ALIMONY AT TWILIGHT

EFFECTS ON ESTABLISHING AND MODIFYING SPOUSAL SUPPORT OF PARTIES BEING AT OR NEAR RETIREMENT AGE

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BIOGRAPHY

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I. INTRODUCTION: ALIMONY AND RETIREMENT AGE

Alimony[1] continues to be the most difficult component of family law financial transfer to neatly catagorize and conceptualize. Throughout the country, laws concerning child support, and property division, are reasonably easy to explain in terms of both the desired goal and the approach taken by the law to achieve it. For alimony, however, both the public policy objectives, and the legal framework designed to attempt it, are much more difficult to discern and explain.

It is presumably for this reason that it has proven so much more difficult, in practice, to create generally acceptable formulaic approaches to alimony, whereas both property division and child support have proven capable of being sufficiently predictable that litigation as to their outcome can often be eliminated entirely. Most states have either statutory or case authority setting up a theoretical analysis for alimony that either recites a list of economic or behavioral factors (which could include or exclude questions of "fault"), or otherwise attempt to give trial courts general guidance on how to balance an obligee's "need" with an obligor's "ability to pay."

The American Law Institute's Principles of the Law of Family Dissolution has noted that the current law of alimony, nationally, has "no coherent rationale." In an effort to move the alimony analysis toward predictability and consistency, the ALI has suggested recasting the question of alimony as one of "loss occasioned by dissolution" rather than one of the "need" of the former spouse.

It is in this rather murky area of legal theory that the demographics of modern society are almost certain to cause much more litigation. There is no question that the population is aging. As the Baby Boomers hit retirement age, the questions relating to spousal support establishment and modification between parties nearing or past retirement will become increasingly important.

Traditionally, "retirement age" was thought of as age 65.[2] In fact, an entire line of authority has come into existence essentially holding alimony obligors to the requirement of keeping up alimony

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[1] Famously defined by H.L. Mencken as "the ransom that the happy pay to the devil." A BOOK OF BURLESQUES (1920).

[2] *Misinonile v. Misinonile*, 645 A.2d 1024 (Conn. Ct. App. 1994) (where the obligor retired after 33 years of employment, modification of alimony was affirmed, holding that it is not unreasonable for a person who has reached "retirement age" to seek the less strenuous and less demanding lifestyle offered by retirement). Some courts have even referred to the "traditional and presumptive age of retirement" in America as being age 65, so that any voluntary retirement prior to that age is suspect for that reason alone. *See Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992) ("Based upon this widespread acceptance of sixty-five as the normal retirement age, we find that one would have a significant burden to show that a voluntary retirement before the age of sixty-five is reasonable. Even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty"); *Rogers v. Rogers*, 746 So. 2d 1176 (Fla. Dist. Ct. App. 1999); *Reeves v. Reeves*, 706 P.2d 1238 (Ariz. Ct. App. 1985) (upholding decree provision stating that if obligor chose to retire between ages 62 and 65, that act would not constitute a change in circumstances that could support alimony modification); *Smith v. Smith*, 396 N.E.2d 859 (Ill. Ct. App. 1979) (acknowledging that obligor "does have a right, *at some point*, to retire or to substantially reduce his working hours," nevertheless reversing alimony award and remanding for a "substantial" increase where obligor quit his job at age 54 during pendency of divorce; rejecting obligor's claim that alimony amounts to "peonage" or unconstitutional involuntary servitude) (emphasis in original quote).

payments, once ordered, to that point.[3] However, more people are living longer than ever before, and well past that mark. At the same time, what is thought of as a "normal" career path is diversifying, and the concept of what constitutes "retirement age" is in flux.[4]

At whatever age retirement is chosen (or forced), regular employment tends to end, replaced with income derived from savings, Social Security, and any retirement benefits that were saved during the working years. Upon reaching retirement age, most people in this age group are less readily employable (***especially*** those that were dependent spouses during the marriage).[5] While the needs of persons in this age group might have stabilized, health concerns in later years can create a sudden and dramatic rise in expenses.

These factors suggest that traditional establishment-of-alimony factor lists are incomplete for members of the nearing-retirement age group, and should be re-thought, at least in part. Specifically, the concept of the "career asset" should explicitly be considered as a temporal one, by which potential income is converted over time to fixed assets divided as property; a way of doing so is suggested below.

Traditional "modification of alimony" factors are skewed in this group as well, since in most cases, the potential pool of income will be smallest just when needs most increase. As to modification cases, however, there is a wealth of published authority, but it is largely intensely fact-driven, and many cases reach opposite results from very similar fact patterns. This paper explores some of those inconsistent results.

Next, this paper turns to modifications relating to the obligee, and then to the interplay between the actual receipt of retirement benefits and alimony that was received prior to such receipt.

Finally, this paper asks whether there is any cohesive analysis in the existing case authority for analysis of retirement-age alimony cases, and suggests how such analysis might be achieved.

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[3] In a number of decisions handed down after *Pimm* where the husband had retired at an age earlier than 65 years, the courts have routinely declined to consider the fact of the early retirement as sufficient to warrant a reduction of the duty to provide support. *See*, *e.g.*, *Rahn v. Rahn*, 768 So. 2d 1102 (Fla. Dist. Ct. App. 2000) (modification of existing alimony order); *Rogers v. Rogers*, 746 So. 2d 1176 (Fla. Dist. Ct. App. 1999) (modification of existing alimony order); *Wiedman v. Wiedman*, 610 So. 2d 681 (Fla. Dist. Ct. App. 1992). In *Yamasaki v. Yamasaki*, 754 So. 2d 885 (Fla. Dist. Ct. App. 2000), the first attempt to seek a modification of the alimony order failed when the husband was still younger than 65 years of age. When he sought modification again after he had reached the normal retirement age, however, the court was more receptive and found a change in circumstances that justified a modification.

[4] *Bogan v. Bogan*, 60 S.W.3d 721 (Tenn. 2001) (there is no presumptive age for objectively considering retirement "reasonable"); *Mangino v. Mangino,* N.Y. Super., NYLJ 7/16/93, 19 FLR 1445 (BNA Aug. 3, 1993), *aff'd*, 628 N.Y.S.2d 531 (App. Div. 1993) (reducing alimony payments after obligor's voluntary retirement, and noting the "doubtless right, in good faith, to retire at a ripe age," even for an individual in generally good health who might be "capable of continued substantial income").

[5] At various places in these materials, the obligor spouse is referred to as "he," while the obligee spouse is referred to as "her." This is not meant to be a sexist classification, but rather a reflection of the true state of virtually all published alimony cases – especially those involving older individuals, in whose lives women's careers more often consisted of raising children and taking care of the household.

II. INITIAL AWARDS OF ALIMONY WHEN ONE OR BOTH PARTIES IS AT OR NEAR RETIREMENT AGE: THE DOUBLE-EDGED SWORD OF LENGTH OF MARRIAGE AND ONE PARTY'S CREATION OF A "CAREER ASSET"

Whether approached from a "loss" or "need and ability" basis, most alimony frameworks try to take into consideration the concept of the "career asset." The term is shorthand for the common scenario in which only one career or other primary source of income has been developed by the efforts of both spouses during the marriage.[6] Even when the case concerns an original alimony award (rather than modification of an existing award), courts have reacted negatively to one spouse's early retirement that has the effect of decreasing the expected cash flow from the career to the detriment of the supported spouse.[7]

Most such cases, however, tend to either omit mention or analysis of the stage of the career path that the working spouse had achieved as of the moment of divorce.[8] This would appear to be a mistake.

It has been said that time, money, and effort are largely interchangeable resources, as if they were components of some human relativity equation. As to the creation of a career asset, most alimony analyses give no significant weight to the natural talent or primary education of the working spouse (definitionally "separate property" components to any career success), focusing instead on the education, training, and even business experience achieved during marriage to determine whether there is a legitimate spousal interest in the career asset of the employed spouse.[9] This analysis necessarily tends to lead to the conclusion that there is a marital component to the "career asset" of the working spouse.

The tangible products of that career asset over time are spun off as "hard" assets – cash that can be saved, invested, or used for the purchase of tangible goods, or income deferred as retirement benefits that are now divisible (as a general matter) under the divorce law of every State. But the remaining

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[6] In Nevada, for example, the current leading case is *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000). The Court supported permanent alimony as a factor for the dependent spouse after a long-term marriage, noting that the husband was walking away with the "career asset" of the Ph.D. degree and high degree of employability, and that the wife was entitled after a long marriage to live as nearly as fairly as possible to the station in life that she enjoyed before the divorce.

[7] *See Smith v. Smith*, 737 So. 2d 641 (Fla. Dist. Ct. App. 1999) (the court pointed out that even if the parties had agreed to an early retirement, where the circumstances warranted, the court could still impute income to a retiring spouse); *Hill v. Hill*, No. ED76954, 2000 Mo. App. LEXIS 1506 (Mo. Ct. App. Oct. 10, 2000) (where husband voluntarily retired at age 56 before the separation and divorce and sought no other employment, the trial court acted properly when it imputed income to the husband since he was capable of earning a substantial income but chose, instead, to pursue nonremunerative activities, given his education, work experience, work history, and past income levels).

[8] *See* collected cases in Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Prospective Retirement*, 110 A.L.R. 5th 237 (2003).

[9] For example, in *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), the Nevada Supreme Court listed "the husband's education during the marriage" as a factor to be considered and, finding that he had developed his "business acumen" during the marriage, ordered the lower court to "increase and extend" the alimony awarded.

intangible potential for further production is not usually quantified in any overt way, other than whether the worker's business is a "going concern," or a professional remains in practice.

Whenever an obligor is approaching retirement, and the question of establishing an initial award of alimony is before the court, it might make sense to try to analyze the career asset more formally. The actual income then being received should be known. The components combining to create that income, from natural ability to education to experience, could be weighted and attributed to separate or marital contributions. Then the reasonable expectation of length of future receipt could be projected, based on standards in the field, and any individual factors.

For example, a 59-year-old airline pilot has an effective work life of just one year, as a matter of federal regulation. While such a person is not foreclosed from other work, even in the same industry (say, as a navigator, or a flight instructor), it would not be appropriate, no matter the length of the marriage, to create a permanent or long-term alimony award based on a career asset which has been nearly converted from potential income to realized income.[10]

Perhaps it would be best to deal with such realities with presumptions and burdens of going forward. Not every career has a clear "no later than" termination, but either within an industry, or for a particular individual, it is not unusual for there to be an expectation of concluding employment at some predictable point.

It seems reasonable that when alimony is being established, it could be couched as terminating or reducing at the date predicted for work to cease (and alimony payable to be adjusted accordingly), with the burden being explicitly placed on one side or the other to file a motion if the expectation was for some reason not fulfilled.[11] This could prevent the kind of cases in which modification upon retirement was denied because retirement was "foreseen" or "foreseeable" at the time the original order was made.[12]

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[10] *See Lambertz v. Lambertz*, 375 N.W.2d 645 (S.D. 1985) (obligor retired from the military shortly before his mandatory retirement date was entitled to downward modification of alimony since the retirement was not voluntary, despite his age of 55); *but see Stubblebine v. Stubblebine*, 473 S.E.2d 72 (1996) (setting alimony in accordance with husband's earning capacity despite his lack of income following retirement from both military and post-military private employment, at the age of 64, taking into account the obligee's needs and ability to provide for those needs, and balancing those against the obligor's ability to provide support, even when he has retired in good faith at a "normal" retirement age).

[11] Indeed, with the benefit of hindsight, courts have pronounced that the drafters of support agreements should provide for such "contingencies" as retirement at the time of drafting. *See Bogan v. Bogan*, *supra*. Some courts and commentators have been quite harsh in such comments, stating that "no thoughtful matrimonial lawyer should leave an issue of this importance to chance and subject a client to lengthy future proceedings." *See Deegan v. Deegan*, 603 A.2d 542 (N.J. Super Ct. App. Div. 1992), *quoted in* Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree – Early Retirement*, 2002 A.L.R. 5th 22, 2002 WL 31414142 at 19.

[12] *See*, *e.g.*, *In re Marriage of Jones*, 389 N.E.2d 338 (Ind. App. 1979) (husband unable to show that eventual retirement was "not reasonably foreseeable when the judgment was entered"); *Jenkins v. Jenkins*, 1993 WL 385346 (Ohio Ct. App. 1993) (same); *McManus v. McManus*, 638 So. 2d 1051 (Fla. Dist. Ct. App. 1994) (reversal of order terminating alimony because retirement was not an "unanticipated" change of circumstances). To some degree, of

A divorce decree calling for future reduction or termination of alimony may seem harsh to the obligee, whose needs presumably will not decrease. But property division schemes in the various States increasingly resemble the community property scheme of dividing, usually equally, that which was created during the marriage, and more and more States seem to be eliminating "fault" analyses in favor of straight economic criteria for whether and how much alimony should be awarded.

Thinking of the "career asset" as just one more thing to divide, alimony based on that concept is actually akin to property, and any alimony award outliving the income stream thrown off by the career would not be compensatory to the former spouse, but a transfer of wealth from one party's separate property to that of the other. Where the property accrued during the marriage is divided, presumably equally, alimony awards reaching beyond the exhaustion of the career asset can be seen as unfair.

The illustration of the point is the post-retirement case. Where both parties have truly passed their productive years, they will have completed the transformation of the career asset into assets and investments, large or small. If those assets and investments are equally divided, no alimony award would be proper, since the parties would have precisely equal access to resources for self-support.

The point is that the "career asset" focus of modern alimony analyses should probably seen as pointing to a dynamic, not static, factor, which dissipates over time as effort and education/training are converted into assets, and potential income is transformed into realized income. The career asset declines in value with age and reaches zero upon *bona fide* retirement. There are cases which hint at exactly such a reasoning process in the court's mind, even if not stated exactly this way.[13]

Researchers have noted that alimony continues to be a "residual category," defined as a negative – i.e., a financial award that is neither child support nor a division of property.[14] It is perhaps the lack of any uniform framework for considering the function of alimony, and factors of age, retirement, need, ability, and the temporal nature of the career asset, that explains the hodge-podge of decisional authority touching on these subjects.

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course, eventual retirement is "foreseeable" in ***every*** case – no one expects to be able to work forever.

[13] *See*, *e.g.*, *Kuester v. Kuester*, 554 N.W.2d 684 (Wis. Ct. App. 1996). In that case, a husband in his early fifties was involuntarily terminated, sought work for about a year, and then gave up, voluntarily retired and began to withdraw monthly amounts from his IRA. The court ordered alimony based upon his prior income, finding his decision to retire unreasonable given his age, health, work experience, and the job market, and stating that "since Frederick retained a substantial earning capacity at the time of the divorce, the trial court was entitled to impute income to him based on his unreasonable refusal to exercise that potential."

[14] ALI *Principles of the Law of Family Dissolution* (Summary Outline).

III. MODIFICATIONS OF ALIMONY PREVIOUSLY AWARDED WHEN THE OBLIGOR REACHES RETIREMENT AGE

Courts have been, pretty literally, all over the map in deciding whether to grant modifications to previously-issued alimony awards based on the regular retirement of the obligor. It has been suggested that the meaning of "lawful" is "compatible with the will of a judge having jurisdiction."[15] Those of a less cynical bent will attempt to discern the principles governing those times when modification of such awards should be permissible. This section addresses some of the questions asked, and the reasons given, for granting or denying such requests.

A. Preliminary Questions: *Can* the Divorce Decree Prevent a Later Court from Modifying Alimony And, If Not, Whose Changes in Circumstance Are Properly Considered?

Parties might well wish to consider inclusion of clauses intended to prevent relitigation of spousal support that has been either ordered or agreed upon as part of a larger settlement. Most reasons for doing so center on freedom from uncertainty and future litigation. Of course, this is another two-edged situation – the obligor seeking unmodifiability is banking on there being no decline in his ability to comply due to some unexpected event, and the obligee is gambling that there will be no unforeseen contingency increasing need, or otherwise warranting an increase.

Regardless of the wisdom of such clauses, there is some question of whether it would be given effect by a later court. It can be presumed that no court would grant modification of a purportedly unmodifiable support obligation if it looked as if one party or the other was simply trying to renege on their deal. However, irrespective of intentions to "settle fully, fairly, and for all time the obligations of the parties toward one another (etc.)," it is not difficult to construct a hypothetical situation in which an obligor, through no fault of his own, can no longer afford the court ordered spousal obligation, or an obligee, who was granted an award for a set period of time that is about to end, but who has or develops a need for additional support.

Faced with such situations, some courts have found such clauses unenforceable, stating that parties are unable to nullify a court's inherent power under state law to amend an order for spousal support in certain circumstances.[16] Other courts have held such clauses to be contrary to public policy and therefore refused to recognize or enforce them.[17] In those places, supposedly "unmodifiable" alimony terms can be modified, at least where the required factual showing can be made out.

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[15] Ambrose Bierce, THE UNABRIDGED DEVIL'S DICTIONARY 147 (1911; D. Schultz & S. Joshi ed., U. of Georgia Press, 2000).

[16] *See Vorfeld v. Vorfeld*, 804 P.2d 891 (Hawaii Ct. App. 1991).

[17] *See Smith v. Smith*, 618 A.2d 381 (NJ Super. Ct., Chanc. Div. 1993).

Other jurisdictions have staked out a middle ground, permitting "unmodifiability" clauses to bar modification only if certain special formalities or procedures are followed.[18] Some, following classic contract theory, focus on whether or not an agreement was merged into the decree; if so, it can be modified, but if not, the clause prevents modification.[19]

Oddly, there does not seem to be a significant body of case law in which courts have simply held that "unmodifiable" ***means*** "unmodifiable," and enforced clauses indicating that payments should continue. There are plenty of cases indicating that payments to a former spouse should continue, denying modification of a previous alimony award, but for some reason the decisions always seem to recite additional rationales for that conclusion (some of which are discussed in this article). Yet, there must be a general consensus in the Bar that such clauses have meaning, because lawyers continue to draft agreements and decrees containing them, and judges continue to enter them.

Unfortunately, that leaves the answer as to whether parties ***can*** validly agree to make spousal support clauses non-modifiable as "maybe." It also seems clear that it matters a great deal where the parties divorce as to whether such a clause has meaning, and even what procedural hoops must be jumped through to achieve it. Further, it seems pretty clear that courts will sometimes stretch the facts to find a way to modify terms no matter the intent of the parties, if they are convinced that they should do so.

Presuming that it ***is*** possible to modify an alimony award (either because the decree says that it is modifiable, or a court overrides a provision saying that it can ***not*** be modified), there is some question as to whether a proposed change should be based upon the obligor's ability to pay, or the obligee's need, or both.

The basic thrust of most modification of alimony motions relating to retirement is the assertion that the obligor's income will drop as a result of the retirement from active employment.[20] This indicates that the court's focus should be on the obligor's side of the equation. But the existing case law indicates that it is not so simple. It appears that, once a court determines that there has been a change in circumstances, the entire need ana abilities test (or other statutory or case-law list of factors and

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[18] *See In re Scott*, 563 N.E.2d 995 (Ill. Ct. App. 1990) (requiring that a clause seeking to bar judicial modification of spousal support must be contained in a separate paragraph from the paragraph that limits the conditions for termination of such an obligation); *Bowman v. Bowman*, 567 N.E.2d 828 (Ind. Ct. App. 1991) (requiring that such a clause be contained in some agreement between the parties, since the parties can bargain for non-modifiability even if state law would not have permitted the court to so order without such an agreement); *Bradley v. Bradley*, 880 S.W.2d 376 (Mo. Ct. App. 1994) (while a spousal maintenance order in a decree would be modifiable, "contractual maintenance" set out in a separation agreement is not).

[19] *See Riffenburg v. Riffenburg*, 585 A.2d 627 (R.I. 1991). In jurisdictions as diverse as Nevada and Alabama, incorporating into a divorce decree an agreement that calls for payment of periodic alimony operates to merge that agreement into the decree such that the agreement loses it contractual nature. *See*, *e.g.*, *Ex Parte Owens*, 668 So. 2d 545 (Ala. 1995); *Renshaw v. Renshaw*, 96 Nev. 541, 611 P.2d 1070 (1980) (enforcing unmerged agreement that attorney father pay mother child support even as to child who left mother's house to go live with father).

[20] *See*, *e.g.*, *Lytle v. Lytle*, 781 S.W.2d 476 (Ark. 1989).

considerations) is once again before the court, either limited in scope of review by local practice, or not.[21]

B. Factors Considered in Determining Whether Alimony Should Be Modified Downward upon the Worker's Retirement

1. Issues of Timing of the Motion

Retirement does not tend to come upon workers unexpectedly one day. More typically, it is anticipated, planned-for, and it makes perfect sense that a worker would wish to get his personal and work life in order, in advance, so that as of the time of retirement, job functions could be smoothly transferred to a replacement.

In the meantime, family courts throughout the country are typically backlogged and overcrowded, and it is difficult to immediately obtain a hearing in most sorts of non-emergency cases. In many jurisdictions, a substantial period can elapse between the filing of a motion and its final resolution (and this is enormously magnified if the matter goes up on appeal). So it is no wonder that a worker, facing imminent retirement, might file a motion for modification of alimony in advance of the actual retirement date, so that the worker's individual financial affairs would be in order when the income reduction actually occurred.

Some timing issues do seem reasonable to consider, such as that the change asserted occurred since with time of the last prior order, which is a derivative of general principles of law of the case, or even *res judicata*.[22]

Unfortunately, several courts have fixated inappropriately on matters of timing to refuse to resolve such disputes. Some have dismissed modification motions if filed in advance of the date of actual retirement, claiming that they are "speculative"[23] or "premature."[24]

Now, if retirement is projected as something that might happen years in advance, that argument might be reasonable, but if the date is fixed, it seems silly not to entertain the argument in advance of the time that one party or the other would be feeling desperation because of non-resolution. And if the fact but not the date is known, it would not seem terribly difficult to fashion the order to activate upon the happening of the contingency. And given the length of time that appellate

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[21] *See*, *e.g.*, *In re Marriage of Kuppinger*, 48 Cal. App. 3d 628, 120 Cal. Rptr. 654 (Ct. App. 1975) (when ex-husband moves to modify alimony, circumstances and needs of ex-wife must be considered).

[22] *See Kuppinger*, *supra*; *Baker v. Baker*, 329 N.E.2d 408 (Ill. Ct. App. 1975).

[23] *See*, *e.g.*, *Blink v. Blink*, 528 So. 2d 860 (Ala. Civ. App. 1988); *Frost v. Frost*, 155 S.W.2d 895 (Ark. 1941); *Adamson v. Adamson*, 2002 WL 31770882 (Utah Ct. App. 2002) (dispute not "ripe" where obligor had not yet retired).

[24] *See*, *e.g.*, *In re marriage of Kuppinger*, 48 Cal. App. 3d 628, 120 Cal. Rptr. 654 (Ct. App. 1975).

resolution takes, it seems likely that the "speculative" retirements would have long since occurred by the time that the courts of appeal opined upon them.

In any event, practitioners should note that any motion filed in advance of the actual change in circumstance has some possibility of being dismissed for prematurity. Good common sense would suggest that advocates be prepared to make a convincing case that a change in status is a certainty, as of a certain date, and resulting in specific changes of income, prior to filing a motion for modification.

2. Issues of Need and Ability to Pay

There is a question of whether the entire needs/ability analysis is re-opened once an obligor shows an imminent (or recent) decline in income from retirement. Most courts, however, appear to take the existing order as a baseline, and reframe the analysis as being whether the obligor is able to ***continue*** paying support at the pre-existing level, rather than whether alimony at the prior level would have been awarded given the changed circumstances.[25]

Most such courts then turn to the needs of the obligee, but again as a matter of determining that the need still exists, given the income, assets, and earning capacity of the obligee at the time of the request for modification.[26] And it is worth noting that the "needs" analysis, at least upon such

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[25] *See*, *e.g.*, *Id.*; *Borowitz v. Borowitz*, 311 N.E.2d 292 (Ill. Ct. App. 1974); *Eastman v. Eastman-Veres*, 690 A.2d 494 (Me. 1997); *In re Marriage of Hammerschmidt*, 48 S.W.3d 614 (Mo. Ct. App. 2001); *Mottice v. Mottice*, 693 N.E.2d 1179 (Ohio App. 1997); *Maturin v. Maturin*, 685 So. 2d 468 (La. Ct. App. 1996) (alimony reduction, but not termination, upheld, where obligor voluntarily retired, but obligee's needs remained the same); *Stoltman v. Stoltman*, 429 N.W.2d 220 (Mich. Ct. App. 1988) (no change in circumstances where the income level of the obligor was virtually the same after his retirement as it was before he decided to retire); *Kennedy v. Kennedy*, 650 So. 2d 1362 (Miss. 1995) (reduction commensurate with husband's reduced ability to pay was required because of a substantial change in circumstances where he retired at age 59 years after his long-time job was eliminated and was forced to accept another job for which he was not physically fit); *Leslie v. Leslie*, 827 S.W.2d 180 (Mo. 1992) (husband's retirement was voluntary, even though induced by concerns as to layoffs and thus, was not a change in circumstances for purposes of modifying an alimony award where he was in good health and retained the same income-earning capacity as before retirement and where the wife, who had only worked part-time in the past, suffered from cancer, for which she was undergoing treatment, as well as other illnesses); *Bradley v. Bradley*, 880 S.W.2d 376 (Mo. Ct. App. 1994) (husband's retirement at age 57 where he could still work did not justify downward modification in light of the wife's limited employment potential and health problems); *Schoolcraft v. Schoolcraft*, 869 S.W.2d 907 (Mo. Ct. App. 1994) (modification was not appropriate even though the husband's income dropped, where his decision to retire was voluntary and he could earn more if he chose to do so, while wife was unable to support herself or locate full-time employment); *Draper v. Draper*, 982 S.W.2d 289 (Mo. Ct. App. 1998) (even if retirement is involuntary, obligor is only entitled to a modification if reduced income precluded him from making the previously ordered payments); *Meinke v. Meinke*, C.A. Case No. L-95-282, 1996 Ohio App. LEXIS 5911 (Ohio Ct. App. Dec. 30, 1996) (obligor could not reduce alimony obligation despite forced retirement for health reasons where his pension income actually exceeded his last income earned before retirement).

[26] *See Mottice*, *supra*; *Borowitz v. Borowitz*, 311 N.E.2d 292 (Ill. Ct. App. 1974); *Eastman v. Eastman-Veres*, *supra*; *In re Marriage of Hammerschmidt*, *supra*; *Spencer v. Spencer*, 720 A.2d 1159 (Me. 1998) (focusing on former wife's ability to self-support); *Sannella v. Sannella*, 993 S.W.2d 73 (Tenn. Ct. App. 1999) (obligor's request to terminate alimony denied even though he was well past normal retirement age and his income declined post-retirement, where he

reviews, encompass "more than bare necessities."[27] This seems proper, as an echo of the evaluation of "need" typically done by courts in setting alimony in the first place.

Many courts have noted that the obligee's needs and standard of living during the marriage are factors to be considered in ***setting*** the support amount.[28] One of the best summaries of the reasoning underlying this sort of order was by the Illinois Court of Appeals, which heard an appeal from an trial court order in a separation action raising the wife's monthly maintenance from $850.00 to $1,600.00. For the prior 2½ years that the action had been pending, the wife had been subsisting on the lower maintenance amount plus social security. The court stated that:

> [the wife's] paltry income, and therefore her budget, makes new underwear a luxury item. We emphatically reject the notion that her past inability to plan social excursions, buy clothes, and afford carfare means that she failed to 'prove' reasonable need for such things.[29]

Responding to the husband's claim that the award of maintenance was "outrageous" because the wife would not possibly change her lifestyle irrespective of the money awarded, the court stated: "In our opinion, if anything is outrageous it is [the husband's] insistence that the reward for frugality is poverty."[30]

Of course, there are limits to the definition of need. The Florida Supreme Court has stated that, in its opinion, the purpose of alimony is to provide for a former spouse's "needs and necessities of life" as established during the marriage. Reversing an award of alimony that included a savings component ("savings alimony"), the court held that legitimate "needs" generally include shelter, food, clothing, and transportation, and that current support rather than the accumulation of capital is the focus of periodic alimony.[31] Other courts in even the same state, however, have held that a ***post-divorce*** increase in the needs of the obligee, or even the obligor's increased ability to pay, could justify an upward modification of an alimony award.[32]

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could still afford to pay it and the wife's needs still were such that the support provided by the alimony award was necessary).

[27] *In re Marriage of Kuppinger*, *supra*.

[28] *See Ostler v. Smith*, 272 Cal. Rptr 560 (Cal. Ct. App. 1990); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284, *supra* (alimony award to be set so that wife, who had not worked outside the home in decades, would enjoy, "as nearly as possible," the "station in life" she had prior to the divorce until she remarried, died, or her financial circumstances changed).

[29] *In re Marriage of O'Brien*; 601 N.E.2d 1227 (Ill. Ct. App. 1992).

[30] *Id*.

[31] *Mallard v. Mallard*, 27 Fam. L. Rep. (BNA) 1041 (Fla. 2000).

[32] *See Bedell v. Bedell*, 561 So. 2d 1179 (Fla. Ct. App. 1989); *Schlesinger v. Emmons*, 566 So. 2d 583 (Fla. Ct. App. 1990).

The point is that, generally, questions of need and ability are measured as of the time of divorce, and the question upon motion for modification is whether compliance with the previous order is still possible. Given the modern concept of tying an award of alimony to compensation to the former spouse for the career asset retained by the worker, however, it is at least worth pausing to question that focus in modification motions.

Specifically, it is sometimes stated that an alimony recipient is not permitted to share in the rewards of an obligor's post-divorce efforts (or luck). It seems, however, that exactly that is the effect of orders denying modification of alimony based on the conclusion that the obligor has accrued "other resources" from which an alimony order can continue to be satisfied despite retirement.[33]

The cases touching on inflation, or the "purchasing power" of the original award,[34] analyze much the same way, in the long view. The analysis remains one of an inherent presumption of continuity of the interest-balancing that took place when the original award was made, and whether the continuation of the award, as stated, continues to be possible and make sense in light of the alleged changed circumstances.

3. Issues Relating to Subjective Factors of Motivation, "Foreseeability," and "Good Faith"

Substantially less consistent and predictable are the alimony modification decisions that stray from a purely economic analysis in order to consider inherently subjective matters regarding which the courts must decide issues such as credibility. Some courts have directly questioned the motive of the worker in retiring.[35] As noted above, there is at least some underlying consensus that most workers will someday retire at a "normal retirement age," so this overt review tends to appear most often, understandably, in the early retirement cases.[36]

What these courts ***say*** they are doing is indexing the "totality of the circumstances" involved – looking to good faith and the reasonableness of the decision to retire in light of the surrounding circumstances. Such circumstances include the age, health of the [retiring] party, his motives in

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[33] *See In re Marriage of Stephenson*, 39 Cal. App. 4th 71, 46 Cal. Rptr. 2d 8 (Ct. App. 1995) (denying former husband's request for downward modification where severance pay would for some time replace regular salary).

[34] *See*, *e.g.*, *Greene v. Greene*, 372 So. 2d 189 (Fla. Dist. Ct. App. 1979).

[35] *See*, *e.g.*, *Spencer v. Spencer*, *supra.*

[36] *See*, *e.g.*, *In re Marriage of Colombo*, 555 N.E.2d 56 (Ill. Ct. App. 1990); *Pimm v. Pimm*, *supra* (noting that even retirement after "traditional and presumptive" retirement age of 65 should be examined to see if it was voluntary and would cause hardship to the obligee); *Ebach v. Ebach*, 2005 ND 123, ___ N.W.2d ___ (N.D. No. 20040306, July 13, 2005) (obligor had not satisfied his burden of providing that his "early retirement was reasonable and done in good faith" when he retired at age 62); *Schmitz v. Schmitz*, 622 N.W.2d 176 (N.D. 2001) (not every financial change in circumstances justifies a modification of alimony, and if a change is self-induced, no modification is warranted).

retiring, the timing of the retirement, his ability to pay maintenance even after retirement, and the ability of the other spouse to provide for himself or herself.[37]

In all probability, the total income of an obligor will decrease on retirement whether the retirement was "voluntary" or not. Retirement might look far more attractive if the obligor believes that the fact of retirement will cause a reduction in the spousal support that must be paid such that, without working, the obligor's net income might be about the same.

To cope with that reality, some courts have held that "absent a substantial showing of good faith," any voluntary retirement is a self-imposed curtailment of income and will not constitute a change of circumstances warranting modification.[38] However, many courts do not like to announce such sweeping generalizations, bringing them back to trying to divine the obligor's motive in seeking voluntary retirement to make sure that the obligor's ***purpose*** was not to avoid a spousal support obligation.[39]

To their credit, some courts have tried to set out factors that would go into reaching a conclusion on that question, one way or the other.[40] Unhelpfully, other courts have merely redefined the issue of "purpose" or "motivation" by way of circular re-labeling, stating that the inquiry is into whether the retirement was "reasonable."[41] More subtly, other courts have effectively "stacked the deck" on the

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[37] *Deegan v. Deegan*, *supra*; *Misinonile v. Misinonile*, *supra*; *Kemsley v. Kemsley*, FA 860083278S, 1997 Conn. Super. LEXIS 3364 (Conn. Super. Ct. Dec. 17, 1997); *Smith v. Smith*, 419 A.2d 1035 (Me. 1980); *McFadden v. McFadden*, 563 A.2d 180 (Pa. Super. Ct. 1989); *Adkins v. Adkins*, 540 S.E.2d 581 (W. Va. 2000); *Shellene v. Shellene*, 368 N.E.2d 153 (Ill. App. Ct. 1977) (reversal of order decreasing support by 50% because, in its weighing of the relevant factors, such as the length of the marriage, the age of the obligor (55), and the continued need of the obligee even though she was employed, the court determined that it would be inequitable to reduce the support payments previously ordered).

[38] *See Tydings v. Tydings*, 349 A.2d 462 (D.C. Ct. App. 1975); *Lambert v. Lambert*, 403 P.2d 664 (Wash. 1965); *Di Novo v. Robinson*, 672 N.Y.S.2d 492 (App. Div. 1998) (voluntary change in employment status does not constitute a meaningful change in circumstances); *Wheeler v. Wheeler*, 548 N.W.2d 27 (N.D. 1996) (analogizing voluntary retirement to "unclean hands").

[39] *See Pennsylvania ex rel. Burns v. Burns*, 331 A.2d 761 (Pa. Super. Ct. 1974); *In re Marriage of Sinks*, 204 Cal. App. 3d, 251 Cal. Rptr. 379 (Ct. App. 1988) (finding decision to retire motivated by desire to avoid paying support, and so imputing income and denying alimony modification); *Chaney v. Chaney*, 699 P.2d 398 (Ariz. Ct. App. 1985) (changed circumstances warranting downward modification in alimony is appropriate where given obligor's age and health, retirement not truly "voluntary," and there is no evidence for finding bad faith or a basic purpose of alimony avoidance).

[40] In determining the ***reasonableness*** of the obligor's retirement, courts consider the obligor's age, health, known motivation for retiring, and the age when others in the obligor's line of work usually retire, as well as the impact that such a termination or reduction in support will have on the obligee. *See Pimm v. Pimm*, *supra*; *Dilger v. Dilger*, 576 A.2d 951 (N.J. Super. Ct. Chanc. Div. 1990).

[41] *See*, e.g., *Barbarine v. Barbarine*, 925 S.W.2d 831 (Ky. Ct. App. 1996).

determination of purpose by raising or lowering the evidentiary burden necessary to find a purpose to avoid a support obligation.[42]

For some courts, the inquiry is a balancing test; some courts have held that even where a retiring obligor has been shown to have acted in good faith and has advanced entirely rational reasons for his actions, a trial court must still decide whether the advantage to the retiring obligor spouse substantially outweighs the disadvantage to the obligee spouse. Only if that answer is affirmative should the retirement be viewed as a legitimate change in circumstances warranting modification of a pre-existing spousal support obligation.[43]

While facially appealing on grounds of equity, such holdings provide no framework beyond "abuse of discretion" for evaluating a court's decision in such a case, or predicting the outcome of other cases in similar circumstances. The terms to be "weighed" are not set out in any way that allows an objective analysis of any given fact pattern.

Slightly more capable of prediction, and much more logically based, is the line of case analyzing the "foreseeability" of retirement as indicating whether modification of alimony should be allowed at that time.[44] This ties into the question, discussed above, of whether lawyers should anticipate changes of status of the parties to agreements and decrees, and build into court orders whether and how they will change when those changes take place.

It makes some sense to put the burden of proof (that the retirement was not contemplated at the time of the original order) on the party seeking modification.[45] This ties in with the general principle that the burden of proof should presumably lie with the party seeking to change existing orders.

Less clearly equitable are those cases where the court, in hindsight, finds that the possibility of retirement was or was not (or should have been, or should not have been) "foreseeable" at the time

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[42] For example, *compare In re Marriage of Richards*, 472 N.W.2d 162 (Minn. Ct. App. 1991) (court declared that its inquiry was whether the worker had a "specific intent" to decrease or terminate support in making his decision to retire early) *with In re Marriage of Waldschmidt*, 608 N.E.2d 1299 (Ill. Ct. App. 1993) (voluntary changes in employment must not be "prompted by a desire to avoid maintenance obligations") *and with Richardson v. Richardson*, 2001 WL 822440 (Conn. Super. Ct. 2001) (changed circumstances found where obligor's retirement "not solely motivated" by effort to avoid alimony).

[43] *See Deegan v. Deegan*, 254 N.J. Super. 350, 603 A.2d 542 (N.J. Super. Ct. App. Div. 1992); *Maddox v. Maddox*, 612 So. 2d 1222 (Ala. Civ. App. 1992) (where obligee was ill and unable to work, obligor's choice to take early retirement at age 62, would not warrant any alimony reduction, at least where there was evidence that the obligor may have retired to avoid paying alimony).

[44] *See*, *e.g.*, *Huffman v. Huffman*, 477 N.W.2d 594 (N.D. 1991) (modification denied to obligor following his retirement from the military, which was earlier than expected but still voluntary; if the parties had expected retirement to affect the support obligation, they could have included such a provision in their agreement which became the basis for the court's original decree).

[45] *See Mottice*, *supra*; *Weaver v. Weaver*, 431 N.W.2d 476 (Mich. Ct. App. 1988) (remanding for determination of whether the retirement was contemplated as part of the planned distribution of assets).

of divorce. These cases then make modification available, or not, when that retirement occurs.[46] These "hindsight" cases should be distinguished from those where the reviewing court finds as a matter of fact that the reduction in income upon retirement ***was*** specifically contemplated, and the relevant economics are already part of the decree.[47]

Whenever the decisional law of a jurisdiction makes the question of permissibility of modification of alimony upon retirement dependent upon the "good faith" or motives of the parties, these cases enter the gray world of discretionary calls largely immune to objective modeling and the derivation of useful rules. This may be, more than anything else, a function of the lack of clarity as to what the original award of alimony was based upon, or meant to accomplish. Absent some clear basis for why alimony was existing in the first place, it is no wonder the rules regarding its modification are less than apparent.

4. Miscellaneous "Factors" Seized upon as Rationalizations to Modify Alimony Downward or Refuse to Do so

In altogether too many decisions in this area, it appears that courts have simply decided what is "fair," and then set about constructing rationalizations in support of the conclusion already reached. In fairness, this might be an artifact of the lack of a coherent theoretical model for either the original award of alimony or its modification once awarded, but the dubious relationship between the factors recited and the modification-upon-retirement sought makes their relevance somewhat questionable.

Some such factors just seem to be rubric translations for other bases already recited. For example, the "health and age of the parties" does not seem to add anything beyond the "good faith" of the obligor, and the continuing "need" of the obligee.[48] Likewise, specific inquiry into the obligor's income after retirement does not seem much different from the inquiry into the obligor's continuing ability to maintain payments under the original order.[49]

Some recited factors just do not seem appropriate at the time of a modification motion, as they should (or must) have been actively considered at the time the original award was set. Most obvious

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[46] *See*, *e.g.*, *Bogan v. Bogan*, *supra*; *Watrous v. Watrous*, 738 N.Y.S.2d 771 (App. Div. 2002) (affirming denial of modification when husband retired due to poor health, because he was already in poor health at the time of divorce); *McFadden v. McFadden*, 563 A.2d 180 (1989) (deciding that the obligor's five-years-in-the-offing was not so foreseeable at the time of divorce that modification based on that retirement should be foreclosed).

[47] *See*, *e.g.*, *Wheeler v. Wheeler*, 548 N.W.2d 27 (N.D. 1996) (in divorce of an attorney, decree provisions provided for drop in alimony on precise date that attorney retired, indicating that the retirement was foreseen and taken into account as part of the economic orders, so that no further "material change in circumstances" occurred when that retirement occurred); *Guerrero v. Guerrero*, 1991 WL 18667 (Ohio Ct. App.), *motion overruled*, 575 N.E.2d 215 (1991) (reversing downward modification of alimony where, under the facts, "it would defy all logic and common sense" to conclude that potential early retirement was not contemplated upon divorce).

[48] *See Borowitz*, *supra*; *Eastman*, *supra*; *Spencer*, *supra*; *Mottice*, *supra*.

[49] *See Spencer*, *supra*.

of these would be the "length of the marriage,"[50] paragraph whether the wife had contributed significantly to the husband's original success and ability to pay support at the time of divorce.[51]

And various other factors simply do not seem to bear most properly on the issue of alimony (or its modification) at all, either because they analyze more properly as components of property or child support,[52] or because they just don't seem to relate to the question at all.[53]

The inclusion of non-salient "factors" in deciding whether alimony should be modified upon an obligor's retirement does little except make the analysis more murky, and prediction of future cases less accurate.

IV. THE IMPACT OF EARLY RETIREMENT ON ESTABLISHING OR MODIFYING AWARDS OF ALIMONY

An early retirement[54] taken prior to divorce does not appear much in the published cases. This seems reasonable, since divorce courts are used to apportioning property, debts, and alimony between parties who are taken "as they come." In other words, where the parties had remained married during the period in which an early retirement was taken, it is likely to simply be seen as one more fact to be equitably weighed, rather than as a specific factor militating toward any particular result.

Where the divorce has been concluded, however, it is reasonable to presume that the divorce court engaged in a certain number of presumptions and assumptions of fact related to the parties, whether they were explicitly recited or not. Where an early retirement occurs ***after*** divorce, much of the discussion above is equally applicable, as reviewing courts appear to use all of the factors applicable to actual retirement, or imminent retirement, in the "early retirement" cases. But the case law seems to be even more extreme in each of the directions criticized above for providing no coherent framework of analysis.

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[50] *See Borowitz*, *supra*.

[51] *Id*.

[52] For example, whether minor children used to reside with the obligee, *see In re Marriage of Hammerschmidt*, *supra*.

[53] Such as the length of time the obligor has paid alimony, *see Borowitz*, *supra*; *Baker*, *supra*, or whether the obligor had remarried. *See Kuppinger*, *supra*.

[54] There does not appear to be any universally applicable definition of "early retirement." The cases seem to discuss it both in the sense of a worker retiring at an earlier calendar date than expected by one or both parties at the time of divorce, and in the sense of retiring prior to the "customary age," usually age 65.

For example, the early retirement cases seem to be even more involved with revisiting the weighing of the kind of equities that went into the original alimony determination, with the debate almost looking like a second round of divorce rather than a modification proceeding.[55]

As noted above, the early retirement cases tend to focus keenly on subjective "good faith" considerations, and courts hearing these cases appear much more willing to engage in speculation about the potential earning capacity of the obligor, considering the imputation of income in place of the actual income given up in favor of retirement.[56]

V. RELATIONSHIP OF RECEIPT OF RETIREMENT BENEFITS TO REQUESTS FOR MODIFICATION OF AWARDS OF ALIMONY

When divorce precedes retirement, the deferred income to the obligee spouse could be several years from entering pay status. A full treatment of the law of retirement benefits themselves is beyond the scope of this article, but it is appropriate at this point to note the predilection of at least some courts to treat alimony as a "bridge" to get the obligee spouse to the point of receipt a share of the worker's retirement benefits, even when the worker took early retirement to obtain them.[57]

On the other hand, there is a body of law indicating that, traditionally, "property and alimony awards differ in effect," so that the property equalization payments "do not serve" as a substitute for alimony.[58]

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[55] *See*, *e.g.*, *Murphy v. Murphy*, 470 So. 2d 1297 (Ala. Civ. App. 1985) (going over employment and self-support possibilities); *Adams v. Adams*, 51 S.W.2d 541 (Mo. Ct. App. 2001) (the "passive acceptance of support over an extended period of time without significant efforts to become self-sufficient" may in itself constitute changed circumstances justifying termination of alimony); *In re Marriage of Colombo*, *supra*.

[56] *Taylor v. Taylor*, 640 So. 2d 971 (Ala. Civ. App. 1994); *Shaughnessy v. Shaughnessy*, 793 P.2d 1116 (Ariz. Ct. App. 1990), overruled on other grounds by *In re Marriage of Zale*, 972 P.2d 230 (Ariz. 1999); *In re Marriage of Sinks*, 204 Cal. App. 3d 586, 251 Cal. Rptr. 379 (Ct. App. 1988); *In re Marriage of Stephenson*, *supra* (imputing income); *Marshall v. Marshall*, 1995 WL 217236 (Conn. Super. Ct. 1995); *Leslie v. Leslie*, 827 S.W.2d 180 (Mo. 1992); *Schlicher v. Schlicher*, 346 N.W.2d 470 (Ct. App. 1984).

[57] *See*, *e.g.*, *Reed v. Reed*, 2001 WL 127873 (Ohio Ct. App. 2001) (reversing lower court refusal to modify alimony based, in part, on obligee's receipt of share of obligor's retirement following his early retirement); *McGuire v. McGuire*, 391 S.E.2d 344 (Va. Ct. App. 1990) (affirming termination of alimony despite obligor's early retirement, on the basis that obligee was not injured, since she received several hundred dollars per month more in retirement benefits than she received in alimony); *Adkins v. Adkins*, 540 S.E.2d 581 (W. Va. 2000) (where obligee's total income went up considerably following obligor's early retirement, and obligor's income decreased, so that obligee's income was much higher than obligor's, termination of alimony was affirmed); *Gates v. Gates*, 997 P.2d 903 (Utah 2000) (modification or elimination of alimony proper where husband's retirement reduces his income and increases wife's income by way of retirement payments); *Leslie v. Leslie*, 827 S.W.2d 180 (Mo. 1992) (additional sums being received by the obligee may be taken into consideration in determining whether such a change in circumstances exists as to make the original alimony award unreasonable).

[58] *See*, *e.g.*, *Shydler v. Shydler*, 114 Nev. 192, 954 P.2d 37 (1998).

This may no longer really be true. In the modern world, pensions are typically divided between spouses to the degree accrued during the marriage. Alimony might be seen, in part, truly as "maintenance" – stopgap payments by the employee spouse to the non-employee spouse to provide the ability to live long enough for the deferred compensation portion of the career asset to enter pay status.

Conceptualized this way, alimony becomes merely a means of preventing too gross of a disparity in the available incomes of the parties until the career asset is completely converted from potential to realized income, and the parties are returned to parity as they each begin to receive their half of the marital portion of that asset.

There is no significant body of published authority on the subject, but anecdotal accounts suggest that this basic approach is being followed in some cases at the trial level. Specifically, more and more divorcing couples consist of two parties, both of whom have worked for some time outside the home. Unless they happen to be exactly the same age, it is quite possible upon divorce for one party to be at or near retirement age, while the other still has some time in the workforce before retirement.

At least in long-term marriages, such parties may choose to effectively pool the current income of the one still working, and the retirement income of the one who has retired, until both achieve retirement age, at which time each receives his or her time-share rule of the other's retirement benefits. This choice achieves by design essentially the effect created by the cases recited above that provide for alimony termination upon retirement benefits reaching pay status – without the additional litigation.

VI. AN ASIDE REGARDING SURVIVORSHIP BENEFIT DESIGNATIONS AND LIFE INSURANCE

The complexities of survivorship benefits under the retirement systems for military, Civil Service, state, and private employees' defined benefit, IRA, and 401(k) plans, is beyond the scope of this article.[59]

What is relevant here, however, is that all such plans have some kind of provision for "survivorship benefits" – i.e., benefits payable to the spouse or former spouse if the worker/employee should die prior in time to the spouse or former spouse.[60] What is not clear to many people, and has spawned decades of litigation, is the reality that survivor beneficiary designations in most of these plans can survive the divorce of the parties, and often ***will*** do so unless concrete steps are taken to alter those designations.

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[59] A primer on many of these topics can be found on the "Published Works" page of our firm web site, at: http://willickpc.com/page.asp?id=40.

[60] The article recounting the basic attributes of the survivorship programs available under each retirement scheme is set out in the article entitled "Death, Disability, and Related Subjects of Cheer – Part One – Death" on the web page specified in the preceding footnote.

This is not necessarily a bad thing, of course. It could well be that the parties explicitly considered, or even bargained, for the continuance of benefits to a former spouse in the event that a worker dies first. But what those of us who do expert witness work in malpractice cases are seeing is that altogether too many parties and their attorneys are either ignoring this matter, or dealing inadequately with it, leaving entirely to chance who is going to actually end up with what benefits, depending on the happenstance of who happens to die first.

In most (if not all) jurisdictions, unless otherwise specifically provided for, the obligation to pay alimony is considered "personal," and so dies with the obligor. Therefore, in representing the obligee it is important not to overlook possible options such as survivor benefits or life insurance policies that will continue to pay the obligee some reasonable equivalency of the spousal support that was found to be necessary, if the obligor should die first.

It is similarly important, for counsel on ***both*** sides, to verify whether or not the relevant survivorship benefits are terminable at all,[61] determine whether survivorship beneficiary designations ***should*** lapse at any specific time in the future, and actually provide the legal mechanism for effectuating the desired changes at the desired times. Any failure to do this will result in the unjust enrichment of an unintended beneficiary, and perhaps many years of litigation seeking recovery, constructive trusts, and related attempts at obtaining relief. The potential losses to the client (or his or her heirs) are catastrophic, and the resulting risks to counsel are enormous.[62]

Counsel ***must not*** presume that a simple statement of "waiver" in a divorce decree is adequate protection of anyone. Litigation is raging throughout the federal circuits and state courts as to whether and under what circumstances a designated beneficiary can validly waive a survivorship designation in various kinds of plans,[63] and the attorneys are always the target of last opportunity for

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[61] Some plans do not permit the post-divorce change of survivor beneficiary, but again, the intricacies of which, and how, and under what circumstances, are beyond the scope of this article.

[62] While there is not much appellate authority in this area, and virtually no statutory authority anywhere, I have been hired as an expert witness in several cases in which liability was sought against practitioners who did not properly see to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, estimates that 90% of his malpractice consultations involve failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956). This problem is increasing in magnitude with the aging of the population.

[63] *See*, *e.g.*, *Lasche v. George W. Lasche Basic Retirement Plan*, 870 F. Supp. 336 (D. S. Fla. 1994), *aff'd*, 111 F.3d 863 (11th Cir. 1997) (former spouse received benefits despite purported waiver); *Estate of Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996) (finding that a woman, who was the default beneficiary of her now deceased ex-husband's employer-provided pension plans, "effectively surrendered her rights" in the pensions in their decree-incorporated marital settlement agreement); *Guardian Life Insurance Company of America v. Finch*, 395 F.3d 238 (5th Cir. 2004) (federal common law governs disputes between an ex-spouse who is an ERISA plan's designated beneficiary and other claimants to the plan's proceeds. The court held that ERISA does ***not*** preempt a waiver by a named beneficiary of her interest in the plan's proceeds); *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed.2d 264 (2001) (ERISA preempts state law statutorily altering beneficiary designations upon divorce); *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003) (using federal common law to find waiver of spousal interest in ERISA-governed plan, and no pre-emption); *Metropolitan Life Insurance Co. v. Johnson*, 297 F.3d 558 (7th Cir. 2002) (same); *Keen v. Weaver*, 121 S.W.2d 721 (Tex. 2003) (same); *Silber v. Silber*, 786 N.E.2d 1263 (N.Y. 2003) (same); *Strong v. Omaha Construction Industry Pension Plan*, Neb., No. S-03-1403, June 24, 2005, 2005 WL 1704792 ("under the federal common law, a divorce decree can

whoever is ultimately dispossessed of a cash flow to which that party believes that he or she is entitled.[64]

The cases can be mind-numbingly convoluted and extremely fact-specific. Collectively, they stand for the proposition that counsel at the time of divorce ***must*** explicitly consider – and address – the survivorship interests in every retirement in which either party has an interest.

Similar considerations apply to any life insurance policies wither party might hold. Many jurisdictions allow securing of spousal support awards by way of life insurance policies on obligors' lives. However, some jurisdictions require that such policies may only issue with the obligors' consent. The obvious reason for this is "to avoid affording the beneficiary the temptation to hasten the insured's demise."[65] Other jurisdictions, however, find that this is not a concern and hold that the obligor's consent is unnecessary.[66]

VII. CONCLUSION

As demographics change, what is important for lawyers to know and use changes as well. Increasingly, divorce lawyers are going to be required to be attuned to the lives and needs of clients over the age of 60, who are either paying or receiving support.

The concept of what a normal "retirement age" might be is in some flux. In the meantime, the purpose and legitimate uses of alimony continues to be debated; the American Law Institute has suggested a complete reconceptualization, from "need" to "loss," so the question becomes one of entitlement rather than a subjective plea for assistance. Multiple states[67] have experimented with or proposed setting up some kind of formulaic approach to the awarding or modification of alimony in an effort to bring some predictability and consistency to decisions concerning it.

The lack of a theoretical framework on which there is some reasonable consensus plagues all these efforts, since it is hard to formalize a process when it is uncertain exactly where it is intended to go.

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waive a beneficiary interest in the death benefit of an ERISA-governed pension plan"); *MacInnes v. MacInnes*, 677 N.W.2d 889 (Mich. App. 2004).

[64] For some time, courts have held attorneys handling divorces to knowledge of the intricacies of the retirement system involved in their cases. *See*, *e.g.*, *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law; attorney's original advice was correct (the retirement was non-divisible under *McCarty*), but when USFSPA passed just days before the separation agreement was signed, he missed it).

[65] *See Hopkins v. Hopkins*, 614 A.2d 96 (Md. Ct. App. 1991).

[66] *See In re Orr*, 17 FLR 1577 (Iowa Ct. App. 1991).

[67] Including at least Nevada, New Mexico, New York, and Kansas, plus the country of Canada.

Societal demographics will not wait for the theory to catch up to it, however. An ever-increasing number of retirees are finding themselves enmeshed in family court litigation, litigating establishment or modification of alimony awards under the existing framework of laws and cases governing alimony, and arguing about retirement benefits taken, foregone, deferred, accelerated, or pending. This has created the very messy situation described above.

By and large, most courts will not permit parties to foreclose consideration of modifications of alimony upon the retirement of one or both parties, so more and more parties will have at least one additional round of family court litigation to look forward to if their divorce decrees do not adequately consider and provide for exactly what will happen at the twilight of their careers – or if the predictions made at the time of divorce turn out to be inaccurate.

Some courts demand that the litigation not commence until the facts have already changed, making it impossible in many cases to ameliorate impacts depending on the courts' rulings, and increasing the stakes on the outcome of the court fights. Either party's changing circumstances can trigger a complete re-evaluation of the alimony portion of the divorce litigation, and relatively minor changes in either need or ability – or even the judicial perception that needs or abilities ***could*** be changed – can completely change the orders issued upon divorce.

Many courts considering these changes, in an effort to do equity, examine a multitude of "factors" of varying degrees of objective and subjective verifiability, and by so doing make it nearly impossible for counsel to predict the outcome of litigation or adequately advise clients as to the reasonably foreseeable outcomes of proposed litigation. This, of course, increases the chances for such litigation going forward instead of settling or being avoided.

If anything, the imprecision is even more extreme in the "early retirement" cases, where a bewildering variety of nearly contradictory holdings on similar facts make predicting the outcome of anything but the most one-sided cases very difficult.

When retirement benefits are finally received by one or both parties, that receipt becomes a potential basis for modification of any existing alimony award, perhaps re-weighing the needs and abilities of both parties. As States move from a fault-based to a strictly economic analysis of alimony, however, the maturation of retirement benefits can be seen as the realization of the career asset of the working spouse, which could create the basis for building into divorce decrees some expected change in payments, as a matter of course, or at least the basis for a reasoned approach to modification of alimony orders when the decree fails to provide for the contingency of retirement.

In any event, one precaution necessary for all modern divorces is the examination of survivorship designations on retirement plans, and insurance policies, since the failure to do so invites litigation that should be unnecessary – perhaps long after the divorce.

The analytical messiness and decreased predictability and consistency among cases indicates a lack of definitional agreement about what alimony is, and should be, and what role retirement benefits play, and should play, in marriage and in divorce. More directly, the cases indicate that courts (and,

presumably, the state laws they apply) are in disarray as to what alimony is, and what legal doctrines should govern its award and post-award modification.

It remains to be seen whether the ALI approach is accepted and, if so, whether it leads to a greater consensus among States as to what should be done in establishing and modifying alimony awards. In the meantime, it is incumbent upon counsel to look ahead to retirement, and even death, in every divorce case, and build the foreseeable contingencies into the orders issued at divorce. Counsel should strive to complete agreements and decrees in such a way that when parties reach retirement age, they are thankful for the foresight and planning of their attorneys, rather than wondering how some disaster was left for them to discover at that stage of their lives.

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