At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 26th day of January, 2006

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

HUSBAND,

Plaintiff,

DECISION AND ORDER

vs.

Index No. 2004-XXXX
RJI No. 2005-XXXX-C

WIFE,

Defendant.

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matrimonial action was tried before the Court on two separate dates. The first date (October 6, 2005) addressed all issues except for valuation of the marital residence and confirmation of the existence of a settlement of a personal injury claim of the plaintiff HUSBAND. The latter issues were addressed on the second day of trial held on January 26, 2006. Post-trial submissions were received by the parties with the last one received on March 8, 2006.

At the October 6, 2005 trial date, the parties stipulated that they would have mutual divorces on the grounds of constructive abandonment, there would be no award of spousal maintenance to either party and all issues of custody, visitation and child support would be referred to Broome County Family Court.

"Equitable distribution issues are resolved by the exercise of the Court's sound discretion, guided by consideration of the statutory factors set forth in DRL §236[B][5][d], and need not result in an equal division of the marital property regardless of the length of the marriage" (*Lincourt v. Lincourt*, 4 AD3d 666 [3d Dept 2004]). In reaching a decision on the issue of equitable distribution, the Court must consider:

> (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
> (2) the duration of the marriage and the age and health of both parties;
> (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
> (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the

> date of dissolution;
> (5) any award of maintenance under subdivision six of this part;
> (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;
> (7) the liquid or non-liquid character of all marital property;
> (8) the probable future financial circumstances of each party;
> (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;
> (10) the tax consequences to each party;
> (11) the wasteful dissipation of assets by either spouse; and
> (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration

(*see* DRL §236[B][5][d]). The law is clear that the distribution of marital assets, while based on consideration of the enumerated factors, must be equitable and not merely a 50/50 split of assets (*see Snow v. Snow*, 14 AD3d 764, 766 [3d Dept 2005], *citing Sarafian v. Sarafian*, 140 AD2d 801, 804 [3d Dept 1988]). Rather, an equitable distribution award is made after due consideration of the needs and circumstances of each party (*see Lincourt*, 4 AD3d at 667).

Accordingly, after considering the factors set forth in DRL §236[B][5][d] and the needs and circumstances of both parties, the Court has reached the following decision with regard to equitable distribution in this matter.

There are at least three issues or areas on which the parties disagree and on which they submitted evidence during the two trial dates in this matter. One is the value of the marital residence currently occupied by Mr. XXXX and the XXXX' son. The second is the accounting of and credit for various assets that they assert are separate property and for which they are entitled to credit in equitable distribution. The third is the location, or perhaps, misappropriation or waste of certain assets such as a Harley Davidson motorcycle and a emerald necklace.

VALUATION OF THE MARITAL RESIDENCE

The parties were unable to agree on the current value of the marital residence. As this issue was not fully ready for testimony during the first day of trial, a second date for the trial of this issue was scheduled for January 26, 2006. This allowed the parties sufficient time to receive and exchange appraisals of the residence and schedule their respective appraisers to testify at trial.

It is undisputed that the parties purchased a residence at XXXX Road in the Town of XXXX in Broome County on XXXX, 2001 for $130,000.00. They lived there together until they separated in July of 2002. Mr. XXXX, who currently occupies the residence, produced the testimony of Matthew J. Congdon from Congdon & Company, Inc. and a written appraisal stating that the value of the property had decreased to $110,000.00. Mrs. XXXX, who does not live in the marital residence, produced the testimony of George Cade and a written appraisal stating that the value of the property had increased to $145,000.00.

Both appraisers used the market approach to value the property, which is a two story center hall colonial home located on 3.5 acres of land in a rural section of Broome County. While the area is rural, the home is located in a neighborhood with what might be referred to as upscale homes lined along XXXX Road. The parties paid $130,000.00 for the home in 2001. One appraiser sees a home that has decreased in value, while the other sees a home that has increased in value.

Turning to the Congdon appraisal, he does not identify a unique or specific circumstance that accounts for a 15% reduction in the value of the home over 5 years. Certainly, there is no general market trend to explain this, which would seem to leave only a circumstance unique to

that small neighborhood or town or a general failure to tend to the normal upkeep of the home ownership as the culprits.[1] As there is nothing in the record to indicate that there are any unique market factors in that small neighborhood or town, perhaps it is the lack of general maintenance and upkeep.

The Cade appraisal lists as comparables properties that have some significant differences with the subject property. While he does make adjustments for those differences, the level of the differences calls into question their overall applicability and probative value in valuing the subject property.

In the final analysis, there is nothing in the record to explain the claimed decrease in value of the residence. A lack of maintenance or overpayment by the XXXX at the time of purchase may be reasons but nothing in the record identifies or points to these as the reasons for the claimed decrease on value. The lack of maintenance is pointed out in the Congdon appraisal in that, for example, pealing paint is mentioned. To allow the claimed decrease in value to be based on these would in essence reward the failure to perform usual and customary maintenance on the property.[2]

There is simply nothing in the record to support a showing that the market has changed such that the house that was worth $130,000.00 when they bought it in 2001 is now worth far less than that. It could be said that the Congdon appraisal supplies a basis for ascribing a value

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[1] Another explanation might be that the XXXX paid too much for the house when they purchased it. Though no one suggested this.

[2] Mr. XXXX has had exclusive possession of the property for approximately the last three to four years.

to the property less than the purchase price. However, that appraisal does not directly contradict the notion that this could be due to the condition of the property. It appears from the photos in the appraisal that there was no effort to put the best face on the property.

On the other hand, the comparables in the Cade appraisal have significant differences from the XXXX property. They require significant adjustment or explanation of the significance of the differences to support their validity as comparables.

For these reasons there is a lack of basis on which to support a finding of any appreciable change in the value of the property. As the parties themselves no doubt felt it was worth what they paid for it in 2001, and no one has supplied a persuasive reason why that judgment on their part was erroneous,[3] the value of the marital residence is the $130,000.00 purchase price paid by the Mr. and Mrs. XXXX.

CREDITS AND ALLOCATION OF CLAIMED SEPARATE PROPERTY

The transactions in question here are not clear.[4] There were by all accounts several significant financial transactions that made funds available to one or both parties that they now dispute how and where and when, or if, they were used for or to acquire marital assets.

Mr. XXXX received a personal injury settlement. A March 14, 2001 statement from his attorneys in Virginia shows that the net proceeds to Mr. XXXX from this was $51,101.77. He

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[3] And, if anything, in general the real estate market in Broome County has seen moderately increasing prices in the last few years.

[4] Or, at least, the records were not produced at trial. Nor did the parties, apparently deem it worthwhile to ask their counsel to, or on their own, spend the time and effort to obtain and assemble and identify the banking and other documents that would clearly establish the financial transactions of the parties.

also received a lump sum settlement in connection with a workers' compensation claim. Mr. XXXX received his workers' compensation lump sum settlement in June 1998 in the amount of $80,000.00.[5] Mrs. XXXX received funds for the exercise of stock options from her work at a previous employer.[6] These funds were apparently received in 1997 as they are reflected on the parties joint tax return for 1997.[7] The statement from Mrs. XXXX's Chartway Federal Credit Union account shows a deposit of $110,388.29 into that account on September 16, 1997. There is evidence that both parties accessed retirement (IRA) funds during the course of the marriage. Mrs. XXXX supplies a 1099-R from showing a distribution to her from her IRA of $23,000.00 in 2001.[8] There is no record of this for Mr. XXXX's claim.

These funds become relevant here as both parties seek credits in equitable distribution for contributing them to martial assets or expenses or contend that they are separate property which should not be considered in making a equitable distribution of the assets and liabilities of this marriage.

It is clear that property acquired prior to a marriage is separate property (*see Burgio v. Burgio*, 278 AD2d 767, 768 [3d Dept 2000]; *Zelnik v. Zelnik*, 169 AD2d 317, 328 [1st Dept

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This is according to Defendant's exhibit B which states in a letter from a Norfolk, Virginia law firm that the payment is forthcoming. It appears that $80,000.00 is the actual amount of the payment according to Defendant's exhibit C dated May 1998. The papers indicate that a $10,000.00 attorneys' fee was paid out of this amount.

6

The evidence was that the employer was The Family Channel and the exercise of the stock options may have been mandatory rather than discretionary.

7

The tax return shows a $134,127 capital gain.

8

Defendant's Exhibit I.

1991]). Separate property is defined, in part, as "property acquired before the marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse" (Domestic Relations Law § 236 [B] [1] [d] [1]). The term marital property is broadly construed and the term "separate property" is to be narrowly construed (*see e.g. Judson v. Judson*, 255AD2d 656, 657 [1998], *citing Price v. Price*, 69 NY2d 8, 15 [1986]). The party seeking to establish that property is separate rather than marital has the burden of proof on that issue. *(LeRoy v. LeRoy*, 274 AD2d 362 [2000], *citing Seidman v. Seidman*, 226 AD2d 1011, 1012 [1996]).

The parties contend the separate property they acquired or received during the marriage is, more or less, still separate property. Thus they assert they are entitled to a credit for its use during the marriage or (stated another way) its contribution toward the marriage expenses or assets of the marriage.

It does appear that the parties had separate assets that would in the normal course be deemed separate property in a divorce. For such property to remain separate it must not be commingled with joint property or assets. (*Cassara v. Cassara*, 1 AD3d 817, 819 [3rd Dept 2003]). There should be a clear trail or a paper trail showing how the claimed separate property was used. (*Id.*) If the claimed separate property was used for regular customary or even specific marital expenses, then it loses its separate status as separate property and becomes marital property. In other words, a contribution of separate property to the marital expenses transforms that separate property into joint property similar to a paycheck that goes into the parties joint account. Only if the party claiming the property is separate can show that it was directly and

specifically used to acquire a particular asset will the property retain its separate character and status.

The record here is that the parties both claim entitlement to credits for contribution of separate property but following the trail of those contributions is difficult at best. Simply stated it appears that the parties did actually have separate property that was spent during the marriage. In most instances neither supplied evidence establishing a trail from which those funds could be identified.

Marital home down payment.

It is clear here that the parties paid a significant down payment on the current marital residence. They purchased the home on XXXX, 2001. According to Mr. XXXX this came from "his retirement, the settlement and a small amount from her IRAs." He could not specify the amount that came from any of these sources. His attorney stated that the settlement monies[9] received two months before the purchase of this property were put in the Command Account and were utilized to purchase the property.

Mrs. XXXX testified that the down payment for this property came from her IRA and $40,000.00 from the Command account. Mrs. XXXX also testified that no money was taken out of Mr. XXXX's IRA for this purpose and at the time there was about $9,000.00 in that account.

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[9] This settlement must refer to the civil action settlement received in March 2001 rather than the workers comp lump sum settlement received in 1998

The funds from Mr. XXXX's workers compensation settlement and Mrs. XXXX's stock option sale were received years before the purchase of the XXXX Road property. Mr. XXXX's civil action settlement and Mrs. XXXX's IRA withdrawal were just prior to it.

It is clear that they made a substantial down payment on the purchase. The precise amount of this was not established by documentary evidence from either party. But it is essentially undisputed that the amount was between $60,000.00 and $65,000.00. No one produced bank or other records showing deposits and withdrawals from accounts for the home down payment. Thus while the record does establish that it is possible that the funds as suggested were used for the down payment, it is equally possible that the funds were comingled in a joint account and numerous deposits and withdrawals were made for such an account.

Simply stated, the parties have not met their burden of demonstrating the trail of the separate funds to the down payment on the house or the lack of commingling with other funds. In these circumstances it would be speculation to presume that such a trail.

For the above reasons, the claim that separate funds or the amount of separate funds has not been established by either party. Thus the funding of the down payment is deemed joint property.

The balance due on the mortgage was $64,293.58 at the parties separation and $62,935.30 at commencement of this action.

As the value of the real property as above is the purchase price, the parties' equity in the marital residence is that price less the mortgage balance on the date of commencement. The equity in the marital residence is $67,064.70.

Mr. XXXX is awarded possession of the marital residence as he currently resides there with the parties' son. Mrs. XXXX's share of the equity in the marital residence is $33,532.35 which is one half of that equity.

Wachovia Command Account

Although the Wachovia Command account was purportedly funded with separate property from each party, the record does not establish any separate funding source for this account. It appears that any separate property either party may have contributed to this account was comingled with both parties drawing off this account during the marriage. Neither party has shown their separate property directly and specifically funded this account. As a result, each of them is entitled to 50% of the joint account balance currently held in their names. As of October 5, 2005 the balance in this account was $27,910.55. The remaining funds held by Wachovia are in an account established for the benefit of the parties' son, A and not for distribution in this action.

THE LOST OR NO LONGER AVAILABLE ASSETS

There are two assets which were lost or no longer available. No one admits knowing where the emerald necklace is. Mrs. XXXX contends that it was at the home the day she agreed to let Mr. XXXX into the home for three hours (following a Family Court appearance) while he was restricted by an Order of Protection in favor of Mrs. XXXX. She testified that the necklace was on a table in the home and when she returned it was gone and only Mr. XXXX or persons with him had access to the house in the interim. Mr. XXXX makes no claim for an allowance or credit for the necklace.

Mr. XXXX contends that the Harley Davidson motorcycle he had during the marriage was "totaled"[10] and was disposed of in Syracuse, NY. He claims that this incident happened while he was riding the motorcycle in the Spring. He testified that he hit sand or gravel in the roadway causing him to lose control[11] and the motorcycle to fall.[12] Not a single piece of paper was produced to verify this claim.[13]

While this may all be true,[14] it would have been prudent to offer some additional or background information to confirm this story.

The motorcycle was, according to Mrs. XXXX, purchased in October 1997 with a $16,000.00 withdrawal from the Chartway account.[15] Mr. XXXX's Statement of Net Worth lists a 1996 date of acquisition. Mr. XXXX testified that he purchased it with his disability funds. Mr. XXXX received his lump sum workers compensation payment in June 1998. Thus it was

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With no significant injury to him or his rider thanks to their "leathers." Apparently causing or contributing to the motorcycle being totaled was the fact that the frame was bent.

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Having ridden a motorcycle for many years a few decades ago, the Court is aware that this is a common risk of riding a motorcycle.

12

No one sought to bolster this story with proof of documentable injuries. Perhaps miraculously or luckily he and his rider simply got up and walked away from this accident even though the force of the accident was sufficient to bend the frame.

13

For example, an estimate to repair the vehicle.

14

But suspect.

15

See Defendant's Exhibit K. Exhibit K is actually the second page of a bank statement the first page of which is labeled Exhibit J. There was an additional $1,000.00 withdrawal that may have also been for this purpose. The evidence on this is not clear and thus no award is made for that sum.

either some other disability funds or the motorcycle was not purchased with the $16,000.00 withdrawal from the Chartway account in October 1997.

So what really happened? To say the least, Mr. XXXX has not persuasively explained the acquisition of and loss of the motorcycle. No matter which way it is viewed there are inconsistencies–not the least of which is how he purchased it in 1996 with funds he did not receive until 1998.

The record here does persuasively show that the motorcycle was purchased with funds from Mrs. XXXX's Chartway account which were her separate funds.[16] Thus she is entitled to a credit for those funds. Noteworthy here is the fact that Mr. XXXX does not claim that the funds were a gift. Rather he contends that the funds were his own funds and the asset (now apparently damaged) was his alone. The proof simply does not support that contention. Therefore, Mrs. XXXX is entitled to a credit for the $16,000.00 she supplied to purchase the motorcycle.

As insufficient proof was submitted as to the existence and/or valuation of the emerald necklace, no provision is made for the distribution of it or its value (*Fabricius v. Fabricius*, 199 AD2d 695, 697 [3d Dept 1993]).

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[16] This was the year she received the payment for her stock options in September 1997, one month before the $16,000.00 withdrawal in October.

THE VIRGINIA DEVELOPMENT PROPERTY

The Virginia XXXX Road property was purchased jointly shortly before their marriage in May of 1994 according to the testimony of both the parties.[17] The house was sold in 2001, and the remaining land was developed into two lots and sold in 2004. Mr. and Mrs. XXXX both testified as to their use of separate property in the acquisition and development of the property. Mr. XXXX alleges that he used money from the sale of a home he owned before marriage for development, and Mrs. XXXX testified that they borrowed against her stock in order to purchase the property. Again, neither party established these amounts via documentary evidence. Mr. XXXX alleges that he did a majority of the work in developing the land after their separation and used $10,000 of his personal injury settlement for the development. Mrs. XXXX testified that the development began in 1998 and most of the development occurred prior to their separation. As the court has no clear evidence as to separate funds used in the development or purchase of the Virginia XXXX Road property, and only contradictory testimony, the net proceeds of the sale of the land will be divided equally. Each party is entitled to one half of the current balance of the account held in escrow.

REMAINING ITEMS

Pensions

According to the testimony, Mrs. XXXX has certain pension rights from at least two former employers and one current employer. While living in Virginia she was employed by both the XXXX and XXXX University and is currently employed by XXXX University. Mr. XXXX

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[17] Mr. XXXX testified the property was purchased in 1993, a year before they were married, while Mrs. XXXX testified the property purchased in January of 1994.

is currently receiving his pension benefit in the form of disability payments. If all of the current pension benefit payable to Mr. XXXX is in the form of disability payments, then it is separate property not subject to equitable distribution (*see Pulaski v. Pulaski*, 22 AD3d 820, 821 [2d Dept 2005]). Any portion of it representing deferred compensation referable to the period of the marriage is marital property subject to equitable distribution. *(Id.)*

In their post-trial submissions, the parties have substantially different views regarding the pensions. Mr. XXXX asserts an interest in Mrs. XXXX's pensions under the *Majauskas* formula. He contends that he has no pension. Mrs. XXXX asserts that both parties have pensions and should retain a full interest in their own respective pensions. Counsel for each party shall submit the appropriate QDROs for division of the pensions consistent with the principles stated in *Majuaskas v. Majuaskas,* 61 NY2d 481 [1984].

Life Insurance

Mr. XXXX has a life insurance policy with a cash surrender value of $2,750. As it is undisputed that this is marital property, Mrs. XXXX is entitled to 50% of its value. Mrs. XXXX has a life insurance policy with a cash surrender value of $5,500. As it is undisputed that this is marital property, Mr. XXXX is entitled to 50% of its value.

Vehicles

Mr. and Mrs. XXXX each have their own vehicle. Mrs. XXXX currently has the 1999 Dodge Durango automobile. According to both parties, the value of this vehicle is approximately $12,000. According to Mr. XXXX's testimony, he currently owns a Ford truck that was paid for by trade in of a vehicle worth $11,000.00 and an additional $5,000 in cash. It is unclear what the value of this vehicle is at the present time and neither party submitted any

evidence substantiating the value of either vehicle. Nor has either party proved that either vehicle was paid for with separate property. Consequently, each party shall retain their current vehicle.

Timber

Mr. XXXX testified that he received $2,259.00 in proceeds from timber that was removed from the parties' property on XXXX Road. Mr. XXXX also testified that he did not share any of the proceeds with Mrs. XXXX. Consequently, Mrs. XXXX is entitled to a credit of one half the proceeds of the sale of the timber or $1,129.50.

Credit Card Debt

Mrs. XXXX testified that there is $18,000 of marital credit card debt. She testified that there is a balance of $11,000 on a Capital One Account and another $7,000 she has paid on this account since their separation. Mr. XXXX testified regarding a Chase account balance of approximately $5,000. There was no documentary proof as to the payment and balance of these accounts. As neither party has established that either of these accounts are nonmarital, the balances of these accounts are presumed marital. Each party is responsible for one half of the marital credit card debt.

Personal Property

Although there was some testimony regarding personal property, neither party addressed the division of personal property in their post-trial submissions. As a result, the court makes no provision for the division of personal property. If this an oversight of counsel and personal property is to be divided, counsel should contact the court to arrange for a conference on this issue.

CONCLUSION

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: July 3, 2006
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice