

# Domestic Relations

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### Publisher's Note

Dave Kelley's article, *How Does Neville v. Neville Introduce Social Security Into Ohio Divorces?*, was featured as the Practice Pointer in the September/October 2003 issue of the journal. Part II of the article follows.

### Practice Pointer

Neville—Part II:  
Analyzing Neville Reports

*by Dave Kelley*  
*QDRO Consultants/ Pension Evaluators*

#### Practice Overview

Because no trial courts have yet interpreted *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791 N.E.2d 434 (2003), attorneys have precious little guidance on what evidence they should present in a case. This article will suggest that both the income stream and the derivative present values of the Social Security entitlements for both parties should be presented to courts in an a la carte fashion until courts begin to assess exactly which benefits and values they wish to employ.

While the Supreme Court's decision that a trial court "may" consider differing Social Security benefits as an equitable factor does not read as "must", an analysis of our last 100



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Neville Social Security reports does demonstrate that middle-aged, full-time homemakers commonly suffer economic damages at divorce from lost Social Security benefits – benefits that inured to their spouse during the marriage. These damages increase with the age of the couple and the years spent out of the workforce by the lower wage earner.

Introducing evidence on Social Security entitlements will likely become commonplace in divorces involving couples in the 45+ age group in which one party has not worked or has earned much lower wages. The disparity in benefits between husband and wife is the “fundamental fairness” issue discussed by Lon Vinion, the attorney for Judy Neville, in his article following this one.

### **Neville Analysis Unnecessary for Couples in Their 20s and 30s**

Our analysis indicates that Social Security evidence makes no sense for couples in their 20s and little sense for the vast majority of couples in their 30s. The exception takes place under the following circumstances:

- (1) The couple is in their late 30s and the marriage approaches 20 years,
- (2) The larger wage earner has earned high wages,
- (3) The smaller wage earner has been out of the work force for most of the marriage but possesses, or could possess with training, a high earning capacity.

This counter intuitive observation is quite different than the fact pattern in Neville where the lower wage earner possessed minimal job skills will be explained later.

Two basic factors mitigate against the necessity for Neville reports for younger couples.

- (1) **COATTAIL EFFECT:** The value of the marital Social Security for the larger wage earner is invariably smaller than the value of the lower wage earner’s earned Social Security during the marriage coupled with the 50% spousal and 100% widow(er)’s benefit. This occurs because the smaller wage earner receives 50% and 100% of the final Primary Insurance Amount of the

larger wage earner when retirement age is attained. The benefit is not frozen at the time of divorce, but instead grows as the larger wage earner continues to work. Thus, the smaller wage earner rides along on the coattails of the larger wage earner until retirement – hence the expression “Coattail Effect.”

- (2) **CRYSTAL BALL EFFECT:** The farther one has to gaze into the future, the less clear one’s vision. Recognizable variables like remarriage and career/salary changes which seem manageable and reasonable for couples retiring in 5 to 15 years are less so for younger couples. Small errors magnify into large errors when carried through time. For example, we have found it necessary to project benefits for both parties because role reversals can take place in which the current larger wage earner could actually be drawing spousal or – more likely – widow(er)’s benefits from the smaller wage earner. These potential flip-flops make even the nicest looking tabbed reports with reams of information and computer-generated tables worthless. However, as the age of the couple climbs, the damage done to the lower wage earner becomes more evident.

**Caveat:** If one ignores the “Coattail Effect” of Social Security or the value of the widow(er)’s benefit there will almost always be damage to the lower wage earner. The losses we are about to discuss are based on projecting the wages for both the higher and lower wage earner by 3.6% per year until age 62, which is “Alternative I” offered under the “2003 Trustees Report.”

Table 1 – broken out by age - lists the average loss to the lower wage earner and the percentage of cases within that age group where a loss can be shown. For example, while 24% of the cases submitted to us in the 41-45 age group showed a loss, 86% of those in age 56-60 age group did. The average loss in the 25 cases in the 51-55 age group was \$8,671 while it climbed to an average of \$28,589 for the 56-60 age group. Of course, averages don’t tell the story of specific cases. One case in the 51-55 age group resulted in a \$97,298 potential loss while the greatest loss, \$129,190, occurred with a 62 year-old husband and 58 year-old wife. Note that this is not a scientific study reflecting the underlying age groups but merely a reflection of cases submitted

to us. Another analysis will be issued after 1,000 reports.

**Table 1**

Age Category	PROJECTED		CURRENT	
	Percentage of cases where there is a loss for the Lower Wage Earner	PV of Higher Wage Earner SS v. Actual+ Spousal+ Widow's	Percentage of cases where there is a loss for the Lower Wage Earner	PV of Higher Wage Earner SS v. Actual+ Spousal+ Widow's
Under 40 Average	14%	-\$35,300	43%	-\$391
41-45 Average	24%	-\$22,510	86%	\$12,957
46-50 Average	46%	\$3,656	83%	\$34,477
51-55 Average	52%	\$8,671	80%	\$28,589
56-60 Average	86%	\$29,278	93%	\$35,396
Over 61 Average	77%	\$45,440	66%	\$38,586

**Focus on the Income**

Three case studies follow. They involve couples in their 30s, 40s and 50s as illustrative of what is commonplace in their age group. Note that the top part of each grid is entitled “Benefits” and focuses on the income that each party will receive. It is essential to examine the charts carefully and note that the first 4 lines deal with “projected” benefits while lines 5-8 deal with “current” benefits. The distinction between the two is perhaps the biggest issue facing Ohio courts.

**Current v. Projected: Which Is Better?**

The “current” income figures are the more traditional ones that have been seen by attorneys in the past. They represent what each of the parties has earned based on their income to date. No future wages are projected. However, the traditional “frozen” Social Security benefit is no longer used in estimating the potential benefit. Instead, “Alternative I” which assumes a 2% pre-retirement cost of living adjustment (COLA) has been employed. That means even though no additional wages are credited to the account, the benefit will increase each year as a result of wage

indexing. This is the most conservative assumption made by Social Security. “Intermediate” projections employ 3% COLAs and “High Cost” employ 4% COLA projections.

The “projected” benefits in lines 1-4 project wages until age 62 assuming an annual 3.6% increase in salary – “Alternative I which we have referred to previously.. Note that the first line gives the entire projected Social Security wage based benefit while line 2 separates out just the marital portion. The spousal and widow(er) benefits are fully marital and are presented as additional portions of potential benefits. This new approach is designed to clarify the complex entitlements available under Social Security and prevent distorting the entitlements earned during the marriage.

Both the “projected” and the “current” streams of Social Security income are shown in the following way:

*Higher Wage Earner:*

The total benefit earned under Social Security covered compensation and the marital portion of the benefit are presented. (Lines 1&2 and lines 5&6)

*Lower Wage Earner:*

(a) The total benefit earned under Social Security covered compensation and the marital portion of the benefit are presented. (Lines 1&2 and lines 5&6)

(b) Additional 50% Spousal Benefit: The additional benefit amount, greater than the earned wage related benefit, and the present value are presented. (Lines 3 and 7)

(c) Additional 100% Widow(er) Benefit: The additional benefit amount, greater than the total of the earned wage related benefit and the additional spousal benefit, are presented. (Lines 4 and 8)

The three components for the lower wage earner are added together under both scenarios to arrive at the total income and present values of the potential Social Security benefits. As we noted earlier, this is an a la carte grid presentation of the benefits. Those wishing to exclude consideration of the widow(er) and/or spouse and widow(er) benefits can do so without compromising the integrity of the earned wage related portion. It is

conceivable that some courts might wish to look at the “current” benefits for younger divorcing couples while eschewing them in favor of “projected” benefits for older couples.

The “projected” benefit approach was developed to supplement the “current” benefit approach for three main reasons. First, unlike a private pension, Social Security benefits accrue rapidly in the first years of employment. Second, Social Security benefits have a pre-retirement Cost of Living Adjustment (COLA) due to yearly wage (re)indexing that is not present in private pensions. Third, because the only method to reflect the likely 50% spousal and 100% widow(er) benefits under the “coattail” effect is by projecting future wages, it would be inconsistent to project the spousal and widow(er) benefits and not the earned wage benefits of both parties. Keep in mind that a spouse of 10+ years who has not remarried has the right to draw spousal and widow(er) benefits based on the former spouse's entitlement at the time of eligibility - not those frozen at the time of divorce. Thus, Social Security allows one to reap benefits that may include decades of post-divorce earnings by a former spouse.

**Note:** The income and resulting present value of the marital portion of the “projected” wage earned benefit is likely to be less than the marital present value of the “current” benefit. This is true because earnings – even after indexing – are usually greater towards the end of one’s career and supplant those lower early years that are reflected in the “current” method. This causes a lower portion of the benefit to be considered as earned during the marriage when one employs the “projected” method. Spousal and widow(er) benefits may increase or decrease depending on the relative increases of the parties’ “projected” benefits. The present value of the total benefits, on the projected basis, may or may not, be less depending on the relative changes in the individual portions of the total benefits.

The three-tier system of Social Security also leads to distortions of “earned during the marriage” calculations. Keep in mind that Social Security benefits accrue most rapidly at the beginning of a work career. For a person eligible for benefits in 2004, the first \$612 of Average Indexed Monthly Earnings are multiplied by a 90% factor while the next \$3,077 are multiplied by 32% and the remaining portion by 15%. The “projected” approach is essential if courts wish to avoid the “Two Spouse Dilemma” in which two spouses married for relatively the same length of time to the same person would receive very different Social Security awards.

The grid for the income and present values does not quantify all possibilities. It is important to remember that Social Security is very complex. Depending on the future, relative ages and wages, a former spouse may be potentially eligible to draw spouse and widow(er) benefits from the higher wage earner at one point and then later, the situation might reverse. (It might even reverse again if the couple is in and out of the workforce!) Also keep in mind that former spouse benefits are not limited and do not limit the family maximum.

#### **Should Projected Wages Be Used?**

The main objection offered to the “projected” method is the uncertainty of future wage increases - or even the existence of future wages. This fair question is one reason to adopt the most conservative salary increase offered by the SSA of 3.6%. However, ignoring future wages and likely increases in salary makes the traditional snapshot present value based on the current salary, less accurate than the projected method. As we have noted, there is a special problem with overstating the marital portion of Social Security if one does not employ the projected method. As the age of the parties being evaluated increases, a convergence takes places between the current and the projected benefits.

## Case I – Thirties

<b>Social Security Summary Table for (Doe Age 36 - Age 37)</b>			
<b>Benefits</b>			
		<b>John Doe</b>	<b>Jane Doe</b>
1	Early Projected Wage Related Benefit	\$ 2,186.00	\$ 583.00
2	<i>Marital Projected Wage Related Benefit</i>	<i>\$ 416.65</i>	<i>\$ 50.06</i>
3	Additional Spousal Benefit with Coattail projection		\$ 425.00
4	Additional Widow(er) Benefit with Coattail Projection (at age 62)		\$ 1,463.00
<b>Total (1+3+4)</b>		<b>\$ 2,186.00</b>	<b>\$ 2,471.00</b>
5	Early Current Wage Related Benefit	\$ 1,225.00	\$ 65.50
6	<i>Marital Current Wage Related Benefit</i>	<i>\$ 856.71</i>	<i>\$ 28.77</i>
7	Additional Spousal Benefit		\$ 499.50
8	Additional Widow(er) Benefit (at age 62)		\$ 819.00
<b>Total (5+7+8)</b>		<b>\$ 1,225.00</b>	<b>\$ 1,384.00</b>
<b>Present Values</b>			
		<b>John Doe</b>	<b>Jane Doe</b>
9	Present Value of Marital Projected Wage Related Benefit (line 2)	\$19,484.67	\$ 3,047.80
10	Additional Spousal Present Value with Coattail Projection (line 3)		\$25,729.05
11	Additional Widow(er) Present Value with Coattail Projection (line 4)		\$32,936.36
<b>Total (9+10+11)</b>		<b>\$19,484.67</b>	<b>\$61,713.21</b>
12	Present Value of Marital Current Wage Related Benefit (line 6)	\$40,125.69	\$ 1,829.39
13	Additional Spousal Present Value (line 7)		\$30,239.22
14	Additional Widow(er) Present Value (line 8)		18442.23
<b>Total (12+13+14)</b>		<b>\$40,125.69</b>	<b>\$50,510.85</b>

**Discussion:** This is fairly typical of younger couples. It also explains why Neville reports for younger couples are typically unnecessary especially when one considers the impact of the “coattail” effect. Jane, as the smaller wage earner, has a larger benefit under both the “current” and “future” methods. Despite having limited and meager wages her present value advantage under the “current” method thanks to the spouse and widow’s benefits is \$10,384.96 and \$42,228.54 under the “projected” method.

Note that Jane Doe has only earned some \$65.50 per month as a result of her own covered Social Security compensation under the “current” scenario on line 5. She has been out of the workforce for 10 years. The present lump sum value of this meager income is only \$1,829.39 on line 12. However, the value of the potential 50% spousal benefit and 100% widow’s benefit are significant and almost always exceed the Social Security of the larger wage earner. The potential \$499.50 spousal benefit (line 7) which is an additional benefit above the earned benefit is worth some \$30,239.23 (line 13) while the additional widow’s benefit of \$819.00 (line 8) is worth \$18,442.23 (line 14).

If one accepts the logic of the spousal and widow’s benefits, knowing that they are forfeit upon remarriage, then Jane Doe’s marital SS benefits are greater than those of John Doe: (\$50,510.85 v. \$40,125.69) under the “current” method...

Interestingly, this advantage for Jane grows from \$10,384.96 to \$42,228.54 for the “projected” benefits for two not readily apparent reasons: a significant drop in the amount of Social Security earned during the marriage occurs to John and an inevitable increase to the spousal and widow’s benefits caused by the “coattail” effect. To explain:

(1) Less of John Doe’s SS will have been earned during the marriage. Note that while John’s SS on line 5 grows from \$1,225 to \$2,186 on line 1, less of the benefit will be considered to have been earned during the marriage. The monthly benefit earned during the marriage drops from \$856.71 under the “current” scenario to \$416.65 under the “projected” benefit. This occurs because of the 90%, 32%, 15% tiering of SS

benefits and the fact that the later years wages will likely eclipse early low earning years even after indexing.

(2) While Jane Doe's future wages will help limit the inevitable increase to the spousal and widow's benefit, those benefits will increase. Her future, non-marital wages, which will earn a non-marital benefit, will eat into the significant increases to the spousal and widow's benefit but not eliminate them. Notice that Jane's projected benefit even with low wages is expected to be \$583.00 (line 1) a month with only \$50.06 (line 2) earned during the marriage. This benefit erodes the spousal and widow's benefit. In fact, the spousal benefit under the "projected" is only \$425.00 (line 3) while it is \$499.50 (line 7) a month under the "current" scenario. The widow's benefit does increase from \$819.00 under the "current" to "1,463 under the "projected" and accounts for an increase in the widow's benefit of \$14,494.13 (\$32,936.36 on line 11 - \$18,442.23 on line 14).

### **The "Big" Question: Does Jane Owe John Money?**

Of course, some attorneys have raised the issue that when the lower wage earner has a larger benefit it should be factored into the division of property? Practically that means that all couples married over 10 years would have to produce evidence on their SS benefits with the likelihood that the lower wage earner would have to cough up additional assets or lower Spousal Support demands.

While no one should ever preclude what any court should or will do that hardly seems to be what Neville intended. Neville was about a person who suffered economic damage as a result of being a mother and homemaker. Remember that spousal and widow(er)'s benefits do not reduce the benefits of the higher wage earner. They are an idiosyncrasy (politically inspired to be sure!) of the law that a divorced individual can share in the future earnings of a former spouse. To penalize the lower wage earner for having been granted that right in light of the fact that the higher wage earner continues to accrue their own unreduced benefit seems a punitive exercise hardly designed to achieve equity. Judy Neville was 50 years-old, had only

earned 12 quarters of coverage from her own employment and was unlikely to earn much of a benefit because of limited job skills. The trial court thought to totally ignore her plight would not result in justice. The Supreme Court apparently agreed.

It is hard to envision a scenario in which a young homemaker with few job skills will be penalized by a court for having been granted this future expectancy. And this leads us to another important issue that will be addressed by courts.

### **Should the Widow(er)'s Benefit Be Counted?**

Wide agreement exists within the legal community that the 50% spousal benefit should always be factored in. The spousal benefit is payable to an unmarried lower wage earner to the extent that it exceeds their own accrued benefit earned under SS covered compensation. All that is necessary is that he or she be alive to receive it and not have remarried.

The same unanimity does not exist regarding the widow(er)'s benefit. In a sense the widow(er)'s benefit is a contingency based on a contingency. Its value is based on two lives: the larger wage earner must be dead and the smaller wage earner must be alive. While joint lives is a standard actuarial calculation in which the likelihood that the larger wage earner is dead is multiplied by the likelihood that the smaller wage earner is alive, it does introduce another level of speculation that makes some question its efficacy. They don't question that the calculation can and is done but whether it should be done.

The other side counters that to ignore the widow(er)'s benefit either as potential income or the resulting present value will be extremely detrimental to the higher wage earner and ignores an asset that has a statistically valid cost associated with it. Under most scenarios, they argue, the smaller wage earner – more often a female - will outlive the larger wage earner – the male. Most of all, they argue, if the value of survivorship is so unimportant why do so many people fight so fiercely for it?

What, they wonder, should be done when the 100% widow(er)'s benefit kicks in upon the demise of the larger wage earner? Should the estate of larger wage earner receive payments

from the lower wage earner or is the healthier financial status of the smaller wage earner of little consequence to the deceased or their estates especially when it does not come at a direct cost?

However, to always ignore the widow(er)'s benefit and to just balance out the streams of Social Security income during the period when both husband and wife are both alive is somewhat myopic and likely results in a windfall to the smaller wage earner upon the death of the larger wage earner. When present values are employed, the dollar awards to the lower wage earner will dramatically increase if the widow(er)'s benefit is not factored in. For example, the average value of the widow(er)'s benefit in the 51-55 age group is \$49,477 under the projected scenario.

**Case II – Forties**

<b>Social Security Summary Table for Jones (Age 46 - Age 46)</b>			
<b>Benefits</b>			
		<b>Jim Jones</b>	<b>Julie Jones</b>
1	Early <b>Projected</b> Wage Related Benefit	\$ 2,535.00	\$ 1,209.00
2	<i>Marital Projected Wage Related Benefit</i>	\$ 1,296.79	\$ 469.64
3	Additional Spousal Benefit with Coattail projection		\$ -
4	Additional Widow(er) Benefit with Coattail Projection (at age 62)		\$ 775.00
<b>Total (1+3+4)</b>		<b>\$ 2,535.00</b>	<b>\$ 1,984.00</b>
5	Early <b>Current</b> Wage Related Benefit	\$ 2,027.00	\$ 783.00
6	<i>Marital Current Wage Related Benefit</i>	\$ 1,893.79	\$ 698.53
7	Additional Spousal Benefit		\$ 149.00
8	Additional Widow(er) Benefit (at age 62)		\$ 1,294.00
<b>Total (5+7+8)</b>		<b>\$ 2,027.00</b>	<b>\$ 2,226.00</b>

<b>Present Values</b>			
		<b>Jim Jones</b>	<b>Julie Jones</b>
9	Present Value of Marital <b>Projected</b> Wage Related Benefit (line 2)	\$ 99,231.06	\$ 43,012.35
10	Additional Spousal Present Value with Coattail Projection (line 3)		\$ -
11	Additional Widow(er) Present Value with Coattail Projection (line 4)		\$ 32,293.85
<b>Total (9+10+11)</b>		<b>\$ 99,231.06</b>	<b>\$ 75,306.20</b>
12	Present Value of Marital <b>Current</b> Wage Related Benefit (line 6)	\$ 144,951.86	\$ 64,037.63
13	Additional Spousal Present Value (line 7)		\$ 13,621.55
14	Additional Widow(er) Present Value (line 8)		\$ 45,619.59
<b>Total (12+13+14)</b>		<b>\$ 144,951.86</b>	<b>\$ 123,278.76</b>

**Discussion:** Jim and Julie Jones, age 46, present another case where the wife remained out of the workforce for nearly a decade to raise children. Julie's current benefit of \$698.53 (line 6) earned during the marriage is much smaller than Jim's, \$1,893.79 (line 6). Even adding on the spousal benefit of \$149.00 and the sizable widow's benefit of \$1,294 leaves her with \$21,673.10 less than Jim (\$144,951.86 - \$123,278.76).

Note that as Julie continues to work, her marital Social Security will drop which will erode, and in this case, eliminate the spousal benefit (line 3). Overall, her continued employment drops the value of her Social Security entitlements even with the widow's benefit included to \$75,306.209 from \$123,278.76. However, the marital projected Social Security from Jim also continues to drop ending up at \$99,231.06 from the current present value of

\$144,951.86. Coincidentally, the loss under the projected is similar to the current: \$23,924.86 (\$99,231.06 - \$75,306.20) versus \$21,673.10 (\$144,951.86 - \$123,278.76).

Please note that there are no easy fast rules for couples in their 40s to determine when a Neville report shows a loss.

**Case III – Fifties**

<b>Social Security Summary Table for Smith (Age 57- Age 59)</b>			
<b>Benefits</b>			
		<b>Bob Smith</b>	<b>Kathy Smith</b>
1	Early <b>Projected</b> Wage Related Benefit	\$ 1,450.00	\$ 592.00
2	<i>Marital Projected Wage Related Benefit</i>	\$ 1,290.33	\$ 295.19
3	Additional Spousal Benefit with Coattail projection		\$ 81.00
4	Additional Widow(er) Benefit with Coattail Projection (at age 62)		\$ 884.00
<b>Total (1+3+4)</b>		<b>\$ 1,450.00</b>	<b>\$ 1,557.00</b>
5	Early <b>Current</b> Wage Related Benefit	\$ 1,427.00	\$ 567.00
6	<i>Marital Current Wage Related Benefit</i>	\$ 1,351.32	\$ 291.40
7	Additional Spousal Benefit		\$ 95.00
8	Additional Widow(er) Benefit (at age 62)		\$ 870.00
<b>Total (5+7+8)</b>		<b>\$ 1,427.00</b>	<b>\$ 1,532.00</b>

<b>Present Values</b>			
		<b>Bob Smith</b>	<b>Kathy Smith</b>
9	Present Value of Marital <b>Projected</b> Wage Related Benefit (line 2)	\$ 178,932.04	\$ 55,491.99
10	Additional Spousal Present Value with Coattail Projection (line 3)		\$ 15,199.59
11	Additional Widow(er) Present Value with Coattail Projection (line 4)		\$ 42,837.09
<b>Total (9+10+11)</b>		<b>\$ 178,932.04</b>	<b>\$ 113,528.67</b>
12	Present Value of Marital <b>Current</b> Wage Related Benefit (line 6)	\$ 187,392.54	\$ 54,783.87
13	Additional Spousal Present Value (line 7)		\$ 17,826.68
14	Additional Widow(er) Present Value (line 8)		\$ 42,157.06
<b>Total (12+13+14)</b>		<b>\$ 187,392.54</b>	<b>\$ 114,767.61</b>

**Discussion:** Bob and Kathy Smith are typical of reports done for couples in their late 50s. Bob, age 57, has a current accrued benefit at age 62 of \$1,427 per month (line 5) with \$1,351.32 earned during the marriage (line 6). Kathy, age 59, has a current benefit earned as a result of her own employment of \$567.00 with \$291.40 earned during the marriage. She has a meager additional spousal benefit of \$95.00 a month under the current scenario and a \$870.00 widow’s benefit. Under this scenario which

includes the full value of the spouse and widow's benefit, Bob's SS is worth some \$72,624.93 more than Kathy's. (\$187,392.54 - \$114,767.61). Of course, ignoring the widow's benefit would open up the loss another \$42,157.06 (line 14).

Note how little the "projected" benefit differs from the "current" benefit! The "projected" monthly benefit increases to \$1,450 (line 1) with the marital portion, predictably as we noted earlier, dropping to \$1,290.33 (line 2) from \$1,351.32 (line 6). Remember this occurs because of the three tiers of Social Security: 90%, 32% and 15% and the typical heavier weighting of salaries late in one's career which replace low indexed earnings at the beginning of careers.

Because Kathy is two years older, her benefit increases nominally but she is still quite shy of the income of Bob. When Bob reaches 62, Kathy is likely to have a monthly income of some \$673 (lines 1 and 3) with \$376.19 earned during the marriage. Bob's income on the other hand will be \$1,450 a month with \$1,290.33 earned during the marriage. In other words, Bob will have \$1,290.33 of marital Social Security and Kathy \$376.19. Clearly, this is a Neville situation. The only time that Kathy will have the same income as Bob is upon his death unless the court fashions a settlement to help her.

### Is the Present Value Section Necessary?

Keep your eye on the income is the opinion of many attorneys. They believe that the present value section of the report is only employed when there are adequate offsetting assets and the parties reach an agreement. They feel the derivative present values at the bottom should not be foisted on anyone when spousal support can be fashioned to equalize marital incomes. This opinion, however, does lose sight of the value of the widow(er)'s benefit as noted earlier.

But the "income first" perspective is a strong one and is the reason that our format details the income entitlement before offering the present values. The role of the court is to see that both parties have equal incomes – and assets – to live on. Present values are a useful tool when offsetting assets are employed to achieve an equitable division of property.

Present values are, of course, more speculative than income streams. Present values are based on interest rates which change and mortality tables which rarely describe the individual accurately. The present value given in the grid is, of course, never exactly correct. In order to be so both parties must die on the estimated dates. With the widow(er)'s benefit, the value is based on joint lives and is even more speculative. The values are, however, for most situations reasonable and fair. When there are significant health concerns, present values fail and income orders make far more sense.

### Neville Shortcut Reports

When the parties have earned most or all of their Social Security wages during the marriage, it is possible to **estimate** benefits from Social Security statements. These statements may show an anticipated benefit at retirement and an estimated widow(er) benefit. The spousal benefit can be calculated using simple arithmetic. We estimate that this type of gross estimate will be within 20% of the more sophisticated analysis. This type of estimate will be more accurate the closer the couple is to retirement.

The major pitfalls to this simple approach are:

- (1) PEBES differ based on the assumptions provided by the requesting party. Some take into account future wages while some are based only on current wages. Always carefully check the assumptions made at the bottom of the benefit page!
- (2) The estimates only consider the worker and do not consider the possible effect of age differences between the parties.
- (3) Government plan offsets are not considered.
- (4) Marital portions are not recognized (and are difficult to calculate without determining the Average Indexed Monthly Earnings acquired during the marriage).
- (5) Only the income for the participant at full retirement age is given. The reduction factors for participant, spouse and widow(er) differ and are not considered.
- (6) The approach is limited to benefits and does not reflect present values.

**Offsets to Social Security**

Remember that in cases involving a state or civil service participant there are two offsets that must be included in the analysis of Social Security. The Government Pension Offset (GPO) and the Windfall Elimination Provision (WEP) were discussed in detail in Part I.

The GPO affects those who have non-covered earnings in a government pension, and will receive spousal and widow(er) benefits. For every three dollars of pension benefits they earn from that plan they lose two dollars of the spousal and widow(er) Social Security benefits.

The WEP affects those who have both Social Security earnings and government pension earnings. This reduction is more complex. It applies to workers with less than 30 years of substantial Social Security earnings, and reduces the first tier of the AIME formula. Rather than receiving 90% of the first \$612, the worker with non-covered earnings receives 40%.

**Warning:** There were 283 co-sponsors on one bill in the U. S. House of Representatives (H.R. 594) in the 108<sup>th</sup> Congress that would have repealed both the GPO and the WEP as of December 2003. It was not voted on. There were numerous other bills that modify the GPO and

WEP especially for lower income individuals that were not acted upon. Because repeal of the GPO and WEP offer such concentrated benefits to some and spread the costs amongst many others, it is likely that both offsets will be at least modified in the near future.

**Language for Deferred Distribution**

Most courts endeavor to bring finality to a divorce. Whether one agrees to a formula for a future division of Social Security income or to current offsetting assets, we recommend including at least the following language which deals with making future orders that are “just and equitable.”

**Continued Jurisdiction:** The court shall retain jurisdiction to maintain the original intent of the parties as stipulated herein. The court shall also retain jurisdiction to enter such further orders as are necessary to enforce the assignment of benefits to the former spouse, including the recharacterization thereof, as a division of benefits under another plan, as applicable, or to make an award of spousal support, if applicable, in the event that the employee fails to comply with the provisions herein. Furthermore, the court retains jurisdiction to enter orders that are just and equitable so long as the orders are not inconsistent with any other provisions of the Decree.❖

**Raw Data: 100 Most Recent Neville Analysis Reports**

Case Number	Age of Higher Wage Earner (HWE)	Age of Lower Wage Earner (LWE)	Years of \$0 SS Earnings	Marital PV of HWE (\$)	Marital PV of LWE (\$)	PV of Spousal (\$)	PV of Widow(er) (\$)	PV of HWE SS v. LWE SS+Spousal+Widow's (\$)	Marital PV of HWE (\$)	Marital PV of LWE (\$)	PV of Spousal (\$)	PV of Widow(er)(\$)	PV of HWE SS v. LWE SS+Spousal+Widow's (\$)
<b>Under 35</b>													
1	34	35	0	28,579	21,763	7,195	45,626	(46,004)	58,389	36,816	-	21,579	(6)
2	35	38	10	10,030	123	-	3,112	6,795	22,193	123	-	-	22,069
3	36	37	10	19,485	3,048	25,729	32,936	(42,229)	40,126	1,829	30,239	18,442	(10,385)
4	37	38	8	37,580	14,908	50,726	37,909	(65,963)	51,633	18,102	19,505	21,068	(7,042)

5	38	36	1	39,189	14,139	-	47,529	(22,480)	64,179	33,367	-	23,809	7,003
6	38	39	0	36,506	11,604	20,244	41,583	(36,926)	55,779	17,540	2,092	22,623	13,524
7	39	40	0	46,386	63,231	-	23,446	(40,291)	69,371	84,467	-	12,802	(27,897)
<b>Average</b>			4	31,108	18,402	14,842	33,163	<b>(35,300)</b>	51,667	27,464	7,405	17,189	<b>(391)</b>
<b>Age 41-45</b>													
8	41	38	0	67,398	26,726	-	38,092	2,580	73,117	54,160	-	31,941	(12,983)
9	41	38	5	68,024	42,126	-	48,999	(23,100)	96,923	57,184	-	33,098	6,640
10	41	41	0	55,562	37,869	-	41,496	(23,803)	85,592	62,211	-	26,069	(2,688)
11	42	39	15	57,844	832	12,317	33,413	11,281	91,747	832	8,843	30,981	51,091
12	42	43	7	53,665	21,531	-	41,803	(9,669)	86,811	33,571	14,309	27,794	11,136
13	42	49	24	75,382	86	90,285	13,812	(28,801)	101,430	86	55,717	8,917	36,710
14	42	42	0	63,297	26,339	-	27,693	9,265	67,631	38,191	-	29,198	242
15	42	40	5	89,709	73,363	18,201	74,131	(75,985)	120,929	73,363	-	51,721	(4,155)
16	43	43	7	76,160	24,451	6,350	49,948	(4,590)	119,429	35,209	28,734	40,906	14,580
17	43	44	7	68,534	17,444	42,732	48,521	(40,163)	93,979	17,550	21,534	35,761	19,134
18	44	44	1	68,285	44,398	21,366	49,921	(47,400)	95,737	52,113	-	33,344	10,279
19	44	41	8	70,311	1,624	83,671	58,883	(73,866)	100,084	1,624	55,263	39,295	3,902
20	44	44	10	21,488	4,717	2,650	36,078	(21,957)	42,622	4,717	-	25,348	12,557
21	44	44	0	116,689	61,078	-	24,163	31,448	152,054	68,804	-	18,101	65,149
22	44	45	14	94,579	36,061	47,437	58,730	(47,648)	137,050	36,061	25,496	46,574	28,919
23	44	42	12	90,221	13,789	42,025	55,326	(20,919)	127,376	13,756	53,691	46,543	13,387
24	45	44	2	109,931	61,756	-	54,469	(6,294)	140,166	82,237	3,432	51,470	3,028
25	45	42	0	96,224	50,182	-	43,451	2,591	125,774	79,238	-	45,521	1,015
26	45	45	6	68,514	56,511	-	47,043	(35,041)	98,978	70,060	-	28,074	844
27	45	46	14	97,196	2,356	93,846	49,354	(48,360)	137,305	2,356	82,931	43,985	8,033
28	45	47	6	94,381	46,864	26,598	43,205	(22,286)	118,632	45,355	32,634	35,367	5,277
<b>Average</b>			7	76,352	30,957	23,213	44,692	<b>(22,510)</b>	105,398	39,461	18,218	34,762	<b>12,957</b>
<b>Age 46-50</b>													
29	46	37	7	71,371	12,778	-	87,282	(28,689)	100,092	16,590	49,800	70,963	(37,261)
30	46	46	10	110,262	25,803	37,383	63,556	(16,481)	155,772	25,803	13,565	51,713	64,691
31	46	41	12	76,999	6,538	13,932	57,725	(1,196)	103,382	4,741	41,513	39,228	17,900
32	46	46	10	99,231	43,012	-	32,294	23,925	144,952	64,038	13,622	45,620	21,673
33	46	43	13	61,843	5,763	-	16,913	39,167	70,632	4,251	-	18,122	48,259
34	47	48	0	93,678	59,044	-	49,549	(14,915)	134,772	82,864	-	41,906	10,003
35	47	47	12	80,456	42,579	-	28,055	9,822	103,033	62,865	-	32,137	8,032
36	47	46	12	106,377	45,373	-	47,159	13,845	143,184	65,268	-	37,997	39,918
37	47	51	9	94,953	69,161	12,917	33,861	(20,986)	104,304	69,161	5,382	30,864	(1,104)
38	48	49	9	132,974	13,203	70,128	63,341	(13,698)	170,349	13,203	43,904	50,833	62,409
39	48	46	15	61,935	15,214	35,674	38,732	(27,684)	78,968	15,214	23,783	31,735	8,237
40	48	48	0	122,545	67,571	-	46,268	8,706	154,420	93,412	-	38,392	22,616
41	48	50	9	125,874	31,072	44,096	57,443	(6,737)	163,051	31,072	20,593	46,670	64,715
42	49	48	7	129,372	91,370	-	54,035	(16,033)	180,666	113,302	-	51,174	16,190
43	49	52	15	141,460	3,445	48,756	54,671	34,588	166,833	3,445	28,714	47,410	87,265
44	49	47	0	103,403	35,603	5,227	61,808	766	125,255	55,982	7,453	52,623	9,197
45	49	42	5	83,848	14,525	29,204	64,488	(24,370)	100,709	15,583	37,224	48,364	(461)
46	49	44	15	118,956	5,680	58,755	61,821	(7,300)	129,692	5,589	60,418	56,195	7,490
47	49	47	8	62,201	4,780	39,806	37,042	(19,427)	76,797	4,780	26,571	29,590	15,856

**Domestic Relations Journal of Ohio**

48	50	49	17	131,579	7,855	61,715	59,196	2,813	163,887	7,855	41,373	49,303	65,356
49	50	52	11	54,357	46,255	-	21,946	(13,844)	54,365	46,255	-	21,978	(13,867)
50	50	51	18	107,062	517	-	-	106,545	107,202	517	-	-	106,685
51	50	51	23	80,348	-	-	23,306	57,043	106,194	-	-	18,197	87,997
52	50	49	15	150,871	27,127	53,462	69,026	1,256	180,158	27,127	36,117	59,367	57,547
<b>Average</b>			11	102,063	29,959	21,892	43,855	<b>6,356</b>	126,639	37,228	16,436	38,499	<b>34,477</b>
<b>Age 51-55</b>													
53	51	49	1	96,647	55,017	-	43,514	(1,884)	111,012	64,977	-	40,406	5,629
54	51	48	23	148,406	-	114,992	70,445	(37,032)	187,358	-	97,611	59,787	29,960
55	51	50	15	143,884	26,087	32,805	25,709	59,282	182,658	26,087	24,362	22,119	110,091
56	51	49	10	106,867	39,043	-	62,194	5,629	119,714	39,043	-	52,390	28,280
57	51	42	14	41,518	5,215	8,883	41,298	(13,877)	44,065	5,215	5,066	37,417	(3,632)
58	51	52	17	152,175	28,107	73,586	54,355	(3,873)	191,117	27,871	80,240	49,815	33,190
59	52	50	19	152,697	874	108,353	62,833	(19,363)	184,520	856	97,928	56,610	29,126
60	52	51	7	90,011	14,699	29,602	35,112	10,597	90,011	14,699	29,602	35,112	10,597
61	52	47	13	138,486	19,711	57,416	61,811	(452)	161,221	19,711	52,530	58,359	30,622
62	52	45	14	130,543	46,434	21,510	78,063	(15,465)	150,647	46,434	11,031	69,261	23,921
63	53	55	8	134,156	64,025	24,730	57,788	(12,387)	143,614	66,020	19,981	54,187	3,427
64	53	49	16	116,216	49,002	-	47,859	19,355	138,413	61,321	15,535	45,371	16,186
65	53	53	6	147,004	31,295	44,147	54,910	16,653	165,672	31,295	33,143	49,902	51,332
66	53	53	23	170,282	22,868	41,822	55,958	49,633	199,571	25,155	65,889	50,482	58,045
67	54	48	17	109,872	12,278	66,823	64,463	(33,691)	123,451	12,329	62,296	61,198	(12,371)
68	54	54	24	135,033	9,230	6,189	36,916	82,698	137,670	9,230	2,751	35,262	90,427
69	55	57	7	130,186	70,105	11,749	46,253	2,078	154,009	75,470	10,910	41,912	25,717
70	55	51	17	129,939	4,186	24,442	64,845	36,466	138,165	4,186	21,071	62,738	50,170
71	55	55	21	183,044	55,646	34,516	56,276	36,607	204,060	65,688	43,808	52,168	42,395
72	55	55	3	208,700	88,305	-	23,098	97,298	243,744	88,305	-	21,853	133,587
73	55	40	11	54,674	9,304	25,593	59,303	(39,526)	57,372	9,304	21,523	53,689	(27,144)
74	55	54	14	7,625	33,999	-	-	(26,374)	7,625	33,999	-	-	(26,374)
75	55	54	8	102,047	94,103	-	42,564	(34,620)	108,372	105,705	-	46,396	(43,729)
76	55	56	24	171,252	2,767	107,136	44,189	17,160	178,506	2,767	105,861	43,697	26,181
77	55	54	24	171,252	2,520	99,704	47,164	21,864	176,799	2,520	98,551	46,630	29,098
<b>Average</b>			14	126,901	31,393	37,360	49,477	<b>8,671</b>	143,975	33,527	35,987	45,870	<b>28,589</b>
<b>Age 56-60</b>													
78	56	53	2	158,851	113,664	-	48,365	(3,179)	180,006	126,502	-	49,664	3,840
79	56	60	14	193,032	136,540	-	31,423	25,068	193,032	139,062	-	32,271	21,699
80	56	56	6	152,286	98,982	-	37,856	15,449	168,018	105,902	-	37,890	24,226
81	56	46	10	156,842	59,044	3,306	81,338	13,153	156,842	59,044	3,306	81,338	13,153
82	57	52	13	159,049	51,454	-	55,481	52,115	179,237	66,055	9,844	57,438	45,899
83	57	57	26	202,804	7,089	119,098	57,433	19,183	227,912	7,049	114,885	54,992	50,986
84	57	56	17	189,940	75,174	34,589	56,323	23,853	206,410	75,174	27,459	53,098	50,678
85	57	60	11	178,932	55,492	15,200	42,837	65,403	187,932	54,784	17,827	42,157	73,164
86	58	60	14	178,086	22,327	74,408	44,681	36,669	178,086	22,327	74,408	44,681	36,669
87	58	46	4	136,442	66,455	-	81,830	(11,843)	142,472	79,668	-	85,545	(22,741)
88	59	59	8	225,392	131,304	-	48,849	45,239	237,159	133,366	-	48,664	55,129
89	59	59	19	211,959	119,981	-	44,269	47,709	211,959	119,981	-	44,269	47,709
90	60	62	23	236,183	-	154,501	49,701	31,980	239,629	-	151,692	48,830	39,107
91	60	54	10	213,960	83,331	7,890	73,650	49,088	219,919	83,874	7,160	72,864	56,021

<b>Average</b>			13	185,268	72,917	29,214	53,860	<b>29,278</b>	194,901	76,628	29,042	53,836	<b>35,396</b>
<b>Age 61-65</b>													
92	61	50	2	154,967	107,074	-	41,087	6,807	159,004	126,239	-	55,528	(22,763)
93	61	59	21	227,154	30,049	75,505	52,419	69,181	227,154	30,063	86,002	52,419	58,670
94	62	58		277,386	-	90,269	57,928	129,190	277,386	-	90,269	57,928	129,190
95	64	51	4	254,055	45,762	6,473	99,059	102,761	254,055	56,663	17,179	99,059	81,154
96	65	63	16	299,217	52,012	75,310	52,691	119,205	299,217	52,012	75,310	52,691	119,205
97	65	62	20	87	894	-	-	(807)	87	894	-	-	(807)
<b>Average</b>			13	202,144	39,298	41,260	50,530	<b>71,056</b>	202,817	44,312	44,793	52,937	<b>60,775</b>
<b>Over 66</b>													
98	66	63	10	232,911	136,866	-	45,640	50,405	232,911	136,866	-	45,640	50,405
99	67	61	39	149,052	-	99,048	62,889	(12,885)	149,052	-	99,048	62,889	(12,885)
100	73	67	5	136,607	83,975	-	107,526	(54,894)	136,607	83,975	-	107,526	(54,894)
<b>Average</b>			18	172,857	73,614	33,016	72,018	<b>(5,791)</b>	172,857	73,614	33,016	72,018	<b>(5,791)</b>

## Neville: An Abuse of Discretion Case

by Lon Vinion, Esq.  
Wooster, Ohio

• **Editor’s Note:** The author, a Wooster attorney, successfully argued to the Ohio Supreme Court that the trial court’s award of the equity in the marital residence to balance out her husband’s larger Social Security benefits was necessary to maintain an equitable division of property.

In *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791 N.E.2d 434 (2003), the Ohio Supreme Court was faced with a very difficult fact pattern. Specifically, this was a situation where it appeared on one end that the United States Congress wanted to preserve the integrity of the Social Security System, and yet on the other hand the interests of the State of Ohio in making sure divorcing spouses were treated equitably.

On one level, the case involved a complicated Federal preemption question, which the court had to grapple with, but on a much more basic level the case dealt squarely with the fundamental family law concepts of fairness and equity.

A great deal of credit should go to the Magistrate and Judge of the original trial court in *Neville*, because they did a terrific job at clearly articulating what the issues were and how the court was addressing those issues. Specifically, the Magistrate initially said that he recognized that although he could not divide Social Security, he could “consider” the tremendous disparity which Joe and Judi Neville would face in income during their retirement years, when making a division of property award.

The bottom line of the *Neville* decision essentially revolved around the technical legal argument that since there was no express preemption of considering Social Security benefits in a divorce proceeding, preemption could only be implied, if the court found that doing so would do major damage to clear and substantial federal interest of the Social Security systems. *U.S. v. Yazell*, 382 U.S. 341, 86 S.Ct. 500 (1966). Militating against finding such damage to the federal interest again was the substantial savings risk in protecting divorcing spouses, and another aspect which appealed to the court was the gender equality argument, considering women have historically earned substantially less than men, and consequently will receive substantially less Social Security benefits than men upon retirement. The Supreme Court also acknowledged the importance of the federalism issue in *Neville*, recognizing that State supremacy

in those areas, such as domestic relations that have always been the traditional state province should not be assumed, but instead should *not* be assumed unless and until there was some clear demonstration that preemption was intended.

Having noted all of these technical legal arguments. Probably the note that carried the day with the Supreme Court was the concept of fundamental fairness. After 30 years of marriage, Joe and Judi Neville found themselves precipitously close to retirement, and it was clear that Joe would have twice as much income upon retirement, \$1,400 per month, compared to Judi's \$700 independent spousal benefit per month. She had not earned any Social Security as a result of her own employment. Moreover, she had essentially no skills nor any remaining time to increase her retirement and to close that gap, and was a classic displaced homemaker in the sense that she had donated her prime earning years to the family, and as a consequence, had suffered when it came time to reap the rewards of Social Security upon retirement.

It appeared the justices could not allow such a dramatic disparity to go uncorrected in an area that is grounded upon both historical and modern concepts of equity.

So in many ways, the *Neville* case, despite its somewhat complicated and technical posture, was really nothing more than an abuse of discretion case in the sense that the trial court looked at each and every factor, reached a decision and the Supreme Court ruled, in the end, that the trial court's decision, under all of the facts and circumstances, was not unreasonable.

As far as what the *Neville* decision means for Ohio divorce litigants, there are probably two aspects that need to be considered to answer that question. The first aspect is pragmatic, and relates to current developments where the traditional pension system is slowly withering away, where many older citizens find themselves facing divorce with a limited income flow and limited resources, and the impact of a substantial asset such as Social Security in these cases will be playing an increasingly larger role. Failure to take into account this kind of an asset

could leave the court essentially without the ability to provide a remedy for what would otherwise be an inequitable divorce order.

The second aspect of the *Neville* case probably revolves around the continuing evolution of the concept of marital property. Such things as pensions, stock options, health insurance benefits, frequent flyer miles and a myriad of other items are finding their way into the courtroom for consideration and potential division upon divorce.

If one side is left with a significant disadvantage over the other, from whatever source, then true equity cannot be achieved. It is only by considering *everything* and seeing how each item impacts the total attempt to divide assets fairly, can the court achieve true fairness and equity. In that respect then, *Neville* is no more than one more link in the evolutionary chain in an effort to determine what is property and what is fairness when it comes to dividing property in a divorce.

## Briefly Noted

### Child Support

#### *Pushkin v. Pushkin*

**Citation:** 2003-Ohio-6109, 2003 WL 22707800 (Ohio Ct. App. 10th Dist. Franklin County 2003)

Father's motion to modify support was correctly denied for failure to show an involuntary change of circumstances. Father, a dentist, had voluntarily entered a guilty plea to counts of Medicare fraud. He voluntarily agreed to a plan of restitution and voluntarily agreed to a 4-year suspension of his dental license.

His claim that felony convictions, loss of his license and clinical depression prevented him from obtaining employment, was unpersuasive.

#### *Ullom v. Ullom*

**Citation:** 2003-Ohio-6728, 2003 WL 22939471 (Ohio Ct. App. 7th Dist. Columbiana County 2003)