

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25459
H/prt

_____AD3d_____

Submitted - October 20, 2009

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
HOWARD MILLER
L. PRISCILLA HALL, JJ.

2009-00779

DECISION & ORDER

Michael Mongelli, appellant,
v Susan Mongelli, respondent.

(Index No. 202287/06)

Rubin & Rosenblum, PLLC, Commack, N.Y. (Debra L. Rubin of counsel), for appellant.

Eric Dubinsky, Westbury, N.Y., for respondent.

In an action for a divorce and ancillary relief, the plaintiff appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Nassau County (Grob, Ct. Atty. Ref.), entered November 24, 2008, as, upon a decision of the same court dated July 31, 2008, made after a nonjury trial, awarded the defendant 50% of the appreciation of the marital residence from the date of the marriage, awarded him a separate property credit in the sum of only \$48,000 for the marital residence, imputed income to him in the sum of \$100,000, directed him to pay child support in the sum of \$1,924 per month for the parties' two minor children until the emancipation of the older of those children and, upon emancipation of the older minor child, to pay child support in the sum of \$1,308 per month until the emancipation of the younger of those children, and awarded the defendant an attorney's fee in the sum of \$15,000.

ORDERED that the judgment is modified, on the law and the facts, by deleting from the fifteenth decretal paragraph thereof the sums of "\$1,924.00," and "\$1,308.00," and substituting therefor the sums of "\$1,356.77," and "\$922.60" respectively; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements.

December 22, 2009

Page 1.

MONGELLI v MONGELLI

The Supreme Court erred in determining the plaintiff's child support obligation. While a court may depart from a party's reported income and impute income based on the party's past income or demonstrated earning potential (*see Viscardi v Viscardi*, 303 AD2d 401), such a determination must be grounded in law and fact (*see Petek v Petek*, 239 AD2d 327, 328). Here, the court failed to properly consider that the plaintiff's opportunities to earn overtime compensation at his job had lessened in recent years, and that the home improvement jobs that he performed on the side were for family and friends, with no showing that he profited therefrom. Thus, the plaintiff's child support obligation, as determined by the Supreme Court based upon income imputed to the plaintiff, must be modified.

We recalculate the plaintiff's child support obligation based on his total annual income of \$70,254, as reflected on his 2007 federal tax return. Less FICA, his annual income for that year was \$64,879.57. Since it is undisputed that the defendant's relevant annual income was \$32,322 after the FICA deduction, the parties' combined parental income was \$97,201.57. The plaintiff's pro rata share was 67% (*see Domestic Relations Law* § 240[1-b][f]).

As there were two unemancipated children, the applicable statutory percentage was 25% (*see Domestic Relations Law* § 240[1-b][b][3][ii]). The Supreme Court applied the statutory percentage to the total parental income in excess of \$80,000 (*see Domestic Relations Law* § 240[1-b][c][3]), finding that such a step was warranted for a number of reasons, which it set forth in its decision. Among other things, the court noted that doing so was consistent with the children's pre-separation standard of living. The court thus complied with *Matter of Cassano v Cassano* (85 NY2d 649) (*see Kennedy v Kennedy*, 62 AD3d 755, 756-757). We agree with the court's assessment, and similarly apply the statutory percentage to the combined parental income in excess of \$80,000.

Applying the statutory percentage of 25% to the entire \$97,201.57 in combined parental income, results in a basic child support obligation of \$24,300.50 (*see Domestic Relations Law* § 240[1-b][b][3][ii], [f]). Therefore, the plaintiff's child support obligation is 67% of that amount, or \$1,356.77 monthly. Upon the emancipation of the older of the parties' two unemancipated children, the plaintiff's support obligation will be payable at a statutory rate of 17%, and his support obligation will become \$922.60 monthly.

The court properly determined that the defendant is entitled to an equitable share of the appreciation in the value of the marital residence over the course of the marriage, notwithstanding that the residence was the separate property of the plaintiff until 1999, when the property was transferred into the names of the plaintiff and the defendant as tenants by the entirety. The increase in the value of 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" (*Domestic Relations Law* § 236[B][1][d][3]; *see Price v Price*, 69 NY2d 8), at which point the increase in value becomes marital property, in accordance with the rule that the definition of marital property is to be broadly construed, given the principle that a marriage is an economic partnership (*see Mesholam v Mesholam*, 11 NY3d 24, 28; *Price v Price*, 69 NY2d 8, 14-15). The record establishes that the appreciation in the value of the marital residence was attributable to the joint efforts of the parties (*see Kilkenny v Kilkenny*, 54 AD3d 816, 818-819; *Michelini v Michelini*, 47 AD3d 902, 903; *Lagnena v Lagnena*, 215 AD2d 445, 446). Thus, the defendant is entitled to share equitably in that increased value. In

addition, the court's award of a separate property credit to the plaintiff in the sum of only \$48,000 for the value of the marital residence at the time the parties were married was proper.

The award of reasonable counsel fees is a matter within the sound discretion of the trial court (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881-882). The issue of counsel fees is controlled by the equities and circumstances of each case, and the trial court must consider the parties' respective financial circumstances in determining whether an award is appropriate (*see Kearns v Kearns*, 270 AD2d 392, 393). Here, considering all of the factors, the court found that the plaintiff was in a better financial position to pay for a portion of the defendant's legal expenses and the reasonable amount of fees for the litigation. The trial court did not improvidently exercise its discretion in its award of counsel fees.

The plaintiff's remaining contentions are without merit.

RIVERA, J.P., FLORIO, MILLER and HALL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court