

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

D25546
G/kmg

_____AD3d_____

Argued - November 6, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2009-00161

DECISION & ORDER

Melissa J. Frey, respondent-appellant, v
Frederick R. Frey, Jr., appellant-respondent.

(Index No. 17742/07)

Golden & Mandel, LLP, New York, N.Y. (Marc Owen Mandel of counsel), for
appellant-respondent.

John Ray, Miller Place, N.Y. (Robert R. Meguin of counsel), for respondent-
appellant.

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, Suffolk County (MacKenzie, J.), entered December 12, 2008, which, upon a decision of the same court dated October 15, 2008, made after a nonjury trial, inter alia, awarded him a separate property credit in the sum of only \$213,962.37, awarded the plaintiff the sum of \$8,800 representing her 20% share of the value of his business, and directed that he was to be solely liable for any income taxes, interest, and penalties with respect to certain income earned by him during the marriage, and the plaintiff cross-appeals, as limited by her brief, from so much of the same judgment as denied her an award of an attorney's fee.

ORDERED that the judgment is modified, on the law and in the exercise of discretion, by deleting the provision thereof awarding the plaintiff the sum of \$8,800 representing her 20% share of the value of the defendant's business; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

Under the circumstances of this case, where the parties, for the most part, maintained

December 22, 2009

Page 1.

FREY v FREY

separate finances, and determined from the start of the marriage to file separate tax returns, the trial court providently exercised its discretion in directing that the defendant, who failed to file tax returns throughout the duration of the marriage, bear the responsibility for paying income taxes, interest, and penalties (*see Costello v Costello*, 304 AD2d 517, 519; *Fiedler v Fiedler*, 230 AD2d 822, 823; *cf. Conway v Conway*, 29 AD3d 725; *LaBarre v LaBarre*, 251 AD2d 1008, 1009; *Capasso v Capasso*, 129 AD2d 267, 290-293). The plaintiff had no role whatsoever in the operation of the defendant's business, and she did not learn that he failed to file tax returns until after she commenced the instant action. The husband's conduct constituted economic fault, justifying the trial court's determination (*see Kaur v Singh*, 44 AD3d 622, 623; *Blickstein v Blickstein*, 99 AD2d 287, 293).

The defendant failed to overcome the presumption that property he contends constitutes separate property, which was acquired during the marriage, was marital property (*see Embury v Embury*, 49 AD3d 802, 804; *Palumbo v Palumbo*, 10 AD3d 680, 681-682; *Solomon v Solomon*, 307 AD2d 558, 559; *Heine v Heine*, 176 AD2d 77, 83). In addition, the Supreme Court providently exercised its discretion, after examining the circumstances of the case and the pertinent statutory factors, in distributing the value of the marital home, the plaintiff's pension, and the plaintiff's investments, equally between the parties (*see Domestic Relations Law* § 236[B][5][d]; *Smith v Smith*, 8 AD3d 728, 729).

However, the Supreme Court erred in awarding the plaintiff the sum of \$8,800 representing her 20% share of the value of the defendant's business. Under the circumstances of this case, in order that the parties' property be equitably distributed to achieve the ultimate goal of fairness (*see Coffey v Coffey*, 119 AD2d 620, 622), the award to the plaintiff of 20% of the value of the defendant's business, which was separate property, was not warranted.

The Supreme Court correctly denied the plaintiff's request for an attorney's fee (*see Chi-Yuan Hwang v Hwang*, 308 AD2d 560, 561).

The defendant's remaining contentions are without merit.

SKELOS, J.P., ENG, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court