

**Husband v Wife**

2006 NY Slip Op 30183(U)

September 21, 2006

Supreme Court, Broome County

Docket Number: 0002150/2005

Judge: Jeffrey A. Tait

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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 23rd day of August, 2006.

PRESENT: HONORABLE JEFFREY A. TAIT  
JUSTICE PRESIDING

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

WIFE,

Plaintiff,

**DECISION AND ORDER**

vs.

Index No. 2005-XXXX  
RJI No. 2006-XXXX-C

HUSBAND,

Defendant.

APPEARANCES:

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

This matrimonial matter was tried before the Court on August 23, 2006. Before the commencement of the trial, the parties and their counsel negotiated and agreed to a stipulation resolving some of the issues. However, there were two issues that the parties could not resolve by stipulation. Those issues were equitable distribution of Eighteen Thousand Dollars (\$18,000.00) of cash that Mr. XXXX asserts was in the marital residence when he left, and a credit Mr. XXXX claimed he was entitled to for separate property contributed to the purchase of the marital residence in 1994. Mrs. XXXX denies the existence of the cash in the marital residence and denies that Mr. XXXX contributed separate funds to the initial cost of purchasing the marital residence.

The testimony and evidence at trial consisted of the testimony of the parties and exhibits offered and received in evidence. The exhibits consisted of certain documents from the purchase of the marital residence. They were the purchase and sale contract (Defendant's Exhibit A), a statement of mortgage closing costs (Defendant's Exhibit B). In addition, a chart of assets (Plaintiff's Exhibit 1) to show the basis for the stipulation settling the issues that were resolved prior to trial, and a May 1, 2006 letter from Mr. Meagher to Ms. Fitzgerald (Defendant's Exhibit C), were also received into evidence. The May 1, 2006 letter was offered to show that the issue of the Eighteen Thousand Dollars (\$18,000.00) was raised by Mr. XXXX at least as early as the date of the letter.

The proof at trial established that the parties managed their finances well throughout the marriage. Unlike is so often the case in a matrimonial action, they did not over spend their

income, nor did they incur debt that they lacked the means to repay. Rather, they managed to accumulate assets and funds while earning a steady but moderate income.<sup>1</sup> For that, they are commended. The statements of net worth and evidence at trial indicate a financially responsible couple.

The evidence also established that the parties' practice throughout the marriage was to maintain separate bank accounts and finances. To the extent they pooled their funds, they did so in a joint account into which they each contributed funds on a monthly basis. According to Mrs. XXXX, she and Mr. XXXX each contributed \$400.00 to \$450.00 each month to this joint account. Mrs XXXX would then pay the mortgage, and the utility bills, including telephone and cable TV bills. According to Mrs. XXXX, the mortgage payment, including tax amounts, was \$469.00 per month. She noted however, that she regularly paid additional money above the required mortgage payment. She stated that she often paid \$500.00 to \$600.00 per month toward the mortgage. She testified that groceries were purchased with funds from both of them, although not out of this joint account.<sup>2</sup>

#### **THE EIGHTEEN THOUSAND DOLLARS IN CASH**

Mr. XXXX contends that the parties had Eighteen Thousand Dollars (\$18,000.00) in cash at the marital residence comprised of actual bills in denominations of twenties, fifties and

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The parties joint tax returns show income of \$52,467.00 in 2002, \$58,495.00 in 2003 and \$64,227.00 in 2004.

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She stated that they regularly did grocery shopping together and each contributed money for those purchases.

hundreds.<sup>3</sup> According to him, these bills were not accumulated in any particular event or series of events. Rather, they were accumulated out of the left over funds in the joint account from the money each of them contributed to that account.

Mr. XXXX cited at least two instances, using specific dates, where he contends Mrs. XXXX acknowledged to him the existence of the cash. Although there was testimony that they both had part-time work which generated extra income, Mr. XXXX denies that the cash was funded by unclaimed cash income received from part-time work.

Mrs. XXXX denies the existence of this cash. She simply says that it did not exist.

The claimed existence of the cash raises a variety of questions. While the parties each had part-time employment that might have generated cash payments which may not have been reported on any income tax return, neither claims this was their practice.<sup>4</sup> The parties had a joint bank account and each had separate individual accounts. They paid the bills on a regular basis and each made regular contributions toward monthly expenses. This raises the question of why the parties would have this large amount of cash on hand, and this was not explained. Perhaps, it was just the way they did things.

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To perhaps place some context on this, Eighteen Thousand Dollars in cash in an equal number of bills of each denomination would be 315 bills comprised of 105 one hundred dollar bills, 105 fifty dollar bills and 105 twenty dollar bills or if the total value of each denomination was equal, 480 bills comprised of 60 one hundred dollar bills, 120 fifty dollar bills and 300 twenty dollar bills.

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While one might think parties to a matrimonial action would never make such a claim (as such a claim is an admission of tax fraud), such claims are sometimes made where one of both spouses operate a cash business or earns cash.

Accordingly, there is enough here that does not seem to fit with the way the parties operated. Against this backdrop, it simply is not sufficiently clear that the cash existed, or if one presumes some cash existed, what the amount of it was.

For the foregoing reason, no award is made regarding cash claimed to be in the possession of Mrs. XXXX.

#### CONTRIBUTION OF SEPARATE PROPERTY TO THE MARITAL RESIDENCE

Mr. XXXX testified that the purchase of the marital residence in 1994 was accomplished through the contribution of Twelve Thousand Dollars (\$12,000.00) of his separate property toward the closing costs and down payment. He testified that the source of these funds was a wrongful death claim through his mother's estate. The amount of funds he received from this action was Twenty Four Thousand Dollars (\$24,000.00). Mr. XXXX did not produce any bank records or other documents to support this claim.

Mrs. XXXX countered that the parties both contributed funds to the costs of acquiring the home. She noted in this regard that she and Mr. XXXX resided rent free with her mother from the time they were married in May 1991, until they acquired the house in February 1994. Thus, she asserted, they had ample opportunity to save money during this time to pay for the down payment and closing costs.

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 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 [3d Dept 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 [1st Dept 2000], *citing Seidman v. Seidman*, 226 AD2d 1011, 1012 [3d Dept 1996]).

It appears 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 [3d 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.

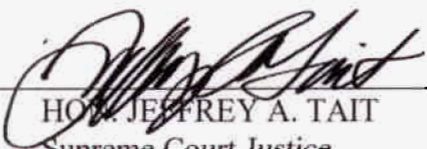
Courts have held that the failure to establish a paper trail is not determinative or fatal to a claim that the asset, or in this case, contribution to an asset, is separate property (*Chiotti v. Chiotti*, 12 AD3d 995, 996 [3d Dept 2004]; *Zanger v. Zanger*, 1 AD3d 865, 867 [3d Dept 2003]). In these cases, however, the Court noted that the other spouse was unable to offer an alternative explanation regarding the origin or source of the funds that were claimed to be separate property.

In this case, Mrs. XXXX not only contests the claim, but offers a plausible explanation consistent with the parties conduct throughout the marriage. She asserts that she and Mr. XXXX lived with her mother and they were able to save the money in question. Based on the parties finances to date, this is consistent with what they did throughout the marriage. The fact that there is no showing of the specific origin of the claimed separate funds or any documentary evidence indicating the amount of funds contributed to the home purchase is fatal to Mr. XXXX's claim that his separate property went to purchase of the house.

For that reason, no award is made for any separate property contributed to the purchase or acquisition or improvement of the marital residence.

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: September 21, 2006  
Binghamton, New York

  
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HON. JEFFREY A. TAIT  
Supreme Court Justice