

NEW YORK SUPREME COURT : QUEENS COUNTY
MATRIMONIAL PART 52

P R E S E N T : HON. JEFFREY D. LEBOWITZ,
Justice.

-----X

G. C.,

Plaintiff,

Decision After Trial

-against-

J. C.,

Defendant,

-----X

LEBOWITZ, J.

This case brings up for review the issues of enhanced earnings with regard to the defendant's nursing license which was concededly acquired during the course of the marriage; see, *Grunfeld v. Grunfeld*, 94 NY2d 696 and *McSparron v. McSparron*, 87 NY2d 275; equitable distribution of a home purchased by the defendant after she left the marital residence; and counsel fees requested on behalf of plaintiff husband. ¹

The question of enhanced earnings has become the focal point of recent criticism (e.g., Judge Robert S. Smith's dissenting opinion in *Holterman v. Holterman*, 3 NY3d 1, 9). Indeed the recently released Matrimonial Commission Report, (a/k/a the Miller Commission), has recommended that enhanced earnings should be eliminated as

¹While there was some colloquy during the course of the trial with regard to the issue of maintenance, this issue was not briefed nor set forth in the respective parties' post trial moving papers.

an asset subject to equitable distribution. Among the problems associated with enhanced earnings the Miller Commission found was the non-modifiable nature of an award based on projections of earnings, the cost of evaluating the asset, the problems of double counting and the litigation spawned by the concept which concomitantly has increased the cost and duration of matrimonial proceedings. See, Miller Commission Report pages 65 to 66.²

Clearly, much of the debate over the issue of enhanced earnings is caused by the clear lack of certainty upon which these awards are made by the Courts. These awards, based upon future earnings potential of a licensee or degree holder and the number of years he or she may remain in the work force, makes certainty a goal that is impossible to attain by any finder of fact. Indeed, even the issue of the utilization of the appropriate discount rate to reflect these contingencies as well as future economic circumstances has come under increased scrutiny. See, *Sonnenfeld v. Sonnenfeld*, 801 NYS2d 242 (Ross, J., Supreme Court, Nassau County, 2005).

Notwithstanding these recent events, this Court must still view the enhanced earnings generated by the defendant wife's license as an asset subject to possible distribution. The evidence which was adduced during the course of two EBT's of defendant G. C. and testimony by the defendant before this court, established that the

²As noted by the Miller Commission, the difficulty in calculating any future award is exacerbated by the fact that the distributive award made by the Court is not subject to modification as is child support or spousal maintenance. As a result, the concept of a stream of income percentage to compensate for the loss of enhanced earnings to the non-degree holding spouse is a method which can reflect the true value of the lost income and may still be subject to modification if future events do not coincide with the calculations upon which the award is based by the Court.

parties were married in October of 1984.^{3 4}

From that marriage, two children were born, Amanda, who is twenty, and Pietro or Peter, now eighteen, as of the writing of this decision.

At the time the parties were married, the plaintiff was the owner of a beauty salon which ultimately went out of business and was the major cause for the parties seeking bankruptcy protection.

In 1985, shortly after losing his beauty salon business, the plaintiff became employed by the United States Postal Service, which he testified offered his family security, steady salary and health benefits.

During this time, defendant J. C. was employed by the law firm of Hayt, Hayt and Landau as an officer clerk. Upon the birth of Amanda in 1985, Mrs. C. ended her employment and remained at home caring for her children.

Mrs. C. testified that in 1990 she decided to return to school to secure an Associate's Degree in nursing from Queensborough Community College, from which she ultimately graduated in 1993. Mrs. C. testified that when told of her intention to return to school, the plaintiff expressed his lack of support for the idea believing it would take too much time away from the children and their home. Nonetheless, Mrs. C. began attending Queensborough Community College with money she received from loans, grants and

³With regard to grounds, Mrs. C. testified with the consent of the parties to conduct which established her constructive abandonment by the plaintiff.

⁴The Court determined in an Order dated January 7, 2005, that the defendant had established by sufficient proof that he was unable, due to disability, to appear in Court to testify in this matter. Therefore, the Court allowed the plaintiff to be deposed in an out of court setting as well as to consider an earlier deposition dated July 24, 2000.

financial contributions by her husband. (Though the parties disagree as to the amount and nature of the contribution, it is beyond cavil that the financial contributions were limited in nature as Queensborough is a City subsidized college). Mrs. C. testified that the loans were approximately \$1,400.00 per year. During her first year at Queensborough, the defendant attended school late in the afternoon to early evening two days a week.

On school days, prior to leaving for class, Mrs. C. testified that she woke the children up, gave them breakfast and was still home at 3:00 when they arrived back from school. Mrs. C. testified that during the first year of her schooling, her husband returned from work about 4:00 or 4:30 in the afternoon. She stated that on the nights that she went to school she would return home about 9:00 or 10:00 p.m. She further testified that during this first year her husband did not help with the schooling of the children and that there was no change in his hours at the post office during the time that she went to school. Mrs. C. further testified that in the years 1989 and 1990, in fact up and through 1992, she was also employed at the Clearview Nursing Home, working Thursdays from 4:00 to 8:00 p.m. and Saturdays from 9:00 a.m. to 5:00 p.m.

Mrs. C. stated that her in-laws, who they lived with at the time, assisted with the children when she was either at school or at work.

In 1991 and 1992, the defendant attended Queensborough from 7:00 in the morning to 2:00 in the afternoon three days a week. The defendant would get home before 3:00 and be there when the children came home. She would help them with their homework, cook their dinner and clean the house. On the days she was home, she took the children to school. On the other days, her mother-in-law took the children to school when she had to leave early for class. In response to whether her husband during her

schooling was supportive of her studies, she responded "I wouldn't say that". She stated that on a number of occasions, as a result of arguments, her husband took her car keys so that she would not be able to go to school. On those occasions, Mrs. C. testified that she either missed classes or took the bus to class.

Amanda was hospitalized on three occasions, the longest period being ten days and that during these hospitalizations, Mrs. C. remained in the hospital with her daughter.

Mrs. C. indicated that when her husband became ill, it was she who found a therapist who was willing to come to the house, as her husband was unable to venture far, if at all, from the house because of his illness. She indicated that she would go to the psychiatrist's office to pick up prescriptions and have them filled at the pharmacy.

Mrs. C. testified that at the time she graduated from Queensborough and became employed at New York Hospital, the family bought a new car which was purchased through a loan that was subsequently repaid from the proceeds of a joint checking account.

Mrs. C. testified that in 1999 she left the marital residence, however, the children remained with Mr. C.. She indicated that in 2002 she jointly purchased a property with her boyfriend located in Suffolk County. Mrs. C. testified that the property was purchased for \$175,000.00 with \$15,000.00 provided by her boyfriend and a \$160,000.00 mortgage. Mrs. C. stated that she put no money down, but at present contributes to the mortgage payments and carrying costs of the house. She stated that the property was refinanced in 2004 from a thirty year mortgage adjustable rate mortgage to a fifteen year fixed rate. The property was recently appraised by Mr. Michael Schlesinger in the amount of \$335,000.00.

Mrs. C. indicated that upon graduation from Queensborough, she obtained a license as a registered nurse and began working at Booth Memorial, now New York Hospital, in August of 1993. In 1996, Mrs. C. obtained additional employment with the Visiting Nurse Service where she worked for approximately four years. In 1999 when this action was commenced, the combined income from New York Hospital (Booth Memorial) and Visiting Nurse Service was approximately \$80,000.00 per year. ⁵

Mrs. C. indicated that the loan which she had incurred from her studies at Queensborough Community College had been paid from proceeds of a joint checking account. Mrs. C. further testified that in 2003 her income from New York Hospital was approximately \$76,700.00 and that through August of 2005, she had grossed approximately \$57,300.00, which over a full year would work out to approximately \$87,000.00. The defendant testified that her husband received approximately \$17,000.00 in retroactive social security payments in 1999, but that she did not receive any of that money.

Mrs. C. testified that she received two certifications, one for medical surgery and the other in gerontological nursing. The first received in 1995 and the second in 2004. While she had certifications in both fields, she testified that only one of them resulted in an increase of salary, in an amount of approximately \$1,200.00.

Mrs. C. indicated that the certificate she received in 1995 was a result of sitting for an exam, and that she prepared for the exam by purchasing a series of audio tapes and books.

Plaintiff, G. C. testified at deposition that he encouraged his wife's desire to

⁵ Mrs. C.'s employment with the Visiting Nurse Service ended in 2000.

return to school and that he paid part of the tuition but agreed that the loans which were taken to finance her tuition and other educational costs were in fact repaid by marital funds. Mr. C. further said that he economically provided for his wife by paying for lunches, clothing and other necessities needed by her while receiving her nursing degree. Mr. C. made a point of indicating that he assisted in his wife's studies by helping with homework and indeed helping to write several term papers. Mr. C. indicated that he, with the assistance of his parents, helped to take care of the children when the defendant was in class or otherwise involved with her studies. Mr. C. said that by helping to care for the children he allowed her to study every night and as a result she received a 3.7 GPA, testifying that "it takes a lot of studying to get that".

Mr. C., while not blaming his illness on his wife's studies, believed that the three years that it took for her to receive her nursing degree, placed an economic hardship on the family and a toll on his mental and physical health. Moreover, his income was limited by his inability to work almost two hours of overtime per day as he wanted to spend more time with his children while his wife was at school.

The plaintiff testified that in the summer of 1991 he had a reoccurrence of panic attacks, although he continued to work. He continued to work until 1996 when his illness intensified (blaming this exacerbation on his discovery that his wife was having an affair). As a result, in 1997, he ultimately became disabled and unable to work. Mr. C. remains disabled as of this time.

Plaintiff testified that as of 1997 he became the primary caretaker for the children as he was at home and the children remained with him after his wife left the marital residence. The plaintiff indicated that in 1990 as his wife started to return to school and

work part-time, the meals were cooked either by Mrs. C. or the plaintiff's mother. He indicated that he helped financially by purchasing school uniforms and supplies for the children. Within the abilities of his illness, he helped take his children to certain events such as basketball games and karate.

Mr. C. stated that he never took the car keys away from his wife, was totally supportive of her education, and indeed gave her the time to study every night by taking care of the children. Mr. C. said there was less money when his wife returned to school as he had to cut back on his overtime.

Mr. C. conceded that when Amanda was in the hospital with asthma that his wife stayed overnight with her.

Mr. C. stated that in 1990, when his wife returned to school, he purchased a 1981 Chevette for her at a cost of approximately \$800.00.

Each party submitted as part of their case, without objection, the forensic evaluation of the enhanced earnings generated by Mrs. C.'s professional license. On behalf of Mr. C., it was determined that baseline would be that of a payroll clerk whose earnings as of 1999, the date of the commencement of the action,⁶ would be \$37,103.00, taking into account appropriate deductions would leave net earnings of \$26,575.00. Mr. C.'s forensic evaluator further determined that the appropriate income to establish the enhanced earnings would be the combined salary of her gross wages from New York Medical Center in 1999 of \$58,429.00 and those from the Visiting Nurse Service of New York wages of \$23,000.00 which totaled \$81,429.00. Using what Mr. C.'s forensic

⁶While Mrs. C.'s forensic accountant indicated the date of 1998 was used for the baseline, such does not appear within the plaintiff's forensic report.

evaluator considered a common and customary 3% discount rate and a work expectancy of 22.6 years, left a discounted enhanced earnings between that of a payroll clerk and that of a registered nurse of \$375,749.00.

The defendant's forensic evaluator determined that income should be based on the difference between a bookkeeper's salary, which after appropriate deductions, he determined to be a baseline of \$24,586.00, and that of a registered nurse, excluding the secondary employment at the Visiting Nurse Service, for a net top line amount of \$58,429.00. After factoring in appropriate deductions, the enhanced differential between a bookkeeper and a registered nurse in 1999, was determined to be \$15,030.00. Using a discount rate of 3.4%, which Mrs. C.'s accountant indicated was the difference between a 30-year treasury bond yield in 1999 and the Consumer Price Index of 2.8% of that year, resulted in a 3.4% discount rate, and using a workforce life expectancy of 18.7 years, yielded an enhanced earnings of \$281,061.00. This amount discounted at 3.4% left a discounted enhanced earnings of \$150,460.00.

At the outset, the Court notes that it believes the earnings in 1999 should be calculated as those achieved only by the work at New York Hospital. The Court does not believe that the secondary income that Mrs. C. earned for the family by working an additional job should be factored into the enhanced earnings calculation as it was the nursing license that gave rise to her ability to be employed at New York Hospital. The second job was less a reflection of the enhanced earnings made possible by her license and more of an example of Mrs. C.'s work ethic.

While the frequency in which individuals in this economically challenged environment need resort to two jobs is not an unusual occurrence, this Court, after

extensive research, has discovered only one case which spoke directly on the issue of secondary employment being included to determine top line income and enhanced earnings differential.

In *Cadette v. Cadette*, (NYLJ, 12/12/96, page 31, col. 6, Rockland County Supreme Court), then Justice, now Associate Justice of the Appellate Division, Second Department Howard Miller held that “while it is true that *McSparron* (supra) requires that the method for evaluating a license must be based on actual past earning produced by actual practice, the earnings from the law practice which was the subject of the *McSparron* decision was from but one source. In this case, defendant has no less than five separate and distinct sources of income which required him to work in excess of eighty hours per week with forty-eight hours being devoted to Harlem and St. Mary’s Hospitals. Justice Miller went on ...that defendant was able to earn additional income working an eighty-two hour work week in 1995 and 1996 cannot, in all fairness, be used to project defendant’s enhanced income over the next twenty-four years. ...While there was testimony regarding defendant’s guaranteed private practice income, it was not clear whether defendant earns any *guaranteed* (emphasis supplied) private practice income in excess of the \$99,000.00 he testified to”. Justice Miller therefore determined that the top line earnings should be the \$99,000.00 from Harlem Hospital and the \$26,000.00 from St. Mary’s Hospital, but excluded \$51,912.00 that he earned from three other sources.

In the instant matter, while it is true that based upon her certifications as well as her employment history, the defendant is now earning an income from her employment solely at New York Hospital equivalent to what she earned from both sources of employment in 1999, perhaps what is more important in using actual income projections

is that she stopped employment with the Visiting Nurse Service in the year 2000. If we are to try to put real world certainty into an uncertain calculation of enhanced earnings, it would seem that to include the additional employment of 1999, employment that has not been utilized by the defendant for six years, over the course of her full work life expectancy would be to include calculations that are not borne out by present day reality.

To accept plaintiff's argument that Mrs. C.'s present income substantiates the use of the dual sources of income in 1999, would perhaps create a greater imbalance of enhanced earnings by allowing income some several years after the commencement of this action to be the basis for the top line, while at the same time allowing the work expectancy to be calculated from the date of the action therefore giving that plaintiff the best of all worlds. Essentially, it is this Court's belief that to include income that is the result of secondary employment which helped her family at the time, employment which ultimately ended more than six years ago, would run counterproductive to the manner in which enhanced earnings should be determined by the Court. See, *Fanelli v. Fanelli*, 740 NYS2d 823. Also, see, *Guskin v. Guskin*, 18 A.D.3d 814, (2nd Dept. 2005). (The Court erred in using hypothetical as opposed to actual earnings of license holder).

The Court further finds that the discount rate utilized by the defendant's accountant of 3.4% was explained in detail as opposed to the utilization by Mr. C.'s accountant of 3% merely as being a customary discount rate used in these matters. See, *Sonenfeld*, (supra).

With regard to the baseline earnings, plaintiff's report indicated that the income of a payroll clerk with four years experience should be \$26,575.00. However, it is

pointed out in defendant's report that this baseline earnings reflects those of a college graduate. However, since the defendant was not a college graduate at the time she worked as a payroll clerk, the proper amount, after taxes, for baseline earnings should be \$24,586.00. As to the work life expectancy, Mr. C.'s report indicated that the appropriate work life expectancy should be 22.6 years starting in 1999 which would have Mrs. C. retiring at age sixty-two. Mrs. C.'s report forensic report indicated that the work life expectancy from 1999 should be 18.7 years resulting in Mrs. C.'s retirement at age fifty-seven.

Reviewing the basis for the two reports, the Court is really left with no preponderance of the evidence as to the appropriate work life expectancy based upon the sources cited therein by the respective evaluators.

Therefore, the Court, taking a more pragmatic approach, determines that given the fact that Mrs. Collaci appears to be in good health, entered the nursing field at a relatively late stage in life, has recently purchased a new residence, and has one child in and another child about to start college, that it is reasonable to believe that she will remain active in the workforce until she is approximately sixty-two years of age. Therefore, the Court will accept a work life expectancy of 22.6 years. Accordingly, the calculation of enhanced earnings shall be based upon the following: Enhanced yearly earnings differential of \$15,030.00 discounted at a rate of 3.4% for a total of 22.6 years leaving a discounted earnings differential of \$236,027.00.⁷

⁷While the parties have agreed to child support, it is important that the income be reduced by the earnings differential of \$15,030.00 to avoid any error in calculations. See, *Murphy v. Murphy*, 6 A.D.3d 678 (2nd Dept., 2004).

The Court must still determine what percentage, if any, that the plaintiff is entitled to for his contribution to his wife's acquisition of her nursing license. See, *McSparron v. McSparron* (supra); *Chamberlain v. Chamberlain*, 24 A.D.3rd 589 (2nd Dept., 2005).

In the instant case, Mr. C. indicated that he was supportive of his wife's studies, assisted by allowing her to study while he took care of the children, assisted financially by paying for non-loan covered school items, buying her a car at the beginning of her school studies and cutting back on his overtime to spend more time with the children while his wife was either working or at school.

Mrs. Collaci, on the other hand, indicated that she was the primary caretaker up until the time she went back to school, and even while at school or working, was at all other times available to take the children to school, to pick them up at the end of the day, make their meals and continue to attend to their overall well being. Mrs. C. testified that most of the school fees were either paid for by stipends or student loans and that the loans were repaid from a joint account in which both of the parties deposited their respective salaries. She testified that when assistance was given it was by Mr. C.'s mother and that there was no real change in her husband's employment during the time that she was attending school.

The testimony indicates that Mrs. C. not only graduated but did so with a 3.7 GPA and was thereafter and upon graduation and receiving her license was able to secure employment with New York Hospital where she remains employed today. While Mr. Collaci did emphasize his help with his wife's school work, the evidence establishes that the bulk

of the school work was done by Mrs. C..

The Court therefore finds that the plaintiff's contribution to the attaining of the license involved some financial, albeit limited, assistance, allowing Mrs. C. to study while she was at home and by assisting with the financial upkeep of the house while Mr. C. was the higher income earner during the period that Mrs. C. attended college and help with the couple's two children. The Court therefore finds that Mr. C. should be awarded at 20% share for his contributions to Mrs. C.'s earning of her degree. See, *Holihan v. Holihan*, 159 A.D.2d 685 (App. Div. 2nd Dept., 1990); *Flanigen-Roat v. Roat*, 17 A.D.3d 1093 (4th Dept., 2005).

With regard to the share of the appreciation of property which was purchased for \$175,000.00 in 2002 by Mrs. C. and her paramour and was recently appraised by Mr. Michael Schlesinger in the amount of \$335,000.00, the Court finds that the property was acquired subsequent to the commencement of the action. Therefore, it should be presumptively considered non-marital in nature. See, D.R.L. §236(B)(1)©. It therefore becomes the burden of the non-titled spouse to prove that this property was acquired from marital funds. (See, *Sinha v. Sinha*, 17 A.D.3d 131 (1st Dep., 2005). However, the only testimony before the Court was that the money from the downpayment came from Mrs. C.'s boyfriend and that her present financial contribution is to help to pay the monthly mortgage and carrying costs. There is no proof that this property was acquired or is being maintained with the use of marital funds and as a result, Mr. C. has not met his burden of establishing a right to an equitable share of Mrs. C.'s fifty percent ownership of the Suffolk County property. See, *Herzog v. Herzog*, 18 A.D.3d 707 (2nd Dept., 2005).

Lastly, as to counsel fees, the Court determines that upon a review of the

respective papers ⁸ and based upon the disparity of income of the parties, (Mr. C. is now on disability and Mrs. C. earns in excess of \$80,000.00 per year from her nursing position), the fact that Mr. C. is permanently disabled and is caring for the children, and that Mrs. C. presently owns her own home, that \$7,500.00 in counsel fees is awarded to the plaintiff. See, *Gainey v. Gainey*, 303 A.D.2d 628 (2nd Dept., 2003); *Weiss v. Weiss*, 213 A.D.2d 542 (2nd Dept., 1995). Defendant is directed to pay this amount in two equal sums of \$3,750.00, the first within forty-five days of the date of this order and the second in forty-five days thereafter.

Settle judgment.

Dated: Jamaica, New York
April 27, 2006

HON. JEFFREY D. LEBOWITZ, A.J.S.C.

⁸The parties stipulated that counsel fees could be determined upon submission of papers.