

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

X INDEX NO. 2496/01
JACK D'ELIA,
Plaintiff,
- against -
JOANNE D'ELIA,
Defendant.
X

STANLEY GARTENSTEIN, JUDICIAL HEARING OFFICER:

By order of the Appellate Division, Second Department, dated January 10, 2005, (14 AD3d 477) this action was remanded to the trial court "... for the equitable distribution of the marital residence, subject to any separate property credit to which either party may be entitled." The Appellate division did not order a new trial or post-trial hearing. Accordingly, implementation of its directives is properly accomplished upon the original trial record. Final submissions were completed on April 13, 2006. This decision addresses those issues raised by the Appellate Division.

VALUATION DATE:

An indication of the profound differences between the parties is illustrated by their arguments with regard to the date of valuation of the marital domicile. Plaintiff husband relies upon a court ordered valuation which was effectively not contested at the trial while defendant seeks immediate sale and distribution based upon current value. This dispute was before the court at the

earliest stages of this litigation. At that time the court declined to order a pre-trial sale. (D'Elia v D'Elia, NYLJ, March 13, 2002, p 20, col 1). Now, after trial and remand, valuation of this passive asset is properly set at its current updated value under prevailing market conditions (Wagner v Wagner, NYLJ January 4, 2005, P. 18 Col. 1).

Section 236(B)(4)(b) of the Domestic Relations Law, provides that "The valuation date or dates may be any time from the date of the commencement of the action to the date of trial." The statutory phrase "date of trial" cannot be taken literally to require unrealistic valuation as of a trial held in 2002. An apparently over-restrictive reading of the statute was held to be inappropriate by the undersigned in Wagner v Wagner, supra, relying upon Moody v Moody, 172 AD2d 730, the leading case in this Department.

In Moody, supra, the divorce action was commenced 15 years after the parties permanently separated. During that interval, the house in question increased in value from \$33,000 to \$265,000. In the face of the overwhelming equities in favor of the wife, the husband was awarded a distributive share of 7 percent by the trial court based upon its current value. This was affirmed by the Appellate Division."

In discussing Moody, Wagner pointed out that "Moody v Moody is indeed controlling on the issues before us, not because it requires that we torture the thrust of Domestic Relations

Law § 236(B)(4)(b) out of context by applying an overly literal reading thereof but because it authorizes, indeed requires, that we vindicate all equities now existing in favor of one party against the other. This may not properly be accomplished by selecting an unrealistic date for valuation of a passive asset, but by recognizing, as the statute does, that equitable distribution is a proceeding in equity which allows consideration of the totality of these facts in setting (an) ultimate distributive share. Indeed, in setting valuation, Moody itself mandates that we set and utilize - 'the current value of the asset which her efforts preserved...' (supra at 733). (See also Butler v Butler, 171 AD2d 89 referring to appointment of impartial appraiser to determine value as of time of sale.)"

The court's transcendent obligation to maximize the assets available for distribution is best achieved by a sale of the marital domicile on the open market. In this event no expert valuation is necessary or appropriate.

As a general proposition, when, as and if one party wishes to retain a particular asset, this may be effectuated if possible by alternate methodology which avoids financial loss to the other. In the exercise of discretion, the court may implement an appropriate procedure to achieve this goal.

The court has no objection to accommodating plaintiff's desire to remain in the former marital domicile, given his special emotional attachment to it stemming from the sale of his prior

residence by him to generate funds necessary to purchase it. (Ierardi v Ierardi, 151 AD2d 548.) But this accommodation cannot become reality without making defendant whole. Should plaintiff seek to purchase his wife's share, he shall cause an updated appraisal to be made by the same impartial appraiser whose report was introduced into evidence at the trial. This must be complete no later than 60 days from the date of this order. It shall take place at his sole expense. A copy of the appraisal is to be served upon defendant's counsel no later than 10 days thereafter. Defendant shall then have the right to demand a hearing to present evidence with regard to her claim of its value. Failing her timely exercise of this right, plaintiff shall have 60 days thereafter to apply for and be approved for financing sufficient for him to buy out defendant's share calculated according to the formula to be articulated herein. Unless extended by the court upon application on notice, all deadlines are final.

In the event plaintiff fails to avail himself of this mechanism to buy out his wife, the house shall be placed on the open market for sale, in which event the parties are ordered to cooperate to achieve immediate sale to an arms' length bona fide purchaser.

DISTRIBUTION:

Plaintiff is entitled to an initial separate property contribution of \$79,569.87. The trial record indicates that he made separate property contributions toward purchase and

renovation/repair of the marital domicile in this total sum as calculated in his closing submission. These amounts claimed were not effectively controverted at the trial. The trial record also established that plaintiff sold his pre-marital apartment, realizing net proceeds of \$41,400.43 and \$14,400.00 which were placed in a separate account dedicated to and actually expended for renovations to the marital domicile. This evidence was also effectively un rebutted.

On the other hand, defendant is entitled to dollar-for-dollar credit for her separate property contribution. It is uncontested that this credit to her is \$30,000. The closing submissions indicate that plaintiff has already paid this amount directly to defendant. Because the existence or non-existence of this payment is outside the parameters of the actual trial record, the court will accept this representation of payment without prejudice to either side demanding a hearing on this issue.

It is settled law that each party is entitled to a dollar-for-dollar separate property credit for all amounts so expended. (Hassanin v Hassanin, 279 AD2D 550; Traut v Traut, 181 AD2d 671; Robertson v Robertson, 126 AD2d 124.)

Plaintiff's initial credit is \$79,570; defendant's \$30,000. To these credits must be added an appropriate return to plaintiff of mortgage amortization as shall be discussed hereinafter.

In determining each party's entitlement to a proportionate share of the value of the marital domicile, reference is appropriately made to DRL § 236. Factors 3, 4, 5, 6, 7, 9, 10, 11 immediately present themselves as irrelevant. The marriage was brief in duration; both parties are in good health (Factor 2). The income and property of each party at marriage and at commencement is relevant only to the extent that Mr. & Mrs. D'Elia, whatever their respective incomes and assets may have been, never intended to, nor did they establish a true marital partnership as contemplated by the statute. The impossibility or difficulty of evaluating a specific asset and/or economic desirability of retaining such asset intact (Factor 8) has already been considered as a threshold to the directives ruling upon plaintiff's application to retain this property and/or his buy out of defendant's interest.

Weighing the equities between the parties, it is clear that whatever actually transpired at the time plaintiff executed the deed to defendant, the law of this case has been settled to the effect that there was no taint of fraud, duress or other overreaching.

We respectfully believe that the ratio of the respective separate property contributions by the parties is the best measuring rod of all equities now existing between them. A ratio may be established by totaling the separate property contributions of both and computing the percentage each bears to the whole.

All additional claimed contributions either in money or in kind other than amortization as shall be set forth hereinafter are disallowed as unproven.

In McCasland v Mandora, 259 AD2d 993, the Appellate Division, Fourth Department, relying on the Third Department holding of McVicker v Sarma, 163 AD2d 721, established a formula for equitably distributing the proceeds of liquidation of a non-marital joint tenancy, also governed by principles of equity. (Cf., Freigang v Friegang, 256 AD2d 539 in which the Appellate Division, Second Department held that while partition is a statutory remedy, it is equitable in nature and the court may compel equity between the parties in distribution.) First, the separate property contributions of each claimant whether toward purchase price or improvements/renovations are to be returned dollar-for-dollar, after which all net proceeds realized from sale or transfer are to be distributed in accordance with that ratio which the contribution of each bears to the total contributions of all. We find no authority within the Second Department either approving or rejecting this methodology. It is therefore appropriate that we follow stare decisis existing in the Fourth Department. To be sure, this approach cannot address every contingency or equity which may arise. Nevertheless, it does exhibit merit in terms of limiting the uncertainty generated by a wide range of competing, often contradictory reported holdings of trial courts and cannot help but to inject order and uniformity

into this area of the law. It also yields a result exactly conforming to that we would have reached in its absence.

Plaintiff's contribution of \$79,750 shall be returned to him from the top of any proceeds of prospective sale. In addition, plaintiff who has been paying the existing mortgages has, in the process of doing so, amortized the principal of the loans underlying them and has thus enriched defendant. He is entitled to the return of all monies so advanced on behalf of defendant. This is a separate property contribution which may be computed by reference to the standard mortgage amortization tables. It is first necessary to determine the exact amount of his total payments to date of sale or buyout. The amount thereof allocated by the standard amortization table to principal must then be factored out for return to plaintiff. This figure shall be added to the dollar-for-dollar return of separate property contribution to him after which the total yielded shall be returned to him off-the-top. This total so yielded (viz., separate property credits herein awarded plus return of amortization as set forth) shall be added to defendant's \$30,000 separate property contribution. The grand total of both separate property contributions shall then serve as a base upon which to calculate the ratio which each separate property contribution bears to the whole. The net balance after dollar-for-dollar return of investment capital to each side from the net after deduction of mortgages, encumbrances and other

expenses shall be distributed at the rate and upon the ratio calculated as above.

The foregoing is a "paper trail" computation which may properly be accomplished by counsel without the court's intervention. Should any dispute arise with reference thereto, either party may demand a hearing.

We find no reason, based upon the equities, to depart from the McCasland formula. Defendant who was entitled to return of her \$30,000, also off the top, has already received this amount directly from plaintiff. Appropriate adjustment of the respective net shares distributed at the ratio thus established shall be made in due course and in consideration of the fact that it should have been paid off the top as opposed to payment by plaintiff from his own funds.

Either side may demand a hearing or conference to calculate specific credits and debits in the event there is disagreement.

SANCTIONS:

With respect to sanctions and/or counsel fees against defendant as requested in plaintiff's reply memorandum, it is difficult to disagree with counsel's charges that defendant's submission mischaracterizes and/or distorts the trial record in significant measure. Nevertheless, in the exercise of discretion, we respectfully decline to impose either sanctions or counsel fees. This action has been litigated bitterly by two intelligent,

articulate individuals who were married only a fraction of the time already expended by them on this litigation. There comes a point at which litigation must end. While an award as requested might be warranted, it would have the destructive effect of further heightening their conflict. We will not impose this upon them. It is time for both to move on with their lives.

Counsel shall meet with each other to complete the calculations as above after which they shall settle amended superceding judgment on notice. In the alternative, either party may demand a hearing on any of the issues delineated above by notifying the clerk (718/298-1223) within 15 days.

Dated: May 5, 2006

STANLEY GARTENSTEIN
Judicial Hearing Officer