

Preserving *Innes*

by Brian D. Winters

Most matrimonial practitioners are familiar with the Supreme Court holding of *Innes v. Innes*.¹ *Innes* prohibits our trial courts from considering income derived from pension benefits distributed by way of equitable distribution when modifying alimony post-judgment. The infamous double dip is avoided in a motion to terminate or modify alimony, by excluding retirement benefits previously distributed between the parties.

The practical application of the principles set forth in *Innes* can be vexing to a practitioner. For example, Mr. and Mrs. Smith may divide their assets simply by placing certain assets in each other's column. They choose to offset assets against each other, rather than dividing each and every asset. The bottom line reflects a fair and equitable overall division of the assets. Mr. and Mrs. Smith are both satisfied with the final agreement. Mrs. Smith retained the marital home and Mr. Smith retained his pension.

Mr. Smith then retires and files a post-judgment application seeking a termination or modification of alimony based upon changed circumstances under *Lepis v. Lepis*.² The property settlement agreement provides that the wife has "waived" any interest she may have had in her husband's pension. Many trial court judges adjudicating such an application will refuse to apply the *Innes* holding. The trial court does not perceive a prohibited double dip under *Innes*, since Mrs. Smith waived her interest in the pension rather than the pension being equitably distributed.

It clearly was not the intention

of the parties for the waiver language found in one provision of the property settlement agreement to constitute a judicial determination that the asset had not been equitably distributed. Remember, Mrs. Smith waived her interest in the pension in exchange for receiving Mr. Smith's interest in the marital home.

Before exploring suggestions regarding how this potential problem may be avoided, a review of the *Innes* holding, the statutory amendment upon which it was based, and the relevant case law is appropriate. N.J.S.A. 2A:34-23, as amended, and *Innes* did not represent new law, but rather a codification of existing law.

In *D'Oro v. D'Oro*,³ the husband brought a post-judgment motion to terminate alimony based upon his retirement. He took the position that his share of a previously distributed pension should not be considered as income for alimony purposes, and argued that "it would be inequitable for [the wife] to be able to include [the husband's] pension income *twice* for her benefit, first for her share of equitable distribution, and second for an inclusion in his cash flow determination of an alimony base."⁴

The trial court phrased the issue as follows:

This court is faced with the following question: Once a "present value" of a pension is equitably distributed, and the nonpensioner receives her share in immediate cash, and the pensioner's share is deferred, specifically "leaving all pension benefits to the employee himself," can his monthly pension benefits upon his retirement

be included in an income base for purposes of re-establishment of alimony? This court answers in the negative.⁵

The trial court declined to double-dip and consider the husband's pension as income in determining his alimony obligation. The Appellate Division affirmed, and in *dicta* stated:

Judge Krafte in his opinion indicated that he was not deciding whether after defendant received, in pension payments, the value of his pension calculated as of the termination of marriage, the pension could be considered income. He made this disposition since defendant had not as yet received such value. See 187 N.J. Super. at 380, 454 A.2d 915. While we approve of this result we want to make it clear that we are not inferring that after defendant receives payments equalling [sic] the value as of the termination of the marriage, the payments may be considered income for alimony purposes. Obviously a pensioner who receives pension payments following the distribution of a pension to him has been delayed in the receipt of actual cash. When a pensioner receives payments equal to the value of the pension as of the date of the termination of the marriage, he does not obtain equal value to a cash or other property distribution made at the time of the divorce. This is obvious since a current distribution of money or other property will allow immediate use of the property or permit generation of income. Further the pensioner receiving distribution of a pension runs the risk of dying and receiving no payments on the pension. Since the payments he does receive are actual cash distributions contem-

plated by the court at the time of the divorce ultimately to flow from the equitable distribution of the pension, a substantial argument may be made that no matter how much is paid to the pensioner, the payments should not be regarded as income for alimony purposes.⁶

It should be noted that the trial court held that the wife was not entitled to have the husband's pension benefits considered as income for the purposes of a modification of alimony, based primarily on the fact that the husband had not yet received pension payments in an amount equal to the value of his share of the marital portion of the asset as of the date of divorce. *D'Oro* left open the issue of post-marital pension income.

The issue of post-marital pension income was addressed several years later by the court in *Staver v. Staver*.⁷ In *Staver*, the trial court ruled that pension payments flowing from benefits earned after divorce may be considered in determining changed circumstances, but those attributable to benefits earned during the marriage that were subject to equitable distribution may not.

In *Innes*, the Supreme Court analyzed the issue of "whether the trial court in determining whether [a litigant's] alimony payment should be modified may consider [that litigant's] pension payments."⁸ Stated otherwise, the issue before the Supreme Court in *Innes* was whether the trial court may consider, on a post-judgment application, either party's receipt of pension benefits that were already distributed by way of equitable distribution in admeasuring alimony or whether the same represents a double dip. The Supreme Court ruled that the trial court may not consider income derived from a pension in a post-judgment modification of alimony motion, to the extent that the asset was distributed at the final hearing of the matter.⁹ The Court relied in part on an amendment to

N.J.S.A. 2A:34-23, which provides in pertinent part:

When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

Interpreting the amended statute, the Supreme Court stated:

The plain language of the pertinent amendment provides that income from pension benefits that has been treated as an asset for equitable distribution purposes (those benefits reflecting work during the marriage partnership) is not to be considered in determining alimony. Conversely, under the amendment income from pension benefits earned after the marital relationship has ended may be considered. This interpretation is substantiated by Senate Judiciary Committee, *Statement to Senate No. 90. 976*, which provides "that when a share of retirement benefit is treated as an asset for purposes of equitable distribution, income generated by that share *only* is not to be considered in determining alimony."¹⁰

The Supreme Court emphasized that the statute, as amended, codified and embodied the holding and policies of previously decided cases. The *Innes* court stressed that the prior case law applied to both initial alimony awards and modification of earlier alimony awards.¹¹ Lastly, the Supreme Court in *Innes* made it clear that "the double dipping amendment" applies to both consensual property settlement agreements and to judicial determinations.¹²

Innes holds that "the trial court can no longer...determine alimony by considering income generated by retirement share that has been equitably distributed, either at the time of divorce or when it considers a modification application."¹³ Indeed, "payments generated by pension benefits that had been pre-

viously equitably distributed are not income for purposes of alimony modification."¹⁴

So how do we, as matrimonial practitioners, heed our clients' desires to trade, yet still preserve *Innes*? The author believes that first we should acknowledge that the answer is not to give up on off-setting assets or to enter into a qualified domestic relations order for every pension in every case. The Supreme Court in *Moore v. Moore* implicitly encouraged the use of an off-set or buy-out approach with respect to equitable distribution of a litigant's pension as opposed to dividing a pension by way of a QDRO, while recognizing that there are often difficult and thorny issues associated with dividing pension assets by way of QDRO including, but not limited to, how to divide future post-retirement cost of living benefits.¹⁵ In order to avoid such complications and serve the goal of divorce proceedings, which is "to eliminate possible contact and strife between the parties," the *Moore* Court encouraged the use of an "immediate off-set or payment" method or the "present pay-out" method whereby the non-participant spouse receives her share of the current evaluation of the participant spouse's pension benefits either by way of immediate pay-out or by way of an off-set against other assets.

Similarly, in *Kikkert v. Kikkert*¹⁶ the Appellate Division encouraged the present-day evaluation of a pension followed by a payout to a non-participant spouse or an off-set against other assets versus any sort of pension distribution. The court instructed:

Although fixing present value under such circumstances may be difficult and inexact, nevertheless, immediate final resolution of the method of distribution is to be encouraged, preferably by voluntary agreement whenever possible. Long-term and deferred sharing of financial interest

are obviously too accessible to continued strife and hostility, circumstances which our Courts traditionally strive to avoid to the greatest extent possible. This may be best accomplished, if present value of a pension benefit is ascertainable, by fixing the other spouses share thereof, as adjusted for all appropriate consideration, including the length of time the pension must survive to enjoy its benefits, to be satisfied out of the other assets, leaving all pension benefits to the employee himself.¹⁷

Clearly, the best method to heed the guidance and principles set forth in *Innes*, *Staver*, *D'Oro*, *Moore* and *Kikkert* is in the careful drafting of the property settlement agreement. Therefore, any property settlement agreement that provides for the offset of a pension against other assets, where there also is the payment of alimony, must specifically provide that the pension was equitably distributed, as well as an acknowledgment that the parties have considered the post-judgment implication of the division. For example, if such is the case, the property settlement agreement should contain language as follows:

The parties have determined that the value of husband's pension is roughly equivalent to the value of his putative interest in the former marital residence, and the parties agree therefore to have wife retain the former home and have husband waive his interest therein and husband shall retain his pension and wife shall waive her interest therein. For purposes of any potential post-judgment application filed by either party and in keeping with the *Innes* decision, any income received by husband attributable to pension benefits accrued during the coverture period, shall not be considered as income for purposes admeasuring alimony.

If the parties intend that even income derived from pension benefits that accrued pre- or post-

divorce not be considered as income for alimony purposes in a post-judgment setting, the following language may be appropriate:

Given the overall scheme of equitable distribution and support in this matter, it is expressly understood and agreed that wife shall waive any interest she may have in husband's pension benefits and, moreover, that husband's receipt of income relating to pension benefits which accrued prior to, during, or following the marriage shall not be considered income for purposes of admeasuring alimony upon post-judgment application initiated by either party.

In addition, if applicable, the following language may be added:

Nor shall the increase in value of assets acquired by wife by way of equitable distribution be considered in any such post-judgment application.

It may be that the parties specifically negotiate and agree that the entirety of the income derived from the husband's pension be considered as income upon a post-judgment application, notwithstanding *Innes*. In this event the following language may be considered:

Notwithstanding the *Innes* decision, the parties specifically agree that any and all income derived from husband's receipt of pension benefits upon his retirement shall be considered income for purposes of measuring alimony on a post-judgment application initiated by either party. This is fair and appropriate given the overall scheme of equitable distribution and support in this matter.

The simplest way to avoid any confusion regarding the application of *Innes* on a post-judgment basis is to be as specific as possible with respect to how income derived from pension benefits is to be treated in a post-judgment setting. This approach also is beneficial to the post-judgment court that will be

determining a modification application, as it provides a clear and unambiguous statement of the parties' intentions. While this approach might create an additional issue to debate pre-judgment, the parties will benefit from the time and money spent. This approach is designed to avoid confusing and unnecessary litigation in the future. It is the attorney's obligation to his or her clients to advise them of the complications that may arise in the post-judgment setting, if their intention is not clearly set forth in their agreements. ■

ENDNOTES

1. *Innes v. Innes*, 117 N.J. 496 (1989).
2. *Lepis v. Lepis*, 83 N.J. 139 (1990).
3. *D'Oro v. D'Oro*, 187 N.J. Super. 377 (Ch. Div. 1982), *aff'd*, 193 N.J. Super. 385 (App. Div. 1984).
4. *Id.* at 379.
5. *Id.* at 378.
6. *Id.* at 387-88.
7. *Staver v. Staver*, 217 N.J. Super. 541 (Ch. Div. 1987).
8. *Innes*, at 504.
9. *Id.* at 505.
10. *Id.*
11. *Id.*
12. *Id.* at 511.
13. *Id.* at 514.
14. *Id.*
15. *Moore v. Moore*, 114 N.J. 147, 158-9 (1989).
16. *Kikkert v. Kikkert*, 177 N.J. Super. 471 (App. Div. 1981), *aff'd o.b.*, 88 N.J. 4 (1981).
17. *Id.* at 478.

Brian D. Winters is a partner at Keith, Winters and Wenning LLC, located in Bradley Beach, where he practices primarily in the area of matrimonial law.