

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND

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**R R.,**

Plaintiff,

**D E C I S I O N**

*-against-*

Index Number:

**M R.,**

Defendant.

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**ALFRED J. WEINER, J.S.C.**

The parties in this divorce action were married on September 4, 1976 and there are two children of the marriage, M.R., age 20 and E.R., age 27. On May 25, 1994 Plaintiff and Defendant were legally separated pursuant to a Judgment of Separation that was entered in this Supreme Court.

At trial the parties were granted a conversion divorce pursuant to Domestic Relations Law §170(5), *i.e.*, that the parties have lived separate and apart for one or more years pursuant to the 1994 Judgment of Separation. The trial continued on the ancillary issues of equitable distribution, child support and counsel fees.

## MARITAL PROPERTY

Based upon the testimony presented, the Court finds the following to be items of marital property as defined in Domestic Relations Law § 236B(1)(c).

1. The **marital residence** located in Rockland County, the title to which is in joint names.

Plaintiff contends that the value of the marital residence for equitable distribution purposes should be as of the date of entry of the Judgment of Separation.

Defendant contends that the marital residence should be valued as of the day of trial in accordance with Domestic Relations Law §236(B)(4)(b).

A “matrimonial action” does not include separation action and, therefore, entry of the Judgment of Separation did not terminate the period for accrual of the “marital property”. Domestic Relations Law §236B(1)(c); *Anglia v. Anglin* 80 N.Y.2d 553, 607 N.E.2d 777, 592 N.Y.S.2d 630, 1992

The Court finds that the marital residence is valued as of May 2006 at \$248,000.00 and the mortgage balance is approximately \$70,000.00.

2. The **Plaintiff’s pension** through Local 12 AA Plumbing Supply House Pension Plan.

Plaintiff has an accrued vested interest in and will be entitled to receive a monthly pension payment of \$1,881.75 as of her ‘Normal Retirement Date’ of May 1, 2019.

3. **Defendant’s pension** obtained through his former employer.

Defendant is entitled to receive a pension of approximately \$450 each month.

## SEPARATE PROPERTY

A personal injury settlement in 1983 resulted in a net settlement amount of approximately \$31,000.000. Plaintiff testified that approximately \$7,000 of the settlement proceeds was attributed to her loss of Defendant's services and the balance of approximately \$24,000.00 represented compensation for the Defendant's injuries. It is undisputed that a portion of the proceeds of the accident were used for the purchase and repair of the marital residence and to pay various obligations the parties had at that time.

Defendant contends that the proceeds of the accident, although used in the purchase of the marital residence, remains his separate property and, therefore, is not subject to equitable distribution. D.R.L. §236B(1)(d).

Plaintiff contends that any portion of the proceeds of the personal injury settlement that was used in the purchase of the marital residence is no longer separate property.

Since the former marital residence was purchased during the marriage it must be deemed to be 'marital property' subject to equitable distribution. *Domestic Relations Law* §236B(1)(c). A party seeking to overcome the marital property presumption, here the Defendant, has the burden of proving that the property in dispute is 'separate property' (*Farad v. Farad* 4 A.D.3d 502, 772 N.Y.S.2d 368, 2 Dept.,2004). Since the term "separate property" must be narrowly construed (*Domestic Relations Law* §236(B)(1)(d); *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684), the Court finds that Defendant failed to effectively trace the claimed separate property and meet his burden of proof. (*Farad v. Farad*, supra.; *Cesta v. Cesta* 211 A.D.2d 708, 621 N.Y.S.2d 660, 2 Dept.,1995.) Accordingly, the Court further finds that Defendant's personal injury settlement proceeds cannot be considered separate property for equitable distribution purposes.

## STATUTORY MANDATES

Domestic Relation Law § 236B(5)(a) provides that “...the court, in an action wherein all or part of the relief granted is divorce,...shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.”

Domestic Relation Law § 236B(5)(c) provides that “marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties” and that subdivision (d) thereof provides that “...in determining an equitable disposition of property under paragraph c, 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;**

Neither party offered any testimony regarding their income and property at the time of marriage.

Defendant testified that he has been unemployed for more than ten (10) years and receives a net Social Security Disability payment of \$597 per month although his entitlement is greater. Approximately \$533 is deducted each month to pay his child support obligation. In addition to Social Security Disability payments, Defendant receives \$112 from the Veterans Administration. He has no other monthly income. The Defendant did, however, testify that he’s entitled to receive a pension from his former employer, in the sum of “...close to \$500.”

The Plaintiff testified that she has been employed for the last 32 years as a bookkeeper in New City, New York and her gross weekly salary is \$866. Her weekly “take home” is \$597. Although she did some work “off the books” in years past, such work was sporadic and her earnings insignificant.

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

The parties have been married almost 30 years and they lived together for 16 years prior to separating.

The Defendant testified that he is 55 years old and suffers from a myriad of physical ailments and recently had a liver transplant as well as knee replacement surgery.

The Plaintiff is 51 years old and suffers from sarcoidosis, stress anxiety, high blood pressure, glaucoma and uveitis, an inflammation of the eyes that can cause low vision.

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

The Court has considered the need of a custodial parent to occupy or own the marital residence and to use or own its household effects and finds it to be inapplicable to this case.

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

The Court has taken judicial notice of the loss of inheritance and pension rights upon dissolution of the marriage.

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

The Court has considered the issue of maintenance and finds it to be inapplicable to this case.

**(6) 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 finds that the parties were both employed during the marriage and until the Defendant left the marital residence both contributed to the support of the family and to the upkeep of the marital residence. After the Defendant left the marital residence his contributions terminated.

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

The Court finds that the pensions of both parties are non-liquid.

**(8) the probable future financial circumstances of each party;**

The Court finds that Plaintiff is capable of continued gainful employment at her present place of employment and at the same level of income she now has.

The Court also finds that the Defendant is disabled and not capable of future employment.

**(9) 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;**

The Court has considered this factor and finds it to be inapplicable to this case.

**(10) the tax consequences to each party;**

In determining an equitable disposition of property, the Court has taken judicial notice of

the tax consequences to each party upon dissolution of the marriage.

**(11) the wasteful dissipation of assets by either spouse;**

The court has considered the wasteful dissipation of assets by either spouse and finds it to be inapplicable.

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

The court has considered whether there was any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration by either spouse and finds it to be inapplicable.

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

The parties lived together at the marital residence until 1992 when Defendant left the marital residence. Plaintiff remained to care for the children of the parties. Defendant testified that he started a second family after he and the Plaintiff separated and that a child was fathered in that second relationship. It is not disputed that Defendant had no contact with the two children he had with Plaintiff from the time he left the family in 1992 until 2006.

Throughout the time the parties lived together, they were both gainfully employed, contributed to the support of the family and paid the carrying charges on the marital residence. After the parties separated, Plaintiff supported the family and paid the carrying charges on the marital residence without significant financial assistance from Defendant. Since 2000, however, Defendant has made child support payments including arrears through a deduction from his social security disability income.

In 1997 Plaintiff filed a petition in the United States Bankruptcy Court pursuant to Chapter

7 of the Bankruptcy Code and was ultimately discharged of her debts.

**AWARD PURSUANT TO DRL. §236B(5)(a) and §236B(5)(b)**

Established case law authorizes the un-equal division of the marital residence where a party has contributed services as a spouse, parent and sole homemaker when the other spouse has left the residence for an extended period of time or failed to contribute to it's upkeep. *Gross v Gross* 160 A.D.2d 976, 554 N.Y.S.2d 699, 2 Dept.; *Balsamo v Balsamo* 200 A.D.2d 649, 608 N.Y.S.2d 7, 2 Dept., 1994; *Kaplinsky v Kaplinsky* 198 A.D.2d 212, 603 N.Y.S.2d 574, 2 Dept., 1993; *Robinson v. Robinson* 166 A.D.2d 428, 560 N.Y.S.2d 665 2 Dept.,1990; *Sade v. Sade* 251 A.D.2d 646, 675 N.Y.S.2d 119, 2 Dept.,1998. There is no requirement that each item of marital property be distributed on equally. Property acquired during a marriage should be distributed in a manner which reflects the individual needs and circumstances of the parties and with the ultimate goal of fairness. (*Coffey v Coffey* 119 A.D.2d 620, 501 N.Y.S.2d 74, 2 Dept. 1986).

**Marital Residence**

It is Plaintiff's contention that it would be unjust to allow Defendant to share in the accrual in value of the residence from the time the parties separated in 1992 because Defendant subsequently failed to contribute to the upkeep of the residence and support the family.

Defendant contends that the current equity in the marital residence should be divided equally.

Based upon the consideration of the thirteen (13) factors enumerated in Domestic Relation Law §236B(5)(c) the Court finds as follows.

The financial contributions both parties made toward the purchase and improvement of the marital home and their mutual support of the family prior to separating in 1992 warrants

acknowledgment. However, the years of paying the mortgage and other carrying charges without significant financial assistance from the Defendant and the wife's other financial contributions to the marriage, including her contributions as a homemaker and care giver of the parties' children, all require special recognition. Therefore, the Court directs that upon the sale of the marital residence, the net proceeds of sale shall be divided, as follows: eighty (80%) percent of the net proceeds of sale to the Plaintiff and twenty (20%) percent of the net proceeds of sale to the Defendant.

The Court directs that the former marital residence be immediately sold and that Plaintiff make all arrangements for its sale. The parties shall agree to the sales price and the residence shall be listed for sale. In the event the parties cannot agree on a sales price, each party shall secure a realtor who shall together set the sales price. If the two Realtors cannot agree as to the sales price, the two Realtors shall choose a third realtor and the price determined as the adequate sales price by the third Realtor shall be binding on the parties.

Upon the sale, the net proceeds - defined to mean the gross proceeds of sale less any outstanding mortgage then due and owing, the normal and customary costs of closing such as real estate commissions, attorney's fees, transfer taxes and any other appropriate costs associated with the transaction - shall be determined and shall be divided as aforesaid. Plaintiff shall also receive a credit for one-half the reasonable costs of any repairs paid by her in preparing the property for sale.

Notwithstanding the foregoing, Plaintiff shall have a right of first refusal to purchase Defendant's interest in the marital residence. If Plaintiff chooses to exercise her right of first refusal, Defendant shall, nonetheless, be entitled to receive the same net proceeds (as defined above) as he would be entitled to receive if the former marital residence was sold to a third party.

## **Pension**

The Plaintiff wife would like each party to keep his or her own pension and the Defendant husband has taken no position.

Plaintiff's pension is not in pay status and will not be until her 'Normal Retirement Date' of May 1, 2019, another 13 years. At that time she will be entitled to receive a monthly pension payment of \$1,881.75. The Defendant, is apparently entitled to receive a pension at this time of approximately \$450 each month but has not made application.

There are two recognized methods for the distribution of pension benefits. The Court can either direct that the non-employee spouse be given a lump-sum payment discounted for present value or, in the alternative, a deferred distributive award consisting of a specific share of the periodic pension benefits which the spouse will receive in the future (*Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699, 1984.; *Damiano v Damiano*, 94 AD2d 132, 463 N.Y.S.2d 477). Here, since neither party offered any evidence as to the present value of the pension benefits, the Court finds that the distribution of the parties' pensions must be deferred.

Considering all of the foregoing, the fact that the Defendant worked prior to and since the parties separated (and most likely will continue working and accrue additional pension benefits), the fact that the accrual of the husband's pension benefits effectively ended when the parties separated and, further, considering all of the thirteen (13) relevant factors set forth in the Domestic Relations Law, the Court directs that Plaintiff is entitled to fifty (50%) percent of the marital portion of the Defendant's pension upon his receipt of his retirement benefits and Defendant is entitled to twenty-five (25%) percent of the marital portion of Plaintiff's pension upon her receipt of retirement benefits. The division of these marital assets shall be made through the submission of Qualified Domestic Relations Orders.

## CHILD SUPPORT

Plaintiff and Defendant have an unemancipated son, M.R., who is 20 years old and attends a Community College. Tuition for MR is approximately \$4000 annually. The cost of his education has been paid for through loans and Plaintiff's contributions.

Plaintiff and Defendant have a second son, E.R., who is now 27 years old. E.R.'s education was financed through financial aid and subsidized loans. The outstanding loan balance is approximately \$16,000 that Plaintiff shares responsibility for with E.R .

Defendant testified that he has a third child with a woman whom he presently resides with and with whom he shares living expenses.

In 1993, the year after the parties separated, a child support order was obtained by Plaintiff in the Family Court. Defendant's failure to abide by the Family Court's order resulted in the entry of two money judgments against him. At trial, the parties stipulated that as of the date of trial the outstanding child support arrears totaled \$22,822.11.

In July 2005 Defendant made an omnibus motion that included a request for an order vacating and/or modifying downwards the current child support order of the Family Court and for an adjustment of arrears. It was later stipulated by counsel that Defendant's motion would be decided at the time of trial.

As a party seeking a downward modification of child support, the father had the burden of establishing an unanticipated and unreasonable change of circumstance (*Matter of Boden v. Boden*, 42 N.Y.2d 210, 213, 397 N.Y.S.2d 701, 366 N.E.2d 791; *Matter of Heverin v. Sackel*, 239 A.D.2d 418, 657 N.Y.S.2d 441). The record does not establish that defendant met the requisite burden so as to entitle him to a downward modification of the Family Court order for child support. Nonetheless, the issue of child support is before the Court. Domestic Relations Law §240 provides that in any action for a divorce, the court shall enter

an order for child support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.

The Court finds that Defendant's gross annual income including his entitlement to pension benefits is \$20,304.<sup>1</sup> When FICA taxes in the sum of \$1,599. are deducted, Defendant's income for child support purposes, as defined in Domestic Relations Law §240(1-b), is \$18,705.

The Court also finds that Plaintiff 's gross annual income is \$43,772. After the deduction of FICA taxes in the sum of \$3,294. Plaintiff's income for child support purposes, as defined in Domestic Relations Law §240(1-b), is \$40,478.

The combined annual parental income of the parties for child support purposes is \$59,783. Domestic Relations Law §240(1-b)(b)(5). The child support percentage is 17 percent of the combined parental income for one child up to \$80,000. The basic child support obligation pursuant to Domestic Relations Law §240(1-b)(b)(3)(ii) is \$10,163. annually.

Since Defendant is the non-custodial parent, his child support obligation is 17% of \$18,705. or \$3,179. annually. Monthly payments of \$264.92<sup>2</sup> shall commence upon the entry of judgment herein.

Child support payments shall continue, (except for arrears, if any) until such time as the child reaches the age of 21 years or is sooner emancipated. Until the entry of said judgment the Family Court order shall continue. Arrears that may have accrued under the Family Court order shall continue to be paid as had been directed by the Family Court and

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<sup>1</sup> Social Security Disability \$1130 per month (including deduction of \$533 per month for child support); Veteran's Administration benefits \$112 per month; Imputed pension benefits \$450 per month.

<sup>2</sup> \$3,179 divided by 12 = \$264.92

any further adjustments shall be made by that court.

Because a portion of Defendant's pension is to be distributed to Plaintiff, Defendant's child support obligation shall be recalculated upon the initial payment of Defendant's monthly pension. At that time Defendant's child support obligation shall be reduced to reflect Defendant's *pro rata* reduction in gross income as a result of the partial distribution of his pension to Plaintiff.

This Decision shall also be deemed to be a finding and order encompassing the prior motions previously made by Defendant for a modification of child support and counsel fees.

#### **COUNSEL FEES**

In this divorce action, Defendant's attorney contends that Defendant is unable to pay his own counsel fees and has requested that Plaintiff be ordered to pay Defendant's obligation pursuant to Domestic Relations Law §237. The application is opposed by Plaintiff.

Since the application is opposed by Plaintiff and the parties have not consented to allow the Court to determine the issue upon submitted documents, a hearing is necessary to explore the relative financial circumstances of the parties and the attorney's claim for a fee. *Gomes v Gomes*, 303 AD2d 454.

Plaintiff is directed to settle judgment on notice.

Dated: New City, New York  
November 13, 2006

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**HON. ALFRED J. WEINER**  
Justice Supreme Court