

SHORT FORM ORDER

**SUPREME COURT-STATE OF NEW YORK**

**PRESENT:**

**HON. ELAINE JACKSON STACK**

Justice.

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**MARGARET R-P,**

Plaintiff

against

**MICHAEL P,**

Defendant.

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**TRIAL/IAS PART 25**

NASSAU COUNTY

**DECISION AFTER TRIAL**

**XXX**

This action was commenced by filing a summons with notice on September 3, 2002. The parties were married on January 9, 2002 and separated on or about August 15, 2002. Thereafter a verified complaint was served and a verified answer with counterclaims. The trial of this matter was held on August 6, September 30, October 29 and November 12, 2004.

**THE DIVORCE**

Plaintiff testified that Defendant had failed to return home on the night of August 14, 2002. On August 15, 2002 he left the marital residence, (the "Marital Residence") and has not returned to reside there since that date. On August 27, 2002, when he came to the Marital Residence to collect certain property, he yelled and cursed at Plaintiff and admitted to her that he was involved in an extra-marital affair.

In this short term marriage, Plaintiff's allegations satisfy the requirements of Domestic

Relations Law §170(1). Plaintiff is awarded a judgment of absolute divorce on the grounds of cruel and inhuman treatment of her by Defendant. Plaintiff may resume the use of her maiden name, Rice, or any other surname by which she was previously known.

### **FACTS**

Plaintiff, 45 years old is a registered nurse; Defendant, 43 years old, is a village police officer. The parties have lived together since 1997, according to Plaintiff's testimony and they became engaged in 1998. Plaintiff asserted that throughout their engagement and up to and including the period of their marriage, she used her income and assets to support the couple. Defendant's income was used to pay child support for his children from a prior marriage and to fund his deferred compensation account ("401-k") with the maximum allowable contribution. According to Plaintiff, the Defendant lived "free" while she paid both his and her own bills, as well as contributing to payment of the Defendant's child support obligations for his two children of a prior marriage.

The Marital Residence was the separate property of Plaintiff when the parties married. In March 2002, they refinanced and obtained a lower rate on a fifteen year mortgage, although the monthly payment amount increased somewhat. A deed was executed transferring ownership of the Marital Residence from Plaintiff alone to Plaintiff and Defendant as husband and wife.

From the total refinance amount, the parties paid off the existing mortgage and Plaintiff deposited \$34,683.89 into a joint checking account which the parties maintained. Plaintiff testified that the balance from the loan was used to pay off "defendant's debts." Defendant testified that the parties also paid off a car loan for a 2001 Toyota "Spyder." The proceeds were also used to pay off a Providian credit card debt of \$3,138, an education bill for Plaintiff in the

sum of \$1,626 and a loan on Plaintiff's insurance policy in the sum of \$2,412.

Both of the parties' cars were titled in Defendant's name, according to Defendant's testimony, and both were purchased in the year 2000. Loans were taken on both cars and no down payment was made. For the Suburban the parties took a \$38,000 loan; for the Spyder, a \$25,800 loan was taken. That was the loan satisfied when the house was refinanced.

Prior to the transfer of the house from Plaintiff alone to both parties, Plaintiff's checking account at Fleet Bank showed checks to Northwest Mortgage. After the refinance, the mortgage was paid from the joint Employees Federal Credit Union account into which the Defendant deposited his payroll checks.

Several checks from Plaintiff's separate account in Fleet Bank were admitted into evidence which supported Plaintiff's contention that she paid the household expenses from her own account while Defendant lived with her before their marriage. Checks were introduced drawn to LIPA, Keyspan, Bell Atlantic and other similar providers of utilities. No checks were proffered by Defendant showing similar payments, although he testified that when he "saw a bill, [he] paid it."

Plaintiff asserted also that she had "cashed in" several annuities and an insurance policy and that she had given her income tax refund checks to Defendant as well as the insurance proceeds she recovered after a fire in her garage and other funds in the total amount of more than \$127,000. She asserted at trial that she "loaned" these funds to Defendant and she expects Defendant to repay her. No documents evidencing a loan were introduced into evidence.

Moreover, Plaintiff asserts that a constructive trust should be imposed against the Defendant's deferred compensation plan and pension based on a promise he made to her and her

reliance on that promise which induced her to pay all the parties' expenses, thus enabling him to contribute the maximum amount allowable into these accounts. According to Plaintiff's testimony, the Defendant promised that they would jointly share in the enhanced value of his pension and deferred compensation plan when he retired. This encouraged Plaintiff to take on the responsibilities of paying for household expenses. Plaintiff contends that Defendant has been unjustly enriched because of these financial arrangements.

Defendant contends in his testimony, however, that he had been contributing 5% of his salary to his deferred compensation plan and after the marriage he lowered his contribution by 4% to a contribution of 1%. This contrary testimony was unsupported by any documentary evidence. The only document submitted into evidence was an April 4, 2001 statement from the New York State Deferred Compensation Plan which established that as of that date and since October 1, 1998 Defendant's "current contribution" to the plan was "15%." A pending reduction to "5%" as of May 1, 2001 was indicated on the same document.

On the same document under the heading "Change of Beneficiary," the Plaintiff was denoted the "Primary Beneficiary" who, as of that date, was to receive 100% of the funds in the Plan.

No statements showing Defendant's contributions to his 401-(k) plan were produced for the years the parties lived together or for the eight months of their marriage. No documents were produced which showed the contributions made to the Defendant's pension plan for the same period. Although Defendant testified that his 401-(k) plan decreased in value during the marriage, there was no testimony or evidence to support any claim that market forces or some other factor were responsible for the alleged reduction in value.

Defendant testified further that the parties never discussed retirement, that he never put in more than 5% into his 401-(k) account and that he lowered the amount he contributed because he needed more available cash. His pension contribution, he stated, is made solely by his employer and the Defendant himself made no contribution to the pension. No documents were submitted by Defendant to support this proposition. In fact, Defendant's net worth affidavits dated September 15, 2002 [Ex. 9] and dated March 19, 2004 [Ex. L] both show that his New York State and Local Pension is funded by "payroll deduction and employer contribution." Both of these documents record "unknown" as the value of the 401-(k) plan and the pension.

Defendant contends that he assumed many of the expenses of the parties' home both before and after the marriage. According to his testimony, Defendant did substantial repair work on that residence prior to the marriage, asserting that he paid for all the supplies. He was unable to provide checks or receipts for any of these expenses; Plaintiff did not dispute that work had been done at the Marital Residence but submitted checks drawn on her personal account which showed payments to Home Depot during the same time period as Defendant had alleged work was accomplished.

Plaintiff asserted that she had never had a tenant in her home. Defendant contradicted that statement and called as a witness a person who testified that he had been living at the Marital Residence in an upstairs apartment for close to ten years.

Defendant testified further that he had married the Plaintiff on January 9, 2002 and that he had removed himself from her home on August 15, 2002. In 1998, according to Defendant's testimony, he began living with the Plaintiff at her home. Plaintiff's name was on all the bills, according to Defendant's testimony. He stated that there was "no set agreement on who would

pay what [bills].” Defendant asserted he “paid [his] share” which meant, he said, that he “paid some bills.” He couldn’t recall which bills these were. He agreed that he had written checks from the Plaintiff’s account, some of which he presented to her for her signature and some on which he signed her name. He did not produce any checks showing payments he made for household expenses.

Although the Defendant stated that he did make up an accounting on the computer of all transactions from 1999 to 2002, he could not identify a print out of such a document which was offered into evidence and stated that he had not created nor could he recognize that particular document. No other compilation of checks or payments was offered into evidence.

Defendant stated that as to the automobiles, he made the monthly payments for the Suburban of about \$700 and the Plaintiff made the payments for the Spyder. At present there is no loan on the Spyder, having paid off the indebtedness with the balance of the refinance. Defendant’s net worth affidavit indicated that the car is currently “off road.” However, he consented to the Plaintiff having use of the vehicle, which is currently at his residence.

He testified that he deposited “varied” amounts from his salary into a joint account with the Plaintiff. Out of their joint account the Defendant paid \$1,730 in child support monthly. There is also a loan payment noted on his net worth affidavit of \$1,004 monthly, but no testimony was received as to the source of these funds and to whom the repayment is currently being made.

He also paid credit card debts and at some point he arranged for debt consolidation – he couldn’t recall when this occurred – and thereafter \$1,100 monthly was withdrawn from the joint account. He also gave money to his mother on a regular basis. From 1997 to the present he gave

his mother about \$ 325 each month.

In 1998 he was a member of a village Police Department, as he was at the time of trial. In 1998 his salary was about \$85,000 annually. Plaintiff, he said, was a nurse who worked in a hospital in Brooklyn earning about \$60,000 a year at that time. In late 2001, when she was employed by a local Hospital, she stopped working because she said she had injured her back. At the time of the parties' marriage she was not employed, he stated.

On December 10, 1998 Plaintiff filed for bankruptcy. Thereafter, she used Defendant's credit cards for any purchases she needed. Defendant asserted that although he knew that Plaintiff had cashed in annuities, she did not use the money to benefit him in any way. He stated the same was true as to insurance proceeds Plaintiff received after a fire in her garage. The proceeds, about \$16,000, were utilized to rebuild the garage at a cost of about \$11,000, according to Defendant or \$5,000 according to Plaintiff. Neither party submitted any documents evidencing the cost of rebuilding the garage.

#### **Plaintiff's Application for Imposition of a Constructive Trust**

Plaintiff urges that the court should impose a constructive trust upon Defendant's deferred compensation plan [401-(k)] and his pension. In the alternative she asserts that she has "loaned" more than \$127,000 to the Defendant over the course of their relationship which she urges the court to direct Defendant to repay.

Generally a constructive trust may be imposed when property has been "acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." *Sharp v Kosmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976). The doctrine of constructive trust is available to courts of equity when the following four requirements are

present: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon and (4) unjust enrichment. *See, Janke v Janke*, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4<sup>th</sup> Dept. 1975, *aff'd* 39 N.Y.2d 786 (1976)). That neither a marital nor family relationship exists does not preclude the finding of a confidential relationship. *See Muller v Sobol*, 277 A.D. 884, 97 N.Y.S.2d 905 (2<sup>nd</sup> Dept. 1950). Here, as in *Muller, supra*, the parties lived together for several years and a relationship of trust and confidence did exist between the parties.

Unquestionably, there was a transfer of property here, that property being funds belonging to the Plaintiff which were utilized by both parties for their support as well as by the Defendant to pay his child support and other personal expenses. Plaintiff asserts that Defendant's promise was to provide for them in the future through generous donations to his 401-(k) plan and his pension. Although Defendant's testimony contradicted that of the Plaintiff, the only document received relevant to the Deferred Compensation Plan showed that Defendant had, as Plaintiff asserted, deposited 15% of his salary to the plan for some period of time before requesting that the amount be decreased.

Because Defendant has produced not one document evidencing his actual deposits into the 401-(k) plan the court accepts Plaintiff's testimony, as supported by documentary evidence, that Defendant did contribute greater amounts of his salary because Plaintiff was able to support both of them with her earnings. At some point in time, during the spring of 2001, Defendant needed more money, according to his testimony, and thereafter he reduced his contributions from 15% to 5%. Defendant further testified that his pension was solely an employer contribution plan, although he submitted no evidence of this fact nor of the value of his pension

at the time of trial or at any other time in the litigation

The degree to which Defendant was unjustly enriched by the use of Plaintiff's funds to support the couple in their lifestyle is impossible to compute. The court does not agree that the entire amount that Plaintiff claims was "loaned" to Defendant should be the sum for which he is responsible. Most of those funds were utilized for Plaintiff's benefit as well. The mortgage, utilities, car payments and credit cards were among the expenses for which these funds were used. Full documentation of the source and the distribution of these funds is unclear. It is not possible to identify any specific payment made by the Plaintiff which used any specific "cashed in" funds. In any event, money is fungible; once deposited into the parties' joint account and used for the parties' joint benefit, the funds cannot be considered separate property.

Marriage is an economic partnership. The financial contributions of the parties need not be equal for such a partnership to exist. Although Plaintiff may have paid many expenses for Defendant, both before and during the marriage, including child support payments for his children, these are not payments which Plaintiff can recoup. If payment of such amounts permitted Defendant to make larger contributions to his deferred compensation plan, that does not change the outcome that a constructive trust cannot be imposed on a deferred compensation plan especially when other alternative means for the plan's distribution are available.

All the essential elements of a constructive trust have not been met in this case. There is the confidential relationship and the promise in the future that the parties would share in the retirement funds being set aside. However, the aspect of property being transferred or conveyed to another has not been met. The property which the Plaintiff claims to have transferred were her separate funds which were then utilized to support both parties. While this may have eased

the financial burdens of Defendant, the property was not transferred directly to the Defendant for his use. In any event, the Plaintiff will share in the Defendant's 401-(k) plan and in his pension in the manner and according to the factors described in *Majauskas v Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699 (1984).

The salutary purpose of the constructive trust remedy is to prevent unjust enrichment. "A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust. [citation omitted] A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties." *Sharp v Kosmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976). In *Sharp, supra* and other cases cited herein, the "property" conveyed was real property, not money. A review of the facts surrounding the transfer of money from separate accounts to joint accounts establishes that such a transfer does not constitute unjust enrichment for the recipient.

Finally, we note that Plaintiff willingly and knowingly transferred her separate funds to the Defendant to assist him in paying his bills and to permit him to make larger contributions to his deferred compensation plan of his salary, which, because the parties were not then married, was his separate property. As noted in the dissent in *Sharp, supra*, "Although we are sympathetic to the [Plaintiff] who has been doubly aggrieved by the loss of [her marriage] and her property, we are limited to consideration of questions of law and, therefore, in light of the factual findings, would affirm [that no constructive trust should be imposed]."

## **ASSETS**

### **REAL PROPERTY**

The parties are listed as tenants by the entireties as of March 2002, shortly after their

marriage, of the real property designated the Marital Residence, which had been the Plaintiff's separate property at the time of the parties' marriage in January 2002. In March of that year, the parties refinanced the mortgage and the Defendant's name was added to the deed. The current value of that property is approximately \$350,000; there is a mortgage outstanding of approximately \$180,000.

Plaintiff and her son from a prior marriage live in that residence.

### **PENSIONS**

As noted above, Defendant has both a pension and a deferred compensation plan, both of which were in place before the parties' marriage. Defendant's contributions to these plans during the eight month marriage of these parties was not revealed during the testimony. The Defendant offered no documents in evidence to refute Plaintiff's allegations that, because of her financial support, he was able to contribute a greater amount than he would otherwise have been able to manage. Defendant submitted no testimony about the value of either of these accounts.

### **BANK ACCOUNTS, STOCKS and BONDS**

These parties have *de minimus* balances in their current bank accounts, according to their net worth affidavits, which were uncontradicted at trial.

### **PERSONAL PROPERTY**

Testimony about the purchase of two automobiles was received by the court. Both vehicles are titled to Defendant. The loan for one of these, a Toyota Spyder, was paid off with a portion of the proceeds of a refinance on the Marital Residence. The other, a Chevrolet Suburban, is being paid off by Defendant. Defendant has stated alternatively that the vehicle is in bad, undriveable condition and that the Plaintiff can have the car, which is located at

Defendant's residence.

## **CONCLUSION**

### **EQUITABLE DISTRIBUTION FACTORS**

#### **1. Income and Property**

The parties were married in January 2002 and separated in August 2002. Defendant is a police officer with a village Police Department earning approximately \$96,000 annually.

Plaintiff has received her nurse practitioner license but is currently unemployed; she received \$915 monthly as worker's compensation because of a back injury.

The parties' short marriage was preceded by a period during which they lived together, allegedly sharing expenses. Most of these expenses were paid by Plaintiff, in part because Defendant has monthly expenses which include \$1,730 in child support for two children of a previous marriage, \$1,004 in loan repayments and \$700 monthly for a car loan payment for a total of \$3,434. Defendant asserts his net income is \$3,177. Defendant supplements his income with work as a chauffeur and doing demolition work. His income for this employment was not stated at the trial.

#### **2. Duration of the marriage and age and health of the parties.**

This is a short marriage. The parties lived together as a married couple for eight months and the divorce action was commenced early in the ninth month of their relationship, September 2002. There are no children of this marriage although each has two children from prior marriages.

Defendant is in good health. Plaintiff has asserted that a back injury keeps her from working but provided no medical documentation or testimony to support that allegation.

### **3. The need of the custodial parent to occupy or own the marital residence.**

There are no children of this marriage. However, this residence was Plaintiff's separate property prior to the marriage and she has indicated she wishes to remain in that residence with her son from a prior marriage.

### **4. The loss of inheritance or pension rights.**

The parties will lose inheritance rights. However Defendant's pension is one into which marital funds were contributed during the marriage. Provisions will be made to allocate pension rights.

### **5. An award of maintenance.**

Plaintiff was unemployed at the time of trial. She has recently acquired a degree as a nurse practitioner which should afford her job opportunities. At present she receives an award of worker's compensation because of an injury received several years ago. No testimony was received regarding any specific sum that could be earned by Plaintiff were she to resume full time employment. An award of some maintenance is called for until she is fully able to become employed full-time.

Maintenance during a period of job seeking would be reasonable. The limited duration of the husband's obligation will ensure that the needs of the Plaintiff/Wife are met while she prepares for the rigors of a new position. *Nolfo v Nolfo*, 188 A.D.2d 451, 590 N.Y.S.2d 902 (2<sup>nd</sup> Dept. 1992). Such an award should be tailored to provide an incentive to the recipient to become financially independent. *Grandade-Bastuck v Bastuck*, 249 A.D.2d 444, 671 N.Y.S.2d 512 (2<sup>nd</sup> Dept. 1998).

The court orders that the Plaintiff receive maintenance for a period of one year in the sum

of \$100 per week, which amount, pursuant to 26 U.S.C. § 71(b)(1)(B) shall be tax free to the Plaintiff and not deductible by the Defendant. *See Lowe v Lowe*, 211 A.D.2d 595, 622 N.Y.S.2d 26 (1<sup>st</sup> Dept. 1995). Such payments shall begin on the first of the month closest to the date on which the judgment is entered and continue, bi-weekly for one year thereafter.

**6. Direct and indirect contributions.**

Although the Plaintiff worked prior to the marriage and paid substantially all of the couple's bills, her injury precluded work thereafter. In this short duration marriage, the economic partnership that is presumed to exist between the parties was in its infancy. Because much of the Defendant's salary was allocated to debts and child support, he worked as a limousine driver or doing demolition work to earn extra funds in his off hours. Plaintiff's contributions came in her cashing in several annuities and other policies in order to meet the couple's needs.

**7. Liquid or non-liquid character of the property.**

The assets of this couple have been identified above. None are liquid. If the pension or deferred compensation plan are distributed now, extensive penalties would result. However, the Defendant's pension and 401-(k) would be available for distribution pursuant to an appropriate QDRO.

**8. Future financial circumstances of the parties.**

Absent any significant change in circumstances, the court assumes that the Defendant's financial circumstances will continue to improve, due to contract-based salary increases. The Plaintiff's financial circumstances will depend on equitable distribution, maintenance and a division of property she receives at the conclusion of this action, plus her proactive efforts to

secure a salaried position.

**9. The difficulty of evaluating any business.**

Not relevant to this matter.

**10. The tax consequences to each party.**

Each party shall bear the tax liabilities, if any, attributable to assets which are distributed to them.

**11. Wasteful dissipation of assets.**

Not relevant to this matter.

**12. Transfer of property in contemplation of this action.**

Not relevant to this matter.

**13. Other factors**

The lack of specificity in Defendant's testimony, his failure to produce documents which would clarify his holdings in his 401-(k) and pension, his failure to produce evidence to support other portions of his testimony, among other factors, cause the court to doubt the credibility of the Defendant's testimony in certain matter and to question his veracity and lack of recollection. Defendant was unable to specify which if any expenses he paid and produced no evidence by way or checks or receipts to support his testimony.

Plaintiff's testimony relative to certain matters was also lacking in clarity. Her statement that she never had a tenant in the Marital Residence was contradicted by the testimony of the person who said he had been the tenant at that location. Her assertion that the balance of funds from the refinance went to pay Defendant's debts was also contradicted by evidence which demonstrated that the actual use of the refinance proceeds included payments for Plaintiff's

benefit.

### **PROPORTION OF DISTRIBUTION**

The court finds that Plaintiff's contributions to the marriage, providing a home, food, and financial support, was a significant effort. Having examined all the factors set forth above, the court determines that the marital assets should be distributed as "close to if not totally equal." *Perri v Perri*, 97 A.D.2d 399, 467 N.Y.S.2d 226 (2<sup>nd</sup> Dept. 1983).

### **IMPLEMENTATION and DISTRIBUTIVE AWARD**

The court must now fashion an equitable distribution of the marital assets and determine whether to distributed in kind or to make a distributive award in lieu of or to supplement, facilitate or effectuate distribution.

### **REAL PROPERTY**

The Marital Residence has an approximate value of \$350,000 and is burdened with a mortgage of about \$180,000. This residence was Plaintiff's separate property at the time of the marriage. Defendant's name was placed on the deed at the time of a refinance, three months after the marriage. Thus from March 2002 to August 2002, he was the joint owner of the property.

No evidence was submitted evidencing any payments made by Defendant from the date of the marriage to his departure from the Marital Residence which established that he paid the mortgage or any portion thereof during that period or since his departure, although he testified to such payments being made from the parties' joint account.

In consideration of the sums spent by Plaintiff in support of this couple throughout their relationship, which far exceeded any contributions by Defendant, Plaintiff is granted sole

ownership of the former marital residence subject to the existing mortgage. The parties shall execute a bargain and sale deed transferring title from their joint names to the Plaintiff's sole name within 30 days of entry of Judgment.

### **PENSIONS**

Defendant has both a pension and a deferred compensation plan [401-(k)]. Although he told the court that his pension plan was solely an employer contribution plan, his net worth affidavits indicate that there is some contribution from Defendant himself. Similarly, Defendant contributes to his 401-(k) plan in an amount he determines to be appropriate. For some period of time during his relationship with Plaintiff, he was contributing up to 15% of his salary to the plan.

As noted above, Plaintiff's efforts to have the court impose a constructive trust on the 401-(k) plan and pension failed. However, the Plaintiff shall have 50% of the marital portion of the Defendant's pension and 401-(k) according to the formula set forth in *Majauskas, supra*, pursuant to a QDRO to be submitted to the court by Defendant's counsel at the time of submission of the Judgment of divorce.

### **BANK ACCOUNTS**

Each party shall maintain such bank accounts as existed in their individual names at the time of commencement of this action.

### **PERSONALTY**

Defendant shall execute the title of the Toyota Spyder to reflect ownership in Plaintiff's name. Plaintiff thereafter shall be responsible for its maintenance, insurance and registration.

Defendant shall retain title to the Chevy Suburban.

### **COUNSEL FEES**

Defendant's attorney made an on-the-record request for attorneys fees which she asserted should be paid by Plaintiff. Plaintiff, counsel stated, had made unnecessary motions and caused unnecessary delay. Also, Plaintiff was alleged to have failed to produce requested discovery documents.

While it is correct that Plaintiff did not appear on several dates on which conferences or trial were scheduled, Defendant's failure to produce certain discoverable material is also noted by this court.

The issue of counsel fees is controlled by the equities and circumstances of each particular case, *see, Basile v Basile*, 122 A.D.2d 759, 505 N.Y.S.2d 448 (2<sup>nd</sup> Dept. 1986). Among many factors, the court must consider the respective financial positions of the parties in determining whether an award is appropriate, *See, Borakove v Borakove*, 116 A.D.2d 683, 498 N.Y.S.2d 5 (2<sup>nd</sup> Dept. 1986), the financial need of the party and the parties' disparate incomes, *Hausman v Hausman*, 162 A.D.2d 590, 556 N.Y.S.2d 774 (2<sup>nd</sup> Dept. 1990) , the time expended by counsel, the hourly rate for such services in the legal marketplace, the nature of the legal services rendered, the issues before the court and the professional standing of counsel, *DeCabrera v Cabrera-Rosete*, 70 N.Y.2d 879, 524 N.Y.S.2d 176 (1987).

The Court must take "into account the parties' ability to pay, the complexity of the litigation, the nature, extent and reasonableness of the services rendered. . . as well as the obstructionist conduct . . . that has prolonged the litigation" in determining the amount of the fees awarded. *Merrick v Merrick*, 190 A.D.2d 515, 593 N.Y.S.2d 191 (1<sup>st</sup> Dept. 1993).

The court may also consider whether “the more financially secure litigant is. . . waging a campaign against the more needy party.” *Sampson v Glazer*, 109 A.D.2d 831, 486 N.Y.S.2d 354 (2<sup>nd</sup> Dept. 1985).

The issues involving the finances of these parties as demonstrated at trial, while not simple, were not overly complex. The Plaintiff has limited resources; until she resumes full time employment her income is stagnant. Defendant’s income will continue to grow commensurate with his contractual increases.

Plaintiff’s request for a constructive trust was not frivolous; not all the criteria were satisfied but the application was made in good faith and with good cause. Domestic Relations Law § 237 (a) permits the court to direct either spouse to pay counsel fees to the other 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.” The intent of the provision is to ensure a just resolution of the issues by creating a more level playing field with respect to the parties’ respective abilities to pay counsel, “to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence.” Sheinkman, *Practice Commentaries, McKinney’s Cons Law of NY*, Book 14, citing *O’Shea v O’Shea*, 93 N.Y.2d 187, 689 N.Y.S.2d 8 (1999). When the parties’ respective financial positions gives one of them a distinct advantage over the other, the court may direct the monied spouse to pay counsel fees to the lawyer of the non-monied spouse.

The statute’s reference to “having regard to the circumstances of the case and of the respective parties,” permits consideration by the court of many factors, but focuses primarily on the paramount factor of financial need. *See, Kremler v Kremler*, 199 A.D.2d 901, 605 N.Y.S.2d

550 (3<sup>rd</sup> Dept. 1993).

The court finds that there is a substantial disparity between the financial resources available to each of the parties. Here Plaintiff has finite assets and a relatively modest income. She should not be required to spend down a substantial portion of her assets to satisfy Defendant's application for an award of legal fees, although Defendant, according to his testimony, is also in financial straits. *Melnitzky v Melnitzky*, 284 A.D.2d 240, 726 N.Y.S.2d 649 (1<sup>st</sup> Dept. 2001).

The court having examined all the factors relevant to this application as detailed above and noting the disparity of assets and income between the parties and the Defendant's superior financial position, Defendant's application for an award of counsel fees from Plaintiff is denied.

This constitutes the decision and order of this court. Settle judgment on notice within 60 days.

Dated: Mineola, NY  
December 15, 2004

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Elaine Jackson Stack  
J.S.C.  
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