

DIVIDING EMPLOYEE BENEFITS IN DIVORCE AND THE OCCASIONAL INTERPLAY (AND OFTEN OVERLOOKED IMPACT) OF FEDERAL LEGISLATION

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Incident to many (if not most) divorces in Massachusetts is the identification and equitable division of employee benefits: pensions, employer-provided life insurance, medical insurance, deferred compensation and defined benefit plans, and stock options, among others. While Massachusetts state law may dictate whether, and to what extent the court can consider such “assets,” it is principally federal law that governs how they are divided. The practitioner would do well to review and familiarize himself with both statutory schemes – including the Employee Retirement Income Security Act (ERISA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), and the Federal Employees Group Life Insurance Act (FEGLIA) - for therein lay several potential traps for the unwary.

PENSIONS:

It is now beyond peradventure that pensions often constitute valuable (in many cases the most valuable) marital assets. General Laws, chapter 208, section 34, includes as part of the marital estate all “retirement benefits,” including “military retirement benefits,” as well as both vested and non-vested rights. See Early v. Early, 413 Mass. 720 (1992); McMahon v. McMahon, 31 Mass. App. Ct. 504, 508-509 (1991); Feathler v. Feathler, 33 Mass. App. Ct. 924, 924 n.1 (1992).¹ Section 34 makes no distinction between public and private pensions.

The division of pensions is generally governed by ERISA, which for many reasons, initially barred their assignment or alienation. However, the Retirement Equity Act of 1984 (Act), Pub.L. No. 98-397, § 104, 98 Stat. 1433 (1984), see Dewan v. Dewan, 399 Mass. 754, 758 n. 4 (1987), provided an exception to ERISA’s anti-assignment and anti-alienation provisions by authorizing State courts to assign pension interests by means of a qualified domestic relations order (QDRO) when entering a judgment or order relating to marital property rights, alimony or child support. See 29 U.S.C. § 1056(d)(3) (1985).

Now, it is settled that “[a] judge may assign pension benefits ‘*either* as a present [i.e. as of the date of divorce] assignment of a percentage of the present value of the future pension benefits *or* as a percentage of the pension benefits attributable to the marriage if and when the benefits are actually received.’” Early v. Early, 413 Mass. at 725-726 (emphasis added), quoting from Dewan v. Dewan, 399 Mass. at 755. The former method, sometimes called the “bright-line rule,”² is the “preferable approach” where there are “sufficient assets available.” Dewan v. Dewan, *supra* at 757. This mechanism “provides an immediate settlement of the pension distribution problem and it avoids continued strife and uncertainty between the parties.” Id.

¹ Military retirement pay may also be considered a “stream of income” for purposes of alimony. See Andrews v. Andrews, 27 Mass. App. Ct. 759, 759 (1989). See Krapf v. Krapf, 439 Mass. 97 (2003), for a discussion on dividing military pensions and disability benefits. But see Mansell v. Mansell, 490 U.S. 581, 595 (1989), which held that the Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408 (2000) that provides for the divisibility of military retirement pensions, does not permit State courts “to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans’ disability benefits”).

² See Brower v. Brower, 61 Mass. App. Ct. 216, 219 n.7 (2004).

(citations omitted). As explained in Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (cited with approval in Dewan), the assignment of a percentage of the present value of the future pension benefits “provides a clean break between the parties. . . , an unencumbered pension plan to the employee, . . . relieves the court of any further supervision, and . . . relieves the retirement agencies of the duty to pay benefits to anyone but the employee.”

Conversely, although the award of the pension benefits on an “if and when” basis (sometimes referred to as the “time rule formula”),³ avoids the oftentimes difficult problem of valuing pension benefits, the non-employee spouse’s access to the asset is deferred to a future date, and is wholly reliant on the employee spouse’s control, risk tolerance and continued employment. In at least one recent decision, it has been error to fail to use the “preferred approach” in dividing a pension. See Sampson v. Sampson, 62 Mass. App. Ct. 366, 372-373 (2004) (*vacating* and remanding division of husband’s pension after 24 year marriage).

While the court may properly include in the “marital estate” a spouse’s retirement benefits accrued *before* the marriage, Moriarty v. Stone, 41 Mass. App. Ct. 151, 156 (1996), the court also may include the *future* retirement plan benefits. Mahoney v. Mahoney, 425 Mass. 441, 443 (1997) (*including* wife’s future benefits but awarding her a majority of the estate). The Appeals Court also has additionally concluded that where the preferred, present valuation and distribution of a pension benefit is not possible, the trial court may properly utilize the marital coverage approach (if and when) and actually assign one spouse a portion of the *future* benefit received as a result of the employee-spouse’s earnings post-separation. See Brower v. Brower, 61 Mass. App. Ct. 216 (2004). Cf. Kuban v. Kuban, 48 Mass. App. Ct. 387 (1999) (employer’s post-separation contributions to employee-spouse’s annuity fund was after acquired asset not subject to division); Daugherty v. Daugherty, 50 Mass. App. Ct. 738 (2001) (employer post-separation contributions to profit sharing fund was an after-acquired asset not subject to division); Condon v. Condon, 63 Mass. App. Ct. 1101 (2005) (Memorandum and Order Pursuant to Rule 1:28) (*vacating* and *remanding* percentage assignment of employer’s post-divorce contributions to husband’s defined contribution and deferred compensation plans).

The thematic undercurrent of Brower appears to be not only the factually difficult (if not impossible) means to ascribe a value to the husband’s pension, but also the non-employee wife’s historic and long-standing contributions in helping lay the foundation on which his pension (and future benefits) were built. Cf. Baccanti v. Morton, 434 Mass. 787, 799 n.7 (2001) (where the division of stock options, which had been given for efforts to be expended after the marriage dissolved, the judge must first determine “whether the options were given for efforts attributable to the marital partnership” in order “to include them in the marital estate). As a matter of fundamental fairness, this makes sense. As the Brower court reasoned in affirming the trial court’s division of the future pension benefits, *viz.* the less preferred approach:

In consideration of the [non-employee spouse] forgoing the present enjoyment [i.e. the preferred approach in dividing pensions] of the benefits, he or she will share in any increase in benefits that continued employment will produce, including [any] increase in pension benefits and salary. A non-employee spouse should be compensated for risk of forfeiture, delay in receipt, and lack of control over the timing of receipt of benefits.

³ See note 2, *supra* at 219 n.8.

Brower v. Brower, 61 Mass. App. Ct. at 220-221 (internal quotation marks and citations omitted). Of course, ceding control does not entitle the employee spouse to deal with his “ex” with impunity, nor does it leave the non-employee spouse without recourse. See Krapf v. Krapf, 439 Mass. 97 (2003) (discussing duties of good faith, fair dealing owed between spouses)

The bottom line is that a “one-size fits all” approach to dividing pensions simply is not appropriate. Id. at 221-222 (noting “[a]n equally wise judge in another case might appropriately decide that the total pension benefit should be frozen as of the date of divorce”). The facts of each case must be considered in detail. At a minimum, in light of the present state of the law, the practitioner must be intellectually armed with the knowledge that pensions may mechanically be divided in at least three ways:

1. present assignment of the present value;
2. present assignment of a percentage of the future benefits accrued and received over the marital coverature; and
3. a present assignment of a percentage of the benefits accrued up to the date of retirement, even of earned post-separation.

SOCIAL SECURITY

While akin to a pension, Federal law prohibits this governmental safety net from being included as an asset in the marital estate. See Mahoney v. Mahoney, 425 Mass. at 443-444, citing Title 42 U.S.C. § 407(a)(1994) (the rights to a future payment “shall not be transferable or assignable”). See also 42 U.S.C. § 659(i)(3)(B)(ii). Cf. 42 U.S.C. § 659(a) (permitting assignment of social security monies to pay for alimony and child support). Nevertheless, the trial court is not precluded from considering these anticipated benefits in determining the amount of support to be ordered. Cohen v. Murphy, 368 Mass. 144, 148 (1975); Early v. Early, 413 Mass. at 722 (judge considered wife’s expected Social Security benefits when dividing marital estate). See also Rosenberg v. Merida, 428 Mass. 182 (1998) (addressing Social Security disability benefits for support purposes).

HEALTH INSURANCE

In the health insurance division of the divorce arena, the practitioner who prefers to not spend his time defending malpractice cases, is well advised to consult both G.L. c. 176G, § 5A, and G.L. c. 175, § 110I. The former provides, in relevant part, that:

- (a) In the event of the granting of a judgment absolute of divorce or of separate support to which a member of a group health maintenance contract is a party, the person who was the spouse of said member prior to the issuance of such judgment shall be and remain eligible for benefits under said contract, whether or not said judgment was entered prior to the effective date of said contract, without additional premium or examination therefor, as if said judgment had not been entered; provided, however, that such eligibility shall not be required if said judgment so provides. Such eligibility shall continue through the member's participation in the contract until the remarriage of either the member or such spouse, or until such time as provided by said judgment, whichever is earlier.

The latter similarly provides that:

(a) In the event of the granting of a judgment absolute of divorce or of separate support to which a member of a group hospital, surgical, medical, or dental insurance plan provided for in [G.L. c. 175, § 110,] is a party, the person who was the spouse of said member prior to the issuance of such judgment shall be and remain eligible for benefits under said plan, whether or not said judgment was entered prior to the effective date of said plan, without additional premium or examination therefor, as if said judgment had not been entered; provided, however, that such eligibility shall not be required if said judgment so provides. Such eligibility shall continue through the member's participation in the plan until the remarriage of either the member or such spouse, or until such time as provided by said judgment, whichever is earlier. *The provisions of this section shall apply to any policy issued or renewed within or without the commonwealth and which covers residents of the commonwealth* ”

(emphasis added).

The SJC has recently and notably interpreted c. 175, § 110I, and held that its italicized mandated benefits provision is not available to a spouse, who becomes a Massachusetts resident post-divorce where his former spouse resided out of state at the time of divorce, and continues to be insured by insurers which are not subject to Massachusetts regulations. Foster v. Group Health, Inc., 444 Mass, 668, 677 (2005) (*affirming* summary judgment for insurer).

A litigant’s remedy for a spouse’s (or a spouse’s employer’s) failure to provide court-ordered or agreed-upon health insurance also may be preempted by Federal law, viz. ERISA. Whether that is the case, however, appears to be predominantly (if not completely) predicated on whether the underlying insurance plan is self-funded. Compare Bergin v. Wausau Ins. Co., 863 F.Supp. 34 (D. Mass. 1994) (ERISA preempts state court’s consideration of self-funded employee benefit plan under G.L. c. 175, § 110I), with Cellilli v. Cellilli, 939 F.Supp. 72 (D.Mass.1996) (ERISA did not preempt consideration of non-self-funded HMO plan under G.L. c. 176G, § 5A).

A working knowledge of the federal statutory scheme of COBRA also is critically important in representing divorcing parties. As summarized by the U.S. Supreme Court in Geissal v. Moore Medical Corp., 524 U.S. 74, 79-81 (1998):

The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. 99-272, 100 Stat. 82, 222-237, amended the Employee Retirement Income Security Act, among other statutes. The amendments to ERISA require an employer who sponsors a group health plan to give the plan’s ‘qualified beneficiaries’ the opportunity to elect ‘continuation coverage’ under the plan when the beneficiaries might otherwise lose coverage upon the occurrence of certain ‘qualifying events,’ including . . . divorce or legal separation from the covered employee. 29 U.S.C. § 1163. Thus, a ‘qualified beneficiary’ entitled to make a COBRA election may be a ‘covered employee’ . . . or a covered employee’s spouse or dependent child who was covered by the plan prior to the occurrence of the “qualifying event.” § 1167(3). COBRA demands that the continuation coverage offered to qualified beneficiaries be identical to what the plan provides to plan beneficiaries who have not suffered a qualifying event. § 1162(1). If a qualified beneficiary makes a COBRA election, continuation coverage dates

from the qualifying event, and when the event is termination or reduced hours, the maximum period of coverage is generally 18 months; in other cases, it is generally 36. § 1162(2)(A). The beneficiary who makes the election must pay for what he gets, however, up to 102 percent of the “applicable premium” for the first 18 months of continuation coverage, and up to 150 percent thereafter. § 1162(3). The “applicable premium” is usually the cost to the plan of providing continuation coverage, regardless of who usually pays for the insurance benefit. § 1164. Benefits may cease if the qualified beneficiary fails to pay the premiums, § 1162(2)(C).

LIFE INSURANCE

Allocation of responsibility for maintaining life insurance also lays traps for the unwary. Consider the case of Foster v. Hurley, 444 Mass. 157 (2005). There, the wife unambiguously agreed to maintain no less than \$200,000 of life insurance, naming her then husband as beneficiary. At the time of divorce, she had one policy with UnumProvident, though it was not specifically identified in the separation agreement. Following the divorce, the wife remarried and obtained another policy, with Prudential, naming her new spouse as beneficiary, and also making him the beneficiary of her Unum policy. When she died, the wife had no insurance of which her first husband was a beneficiary. He sued, seeking rights of equitable substitution. The Appeals Court agreed with him, requiring the proceeds from both the Unum and Prudential policies to be turned over to him on the theory that husband #2 would be unjustly enriched if allowed to retain the proceeds from both policies. The SJC, disregarding the wife’s contemptuous conduct, and finding no basis to support a theory of unjust enrichment against husband #2, concluded that the deceased wife had the right to buy (and the separation agreement did not explicitly preclude her from buying) another insurance policy, naming husband #2 as beneficiary. Id. at 168-169. *Ergo*, the court equitably substituted husband #1 only insofar as the Unum policy was concerned, further reasoning that policy was the only one in existence at the time of divorce, the value of the policy increased post-divorce (from \$100,000 to \$168,000), the proceeds satisfied a “significant part” of the deceased wife’s obligations, and the parties did not specify any particular policy, the parties must have intended that the husband would only look to the Unum for satisfaction. Id. at 165.

Regardless of Foster’s arguably strained logic (it was notably a 4-3 decision), what does this case teach us? Several things. Be specific: if there are policies in existence at the time of divorce, identify them. If the then policies’ combined death benefits are insufficient protection (and you represent the beneficiary spouse), articulate what is required to be done to obtain sufficient benefits, and identify the deadlines within which such benefits will be secured and documented (and the consequences for failure to honor such deadlines). In the event that the ultimate death benefits then are inadequate, explain the beneficiary’s rights (and the parties’ intent) vis-à-vis after-acquired policies, *viz.* that both parties intend to use any and all policies, regardless of when acquired, to first satisfy the obligor’s duties under the separation agreement, or that it is agreed and understood that the beneficiary spouse shall have all rights of equitable substitution against any policies in effect at the time of the obligor’s death to the full amount of benefits required to be maintained under the separation agreement. Keep in mind, while affording a client a preferred creditor’s claim may be a useful fall-back position, it may ultimately prove to be worthless if the deceased spouse’s estate is insolvent. See also G.L. c. 175, §§ 125, 135. Of course, if you represent the insured spouse, you may want to explicitly

vitiating such implied rights (as apparently exist under Foster), and demand that the beneficiary's sole and exclusive remedy (if the insurance policies are not existent or insufficient at the time of death) will be solely against the decedent's estate.

Some things you should know about the application of the Federal Scheme:

While most practitioners understand that ERISA predominantly preempts application of state law to retirement accounts or pensions (necessitating QDROs to circumvent its traditional anti-assignment provisions), ERISA also may preempt consideration of life insurance provisions of a divorce agreement. See Sun Life Ins. Co. v. Sullivan, 206 F.Supp.2d 191 (D. Mass. 2002); 29 U.S.C. § 1002(1). "Plainly, insurance coverage, which is part of an ERISA plan is regulated under ERISA." Forcier v. Forcier, 406 F.Supp.2d 132, 139 (D. Mass. 2005). To qualify as a QDRO, then, the order (insofar as it addresses the employee's obligations to maintain life insurance for a beneficiary-spouse) must "clearly specify" (as with the division of pensions) the following four items:

- (i) the name and the last known mailing address (if any) of the participant [i.e. the employee] and the name and mailing address of each alternate payee [i.e. the beneficiary spouse] covered by the order;
- (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
- (iii) the number of payments or periods to which such orders applies; and
- (iv) each plan to which such order applies.

Title 29 U.S.C. § 1056(d)(3)(C)(i)-(iv). Where the divorce agreement fails to specify these topics, the beneficiary-spouse will be unable to demand payment from the insurer, and must (inferentially) pursue a claim against the actual beneficiaries, and/or the estate of the insured-spouse. See Foster v. Hurley, *supra*.

In the first instance, and to obviate the need for future litigation, it appears incumbent upon the practitioner to: (1) ascertain whether the employer provided life insurance is governed by ERISA; and (2) if so, ensure a QDRO is prepared and approved by the Probate Court. Additional prophylactic language in a separation agreement, which obligates the insured, employee-spouse where necessary to cooperate in the preparation and presentation of a separate "life insurance QDRO," also may prove useful.

The second question becomes, what is the effect of an originally valid QDRO (as of the date of divorce) where the insured-spouse changes jobs post-divorce? Stated differently, how can practitioners preserve a beneficiary-spouse's right to life insurance proceeds if the underlying policy is subsequently substituted or superceded? At present, this is an unresolved issue. See Barrs v. Lockheed Martin Corp., 287 F.3d 202, 209 n.7 (1st Cir. 2002), explaining we "intimate no view as to whether an assignment [of life insurance under a valid QDRO] covering unspecified future policies would meet the statutory requirements for a QDRO, and if not, whether it would be enforceable." Nevertheless, it should be considered and addressed with "backup language" in any separation agreement.

We now turn to Barrs. Concluding that under ERISA, the employer may not have a fiduciary duty to ensure communication of facts affecting a life insurance beneficiary's interests, the court addressed the inherent difficulties in enforcing life insurance provisions of a separation agreement. There, and pursuant to a separation agreement, the husband agreed to make his wife the irrevocable beneficiary of his then existing life-insurance policies. Included in the list of policies (as recommended by Foster), were various policies, including one administered by the husband's then employer. Over time, and through acquisitions, however, the husband's employer experienced various permutations, while the employer-provided insurance was substituted and/or superceded by others. Meanwhile, the wife moved and the notice of changes sent by the husband's then employer never reached the beneficiary-wife. The husband later died after the policy that existed as of the time of divorce, had been superceded and later substituted for another policy that did not name his wife its beneficiary. Id. at 204-205. Neither the parties' separation agreement, nor the court-approved QDRO, however, addressed any such "unspecified future policies," and the wife was denied benefits.

Explaining ERISA "does not provide insurance" to beneficiary spouses against "commonplace problems" associated with divorce agreements, the Court observed that:

It is easy to be wise after the fact: presumably if [the wife's] matrimonial lawyer faced the same problem again, he or she would include in the settlement agreement a provision covering *successor* policies. Arranging for effective notification as to key events (e.g. termination, non-payment of premiums) would be more difficult, since it would probably require cooperation from the plan administrator as well as imaginative drafting.

So, what do we learn from Barrs?

Thorough advocacy compels critical forethought (rather than a rote transcription of traditional QDRO language). Any separation agreement should not only specify (and any QDRO should additionally contain where possible) language extending the beneficiary-spouse's rights to any subsequent policy that supercedes or substitutes that in existence as of the date of divorce. Equally important is the notice provisions of the QDRO. Unless the beneficiary spouse never intends to relocate (which of course is impossible to predict with any accuracy), why not request that notification of rights be made separately to the beneficiary-spouse and to her counsel? See Barrs v. Lockheed Martin Corp., 287 F.3d 202 at 211, citing 29 U.S.C. § 1056(d)(3)(G)(ii)(III) (allowing a QDRO beneficiary to require such double notification). That way, at the very least, the beneficiary stands twice the chance of being notified of any changes so that her rights may be preserved.

Specificity of life insurance under Foster, then, may not be the end of the matter. The practitioner must be creative and do his best to account for potential, future contingencies. Of course, not all contingencies can be accounted for. At the end of the day, the best protection a beneficiary-spouse may have is her own inquiries to the insured's employer. As Barrs observed, "regular inquiries by the beneficiary to the company and insurer [will] probably be necessary." Id. at 209. It is up to you to ensure (in every sense of the word) that the right to make such inquiries is protected.

LIFE INSURANCE OF FEDERAL EMPLOYEES

In the case of federal employees, life insurance benefits are governed by (and predominantly preempted by), *inter alia*, the Federal Employees Group Life Insurance Act

(FEGLIA). See Metropolitan Life Ins. Co. v. Zaldivar, 337 F.Supp. 2d 343, 346 (D. Mass. 2004). While a 1998 amendment to FEGLIA did authorize state courts to dictate the order of benefit distribution via divorce decree, there are two prerequisites: (1) the federal employing agency must receive a copy of the court order; (2) before the death of the insured. Id. at 348.

Under this reasoning, if the insured employee dies after the divorce judgment enters, but before his employer receives notice of the order, the divorce judgment would be ineffective to control the disposition of the employee-spouse's life insurance benefits. So, what does Zaldivar teach us? Be vigilant and immediately forward any probate court order (and underlying separation agreement) to the spouse's federal employer, getting proof of service.⁴

STOCK OPTIONS:

Likening unvested stock options to unvested retirement benefits that will vest after the dissolution of the marriage, and after considering the development of § 34, Baccanti v. Morton, 434 Mass. 787 (2001), concluded that these assets may properly be included in the marital estate. But that alone does not compel their division. The Baccanti Court explained that:

[because t]he division of property incident to a divorce . . . is based on the principal that marriage is a partnership . . . [t]he key question then, in assigning one spouse's employee stock options is what, if any, portion of the options is to be considered marital property and what, if any, portion is to be considered nonmarital property because the options relate to a period subsequent to the marriage.

Id. at 797.

Step #1:

In order to determine whether and to what extent stock options may be included in the marital estate, Baccanti clarified that: "the judge must [first] determine if the options were given for efforts expended before, during, or after the marriage. This requires a finding as to the reason (or reasons) for which the options were given (i.e. for past, present or future services). Id. at 799-800. If given for efforts before and during the marriage, they should be included in the estate. Id. at n. 7. Options given for efforts expended *after* the dissolution may nonetheless also be included if attributable to the non-employee spouse's contributions to the employee obtaining the options. Id. at 800 n.6, 7.

Step #2:

The burden is on the spouse challenging their inclusion. It is two-fold:

- (1) first, he must demonstrate the reasons why the options were granted, see id. at 800 (i.e. they were granted for future services to be performed post-divorce and are thus after acquired assets not subject to division); and
- (2) that "the non-employee spouse did not contribute to the employee-spouse's ability to acquire the options at issue, and for that reason, the value of the options either in whole or in part, should not be considered part of the marital estate."

⁴ Of course, under the reasoning of Foster v. Hurley, supra, the beneficiary-spouse would not be left without recourse if the insured dies prior to his employer receiving notice of the Probate Court's order.

Id. at 800. In evaluating whether to include the options, Baccanti teaches that the judge may consider:

- the employee’s stock option plan
- testimony from the employee
- testimony from a representative of the employer, or
- testimony from an expert witness, if any

Id. at 800. The judge also may consider the circumstances surrounding the grant, including whether the options were intended to:

- secure optimal tax treatment;
 - induce the employee to accept employment;
 - induce the employee to remain with the employer;
 - induce the employee to leave his or her employment;
 - reward the employee for completing a specific project or attaining a particular goal;
- or

- be granted on a regular or irregular basis.

Id. at 800 (citation omitted).

Step #3.

Even if the spouse challenging the options’ inclusion meets his initial burden and shows both that the options were given for *future* services and the non-employee spouse made no contributions in their acquisition, Baccanti explains that the court may still divide them if it “determines that equity requires” their apportionment.” Id. at 801. If that is the case, the trial court is instructed to use the “time rule” calculus found in note 10.

Step #4.

After concluding that the unvested options should be included in the estate and apportioned, the court must finally “determine how and when to value the options.” The judge then has the discretion to utilize either the “present value” method or the “if and when received” method. Id. at 802-803.

TAX CONSIDERATIONS

It cannot be emphasized enough that it is incumbent upon the practitioner to set forth for the trial judge any tax considerations that may befall the assignment of particular assets. See Fechtor v. Fechtor, 26 Mass. App. Ct. 859, 866 (1989) (in dividing marital assets, “a court should [generally] consider and should minimize adverse tax consequences”); Williams v. Massa, 431 Mass. 619 (2000). This duty makes good practical sense given the already overburdened courts. (This duty is also explicitly evident in the Child Support Guidelines. See Child Support Guidelines at Article II(A)). If neither party requests the court to consider potential tax consequences of dividing assets, and “do not introduce reasonably instructive evidence bearing on those tax issues, the probate judge is not bound to grapple with the tax issues.” Fechtore v. Fechtore, supra at 866. What is more, failure to raise the tax implications at the trial level also precludes consideration of such issues on appeal. See also Rovito v. Rovito, 58 Mass. App. Ct. 1107 (Memorandum and Order Pursuant to Rule 1:28) (*affirming* division of pension) citations omitted).

CONCLUSIONS

Though by no means intended to be a comprehensive discussion of employee benefits and their potential impact upon divorce cases, this article is intended to apprise the practitioner of certain issues of which he or she must be aware. Once the practitioner has identified the benefit, he or she must decide how to treat it (i.e. asset or income) when negotiating or trying the case.

Nobody starts out as an expert – if you do not know, speak with someone who does.