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Vulnerabilities of Trusts in Matrimonial Law

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Presenters: Margaret M. Donohoe, Esq.
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When Trusts Aren't Enough: Vulnerabilities of Trusts in Matrimonial Law

By Margaret M. Donohoe & Paul M. Talbert

June 1, 2024

1) Separate Property vs. Marital Property
   a) Separate Property – Domestic Relations Law § 236(B)(1)(d) The term separate property shall mean:
      (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
      (2) compensation for personal injuries;
      (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
      (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.
   b) Marital Property – Domestic Relations Law § 236(B)(1)(c)
      The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

2) Commingling & Transmutation of Separate Property
   a) Commingling refers to the combination of separate property and marital property such that the separate property loses its character.
      Commingling of separate property occurs when separate funds are placed into a marital account. This does not necessarily change the ownership of the funds. To become a marital asset, there must be an intent to make it a marital asset.
   b) Transmutation occurs with the intention to convert the asset into marital property. Transmutation is a change in the status of property from separate to marital. Transmutation can happen when one spouse takes separate property titled in his or her name and changes the titled to joint names. By doing this, the funds transmute and become a marital asset.

c) *Steinberg v. Steinberg*, 59 A.D.3d 702, 874 N.Y.S.2d 230 (2d Dep't 2009)
   i) The Husband created his management company two years prior to the marriage.
   ii) However, the company's only asset was acquired two years after the marriage.
   iii) Having failed to trace the source of his portion of the building's acquisition costs to his separate property, the court concluded that the acquisition costs came from marital funds.
   iv) "Marital property is to be viewed broadly, while separate property is to be viewed narrowly. Where…a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property."

d) *Imhof v. Imhof,* 259 A.D.2d 666, 686 N.Y.S.2d 825 (2d Dep't 1999)
   i) The Husband deposited the proceeds of sale of his separate property into the parties' joint account.
   ii) The parties' then used those funds to support their shared business and their family.
   iii) The Husband was not entitled to a separate property credit for the funds as his actions indicated an intention to commingle the funds.
   iv) "Separate property can be transmuted into marital property when the actions of the titled spouse demonstrate his intent to transform the character of the property from separate to marital."

3) Equitable Distribution & Factors Relevant to Trusts

a) Equitable Distribution Factors - Domestic Relations Law § 236

(B)(5)(d) In determining an equitable disposition of property, the court shall consider:

(1) *the income and property of each party at the time of marriage, and at the time of the commencement of the action;*

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) the loss of health insurance benefits upon dissolution of the marriage;

(6) any award of maintenance under subdivision six of this part;

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from

a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;

(8) the liquid or non-liquid character of all marital property;

(9) *the probably future financial circumstances of each party;*

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts;

(15) in awarding the possession of a companion animal, the court shall consider the best interest of such animal. "Companion animal", as used in this subparagraph, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law; and

(16) *any other factor which the court shall expressly find to be just and proper.*

4) Contributions to Separate Property

a) *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986)

The test "established guidelines for determining whether the appreciation in a titled spouse's separate property has been transmuted into marital property based on the indirect contributions of the nontitled spouse." *Hartog v. Hartog*, 85 N.Y.2d 36, 623 N.Y.S.2d 537 (1995)

b) *Fields v. Fields*, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)

i) In this divorce action, the Court analyzed the purchase history of the parties' marital residence.

(1) 8 years into the marriage, the Husband wanted to buy a multi- apartment building, in which the family would establish their marital residence. The Wife agreed to the purchase if certain conditions were met.

(2) Instead of meeting those conditions, the Husband chose to purchase the building with financial assistance from his mother.

(3) The apartment building served as the marital residence for the parties' and their son for approximately 30 years.

ii) In consideration of the time spent utilizing the building as the marital residence, as well as mortgage payments made by the Husband unproven to be solely from Separate Property, the Court determined that the residence was Marital Property subject to distribution.

c) *Johnson v. Chapin*, 12 N.Y.3d 461, 909 N.E.2d 66 (2009)

i) Prior to the marriage, the Husband owned a home.

ii) During the marriage, the parties' expended approximately $2 million on renovations.

iii) Though renovations were financed by Husband's separate property and Husband's involvement was far more extensive, Wife's efforts in the renovations entitled her to 25% of the home's appreciation.

iv) "Any appreciation in the value of separate property due to the contributions or efforts of the non-titled spouse will be considered marital property. This includes any direct contributions to the appreciation, such as when the non-titled spouse makes financial contributions towards the property, as well as when the non-titled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence."

d) *Culman v. Boesky*, 207 A.D.3d 18, 170 N.Y.S.3d 5 (1st Dep't 2022)

i) The Wife, prior to the marriage, acquired an art gallery.

ii) The Husband made indirect contributions as a supportive spouse and parent, and direct contributions by attending events and providing occasional assistance.

iii) The court determined that the initial award of 7.5% of the business's appreciation was too low, but 25% would be too high (when compared to other cases in which the non-titled spouse worked for the titled spouse's business). Ultimately, the Husband was awarded 15% of the appreciation of the Wife's art business.

5) Irrevocable vs. Revocable Trusts

a) Irrevocable

i) Irrevocable trusts are seldom subject to distribution. When a trust is irrevocable, the assets are typically out of reach of the parties – the grantor spouse has relinquished ownership of the assets and has no authority to revoke the trust or transfer the assets.

ii) *Markowitz v. Markowitz*, 146 A.D.3d 872, 45 N.Y.S.3d 203 (2d Dep't 2017)

(1) Similar to *Wortman*, the Husband placed his life insurance policy in an irrevocable trust. However, in this case, the Wife was not the trustee.

(2) Here, the court erred in granting the Wife the cash surrender value of the policy as part of the distributive

award because neither party had control or ownership of the trust's assets.

(3) "While marital assets placed in a trust may be subject to equitable distribution, the trust here is irrevocable, and neither party is a trustee with the power to transfer control of the trust assets."

iii) *Hofmann v. Hofmann*, 155 A.D.3d 442, 63 N.Y.S.3d 243 (1st Dep't 2017)

(1) Prior to this divorce action, the parties placed their marital residence in an irrevocable trust. The Wife argued for division of the residence.

(2) In analyzing the creation of the trust, the court determined that the Wife was fully aware of the specific terms of the trust and voluntarily transferred her interest.

(3) "[T]he trust assets were not marital property subject to equitable distribution…as here, the parties are not trustees and have relinquished control over the trust assets."

b) Revocable

i) Revocable trusts are often equated by the court as ownership of the assets under the trust's protection. If a party has the authority to control the assets in the trust and the ability to revoke the trust, regain title, and transfer the assets, the court is more likely to include the assets in equitable distribution.

ii) *Wortman v. Wortman*, 11 A.D.3d 604, 783 N.Y.S.2d 631 (2d Dep't 2004)

(1) Prior to this divorce action, the Husband placed life insurance policies in an irrevocable trust and named the Wife as trustee.

(2) As trustee, the Wife had the authority to transfer control and ownership of the trust assets to her Husband at any time.

(3) The Husband argued that the Wife could not be awarded any of the trust's assets because the trust was irrevocable.

(4) The court, in recognizing that the Wife could transfer the policies to the Husband for his ownership and control (and once in control, he could cash out the policies and receive their value), awarded the Wife the cash surrender value of the policies.

iii) *DeNiro v. DeNiro*, 185 A.D.3d 465, 128 N.Y.S.3d 7 (1st Dep't 2020)

(1) Property purchased by wife and wife's father in joint names.

(2) Property later transferred to wife's father's "family trust."

(3) Wife was primary beneficiary of trust, had the power to appoint and remove trustee, who in turn had the absolute power to terminate the trust.

(4) Court held property was the wife's separate property.

(5) Court held that trial court's award of 15% interest in property to husband was inappropriate because husband showed no nexus between occasional payments towards upkeep and appreciation of property.
(6) Court seemingly did not treat trust as insulating the property fromo potential equitable distribution given the history and terms of the trust.

6) "Sham" Trusts
a) A "sham" trust is a trust in which the grantor attempts to shield assets in a trust to defraud creditors.
b) When a court reveals a trust to be a sham, the court can order dissolution of the trust and divide the assets.
c) In some cases, the party with unclean hands has received a lower distribution of other assets as a penalty for their bad faith in creating a sham trust.
i) *Surasi v. Surasi*, 2001 N.Y. Slip Op. 40408(U) (Sup. Ct. Richmond Cnty. 2001)
(1) During the pendency of this divorce action, the Husband placed the parties' real estate assets in trust.
(2) The court ordered that the trust be set aside, the assets became subject to equitable distribution, and the marital home was transferred from the trustee directly to the Wife.
(3) "That trust is a sham and a fraud upon this court created expressly with the intent to deny plaintiff's claims to said marital property and to thwart the jurisdiction of this court to make a distributive award."
ii) *Reichers v. Reichers*, 267 A.D.2d 445, 701 N.Y.S.2d 113 (2d Dep't 1999)
(1) In anticipation of the divorce, and without the Wife's knowledge or approval, the Husband established an offshore trust in the Cook Islands.
(2) Due to its location, the offshore was outside of the court's jurisdiction.
(3) Since the court couldn't control the corpus of the trust, it granted the Wife 50% of the value of the offshore trust, to be paid by the Husband as a distributive award.

7) Support – Trust Income Availability for Support
a) Distributions from trusts, both taxable and non-taxable, are often included in calculations of a party's income for determinations of child and spousal support.
b) Support Factors – Domestic Relations Law § 236(B)(6)(e)
The court shall order the post-divorce maintenance guideline obligation up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the

following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration:

(1) The age and health of the parties;
(2) The present or future earning capacity of the parties, including a history of limited participation in the workforce;
(3) The need of one party to incur education or training expenses;
(4) The termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded;
(5) The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
(6) The existence and duration of a pre-marital joint household or a pre-divorce separate household;
(7) Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
(8) The availability and cost of medical insurance for the parties;
(9) The care of children and stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
(10) The tax consequences to each party;
(11) *The standard of living of the parties established during the marriage;*
(12) The reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage;
(13) The equitable distribution of marital property and the income or imputed income on the assets so distributed;
(14) The contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
(15) *Any other factor which the court shall expressly find to be just and proper.*

c) *Alvares-Correa v. Alvares-Correa*, 285 A.D.2d 123, 726 N.Y.S.2d 668 (1st Dep't 2001)

i) The Husband had vested interests in substantial trust portfolios valued, in 1998, at approximately $37 million. The Husband was a beneficiary and had sole power of appointment to direct the distribution of any and all trust assets.

ii) The court deemed that the Husband had "complete and unfettered access to those funds."
iii) Taking into consideration his access to the funds in trust, the Husband was directed to pay $3,500/month per child in child support, and $9,000/month in spousal support.
iv) "A party's interest in trusts can be taken into account when making maintenance and child support awards."

d) *A.G. v. J.G.*, 79 Misc.3d 1216(A), 190 N.Y.S.3d 608 (Sup. Ct. New York Cnty. 2023)
i) In this action for divorce and support, the Husband was found to have received $8,000/month in tax-free trust distributions.
ii) The court properly imputed an additional $96,000 to the Husband's income in consideration of his monthly trust distributions.

8) Discovery
a) Even if a trust's assets are not subject to distribution, it does not mean that the spouse and the court are unable to obtain discovery on the trusts and their assets.
b) In determining distribution of assets and support obligations, courts need transparency to assess:
i) Trust Formation Documents
ii) Asset Titles
iii) Records of Distributions
c) *Trafelet v. Trafelet*, 150 A.D.3d 483, 56 N.Y.S.3d 10 (1st Dep't 2017)
i) Early in their marriage, the parties established a trust, listing their children as the beneficiaries.
ii) In the divorce, the Husband argued that the trust was not subject to distribution or discovery because neither party was a beneficiary.
iii) The Wife alleged that the Husband was utilizing the trust assets and disproportionately benefitting from the trust. Additionally, the Husband had included language in the formation documents allowing him to terminate the trust and distribute the assets to his "wife" (of which the Wife ceased being upon divorce). The Wife alleged that the Husband included these provisions without her knowledge.
iv) Due to the questions of fact presented, the court allowed discovery into the trust and its assets.

9) Problematic Trust Language
Language is crucial in the court's determination of how to treat parties' trusts.
a) Named Spouse vs. Floating Spouse
i) A named spouse beneficiary, i.e., "My wife, Jane Doe…" has definitive rights within the trust documents.
ii) A floating spouse beneficiary, i.e., "My spouse…" is left to the interpretation of the court as to who holds the title "spouse".
(1) Floating Spouse provisions allow the title of spouse to be self-adjusting, meaning the trust will automatically change the identity of the beneficiary with every marriage, divorce, or remarriage.

(2) It's important to specify the intention as the spouse at the time a distribution is made, rather than the spouse at the trust's creation. Spouse at creation would fail to self-adjust in the event of divorce or remarriage.

(3) *Ochse v. Ochse*, 2020 WL 6749044 (Tex. 2020)

(a) The grantor listed "my son's spouse" as a beneficiary in the trust formation documents.

(b) The son's first wife was the spouse at execution, and the son's second wife was the spouse at distribution.

(c) The court looked to the grantor's intent to determine which wife had rights as a beneficiary. The first wife was the son's spouse for 30 years and was identified by name in other provisions throughout the formation documents.

(d) The court determined that the first wife (now ex-wife) was the intended beneficiary listed as the "son's spouse".

b) Deadly Typos

i) If a typo exists and affects the characteristics of the trust, the court will generally find that the clear language of the document governs.

ii) *Dahl v. Dahl*, 459 P.3d 276 (Utah 2015)

(1) The defendant intended to create an irrevocable trust.

(2) The language in the formation documents read, "Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereof." (emphasis added)

(3) If "any" had been the intended term "no", the defendant would have established an irrevocable trust.

(4) However, the language declared that he reserved "any power whatsoever", which the court interpreted to establish a revocable trust.

10) Important Considerations

a) Trusts + Prenuptial Agreements – "Belt & Suspenders" Approach

i) Assets under the protection of a trust can and should be transparently included in the provisions of a prenuptial agreement. A party's informed and knowing waiver to any rights in their future spouse's trust assets is a strong indicator for protection in the court's determinations.

ii) Prenuptial agreements can specifically address treatment of income and distributions from trusts (to exclude from equitable distribution or ensure credit in equitable distribution), as well as appreciation on those distributed assets.

iii) Prenuptial Agreements can also contain provisions that exclude a party's income from spousal support calculations. However, the same cannot be done for child support calculations.

b) The Independent Trustee
   i) A trustee should be as distant as possible (i.e., not a family member or friend). The less influence a beneficiary spouse has over distributions and assets in a trust, the more likely a court will shield those assets from distribution in the event of divorce. An "independent trustee" can tip the scales towards irrevocable, rather than revocable.
   ii) Distributions should be disciplined and have a clear purpose. For example, if a beneficiary requests a distribution to purchase a house, the trustee should gather all relevant information, determine if the distribution request is reasonable, and ensure that any distribution is fully consistent with the provisions of the trust.
   iii) The more regular and consistent distributions are made from the trust, the more likely they will be considered income of the beneficiary in support determinations.

c) Maintain Detailed Records

d) Plan Ahead

   Trust planning should be done as early as possible, including extensive transparent conversations with each party represented by an attorney, being fully informed in their decisions to voluntarily engage in estate planning.

e) Language is Important

   The language used in the formation documents could be the determinative factor on whether a trust's assets will be vulnerable in a divorce.

f) Always Involve a Trusts & Estates Lawyer – Call. The. Experts.
   i) T&E Lawyers can advise matrimonial lawyers in many ways:
      (1) Review trust formation documents
      (2) Interpret trust provisions
      (3) Advise on vulnerabilities & how to present them to the court
   ii) Ultimately, a T&E Lawyer can help determine the likelihood of success for your client in protecting their assets.

259 A.D.2d 666
Supreme Court, Appellate Division,
Second Department, New York.

Viola T. IMHOF, respondent-appellant,
v.
William J. IMHOF, appellant-respondent.

March 22, 1999.

Synopsis
Wife sought dissolution of marriage. The Supreme Court, Suffolk County, McNulty, J., entered judgment of divorce. Former husband appealed, and former wife cross-appealed. The Supreme Court, Appellate Division, held that: (1) equal division between former husband and former wife of proceeds from sale of marital residence was warranted; (2) appreciation in value of second residence constituted marital property in which former wife was entitled to share; and (3) former husband was entitled to credit toward his child support obligation for sums paid for son's college expenses.

Affirmed as modified in part and remitted in part.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****825** William R. Garbarino, Sayville, N.Y. (Stacey Rose Dugan of counsel), for appellant-respondent.

Kurtzberg & Kurtzberg, Melville, N.Y. (Myra Derkatch Rochelson of counsel), for respondent-appellant.

LAWRENCE J. BRACKEN, J.P., THOMAS R. SULLIVAN, WILLIAM D. FRIEDMANN and ANITA R. FLORIO, JJ.

Opinion

MEMORANDUM BY THE COURT.

***666** In an action for a divorce and ancillary relief, (1) the defendant husband appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Suffolk County (McNulty, J.), entered April 7, 1998, which, *inter alia,* after a nonjury trial, (a) directed that the balance of the net proceeds remaining from the sale of the marital residence be divided equally between the parties, (b) awarded the plaintiff wife a credit in the sum of $116,250 for her separate property ****826** contribution to the parties' business and awarded him a credit in the sum of only $100,000 for his separate property contribution, and (c) directed him to pay the sum of $210.56 per week for child support retroactive from January 19, 1993, to December 30, 1997, and (2) the plaintiff wife cross-appeals, as limited by her brief, from stated portions of the same judgment, which, *inter alia,* directed that the defendant husband shall (a) retain ownership of the residence in Alford, Massachusetts, (b) receive the money held in escrow by his attorney, and (c) receive the sum of $3,000 from the monthly mortgage payments until he has received a full credit in the sum of $62,852.84 for his separate property contribution to the parties' business.

ORDERED that the judgment is modified by (1) deleting the provision thereof directing the defendant husband to pay the sum of $210.56 per week for child support retroactive from January 19, 1993, to December 30, 1997, (2) deleting the provision thereof directing that the defendant husband shall retain ownership of the residence in Alford, Massachusetts, and (3) deleting the provision thereof directing that the defendant husband shall receive the money held in escrow by his attorney and shall receive the sum of $3,000 from the monthly mortgage payments until he has received a full credit in the sum of $62,852.84 for his separate property contribution to the parties' business; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court Suffolk ***667** County for a redetermination of the defendant husband's child support obligation and the plaintiff wife's share in the appreciation of the value of the property in Alford, Massachusetts.

The court properly distributed the proceeds of the sale of the marital residence. While a spouse may be entitled to a share of the appreciation in the value of the marital residence (*see,* Domestic Relations Law § 236[B][1][d][3]), he or she must demonstrate the manner in which his contributions resulted in the increase in value and the amount of the increase which was attributable to his or her efforts (*cf., Elmaleh v. Elmaleh,* 184 A.D.2d 544, 584 N.Y.S.2d 857; *Fitzgibbon v. Fitzgibbon,* 161 A.D.2d 619, 555 N.Y.S.2d 399). Here, in addition to her contributions as a homemaker and mother, the wife contributed equally to the maintenance of the home during the 20–year marriage (*see, Lagnena v. Lagnena,* 215 A.D.2d 445, 626 N.Y.S.2d 542).

In light of the fact that funds from joint accounts were contributed to the maintenance and improvement of the Alford, Massachusetts residence, the appreciation in value of

the property constituted marital property in which the wife was entitled to share (*see,* *Hartog v. Hartog,* 85 N.Y.2d 36, 623 N.Y.S.2d 537, 647 N.E.2d 749).

The husband is not entitled to the court's award of $62,852.84, representing a portion of his separate property contributions to the parties' business. Separate property can be transmuted into marital property when the actions of the titled spouse demonstrate his intent to transform the character of the property from separate to marital (*see, Geisel v. Geisel,* 241 A.D.2d 442, 659 N.Y.S.2d 511; *Schmidlapp v. Schmidlapp,* 220 A.D.2d 571, 632 N.Y.S.2d 593). Here, there is every indication that the husband intended to commingle his funds by depositing the proceeds of the sale of his separate property into joint accounts and by sharing the proceeds for family and business purposes (*see, Geisel v. Geisel, supra; Schmidlapp v. Schmidlapp, supra*).

However, the court erred in failing to give the husband credit toward his child support obligation for sums paid for college expenses during the time that his son was living away from home and attending Arizona State University. While the court's direction to the husband to pay a proportionate share of college expenses was proper (*see,* Domestic Relations Law § 240[1–b][c][7]; *Justino v. Justino,* 238 A.D.2d 549, 657 N.Y.S.2d 79; *Reinisch v. Reinisch,* 226 A.D.2d 615, 641 N.Y.S.2d 393), the court failed to credit him for the amounts he contributed to the costs of that education when the child lived away from home while attending college (*see, Justino v. Justino, supra; Reinisch v. Reinisch, supra*).

****827** The husband's remaining contentions are without merit.

All Citations

259 A.D.2d 666, 686 N.Y.S.2d 825, 1999 N.Y. Slip Op. 02482

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59 A.D.3d 702
Supreme Court, Appellate Division,
Second Department, New York.

Marsha STEINBERG, respondent-appellant,
v.
Melvin STEINBERG, appellant-respondent.

Feb. 24, 2009.

Synopsis

Background: In an action for a divorce and ancillary relief, the husband appealed a judgment of the Supreme Court, Nassau County, Ross, J., which distributed marital assets, and wife cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

Supreme Court improvidently exercised its discretion in awarding the husband a separate property interest with respect to his investment account, and

wife was entitled to a marital share of husband's interest in a company.

Affirmed as modified.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****231** Lang, Berman & Lebit, P.C., Garden City, N.Y. (Jamie J. Berman of counsel), for appellant-respondent.

Kenneth Koopersmith, LLC, Garden City, N.Y. (Glenn S. Koopersmith of counsel), for respondent-appellant.

PETER B. SKELOS, J.P., MARK C. DILLON, WILLIAM E. McCARTHY, and RANDALL T. ENG, JJ.

Opinion

***703** In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Nassau County (Ross, J.), dated May 15, 2007, which, after a nonjury trial, inter alia, awarded the plaintiff one half of the marital assets, imputed income to him in the amount of $300,000, awarded the plaintiff nondurational maintenance, and awarded the plaintiff the sum of $200,000 in attorney's fees, and the plaintiff cross-appeals, as limited by her brief, from stated portions of the same judgment which, inter alia, awarded the defendant a separate property interest in his JP Morgan Chase investment account in the amount of $276,724, his interest in Phoenix Capital & Management Company in the amount of $333,333, and a note payable to him by Phoenix Capital & Management Company in the amount of $173,167.

ORDERED that the judgment is modified, on the law, the facts, and in the exercise of discretion, (1) by deleting the provisions thereof awarding the defendant a separate property interest in his JP Morgan Chase investment account, his interest in Phoenix Capital & Management Company, and a note payable to him by Phoenix Capital & Management Company, and substituting therefor a provision directing that those assets are marital property subject to equitable distribution, (2) by deleting the provision thereof valuing the defendant's JP Morgan Chase investment account at $276,724, and substituting therefor a provision valuing that account at $351,724.35, (3) by deleting the provision thereof valuing the defendant's interest in Phoenix Capital & Management Company at $333,333, and substituting therefor a provision valuing the defendant's interest in Phoenix Capital & Management Company at $666,666, and (4) by adding a provision thereto valuing the parties' AB Watley account at $6,152.97; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, with costs payable to the plaintiff.

The Supreme Court providently exercised its discretion in dividing the marital assets equally between the parties. When both spouses equally contribute to a marriage of long duration, as here, the division of marital property should be as equal as possible (*see Adjmi v. Adjmi,* 8 A.D.3d 411, 412–413, 779 N.Y.S.2d 80).

****232** The Supreme Court improvidently exercised its discretion in ***704** awarding the defendant a separate property interest with respect to his JP Morgan Chase investment account. "Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property" (*Judson v. Judson,* 255 A.D.2d 656, 657, 679 N.Y.S.2d 465; *see D'Angelo v. D'Angelo,* 14 A.D.3d 476, 477, 788 N.Y.S.2d 154; *Farag v. Farag,* 4 A.D.3d 502, 503, 772 N.Y.S.2d 368). Here, the assets in question were acquired during the marriage, and the defendant's testimony that the source of

the assets could be traced to premarital property, unsupported by documentary evidence, was insufficient to overcome the marital presumption (*see D'Angelo v. D'Angelo,* 14 A.D.3d at 477, 788 N.Y.S.2d 154; *Farag v. Farag,* 4 A.D.3d at 503, 772 N.Y.S.2d 368). Also, the defendant's JP Morgan Chase investment account, as well as the parties' AB Watley account, both active assets, should have been valued at $351,724.35 and $6,152.97 respectively, which was their value as of the date of commencement of this action (*see Kirshenbaum v. Kirshenbaum,* 203 A.D.2d 534, 535, 611 N.Y.S.2d 228).

The Supreme Court also should have awarded the plaintiff a marital share of Phoenix Capital & Management Company (hereinafter Phoenix) and a note payable to the defendant by Phoenix. Although Phoenix was created two years prior to the parties' marriage, the defendant could not recollect what Phoenix did during the time that preceded the marriage. Instead, the defendant testified that Phoenix acquired an office building two years after the marriage, which was its only asset, and that he and other partners contributed money to Phoenix to manage the property after its purchase. The defendant did not trace the source of his portion of the building's acquisition costs to separate pre-marital funds and likewise did not establish that his actual financial contributions to the building's acquisition and management costs were not derived from marital funds (*D'Angelo v. D'Angelo,* 14 A.D.3d at 477, 788 N.Y.S.2d 154; *Capasso v. Capasso,* 119 A.D.2d 268, 272, 506 N.Y.S.2d 686). Marital property is to be viewed broadly, while separate property is to be viewed narrowly (*see Price v. Price,* 69 N.Y.2d 8, 15, 511 N.Y.S.2d 219, 503 N.E.2d 684; *Saasto v. Saasto,* 211 A.D.2d 708, 709, 621 N.Y.S.2d 660). Where, as here, a party fails to trace sources of money claimed to be separate property, a court may treat it as marital property (*see Saasto v. Saasto,* 211 A.D.2d at 709, 621 N.Y.S.2d 660; *Sarafian v. Sarafian,* 140 A.D.2d 801, 804, 528 N.Y.S.2d 192; *cf. Lischynsky v. Lischynsky,* 120 A.D.2d 824, 501 N.Y.S.2d 938). By extension, the note payable to the defendant as a result of his financial contributions to Phoenix during the marriage should have been considered marital property as well (*see Markopoulos v. Markopoulos,* 274 A.D.2d 457, 458–459, 710 N.Y.S.2d 636).

The Supreme Court valued the defendant's one-third interest ***705** in Phoenix at $333,000, based on the defendant's testimony that the property was worth $3 million and was subject to a $2 million mortgage. However, in a prior sworn bank loan application dated May 12, 2005, the defendant estimated the value of the office building to be $4 million. Given the credibility problems that pervade the defendant's testimony generally, the court's discretion in valuing the property should have been exercised in favor of the defendant's most recently documented admission that the property was valued at $4 million. Accordingly, we set the value of the defendant's interest in Phoenix at $666,666 rather ****233** than $333,333, subject to the plaintiff's 50% equitable distributive share.

The defendant's contention that the Supreme Court improperly imputed income to him in determining his maintenance obligation is without merit. A court need not rely upon a party's own account of his finances, but may impute income based upon the party's past income or demonstrated future potential earnings (*see Brown v. Brown,* 239 A.D.2d 535, 657 N.Y.S.2d 764). Here, the Supreme Court properly imputed an annual income of $300,000 to the defendant given his employment history and his current ownership of a successful, growing business (*see Fruchter v. Fruchter,* 29 A.D.3d 942, 943, 816 N.Y.S.2d 525; *Sodaro v. Sodaro,* 286 A.D.2d 434, 435, 729 N.Y.S.2d 731; *Brown v. Brown,* 239 A.D.2d 535, 657 N.Y.S.2d 764).

In light of the plaintiff's age, health, and history of low earnings over the course of a 23–year marriage, the Supreme Court properly found it to be unlikely that she would become self-supporting and, consequently, providently exercised its discretion in awarding her nondurational maintenance (*see Summer v. Summer,* 85 N.Y.2d 1014, 1016, 630 N.Y.S.2d 970, 654 N.E.2d 1218; *Marino v. Marino,* 52 A.D.3d 585, 860 N.Y.S.2d 170; *Polizzano v. Polizzano,* 2 A.D.3d 615, 768 N.Y.S.2d 374; *Mazzone v. Mazzone,* 290 A.D.2d 495, 736 N.Y.S.2d 683).

The Supreme Court providently exercised its discretion in determining that the plaintiff was entitled to attorney's fees in the amount awarded (*see Prichep v. Prichep,* 52 A.D.3d 61, 64, 858 N.Y.S.2d 667; *DeCabrera v. Cabrera–Rosete,* 70 N.Y.2d 879, 881–882, 524 N.Y.S.2d 176, 518 N.E.2d 1168).

The parties' remaining contentions are without merit.

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85 N.Y.2d 36
Court of Appeals of New York.

Katherine HARTOG, Appellant,
v.
Albert HARTOG, Respondent.

Feb. 14, 1995.

Synopsis

Marriage was dissolved by judgment of the Supreme Court, New York County, Silbermann, J., and husband and wife both appealed from aspects of court's distributive award. The Supreme Court, Appellate Division, Kassal, J., 194 A.D.2d 286, 605 N.Y.S.2d 749,modified and affirmed as modified. On permissive appeal, the Court of Appeals, Bellacosa, J., held that: (1) husband's active involvement in conduct of family owned business supported trial court's determination that portion of appreciated value of husband's stock was "marital property" subject to distribution, without necessity of wife's demonstrating direct causal connection between husband's activity and appreciation; (2) bonus earned during course of marriage, but paid after commencement of marital dissolution proceedings, was "marital property" subject to distribution; (3) dissolution court lacked inherent authority to order lien on husband's estate in lieu of insurance; (4) Appellate Division should have considered wife's predivorce standard of living in determining propriety of maintenance award; and (5) wife's distributive award was properly reduced by her equitable share of tax liability.

Modified and affirmed as modified.

Attorneys and Law Firms

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***540 **752 OPINION OF THE COURT

BELLACOSA, Judge.

This equitable distribution case, reflecting its unique characteristics of the economic partnership aspect of a 23–year marriage relationship, presents a multifaceted puzzle of issues. The solutions lie in the evidence adduced, in the statutory framework, language and policies, and in their discernment, application and harmonization in the respective levels of judicial review and authority.

*42 *I.*

Plaintiff wife appeals, pursuant to leave granted by this Court, 83 N.Y.2d 761, 616 N.Y.S.2d 479, 640 N.E.2d 147, from an order of the Appellate Division, 83 N.Y.2d 761, 616 N.Y.S.2d 479, 640 N.E.2d 147 which modified a judgment of Supreme Court, New York County, dissolving the parties' marriage and distributing property, 194 A.D.2d 286, 605 N.Y.S.2d 749. The wife was granted a divorce on abandonment grounds. Afterwards, a trial was held to determine her maintenance and equitable distribution rights. Both parties appealed conflicting aspects to the Appellate Division. The wife now specifies numerous dissatisfactions about parts of the Appellate Division ruling.

She seeks relief from the Appellate Division determinations (1) that the appreciation in value of the husband's separate property businesses was not marital property; (2) that his bonus, earned prior to but paid after commencement of marital proceedings, was not marital property; (3) that the trial court had no authority to order the husband to obtain life insurance for her benefit to secure maintenance payments; (4) that the trial court had no authority to impose a lien on the husband's estate in the event of a shortfall in the ordered life insurance; (5) that maintenance of five-year duration was appropriate in the instant case instead of lifetime maintenance as directed by the trial court; and (6) that tax consequences to the husband of the equitable distribution award should have been considered.

A lead issue for us to decide is whether the husband's limited involvement during the marriage in businesses that appreciated in value qualified as active participation to transmute the appreciation of that otherwise separate property into marital property subject to equitable distribution. We conclude, as the Supreme Court did, that the record supports the view that the husband's involvement was sufficient to convert a proportionate share of the appreciated value of these businesses into marital property. We also agree with Supreme Court that the bonus is marital property subject to equitable distribution. Further, we hold that by not considering the predivorce standard of living, the Appellate Division erred both in its articulation and application of the proper standard to be used in determining maintenance awards.

On the other hand, while courts have statutory authority to order a spouse to maintain life insurance for the other spouse's benefit, we agree with the Appellate Division that such relief is inappropriate in the instant case. Moreover, ***43** there is no general inherent judicial authority to interpose liens against estates as alternative financial or legal security measures. Finally, we conclude that the Appellate Division did not abuse its discretion by considering the tax consequences to the husband and by reducing the wife's distributive award accordingly.

II.

The parties were married in November 1968. When they divorced, she was 51 and he was 61. Two children were born of the marriage, both emancipated at the time of the divorce. When they married, the wife was 28 and working for an advertising agency. She left this position shortly before the birth of their first child in 1969. With the exception of some freelance work in June 1969, she did not return to work outside the home until May 1980. From May 1980 through 1985, she worked full time at an advertising firm, earning a maximum of $27,500. In 1990, she started a song writing business, from which she earned nothing, but due to which she incurred $5,000 in expenses. During the marriage, she was a traditional homemaker, serving in roles of spouse, parent, housekeeper and hostess. The husband engaged in various business enterprises during the marriage.

*****541** ****753** When they married, the husband was 38 and worked in a family jewelry business, F. Staal, Inc. He was also a shareholder and director of another family business, Hartog Trading Corporation (Trading). He owns 50% of the stock in F. Staal and Trading, and 25% of the stock of Hartog Foods International, Inc. (Foods), a spin-off company of Trading. He worked long hours at F. Staal six days per week until 1985 and five days a week thereafter. He was director of Trading throughout the marriage and was its secretary/treasurer from 1969. He was a director and secretary of Foods from the time of its incorporation in 1969. However, his brother or others had primary responsibility for the day-to-day management and operation of Trading and Foods.

F. Staal, Trading and Foods each deducted a salary for the husband as a business expense, and he participated in their respective profit-sharing plans. The corporate tax returns of Trading and Foods list him as a part-time employee, and the corporate minutes note his presence at meetings and his power to sign checks. Testimony at trial indicated that the husband and his brother conferred at times regarding business ***44** matters concerning Trading and Foods, the two entities at issue in this case.

On the respective personal health side of their lives, the wife was diagnosed with breast cancer in 1985. She underwent mastectomies in 1985 and 1986, and her health appears stabilized as of the time of the litigation. The husband was more recently diagnosed with prostate cancer.

III.

Supreme Court granted the wife a divorce and distributed the marital property. The court outlined various options for the wife, dependent on whether she chose to sell or retain two marital residential properties. Each option also set forth the distributive award to which the wife would be entitled. She ultimately opted to sell both residences, resulting in a distributive award of $1,692,237.09. This aspect is not in dispute on this appeal.

With respect to the rest of the distributive award, the trial court found the following to be marital property: (1) 100% of the increased value of husband's 50% share in F. Staal ($412,500); (2) 25% of the appreciation of husband's 50% share of Trading ($575,000); and (3) 25% of the appreciation of husband's 25% share of Foods ($686,875). The court also declared the husband's annual bonus to be marital property.

As for maintenance, the court awarded the wife spousal support in the amount of $2,816.66 per month until her death. The court also ordered the husband to maintain a $1 million

life insurance policy for his wife's benefit and provided that in the event the policy was not in effect on his death, the amount of the insurance would constitute a pro rata lien against his estate.

The Appellate Division modified, on the law and on the facts and in the exercise of discretion, to provide: (1) the distributive award to the wife be *reduced* by (i) the share awarded the wife in the appreciated value of Trading and Foods ($630,937.50, representing one half of 25% of the increased value of the husband's interest in Trading and Foods [she would thus receive nothing in this category]), (ii) the share awarded the wife in the husband's bonus ($59,998, representing one half of the total bonus paid), and (iii) a portion of the tax liability attributed to the husband resulting from the sale of marital assets; (2) that the distributive award include an additional $197,585, representing one half of the husband's ***45** Thomas McKinnon brokerage account (not in issue here); (3) that the award of spousal maintenance in the amount of $650 per week be limited to five years from the date of judgment, retroactive to July 13, 1992; and (4) that the provisions directing the husband to maintain a $1 million life insurance policy for the wife's benefit and establishing a conditional $1 million lien on the husband's estate should he fail to maintain the policy be deleted. As so modified, the judgment was affirmed.

IV.

The wife asserts that because the husband had some active involvement in Trading and in Foods, then the appreciation in value of those businesses, at least in some *****542** ****754** degree, is marital property subject to equitable distribution. She argues that the Appellate Division imposed a substantial nexus condition requiring a significant connection between the titled spouse's activity and the appreciation of the operating business assets. The wife argues that this (1) is contrary to legislative intent, which meant for the term "marital property" to be broadly construed, and (2) is contrary to this Court's holding and rationale in *Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684, that a titled spouse's "active" contribution to the separate asset during the marriage transforms at least some portion of the appreciated value into marital property.

The husband counters, claiming that his activities amounted to "paper participation" only, and that this type of pro forma involvement had no actual impact on the appreciation in the value of the businesses. The husband asserts that absent some concrete showing by the wife of how his meager involvement actually benefitted the businesses' value, the appreciation in those businesses remains separate property in its entirety. In effect, the husband urges that absent a showing by the wife of a definitive and direct nexus between the husband's activities and the appreciation at issue, the entire amount of the appreciation should be viewed as having been "passively" accumulated and, hence, separate property beyond the reach of the courts' equitable distribution power (*see,* Domestic Relations Law § 236[B][1][c], [d]; [5][b], [c], [d]; *Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra*).

We conclude that requiring a nontitled spouse to produce a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be (1) contrary to the letter and spirit of the relevant statutes ***46** *see,* Domestic Relations Law § 236[B][1][c], [d][3]; [5][c], [d][6]); (2) inconsistent with legislative intent (Governor's Mem approving L 1980, ch. 281, reprinted in 1980 McKinney's Session Laws of NY, at 1863; Sponsor's Mem L 1980, ch. 281, 1980 NY Legis Ann, at 129–130); and (3) at odds with the purport of this Court's precedents construing the Legislature's directives (*Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 *supra*). Thus, we agree with the wife's argument and the Supreme Court's resolution of this issue (*see, id.,* at 16–18, 511 N.Y.S.2d 219, 503 N.E.2d 684; *Zelnik v. Zelnik,* 169 A.D.2d 317, 330, 573 N.Y.S.2d 261; *but see, Feldman v. Feldman,* 194 A.D.2d 207, 605 N.Y.S.2d 777; *Elmaleh v. Elmaleh,* 184 A.D.2d 544, 584 N.Y.S.2d 857).

When a nontitled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the nontitled spouse's indirect contributions, *some* nexus between the titled spouse's active efforts and the appreciation in the separate asset is required (*see, Price v. Price,* 69 N.Y.2d 8, 17–18, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra; contra, Robinson v. Robinson,* 166 A.D.2d 428, 430, 560 N.Y.S.2d 665, *lv. denied* 77 N.Y.2d 807, 569 N.Y.S.2d 611, 572 N.E.2d 52). Applying *Price's* nuanced principles to this case, we hold that the weight of the adduced evidence favors the fact-finding trial court's conclusion that the titled spouse *actively* participated to some degree regarding the separate nonpassive asset and that the appreciation in the asset is, to that proportionate extent, marital property.

Domestic Relations Law § 236(B)(1)(d)(3) expressly provides that appreciation in separate property remains separate property, *"except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse"* (emphasis added). Moreover, Domestic Relations Law § 236(B)(5)(d)(6) explicitly recognizes that indirect contributions of the nontitled spouse (e.g., services as spouse, parent and homemaker, and contributions to the other party's career or career potential) are relevant in the equitable disposition calculations just as direct contributions are. Thus, to the extent that the appreciated value of separate property is *at all* "aided or facilitated" by the nontitled spouse's direct or indirect efforts, that part of the appreciation is marital property subject to equitable distribution (*Price v. Price,* 69 N.Y.2d 8, 18, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra; see,* Domestic Relations Law § 236[B][1][c]; [5][c], [d]). Consequently, while *some* connection between the titled spouse's effort and the appreciation ***543 **755 must be discernible from the evidence, neither the statutory language nor its legislative history justifies the Appellate Division's and the husband's exacting causation prerequisite.

*47 Legislative history of the watershed Equitable Distribution Law (L.1980, ch. 281) demonstrates the bill's salutary purpose—namely, to treat marriage in one respect as an economic partnership and, in so doing, to recognize the direct and indirect contributions of each spouse, including homemakers (Governor's Mem approving L.1980, ch. 281, reprinted in 1980 McKinney's Session Laws of NY, at 1863; Assembly Mem, 1980 NY Legis Ann, at 129–130; *see also, O'Brien v. O'Brien,* 66 N.Y.2d 576, 584–585, 498 N.Y.S.2d 743, 489 N.E.2d 712). Adopting the Appellate Division's view on this issue in this case would undermine this enlightened progress.

We must realistically come to grips with the fact that when the titled spouse has only limited, yet active, involvement concerning a separate asset of nonpassive character, it may be difficult, if not impossible, to link limited, specific efforts to quantifiable, tangible results. The valuation of an asset, such as an ongoing business, may vary due to a combination of and interaction among numerous active and passive forces—activities of workers, decisions of management and operational personnel, advice and activities of consultants, inflation and market forces, among others. Given these complex variables and especially when a party's active involvement in a business is limited, it would be insuperably difficult to prove a direct causal link between the activity and the resulting appreciation.

The causation requirement urged by the husband would, therefore, result in an all-or-nothing contest, as the Appellate Division ruled, and would defeat a central calibrating feature of *Price* and the Domestic Relations Law. That absolutist approach would often procedurally exempt appreciation from being considered marital property even when the titled spouse's active efforts substantively contributed to the appreciation to some degree. This would allow the titled spouse a windfall retention and, contrary to legislative intent, would nullify the indirect effort the nontitled spouse contributed to the circumstances, allowing for appreciation to that asset (*see, Price v. Price,* 69 N.Y.2d 8, 14–15, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra; Majauskas v. Majauskas,* 61 N.Y.2d 481, 489, 490, 474 N.Y.S.2d 699, 463 N.E.2d 15). We thus reject this approach and instead give effect to the Legislature's intent that a nontitled spouse be permitted to share in the "indirect" fruits of his or her labor, even if the connection between the titled spouse's activity and the appreciation is not established with mathematical, causative or analytical precision (*see,* Domestic Relations Law § 236[B][5][d][6]).

*48 Moreover, our precedents support the analysis and result we adopt today in this respect in this case (*see, Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra*). In *Price v. Price,* this Court set forth the "active/passive" test, which established the guidelines for determining whether the appreciation in a titled spouse's separate property has been transmuted into marital property based on the indirect contributions of the nontitled spouse (69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra* ; Domestic Relations Law § 236[B][1][d][3]; [5][d][6]). Explicitly noting the Legislature's intent to have the term marital property broadly construed (*Price v. Price, supra,* at 15, 511 N.Y.S.2d 219, 503 N.E.2d 684), and emphasizing the economic partnership theory of marriage (*id.,* at 14, 16, 511 N.Y.S.2d 219, 503 N.E.2d 684), we held that the dispositive inquiry of "[w]hether [indirect] assistance of a nontitled spouse * * * can be said to have contributed 'in part' to the appreciation of an asset *depends primarily upon the nature of the asset and whether its appreciation was due in*

some measure to the time and efforts of the titled spouse" (*id.,* at 17–18, 511 N.Y.S.2d 219, 503 N.E.2d 684 [emphasis added]). Thus, in *Price,* we required that both the nature of the asset and the efforts of the titled spouse be considered in the inquiry (*id.).* *Price* is silent, however, as to quantifying the threshold "causal link" necessary to trigger the classification of the appreciation of separate property, in whole or in part, as marital property.

*****544** ****756** While we articulated the need for some connection and left the calibration of that standard for another day, the inevitable implication of *Price* was rejection of the "all or nothing" approach that would be interposed by adopting a particularized causative nexus requirement. We were careful to note that the totality of the appreciation retained its separate property character only where the appreciation was "not due, *in any part,* to the efforts of the titled spouse," but, rather, was due in its entirety "to the efforts of others or to unrelated factors" (*id.,* at 18, 511 N.Y.S.2d 219, 503 N.E.2d 684 [emphasis added]). That is not this case.

Elaborating on these principles and remaining true to statutory language and intent, we conclude that where an asset, like an ongoing business, is, by its very nature, nonpassive and sufficient facts exist from which the fact finder may conclude that the titled spouse engaged in active efforts with respect to that asset, *even to a small degree,* then the appreciation in that asset is, to a proportionate degree, marital property. By considering the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors, the fact finder must ***49** then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution (*see,* Domestic Relations Law § 236[B][1][c]; [5][d][6]; *Price v. Price,* 69 N.Y.2d 8, 17–18, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra*). Supreme Court correctly did that here.

Applying these principles to the case at bar, we conclude that the Appellate Division mistakenly undid what Supreme Court wrought. The Appellate Division should not have deemed the total amount of the appreciation in Trading and Foods to be the husband's separate property. The trial court's findings, as accepted by the Appellate Division, demonstrate that the husband engaged in limited, active involvement in the two companies. The husband's activities consisted of (1) attendance at Board meetings; (2) holding officers' positions within the close corporations; (3) being listed as a salaried employee; (4) discussing and conferring on business matters; (5) signing checks on occasion; and (6) participating in the companies' profit-sharing plans. While infrequent and perhaps not central to the businesses' day-to-day operations, these efforts did constitute an "active" involvement and management role. Through the husband's attendance at Board meetings and business discussions with family members, particularly during times of crisis, a reasonable finder of fact could determine that this active involvement contributed to the appreciated value of the businesses. Thus, the Supreme Court's findings are supportable, and the Appellate Division's pinched application of the *Price* test is not.

Accordingly, we reinstate the Supreme Court's determination that 25% of the appreciated value of the husband's interests in Trading and in Foods is marital property.

V.

The husband's bonus, earned during the course of the marriage but paid after commencement of marital dissolution proceedings, is marital property subject to equitable distribution (*see,* *Majauskas v. Majauskas,* 61 N.Y.2d 481, 485–486, 474 N.Y.S.2d 699, 463 N.E.2d 15, *supra; Cappiello v. Cappiello,* 110 A.D.2d 608, 609, 488 N.Y.S.2d 399, *affd.* 66 N.Y.2d 107, 495 N.Y.S.2d 318, 485 N.E.2d 983). The Appellate Division rationale and conclusion fail to heed our precedents and the generous reading which the Legislature intended to be accorded the term marital property in this respect (*see,* *Majauskas v. Majauskas, supra; Cappiello v. Cappiello, supra; see also,* Governor's Mem approving L.1980, ch. 281, reprinted in 1980 McKinney's Session Laws of NY, at ***50** 1863; Sponsor's Mem, 1980 NY Legis Ann, at 129–130; *Price v. Price,* 69 N.Y.2d 8, 16, 511 N.Y.S.2d 219, 503 N.E.2d 684, *supra*).

VI.

Under Domestic Relations Law § 236(B)(8)(a), the courts have the general authority to "order a party to purchase, maintain or assign a policy of insurance on the life of either spouse." The plain language of the statute expressly provides that life insurance may be used as a means to secure maintenance and child support payments,

so that dependent spouses and children ***545 **757 will be adequately protected. Thus, notwithstanding the proviso that the beneficiary's interest "shall cease upon the termination of [the payor spouse's] obligation to provide maintenance" (Domestic Relations Law § 236[B][8][a]), and despite the fact that responsibility for maintenance payments ceases upon the payor spouse's death (Domestic Relations Law § 236[B][6][c]), the statute authorizes discretionary security-type financial protection in the form of life insurance. Domestic Relations Law § 236(B)(8)(a) does not impermissibly conflict with Domestic Relations Law § 236(B)(6)(c) (*see,* *Burns v. Burns,* 84 N.Y.2d 369, 618 N.Y.S.2d 761, 643 N.E.2d 80, *modfg. on other grounds* 193 A.D.2d 1104, 1105, 598 N.Y.S.2d 888).

The Appellate Division came to a correct result based on the particular facts and circumstances of this case, although it misstated the general rule and the power of the court. In the instant case, the trial court erred by ordering the husband to obtain a life insurance policy. Due to his serious illness, the husband is uncontestedly uninsurable, and the proof at trial establishes the lack of any extant life insurance available when the relief was directed in the judgment. Consequently, the Appellate Division correctly found an abuse of discretion in the trial court's ordering the husband to maintain the $1 million policy.

The Appellate Division also correctly held that the courts have no inherent authority to order a lien on a spouse's estate in lieu of insurance. There is no statutory authority or suggestion in the legislative history that the courts were meant to exercise such broad-reaching power to create a lien on an estate for a payor spouse's failure to maintain life insurance (*see,* Domestic Relations Law § 236[B][8][a]; Bill Jacket, L.1980, ch. 281; *see also,* *Pajak v. Pajak,* 56 N.Y.2d 394, 452 N.Y.S.2d 381, 437 N.E.2d 1138).

VII.

Consideration of the predivorce standard of living is an essential component of evaluating and properly determining *51 the duration and amount of the maintenance award to be accorded a spouse (*see,* Domestic Relations Law § 236[B][6][a]; Sponsor's Mem, L.1986, ch. 884, 1986 NY Legis Ann, at 356–357). The Appellate Division erred in failing to consider the wife's predivorce standard of living in determining the propriety of the maintenance award ordered by the trial court (*see,* Domestic Relations Law § 236[B][6][a]; Sponsor's Mem, L.1986, ch. 884, *op. cit.*).

Domestic Relations Law § 236, as amended in 1986 (ch. 884), directs that when the court is considering an award of maintenance, it must "hav[e] regard for the standard of living of the parties established during the marriage" (Domestic Relations Law § 236[B][6][a]). The 1986 amendment altered the prior law by removing the predivorce standard of living from a lengthy list of enumerated factors and according it separate priority within the primary structure of section 236(B)(6)(a) (*compare,* L.1980, ch. 281, *with* L.1986, ch. 884). Legislative history makes clear that the purpose of the amendment was to "*require[ ]* the court to consider the marital standard of living" in making maintenance awards (Sponsor's Mem, L.1986, ch. 884, 1986 NY Legis Ann, at 356, 357 [emphasis added]).

To be sure, generally the lower courts' failure to analyze each of the statutory maintenance factors (Domestic Relations Law § 236[B][6][a] [1]–[11]) will not alone warrant appellate alteration of the award (*see, Cappiello v. Cappiello,* 66 N.Y.2d 107, 110, 495 N.Y.S.2d 318, 485 N.E.2d 983, *supra*). With respect to these enumerated factors, we have held that it suffices for a court to set forth the factors it did consider and the reasons for its decision (*id.*). The "factor" at issue in this case—the predivorce standard of living—has been placed by the Legislature in a markedly distinct category, rendering the general rubric inapplicable.

When the Legislature has acted to achieve a particular objective and has given a clear indication of its intent, we are bound to give effect to that purpose. On the issue of the predivorce standard of living, both the history and plain wording of the statute unequivocally demonstrate the Legislature's intention that the predivorce standard of living be a ***546 **758 mandatory factor for the court's consideration in determining the amount and the duration of maintenance awards (*see,* Domestic Relations Law § 236[B][6][a]; Sponsor's Mem, L.1986, ch. 884, *op. cit.*).

*52 Additionally, the Appellate Division's assertion of the wife's ability to become self-supporting with respect to *some*

standard of living (194 A.D.2d 286, 295, 605 N.Y.S.2d 749) in no way (1) obviates the need for the court to consider the predivorce standard of living; and (2) certainly does not create a per se bar to lifetime maintenance. Correspondingly, a predivorce "high life" standard of living guarantees no per se entitlement to an award of lifetime maintenance. The lower courts must consider the payee spouse's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors, and then, in their discretion, fashion a fair and equitable maintenance award accordingly (*see,* Domestic Relations Law § 236[B][6][a][1]–[11]). That is precisely what Supreme Court did, and the Appellate Division's significant alteration of that award for the reason it advanced is not warranted. We therefore modify in this respect as well and reinstate the trial court's determination awarding lifetime maintenance in the amount of $2,816 per month.

VIII.

Finally, we are satisfied that the Appellate Division acted properly in considering the tax consequences to the husband and reducing plaintiff wife's distributive award by her equitable share of the tax liability (*see, Majauskas v. Majauskas,* 61 N.Y.2d 481, 493–494, 474 N.Y.S.2d 699, 463 N.E.2d 15, *supra*). Given the nonliquid nature of the assets, the Appellate Division did not abuse its discretion in making the wife responsible for an equitable share of the tax consequences (*see, id.;* Domestic Relations Law § 236[B][5][d][10]; *see also, De La Torre v. De La Torre,* 183 A.D.2d 744, 583 N.Y.S.2d 479; *Teitler v. Teitler,* 156 A.D.2d 314, 549 N.Y.S.2d 13, *appeal dismissed* 75 N.Y.2d 963, 556 N.Y.S.2d 247, 555 N.E.2d 619).

Accordingly, the order of the Appellate Division should be modified, without costs, and the judgment of Supreme Court should be reinstated to the extent indicated in accordance with this opinion and, as so modified, the order of the Appellate Division should be affirmed.

KAYE, C.J., and SIMONS, TITONE, SMITH, LEVINE and CIPARICK, JJ., concur.
Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

All Citations

85 N.Y.2d 36, 647 N.E.2d 749, 623 N.Y.S.2d 537

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Distinguished by L.L. v. B.H., N.Y.Sup., September 6, 2011

15 N.Y.3d 158
Court of Appeals of New York.

Ronald FIELDS, Appellant,
v.
Lucille FIELDS, Respondent.

June 10, 2010.

Synopsis
Background: In divorce action, husband appealed from judgment of the Supreme Court, New York County, Jacqueline W. Silbermann, J., awarding wife a divorce with legal fees and distributing the marital assets, and from judgment, same court, Laura Visitacion-Lewis, J., awarding wife a money judgment. The Supreme Court, Appellate Division, 65 A.D.3d 297, 882 N.Y.S.2d 67, affirmed. Leave to appeal was granted.

Holdings: The Court of Appeals, Graffeo, J., held that:

townhouse purchased by husband during parties' marriage was presumptively marital property;

evidence that husband used monies derived from separate property to make down payment on townhouse failed to rebut statutory presumption that townhouse was marital property;

husband's one-half interest in partnership bank account was marital property subject to equitable distribution; and

trial court properly addressed all relevant statutory factors in awarding wife 35% value of parties' marital assets.

Affirmed. Smith, J., filed dissenting opinion, in which Read, J., concurred.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***784** Arnold Davis, New York City, for appellant.

Hoffman, Polland & Furman, PLLC, New York City (Elliot R. Polland of counsel), for respondent.

***161 **1040 OPINION OF THE COURT**

GRAFFEO, J.

The principal issue raised in this matrimonial case is whether husband's one-half interest in the parties' residence —a Manhattan townhouse that husband purchased during the marriage and where the parties have lived for nearly 30 years —is marital property. We conclude that the value of husband's one-half interest in the townhouse constitutes marital property subject to equitable distribution and we therefore affirm the Appellate Division order.

I.

As we have previously observed, although the manner in which marital property is distributed falls within the discretion of the trial court, "the initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal" (*DeJesus v. DeJesus,* 90 N.Y.2d 643, 647, 665 N.Y.S.2d 36, 687 N.E.2d 1319 [1997]).

Domestic Relations Law § 236 defines "marital property" as "all property acquired by either or both spouses *during the marriage* and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the ***162** form in which title is held" (Domestic Relations Law § 236[B][1][c] [emphasis supplied]), and the definition of marital property includes a "wide range" of tangible and intangible interests ****1041** *****785** (*DeJesus,* 90 N.Y.2d at 647, 665 N.Y.S.2d 36, 687 N.E.2d 1319). It is telling that the Legislature chose to initially categorize all property, of whatever nature, acquired after parties marry as marital property. As we have repeatedly emphasized, the Equitable Distribution Law "recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition" (*O'Brien v. O'Brien,* 66 N.Y.2d 576, 583, 498 N.Y.S.2d 743, 489 N.E.2d 712 [1985]). This marital property designation is in keeping with the fundamental purpose of the

Equitable Distribution Law—the recognition of marriage as an economic partnership (*see* Governor's Approval Mem., L. 1980, ch. 281, reprinted in 1980 McKinney's Session Laws of N.Y., at 1863), in which "both parties contribute as spouse, parent, wage earner or homemaker" (*O'Brien,* 66 N.Y.2d at 585, 498 N.Y.S.2d 743, 489 N.E.2d 712).

The Legislature did provide for several exceptions to this general classification. Section 236 specifies that marital property does not include "separate property" and the statute sets forth four categories of property that constitute separate property:

> "(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
>
> "(2) compensation for personal injuries;
>
> "(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
>
> "(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part" (Domestic Relations Law § 236[B][1][d]).

When the Legislature enacted Domestic Relations Law § 236, it sought "to recognize the direct and indirect contributions of each spouse" (*Hartog v. Hartog,* 85 N.Y.2d 36, 47, 623 N.Y.S.2d 537, 647 N.E.2d 749 [1995], citing Governor's Approval Mem., L. 1980, ch. 281, and Assembly Mem., 1980 N.Y. Legis. Ann., at 129–130). Hence, we have stressed that marital property should be "construed broadly in order to give effect to the 'economic partnership' concept of the marriage ***163** relationship" (*Price v. Price,* 69 N.Y.2d 8, 15, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986] [emphasis omitted]). By contrast, separate property—denoted as an exception to marital property—should be construed "narrowly" (*id.* [emphasis omitted]; *see Majauskas v. Majauskas,* 61 N.Y.2d 481, 489, 474 N.Y.S.2d 699, 463 N.E.2d 15 [1984]). The structure of section 236 therefore creates a statutory presumption that "all property, unless clearly separate, is deemed marital property" and the burden rests with the titled spouse to rebut that presumption (*DeJesus,* 90 N.Y.2d at 652, 665 N.Y.S.2d 36, 687 N.E.2d 1319).

With these principles in mind, we turn to the unique facts presented in this case.

II.

Husband and wife, who are 60 and 69 years old, respectively, were married in 1970 and they have a son who was born in 1973. In 1978, the parties decided to purchase a home on the Upper West Side of Manhattan, selecting a five-story townhouse with 10 apartments and a basement. Wife agreed to the acquisition of the townhouse only if husband consented to certain preconditions because she believed that working outside the home and caring for their son, together with maintaining the townhouse, would be too burdensome. Because of wife's reticence, husband decided ****1042** *****786** to purchase the townhouse with his mother's assistance.

Husband paid $130,000 for the townhouse, making a $30,000 down payment. The down payment came from funds husband received from his grandparents—half in lieu of a bequest and half on loan, which his mother agreed to repay. The balance of the purchase price was paid through two mortgages held jointly by husband and his mother. Husband took title solely in his name but later conveyed a one-half interest in the building to his mother. From 1982 to 2001, husband and his mother managed the townhouse as a formal partnership. They deposited rent proceeds into a partnership bank account and made mortgage payments from that account. But the partnership bank account was not used exclusively for the building's income and expenses; husband acknowledges that he commingled marital funds in the account.

In September 1978, husband and wife moved into the townhouse, initially residing in apartment 2 and, in 1979, the couple converted the basement into an apartment where they lived together for five months until wife became ill and moved into apartment 3. In 1983, after apartment 3 was burglarized, wife ***164** relocated to apartment 2. Husband remained in the basement apartment and the couple shared occasional meals until 1997. Husband paid rent to the partnership for the basement apartment until 2002; he used his income from employment to make rental payments. Wife also paid rent using her wages while she was living in apartment 3. Husband's mother and stepfather resided in the building as

well and paid rent for three apartments that they combined into a single residence. The remaining apartments were leased to various tenants. Husband and wife were continuously employed outside of the home, although they each took periods of parental leave to care for their son. It is not disputed that the couple shared child care expenses and responsibilities as parents.

III.

Husband commenced this divorce action in February 2005 and Supreme Court referred the matter to a Special Referee. After a hearing on issues of equitable distribution, the Referee found that both parties contributed to the long-term marriage, their son's upbringing and the townhouse. The Referee recommended that husband's one-half interest in the townhouse be classified as marital property, less the $30,000 down payment, which the Referee deemed as husband's separate property because those funds had been received from husband's grandparents. He also found that husband's one-half interest in the partnership bank account was marital property. The Referee awarded wife 35% of the value of all marital assets because he concluded that wife had made direct and indirect contributions to the townhouse, including services as a spouse and mother. [1] Supreme Court confirmed the Referee's report and directed entry of a judgment of **1043 ***787 divorce. Upon husband's failure to pay wife her distributive award, Supreme Court entered a money judgment in wife's favor.

*165 The Appellate Division, with two Justices dissenting, affirmed (65 A.D.3d 297, 882 N.Y.S.2d 67 [1st Dept.2009]). The court held that husband's interest in the townhouse, less the $30,000 down payment, was properly categorized as marital property subject to equitable distribution. The majority emphasized that husband purchased the townhouse during the parties' marriage, that the couple continuously lived in the townhouse and raised their son in the home, and that wife made direct and indirect contributions to the upkeep of the townhouse. Rejecting husband's assertion that his interest in the townhouse should be viewed as separate property, the court explained that "[t]he fact that the marital residence can also be used to generate income ... does not therefore reclassify marital property into separate property" (*id.* at 304, 882 N.Y.S.2d 67). [2] The two dissenting Justices disagreed and concluded that husband rebutted the statutory presumption by showing that the townhouse, purchased with funds that were separate property, remained separate property and that wife failed to establish that any appreciation in the townhouse's value was caused by her direct or indirect contributions (*see id.* at 305, 882 N.Y.S.2d 67 [McGuire, J., dissenting]). This appeal ensued.

IV

Husband argues that his one-half interest in the townhouse is separate property because he owns and manages the building with his mother and because wife did not contribute to its purchase or its appreciation in value. We disagree and conclude that the value of husband's one-half interest in the townhouse is marital property subject to equitable distribution.

This case involves the application of the well-settled statutory presumption that all property acquired by either spouse during the marriage, unless clearly separate, is deemed marital property (*see* *DeJesus,* 90 N.Y.2d at 652, 665 N.Y.S.2d 36, 687 N.E.2d 1319). Here, husband purchased the townhouse in 1978, approximately eight years into the marriage, and therefore, on the date of acquisition, the presumption of marital property arose. Indeed, New York courts have long treated a marital residence that was purchased after the marriage as marital property subject to equitable distribution (*see e.g. Murphy v. Murphy,* 4 A.D.3d 460, 461, 772 N.Y.S.2d 355 [2d Dept.2004], *lv. denied* 3 N.Y.3d 612, 788 N.Y.S.2d 668, 821 N.E.2d 973 [2004]; *166 *Judson v. Judson,* 255 A.D.2d 656, 657, 679 N.Y.S.2d 465 [3d Dept.1998]; *see also Juhasz v. Juhasz,* 59 A.D.3d 1023, 1024, 873 N.Y.S.2d 799 [4th Dept.2009], *lv. dismissed* 12 N.Y.3d 848, 881 N.Y.S.2d 392, 909 N.E.2d 85 [2009]; *Heine v. Heine,* 176 A.D.2d 77, 84, 580 N.Y.S.2d 231 [1st Dept.1992], *lv. denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632 [1992]). Even where one spouse contributed monies derived from separate property toward the acquisition of the marital residence, this has not precluded its classification as marital property where the other spouse made economic or other contributions to the residence and the marriage; the contributing spouse generally has received a credit for that contribution (*see e.g. Juhasz,* 59 A.D.3d at 1024, 873 N.Y.S.2d 799; *Murphy,* 4 A.D.3d at 461, 772 N.Y.S.2d 355; **1044 ***788 *Judson,* 255 A.D.2d at 657, 679 N.Y.S.2d 465; *Heine,* 176 A.D.2d at 84, 580 N.Y.S.2d 231).

For example, in *Heine,* the parties purchased a townhouse containing several apartments during their marriage. The

husband used separate property to meet the down payment expense and the parties secured two mortgages to pay the balance of the purchase price; however, title was placed solely in the husband's name. The couple lived in an apartment in the townhouse and at least one of the units was always rented to a tenant. The wife was involved in several renovations to the building and she undertook primary care of the family's domestic and social needs. The Appellate Division credited the husband with the amount of the down payment, designating it as separate property (*see* 176 A.D.2d at 84, 580 N.Y.S.2d 231). Nevertheless, the court held that husband was not entitled to the appreciation in value of his separate property contribution because that appreciation was not attributable to the down payment but to market forces, renovations and mortgage payments paid for with marital funds (*see id.*). Thus, the court viewed the townhouse, less the husband's initial contribution, as marital property subject to distribution between the parties (*see id.; see also Bartha v. Bartha,* 15 A.D.3d 111, 115–117, 789 N.Y.S.2d 13 [1st Dept.2005]).

Here, the property was purchased eight years into the parties' marriage with the intent that it would be used as the marital residence where the parties would live and raise their son. In fact, that is precisely what occurred—the parties resided in the home with their son and other family members for nearly 30 years. Thus, the statutory presumption that a residence acquired during the marriage is marital property clearly applies in this case.

Once the statutory presumption was triggered, the burden shifted to husband to rebut that presumption (*see DeJesus,* 90 N.Y.2d at 652, 665 N.Y.S.2d 36, 687 N.E.2d 1319). Husband relies on the fact that he used monies derived from separate property—specifically, the $30,000 down ***167** payment—to acquire the townhouse.[3] But the townhouse was not "acquired in exchange for" the $30,000 down payment (Domestic Relations Law § 236[B][1][d][3]). Instead, husband's $30,000 separate property contribution covered only a fraction of the purchase price. While the down payment facilitated the acquisition, the use of a "separate property" down payment does not, in and of itself, establish the property's character as separate property (*see e.g. Juhasz,* 59 A.D.3d at 1024, 873 N.Y.S.2d 799; *Murphy,* 4 A.D.3d at 461, 772 N.Y.S.2d 355; *Judson,* 255 A.D.2d at 657, 679 N.Y.S.2d 465; *Heine,* 176 A.D.2d at 84, 580 N.Y.S.2d 231).

The remaining $100,000 of the purchase price was paid through two mortgages and, despite husband's claim that he made mortgage payments solely from rental proceeds, he failed to substantiate that allegation. Husband testified that he commingled marital assets in the partnership bank account from which mortgage payments were made. Specifically, he acknowledged ****1045** *****789** that he would sometimes deposit his paychecks—which were marital property—into the account. Funds from other sources of marital income were also placed into the account, such as husband's earnings from his tax preparation and video businesses and wife's paychecks. The fact that husband would later transfer funds or give cash to wife does not alter the commingled nature of the funds. Finally, both husband and wife paid rent to the partnership using income from their outside endeavors, which was a partial source of the mortgage payments. Husband therefore failed to establish that the mortgages, which were used to pay the majority of the townhouse's purchase price, were paid using monies derived exclusively from separate property, much less that all of the expenses associated with the property were covered by segregated funds.

There is no single template that directs how courts are to distribute a marital asset that was acquired, in part or in whole, with separate property funds. In these situations, courts have usually given the spouse who made the separate property contribution a credit for such payment before determining how to equitably distribute the remaining value of the asset (*see e.g.* ***168** *Zurner v. Zurner,* 213 A.D.2d 906, 908, 624 N.Y.S.2d 301 [3d Dept.1995], *lv. denied* 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999 [1995]; *Burns v. Burns,* 193 A.D.2d 1104, 1106, 598 N.Y.S.2d 888 [4th Dept.1993], *mod. on other grounds* 84 N.Y.2d 369, 618 N.Y.S.2d 761, 643 N.E.2d 80 [1994]). In distributing any appreciation in value, courts may consider any of the factors listed in Domestic Relations Law § 236(B)(5)(d) or any other relevant considerations (*see e.g. Butler v. Butler,* 171 A.D.2d 89, 93–94, 574 N.Y.S.2d 387 [2d Dept.1991]; *Woodson v. Woodson,* 178 A.D.2d 642, 642–643, 578 N.Y.S.2d 217 [2d Dept.1991]), including the respective contributions of each spouse and the effect of market forces.

In this case, the courts below properly considered the spectrum and quantity of contributions made by each spouse to the management and maintenance of the townhouse and

the extent to which market factors enhanced the value of the property.[4] Under these circumstances, we decline to disturb the determination below that husband failed to rebut the statutory presumption that his interest in the townhouse is marital property subject to equitable distribution and that wife was entitled to 35% of husband's interest in that asset.

In reaching this conclusion, we emphasize that husband purchased the townhouse eight years into the 35–year marriage and that the family maintained their living arrangement since 1978. It is not for the courts to dictate what type of lifestyle a "normal" marriage should reflect or how married couples should structure their marital relationships. That husband and wife in this case have maintained separate apartments in the building does not change the character of the property from marital to separate, especially since they both made economic and noneconomic contributions to their marriage and the upbringing of their son (*see e.g. Iwanow v. Iwanow,* 39 A.D.3d 471, 475, 834 N.Y.S.2d 247 [2d Dept.2007]; *see also Fagan v. Fagan,* 2 A.D.3d 394, 395, 767 N.Y.S.2d 849 [2d Dept.2003]; *Greenwald v. Greenwald,* 164 A.D.2d 706, 713–714, 565 N.Y.S.2d 494 [1st Dept.1991], *lv. denied* 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443 [1991]). Surely, many married couples sleep in different bedrooms for a variety of reasons and such arrangements do not affect the "marital property" status of ****1046 ***790** their homes if they divorce. Likewise, the fact that husband took title to his one-half interest in the townhouse in his name alone is irrelevant under the statute's express language (*see* Domestic Relations Law § 236[B][1][c]), nor does the fact that husband acquired title with his mother interfere with the marital character of his interest in the property (*see e.g. Bartha,* 15 A.D.3d at 115, 789 N.Y.S.2d 13). Finally, that portions of ***169** the townhouse were used as an income-generating business does not transform the building into separate property (*see e.g.* *Heine,* 176 A.D.2d at 84, 580 N.Y.S.2d 231). Wife's lack of an initial monetary investment and involvement in the management activities pertaining to the townhouse do not preclude a holding that husband's interest in the building is marital property. These were factors properly considered by the trial court in determining the extent of wife's distributive award (*see* Domestic Relations Law § 236[B][5][d]).

We part ways with the dissent at the initial stage of this analysis. The dissent fails to recognize the statutory presumption that property acquired during a marriage is marital property; instead, the dissent begins with the assumption that the building was separate property at the time of its acquisition. As explained above, we do not view husband's interest in the town-house as property "acquired in exchange for" his separate property contribution toward the down payment. Under the dissent's analysis, any time a married couple purchases a marital residence using "separate" funds (e.g., an inheritance or monetary gift from a parent) contributed by one spouse towards the down payment, the entirety of the marital home would be classified as separate property. This approach is not consistent with relevant precedent, does not heed the Domestic Relations Law's statutory presumption in favor of marital property and is contrary to the very purpose underlying the statute in recognition of an "economic partnership."

V

Next, husband claims that his one-half interest in the partnership bank account is separate property because the account was created solely to manage funds relating to the townhouse. But, as previously discussed, husband commingled marital assets in the partnership bank account and he could not sufficiently delineate any of the funds in the account as separate property (*see e.g. McManus v. McManus,* 298 A.D.2d 189, 748 N.Y.S.2d 139 [1st Dept.2002]). We agree with the courts below that husband's interest in the partnership bank account is marital property that should be allocated between the parties.

VI.

Finally, husband challenges the trial court's distribution of the marital property, arguing that the court abused its discretion by awarding wife 35% of the value of the marital assets. We disagree.

***170** In recognizing marriage as an economic partnership, Domestic Relations Law § 236 mandates that the equitable distribution of marital assets be based on the circumstances of the particular case and directs the courts to consider a number of statutory factors. These factors encompass the income and property of each party at the time of marriage and at the time of commencement of the divorce action, the duration of the marriage, the age and health of the parties, the extent of any maintenance award and the nontitled spouse's direct or indirect contributions to the marriage, including "services as

a spouse, parent, wage earner and homemaker" (Domestic Relations Law § 236[B][5] [d]). Absent an abuse of discretion **1047 ***791 this Court may not disturb the trial court's distributive award (*see Holterman v. Holterman,* 3 N.Y.3d 1, 8, 781 N.Y.S.2d 458, 814 N.E.2d 765 [2004]).

Here, Supreme Court issued a comprehensive decision addressing all relevant factors, including that husband and wife were married for 35 years; that both maintained employment and made economic and noneconomic contributions to the marriage, their son and the townhouse; that they had equal parenting responsibilities; that wife did not invest in the purchase of the townhouse; and that the couple maintained separate units in the building for approximately 28 years. In light of these considerations, particularly the length of the marriage, the age of the parties and wife's contributions to the marriage, we cannot conclude that Supreme Court abused its discretion in awarding wife 35% of the value of husband's half interest in the townhouse and other marital assets.

Accordingly, the Appellate Division order should be affirmed, with costs.

SMITH, J. (dissenting).
The decisions below and the majority opinion here rest on different grounds, both indefensible.

The governing statute says that "separate property" includes "property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (Domestic Relations Law § 236[B][1][d][3]). I think it clear, and the courts below seem to have assumed, that the husband's interest in this townhouse was acquired "in exchange for ... separate property," and was therefore separate property at the time it was acquired. That interest grew in value during the next three decades, and the main issue as I see it is whether, and to what extent, the wife's "contributions or efforts" justify *171 treating the "increase in value of separate property" as marital property. The courts below held 100% of the appreciation to be marital—a conclusion that I find to be completely unjustified.

The majority affirms the decisions below on a different rationale. It does not rely on the statutory exception to the rule that appreciation in separate property is separate property, and does not assert that the wife's "contributions or efforts" played any part in that appreciation. Rather, it finds that the property was not separate in the first place. It was, the majority says, not "acquired in exchange for ... separate property" because, according to the majority, some part of the mortgages used to acquire the townhouse may have been repaid with marital funds. This theory has many flaws, but the most obvious is that there is no evidence in this record, and neither court below found, that a penny of marital funds went into repaying the mortgages: The uncontradicted proof is that they were repaid entirely from rental proceeds. Thus the majority's rationale seems to me to be an even weaker one than that of the courts below.

I

While the opinions below contain some confusing language, I think the basis for them is reasonably clear; Supreme Court and the Appellate Division majority treated the husband's interest in the townhouse as having been separate property initially, and found that the wife's contributions to the increase in value of that interest were such that all of the appreciation should be classed as marital property. It is true that both Supreme Court and the Appellate Division referred to the husband's interest itself—not just the appreciation—as marital property, but this seems to be **1048 ***792 simply a misdescription. Both courts in fact included only the appreciation in marital property, excluding the $30,000 down payment; * and the opinions below dwell on, and treat as dispositive, what the Special Referee called the wife's "countless contributions to the building." I see nothing to support the majority's surmise that the Appellate Division's reasoning was the same as the majority's here (*see* majority op. at 165 n. 2, 905 N.Y.S.2d at 787 n. 2, 931 N.E.2d at 1043 n. 2).

I therefore begin by examining the statutory language that I think was decisive below: "[t]he term separate property shall *172 mean ... the increase in value of separate property, *except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse.*" (Domestic Relations Law § 236[B][1][d][3].) Read carefully, the italicized words may be puzzling. "[T]o the extent that" and "in part" seem contradictory: Is the appreciation marital only "to the extent" that the other spouse contributes to it, or is it wholly marital if the other spouse contributes even "in part"? I think this riddle can be answered

by considering an important premise of the law of equitable distribution: that marriage is an economic partnership, in which both spouses may contribute to the wealth accumulated during the marriage, either through direct efforts to earn money or indirect efforts as a parent and homemaker (*see* *Price v. Price,* 69 N.Y.2d 8, 13–15, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]). The statutory words "in part" refer to the possibility that the partnership of which the untitled spouse is "part" may contribute to the appreciation; "to the extent" that it does so, the resulting appreciation will be deemed marital, and the "part" of that marital appreciation due to the untitled spouse's efforts will be recognized when the marital property is divided.

Thus, when dealing with the appreciation in separate property, the statute assigns two tasks to a court: first, to figure out the "extent" to which appreciation results from the "contributions or efforts" of the untitled spouse, either solely or as a member of the marital partnership, and to include the appreciation in marital property to that extent; and secondly, to decide what "part" of that marital property the untitled spouse should receive. Here, the courts below classified 100% of the appreciation in the husband's interest in the townhouse as marital property, and then divided the marital property 65% to the husband and 35% to the wife. They thus implicitly found that 100% of the appreciation was attributable either to the wife's efforts or to the efforts of the economic partnership of which she and her husband were members; and that the 65–35 split is a reasonable reflection of the ratio of the parties' contributions. I do not find it necessary to examine the second of these findings, because I am satisfied that the first is without record support.

As we held in *Price,* the "contributions or efforts" referred to in the statute may be of two kinds: those that directly enhance the value of an asset, or "indirect contributions" as homemaker and parent (69 N.Y.2d at 12–13, 511 N.Y.S.2d 219, 503 N.E.2d 684). Only the first kind of contributions and efforts—the direct kind—is involved in this case. This is not a case like *Price,* in which the wife gave up outside ***173** employment when her first child was born, devoted herself thereafter to bringing ****1049** *****793** up children and taking care of the home, and "attended conventions with her husband and assisted him as hostess at various business-related social events" (*id.* at 12, 511 N.Y.S.2d 219, 503 N.E.2d 684). Here, the parties lived in separate apartments for most of the marriage; both continued in full-time employment, though she took a maternity leave and he took a paternity leave; and both spent roughly equal time on parental duties. Neither party should be penalized for this, of course; the Appellate Division majority was quite right in saying that it is not for courts "to dictate what a 'normal' marriage should be" (*Fields v. Fields,* 65 A.D.3d 297, 304, 882 N.Y.S.2d 67 [2009]). I simply note that, under the statute as we interpreted it in *Price,* the wife's indirect contributions and efforts as homemaker and parent would, if they had contributed to the appreciation of the property, be entitled to recognition; but there is no evidence that they did.

There is some evidence, relied on heavily by the majority in the Appellate Division, that the wife made direct contributions to the value of the townhouse. I quote the Appellate Division's summary:

> "The wife purchased some furniture for apartment 1 and 'occasionally' swept and vacuumed the hall in front of the apartment entrance. She testified that she would clean up the lobby during renovations. She also purchased a $600 vacuum cleaner to clean the lobby three times a week, cleaned the mailbox vestibule, swept the interior and exterior steps, used bleach to clean dog excrement from the sidewalk, and raked leaves from a maple tree in the backyard. In the summers, when the husband would go to France to spend time with his mother, the wife took responsibility for disposing of the building's refuse. She washed lobby curtains, cleaned lobby windows and polished the lobby mirror. She also decorated apartment 1, planted and maintained the backyard, and bought patio furniture.
>
> "In addition to these services, the wife purchased a carpet, and a $500 Formica countertop for the marital apartment, as well as paying $700 for flooring in the foyer. She paid $400 for a foyer mirror, and paid for couches, a basement door installation, linen closet, bathroom cabinets and a chandelier." (*Id.* at 299–300, 882 N.Y.S.2d 67.)

***174** This is the evidence on which the courts below implicitly found *all* of the appreciation in the husband's interest in the townhouse—from $30,000 (as they valued it) in 1978 to $1,158,000 at the time of trial in 2006—to be attributable to the parties' joint or to the wife's sole efforts. With all the deference that is due both to affirmed findings of fact and to the established presumption that, in cases of doubt, property should be found to be marital (*Price,* 69 N.Y.2d at 15, 511 N.Y.S.2d 219, 503 N.E.2d 684), this finding cannot be sustained. No doubt well-cleaned lobbies,

well-kept backyards and attractive furnishings can enhance the value of a building, but they do not cause a Manhattan real estate holding to increase forty-fold in value over 30 years. What does that, obviously, is the real estate market. A court-appointed expert—the only valuation expert to testify—confirmed this. He testified that "the greatest increase in value" came from "market forces." He added that another contributing factor was renovations that had been done in the building—renovations with which the wife had little, if anything, to do.

The record here simply does not support a finding that 100%—or any large part—of the increase in the value of the husband's interest in the real property was "due in part to the contributions or efforts" of the **1050 ***794 wife. For that reason, the Appellate Division's award to the wife of 35% of the value of that interest should be reversed.

II

The majority does not try to defend the conclusion that the appreciation in the husband's interest in the townhouse was an "increase in value of separate property" includable in marital property because of the wife's "contributions or efforts" (Domestic Relations Law § 236[B][1][d][3]). Rather, the majority says that the interest in the townhouse was not separate property at all because it was "property acquired ... during the marriage" (Domestic Relations Law § 236[B][1][c]). At first blush, this seems an impossible conclusion, because the statute also says that "[m]arital property shall not include separate property as hereinafter defined" (*id.*), and goes on to define "separate property" to include "property acquired in exchange for ... separate property" (Domestic Relations Law § 236[B][1][d][3]). As the majority acknowledges (majority op. at 166–167, 905 N.Y.S.2d at 788, 931 N.E.2d at 1044), all of the money the husband put into the townhouse in 1978 was separate property. It is thus indisputable that the interest in the townhouse was separate property when it was first acquired.

*175 But, as the majority notes, most of the money used to purchase the property was borrowed on the security of mortgages; the majority suggests that some part of the mortgages may later have been repaid with marital funds. The majority says that the husband "failed to substantiate" his claim "that he made mortgage payments solely from rental proceeds" (majority op. at 167, 905 N.Y.S.2d at 788, 931 N.E.2d at 1044). If indeed the mortgages were paid back in part with marital funds, I agree that that would make the interest in the townhouse, in part, marital property. The majority ignores the distinction between "in part" and "in whole," but that error is not significant, because the only possible finding on this record is that mortgages were paid not from marital property, but from rental proceeds.

The husband's testimony on this point was not equivocal:

"Q And how did you pay these [original] mortgages?

"A Through the rents they collected from the building....

"Q And the [subsequent] mortgage ..., how was that being paid?

"A Same way."

The wife, having had discovery of the husband's financial records, offered nothing to contradict this testimony. Nor did either of the courts below reject it; no opinion below discusses it. The opinions below proceed on the assumption that the mortgages were indeed, as the husband said, paid out of the rents.

But the majority finds scraps of evidence in the record that it says support a contrary conclusion. It says the husband "acknowledged that he would sometimes deposit his paychecks ... into the account" from which the mortgage payments were made (majority op. at 167, 905 N.Y.S.2d at 788–89, 931 N.E.2d at 1045). But what he actually said was: "I occasionally put my paychecks *so I could pay the rent* " (emphasis added). The fact that the husband and the wife paid their rent with marital property, and that the mortgages were paid out of the rents, cannot support a finding that marital property was being used to reduce the husband's mortgage obligation—not, at least, if the rent payments reflected the fair rental value of the apartments rented. There is no evidence that the husband's (or the wife's) rental obligation was inflated, so as effectively to divert marital property into the **1051 ***795 separately owned building. It is at least as likely that the husband, in renting apartments to himself and his wife, charged a below-market rent, thus enlarging the marital estate.

*176 The other evidence on which the majority relies is to the effect that some money other than rental payments occasionally went through the bank account from which the mortgages were paid. But the husband testified in substance

that these transactions (to the extent that they involved arguably marital funds) were trivial, and again the wife produced no evidence to contradict his testimony. Thus he testified that the account was used as a conduit for payments for a "block guard fund"—apparently payments to a security guard hired by the block association—because the amounts involved did not justify spending $40 a month to maintain a separate account. He also used the account for a "school fund" totaling "a few hundred dollars." There is no evidence that any money from the husband's tax preparation and video business was put into the account before 2004. There is no evidence at all—the wife never even claimed—that any of the marital funds put into the account were diverted to mortgage payments. There is no evidence, and no claim, that the mortgage payments ever exceeded the rents received from the building.

In short, when the record is examined, it is easy to see why the majority's theory that marital funds were used to pay the mortgage was not embraced by the courts below: the record is quite clear that no such funds were ever used that way.

III

The facts that the majority discusses are not limited to those made relevant by the statute—i.e., whether the husband's interest in the townhouse was "property acquired in exchange for ... separate property" or the extent to which the appreciation in the townhouse was "due in part to the contributions or efforts" of the wife (Domestic Relations Law § 236[B][1][c], [d][3]). The majority gives great weight to the fact that the husband and wife lived in the townhouse —a fact whose relevance, on the face of the statute, is not apparent. The majority stresses that "the property was purchased ... with the intent that it would be used as the marital residence where the parties would live and raise their son" and that "that is precisely what occurred" (majority op. at 166, 905 N.Y.S.2d at 788, 931 N.E.2d at 1044). The majority speaks of the "statutory presumption that a *residence* acquired during the marriage is marital property" (*id.* [emphasis added])—but the statutory presumption applies to all assets, not just residences. Indeed, the majority seems horrified by the idea that "any time a married couple purchases a marital residence ***177** using 'separate' funds ... the entirety of the marital home would be classified as separate property" (majority op. at 169, 905 N.Y.S.2d at 790, 931 N.E.2d at 1046)—though that is plainly what the statute says.

The majority seems to think it self-evident that, when a married couple buys a home, whether with separate or marital funds, any later increase in value of that home—whether due to the parties' efforts, market forces or something else —should be shared between the parties. I see some intuitive appeal in that rule, but the Legislature quite clearly did not enact it. The statute, right or wrong, treats residences and other property just the same. I think it inappropriate for us simply to engraft a special rule for residences onto the statute —if indeed that is what the majority is doing.

But even assuming that a "marital residence" has special status—that is, assuming ****1052** *****796** it to be the law that the parties should share in the appreciation of a marital residence, even when the residence was acquired with separate property and the appreciation is due to market forces —it seems absurd to apply that rule to a case like this. The "marital residence" in this case was not the 10–apartment townhouse; it was, for a relatively brief period of time, a rented apartment in that townhouse in which the parties lived together. To suggest that when parties live in an apartment the whole apartment building, if separately acquired by one of them, takes on some special "marital residence" status is to open the door to enormous uncertainty and potential abuse.

IV

The Appellate Division majority, like the majority here, emphasized facts having no relevance under the governing statute to the marital-separate property issue. The facts the Appellate Division stressed may be roughly put under the heading of "equities." That is evident from the opening words of the Appellate Division's majority opinion: "In this action for divorce, plaintiff husband seeks to divest 69–year–old defendant wife...." (65 A.D.3d at 298, 882 N.Y.S.2d 67.)

It is indeed easy to sympathize with the wife's plight. She is a retired school teacher. Her husband, nine years younger than she, decided after a 35–year marriage that he wanted to marry another woman. The husband is the wealthier of the parties. These facts might have supported an award of maintenance, which the courts below did not make. They are supposed to be totally irrelevant to an award of equitable distribution.

I am not naive enough to think it possible that considerations like these will never influence the outcome of cases, even cases ***178** to which they should not be relevant. But I think it is our Court's role to hold lower courts in check when they

find highly inventive ways of reaching what seem desirable results—not to find even more inventive ways of affirming those results. When one spouse can be awarded 35% of the other's valuable asset on a record like this, it is very hard to predict how any equitable distribution dispute will come out—except that the more sympathetic party will usually win. The result is a marked lack of predictability, and the sending of a message that the rules writ-ten in the statute books will not be followed. That is bad for litigants and bad for the law.

Order affirmed, with costs.

Chief Judge LIPPMAN and Judges CIPARICK, PIGOTT and JONES concur with Judge GRAFFEO.

Judge SMITH dissents in a separate opinion in which Judge READ concurs.

All Citations

15 N.Y.3d 158, 931 N.E.2d 1039, 905 N.Y.S.2d 783, 2010 N.Y. Slip Op. 04871

Footnotes

1 Included in his findings, the Special Referee determined that wife decorated the basement apartment, purchasing a carpet, a Formica countertop, couches, a linen closet, bathroom cabinets, a chandelier, curtains, and rugs. She installed a door in the basement apartment, wallpapered the bathroom and paid for flooring and a mirror for the foyer outside the apartment. Wife also helped with the townhouse's day-to-day maintenance. She cleaned the basement apartment and purchased the vacuum used to clean the lobby. Wife cleaned the mailbox vestibule, swept the interior and exterior steps, periodically cleaned the sidewalk, raked and bagged leaves in the backyard and planted a garden. She also cleaned lobby windows and washed the curtains, polished the lobby mirror and, during times when husband was away, disposed of the townhouse's refuse.

2 The majority appears to have concluded that husband failed to rebut the statutory presumption that property acquired during the marriage is marital property, although the court's opinion does not explicitly state its holding in those terms.

3 Wife argues that husband failed to prove that the $30,000 down payment was separate property because he could not produce cancelled checks showing that the money was a gift from his grandparents. Wife did not cross appeal to this Court or seek a modification of the Appellate Division order affirming Supreme Court's classification of the down payment as separate property. In any event, husband testified that he received the funds from his grandparents and his inability to produce the cancelled checks did not preclude a finding that the money was a gift (see *e.g.* *Chiotti v. Chiotti,* 12 A.D.3d 995, 996, 785 N.Y.S.2d 157 [3d Dept.2004]).

4 At the time of trial, the townhouse was valued at $2,625,000.

* The $30,000 figure seems to be an error in the husband's favor committed by the courts below. $30,000 was the amount paid down to purchase the entire townhouse. Since the husband retained only a half interest in it, the amount of the offset against his interest should, on the theory of the courts below, be $15,000.

12 N.Y.3d 461
Court of Appeals of New York.

Janet M. JOHNSON, Respondent–Appellant,
v.
Allan M. CHAPIN, Appellant–Respondent.

May 7, 2009.

Synopsis

Background: In divorce action commenced by wife, the Supreme Court, New York County, John E.H. Stackhouse, J., entered judgment of divorce which distributed parties' marital property and awarded wife maintenance, child support and counsel fees. Husband appealed. The Supreme Court, Appellate Division, 49 A.D.3d 348, 854 N.Y.S.2d 18, affirmed in part, and modified the judgment by reducing the wife's share of the enhanced value of real estate to 25%, and crediting husband for his pendente lite maintenance obligations. Husband appealed as of right and wife's application for leave to cross-appeal was granted.

Holdings: The Court of Appeals, Pigott, J., held that:

husband was entitled to credit in calculating equitable distribution award for amount that his pendente lite spousal support payments exceeded final spousal maintenance award;

husband was not entitled to credit for child support overpayments;

reduction of wife's equitable distribution award to include 25%, rather than 50%, of appreciation of real property acquired by husband before marriage, was warranted;

award of attorney fees to wife was warranted; and

wife was not entitled to 50% credit for money husband paid to satisfy his obligations to first wife.

Affirmed as modified.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

*****375** McDermott Will & Emery LLP, New York City (Daniel N. Jocelyn, Elliot Silverman and Susan S. Casero of counsel), for appellant-respondent.

Sheresky Aronson Mayefsky & Sloan, LLP, New York City (Allan E. Mayefsky, Lawrence B. Trachtenberg, Ronnie M. Schindel and John A. Kornfeld of counsel), for respondent-appellant.

***464 **68 OPINION OF THE COURT**

PIGOTT, J.

Husband and wife were married in January 1991 and have one child. Husband has four children from a previous marriage and is required to pay both maintenance and child support.

At the time the parties married, both were working attorneys. Wife stopped working outside the home when the parties' son was three years old. Husband was a partner at a law firm from 1968 until 1999, and thereafter became a managing director at a major investment banking firm until 2001. Husband also earned additional income by serving on the board of directors of several publicly-traded companies.

Prior to the marriage, husband owned a home on approximately 160 acres of land in Claverack, New York. During the marriage the parties spent approximately $2 million to renovate and improve the property. While husband played a larger role in these improvements, wife also participated in some of the project's details.

In November 2001, wife commenced this action for divorce after discovering husband was having an extramarital affair. Prior to trial, she made an application for interim maintenance and child support. Supreme Court imputed an average annual income of $2,273,680 to husband and ordered him to pay $18,465 monthly maintenance to wife and child support of ***465** $10,625 per month. Husband was also ordered to pay the wife interim counsel fees of $100,000.

Wife was awarded a judgment of divorce on the grounds of cruel and inhuman treatment. A 14–day trial ensued on the issues of equitable distribution, maintenance and child support.

As relevant to this appeal, the court recognized that the Claverack property was the husband's separate property, but held the funds spent on the renovations to be marital property subject to equitable distribution. The court awarded 50% of the appreciation of the Claverack estate to wife.

The court also credited wife with 50% of the marital property husband used to pay the maintenance and child support obligations to his first wife.

*****376 **69** After considering that wife had not worked outside the home for nine years and that it would take six years to develop her career, the court awarded wife durational maintenance of $6,000 per month for six years.

Finally, the court awarded wife legal fees and expert fees to be determined by a referee due in part to the fact that wife and her son "have suffered day to day crises resulting from the [husband's] harassment of them."

The Appellate Division modified the judgment of Supreme Court on both the law and the facts by, among other things, reducing the wife's share of the enhanced value of the Claverack property to 25% and by crediting husband for his pendente lite maintenance obligations (49 A.D.3d 348, 854 N.Y.S.2d 18 [2008]). Two Justices dissented.

The majority noted that husband had consistently been less than forthcoming regarding his income and that Supreme Court had found him incredible in the reporting of his income and assets (*id.* at 360–361, 854 N.Y.S.2d 18). The majority therefore upheld the imposition of legal and expert fees on husband, noting that he "engaged in a pattern of obstructionist conduct which unnecessarily delayed and increased the legal fees incurred in the litigation" (*id.* at 361, 854 N.Y.S.2d 18).

Husband appealed as of right based on the two-Justice dissent and the Appellate Division granted wife leave to cross-appeal.

Pendente Lite Support

The Domestic Relations Law provides: "[i]n determining an equitable disposition of property ..., the court shall ***466** consider: ... any award of maintenance" (Domestic Relations Law § 236[B][5][d][5]). When a pendente lite award of maintenance is found at trial to be excessive or inequitable, the Court may make an appropriate adjustment in the equitable distribution award (*see Gad v. Gad,* 283 A.D.2d 200, 724 N.Y.S.2d 305 [1st Dept.2001]; *Galvano v. Galvano,* 303 A.D.2d 206, 755 N.Y.S.2d 599 [1st Dept.2003]; *Fox v. Fox,* 306 A.D.2d 583, 759 N.Y.S.2d 702 [3d Dept.2003]). Supreme Court did not abuse its discretion in giving husband a credit representing the amount of the pendente lite maintenance he paid that exceeded what he was required to pay under the final maintenance award. In determining the temporary maintenance award, Supreme Court imputed an average salary in excess of $2 million to husband. However, at trial, it was established that his income was significantly lower. Given the disparity in the maintenance amounts, under the circumstances of this case, it was appropriate for husband to receive a credit.

Interim Child Support

As it pertains to husband's claim that he should be entitled to a credit for excess child support payments, we reject that claim. It has long been held that there is a "strong public policy against restitution or recoupment of support overpayments" (*Baraby v. Baraby,* 250 A.D.2d 201, 205, 681 N.Y.S.2d 826 [3d Dept.1998]; *Rosenberg v. Rosenberg,* 42 A.D.2d 590, 345 N.Y.S.2d 73 [2d Dept.1973]); and nothing in this record shows it was error to deny that relief.

Valuing Separate Property

Under the equitable distribution statute, separate property is defined to include an increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse (Domestic Relations Law § 236[B][1][d][3]). Thus, any appreciation in the value of separate ****70 ***377** property due to the contributions or efforts of the non-titled spouse will be considered marital property (*Price v. Price,* 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]). This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions towards the property, as well as when the non-titled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a

marital residence (*see generally* *Price v. Price,* 69 N.Y.2d at 17–18, 511 N.Y.S.2d 219, 503 N.E.2d 684).

Here, Supreme Court properly held that the improvements were marital, since the increase in the property was a ***467** result of both parties' efforts. We find that the Appellate Division did not abuse its discretion in reducing the award to wife from 50% to 25% of the property appreciation. Husband's income was the sole source of the funds expended on the property and, as admitted by wife, husband's involvements in the renovations were far more extensive.

Attorney's Fees

Pursuant to Domestic Relations Law § 237(a), a court in a divorce action may award counsel fees to a spouse "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties." We have held that when "exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v. Cabrera–Rosete,* 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168 [1987]).

Here, when awarding the fees, the court considered the parties' financial positions as well as the delay incurred as a result of husband's obstructionist tactics. Thus, we decline to disturb those awards.

Prior Maintenance

Finally, we hold that wife was not entitled to the 50% credit representing the money paid during the marriage towards husband's premarital obligations to pay his first wife maintenance and child support (*see* *Mahoney–Buntzman v. Buntzman,* 12 N.Y.3d 415 [2009] [decided today]).

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed. The certified question should be not answered upon the ground that it is unnecessary.

Judges CIPARICK, GRAFFEO, READ, SMITH and JONES concur; Chief Judge LIPPMAN taking no part.
Order modified, etc.

All Citations

12 N.Y.3d 461, 909 N.E.2d 66, 881 N.Y.S.2d 373, 2009 N.Y. Slip Op. 03630

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207 A.D.3d 18
Supreme Court, Appellate Division,
First Department, New York.

William S. CULMAN, Plaintiff-Appellant-Respondent,
v.
Marianne BOESKY, Defendant-Respondent-Appellant.

Appeal Nos. 15297-15297A
|
Index No. 300557/16
|
Case No. 2021-00392
|
ENTERED May 26, 2022

Synopsis

Background: Husband commenced divorce action against wife. Following nonjury trial of financial issues, the Supreme Court, New York County, Kelly O'Neill Levy, J., entered judgment of divorce, which distributed parties' many complex and varied assets. Both parties appealed.

Holdings: The Supreme Court, Appellate Division, Gesmer, J., held that:

husband met burden to show that appreciation in value of wife's pre-marital business during marriage constituted marital property subject to distribution;

Appellate Division would award husband 15% share of appreciation during marriage of wife's pre-marital business, rather than 7.5% share awarded by trial court or 25% or higher share requested by husband;

Appellate Division would award husband 15% share of marital value of wife's art company established during marriage, rather than 10% share awarded by trial court;

Appellate Division would award husband 30% share of marital value of real property which housed wife's art gallery and parties' former marital residence, rather than 10% share awarded by trial court;

Appellate Division would award husband 40% share of marital value of parties' condominium property, rather than 20% share awarded by trial court;

trial court improperly awarded husband 20% of appreciation in cash surrender value of wife's pre-marital life insurance policy; and

trial court appropriately exercised its discretionary power in awarding husband $320,000 in counsel fees.

Affirmed as modified.

Procedural Posture(s): On Appeal; Petition for Divorce or Dissolution.

****7** Plaintiff appeals and defendant cross appeals from a judgment of divorce of the Supreme Court, New York County (Kelly O'Neill Levy, J.), entered January 14, 2021 after a nonjury trial, to the extent appealed from as limited by the briefs, valuing the subject art work by including the "buyer's premium," awarding plaintiff 7.5% of the appreciation in value of defendant's business, Art Works Inc., during the marriage, 10% of the marital value of M&E, LLC, without awarding defendant a separate property credit, 10% of the marital value of the real property located in the Chelsea propert, 20% of the marital value of the parties' condominium in Aspen, Colorado, 20% of the appreciation in the cash surrender value of defendant's AXA life insurance policy, 10% of the marital value of defendant's personal art collection, and 50% of the remaining assets, including the value of the parties' club memberships, vehicles, wine collection, bank accounts, and investment and retirement funds, directing defendant to pay plaintiff his equitable share of illiquid assets within four years of judgment at 3% interest, and awarding plaintiff $320,000 in counsel fees. The parties also appeal from the order of the same court (Marilyn T. Sugarman, Special Referee) entered on or about October 9, 2020.

Attorneys and Law Firms

Garr Silpe, P.C., New York (Steven M. Silpe and Emily R. Rubin of counsel), for appellant-respondent.

Bikel & Schanfield, New York (Dror Bikel of counsel), for respondent-appellant.

Barbara R. Kapnick, J.P., Troy K. Webber, Ellen Gesmer, Saliann Scarpulla, Martin Shulman, JJ.

Opinion

GESMER, J.

****8** ***21** The trial court carefully applied our precedents to determine the appropriate and equitable distribution of the parties' many ***22** complex and varied assets. While we modify the order in some respects, we reject plaintiff's claim that the trial court's decision was "unprecedented" and "extraordinarily punitive." Plaintiff's argument is based on two significant errors, which are discussed more fully below. First, reducing the court's distribution of assets to a single fraction is reductive and misleading, in light of the complexity of this marital estate which is made up of multiple assets of varying natures. Secondly, plaintiff fails to take into account that the tax consequences that defendant will incur in order to pay his distributive award will greatly reduce her net assets, thus increasing his share of the net marital estate (*see e.g. Pappas v. Pappas*, 140 A.D.3d 838, 840, 36 N.Y.S.3d 661 [2d Dept. 2016]).

Procedural Background

Plaintiff commenced this divorce action on January 19, 2016. The parties stipulated that they would identify and evaluate marital assets as of May 15, 2015. They resolved issues of parenting time and decision-making for their child in a "Parenting Agreement" dated October 23, 2017, which provides that the parties have joint legal custody and defendant has primary physical custody of the child. By order entered on or about March 15, 2019, plaintiff was awarded $300,000 in pendente lite counsel fees, of which defendant was to pay $100,000 from her separate property and the balance was to be treated as an advance against equitable distribution.

A special referee (the trial court) presided over a 21-day trial of financial issues between February 20, 2019 and August 13, 2019. On the twelfth day of trial, the parties stipulated that the trial court would hear and determine the financial issues. The trial court issued its decision and order after trial on October 9, 2020. The judgment of divorce was entered on January 14, 2021. Both parties appealed.

Factual Background

The trial court made the following relevant factual findings, which are supported by the record. We defer, as we must, to the trial court's findings of fact, particularly its findings as to credibility.

The trial court found defendant to be the "more credible witness with respect to the parties' finances," but found that she overstated plaintiff's lack of contributions during the marriage. The trial court found that plaintiff was "far from forthright," ***23** noting, for example, that he failed to disclose to defendant and the court that he received an inheritance of $500,000.

At the time of trial, plaintiff was 51 and defendant was 52. They met in 2001 and married on June 28, 2003. They have one child born in 2004.

At the date of marriage, plaintiff was employed in the financial industry, and defendant was the owner of an art gallery, incorporated as Art Works, Inc. (AWI), which she had established in 1995.

Throughout the marriage, the parties paid their living expenses primarily with defendant's income, and did so exclusively after 2008, when plaintiff left his employment. Plaintiff then engaged in several business ventures, some of which were funded by defendant, but none of which were remunerative. After 2008, he did not contribute economically, either to defendant's business or the parties' living expenses, except for a deposit of $200,000 ****9** into the AWI account from an inheritance he received in 2011. However, plaintiff was primarily responsible for managing the payment of the family's expenses.

Both parties participated in parenting their daughter, with the assistance of a nanny five days per week. The nanny also accompanied the family on trips to Aspen and Nantucket. The trial court found that there was "some evidence" that plaintiff helped care for the child when defendant was traveling without the child, and on Saturdays from September to June when defendant was at work, which included taking the child to classes and skiing on Saturdays in the winter, starting in 2011. Plaintiff took the child to school and activities when the nanny did not. However, the trial court also found that plaintiff "engaged in conduct that was potentially detrimental" to the child when defendant was away on business.

Defendant testified that, through AWI, she managed approximately 30 artists and served as a broker for their art, for which AWI received 40 to 50% of the proceeds of art sales. She further testified that she also bought art for AWI as investments, not from the artists she represented, but, usually,

from emerging artists. Defendant was the sole arbiter of what to sell from the AWI inventory, and she generally only sold AWI art inventory to raise funds to buy other art or to pay expenses, as the business did not carry much cash and had enormous overhead costs.

Plaintiff attended events with defendant related to her gallery, but he was not involved with the day-to-day work of defendant's ***24** business. He had limited knowledge of defendant's acquisition of art, the art's value, or how it was stored, and he played no role in defendant's purchases or sales of art or her representation of artists. The trial court also found that there was "some evidence that he was detrimental to some aspects of her business," including, for example, that he had engaged in inappropriate behavior with a collector, AWI staff members and an artist whom defendant represented.

The trial court found that plaintiff's contributions to the marriage, both economic and non-economic, began to diminish beginning in or about 2008, to the extent that, after 2012 or 2013, "he failed to make any significant contributions to the marriage."

Before the marriage, in or about 2002, defendant identified a piece of land in the Chelsea neighborhood that she wished to purchase for her gallery (the Chelsea property). She executed the contract of sale for the Chelsea property on November 5, 2004, and the closing took place in January 2005. The Chelsea property was owned by an LLC formed for that purpose on October 28, 2004. Initially, defendant owned 100% of the LLC, but in 2011, she transferred 20% of it to a trust of which the parties' daughter is the beneficiary. While defendant used some of her separate property funds to acquire the property, she also used some marital funds to pay the costs of the construction and renovation. Defendant opened the new gallery in September 2006 in the extensively renovated space. In 2007, construction was completed on the residential portion of the building, which then became the marital residence. The Chelsea property also contained a mezzanine where guests stayed, including artists while installing their shows in the gallery. The majority of the Chelsea property was used by the gallery, and the residence occupied approximately 10% of the building. AWI had a lease with the LLC pursuant to which it paid rent to the LLC. The parties resided in the residential portion of the building rent-free. The parties disputed the degree to which plaintiff was involved in the construction of ****10** the building, beyond attending some construction meetings.

Analysis

Plaintiff's Inapposite Global Objections to the Distributive Award

Plaintiff objects globally to the trial court's distribution of assets on the grounds that he was awarded only 10.2% of the ***25** marital estate, according to his calculations. Although we modify some aspects of the trial court's distributive award in plaintiff's favor, we find that his global objections fail in two important respects.

First, plaintiff complains that the overall distribution of assets to him constitutes a de minimis percentage of the parties' total assets. However, equitable distribution does not require equal distributions. More precisely, our precedents provide courts with a great deal of discretion in distributing assets, and, in particular, support a wide range of appropriate distributions depending on the nature of each asset, whether it was acquired during the marriage or before, and the contributions of each party to the appreciation in value, if any, of the asset. Specifically, and of great relevance to this case, our precedents support a smaller percentage distribution to the nontitled spouse of the value of a business created and managed by the titled spouse. Accordingly, reducing equitable distribution to a single fraction reflecting the value of the assets distributed divided by the total amount of marital assets does not accurately represent the equity of the distribution. Rather, in a situation like this, where the complex marital estate is composed of multiple assets of varying natures, many of which cannot be distributed in kind, the court must carefully consider the equitable distribution of each asset based on the applicable statutory equitable distribution factors, which frequently leads to an unequal distribution that is nevertheless equitable (*see Arvantides v. Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58, 478 N.E.2d 199 [1985]; *Cotton v. Roedelbronn*, 170 A.D.3d 595, 595-596, 97 N.Y.S.3d 28 [1st Dept. 2019]; *Klauer v. Abeliovich*, 149 A.D.3d 617, 622-623, 53 N.Y.S.3d 37 [1st Dept. 2017]). In particular, as defendant's business was the parties' largest asset, the application of the general principle that business assets are generally less evenly divided than other assets results in a greater overall distribution in defendant's favor.

Second, plaintiff's analysis fails to account for the tax consequences that defendant will bear in paying plaintiff his distributive award (*see Pappas v. Pappas*, 140 A.D.3d at 840, 36 N.Y.S.3d 661). For example, in order for defendant to pay plaintiff our increased award to him of 15% of the marital portion of AWI, she will have to liquidate approximately 30%

of the marital portion of AWI's value, as discussed more fully below. Accordingly, taking into account the tax impact of the distribution to plaintiff, defendant will retain not 85% of the marital value of AWI, but closer to 70%. Although the trial court recognized that it was ***26** "a virtual certainty that defendant will have to sell assets in order to satisfy the equitable distribution award," it did not quantify the resulting tax impact on defendant of the payments she must make to plaintiff. Based on the record, we have estimated the tax effect, which demonstrates that plaintiff has understated the actual percentage of the net marital assets that he will receive. On the other hand, we affirm the distribution to plaintiff of 50% of those marital assets that can be distributed in kind without any tax impact, including the value of the parties' vehicles, wine collection, bank accounts, and investment and retirement funds.

****11** In making its award, the trial court found:

> "It would be inequitable to require defendant to bear the entire tax burden of selling assets to satisfy an equitable distribution award, as that diminishes the share of the marital property to her.... [I]t is a virtual certainty that defendant will have to sell assets in order to satisfy the equitable distribution award. The award of equitable distribution is structured in consideration of the reality that defendant will have to sell assets and in consideration of the tax consequences that defendant will bear in having to sell art to satisfy the award."

Plaintiff does not directly dispute defendant's argument that, in connection with the sale of art to raise funds to pay plaintiff his distributive award, "[t]he proceeds she receives from the sale of the art will be attributed to her at the higher ordinary income tax rate, causing her significant tax liabilities." However, he claims that the argument is not supported by the evidence. We find to the contrary.

Defendant's accountant testified that AWI is structured as a "pass-through" entity, so that the income of AWI from the sale of art is reflected on defendant's personal tax return. He further testified that she would pay, in connection with the sale of art owned by AWI, the highest marginal tax rate, which is 37% on federal taxes and 12% on state taxes. He testified that if she sold art from her personal collection that she had held for at least one year, she would pay federal capital gains tax of 31.8% and state tax of 12%. Similarly, the trial court correctly found that the operating agreement of M&E, LLC (M&E) provides that defendant recoups her cost basis and is responsible for 100% of the expenses and taxes when art owned by M & E is ***27** sold. The parties' tax returns in evidence also support the tax rates to which defendant's accountant testified.

Given the tax liability that defendant incurs when she sells art, she will receive approximately 51% to 56% of the sales price after taxes (depending on whether the art is from her personal collection). Therefore, in order for defendant to pay plaintiff $1,000,000, she must sell art worth approximately $1,786,000 if the art is from her personal collection and art worth approximately $1,961,000 if the art is owned by AWI. In effect, in order for her to pay him a distributive award of 15% of the marital value of AWI, she will have to sell art worth approximately 29% of the marital value of AWI. Under these circumstances, it is appropriate to award plaintiff a smaller distribution of assets for which defendant will have to sell property awarded to her in equitable distribution in order to pay him. [1]

Art Valuation

The trial court appropriately adopted the methodology to appraise the artwork at issue used by plaintiff's expert and the neutral expert appointed by the court, both of whom testified that including the "buyer's premium" was the industry standard in appraising the fair market value of art and conformed with IRS regulations. Moreover, although defendant argued that, as a gallerist, she did not sell art at auction, her testimony revealed otherwise. ****12** Accordingly, we afford the trial court's determination deference (*see Peritore v. Peritore*, 66 A.D.3d 750, 752, 888 N.Y.S.2d 72 [1st Dept. 2009]; *see generally Amodio v. Amodio*, 70 N.Y.2d 5, 7, 516 N.Y.S.2d 923, 509 N.E.2d 936 [1987]).

AWI

Contrary to defendant's contention, plaintiff met his burden to show that the appreciation in value of defendant's pre-marital business, AWI, during the marriage constituted marital property subject to distribution (*see* ***28** *Larowitz v. Lebetkin*, 170 A.D.3d 578, 579, 97 N.Y.S.3d 41 [1st Dept. 2019]). [2] The record, including defendant's own testimony, supports the trial court's determination that the appreciation was due to defendant's active efforts (*see* *Price v. Price*, 69 N.Y.2d 8, 17-18, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1986]) and that there was "*some* nexus" between plaintiff's limited indirect contributions as a supportive spouse and active parent, at least in the early years of the marriage,

and the success of defendant's business (*see* *Hartog v. Hartog*, 85 N.Y.2d 36, 46, 623 N.Y.S.2d 537, 647 N.E.2d 749 [1995]; *see also* Domestic Relations Law § 236[B][1][d][3]). Contrary to defendant's argument, the nontitled spouse is not required to quantify the connection between the titled spouse's efforts and the increase in value of separate property during the marriage "with mathematical, causative or analytical precision" (*Hartog*, 85 N.Y.2d at 47, 623 N.Y.S.2d 537, 647 N.E.2d 749).

An award to plaintiff of significantly less than half of the marital portion of AWI is justified by the following facts: defendant started her business years before she met plaintiff; plaintiff was not involved with defendant's acquisition or sale of art; plaintiff's conduct was at times problematic and even a hindrance to defendant's business success; plaintiff's contributions to the marriage diminished over time; and defendant will bear substantial tax consequences when she sells art to pay plaintiff a distributive award (*see* Domestic Relations Law § 236[B][5][d][7], [8], [11]; *see also Cotton*, 170 A.D.3d at 596, 97 N.Y.S.3d 28). However, we find that the trial court's distribution of only 7.5% of the marital appreciation in AWI to plaintiff was an improvident exercise of discretion, given the court's findings that plaintiff made indirect contributions to defendant's business as a supportive spouse and parent, at least in the early years of the marriage, and deposited $200,000 into the AWI account from an inheritance he received in 2011. He also attended many events with her, and provided occasional assistance, particularly following Hurricane Sandy. Plaintiff concedes both that defendant's success was a consequence of "her own hard work and business and art savvy" and that "the case law is consistent that business assets are rarely distributed on an equal ***29** basis." He nevertheless argues that he should receive at least 25% of the appreciation in value of AWI, citing, inter alia, (*Teitler v. Teitler,* 156 A.D.2d 314, 549 N.Y.S.2d 13 [1st Dept. 1989], *appeal dismissed* 75 N.Y.2d 963, 556 N.Y.S.2d 247, 555 N.E.2d 619 [1990]). However, in *Teitler*, the nontitled spouse provided administrative and sales services to the business. ****13** Considering all of the circumstances, we find that plaintiff's share of AWI's appreciation during the marriage should be 15%, or $3,486,821 (*see e.g. Cotton*, 170 A.D.3d at 596, 97 N.Y.S.3d 28; *Gering v. Tavano*, 50 A.D.3d 299, 301, 855 N.Y.S.2d 436 [1st Dept. 2008], *lv denied* 11 N.Y.3d 707, 868 N.Y.S.2d 599, 897 N.E.2d 1083 [2008]).

M&E and Defendant's Personal Art Collection

With respect to M&E, an entity established during the marriage and partly owned by a trust benefiting the parties' daughter, the award of 10% of the marital value to the plaintiff was an improvident exercise of discretion; instead, we find that his share should be 15%. Defendant's role as sole arbiter of the acquisition and disposition of artwork held by M&E, plaintiff's lack of any direct contribution to this asset, and his diminishing indirect contributions as a spouse and parent over time, as well as the tax consequences to defendant from selling assets to pay plaintiff's distributive award justify a relatively small award to plaintiff of this asset (*see Klauer v. Abeliovich*, 149 A.D.3d 617, 625, 53 N.Y.S.3d 37 [1st Dept. 2017], *supra*). However, the trial court found that plaintiff made indirect contributions as a spouse and parent in the early years of the marriage. We further find that defendant is entitled to a separate property credit for art that was gifted to her, valued at $991,400, as detailed in tax returns (*see* Domestic Relations Law § 236B[1][d][1]). The stipulated value of the art held by M&E, taking into account the buyer's premium, is $10,529,638. After deducting defendant's separate property credit and the 33 1/3% interest of the trust benefitting the parties' child, the amount subject to equitable distribution is $6,359,143, of which plaintiff is entitled to 15%, or $953,871.45.

For similar reasons, we find that the award to plaintiff of 10% of the value of defendant's personal art collection was an improvident exercise of discretion and that the distribution to him should be 15%, or $215,812.50, with the buyer's premium (*see Klauer*, 149 A.D.3d 617, 624, 53 N.Y.S.3d 37).

Real Estate

The trial court's award to plaintiff of only 10% of the marital value of the Chelsea property, which houses defendant's art gallery and the parties' former marital residence, was ***30** an improvident exercise of discretion. The award did not give sufficient weight to the facts that marital funds were used to construct, renovate, maintain, and operate the building and that plaintiff was involved during the construction process. On the other hand, after 2008, plaintiff ceased to earn an income and therefore did not contribute financially, and the parties did not pay rent or a mortgage to live in the marital residence since it was situated in a commercially zoned space. Indeed, plaintiff continued to benefit from this asset long after the May 2015 cutoff for marital assets, since after he vacated the marital residence in January 2015, he moved into a separate section of the building, where he lived until April

2016. Considering all of these facts, we find that plaintiff is entitled to 30% of the marital value, or $3,708,233.28 (*see Klauer*, 149 A.D.3d at 622, 53 N.Y.S.3d 37; *Guha v. Guha*, 61 A.D.3d 634, 634, 877 N.Y.S.2d 151 [2d Dept. 2009]).

Similarly, we find that plaintiff is entitled to 40% of the marital value of the parties' condominium in Aspen, instead of the 20% awarded by the trial court. The parties purchased and renovated this property during the marriage. The record shows that, although plaintiff was not earning income to contribute financially, he paid the bills associated with the property ****14** and handled the occasional summer rental.

The trial court properly awarded 100% of the Nantucket property to defendant since it was her separate property. Oddly, plaintiff complains about this aspect of the decision even though he proposed it in his posttrial brief.

Life Insurance, Vehicles and Club Memberships

We find that the trial court improperly awarded 20% of the cash surrender value of the AXA, Inc. life insurance policy to plaintiff. The trial court found that there was no evidence that marital funds were used to pay any premiums on this pre-marital policy benefitting the parties' daughter, and plaintiff admitted that none of his income was used to pay premiums. Accordingly, the policy remains defendant's separate property, and plaintiff is not entitled to a distribution of its cash surrender value (*see Gordon v. Anderson,* 179 A.D.3d 402, 403, 117 N.Y.S.3d 30 [1st Dept. 2020]).

The trial court providently exercised its discretion in awarding plaintiff 50% of the value of the parties' vehicles and the cost of their club membership fees. Defendant's use of the cash proceeds from the sale of her separate property art to help fund these purchases does not render them her separate property, because those funds were commingled with marital funds ***31** in her account and used for the parties' joint benefit (*see generally* *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 421, 881 N.Y.S.2d 369, 909 N.E.2d 62 [2009]).

Payment Schedule and Attorneys' Fees

The court providently exercised its discretion in giving defendant four years to pay plaintiff his distributive award of the non-liquid assets, at 3% postjudgment interest, and 60 days to pay him his share of liquid assets, given the illiquid nature of the assets to be sold, the related tax consequences, and the effect of the pandemic on the economy in general and the art market in particular, of which the trial court took judicial notice (*see Ralis v. Ralis*, 146 A.D.3d 831, 832, 46 N.Y.S.3d 631 [2d Dept. 2017]; *Hamroff v. Hamroff*, 35 A.D.3d 365, 366, 826 N.Y.S.2d 389 [2d Dept. 2006]). In addition, plaintiff proposed in his posttrial brief that defendant be given four years to pay the distributive award, after making an initial payment to him equal to one-third of the full distributive award.

The trial court appropriately exercised its discretionary power to award reasonable counsel fees under Domestic Relations Law § 237(a), considering the particular equities and circumstances of this case, including the relative merits of the parties' positions and their respective financial positions (see *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168 [1987]). We note that plaintiff will have ample funds from the equitable distribution award with which to pay his attorneys (*see Wyser-Pratte v. Wyser-Pratte*, 68 A.D.3d 624, 626, 892 N.Y.S.2d 334 [1st Dept. 2009]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

Accordingly, the judgment of divorce of the Supreme Court, New York County (Kelly O'Neill Levy, J.), entered January 14, 2021, after a nonjury trial, to the extent appealed from as limited by the briefs, valuing the subject art work by including the "buyer's premium," awarding plaintiff 7.5% of the appreciation in value of defendant's business, Art Works Inc., during the marriage, 10% of the marital value of M&E, LLC, without awarding defendant a separate property credit, 10% of the marital ****15** value of the real property located in the Chelsea propert, 20% of the marital value of the parties' condominium in Aspen, Colorado, 20% of the appreciation in the cash surrender value of defendant's AXA life insurance policy, 10% of the marital value of defendant's personal art collection, and 50% of the remaining assets, including the value of the parties' club memberships, vehicles, wine collection, bank accounts, and ***32** investment and retirement funds, directing defendant to pay plaintiff his equitable share of illiquid assets within four years of judgment at 3% interest, and awarding plaintiff $320,000 in counsel fees, should be modified, on the law and the facts, to award plaintiff 15% of the marital appreciation of Art Works Inc., 15% of the marital value of M&E LLC after awarding defendant a separate property credit of $991,400, 30% of the marital value of the Chelsea property, 40% of the

marital value of the condominium in Aspen, Colorado, 0% of the appreciation in the cash surrender value of defendant's AXA life insurance policy, and 15% of the marital value of defendant's personal art collection, and otherwise affirmed, without costs. The appeal from the order of the same court (Marilyn T. Sugarman, Special Referee) entered on or about October 9, 2020, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Judgment of divorce, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered January 14, 2021, modified, on the law and the facts, to award plaintiff 15% of the marital appreciation of Art Works Inc., 15% of the marital value of M&E LLC after awarding defendant a separate property credit of $991,400, 30% of the marital value of the Chelsea property, 40% of the marital value of the condominium in Aspen, Colorado, 0% of the appreciation in the cash surrender value of defendant's AXA life insurance policy, and 15% of the marital value of defendant's personal art collection, and otherwise affirmed, without costs. Order, same court (Marilyn T. Sugarman, Special Referee) entered on or about October 9, 2020, dismissed, without costs, as subsumed in the appeal from the judgment.

All Citations

207 A.D.3d 18, 170 N.Y.S.3d 5, 2022 N.Y. Slip Op. 03440

Footnotes

1 We also reject plaintiff's argument that defendant could avoid this tax issue by selling the Nantucket residence or the Aspen condominium to pay his distributive award. The Nantucket residence, which the trial court found was not marital property because defendant acquired it before the marriage, is owned 20% by the parties' daughter through a trust. The Aspen condominium is owned 32% by the parties' daughter through a trust. Accordingly, the sale of these assets to pay plaintiff's distributive award would be both impractical and inappropriate.

2 We note that the trial court cited to *Larowitz* for the proposition that a distribution of 5% of the increase in value of separate property during the marriage in that case was supported by the parties' relative contributions. However, the distribution in *Larowitz* was also a result of the non-titled spouse's failure to meet his burden to demonstrate that the increase in value during the marriage was due more than a small degree to the titled spouse's active efforts, and not to market forces or the efforts of others (170 A.D.3d at 579, 97 N.Y.S.3d 41).

11 A.D.3d 604
Supreme Court, Appellate Division,
Second Department, New York.

Judy WORTMAN, respondent,
v.
William J. WORTMAN, appellant.

Oct. 18, 2004.
|
Decision and Order Recalled and Vacated Oct. 18, 2004.

Synopsis

Background: In action for divorce and ancillary relief, the Supreme Court, Nassau County, Stack, J., entered order awarding maintenance to wife, directing payment of college expenses, and dividing certain marital property. Husband appealed.

Holdings: On husband's motion for resettlement and clarification, the Supreme Court, Appellate Division, held that:

nine-year spousal maintenance award was not abuse of discretion;

award of funds in particular investment account to wife was not abuse of discretion;

cash surrender value of life insurance policies placed in insurance trust was properly included in distributive award; and

Husband was entitled to credit against his child support obligation for certain college expenses of parties' child.

Affirmed as modified.

Decision, 308 A.D.2d 486, 764 N.Y.S.2d 282, vacated.

Procedural Posture(s): On Appeal.

****632 *605** Motion by the respondent for resettlement and clarification of a decision and order of this court dated September 15, 2003, which determined an appeal from an order of the Supreme Court, Nassau County, entered December 24, 2001.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the decision and order dated September 15, 2003, in the above-entitled case is recalled and vacated, and the following decision and order is substituted therefor:

Attorneys and Law Firms

Reisman, Peirez & Reisman, LLP, Garden City, N.Y. (Seymour J. Reisman, Michael J. Angelo, and Dalit A. Yarden of counsel), for appellant.

Jacalyn F. Barnett, P.C., New York, N.Y., for respondent.

MYRIAM J. ALTMAN, J.P., GABRIEL M. KRAUSMAN, GLORIA GOLDSTEIN, and BARRY A. COZIER, JJ.

Opinion

In an action for a divorce and ancillary relief, the defendant husband appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Nassau County (Stack, J.), entered December 24, 2001, which, after a nonjury trial, inter alia, (a) awarded the plaintiff wife maintenance of $20,000 per month for a period of five years, and $15,000 per month for a period of four years thereafter, (b) directed him to pay the college expenses of the parties' daughter, (c) awarded the plaintiff wife the parties' investment account at Sanford C. Bernstein & Co., LLC, *and* (d) included the cash surrender value of certain life insurance policies owned by an insurance trust in the distributive award.

ORDERED that the judgment is modified, on the law, by adding a provision thereto directing that the amounts the defendant husband is required to pay for the college expenses of the parties' daughter *which are duplicative* of basic child support ****633** while the child lives away from home shall be deducted from his child support obligation; as so modified, the judgment is affirmed insofar as *appealed from,* with costs to the plaintiff wife.

***606** The parties were married in 1981 and have one child, a daughter who is now 17 years old. The defendant husband is a highly successful physician who earns well over $1,000,000 per year as a partner in a radiology group. Although the

plaintiff wife was employed during the early years of the parties' marriage, she stopped working in 1983, and has not been employed outside of the home since that time.

On appeal, the defendant contends that the Supreme Court improperly awarded the plaintiff maintenance for a nine-year duration because she is capable of becoming self-supporting in a shorter period of time. However, it is well settled that the amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts (*see McCully v. McCully,* 306 A.D.2d 329, 760 N.Y.S.2d 686; *Sidhu v. Sidhu,* 304 A.D.2d 816, 817, 759 N.Y.S.2d 134; *Chalif v. Chalif,* 298 A.D.2d 348, 751 N.Y.S.2d 197; *Mazzone v. Mazzone,* 290 A.D.2d 495, 736 N.Y.S.2d 683). The factors to be considered in awarding maintenance include "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (*Unterreiner v. Unterreiner,* 288 A.D.2d 463, 733 N.Y.S.2d 239; *Poli v. Poli,* 286 A.D.2d 720, 723, 730 N.Y.S.2d 168; *Kret v. Kret,* 222 A.D.2d 412, 634 N.Y.S.2d 719). Taking these factors into consideration, the Supreme Court providently exercised its discretion in granting the plaintiff, who has been out of the work force for over 20 years, maintenance for a nine-year duration (*see Chalif v. Chalif, supra; Unterreiner v. Unterreiner, supra;* *Sheridan v. Sperber,* 269 A.D.2d 439, 702 N.Y.S.2d 894).

Furthermore, the Supreme Court correctly awarded the parties' investment account at Sanford C. Bernstein & Co., LLC, to the plaintiff. Although the defendant claimed that the funds in this account were "earmarked" to pay the college expenses of the parties' daughter, the Supreme Court found his testimony regarding financial matters to be less than credible, and the Supreme Court's assessment of the credibility of witnesses is entitled to great weight on appeal (*see Antes v. Antes,* 304 A.D.2d 597, 758 N.Y.S.2d 163; *Carniol v. Carniol,* 297 A.D.2d 697, 747 N.Y.S.2d 539). Moreover, while the parties maintained five custodial accounts for their daughter pursuant to the Uniform Gift to Minors Act, the subject account was held jointly by them during their marriage, and was not an educational account. In addition, we reject the ***607** defendant's claim that the cash surrender value of certain life insurance policies should not have been included in the distributive award because those policies are held in a trust and are unavailable to him. Although the subject policies were placed in an insurance trust, the trust agreement does not preclude the plaintiff, as trustee, from effectuating this aspect of the distributive award by transferring control and ownership of the trust assets to the husband (*see Galachiuk v. Galachiuk,* 262 A.D.2d 1026, 691 N.Y.S.2d 828).

Under the circumstances of this case, we also find that the Supreme Court properly directed the defendant to pay all ****634** of the college expenses for the parties' daughter (*see* *Matter of Cassano v. Cassano,* 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878; *Jablonski v. Jablonski,* 275 A.D.2d 692, 693, 713 N.Y.S.2d 184; *Vainchenker v. Vainchenker,* 242 A.D.2d 620, 622, 662 N.Y.S.2d 545). However, since the defendant is required to pay all college-related expenses, including room and board, the Supreme Court should have given him a credit against his child support obligation for any amounts he pays for college expenses *which are duplicative* of basic child support during those periods when the child may live away from home (*see Saslow v. Saslow,* 305 A.D.2d 487, 489, 758 N.Y.S.2d 825; *Jablonski v. Jablonski, supra;* *Sheridan v. Sperber, supra; Vainchenker v. Vainchenker, supra; Litwack v. Litwack,* 237 A.D.2d 580, 581–582, 655 N.Y.S.2d 613).

We note that the defendant also purports to appeal from an award to the plaintiff of an accountant's fee in the sum of $13,000. However, the judgment contains no decretal paragraph awarding the plaintiff such an accountant's fee. While the Supreme Court issued a decision on July 24, 2001, which concluded that the plaintiff was entitled to an accountant's fee, and directed the parties to settle judgment on notice, there is no indication in the record that a second judgment incorporating this award was entered. Accordingly, we do not reach this issue.

The defendant's remaining contentions are without merit.

All Citations

11 A.D.3d 604, 783 N.Y.S.2d 631, 2004 N.Y. Slip Op. 07480

146 A.D.3d 872
Supreme Court, Appellate Division,
Second Department, New York.

Hillary MARKOWITZ, respondent,
v.
Jeffrey MARKOWITZ, appellant.

Jan. 18, 2017.

Synopsis

Background: Wife brought divorce action. Following a nonjury trial, the Supreme Court, Westchester County, Berliner, J., awarded wife one half of savings account, awarded wife one half of husband's interest in limited liability company (LLC), awarded wife cash surrender value of life insurance policy, awarded husband only partial credit for spousal maintenance and child support payments made prior to amended judgment of divorce, and denied husband's motion to resettle the amended judgment of divorce. Husband appealed.

Holdings: The Supreme Court, Appellate Division, held that:

wife was entitled to half of amount of money in savings account;

wife was entitled to one half of husband's interest in LLC;

cash surrender value of life insurance policy was precluded from being included in equitable distribution; and

trial court's error in determining amount of credit awarded to husband for spousal maintenance and child support payments made prior to amended judgment of divorce warranted remittal.

Affirmed as modified, and remitted.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****204** Guttridge & Cambareri, White Plains, NY (John C. Guttridge of counsel), for appellant.

Harold, Salant, Strassfield & Spielberg, White Plains, NY (Donna E. Abrams of counsel), for respondent.

REINALDO E. RIVERA, J.P., LEONARD B. AUSTIN, JEFFREY A. COHEN, and VALERIE BRATHWAITE NELSON, JJ.

Opinion

***872** Appeals by the defendant from (1) stated portions of an amended judgment of divorce of the Supreme Court, Westchester County (Berliner, J.), dated March 5, 2014, and (2) an order of that court dated September 18, 2014. The amended judgment of divorce, upon a decision of that court dated June 12, 2013, made after a nonjury trial, and upon additional findings of fact and conclusions of law dated March 5, 2014, insofar as appealed from, inter alia, (a) awarded the plaintiff one half of the amount in an ING Direct Savings Account, (b) awarded the plaintiff one half of the defendant's interest in Markowitz, LLC, (c) awarded the plaintiff an amount equal to the cash surrender value as of September 8, 2009, of a Massachusetts Mutual Life Insurance policy, and (d) awarded the defendant only partial credit for spousal maintenance and child support payments made prior to the amended judgment of divorce. The order denied the defendant's motion to resettle the amended judgment of divorce.

ORDERED that the appeal from the order is dismissed, without costs or disbursements; and it is further,

ORDERED that the amended judgment of divorce is modified, ***873** on the law, by (1) deleting the provision thereof directing the defendant to pay to the plaintiff an amount equal to the cash surrender value as of September 8, 2009, of the Massachusetts Mutual Life Insurance policy, and (2) deleting the provisions thereof awarding the defendant only partial credit for spousal maintenance and child support payments ****205** made prior to the amended judgment of divorce; as so modified, the amended judgment of divorce is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith.

The appeal from the order must be dismissed, as no appeal lies from an order denying a motion for resettlement of the decretal paragraphs of a judgment (*see Carrano v. Carrano,* 82 A.D.3d 1143, 919 N.Y.S.2d 376; *Vogelgesang v.*

Vogelgesang, 71 A.D.3d 1131, 898 N.Y.S.2d 211; *Celauro v. Celauro,* 286 A.D.2d 471, 729 N.Y.S.2d 647).

The Supreme Court properly awarded the plaintiff one half of the amount of money in the subject ING Direct Savings Account (hereinafter the ING Account). The parties previously agreed that the ING Account was marital property subject to equitable distribution, and agreed to a 50–50 split of all marital assets. Contrary to the defendant's contentions, his trial testimony did not conclusively establish that the ING Account contained only funds he withdrew from the parties' home equity line of credit, which he had already been directed to repay (*cf. Heymann v. Heymann,* 102 A.D.3d 832, 833–834, 958 N.Y.S.2d 448).

Contrary to the defendant's contentions, the Supreme Court properly awarded the plaintiff one half of the defendant's interest in Markowitz, LLC, without giving the defendant a credit for additional capital investments made after the commencement of this action. The defendant failed to establish that those investments were made with nonmarital funds (*cf. Chabbott v. Chabbott,* 306 A.D.2d 368, 369, 761 N.Y.S.2d 275).

The defendant correctly contends that the Supreme Court erred in awarding the plaintiff the cash surrender value of the subject Massachusetts Mutual Life Insurance policy (hereinafter the policy). The policy is held by the 1995 Jeffrey S. Markowitz Irrevocable Trust. While marital assets placed in a trust may be subject to equitable distribution (*see* Domestic Relations Law § 236[B][5]; *Riechers v. Riechers,* 267 A.D.2d 445, 701 N.Y.S.2d 113), the trust here is irrevocable, and neither party is a trustee with the power to transfer control of the trust assets. Accordingly, the trust assets are unavailable to either party. The defendant's contention that the trust has been implicitly revoked is without merit (*see* EPTL 7–1.9[a]). Accordingly, the ***874** policy should not have been included in the distributive award (*cf. Wortman v. Wortman,* 11 A.D.3d 604, 607, 783 N.Y.S.2d 631).

The Supreme Court erred in determining the amount of the credit to be awarded the defendant for spousal maintenance and child support payments made prior to the amended judgment of divorce. The defendant may be entitled to credit for voluntary child support payments which were made prior to the pendente lite order (*see Darema–Rogers v. Rogers,* 234 A.D.2d 334, 335, 651 N.Y.S.2d 870), and for voluntary maintenance payments made during the pendency of the action (*see Levitt v. Levitt,* 97 A.D.3d 543, 545, 948 N.Y.S.2d 108). In addition, he is entitled to a credit for any amount of temporary maintenance and child support which was paid pursuant to the pendente lite order (*see* Domestic Relations Law § 236[B][former (6)(a)]; [7][a]; *Burns v. Burns,* 84 N.Y.2d 369, 377, 618 N.Y.S.2d 761, 643 N.E.2d 80; *D'Iorio v. D'Iorio,* 135 A.D.3d 693, 697, 24 N.Y.S.3d 325). Contrary to the plaintiff's contention, there is no basis to limit that credit to the unallocated support amount awarded in the pendente lite order. Accordingly, we remit the matter ****206** to the Supreme Court, Westchester County, for a determination of the proper amount of credit for payments made from the commencement of the action to the date of the pendente lite order (up to the amount of the amended judgment of divorce), and for payments made pursuant to the pendente lite order to the date of the amended judgment of divorce (up to the amount awarded pendente lite) (*see Ferraro v. Ferraro,* 257 A.D.2d 598, 684 N.Y.S.2d 276; *Verdrager v. Verdrager,* 230 A.D.2d 786, 788–789, 646 N.Y.S.2d 185).

The defendant's remaining contention is without merit.

All Citations

146 A.D.3d 872, 45 N.Y.S.3d 203, 2017 N.Y. Slip Op. 00296

155 A.D.3d 442
Supreme Court, Appellate Division,
First Department, New York.

Philip A. HOFMANN, Plaintiff–Respondent,
v.
Dina F. HOFMANN, Defendant–Appellant.

Nov. 9, 2017.

Attorneys and Law Firms

The McPherson Firm, PC, New York (Laurie J. McPherson of Counsel), for appellant.

Garr Silpe, P.C., New York (Steven M. Silpe of Counsel), for respondent.

Opinion

***442** Order, Supreme Court, New York County (Louis Crespo, Special Referee), entered February 2, 2017, which, to the extent appealed from, denied defendant wife's cross motion for certain relief with respect to the Hofmann 2012 Family Trust (Trust), and determined that any claims related to assets of the trust could not be asserted as equitable distribution claims in the divorce action, unanimously affirmed, without costs.

The motion court properly determined that the wife's requests for relief concerning the Trust could not be determined in the divorce action since the trust assets were not marital property subject to equitable distribution. It is undisputed that the wife voluntarily transferred her interest in the parties' Michigan house to the husband to be held in the irrevocable family Trust, with the house as the Trust's main asset. Further, the wife was fully aware of the specific terms of the Trust, as evidenced by her notarized signature on the Trust agreement. In general, trust assets are not considered marital property subject to equitable distribution where, as here, the parties are not trustees and have relinquished control over the trust assets (*see Markowitz v. Markowitz,* 146 A.D.3d 872, 873, 45 N.Y.S.3d 203 [2d Dept.2017]; *Stewart v. Stewart,* 133 A.D.3d 493, 494–495, 20 N.Y.S.3d 35 [1st Dept.2015], *lv. denied* 26 N.Y.3d 919, 2016 WL 699709 [2016]).

***443** We have considered the wife's remaining contentions and find them unavailing.

MANZANET–DANIELS, J.P., ANDRIAS, GISCHE, KERN, SINGH, JJ., concur.

All Citations

155 A.D.3d 442, 63 N.Y.S.3d 243 (Mem), 2017 N.Y. Slip Op. 07788

185 A.D.3d 465
Supreme Court, Appellate Division,
First Department, New York.

Raphael DENIRO, Plaintiff–Respondent,
v.
Claudine DENIRO, Defendant–Appellant.

11806-11806A
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Index 312334/16
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Entered: July 9, 2020

Synopsis

Background: Appeal was taken from judgment of the Supreme Court, New York County, Laura E. Drager, J., which determined husband's child support and maintenance obligations, determined husband's interest in limited partnership was his separate property not subject to equitable distribution, and awarded husband 15% of appreciation of certain real property.

Holdings: The Supreme Court, Appellate Division held that:

husband's percent interest in limited partnership that was acquired during marriage was gift from his father;

certain real property purchased by wife's father in both wife's and father's names and subsequently held in wife's father's family trust was wife's separate property; and

trial court could consider access to wife's father's vacation homes, payment of travel and entertainment expenses through work, and employment at her father's businesses in imputing income to her.

Affirmed as modified and remanded.

Procedural Posture(s): On Appeal; Petition for Divorce or Dissolution; Petition to Set Child Support; Motion to Modify Property Division Portions of Divorce or Dissolution Decree.

Attorneys and Law Firms

****8** Mantel McDonough Riso, LLP, New York (Gerard A. Riso of counsel), for appellant.

Chemtob Moss Forman & Beyda, LLP, New York (Nancy Chemtob of counsel), for respondent.

Friedman, J.P., Renwick, Gische, Mazzarelli, Moulton, JJ.

Opinion

***466** Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered January 3, 2020, which, to the extent appealed from as limited by the briefs, determined plaintiff husband's child support and maintenance obligations, determined plaintiff husband's 14.8% interest in Grenmoor Associates L.P. (Grenmoor) is his separate property not subject to equitable distribution, and awarded plaintiff husband 15% of the appreciation of real property located in East Hampton (Hardscrabble), unanimously modified, on the law and the facts, to the extent of deleting the decretal language adjudging plaintiff husband's entitlement to 15% of the appreciation of Hardscrabble, and remanding the matter to Supreme Court for entry of an amended judgment in accordance herewith, and otherwise affirmed, without costs. Appeal ****9** from order, same court and Justice, entered September 13, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly determined that plaintiff's 14.8% interest in Grenmoor, 9.8% of which was acquired during the marriage, was a gift from plaintiff's father, and thus his separate property (Domestic Relations Law § 236[B][1][d][1]). The notarized assignments indicating that plaintiff's father had sold him the interest, and promissory notes executed by plaintiff in which he promised to repay his father specified amounts, do not compel a different result (*see M.M. v. D.M.*, 159 A.D.3d 562, 563, 73 N.Y.S.3d 156 [1st Dept. 2018]; *Harned v. Harned*, 185 A.D.2d 226, 228, 585 N.Y.S.2d 780 [2d Dept. 1992], *lv denied* 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818 [1992]). The court's conclusion that the interest constituted a gift was based upon the lack of correlation between the notes and the value of the asset transferred and plaintiff's testimony concerning the transaction. The court credited plaintiff's testimony that no money (marital or otherwise) had ever been exchanged, there was no expectation that plaintiff would ever repay the notes (one of which was years overdue) and the documents were for estate planning purposes only. There is no basis to disturb the court's credibility determination (*see Winter v. Winter*, 50 A.D.3d 431, 432, 857 N.Y.S.2d 69 [1st Dept. 2008]).

The court properly determined that Hardscrabble, purchased by defendant's father in both his and defendant's names

and subsequently held in defendant's father's family trust, is her separate property. Defendant is not only the primary beneficiary of the trust, but has the power to remove and appoint the trustee, who, in turn, has the "absolute discretion" to terminate the trust (*see* ***467** *Hofmann v. Hofmann*, 155 A.D.3d 442, 63 N.Y.S.3d 243 [1st Dept. 2017]; *Markowitz v. Markowitz*, 146 A.D.3d 872, 873–874, 45 N.Y.S.3d 203 [2d Dept. 2017]). However, plaintiff was not entitled to 15% of Hardscrabble's appreciation based on occasional payments made toward the upkeep of the property, which was frequently used by the parties as a vacation home. Plaintiff failed to demonstrate the nexus between his contributions and the increase in Hardscrabble's value (*see Gordon v. Anderson*, 179 A.D.3d 402, 117 N.Y.S.3d 30 [1st Dept. 2020]).

The court providently exercised its discretion in imputing income to the parties based on its credibility determinations and evidence adduced at trial. Contrary to defendant's contention, the court could consider access to her father's vacation homes, payment of travel and entertainment expenses through work, and employment at her father's businesses in imputing income to her (*see* Domestic Relations Law § 240[1–b][b][5][iv][A–D]; *Nederlander v. Nederlander*, 102 A.D.3d 416, 417–418, 958 N.Y.S.2d 45 [1st Dept. 2013]; *Matter of LoCasto v. Chiofolo*, 89 A.D.3d 847, 848, 932 N.Y.S.2d 365 [2d Dept. 2011]). Defendant fails to show that the child support award, based on a $600,000 income cap, is insufficient to meet the children's "actual needs" to live an "appropriate lifestyle" (*Matter of Culhane v. Holt*, 28 A.D.3d 251, 252, 813 N.Y.S.2d 400 [1st Dept. 2006] [internal quotation marks omitted]), to warrant remand for further proceedings. Notably, defendant does not directly address the court's finding that her claimed expenses were unsupported by evidence and not credible.

We have considered defendant's remaining arguments, including with respect to the equitable distribution of marital assets, and find them unavailing.

All Citations

185 A.D.3d 465, 128 N.Y.S.3d 7, 2020 N.Y. Slip Op. 03873

2001 WL 1607927

Supreme Court, Richmond County, New York.

MARIANNE I. SURASI, Plaintiff,

v.

SRIKRISHNA SURASI a/k/a S. SWAMY SURASI, Defendant.

Index No.: 5057/92

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Dated: November 20, 2001

Opinion

MALTESE, J.:

***1** This decision has been edited for publication.

Grounds for Divorce

This action for divorce was commenced by the filing of a Summons and Verified Complaint with the County Clerk on January 10, 1992. The grounds for divorce were cruel and inhuman treatment and constructive abandonment. The defendant waived his right to answer. The plaintiff withdrew the cause of action for cruel and inhuman treatment proceeded on the grounds of constructive abandonment.

On or about May 1, 1990, the defendant constructively abandoned the plaintiff by refusing to have sexual relations for more than a year prior to the commencement of this action and continuing through the date hereof without reason, despite plaintiff's requests and defendant being physically able to engage in such activity.

Equitable Distribution

Plaintiff's Doctor of Podiatric Medicine Degree and License

The plaintiff-wife acquired an Associate of Science degree in nursing in 1979. She passed her nursing boards and became a registered nurse working at Long Island College Hospital full time while continuing with her nursing education. In December of 1984, the plaintiff completed her requirements for a Bachelor of Science in nursing degree. The parties were married that same month of 1984. In 1985 up until the Fall of 1986 when she started podiatry school full time, she continued to be employed as a registered nurse earning between $16,000 to $18,000 per year. On November 22, 1986 the wife gave birth to her daughter. Two years later on December 10, 1988 she gave birth to her son. Both children were born while the wife was a full time student at podiatry school. The parties had a live-in nanny/housekeeper that maintained the household while the wife attended podiatry school. The wife worked during school recesses and earned approximately $6,000 per year which were generally deposited into the joint bank account or used for family expenses. In May of 1990, the wife graduated with a Doctor of Podiatric Medicine degree. In 1991 she was a resident at the New York Podiatric College. During that year she obtained her license as a podiatrist. The first two years of the wife's tuition of $15,000 per year were paid from the joint checking account. The second two years were paid by her taking out student loans for $30,000. With interest the balance due on her school loans increased to over $40,000, which she started paying in 1992. Only the plaintiff has paid her student loans and there is still an outstanding balance of $18,000.

After receiving her license in podiatry and completing her residency in 1991, the wife did not work full time as a Doctor of Podiatry. Indeed, as a mother of young children and a homemaker, she found it more advantageous due to the time, location and pay to continue to work part time as a registered nurse (which license she still maintained), at $30 per hour and to work part time as a podiatrist. Since 1996, the wife has been employed as a podiatrist working as a W-2 per diem employee in a private practice owned and operated by another podiatrist in Brooklyn, and at the New York Podiatric College as a part time clinical instructor where she earns approximately $40 per hour. The defendant and his counsel challenge the truth of plaintiff's testimony and the evidence of her income.

***2** A professional degree and/or license acquired during the marriage has long been established to be a thing of value and marital property subject to equitable distribution under DRL §236B(5). See, O'Brien v. O'Brien (66 NY2d 576 [1985]; McSparron v. McSparron, 87 NY2d 275 [1995]). Yet, in this case neither party presented any expert testimony or other evidence as to the earnings of a Doctor of Podiatry, nor the value of the wife's degree or license. While it is usually relevant, to establish the intent of the parties, to learn the reason why the wife became a podiatrist, in this case it is less relevant. Here the evidence shows that the podiatry

degree and license did not actually cause her earnings to increase beyond what she would have otherwise earned with normal progression of raises as a registered nurse in a specialized hospital setting. In that event, no distinguishable enhancement may be measured or calculated for purposes of granting a distributive award.

It is not the role of the courts to compel persons who have received advanced degrees, licenses or other attainments which may enhance their earning capacity to maximize their economic potential by taking higher paying positions. However, if it can be demonstrated that a person who has attained a degree, license or other achievement with the assistance of the other spouse who, in the preparation for, or during the pendency of a divorce proceeding intentionally refuses to utilize such achievement with the express purpose of reducing their income during the divorce proceeding, then the court may look at such behavior with askance and apply an average enhanced income for such spouse. The court should pay special attention to the credibility of the witness and the evidence received. Clearly it is against the public policy of this state to compel or prejudice every student who is married prior to attending college or graduate school and who, after graduation and/or licensure gets a divorce, to work for a high paying practice rather than work in a lesser paying public or not-for-profit organization so that they can maximize their income potential for the benefit of their former spouse.

The lost opportunity costs of going to school and paying tuition, rather than working and contributing financially to the family are life decisions made by the parties during the marriage. Recharacterizing those decisions after a divorce is pending as an implied contract to support the other spouse with enhanced earnings for the rest of his or her life whether married or divorced is frequently a fiction. The expectation that the degreed or licensed spouse shall contribute part of their individual attainments to the other merely because the parties were married to each other during the attainment of the degree or license in and of itself, is not an enhancement which is distributable under DRL §236B.

***3** While the court may accept expert testimony and data of the potential value of such degree or license based upon what an expert testifies to be the average income of other persons in a similar category, such evidence, which may be interesting and true, may not be helpful to the judge as the trier of the facts and the law. Such appraisal may be inconsistent with the actual facts and income before the court and thus may be irrelevant. To substitute a fictitious average or maximized income of persons in a similar employment capacity for the actual income of that degreed or licensed person, absent some indication of fraud or intentional reduction of that income, is not a reliable measure of income which the court should rely upon when deciding a distributive award.

The court should also review the contributions of the spouse to ascertain what if anything he did differently than he would have done had his spouse not achieved that attainment. The lost opportunity costs of marital income spent and earnings not received is closer to the reality of actual loss rather than an annuity payment in the form of a distributive award based upon increased earnings from a successful spouse for the remainder of his or her working career. All persons are not equally capable of being successful or even achieving the average income of persons similarly situated in their field of employment. Those persons should not be prejudiced for not reaching their potential. Courts should look to the reality of the situation as to what actual discussions or other manifestation took place before a divorce that would demonstrate the career goals of the person who achieved a degree, license or other attainment during the marriage. Most people want to receive a positive return on their investment of time, effort and money. However, there are those who seek additional education or attainments purely for the love of learning without an expectation of using that degree or license as a means to enhance their earnings. To assert that any attainment of a degree or license during a marriage results in an automatic enhancement of income is a supposition which should be demonstrated by the reality of the facts of the case.

Moreover, some bright people who achieved advanced degrees and licenses who want to enhance their earnings are inept in running a professional practice or business and, in fact, never achieve even an average wage for persons similarly situated. However, keeping track of future earnings of the degreed or licensed spouses will doubtlessly encourage additional post judgment litigation. In order to minimize such post judgment litigation, our appellate courts have opted to utilize a one time distributive award which may be paid over time. The courts should rightly remunerate a spouse for their contributions to the other's degree, license or other achievement which enhances their income.

In equity such awards should not only be reduced for tax consequences, and the difference between their pre-enhanced earnings with a projection for raises and inflation, along with their post achievement enhanced earning, but they should also be reduced by the value of the services the non-achieved

spouse will no longer provide to the achieved spouse. If the marriage partnership is “for better or worse” as the saying goes -- one spouse should not be receiving part of the “better enhanced earnings' while the other receives the ”worse“ -- the loss of the other's income and/or marital services. Both spouses in a divorce loose the future services from each other -- be they domestic services like cooking, cleaning and general household maintenance and/or the additional income earned by the other. Child rearing is a joint responsibility. If the partnership agreement was that one party would work outside the home earning income while the other performed homemaker services without earning an income, then upon a divorce the party who had the opportunity to acquire a degree and/or license while the other was working in the home owes some financial security to that spouse who worked in the home until their situation is changed. Granting large distributive awards as a form of a lifetime annuity for past services and for lost future income should be offset by the future income the non-achieved spouse will receive from his or her own earnings or from a subsequent marriage or other social arrangement. Each party has a new life after divorce with different financial arrangements. Many people remarry again ”for better or worse.“ By receiving a stream of income from their former spouse based upon a percentage of his or her future income with no offset for the value of the services not received by the other and the income received from personal income or a new social relationship which replaced the former marriage may be financially inequitable. Indeed, it is possible to receive a percentage of the divorced spouse's stream of income as a distributive award and then remarry into a situation with an equal or greater stream of income and lifestyle where that spouse shares his or her services with the new spouse and not the former, who continues to pay out the distributive award based upon lifetime earnings. Such a situation may be inequitable. Getting a divorce should not be a windfall for either party.

***4** If the non-achieved spouse claims that he or she lost an opportunity to acquire a degree or license or some other achievement because they were supporting the other while he or she went to school to achieve such a degree or license, then that may be calculated and applied to a distributive award. However, if it can be established that the other spouse did not forego his or her career, but pursued his or her own career goals with its commensurate income in or outside of the home, then there may not have been a lost opportunity which should be compensated. Moreover, it is those services that the degreed spouse will be losing during the pendency and after the divorce which should be considered if a substantial award is made of a percentage of the alleged value of a degree, license or other achievement.

In this case, the husband and his counsel look with askance at the actual earnings of the plaintiff, ten years after she became a Doctor of Podiatric Medicine. The defendant claims that this court should award him through a distributive award a percentage of the plaintiff's future income which was enhanced by her attainment of a Doctor of Podiatry degree and license during the marriage. At the same time he argues that his Doctor of Medicine degree, license and urology practice is separate property. The defense argues that the plaintiff makes more money, but can not demonstrate any facts to support their supposition. Indeed, the facts demonstrate that the plaintiff works virtually full time with considerable travel time to upper Manhattan twice a week and to mid-Brooklyn on another two days. Both of her positions have fixed salaries. One position is with the New York Podiatric College, where the ability to earn unreported income is virtually impossible. The other position is as an employee for another podiatrist who is the sister-in-law of the plaintiff's sister. While such a familial relationship may give rise to a suspicion of under-reported income, not one cintilla of evidence has been presented to reach that conclusion.

On the other hand, the defendant has been a medical doctor with a specialty in urology for over twenty years. The husband maintains a private medical practice where he has control of his own accounting records. Moreover, he disclosed during the trial that, in addition to his private practice, he is in partnership with other physicians supplying and marketing the services of a special urological diagnostic machine which they have patented. What that invention is potentially worth was never established. The defendant claimed that his invention was after the plaintiff filed for divorce and is consequently separate property. The defendant cannot demonstrate that he changed his career or lifestyle or sacrificed anything to enable his wife to become a podiatrist. As to the plaintiff's tuition, she alone is paying for the outstanding school loans. If this court had sufficient data to demonstrate an enhancement of earnings and the value of the degree and license, then this court would also have to fashion a credit for the plaintiff with the amount she is solely paying on those school loans.

***5** While it is the intuition of the defendant and this court that a Doctor of Podiatry should on average earn more than a registered nurse, no evidence has been presented to document those facts. Indeed, the evidence presented demonstrates that

the increase in pay from $30 per hour as a registered nurse in 1986 to $40 per hour in 2001 as a licensed podiatrist is commensurate with the current wage of a registered nurse in a specialty area within the same hospital where she worked before becoming a podiatrist. Other than the difference between her $30 per hour rate as a registered nurse in 1992 and her current $40 per hour rate of income as a podiatrist, no other enhancement of her economic circumstances has been quantified by the evidence presented.

This court is aware that an expert report on the value of plaintiff's license was prepared for the defendant. However, the defendant did not present the expert who prepared the report to testify, nor was that report stipulated into evidence. Indeed, no expert testimony was received as to the average rate of income between a registered nurse with a bachelor's degree and that of a Doctor of Podiatry, nor has any other expert opinion been presented as to any actual or potential enhancement of income due to the attainment of the degree and license in podiatry. With the lack of such data, this court cannot place a value on such enhancement of the plaintiff's degree or license as a Doctor of Podiatric Medicine.

Defendant's Doctor of Medicine License and Urology Practice

While the defendant earned his Doctor of Medicine degree, medical license and Board Certification in Urology before the marriage, his practice in the specialty of urology was developed during the marriage. Since no evidence has been presented to evaluate the enhanced value of that medical degree, license and practice during the marriage, it will not be quantified into a distributive award.

Marital House

A few months before the marriage while the parties were living together the defendant-husband purchased a home at 178 Ocean Terrace, Staten Island, New York for $325,000 solely in his individual name. Notwithstanding the fact that the husband owned the marital house individually, the wife contributed to the maintenance and expenses associated with it. There was a $250,000 mortgage on the house which has been reduced.

The current value of 178 Ocean Terrace, Staten Island, New York is $750,000, less the outstanding mortgage. The defendant is indebted to the plaintiff for arrears of $309,898.33, plus her contributions to maintaining said property during the marriage. In addition, I find that the plaintiff has a 50% interest in the cooperative suite acquired during the marriage at 142 Joralemon Street, Suite 9, Brooklyn, New York, which I find to be valued at $164,000, of which the plaintiff would be entitled to a credit of an additional $82,000. Moreover, the plaintiff is also entitled to a one-half interest in the time share located at ESJ Towers in Puerto Rico which was never quantified to this court. In addition, the plaintiff is entitled to a credit of one half of the value of all of the securities, stocks and bonds acquired by the defendant during the marriage, which are held by him individually or through a pension and profit sharing plan in his medical practice.

***6** Accordingly, in view of all the credits owed the plaintiff outlined above, together and in consideration of any claims the plaintiff may have for the enhanced value of the defendant's medical degree, license and practice, together with her waiver of further maintenance and in consideration of her paying the outstanding balance of the mortgage on the marital home, this court awards the plaintiff title to the marital home located at 178 Ocean Terrace, Staten Island, New York, subject to the outstanding mortgage.

In 1994, well after the husband left the marital home, the wife's sister, who is divorced and without children, came to live with the plaintiff and her children. The wife's sister lives in the basement of the house in a common area where there is the washer and dryer for the house, the children's bikes and other stored items, and a computer used by the children. Her bed is in the corner of the basement in a non-partitioned area. While the wife's sister pays no rent, she has assisted the plaintiff in raising the children. The wife's sister works part time in Brooklyn as a party planner. The defendant seeks a set-off in his arrears due to the fact that the wife's sister has lived in the house owned by him without his prior approval. Since the wife's sister does not have a separate apartment in the one family home and since no quantification of any increased utilities has been attributed to her, and since she has assisted in the child care of the parties' children without pay, the arguments for a financial set-off in favor of the defendant is not calculable, nor are they equitable under the circumstances presented.

This court finds that the plaintiff's sister has not materially increased expenses of the marital home. Indeed, she has contributed her time in child care of the children of the parties which more than offsets the minimal increase in utility bills she may have incurred. Moreover, it was the defendant

who terminated the live-in nanny/housekeeper which the parties had prior to their separation, which was ordered to be continued by Justice Marrero's pendente lite order. After the husband terminated the nanny/housekeeper and stated that he refused to pay for another one, the plaintiff, who attempted to hire a housekeeper, was unable to do so. For the defendant's counsel to now turn that situation around to where the husband will receive a financial off-set for the imputed value of the wife's sister living in the basement, without considering the value of her unbilled time for child care is an audacious and inequitable request of this court which will not be entertained.

I find that the defendant is responsible for the payment of the mortgage and other bills of the premises known as 178 Ocean Terrace, Staten Island, New York, and that same shall be paid by him on a timely basis until he transfers said house to the plaintiff pursuant to this decision and judgment.

Trust

During the pendency of this divorce action which was commenced in 1992, the husband, in the Fall of 1995, while continuing to live in New York, went to New Jersey and retained New Jersey counsel to prepare a family trust into which he placed all of his assets to include the marital residence at 178 Ocean Terrace, Staten Island, New York, his commercial office cooperative at Suite 9-B at 142 Joralemon Street, Brooklyn, New York, EJS Tower and another house owned by him at 20 Hewitt Avenue, Staten Island, New York. The minor children of the parties are the beneficiaries of the trust.

***7** This court finds that the trust created by the defendant, to wit: the S. Swamy Surasi Family Trust, on or about November 15, 1995, is a revocable trust which was created in an effort to defeat the plaintiff's rights regarding arrears and equitable distribution. The trust which was created in New Jersey and authored by a New Jersey attorney lists Virginia as the place of domicile of the beneficiaries. The children have never lived in Virginia. That trust is a sham and a fraud upon this court created expressly with the intent to deny the plaintiff's claims to said marital property and to thwart the jurisdiction of this court to make a distributive award.

I find that the trust must be set aside by the defendant or in the alternative by his agent or representative in that all of the property contained therein is located within the jurisdiction of this court and is subject to equitable distribution. Accordingly, all of the property set forth in the trust, including but not limited to 178 Ocean Terrace, Staten Island, New York, 142 Joralemon Street, Brooklyn, New York, 20 Hewitt Avenue, Brooklyn, New York and EJS Towers, shall be re-transferred back into the name of the party who held such property before the creation of the trust instrument. In the alternative, the trustee on behalf of the defendant, shall directly transfer to the plaintiff title to the marital home located at 178 Ocean Terrace, Staten Island, New York to comply with the distributive award set forth herein.

CONCLUSIONS OF LAW

That jurisdiction as required by Section 230 of the Domestic Relations Law has been obtained.

That plaintiff is entitled to judgment of divorce and is granted the incidental relief awarded herein.

Settle Judgment on Notice.

All Citations

Not Reported in N.Y.S.2d, 2001 WL 1607927, 2001 N.Y. Slip Op. 40408(U)

267 A.D.2d 445
Supreme Court, Appellate Division,
Second Department, New York.

Mary RIECHERS, appellant-respondent,
v.
Roger RIECHERS, respondent-appellant.

Dec. 27, 1999.

Synopsis
Wife brought action for divorce and ancillary relief. The Supreme Court, Westchester County, Rudolph, J., entered various orders equitably dividing marital property and establishing maintenance. Wife appealed, and husband cross-appealed. The Supreme Court, Appellate Division held that: (1) trial court had authority to determine whether assets created prior to commencement of divorce action were subject to equitable distribution, and (2) wife was entitled to one-half of value, accurately calculated, of offshore trust.

Affirmed as modified.

See also, 178 Misc.2d 170, 679 N.Y.S.2d 233.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****113** Tenzer Greenblatt, LLP, New York, N.Y. (Leonard G. Florescue and Jennifer Falstrault of counsel), for appellant-respondent.

Berman Bavero Frucco Gouz & Braunstein, P.C., White Plains, N.Y. (Ronald J. Bavero and Dori–Ellen Feltman of counsel), for respondent-appellant.

LAWRENCE J. BRACKEN, J.P., GABRIEL M. KRAUSMAN, LEO F. McGINITY and ROBERT W. SCHMIDT, JJ.

Opinion

MEMORANDUM BY THE COURT.

***445** In an action for a divorce and ancillary relief, the plaintiff wife appeals (1), as limited by her brief, from stated portions of a judgment of the Supreme Court, Westchester County (Rudolph, J.), dated September 29, 1998, which, after a nonjury trial, *inter alia,* awarded her the sum of $2,000,000 representing one-half the value of an offshore trust established by the defendant husband in the Cook Islands, and awarded her maintenance in only the sum of $5,000 per month until the defendant husband reaches the age of 65, (2) as limited by her brief, from so much of an order of the same court, entered March 29, ****114** 1999, as denied that branch of her motion which was to resettle the judgment entered October 1, 1998, to provide that the defendant husband pay the amount awarded to her as a distributive award by a date certain, and (3) from a judgment of the same court entered May 5, 1999, upon the order entered March 29, 1999, which is in her favor and against the defendant husband in the principal sum of $3,052,853.20. The husband cross-appeals, (1) as limited by his brief, from stated portions of the judgment dated ***446** September 29, 1998, which, *inter alia,* awarded the plaintiff wife maintenance and equitable distribution of certain assets, (2) from so much of the order entered March 29, 1999, as granted that branch of the plaintiff wife's motion which was for leave to enter a money judgment, and (3) from the judgment entered May 5, 1999, which is in favor of the plaintiff wife and against him.

ORDERED that the appeal from the order entered March 29, 1999, is dismissed, without costs or disbursements, as no appeal lies from so much of an order as denies resettlement of the decretal paragraphs of a judgment; and it is further,

ORDERED that the appeal from the judgment entered May 5, 1999, is dismissed, without costs or disbursements, as the plaintiff is not aggrieved thereby (*see,* CPLR 5511); and it is further,

ORDERED that the cross appeals from the order entered March 29, 1999, and the money judgment entered May 5, 1999, are dismissed for failure to perfect the same (*see,* 22 NYCRR 670.10[d]); and it is further,

ORDERED that the judgment dated September 29, 1998, is modified, as a matter of discretion, by deleting from the seventeenth decretal paragraph thereof the sum of $2,000,000 and substituting therefor the sum of $2,178,865; as so modified, the judgment is affirmed insofar as appealed and cross appealed from, without costs or disbursements; and it is further,

ORDERED that the order entered March 29, 1999 is affirmed insofar as reviewed, without costs or disbursements.

Contrary to the defendant's argument, the trial court had the authority to determine whether assets used to create an offshore trust in the Cook Islands two years before the commencement of the divorce action were subject to equitable distribution (*see,* Domestic Relations Law § 236[B][5]; Scheinkman, New York Law of Domestic Relations § 14.15 at 434; *Weiss v. Weiss,* 186 A.D.2d 247, 588 N.Y.S.2d 308; *Sarrica v. Sarrica,* 41 A.D.2d 613, 340 N.Y.S.2d 568). Moreover, the court properly awarded the plaintiff one-half of the value of that trust as of December 1994. However, due to a computation error, the amount awarded to the plaintiff should be increased by the sum of $178,865.

The trial court providently exercised its discretion in declining to award an additional attorney's fee to the plaintiff under the circumstances of this case (*see,* Domestic Relations Law § 237).

The parties' remaining contentions are without merit.

All Citations

267 A.D.2d 445, 701 N.Y.S.2d 113, 1999 N.Y. Slip Op. 11143

285 A.D.2d 123
Supreme Court, Appellate Division,
First Department, New York.

Diane Paine ALVARES–
CORREA, Plaintiff–Respondent,
v.
Jose ALVARES–CORREA, Defendant–Appellant.

July 5, 2001.

Synopsis

Wife brought divorce action. The Supreme Court, New York County, Jacqueline Silbermann, J., entered divorce decree and husband appealed. The Supreme Court, Appellate Division, Buckley, J., held that: (1) assets held in offshore trust, over which husband had sole power of appointment, could be considered in establishing amount of child support and maintenance; (2) child support and maintenance amounts were sustainable, in view of "lavish" lifestyle of couple prior to institution of divorce proceedings; (3) trial court could award lifetime maintenance, under circumstances of case; (4) court could award necessaries to wife; and (5) court could award attorneys fees, despite antenuptial agreement under which each party relieved other of his or her debts and obligations.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****668** ***124** William C. Herman, of counsel (Peter Sullivan, on the brief, Rosenthal & Herman, P.C., attorneys) for plaintiff-respondent.

Myrna Felder, of counsel (Eleanor B. Alter, on the brief, Kasowitz, Benson, Torres & Friedman, LLP, attorneys) for defendant-appellant.

****669** EUGENE NARDELLI, J.P., ANGELA M. MAZZARELLI, BETTY WEINBERG ELLERIN, DAVID B. SAXE and JOHN T. BUCKLEY, JJ.

Opinion

BUCKLEY, J.

Defendant in this matrimonial action claims: that he does ***125** not have control of, nor access to, substantial trust funds; that support awards must be limited to an amount reflecting the precommencement standard of living; that it was error to award lifetime maintenance to plaintiff; that plaintiff should not have been awarded anything for necessaries; and that the award of counsel fees violated the prenuptial agreement between the parties. For the reasons that follow, we reject each of these claims and affirm the trial court.

The parties were married in December 1985 and have two children, born in 1991 and 1993. Prior to the marriage, the plaintiff was an undergraduate at Middlebury College and later at Columbia University, where she received her bachelor's degree in art history. At 21 years of age, she became the income beneficiary of a trust established by her paternal grandfather from which she receives $19,000 per year. She was last employed in the early 1990s and earned between $24,000 and $27,000 per year. Throughout the marriage, plaintiff has been a homemaker and primary caretaker for the children, each of whom has special needs. Defendant was born in Chile, schooled in Switzerland and graduated from Harvard University with an MBA. His premarital employment was with investment banks and, shortly after marriage, his employment income was approximately $75,000 per year. In January 1989, defendant was employed by a Swiss bank, Vontobel, at an annual salary of $100,000, where he remained until July 1991, at which time he founded his own company, ACI Capital Management, Inc., a sole proprietorship which is an investment manager for non-U.S. clients. In that regard, he earns approximately 1 per cent of the money under his management.

On the morning of the parties' marriage, defendant insisted that plaintiff sign a prenuptial agreement which contained a waiver by plaintiff of equitable distribution and estate rights. During their marital cohabitation, the couple enjoyed a relatively lavish lifestyle, which included residence in a Manhattan apartment with a monthly rental of $5,000 and frequent travels, either together or separately, to Europe, South America and the Caribbean. In addition, they not only had a housekeeper but a full-time nanny to help care for their children.

Beginning with the death of defendant's father in 1986, defendant became depressed and drank heavily. By 1993, defendant was completely withdrawn from plaintiff and the following year he sought medical help and began drug

therapy. By ***126** that time, defendant had ceased to provide financial support to his family and plaintiff moved with the children to a recently completed house that had been constructed on property she had purchased with money borrowed from her grandfather's trust. This action was commenced in February 1996 based on allegations that defendant had constructively abandoned plaintiff and had neglected to adequately support her and the children during the prior year.

In an extensive opinion after 20 days of trial, the IAS court dissolved the marriage on the ground of defendant's abandonment, directed defendant to pay support in the amount of $3500 per month for each child, awarded monthly maintenance of $9000 to plaintiff continuing until the death of either party or plaintiff's remarriage or February 29, 2005, after which the amount would be reduced to $5500 per month and continue until plaintiff's remarriage or the death of either party. The court further awarded plaintiff the sum of $101,206 for her necessaries, awarded counsel fees to ****670** plaintiff in the total amount of $408,439, and further ordered defendant to be responsible for private school, summer camp, extracurricular activities and insurance for the children. Defendant moved for renewal on the financial aspects of the court's decision, claiming, among other things, that substantial trust funds which were found available to him were, in fact, beyond his control.

Defendant's connection to the trust funds happened in the mid 1980s when his grandmother established trusts in the British Virgin Islands. In 1991 those trusts were dissolved and new ones established. Defendant was and remains a vested beneficiary of four trusts and has the sole power of appointment for three of the trusts. The trial court properly rejected defendant's contention that he has no control of, or access to, those offshore trusts. Defendant's property interest in such trust property was not evaluated for purposes of equitable distribution (*see, Riechers v. Riechers,* 267 A.D.2d 445, 701 N.Y.S.2d 113, *lv. denied* 95 N.Y.2d 757, 712 N.Y.S.2d 449, 734 N.E.2d 761) but to determine whether he would be able to afford maintenance and child support. The trial court found that defendant had not met his burden of demonstrating that extensive trust assets were not available to him. Such a credibility finding is committed to the discretion of that court (*Galachiuk v. Galachiuk,* 262 A.D.2d 1026, 1027, 691 N.Y.S.2d 828; *Ferraro v. Ferraro,* 257 A.D.2d 596, 684 N.Y.S.2d 274). We have been presented with no reason to disturb that finding.

A party's interest in trusts can be taken into account when making maintenance and child support awards (***127** Domestic Relations Law §§ 236B[6][a], 240 [1–b][b][5][iv]; *Rothberg v. Rothberg,* 174 A.D.2d 359, 570 N.Y.S.2d 566; *Chapman v. Chapman,* 28 A.D.2d 1028, 283 N.Y.S.2d 782; *cf.* Restatement (Second) Trusts § 157[a]). Defendant is not only a beneficiary of four trusts but has a power of appointment which allows him to direct the distribution of all or any part of trust assets which were valued in 1998 at some $37 million. The trusts were apparently established to avoid or minimize U.S. income taxes while vesting defendant and his brothers with virtually unrestricted control over such assets. The evidence clearly showed that defendant and his brothers have control and management of the subject trusts, which were established for their benefit, and that defendant not only effectively oversees the trust funds but, pursuant to trust documents, has complete and unfettered access to those funds. There is, therefore, no basis to set aside the fact-finding of the trial court and thus to ignore the existence of defendant's offshore assets, which are certainly available to him to as a supplement to his other available assets, and these funds, plus his earning capacity, are sufficient to enable him to satisfy his child support and maintenance obligations.

Defendant has further argued that the child support and maintenance awards should have been based on a precommencement standard of living, that lifetime maintenance should not have been awarded, that necessaries should not have been granted and that attorney fees were improvidently granted. The precommencement standard of living was relatively lavish, however, and included a five-bedroom apartment in a luxury building near Lincoln Center, employment of a nanny and housekeeper, extensive travel, rental of a weekend home and private school tuition for the children. The award of the trial court permits plaintiff to resume a lifestyle approximating a standard of living enjoyed before commencement. The award of lifetime maintenance, albeit in a reduced amount after five years, was warranted ****671** under the circumstances since "[c]onsideration of the predivorce standard of living is an essential component of evaluating and properly determining the duration and amount of the maintenance award to be accorded a spouse" (*Hartog v. Hartog,* 85 N.Y.2d 36, 50–51, 623 N.Y.S.2d 537, 647 N.E.2d 749; *see also, Kirschenbaum v. Kirschenbaum,* 264 A.D.2d 344, 345, 693 N.Y.S.2d 149), and "the wife's ability to become self-supporting with respect to some standard of living [citation omitted] in no way (1) obviates the need for the court to consider the predivorce

standard of living; and (2) certainly does not create a per se bar to lifetime maintenance" (*Hartog v. Hartog, supra,* at 52, 623 N.Y.S.2d 537, 647 N.E.2d 749; *see also, Allen v. Allen,* 275 A.D.2d 225, 226, 712 N.Y.S.2d 496).

***128** Throughout the marriage, plaintiff has been the homemaker and primary caretaker for the children and, as such, has delayed employment opportunities. In determining child support and maintenance, the court took into account plaintiff's limited employment history, the special needs of the children, the parties' pre-separation standard of living and the fact that the mother will continue to be the children's primary caretaker. The court correctly determined that, given defendant's vast trust resources, it would be inappropriate to limit child support to the statutory percentage. There simply was no credible support for defendant's conclusory contention that plaintiff has artificially raised the level of her standard of living between commencement and trial.

Where, as here, there is no equitable distribution and a party is not leaving the marriage with any marital property, an award of lifetime maintenance depends upon analysis of the payee spouse's reasonable needs and predivorce standard of living. Plaintiff will be required to rely for her support entirely upon her own assets and whatever earning potential she might possess as a woman in her 40s who is returning to the job market after a long hiatus. The trial court weighed the appropriate statutory factors and correctly recognized that an award of lifetime maintenance was necessary because plaintiff would not otherwise be able to achieve a lifestyle that was at all comparable to the one that she had during the marriage.

Defendant also contends that plaintiff should not have been awarded any money for her necessaries since, in the course of the marriage, each party had paid for his or her own expenses. The necessaries involved included the housing costs of plaintiff and children as well as essential utilities and were properly charged to defendant. Finally, defendant claims that he should not be liable for plaintiff's attorneys' fees since the prenuptial agreement relieved him from liability for "any debts, obligations, liabilities or losses of the other party ... whether resulting from personal transactions of a private nature or from any business ventures entered into by such other party". The prenuptial does not specify attorneys' fees. Plaintiff's claim for attorneys' fees arises under the Domestic Relations Law and is not a result of a personal transaction or business venture. The court had broad discretion in awarding such fees and there has been no demonstration by defendant of any abuse in the fee award (*DeCabrera v. Cabrera–Rosete,* 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176, 518 N.E.2d 1168).

Accordingly, the judgment of the Supreme Court, New York County (Jacqueline Silbermann, J.), entered March 29, 2000, ***129** which, to the extent appealed from as limited by the brief, in this matrimonial action, awarded plaintiff lifetime maintenance, and fixed defendant's obligations for child support, counsel fees and necessaries, and order, same court and Justice, ****672** entered October 24, 2000, which, upon renewal, adhered to the court's prior determination as set forth in the March 29, 2000 judgment, should be affirmed, without costs.

Judgment and order, Supreme Court, New York County (Jacqueline Silbermann, J.), entered March 29, 2000 and October 24, 2000, respectively, affirmed, without costs.

All concur.

All Citations

285 A.D.2d 123, 726 N.Y.S.2d 668, 2001 N.Y. Slip Op. 06089

79 Misc.3d 1216(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, New York County, New York.

A.G., Plaintiff,
v.
J.G., Defendant.

Index No. 365392/2022
|
Decided on May 12, 2023

Attorneys and Law Firms

Counsel for Plaintiff, Mantel McDonough Riso LLP, 410 Park Avenue, Suite 1720, New York, NY 10022, By: Kevin M. McDonough, Esq.

Counsel for Defendant, McLaughlin and Stern LLP, 260 Madison Avenue, New York, NY 10016, By: Neha S. Choudary, Esq.

Counsel for the Child, LoPreto + Levy, LLP, 565 5th Avenue, 7th Floor, New York, NY 10017, By: Virginia LoPreto, Esq.

Opinion

Ariel D. Chesler, J.

***1** The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 40, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 were read on this motion to/for INTERIM RELIEF.

Plaintiff moves by Order to Show Cause seeking various forms of relief. The issue of exclusive use and occupancy of the apartment was moot and/or resolved. The Court has also issued various orders addressing the custody aspects of this matter, including directing access through CFS, appointing an Attorney for the children, and appointing a forensic evaluator.

The remaining relief requested that has not yet been addressed by this Court include interim support and counsel fees. The interim relief granted in the Order to Show Cause directed Defendant to pay the expenses for the marital apartment, including rent and utilities, monthly garage payments, reasonable childcare expenses, and educational and extracurricular expenses. Additional sur-replies filed were not taken into consideration while deciding this matter. The cost to cover the rent on the marital apartment and utilities is $8,550 per month.

Interim Support

The parties were married in 2015 and have two children, N., born in [REDACTED], and J., born in [REDACTED]. This matter was commenced in September 2022. Plaintiff is an attorney working for a [CITY LEGAL AGENCY] and Defendant is a reporter with a [MAJOR PUBLICATION].

Prior to June 2022, the family lived in Plainview, Long Island where they rented a two-family house. The parties have had a conflict-filled relationship for some time and were contemplating a split. Plaintiff asserts she did not want to move into Manhattan. However, Plaintiff agreed to move into Manhattan based on representations made by Defendant that his parents and trust funds would cover all their expenses, and that his parents would pay for private school tuition for the children. He set forth his promises to her in a February 23, 2022 email.

Although Plaintiff earned little income after the birth of the children and was a stay-at-home parent or worked only part-time, more recently she accepted a full-time position earning $145,00 annually. Defendant's basic income is $120,000. Further, he receives additional income from dividends and capital gains, as appears on his tax return. According to Plaintiff, Defendant's family has purchased or gifted two expensive apartments in Brooklyn to Defendant; he currently resides in one of them, a two-bedroom unit in a multi-million-dollar new development. In addition to direct support provided by Defendant's parents, including the apartments, and paying for the children's private school, Defendant receives $8,000 each month in trust distributions.

***2** Plaintiff explains that the parties could never afford to raise the children in Manhattan on their incomes, and Defendant said that his wealthy parents and trust funds (which had always supplemented the lifestyle) would cover all of the expenses. Defendant and his parents promised to pay private school tuition for our children at the finest schools in New York City and cover all of their educational and extracurricular expenses, which they have been doing.

According to Defendant, the parties only temporarily resided in Long Island during the pandemic. He also asserts that Plaintiff has insisted on a lifestyle they could not afford in return for moving back to the City. For example, he states they have over $35,000 in credit card debt and that he borrowed $40,000 from his brother to pay down debt. [1]

Defendant also explains that the apartment he currently resides in is owed by the estate of his deceased grandmother, and the other Brooklyn apartment is owned by his parents. Although it appears there is no cost for Defendant's current housing, he notes that in the past the parties paid his grandmother $6,000 in rent each month. He also avers that his parents cannot forever pay the cost of expensive private schools for the children and suggests the consideration of public schools. He further explains that his trust distributions cover the rent on the marital residence but that he cannot afford to pay this indefinitely, and Plaintiff should locate a more affordable apartment.

The parties have both provided Statements of Net Worth and their tax returns for 2021. There is no dispute that based on the 2021 taxes and documents provided to the Court, Plaintiff's basic income is $145,000 and Defendant's income is $120,000.

However, for the purposes of child support calculations, the Plaintiff's income shall be $145,000 and the Defendant's income shall be $317,380.00. This includes the consideration of reported dividends of $41,335 and capital gains of $60,045 to the Defendant. Notably, Defendant's 2021 tax returns show a total income of $198,426, although his W-2 wages were lower at that time. Additionally, given that there is no dispute between the parties that Defendant receives approximately $8,000 in tax-free payments each month from a trust, $96,000 will also be imputed to Defendant. It is also significant that Defendant's parents pay the costs of the children's education, summer camp and extracurricular activities totaling over $10,000 each month. Defendant's parents also covered the costs of the family's religious organization dues.

In accordance with DRL § 236B(5-a)(c)(1), the presumptive award of temporary maintenance is $327 per month for income only up to the $203,000 cap. However, the Court considers as factors the marital lifestyle and high standard of living, Defendant's access to various income from trusts and family assistance, the issues of domestic violence raised in this case, the Plaintiff staying out of the workforce to raise the children and the impact that may have had on her career.

Upon consideration of the above stated factors, the Court will remove the cap and consider all income. Courts do not have to follow the statutory formula when they deviate from the statutory cap (*see Warshaw v. Warshaw*, 173 AD3d 582, 583-584 1st Dept. 2019 [“calculation of maintenance award over the income cap is not based on an ‘automatic formula but is based upon a set factors enunciated in DRL 236 (b) (5-a) (h) (1)]). Yet, if the Court utilized the formula, the maintenance award would be $2,162.66.

***3** In awarding temporary child support, the Court can but is not required to consider the CSSA guidelines (see DRL 240 [1-b][c]; *Rubin v. Salla*, 78 AD3d 504, 505 [1st Dept 2010]). The presumptive amount of basic child support obtained by calculating the statutory percentage for 2 children (25%) of the combined parental income cap of $163,000 results in child support of $40,750 per year. The Defendant's pro rata share (63%) of that sum is $25,719.85.68 or $2,143.32 per month. However, if the cap is similarly removed based on consideration of the factors listed above, the total monthly child support obligation for Defendant is $5,516.44

In sum, if the Court removes the income cap and uses the formula, the total interim support package would be $7,679.10 a month, consisting of $5,516.44 a month in child support and $2,162.66 a month in maintenance. The Court notes that although the parties may have previously entered into an agreement regarding interim support, that agreement is not enforceable in this Court. While the “Agreement” is not enforceable it is in indication of Defendant's ability to pay higher sums in support. In any event, there is a marital lifestyle and expectation that has been established and as a Court of equity and fairness it would be unjust to only award Plaintiff guideline child support. It would equally be unjust to have Defendant responsible for Plaintiff's request of approximately $12,467 ($8,300 for rent and $4,167 per month) which is based on an unenforceable agreement.

An award of presumptive support or even guideline level support without a cap would not even cover the rent on the marital apartment. Even an order directing Defendant to cover all the carrying charges on the apartment without more would mean he is not contributing anything towards the food, clothes and other basic needs of Plaintiff and the children. It is also fair to maintain the status quo for this family as much as possible for the moment.

After consideration of all the factors and financial circumstances, it is directed that Defendant pay unallocated support of $10,500 per month to Plaintiff. If Defendant is paying the rent, carrying charges and utilities for the marital residence directly, he can continue to do so and then pay an additional $2,000 per month directly to Plaintiff. In the alternative, he can pay the total amount of $10,500 to Plaintiff each month.

The issue of the payment of the children's private schools was resolved in a February 16, 2023 Order. Specifically, Defendant agreed to pay the entire tuition due for the 2023-24 school year, and thus this is not an issue at this time.

As to other add-on expenses for the children, including unreimbursed medical costs, reasonable childcare and extracurricular activities, they shall be paid 65% by Defendant and 35% by Plaintiff.

Counsel Fees

In matrimonial actions, the Court has discretion to direct one party to pay counsel fees for the opposing party (Domestic Relations Law ["DRL"] § 237). DRL § 237 further creates a rebuttable presumption that counsel fees shall be awarded to the non-monied spouse. This presumption reflects the strong policy concern of ensuring "that marital litigation is shaped not by the power of the bankroll but by the power of the evidence" (*Charpie v Charpie*, 271 AD2d 169, 170 [1st Dept 2000]). It is therefore especially important to award counsel fees for the non-monied spouse when there is a substantial discrepancy between the incomes of the parties (id. at 171). However, in addition to looking at the incomes of the parties, "in exercising its discretionary power to award counsel fees, a court should review ... all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]).

***4** In this case, there is no question that the Husband is the monied spouse considering all the various imputed income and income sources available to him. In addition, he is the beneficiary of a trust fund with an undefined value as well as numerous other assets and family assistance.

Further, Defendant's behavior necessitated additional litigation in this Court and criminal court as well as significant attorney time related to custody, supervised visitation, and order of protection concerns.

Plaintiff's counsel submitted their retainer agreement and invoices of counsel fees incurred in connection with this matter, as well as an affirmation setting forth their qualifications and work done on the matter. Thus, having considered the presumption of an award and the foregoing factors, it is directed that Defendant pay $50,000 in interim counsel fees, which is subject to reallocation and without prejudice to further applications.

It is hereby,
ORDERED, and Defendant shall pay Plaintiff the sum of $10,500 as and for interim unallocated support, as directed above; and it is further

ORDERED, That Plaintiff is awarded counsel fees in the amount of $50,000 without prejudice for future applications; and it is further

ORDERED, Defendant shall pay $25,000 as and for counsel fees directly to Plaintiff's counsel on or before June 9, 2023, and pay $25,000 on or before July 7, 2023; and it is further

ORDERED, that all Interim Orders regarding custody shall remain in effect; and it is further

ORDERED, all relief not granted herein is denied.

This constitutes the Decision and Order of the Court.

All Citations

Slip Copy, 79 Misc.3d 1216(A), 190 N.Y.S.3d 608 (Table), 2023 WL 4243501, 2023 N.Y. Slip Op. 50641(U)

Footnotes

1 In reply, Plaintiff notes that the majority of her budget consists of rent, private school and camp. She also states that if the Court does not impute income to Defendant based on historical contributions of his parents, they cannot afford to remain in Manhattan.

150 A.D.3d 483
Supreme Court, Appellate Division,
First Department, New York.

Lara S. TRAFELET, Plaintiff–Respondent,
v.
Remy W. TRAFELET, Defendant–Appellant.

May 11, 2017.

Synopsis

Background: Wife filed suit against husband for divorce. The Supreme Court, New York County, Frank P. Nervo, J., granted wife's motion to compel discovery, denied husband's motion for protective order concerning irrevocable trusts, and denied husband summary judgment as to equitable distribution of the trusts. Husband appealed.

Holdings: The Supreme Court, Appellate Division held that:

genuine issue of material fact precluded summary judgment on husband's claim the trusts were non-marital property, and

trial court acted within its discretion in declining to issue protective order regarding the trusts.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Protective Order.

Attorneys and Law Firms

****11** Stein Riso Mantel McDonough, LLP, New York (Kevin M. McDonough of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

FRIEDMAN, J.P., MOSKOWITZ, MANZANET–DANIELS, KAPNICK, WEBBER, JJ.

Opinion

***484** Order, Supreme Court, New York County (Frank P. Nervo, J.), entered November 2, 2016, which denied that branch of defendant husband's motion for partial summary judgment seeking to dismiss so much of the divorce complaint as seeks equitable distribution of certain irrevocable trusts, and, in effect, denied his request for a protective order pursuant to CPLR 3103 with respect to the trusts, and granted plaintiff wife's cross motion to compel discovery to the extent of ordering the parties to agree on a discovery schedule, unanimously affirmed, without costs.

In this matrimonial action, the husband argues that trusts created early in the parties' marriage for the benefit of their children, are, as a matter of law, non-marital assets, given that neither party is a beneficiary. Although plaintiff wife was previously a discretionary beneficiary of the larger of the trusts as husband's "wife," she relinquished beneficiary status upon divorce commencement per the terms of the trust. Husband's motion not only seeks to protect the trusts from equitable distribution, but to place them beyond the reach of discovery.

Contrary to husband's contention, summary judgment is precluded by questions of fact as to both the creation and the operation of the trusts. It is undisputed that the trusts were initially funded by a ****12** transfer of 40% of husband's business interests, i.e. marital property, and their assets appreciated during the marriage in step with the successful growth of husband's businesses. Further, the trusts contain several provisions seemingly favorable to the husband, of which wife claims she was previously unaware, thus raising a question of fact as to the propriety of the initial transfer of marital property into the trusts. While true that husband is not a named beneficiary of the trusts, a clause allows the "protector" of the larger trust to terminate the trust at any time and distribute all of its assets to husband's then "wife" (defined by the trust as whomever he is legally married to at the time). As well, a "substitution" clause permits husband to substitute property for trust assets, and wife alleges that husband regularly uses the trusts' assets for his own use. Further, wife's expert forensic accountant opined, based on the limited trust documents available, that husband and the trusts were not adhering to the 60%/40% split, creating a question of fact as to whether husband may be disproportionately benefitting from their operation.

***485** Under these particular circumstances, the motion court properly denied husband's motion for summary judgment and directed discovery to proceed. "In a divorce action, '[b]road pretrial disclosures which enables both spouses to obtain necessary information regarding the value and nature of the marital assets is critical if the trial court is to properly distribute the marital assets' " (*Jaffe v. Jaffe,*

91 A.D.3d 551, 553, 940 N.Y.S.2d 1 [1st Dept.2012], quoting *Kaye v. Kaye,* 102 A.D.2d 682, 686, 478 N.Y.S.2d 324 [2d Dept.1984]). Such determination does not run afoul of *Mahoney–Buntzman v. Buntzman*, 12 N.Y.3d 415, 881 N.Y.S.2d 369, 909 N.E.2d 62 (2009), as husband asserts, since questions of fact exist as to wife's participation and knowledge regarding the terms of the trusts, and the extent to which husband benefits from the placement of 40% of his business interests in the trusts (*see Riechers v. Riechers,* 267 A.D.2d 445, 701 N.Y.S.2d 113 [2d Dept. 1999], *lv. denied* 95 N.Y.2d 757, 712 N.Y.S.2d 449, 734 N.E.2d 761 [2000]).

With respect to the denial of that branch of husband's motion seeking a protective order pursuant to CPLR 3103, we find that the motion court did not improvidently exercise its discretion in declining to limit discovery at this point by issuing a protective order (*see generally Diaz v. City of New York,* 117 A.D.3d 777, 777–778, 985 N.Y.S.2d 695 [2d Dept.2014]).

We have considered the remaining arguments and find them unavailing.

All Citations

150 A.D.3d 483, 56 N.Y.S.3d 10, 2017 N.Y. Slip Op. 03873

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198 A.D.3d 472
Supreme Court, Appellate Division,
First Department, New York.

Maria Alexis AZRIA, Plaintiff–Appellant,
v.
Rene-Pierre AZRIA, Defendant–Respondent.

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Case No. 2020–04355
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ENTERED October 14, 2021

Attorneys and Law Firms

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Robert Stephan Cohen and Nicholas Ferris Cohen of counsel), for appellant.

Donohoe Talbert LLP, New York (Margaret M. Donohoe of counsel), for respondent.

Kapnick, J.P., Singh, Pitt, Higgitt, JJ.

Opinion

***473** Order, Supreme Court, New York County (Lori S. Sattler, J.), entered November 4, 2020, which denied plaintiff wife's motion for leave to renew her motion for an order issuing a letter rogatory to French authorities to take the deposition of defendant husband's brother Francois, who lives in France, and granted defendant's cross motion to the extent of ordering her to pay $10,000 of his counsel fees, unanimously modified, on the law and the facts, to deny the cross motion and vacate the counsel fee award, and otherwise affirmed, without costs.

The submitted "new facts" (CPLR 2221[e][2]) notwithstanding, plaintiff failed to demonstrate that the information she seeks from Francois is "crucial to the resolution of a key issue in this litigation" (*Azria v. Azria,* 184 A.D.3d 419, 419, 125 N.Y.S.3d 692 [1st Dept. 2020]). She argues that Francois's deposition is necessary to the issue of equitable distribution, because evidence she obtained in connection with the deposition of defendant's friend and business associate Ariel Lahmi shows that defendant had falsely represented the extent of his and Francois's investments in the property known as 30 Park. Specifically, plaintiff contends that, while defendant asserted that Francois invested $1 million in the property, wire transfer records produced by Lahmi, who was involved in the investment transaction, show that Francois had invested $500,000 at the most, and that this discrepancy, viewed along with other discovery, means that the remainder of Francois's supposed investment must have been funded by defendant himself, who used Francois as a front so as to fraudulently conceal marital assets. However, in opposing plaintiff's ****600** motion, defendant submitted a document reflecting a second $500,000 wire transfer by Francois in connection with 30 Park and an affidavit by Lahmi's counsel providing a reasonable explanation for the delay in discovering the document.

Plaintiff's suspicions about the timing of the document's production are speculative, given Lahmi's counsel's sworn statement explaining the document's belated production, which plaintiff has cast no doubt. Plaintiff's suspicions that defendant used Francois to fraudulently conceal marital assets are also speculative. Moreover, plaintiff has identified no deficiencies in defendant's document production concerning the 30 Park transaction that Francois's deposition would be necessary to cure (*see Kahn v. Leo Schachter Diamonds, LLC,* 139 A.D.3d 635, 636, 30 N.Y.S.3d 862 [1st Dept. 2016]).

***474** Under the circumstances, plaintiff did not engage in frivolous conduct within the meaning of 22 NYCRR 130.1–1 by making and declining to withdraw her renewal motion.

All Citations

198 A.D.3d 472, 152 N.Y.S.3d 599 (Mem), 2021 N.Y. Slip Op. 05621