Only the Strong Survive: The Treatment of Survivorship Interests in Divorce

by Jonathan W. Wolfe and Christopher McGann

Mrs. Smith has retained representation in her divorce from her husband. She is a 60-year-old retired teacher who is in good health. Her husband is 58 and is also in good health. At the initial consultation, Mrs. Smith explains that her pension is her most valuable asset. She also explains that five years ago she and her husband elected a survivorship interest on her pension naming her husband as the beneficiary. The effect of this election is that pension payments received by Mrs. Smith are reduced; however, in the event of her death, payments would continue to be made to her husband until his death. These payments to her husband will be made regardless of whether the parties are married at the time of Mrs. Smith's death. Mrs. Smith would like to understand how her pension, and specifically Mr. Smith's survivorship interest, will be treated in the divorce.

The following day, Mr. Anderson, an 80-year-old retired firefighter, suffering from a host of medical conditions, including emphysema, type 2 diabetes, lymphoma and stage 1A pancreatic cancer, seeks representation. Mr. Anderson also has a pension in pay status, and his 56-year-old wife, who is a fitness coach and participates in three marathons per year, is the surviving beneficiary on the pension. She will continue to be a beneficiary after his death, notwithstanding the parties' divorce, and her status cannot be revoked or modified. Mr. Anderson wants to know how a court would handle his pension and whether, and if so how, the survivorship benefit would be taken into account. He indicates that his pension payments have been reduced by several hundred dollars each month, and he believes that his wife—if she is anything like her mother—will live forever and benefit greatly from the survivorship election.

What guidance can be given to Mrs. Smith and Mr. Anderson? While New Jersey courts have long-since recognized that pensions are assets to be equitably divided, the courts have not yet determined whether, and how, to treat survivorship interests. The good news for Mr. Smith and Mr. Anderson is that the majority of other states that have addressed the issue have concluded that survivorship benefits—even if subject to forfeiture and speculative—should be considered as part of the division of marital property.

New Jersey Treatment of Pensions in Divorce

In New Jersey, a pension is an asset subject to equitable distribution, regardless of whether it is vested or unvested at the time of divorce.[1] As stated by the Supreme Court, "the concept of vesting should probably find no significant place in the developing law of equitable distribution...These now customary usages of the concept of vesting are in no way relevant to the question of effecting an equitable distribution...."[2]

In *McGrew*, at the time of the parties' divorce hearing, the husband's pension had vested and, although he had chosen to do so at the time, he had the ability to elect to start receiving payments immediately.[3] In *Kikkert v. Kikkert*, the appellate court held that a vested pension from which the husband would start receiving payments in nine years was an asset subject to distribution.[4] The court in *Whitfield* held that a non-vested pension is includable in the equitable distribution analysis.[5] There, the husband's pension would vest after 20 years of employment; however, the divorce proceedings occurred four years prior to that time.[6]

Underpinning the above holdings was the determination by each court that the applicable pension benefits, regardless of their status at the time of divorce, had been "legally and beneficially" acquired during the marriage.[7] As stated by the *Stern* Court, the court's inquiry should focus on "whether rights or benefits were *acquired* by the parties or either of them during the marriage, rather than on whether they were vested."[8] That determination is the touchstone for includability in the equitable distribution analysis. "The includability of property in the marital estate does not depend on when, during the marriage, the acquisition took place...[but] depends on the nature

of the interest and how it was earned."[9]

Like other forms of deferred income, pensions are "the result of direct or indirect efforts expended by one or both parties to the marriage—it is additional compensation for services rendered for the employer and a right acquired during the marriage."[10] Parties that contribute to pensions during a marriage undoubtedly expect to have the right to future enjoyment of the pension payments so long as the pensioner survives.[11]

The courts have employed three approaches to equitably distribute pension benefits in divorce: 1) a present-value offset distribution; 2) a deferred-distribution; and 3) a partial deferred-distribution award.[12] Regardless of the approach taken, only the "portion of a pension legally or beneficially acquired by either party during marital coverture is subject to equitable distribution."[13] To determine this marital component, the courts employ a coverture fraction.[14] The fraction reflects the relationship between the credits earned during the marriage and total credits earned, including those earned prior to and after the marriage.[15] The application of a coverture fraction is designed to ensure that the equitable distribution includes only that portion of the pension earned during the "shared enterprise" of the parties' marriage.[16]

The question now becomes will a court *also* take into consideration a pension survivorship interest payable to the surviving spouse, which is similarly based on efforts of the spouses during the marriage.[17] Can that election be valued similar to a pension payment, and how should it affect the equitable distribution analysis? While the results are not uniform (and are no doubt fact specific), many of New Jersey's sister states have concluded that survivorship benefits are assets to be included in the property distribution analysis.

Case Law from Other Jurisdictions

Indiana

In *Carr v. Carr,*[18] the appellate court held that the survivorship benefit was an asset that must be added to the marital property in the distribution scheme.[19] The husband's pension vested during the marriage and the wife was named as the surviving beneficiary.[20] The court rejected the wife's arguments that the survivorship interests should not be considered an asset because they were unvested and uncertain to be received.[21] Regarding the wife's uncertain receipt, the court stated that "this same uncertainty exists with any pension without a provision for survivor benefits—if the pension-earner dies before the other spouse, pension payments cease."[22] The court ruled that the uncertainty regarding the survivor benefit factors into the *value* of the interest, but does not nullify the survivor benefit's status as marital property.[23]

The court further reasoned that its holding conformed with the expectation of the parties, and any other result would create a disincentive for a pension-earner to elect a survivor benefit, as doing so reduces the income he or she would receive during his or her lifetime.[24] "Electing a [survivor benefit] provides value to the other spouse, which the law acknowledges by counting that value as part of the marital pot."[25]

Alaska

In *Ethelbah v. Walker,*[26] the Alaska Supreme Court rejected the husband's arguments that his survivorship rights were too speculative or highly contingent to be considered an asset in the divorce, and credited the husband with the present value of the survivorship rights at the time of divorce.[27] Of note, at the time of the parties' divorce, the husband was 68 and the wife was 64, but was undergoing treatment for breast cancer.[28] The Court stated that notwithstanding the fact that the husband bore the risk of forfeiture if he predeceased his wife, and his wife was getting a credit up front as the pension had already vested, calculating the present value payout was "much less speculative and [reduced] the risk of forfeiture."[29] The Court focused on the likelihood that the wife would predecease her husband and concluded that equity and fairness dictated that they both should share in the value of the survivorship benefits during their lifetimes.

New Mexico

In *Irwin v. Irwin,*[30] the New Mexico court of appeals held that a survivor's benefit provision "constitutes a valuable portion of the community assets, and the survivor's benefit provision should be considered in valuing and distributing the community interest in the retirement plan."[31] There, the wife was two years younger and had a four-year greater life expectancy.[32] If the pension payments were divided evenly, the wife would receive a greater portion of the pension than the husband. This would be contrary to New Mexico law, which requires an equal division of all community property.[33] As such, the court held that when dividing the actual retirement payments, the value of the survivor's benefit must be considered.[34]

California

In re Marriage of Cooper,[35] the court of appeals held that it was error to allocate the entirety of the survivor benefit to the wife without providing an offsetting payment to the husband, as this resulted in an unequal division of the community estate.[36] There, the parties stipulated the wife's interest in the husband's pension benefits totaled only 6.38 percent, or $33,900.[37] However, the survivor benefit was valued at $208,400 and the husband, therefore, argued that if he predeceased his wife she would receive a substantial windfall.[38] The court of appeals noted that the lower court's ruling was "tantamount to a finding that [husband] made an irrevocable and outright gift of a community property asset to [wife]" when he designated her as beneficiary."[39] However, there was no evidence presented of such a gift being made.[40]

Oregon

In re Marriage of Forney,[41] the court of appeals held that the value of the two survivor annuities should be assigned to the wife in the property division, with the husband receiving a corresponding credit.[42] At the time of the parties' divorce, the husband was 65 years old, took medication for his heart and to manage his blood pressure, cholesterol and depression, and had arthritis in one foot that could limit his physical activities.[43] Conversely, the wife was 47 and in good health.[44] The court of appeals held that a survivor's annuity is:

> analogous to an unvested pension and is subject to valuation and the court's disposition on dissolution. Although it is possible that wife could die before husband and never see the benefits from the annuity, *in light of the 18-year disparity in their ages, it is likely that wife will survive husband*.[45]

The contingent nature of the asset was not a basis for rejecting the above conclusion, as the court noted that the parties' expert took into account the contingency of the wife's survival when valuing the annuities.[46]

Illinois

In re Marriage of Sawicki,[47] it was held that a survivor's benefit is a distinct property interest.[48] "Even though it is of a contingent nature, a survivor's benefit has a determinable value and it is properly considered a marital asset."[49] That court stated it was irrelevant whether the husband "voluntarily" chose to elect the survivorship annuity during the marriage.[50] Because it was chosen during the marriage, it was a marital asset, and a division of the marital property without reference to the wife's interest in the survivor annuity is not a division "in just proportions," and, therefore, violates Illinois statutory law.[51]

Conclusion

Only time will tell how New Jersey will treat survivorship interests in divorce. For a litigant like Mrs. Smith this issue may be of little consequence, as she and her husband were of a similar age and health. However, for a party that is significantly older than his or her spouse, or in poor medical condition like Mr. Anderson, a survivorship interest could be of substantially greater value than the value of the pension itself. When confronted with such a disparity in life expectancy, the courts may be guided by the reasoning from other jurisdictions that equity and financial reality require the consideration of the survivorship interest as an asset, even if it is subject to forfeiture. ■

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Endnotes

1. *Whitfield v. Whitfield*, 222 N.J. Super. 36 (App. Div. 1987); *Kikkert v. Kikkert*, 177 N.J. Super. 471 (App. Div. 1981); *McGrew v. McGrew*, 151 N.J. Super. 515 (App. Div. 1977).
2. *Stern v. Stern*, 66 N.J. 340, 348 (1975).
3. *McGrew* at 517.
4. *Kikkert*, 177 N.J. Super. at 471.
5. *Whitfield* at 47.
6. *Id.* at 46-47.
7. N.J.S.A. 2A:34-23(h).

8. *Stern* at 348 (emphasis added).
9. *Whitfield* at 47.
10. *Kikkert* at 476.
11. *Moore v. Moore*, 114 N.J. 147 (1989).
12. *Claffey v. Claffey*, 360 N.J. Super. 240, 255-56 (App. Div. 2003).
13. *Larrison v. Larrison*, 392 N.J. Super. 1, 14 (App. Div. 2007).
14. *Claffey*, 360 N.J. Super. at 256.
15. *Sternesky v. Salcie-Sternesky*, 396 N.J. Super. 290, 303 (App. Div. 2007).
16. *Eisenhardt v. Eisenhardt*, 325 N.J. Super. 576, 581 (App. Div. 1999).
17. In *Corrigan v. Corrigan*, 160 N.J. 400 (Ch. Div. 1978), the court ruled that the survivorship interest that could be designated by a spouse upon their death to a third party is not an asset subject to equitable distribution because the assets will never be legally and beneficially acquired by either party. Whether *Corrigan* remains good law or not, it does not address the issue presented here—namely, whether a survivorship interest payable to one of the divorcing spouses, as opposed to some other party, should be considered an asset subject to equitable distribution.
18. *Carr v. Carr* __ N.E.3d __ 2016 WL 320687 (Ind. Ct. App. 2016).
19. *Id.* at *4.
20. *Id.* at *1.
21. *Id.* at *4.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Ethelbah v. Walker*, 225 P.3d 1082 (Alaska 2009).
27. *Id.* at 1086-87.
28. *Id.* at 1085.
29. *Id.* at 1088.
30. *Irwin v. Irwin*, 910 P.2d 342 (N.M. Ct. App. 1995).
31. *Id.* at 347.
32. *Id.* at 346.
33. *Id.* at 345.
34. *Id.* at 347.
35. *In re Marriage of Cooper*, 73 Cal. Rptr. 3d 71 (Cal. Ct. App. 2008).
36. *Id.* at 76.
37. *Id.* at 73.
38. *Id.*
39. *Id.* at 77.
40. *Id.*
41. *In re Marriage of Forney*, 244 P.3d 849 (Or. Ct. App. 2010).
42. *Id.* at 851.
43. *Id.*
44. *Id.*
45. *Id.* (emphasis added).
46. *Id.*
47. *In re Marriage of Sawick*, 806 N.E.2d 701 (Ill. App. Ct. 2004).
48. *Id.* at 709.
49. *Id.*
50. *Id.*
51. *Id.*