Court will look beyond the actions of the parties to determine their true intent.

In Glynn v. Glynn, 789 A.2d 359 (Pa. Super. 2001) the court approved wage attachment, assessment of attorney fees and costs, with interest, and incarceration with work release as contempt sanctions. See also Fouk v. Fouk 789 A.2d 254 (Pa. Super. 2001). The court can even go as far as to attach non-marital assets and income as a contempt sanction for failure to pay alimony: Richardson v. Richardson 774 A.2d 1267 (Pa. Super. 2001). Compare with Polito v. Polito, 440 Pa. Super. 328, 655 A.2d 587 (1995). The Politos entered into a Marital Settlement Agreement in Pennsylvania in January 1981 providing that \$225.00 per week spousal support would be automatically converted to alimony upon entry of a Divorce Decree. Wife obtained a Dominican Republic divorce on February 16, 1981, which included language that the Marital Agreement survived the divorce, and the parties were ordered to comply with it. Mr. Polito paid alimony for over ten years, then stopped claiming that since the Dominican Republic doesn't recognize alimony, he was under no obligation. The Superior Court disagreed, holding that since the Agreement was made in Pennsylvania, and is unambiguous, the alimony is binding and enforceable under Section 3105 through application of Section 3104.

Tuthill v. Tuthill, 763 A.2d 417 (Pa. Super. 2001) held that alimony would continue under the terms of the parties' Marital Settlement Agreement at a monthly payment rather than as a lump sum payment. There, husband had elected to withdraw his pension rather than receive it in periodic payments. Wife was entitled only to the 20% of the projected monthly payment, rather than a 20% share of the lump sum.

But see Dudas v. Pietzykowski, 578 Pa. 20, 849 A.2d 852 (2004) in which the Supreme Court disapproved the escrow of husband's entire worker's compensation compromise for future due alimony, even though husband had a previous history of arrears. The Supreme Court first noted that since worker's compensation is a substitute for wages, only 50% could be attached under 23 Pa. C.S. Section 3703(c). Also, since husband's Social Security Disability could be attached for alimony, there was no need for additional security.

§3703 Enforcement of arrearages

"If, at any time, a party is in arrears in the payment of alimony or alimony pendente lite as provided for in sections 3701 and 3702 after hearing, the court may, in order to effect payment of the arrearages:

- (1) enter judgment; see Stewart v. Stewart, 743 A.2d 955 (Pa. Super. 1999) - alimony judgment not restricted to statute of limitation for recording under 42 Pa.C.S. §5525 (4 years under action upon foreign judgment) or 42 Pa. C.S. §4306 (Uniform Enforcement of Judgment Act).

In Bonfiglio v. Bonfiglio, 781 A.2d 1197 (Pa. Super. 2001) the court confirmed that in addition to UEFJA, alimony arrears may be entered as a judgment under 23 Pa.C.S. §3705. There is no statute of limitations applicable under either act to register an alimony arrears judgment! Note: The court in Bonfiglio also implied that a judgment remedy may be available under the Uniform Interstate Family Support Act (UIFSA) 23 Pa.C.S. §7601, et seq.;

- (2) authorize the taking and seizure of the goods and chattels and collection of the rents and profits of the real estate of the party;
- (3) attach no more than 50% of the wages of the party; see Dudas v. Pietzykowski, supra.
- (4) award interest on unpaid installments; the Court in Purdy v. Purdy, 715 A.2d 473 (Pa. Super. 1998) ruled that pre-judgment interest on unpaid alimony is discretionary with the Court under this section, but a matter of right if sought by separate suit on the contract.
- (5) Require security to insure future payments;
- (6) Issue attachment proceedings, directed to the sheriff or other property officer of the county, directing that the person named as having failed to comply with the court order be brought before the court at such time as the court may direct. If the court finds, after hearing that said person willfully failed to comply with the court order, it may deem said person in civil contempt of court and in its discretion make an appropriate order including, but not limited to, commitment of said person in civil contempt of court and in its discretion make an appropriate order including, but not limited to, commitment of said person to the county jail for a period not to exceed six months.
- (7) award counsel fees and costs;

In Nika v. Nika, 382 Pa. Super. 551, 555 A.2d 1337 (1989), the Superior Court approved offset from future equitable distribution due husband to create an alimony credit for wife. Husband had previously ignored financial obligations, and wife could not afford continuing litigation.

See also 23 Pa. C.S. §3701(f): "Whenever the Court shall approve an agreement for the payment of alimony voluntarily entered into between the parties, such agreements shall be deemed the Order of the Court and may be enforced as provided in §3703.

The Legislature also built in a method for payment of alimony through the Domestic Relations Office:

§3704 Payment of support, alimony, and alimony pendente lite

"When so ordered by the court, all payments of child and spousal support, alimony or alimony pendente lite, shall be made to the domestic relations section of the court which issued the order or such section of the court at the residence of the party entitled to receive such an award. The domestic relations section shall keep an accurate record of all such payments and shall notify the court immediately whenever any person subject to payment order is 30 days in arrears in such payment so that appropriate action may be taken to enforce the order of the court. It shall be the duty of the domestic relations section to distribute such payments to the person entitled thereto as soon as possible after receipt."

Whenever necessary or appropriate, the court can upon motion, treat the alimony order like a child support order. Contempt of court can follow any non-compliance. Alimony which has been ordered following a full trial is similarly enforceable under Sections 3502(e); 3703 and 3704.

VII. Modification of alimony

23 Pa. C.S. §3701(e) provides:

"Any order (author's emphasis) entered pursuant to this section is subject to further order of the court upon changed circumstances of either party or substantial and continuing nature whereupon such order may be modified, suspended, terminated, re-instituted, or a new order made. Any such further order shall apply only to payment accruing subsequent to the petition for the requested relief. "

Once alimony is ordered by court, it is always subject to review Soncini v. Soncini, 417 Pa. Super. 393, 612 A.2d 998 (1992) is illustrative. The trial court originally awarded wife one-year alimony of \$475 .00 to assist her in taking care of the parties' incurably ill daughter. However, alimony was later continued indefinitely because of wife's substantial involvement

in daughter's

unique medical care and daughter's deterioration. (Author's note: Shouldn't this have been handled in child support?)

Nemoto, supra, shows that courts can be very creative in alimony modification. There, wife is permitted to seek an increase if her earnings decrease or if her needs increase, but not if husband's income increases. See also Wagoner, supra.

The court in McFadden v. McFadden 389 Pa. Super. 506,563 A.2d 180, (1989) affirms the concept that alimony is modifiable, but creates a heavy burden to prove substantial and continuing change in circumstance. Husband's retirement did not constitute such a change when he knew of retirement 5 years earlier when negotiating divorce settlement.

In Gates v. Gates, 933 A.2d 102, (Pa. Super. 2007) the Superior Court approved the trial court's reservation of jurisdiction to modify an alimony award to reflect the actual income produced by the husband's trust fund. It is uncertain that this dictum would allow for annual review, or an increase or decrease, based on the performance of the investments.

However, note Lee v. Lee, 352 Pa. Super. 241, 507 A.2d 862 (1986). The court reversed the trial court's refusal to permit a payor husband to seek an alimony decrease. The parties had entered into an Agreement in 1980 for the husband to pay \$450.00 per month alimony. But in 1984 husband's income was reduced from \$2,000.00 per month to \$1,100.00 because of forced retirement.

Section 3701(e) applies only to court ordered alimony. 23 Pa. C.S. §3105(c): "In the absence of a specific provision to the contrary appearing in the Agreement, a provision regarding the disposition of existing property rights and interest between the parties, alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court. " But, language in a Marital Settlement Agreement allowing modification will be honored Chamberlin v. Chamberlin, 693 A.2d 1368 (Pa. Super. 1997).

But, in Stammerro v. Stammerro, 889 A.2d 1251, (Pa. Super. 2005), the court denied husband's attempt to decrease alimony although he alleged his annual income fell below a threshold of \$200,000.00 permitting review. The court held that because husband had voluntarily left a job paying over \$300,000.00, he could not take advantage of the opener in the agreement. Parties are bound by a duty of good faith in negotiations, and the court imposed the doctrine of necessary implication as a means of avoiding an unjust result. Here, husband claimed his annual income was \$84,000.00, but he listed yearly living expenses of over \$210,000.00. The Superior Court also approved the trial court's language that tax definitions of income are not controlling to determine income under the Divorce Code. See Darby v. Darby, 686 A.2d 1346 (Pa. Super. 1996).

Incarceration, for any reason, is not a basis for modification of alimony Willoughby v.

Willoughby, 862 A.2d 654 (Pa. Super. 2004). The court should schedule a hearing when obligor is released to determine repayments due.

Only an alimony order that has been docketed in the Prothonotary's office can be subject to a review for modification. Halpern v. Halpern, 926 A.2d 444, (Pa. Super. 2007)

VIII. Termination of alimony

The line of cases from Van Kirk v. Van Kirk, supra (see section IV - Cohabitation) establishes two distinct methods for termination of alimony: For alimony provided in a Marital Settlement Agreement, only the language in the Agreement will determine grounds for termination. However, the termination sections of the Divorce Code do apply to those alimony orders entered by court following full litigation, whether or not the language is specifically included in the Order. Gaydos v. Gaydos, Pa. Super., 693 A.2d 1368 (1997).

Cohabitation: See 23 Pa. C.S. §3706, supra.

Remarriage: ". . . remarriage of the party receiving alimony shall terminate the award of alimony." 23 Pa. C.S. §3701(e).

Death: "Upon the death of the payee party, the right to receive alimony pursuant to this chapter shall cease. Upon the death of the payor party, the obligation to pay alimony shall cease unless otherwise indicated in an agreement between the parties or an Order of Court." 23 Pa. C.S. §3707.

In Little v. Little, 441 Pa. Super. 185, 657 A.2d 12 (1995) the parties' Marital Settlement Agreement clearly stated that alimony would continue only while wife was a full time student. Husband was permitted to terminate alimony when wife entered inpatient alcohol rehabilitation program. The court went on to hold that the parties' prior modification of the agreement did not prospectively cause waiver of the termination provision where the contract was unambiguous.

Consider when negotiating alimony: Is your recipient client going to marry soon? Is the payor elderly or sick? If alimony is being used as a distribution tool, make sure that it remains payable following recipient's death, and have payments secured by judgments and insurance. The court can, but is not required to, order life insurance to secure alimony. Balicki v. Balicki, 4 A.3d 654, (Pa. Super. 2010).

IX. General tax aspects of divorce

The 2018 Tax Cuts and Jobs Act (TCJA) eliminates the deduction by the payor and inclusion by the payee for federal income tax purposes of alimony payments under a divorce or

separation instrument executed after 12/31/18 or a modification after that date if the modification specifically provides that the TCJA now applies. The balance of this section remains applicable to alimony payments under a divorce or separation instrument executed prior to 01/01/19.

See also: *Slicing Up the Pie, Property Distribution in Pennsylvania*: published 2016, 3rd Edition, PBI Press Book #7582.

Internal Revenue Code Section 71 provides that alimony payments are income to the recipient and are deductible to the payor if certain requirements are met:

- (a) The payment is in cash;
- (b) The payment is made under a divorce or separation instrument by or on behalf of a spouse or former spouse;
- (c) The Agreement itself does not provide contrary tax treatment;
- (d) The parties must be in separate households;
- (e) Payments terminate at the death of the payee;
- (f) The parties do not file joint tax returns with each other; Types of

Payments: Cash or checks directly to payee; Cash payments to a third party made for the benefit of the payee, if pursuant to the divorce or separation instrument, i.e. rent, health insurance premiums, income.

Payment will not be considered alimony for tax purposes if tied to contingencies such as the age of the child. For example, the service will consider that part of an alimony payment as child support if payment is reduced when the child reaches age 18.

X. Recapture of front loaded alimony

A property distribution buyout may be couched as alimony for tax or other advantages. For example, the parties agree that the payee will receive three annual payments, with substantially larger payments due the first two years.

Section 71 (c) of the Internal Revenue Code requires the payor to include in his or her gross income in the third post-separation year the excess payments made the first and

second year.

Generally, the first post-separation year payments can exceed the second year by not more than \$7,500.00, and the second year can exceed the third year payment by no more than \$15,000.00.

Recapture is not required if alimony terminates because of the death of either party, or remarriage of payee before the end of the third post-separation year.

How to Complete Recapture

- Step 1: Did the alimony paid in the second year exceed the sum of the alimony paid in the third year post-separation year plus \$15,000.00?
- Step 2: Did the alimony paid in the first post-separation year exceed the sum of the average of the second year payments, reduced by any second year excess payment, and alimony paid in the third year plus \$15,000.00?
- Step 3: Add the sums of Step 1 and Step 2. This is the excess alimony payment which will be included as income to payor in third post-separation year, and will be deducted from income of payee in third post-separation year.

xi. Alimony trust

Section 682 of the Internal Revenue Code provides that the payee beneficiary of the income of a trust created by a divorce or separation instrument will be taxed under the same terms as the beneficiary of a regular trust. Generally, the recipient must include the payments as income, and the spouse who created the trust will not be entitled to a deduction.

SELECTED MATERIALS FROM

***DRAFTING
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Property Distribution Problem No. 4-Real Estate

Transfer of Title

Husband is transferring his interest in the former marital home to Wife. The home is subject to a lien for the first mortgage. Husband is going to buy a new house and, therefore, wants his name removed from the mortgage on the marital home so that he can qualify for a mortgage. Husband is also concerned that Wife will not pay the mortgage, bills and related expenses on the former marital home after the divorce. Review the proposed clause, keeping in mind you want to protect your client, the husband.

Sample Clause:

Husband and Wife hold title as tenants by the entireties to the premises identified as 412 Sawmill Road, Narberth, Pennsylvania (the "marital residence"). The parties agree as follows with respect to the marital residence:

- a. On the date that Wife satisfies, assumes, and/or refinances the outstanding mortgage against the marital residence, Husband shall deliver to Wife a warranty deed in the form attached as Exhibit "N" to this Agreement, conveying to Wife all of his right, title, and interest in and to the marital residence. Thereafter, Wife shall be the sole owner of the marital residence and shall be permitted to record that deed and take any other action with respect thereto that she deems appropriate.
- b. Commencing on the execution date of this Agreement, and without regard to when bills for such items are incurred, received or due, Wife shall be solely responsible for all past, present and future costs or liabilities associated with or attributable to maintaining the marital residence (except as provided herein), including, but not limited to, all real estate taxes, water and sewer rents, gas, electric and telephone service, homeowners insurance, and gardening expenses and repairs, and Wife shall keep Husband and his successors, assigns, heirs, executors, and administrators indemnified and held harmless from any liability, cost or expenses, including attorneys' fees, which are incurred in connection with such maintenance, cost, and expenses or resulting from Wife's ownership interest in the marital residence. Within 30 days from the date of this Agreement, the parties shall transfer any and all utilities that exist in Husband's name, or joint names, to Wife's name alone.
- c. There is presently outstanding against the marital residence a mortgage in favor of Bush Savings & Loan Association ("mortgage"). Commencing on the date of execution of this agreement, Wife shall be solely responsible for the timely payment of all past, present, and future principal, interest and other fees due under the mortgage.
- d. Within ninety (90) days of the execution of this Agreement Husband and Wife agree to take all steps necessary to have the mortgage transferred to Wife's name alone, provided, however, that Bush Savings & Loan Association agrees to such a change. Wife shall be solely responsible for any

and all fees and/or costs associated with having the mortgage transferred to Wife's name alone or an assumption package.

- e. In the event that Husband should incur any cost, expense or liability in connection with the mortgage due to any action or inaction of Wife, Husband shall have the option, in addition to any other rights or remedies provided by this Agreement, or by law, to set off such cost, expense or liability against any amount owed to Wife pursuant to this agreement.
- f. Wife shall indemnify and hold Husband harmless from any liability, cost or expense, including attorneys' fees, incurred subsequent to the execution date of this Agreement in connection with any expense required to be made by Wife including, but not necessarily limited to, the mortgage, property taxes, and insurance with respect to the aforesaid premises, and in the event that Wife should die and, at that time, there should remain any outstanding balance on the mortgage, it shall be Wife's estate's obligation to promptly satisfy the mortgage.
- g. Wife shall keep and maintain an adequate amount of insurance on her life in a face amount of not less than the then remaining mortgage balance for so long as she owns the marital residence and a mortgage thereon exists in the joint names of Husband and Wife.
- h. In the event that Wife fails to refinance, assume, or satisfy the mortgage, within the stated period of time, the marital residence shall be sold through a realtor of the parties' mutual selection. The initial listing price shall be established based upon the recommendation of the realtor. Wife shall be entitled to receive all net proceeds from the sale of the marital residence after the costs of sale and any liens thereon are satisfied. Both parties shall cooperate with the timely execution of all documents needed to list, market, and sell the marital residence, if necessary.

Points to Consider:

1. *If Husband cannot be released from the mortgage, how can we make it possible for him to get a mortgage on a new residence that he wishes to purchase after his divorce?*

Comment:

Include a clause that requires Wife to cooperate by providing or signing any necessary documents required by Husband's new mortgage company or financial institution. These documents would verify Wife's liability on the mortgage on the former marital residence. They would also verify that under the property settlement agreement she will indemnify Husband from liability on the mortgage on the marital residence.

Points to Consider:

2. *Is the transfer of title to the marital residence from one spouse to the other a condition that may permit the financial institution to exercise the "due on sale" clause of the mortgage*

documents?

Comment:

Title 12 U.S.C. § 1701 J-3(d) and 12 C.F.R. § 591.5 provide that the "due on sale clause" of a residential mortgage may not be exercised upon the transfer of property to a spouse or children, or upon the transfer to a spouse resulting from a divorce decree, separation or property settlement agreement. This federal law preempts any state law to the contrary.

Points to Consider:

- 3. How do we protect Husband in the event that Wife defaults on the mortgage and the equity in the residence is insufficient, which therefore results in a deficiency judgment?*

Comment:

A release and an indemnification agreement should be included in the property settlement agreement. However, realistically, unless Wife has other property or assets with which to satisfy the deficiency judgment, Husband may be responsible to the extent that Wife is unable to satisfy this judgment.

Points to Consider:

- 4. How can you protect Wife from liability for judgments against Husband that were recorded against the residence transferred to her by him pursuant to the property settlement agreement?*

Comment:

A provision as follows should be inserted into the property settlement agreement:

"Husband warrants that there are no liens or encumbrances against the marital residence, with the exception of the existing first mortgage held by (financial institution) in the approximate amount of (balance). In the event Husband has failed to disclose a lien or encumbrance in violation of this paragraph, he shall immediately take all necessary steps in order to remove any such lien, judgment or encumbrance against the aforesaid premises and shall indemnify and hold Wife harmless with respect thereto. Husband shall be responsible to and pay Wife for any costs or expenses, including attorneys' fees, penalties or any other expense of whatever nature, whether direct or indirect incurred by Wife as a result of Husband's failure to remove said liens or encumbrances at any default in payment thereon."

Points to Consider:

5. *Should Wife have done a title search on the premises prior to the execution of the property settlement agreement?*

Comment:

The appropriateness of a title search on any real estate depends on the facts of the particular case. The title search may be done at any point in time from the outset to the conclusion of the case. If there is any question whatsoever regarding title to any real estate being transferred, a title search should be done at approximately the time that the property settlement agreements are being executed and a follow-up title search must be done 30 days after the execution of the property settlement agreement. Under appropriate circumstances, the actual title search documents can be attached as a schedule to the property settlement agreement.

Points to Consider:

6. *What if the spouse keeping the residence does not qualify for a refinance loan to release the other spouse from the mortgage?*

Comment:

With the state of today's economy, it is becoming increasingly difficult for a dependent spouse staying in the marital residence to qualify to re-finance and remove the departing spouse from the mortgage or home equity line of credit. In these situations, be sure to include language in the agreement that the dependent spouse remaining in the house will use his/her "best efforts" to refinance the loan. The departing spouse may agree to remain on the mortgage, subject to an indemnification clause, so long as this does not prevent the departing spouse from qualifying for a mortgage in his/her own name. In most instances, it is prudent to provide that in the event the spouse obligated to pay the joint mortgage defaults, the departing spouse has the option to force the sale of the residence in order to protect his/her credit.

Points to Consider:

7. *What if the spouse keeping the residence desires to "assume" the mortgage rather than refinance or satisfy the marital residence mortgage?*

Comment:

Depending on the parties' marital residence mortgage interest rate, and the fees associated with refinancing the mortgage, the party retaining the marital residence may desire to "assume" the parties' current mortgage, rather than refinance to a new loan. Some mortgage lenders permit a joint borrower to individually "assume" the mortgage if the borrower meets the appropriate lending credentials. If a party desires to "assume" the mortgage, the mortgage lender should be contacted prior to preparing the Property Settlement Agreement to determine what steps are

required to assume the mortgage, and what language, if any, is required to be stated in the Property Settlement Agreement.

Points to Consider:

8. *Would it be best to protect the party relinquishing ownership of the real estate by providing that the party relinquishing ownership will sign a deed contemporaneously with signing the Postnuptial Agreement or within ten (10) days after having been requested to do so?*

Comment:

It is best to have the deed signed at the time of the Agreement. In any event, the deed will not be released just yet. Counsel for the relinquishing party will then hold the deed in escrow until the party assuming the mortgage or removing the other party's name as an obligor from the mortgage has scheduled settlement to do so. At that time, the deed will be delivered either to the settlement agent, mortgage company, or counsel for the receiving party, on the express condition the deed may not be recorded until the relinquishing party -is no longer on obligor on the mortgage.

Property Distribution Problem No. 5-Sale of Real Estate

Wife and Husband have agreed that the marital residence is to be sold and the net proceeds divided equally. The parties have never agreed on anything and you have to draft appropriate clauses to anticipate they will not agree on the listing or sale price, the definition of net proceeds, the responsibility for expenses of the residence or the payment of capital gains tax or any other issues that may apply. Comment on the proposed Sample Clause below.

Sample Clause:

a. The said premises shall be immediately listed for sale at a price acceptable to both parties provided that in the event they are unable to agree upon a price, then the price shall be fixed by a licensed real estate broker selected by both parties. In the event the parties are unable to select a real estate broker, they each shall select a broker who, in turn, shall select a third broker who shall determine the price. The broker shall also advise the parties whether the listing price shall be lowered in the event the premises are not sold within a reasonable period of time. The parties shall cooperate and agree to lower the listing price until the price has been lowered by 30% of the original listing price. Thereafter, the price shall not be lowered unless by agreement of the parties or order of court.

b. Upon the sale of the premises, the net proceeds, after deduction of all expenses, fees and taxes in connection with the sale, and after satisfaction of the lien of the existing first mortgage, shall be divided equally between the parties.

c. In the event that the premises need improvements, whether capital or not, during the pendency of sale, the parties hereby stipulate and agree to pay and be equally responsible for one-half of the cost of those improvements. If one party advances that cost for the other, that party shall be reimbursed from the other party's portion of the net proceeds of sale.

d. Until the premises are sold, but in no event later than one year after execution of this Agreement, Husband agrees to pay all taxes or assessments imposed by any township, county, or other taxing authority connected to said premises, which shall be due or become due. Husband shall pay these taxes or assessments when due. Wife agrees to pay, until the premises are sold, but in no event later than one year after execution of this Agreement, all mortgage payments, insurance, utilities, heating expenses and maintenance expenses with respect to the premises.

e. The parties hereby stipulate and agree that they both shall pay and be equally responsible for one-half of the net capital gains tax attributable to said sale. They shall cooperate and provide each other with all necessary documents in order to establish the effective tax basis for the premises. If one party fails to pay the portion of the capital gains tax, and the other is assessed any portion of the capital gains tax attributable to the party who failed to pay, that party who failed to pay shall indemnify the other with respect to the capital gains tax payment, including any necessary

attorneys' fees in order collect this.

Points to Consider:

1. *What if the parties cannot agree on a listing price?*

Comment:

The agreement should provide for this contingency. If parties cannot agree, the appraised value, or 10% above the appraised value, can be set forth as the initial listing price. An alternative would be, as in the Sample Clause, to provide that each party selects an agent (i.e., licensed real estate broker) who then selects a qualified third party to set the listing price. Another alternative is to allow each party to obtain their own appraisal of the property, and the initial listing price will be based on the average of the parties' appraisals.

Points to Consider:

2. *What can be done to prevent a spouse vetoing a sale if a valid offer is made on the property?*

Comment:

A self-executing provision can be inserted in the agreement, requiring both parties to cooperate in the sale of the premises if a valid qualified offer to purchase is received in writing at a given percentage (e.g., 90 percent) of the current listing price. Modifications of this clause could be made depending on the length of time that the property is being marketed. For example, if the property does not sell for a year, the agreement can provide that the listing price is automatically reduced by a certain percentage (e.g., 10 percent) for every six months that the property is not sold, downward to a final reduction to 70 percent of the original listing price.

Points to Consider:

3. *In most instances, you will be asked to oversee the sale of the former marital home or other real estate. It is advisable to have a checklist available to provide for contingencies that may arise prior to settlement and finalization of the sale of the real estate. Prepare such a checklist.*

Comment:

1. Title search
2. Liabilities and debt verification:
 - a. mortgage; payoff letter
 - b. home equity loan or second mortgage; payoff letter

- c. judgments or other liens; payoff letter
 - d. utilities (telephone, gas, electric, water and sewer)
 - e. miscellaneous (landscaping, trash removal, etc.)
- 3. Verification of satisfaction of judgments, liens or debts.
- 4. Selection of broker
 - a. exclusivity
 - b. appraisals
 - c. determination of listing and/or sales price
 - d. duration of listing agreement
- 5. Improvements
 - a. capital (roof, tuck-pointing, painting, etc.)
 - b. cosmetic
 - c. agreement of parties
 - d. executory clause for decision
 - e. selection of contractor
 - f. responsibility of payment
- 6. Allocation and responsibility for household payments
 - a. mortgage
 - b. utilities
 - c. taxes
 - d. insurance
 - e. maintenance
- 7. Division of proceeds
- 8. Settlement procedures
- 9. Real Estate Power of attorney and Revocation of Real Estate Power of Attorney
- 10. Tax information/basis
 - a. verification and documents
 - b. allocation of capital gains

11. Indemnifications and releases

12. Insurance

Points to Consider:

4. *What other contingencies should be resolved regarding the sale of real estate?*

Comment:

Review the checklist set forth above, which itemizes many contingencies that should be resolved by the property settlement agreement. Other contingencies might include nonpayment of the mortgage, deficiency judgments, lack of adequate insurance, capital improvements, maintenance, cosmetic improvements, etc. Consider also the possibility that the spouse remaining in the house refuses to vacate as the settlement date for the house sale approaches. You may want to state in the Agreement that if ejectment is required, the spouse who is out of the house shall automatically receive an additional percentage of the net proceeds of sale plus additional damages.

Points to Consider:

5. *What if one party determines that the premises need improvements during the pendency of the sale and the other party does not agree?*

Comment:

A provision can be inserted in the agreement that states if the parties cannot agree on whether a particular improvement is necessary, it shall be determined by the parties' licensed real estate broker or the parties may agree to submit the issue to binding arbitration.

Retirement and Employment Benefits Problem No. 2 - Defined Contribution Plans

Harry and Sally have been married for twenty years but have now decided to call it quits and split everything 50-50. Harry's 401(k) plan at ABC Corporation shows a balance of \$100,000 on December 31, 2013, the date of their separation.

Sample Clauses:

- A. Sally shall receive 50 percent of Harry's 401(k).
- B. Pursuant to a Qualified Domestic Relations Order that the parties shall cause to be entered within thirty days hereof, Sally shall receive the sum of \$50,000 from Harry's 401(k) account at ABC Corporation.
- C. The sum of \$50,0000 and Actual interest and dividends earned on this sum from December 31, 2013, that the said funds are actually segregated to Sally as Alternate Payee and carried, in her name, on the Book of the ABC 401(k) Plan, shall be assigned to Sally via tax free rollover pursuant to a Qualified Domestic Relations Order which shall be entered within thirty days hereof. Harry, as participant, shall be awarded the remainder of the 401(k) account balance together with all interest and dividends earned thereon.
- D. The sum of \$50,000, plus actual growth, interest and dividends earned or less any actual loss in value from December 31, 2013, to the date that said funds are actually segregated to Sally as Alternate Payee and assigned to Sally via tax-free rollover pursuant to a Qualified Domestic Relations Order which shall be entered within thirty days of re-approval by the Plan Administrator. Harry, as participant, shall be awarded the 401(k) account balance together with all interest and dividends earned thereon.

Points to Consider:

1. *If you represent Harry is A, a good option? Option B?*
2. *If you represent Sally, who 'just wants \$50,000' from Harry's retirement, how do you advise her?*

Comment:

A 401(k) plan is one form of defined contribution plan that is a qualified plan under ERISA subject to tax-free transfer to a divorced spouse under the Retirement Equity Act. Defined contribution plans have individual accounts for each employee participant. In a defined contribution plan, the contribution is based on contributions by the employee and (sometimes) employer-matching contribution.

A QDRO must specify the amount or percentage of the participant's benefit that is to be paid to the alternate payee as of a specified valuation date or the manner in which such amount or percent is to be determined. ERISA § 206(d)(3)(c)(ii).

Clause A is dangerously simplistic and invites further dispute, if not litigation, between the parties. The clause must either specify an amount or the manner in which an amount can be determined, for example fifty percent as of a specific date.

Clause B is better in that it specifies an exact amount. If the account has increased in value from December 31, 2013, due to interest and/or dividends, Sally has lost out. However, on the other hand, if the account has declined, she wins.

Clause C takes care of the interest and dividend issue. Clause C also specifies that the balance of the account after the assignment of Sally's interest is Harry's.

Clause D attempts to handle both the possibility of loss to the account as well as gain. Obviously, the preference between C and D would depend upon which client you represent.

Points to Consider:

3. *What if the defined contribution account assets consisted of stock in different companies purchased at different times? Can you simply look at the market value at the time of division and then divide the account on specific stock?*

Comment:

The issue of various investments is raised with defined contribution investment accounts. In such circumstances, the agreement often contains a provision to the effect that the transfer of the stock to the alternate payee will be made in such manner as to allocate the various investments between the parties equally or in such manner that is consistent with the agreed distribution.

Points to Consider:

4. *How would you approach the situation where the defined contribution account is not entirely vested? What if there are after-tax contributions to the retirement savings?*

Comment:

The impact of vesting is initially an issue for negotiation. In some cases, it appears certain that the participant will continue in employment long enough for the benefit to become entirely vested. The participant's counsel will nonetheless seek to discount the value of the account for this reason. In the alternative, a QDRO can make provision for the assignment of the full account value when vested.

Pre-and post-tax contributions should be allocated in the same percentages as the allocation of the plan assets. In dividing such account, post-tax contributions will not be taxed on withdrawal.

Points to Consider:

5. *Does Wife have the option to keep her 401(k) assets in ABC Corporation investments? Can you avoid a QDRO with some plans?*

Comment:

The Wife may choose to use a QDRO to set up a new "account" within the auspices of the 401(k) Plan at ABC Corporation or she may wish to use a "rollover IRA" to separate the assets from the 401(k) Plan. Either vehicle will preserve the assets' status as tax-free transfer to a retirement account. Some defined contribution retirement accounts, such as Individual Retirement Accounts, government plans and some union plans, are not governed by ERISA and, as a result, do not involve the entry of a QDRO in order to effectuate a rollover. And some 401(k) Plans have developed a preferred QDRO form to aid in drafting and pre-approval. It is important to research such issues before you get to the point of negotiating a settlement agreement to understand what steps are required to allocate and transfer retirement savings.

Retirement and Employment Benefits Problem No. 3 - Defined Benefit Plans

You negotiated a settlement in a case where the opposing party has a defined benefit pension through his employment. The settlement calls for the parties to divide each asset in the estate equally. As you begin to prepare the settlement agreement, you review the most recent annual benefit statement (2013) for husband's pension, which provides the following information: husband's date of birth - July 1, 1965; his date of hire - September 1, 1990; and projected monthly benefit at normal retirement (age 65) - \$5,000.00 per month.

From your file, you know that the parties married June 1, 1990 and Wife's date of birth is May 23, 1969. The parties separated on September 4, 2010. At the time of the parties' separation, Husband had accrued a monthly pension benefit of \$4,000 per month if paid at age 65, normal retirement.

Sample Clauses:

- A. The parties acknowledge husband is entitled to pension benefits through his present employment. The parties shall enter into a Qualified Domestic Relations Order assigning to Wife a retirement benefit of \$2,500.00 per month upon husband's retirement.
- B. The parties acknowledge husband is entitled to pension benefits through his employment. The parties shall enter into a Qualified Domestic Relations Order assigning to wife 50 percent of that portion of husband's benefit accrued through September 4, 2010.
- C. Wife shall receive 50 percent of the marital portion of husband's pension by way of a Qualified Domestic Relations Order, which will provide the following:
1. Said marital portion shall be determined by utilizing an appropriate coverture fraction as defined hereinafter and shall be calculated with reference to husband's final average salary as of the date of separation.
 2. The coverture fraction is a fraction with a value of less than or equal to one. The numerator is the amount of husband's service from the date of hire, September 1, 1990, to the date of separation, September 4, 2010. The denominator is the total amount of husband's service as of the date of separation.
 3. The portion awarded to wife is 50 percent of the marital component of husband's monthly benefit as described herein subject to such actuarial adjustments as might be necessary based upon wife's age, sex, benefit form selected, or the date upon which she elects to put the plan in to pay status.
 4. Husband is awarded the remaining 50 percent of the marital

property component, as defined herein, as well as all non-marital portions. Wife hereby waives, relinquishes and releases any right, title, claim or interest in and to said amounts. The terms of the QDRO shall be consistent with the terms herein and consistent with the draft attached hereto as Exhibit A and incorporated herein by reference thereto.

D. Wife shall receive 50 percent of the marital portion of husband's pension by way of a Qualified Domestic Relations Order, which will provide the following:

1. Said marital portion shall be determined by using an appropriate coverture fraction as defined hereinafter and shall be calculated with respect to husband's final average salary as of the date of his retirement.
2. The coverture fraction is a fraction with a value less than or equal to one. The numerator is the amount of husband's SERS from the date of hire, September 1, 1990, to the date of separation, September 4, 2010. The denominator is the total amount of husband's service as of the effective date of his retirement.
3. The portion awarded to wife is 50 percent of the marital component of husband's monthly benefit as described herein subject to such actuarial adjustments as might be necessary based upon wife's age, sex, benefit, form selected, or the date upon which she elects to put the plan in to pay status.
4. Husband is awarded the remaining 50 percent of the marital property component, as defined herein, as well as all non-marital portions. Wife hereby waives, relinquishes and releases any and all right, title, claim or interest in and to said amounts. The terms of the QDRO shall be consistent with the terms herein and consistent with the draft attached hereto as Exhibit A and incorporated herein by reference thereto.

Points to Consider:

What actual benefits are intended to be assigned? Which clauses benefit Husband; Wife?

Comment:

A person who has entitlements to a defined benefit plan, i.e., a pension, does not have a set of funds set aside and segregated for his or her benefit by the employer (this is unlike a defined contribution plan that has a defined dollar amount in retirement savings at any point in time). Instead, a defined benefit pension is funded by a pool of funds that the employer projects will be available at some point in the future to provide monthly benefits to retirees. It is a promise to pay

a monthly amount until the retirement or death of the retiree. In this sense, defined benefit plan is stated as an amount payable for the life time of the participant. Such benefits are calculated pursuant to a specific formula adopted by the plan; such formulas include many factors including years of service and compensation.

Sample Clause A does not actually facilitate the agreement reached by the parties. The employer has projected that husband will be eligible for a monthly benefit of \$5,000.00 as of his normal retirement age, age 65. This benefit, however, not only includes the 20 years of marital service but an additional 20 years of projected non-marital service. \$5,000.00 per month is not the benefit that accrued as of the parties' separation. As of separation, husband had accrued a monthly benefit of \$2,500.00 (i.e., one half of the projected amount based upon 20 years of service out of a projected 40 years of total service). Sample Clause A would award wife substantially more than what she bargained for and give husband significantly less than what he bargained for.

Sample Clause B addresses the problems raised in Sample Clause A by expressly providing that what the wife is entitled to receive is 50 percent of the marital portion of husband's accrued benefit as of separation. While Sample Clause B corrects the problem attendant in Sample Clause A, this paragraph benefits husband by not making any provisions for any passive increases to the accrued benefit that might inure to husband's benefit.

Sample Clauses C & D, while similar, differ on a significant point. Sample Clause C provides that the calculation of the benefit with respect to husband's final average salary is cutoff as of the date of separation. This option was used by some courts prior to the 2005 amendments to the Divorce Code. Prior to the 2005 amendments, an Order similar to Clause C meant an alternate payee would not benefit from passive increases to the participant's benefit that accrued as a result of increases in salary. Sample Clause D reflects the Divorce Code provisions after the 2005 amendments as the benefit is calculated with consideration to husband's final average salary as of the date he retires. Both Sample Clauses C and D provide that a draft QDRO will be attached to the agreement and incorporated by reference. It is good practice to have the QDRO attached insuring that the terms of the QDRO are consistent with the terms of the agreement. Further, it facilitates prompt submission of the proposed QDRO to the Plan Administrator.

Other Points to Consider:

2. *How does Wife assure Wife receives benefits if husband dies before he retires?*
3. *What about early retirement incentives?*
4. *Can Wife be named as a survivor beneficiary if she is no longer a spouse?*

Consider the following additional clauses:

E. The proposed QDRO specifically provides that Husband agrees to name wife as an irrevocable pre-retirement death beneficiary to the extent of her interest in husband's pension provided for under this agreement. Within 30 days of execution of this agreement, husband agrees to take all steps necessary to name wife as an irrevocable pre-retirement death beneficiary to the extent of her interest.

F. The proposed QDRO specifically provides that if husband elects early retirement and there is an early retirement incentive beyond that which is presently available under the plan, wife shall be entitled to the same pro-rata share of the marital portion of any early retirement incentive that might become available.

Comment:

If the participant spouse has yet to retire at the time of settlement and the Plan allows a pre-retirement death benefit to a spouse or a designated person, the ex-wife should be named as a pre-retirement death beneficiary so she is treated as "surviving spouse" under ERISA. It is important for the practitioner to thoroughly review retirement plans and understand the options that are available. Some plans allow an alternate payee to receive a "separate interest" carved out for his or her benefit, which is separate and distinct from the participant's interest.

The advocate for this Wife negotiating pension benefits, should address a potential for the participant retiring early and sharing in early retirement incentives. If the incentives are awarded post-divorce, there may be a dispute as to whether those are marital.

If Wife is named survivor beneficiary, this will reduce Husband's lifetime pension benefit. Wife will be receiving an asset to be charged to her in equitable distribution. If the two values are added, they will equal the value of the pension without a designated survivor benefit.

Further Points to Consider:

5. *What about civil service pensions where the participant does not contribute to social security?*
6. *What if the pension plan is not an ERISA plan?*

Comment:

In *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. Super. 1990), the Superior Court held that, when utilizing an immediate offset of pension benefits, the part of a civil service pension that is considered "in lieu of" social security is exempted from equitable distribution must be exempted from the marital estate. While it behooves practitioners to implore the services of an expert actuary in valuing pension benefits, it is critical to utilize the services of an expert when you are dealing with civil service pensions. Further, it is important for the practitioner to note that non ERISA plans permit the participant to change beneficiary designations without the consent of the spouse. If you represent the dependent spouse in cases involving non ERISA pension plans, it is critical to obtain confirmation of the beneficiary designation early in the case and take the steps to ensure those designations are not changed before the case is resolved. At the time of the Agreement, the agreed changes to the beneficiary will usually be upheld by the Plan if Husband fails to follow through with the Plan as provided.

Points to Consider:

7. *How do you protect Wife's interest prior to the entry of the QDRO?*
8. *Can the Agreement protect Wife if a QDRO is not finalized before Husband's death?*

Comment:

Foremost, when representing the spouse who is receiving monies by way of QDRO, it is optimum to ensure the QDRO is approved by the plan administrator and entered by the Court before the parties divorce. Otherwise a divorce occurs, the participant spouse can change a beneficiary designation. If the spouse remarries, benefits will be paid in accordance with the existing designation irrespective of any settlement agreement. See, e.g., *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3rd Cir. 2005). If work isn't done properly, here are some possible outcomes:

1. Dealing with a poorly drafted QDRO that does not effectuate the intent of the parties - see *Hayword v. Hayword*, 808 A.2d 232 (Pa. Super. 2002) allowing a QDRO that had been entered six years earlier to be modified on the basis of extraordinary circumstances, in the form of a fatal defect of record, where QDRO contained an improper coverture fraction

2. Subsequent modification of an order to make it "qualified" under ERISA - see *Lowenschuss v. Lowenschuss*, 683 A.2d 1214 (Pa. Super. 1996).

3. Failure to prepare a QDRO - see *Prol v. Prol*, 935 A.2d 547 (Pa. Super. 2007). Finding the record did not support a forfeiture of retirement benefits awarded where record did not show wife failed to substantially comply with the directive to prepare a QDRO.

Finally, language that the employed spouse's estate is required to fulfill the obligations under the agreement becomes key language to create a fair result to the survivor.

Retirement Benefits Problem No. 4 - Court's Right to Amend QDRO

You realize that your agreement in the Jones case needs additional language calling for the retention of jurisdiction by the Court, to permit any necessary amendments to the proposed QDRO if the Plan Administrator for Wife's pension finds any problem with your proposed order.

Sample Clauses:

A It is intended that the Order to be entered pursuant to this agreement assigning 50 percent of the EFG pension plan to the Husband qualify as a Qualified Domestic Relations Order under the provisions of the Retirement Equity Act. Such Order shall therefore contain provision expressly reserving to the Court jurisdiction to amend such Order as might be necessary to establish or maintain its status as a Qualified Domestic Relations Order under the provision of said law, the Employees Retirement Income Security Act and Retirement Equity Act of the Internal Revenue Code.

B. The parties agree that their mutual intent is to provide Husband (as alternate payee) with a retirement payment that fairly represents his marital share of the retirement benefit under the EFG pension plan as defined herein. If any order submitted to the administrator of a retirement plan pursuant to this agreement is held not to be a qualified domestic relations order within the meaning of IRC § 414(:p), the parties agree that such order shall expressly grant continuing jurisdiction to the Court to permit such modification and/or amendment as is necessary to qualify the order as a Qualified Domestic Relations Order that reflects the parties' intent, said modification order to be entered *nunc pro tune* if appropriate. In the event that the order does not qualify as a QDRO or a court declines to assume jurisdiction to modify the same, the parties agree to submit any dispute which they may have regarding the question of how to provide wife with a payment that fairly represents the equivalent of the marital share of the retirement benefits as defined herein to binding arbitration under the procedures established by the American Arbitration Association. The parties expressly acknowledge that the obligation set forth in this Agreement shall be binding upon the estate of the participant in the event that retirement benefits assigned to the alternate payee under this Agreement cannot be paid due to the failure to qualify such order.

Points to consider:

1. *What other provision might be made to protect against the possibility that the alternate payee might not receive the benefit contemplated by the agreement?*

Comment:

It is essential that any agreement or QDRO make provision for the retention of jurisdiction by the entering court to permit amendment or modification of the order as necessary. But see *Stockton v. Stockton*, 698 A.2d 1334 (Pa. Super. 1997), where the court affirmed the dismissal of a petition to modify a QDRO brought more than 30 days after entry of the QDRO, citing 23 Pa. C.S.A. § 3332.

Clause A simply makes provision for the retention of jurisdiction. Clause B goes beyond this and provides an alternate procedure if the court declines to amend or modify the order to establish the Qualified status of a proposed QDRO.

Query: Should the agreement contain a provision under Divorce Code § 3105(c) expressly permitting modification in the event that any qualification problems cannot be overcome?

Points to Consider:

2. *What about counsel fees incurred to secure qualification?*

Comment:

Consideration may also be given to the possibility that the participant spouse be less than cooperative in following through with the implementation of the QDRO provisions. To protect against this, special provision may be made for counsel fees and expenses or other sanctions. If the Plan Administrator is unresponsive, do you want the Agreement to allocate the legal fees for completion of the QDRO between the parties disproportionately? Equally? Consider which part is hurt by delay.

Retirement Benefits Problem No. 5 - State Employment Retirement Plans

You represent a client who is employed by the Commonwealth of Pennsylvania and participates in the State Employment Retirement System ("SERS"). Wife and Husband have agreed as part of their overall settlement that Husband will receive 50 percent of the marital portion of Wife's total SERS benefits. Wife was 25 at the time of employment (and she was 24 at the time the parties married a year before the start of employment). The parties were married 20 years before separating; they separated three years ago; Wife is five years younger than Husband.

Sample Clauses:

- A. With respect to Wife's SERS benefits with the Commonwealth of Pennsylvania, the parties agree Husband shall receive 50 percent of the monthly annuity Wife receives at the time of retirement.
- B. With respect to Wife's SERS benefits with the Commonwealth of Pennsylvania, Husband shall receive by way of Domestic Relations Order 50 percent of that portion of Wife's monthly annuity accrued through separation.
- C. The parties agree as follows with respect to Wife's SERS benefits with the Commonwealth of Pennsylvania:
 - 1. Husband shall receive, pursuant to Domestic Relations Order, the terms of which shall be consistent with the draft DRO attached hereto as Exhibit A and incorporated herein by reference thereto, 50 percent of the marital portion of Wife's SERS interest. Said marital portion shall be determined by utilizing an appropriate coverture fraction as defined hereinafter and shall be calculated with reference to Wife's final average salary as of the date of her retirement.
 - 2. The coverture fraction is the fraction with a value of less than or equal to one. The numerator is the amount of Wife's service as defined by SERS from the date of marriage to the date of separation. The denominator is the total amount of Wife's service, as defined by SERS, as of the effective date of Wife's retirement.
 - 3. Husband shall receive 50 percent of Wife's marital portion of accumulated contributions and interest as of separation

plus accrued interest thereon at 4% per annum (or such other interest rate that SERS may subsequently utilize prescribe by law) from the date of separation until the date Wife retires and Husband receives his portion of the contributions. Wife shall withdraw her accumulated contributions and interest at the time of retirement if then permitted by SERS.

4. Wife agrees to name Husband as an irrevocable pre-retirement death beneficiary to the extent of his interest in Wife's SERS pension provided for under this agreement. Within 30 days of execution of this agreement, Wife agrees to take all steps necessary to name Husband as an irrevocable pre-retirement death beneficiary to the extent of his interest. In the event Husband predeceases Wife, any contingent beneficiary interest on his behalf shall revert back to Wife.

Points to Consider:

1. *What benefit do you intend to assign?*

Comments:

State Retirement Benefits (i.e., SERS and PSERS), (as well as many union or government plans), are non ERISA pension plans. SERS and PSERS plans are actually "hybrid plans" as they combine elements of defined contribution plans and defined benefit plans. Employees contribute monies throughout their employment, similar to a 401(k) plan, and those contributions accrue statutory interest. Sample Clause C assumes the statutory interest rate is 4 percent. Additionally, when the participant retires, and he or she had sufficient years of employment, the participant is eligible for a monthly annuity. At retirement, employees are permitted to withdraw their accumulated contributions and interest in a lump sum or leave their contributions in and have them considered as part of their monthly annuity.

Sample Clause A is silent as to Wife's accumulated contributions and interest; all that is provided is that Husband receive 50 percent of the monthly annuity Wife will receive. Not only does such a clause deprive Husband of a substantial marital component of Wife's SERS benefits, but it also prejudices Wife in a sense that Husband's entitlement is not limited to 50 percent of the marital component of the annuity. Sample Clause B corrects the latter problem but is still insufficient to correct the former problem.

Sample Clause C addresses both the contributions and interest and the annuity component. Furthermore, the language specifically defines the coverture fraction and further affords Husband pre-retirement death protection.

Points to Consider:

2. *What if Husband protests the reversion to Wife?*

Comments:

If Husband argues it's unfair that Wife gets Husband's benefits if Husband predeceases her (i.e. before Husband receives the benefits of the divorce settlement), Wife may be willing to agree that those reverted after-tax benefits will be passed along to the parties' children. Funds should be reserved for taxes owed by Wife.

