Wife v Husband
2007 NY Slip Op 31790(U)
January 29, 2007
Supreme Court, Broome County
Docket Number: 0002151/2005
Judge: Jeffrey A. Tait

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 17th day of May 2006

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

WIFE,

Plaintiff,

DECISION AND ORDER

vs.

HUSBAND,

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

Defendant.

APPEARANCES:

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

This matrimonial action was tried on May 17, 2006 and October 31, 2006[1]. The plaintiff Ms. XXXX, and the defendant, Mr. XXXX, both testified in support of their claims.

This is by all accounts a short-term marriage. The parties were married on XXXX, 2003, in XXXX, Missouri.[2] They separated sometime in July or August of 2005. Mr. XXXX has XXXX children from a prior marriage and for whom he pays child support. Prior to her marriage to Mr. XXXX, Ms. XXXX lived and worked in California. After meeting Mr. XXXX, first over the internet and then in person, she left California and moved to Missouri.[3]

Ms. XXXX is a native of XXXX and by profession is a teacher of Russian language and literature. It was this profession that led them to move to Broome County when Ms. XXXX was hired as a Russian language teacher by the XXXX Central School District. She also taught nights at XXXX College. After a year, the job at XXXX Central School ended.[4]

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[1] It was disclosed at the October 31, 2006 trial date that Ms. XXXX had signed a contract to sell the marital residence. The parties stipulated that the net proceeds would be held in escrow by her attorney subject to distribution as provided in this Decision and Order. In addition, Mr. XXXX's attorney was given the opportunity to address what he viewed as the proper distribution of the net proceeds and to object to expenses deducted from the sale price to determine net proceeds. At that time, it was expected that a closing would occur by December 1, 2006.

[2] It was the third marriage for both.

[3] It is not entirely clear whether she actually left employment in California to move to Missouri or how extensive her ties to California were or how solid her employment there was. She was employed less than a year at her current job when she left California.

[4] Apparently the school district decided to no longer offer Russian language classes.

Mr. XXXX left Missouri[5], where he lived for a number of years and where his children apparently continue to live, to accompany Ms. XXXX to Broome County. It appears that both were equally willing to make this move. He testified that he sought out employment in the Broome County area, holding several jobs including initially working for a pizza shop and later in June of 2004, obtaining employment as an installer of XXXX equipment. He was injured in that employment when he fell from a ladder and was out of work for approximately six months. During this period, Ms. XXXX testified that she cared for him extensively. Mr. XXXX now works for XXXX and a frame shop.

The core of the disputes between the parties seems to center on the employment or business the parties engaged in following the loss of Ms. XXXX's job with the XXXX Central School District, and the relative contributions of the parties to the marital residence which is titled solely in Ms. XXXX's name. The employment issue and the availability of assets (a computer and van) to conduct that business are at the heart of Ms. XXXX's claim for maintenance. She asserts that Mr. XXXX's taking of these assets prevented her from continuing in that business, and therefore forfeited her ability to earn an income from it.[6]

"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"

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[5] He owned a home in Missouri which was later sold. The use of the proceeds of that sale is a significant factor in the present issues between the parties.

[6] And also causing her to lose the customer base she had built up.

(*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.

The Marital Residence

The marital residence issue focuses on Mr. XXXX's entitlement to recoup his investment in this asset, as well as the loan/gift from his mother toward the down payment. The testimony is clear that the parties made a $50,000.00 down payment on the marital residence which was titled to Ms. XXXX. There is little dispute about the source of the money for that down payment. Ms. XXXX contributed $7,000.00 from proceeds of the sale of real estate she owned in Bulgaria. Mr. XXXX contributed $13,000.00 from the liquidation of his IRA.[7] Mr. XXXX's mother supplied the remaining $30,000.00 of down payment funds. It is disputed whether the funds from Mr. XXXX's mother were a loan to Ms. XXXX and Mr. XXXX or a gift to Ms. XXXX. There is evidence that at one point it was a loan and at another it was a gift.

At the May 2006 trial date, the parties disagreed regarding the admissibility of the so-called gift letter from Mr. XXXX's mother. Ms. XXXX asserted that it was admissible and Mr. XXXX asserted that it was not. At that time, it was disclosed that a separate action had been or was about to be commenced in New York by Mr. XXXX's mother to collect on the note letter dated October 13, 2003. The note letter is in evidence as Defendant's Exhibit A. As the gift letter has only one signature, Mrs. XXXX's, and neither she nor a representative of Vision Credit Union was present to testify regarding it, the trial was adjourned with leave for either party to produce additional testimony in this regard.[8]

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[7] At one point he testified that he contributed $20,000.00 from his IRA toward the down payment.

[8] It was also contemplated that the outcome of the recently commenced or anticipated action by Mrs. XXXX to collect on the letter note might provide some support for one of the parties' positions.

On October 31, 2006, Ms. XXXX produced a representative[9] of Visions to testify that the gift letter was a document produced and kept in the ordinary business of Visions. After her testimony, the gift letter was received in evidence as plaintiff's Exhibit 1. In addition, judicial notice was taken of the decision in the action commenced by Mrs. XXXX (Mr. XXXX's mother). The decision by Hon. Walter J. Relihan, JSC denied a motion by Mrs. XXXX and dismissed the action against Ms. XXXX.[10] This decision determines that Ms. XXXX has no liability to Mrs. XXXX on the letter note. Ms. XXXX asserts that this is res judicata in this action.

What really happened here? It is hard to tell. It is clear that after Ms. XXXX and Mr. XXXX signed the letter note in favor of Mrs. XXXX for the sum of $30,000.00, Mrs. XXXX then signed a gift letter. This gift letter was a form provided by Visions. Was this all a sham – or stated less pejoratively – signed with a wink and a nod subject to a side understanding between Mrs. XXXX, Mr. XXXX and Ms. XXXX that, as between them, this so called gift was still really a loan that had to be repaid? Or was it initially a loan that the parties actually converted to a gift when financing required it?

Neither party produced Mrs. XXXX to testify.

The gift letter contains a heading in bold capital letters stating "**GIFT LETTER**." The letter provides that the $30,000.00 gift is applied to the purchase price of the home and Mrs.

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9 Kathleen Smith

10 Mr. XXXX's counsel objected to this noting that the decision itself does not indicate internally what its impact is. While that is correct, the impact of the decision is readily ascertainable from an examination of the documents that were filed by the parties to the action and from which the decision was made.

XXXX certifies that "no repayment [is] expected or implied on this gift, in the form of cash or future services."

Taking the gift letter literally, there can be no doubt that the $30,000.00 was a gift between Mrs. XXXX and Ms. XXXX.[11] There is no reason not to take the letter for what it is–a declaration that the $30,000.00 is a gift. There is simply no reliable evidence that the $30,000.00 was other than a gift.

However, it does seem clear that the $30,000.00 was originally not intended as a gift. When financing for the home required the gift letter, Mrs. XXXX no doubt had some choices. She could have refused to sign the gift letter which may have resulted in the home purchase not occurring. Another alternative might have been to place title to the home jointly in Mrs. XXXX's and Ms. XXXX's name. This would have made her liable on the mortgage as a co-mortgagee.

Having chosen one option (gifting the $30,000.00), consequences flow from that. Here, those consequences are that the funds are what the parties (at least in writing) said they are–a gift from Mrs. XXXX to Ms. XXXX.

The parties' contributions to the home from their separate funds, and the fact that this is by any reasonable measure a short term marriage, warrants return to the parties of their contributions to its purchase.

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[11] This would not necessarily affect any obligation or understanding between Mr. XXXX and his mother regarding his liability.

At the October 31, 2006 trial, it was disclosed that a contract of sale was pending for the home. It was agreed on the record that the net proceeds of the sale would be placed in escrow with Ms. XXXX's counsel subject to disbursement only upon order of this Court.

Therefore, out of the proceeds of the sale of the marital residence, Mr. XXXX shall receive the $13,000.00 he contributed to the $50,000.00 down payment. Ms. XXXX shall receive the $7,000.00 she contributed to the down payment. She shall also receive the $30,000.00 that was gifted to her by Mrs. XXXX. Any remaining proceeds shall be divided equally between Ms. XXXX and Mr. XXXX. If the net proceeds were less than $50,000.00 the parties' shares shall be adjusted (reduced) pro rata.

The Business, Computer and Van

a) The Business

One of the ventures the parties entered into was a business selling books. It was called "XXXX." It is not clear if this venture was a franchise or some other type of arrangement. Ms. XXXX seeks an award by reason of her claim that Mr. XXXX interfered with this business, and thereby prevented her from generating income after her teaching position at XXXX Central High School ended. The testimony established that it was originally contemplated that Mr. XXXX would devote most of his time to the business. The parties later determined, according to Ms. XXXX, that she would devote her time primarily if not exclusively to the "XXXX" venture.

The business was in its initial stages. There was some testimony that the parties were involved in it prior to March 2005. At that point it may be that Mr. XXXX was devoting time to it before he obtained other employment. After that, Ms. XXXX signed a contract with XXXX (Exhibit 2) in April 2005. She testified that she traveled to Iowa for training regarding the

business. She apparently worked at it from that point until she left for XXXX in the summer of 2005. There is no proof from either party that it had made any significant profit.[12] Mr. XXXX testified that it generated $1,500.00 in income in 2005.

The essence of the claim by Ms. XXXX is that Mr. XXXX took the van and the computer that were used to operate the business, and then refused to return them to her. She could not operate the business and lost what was at that point her only source of anticipated income.

Another noteworthy fact here is that this occurred when Ms. XXXX left for XXXX for a month to help a friend settle an estate and real estate issue. During this time no work was going to be performed by Ms. XXXX.

The business was by all accounts in its infancy. There is no record that it made any significant or regular profit. The contract had an initial term of three months, automatically renewable for six month terms thereafter unless terminated by either party.

There is simply no proof that the business would have been successful or in any way have generated a profit. There is no evidence of any actual sales that generated revenue. It was, according to the contract, a commission business where Ms. XXXX received a percentage of the items she sold.

Under these circumstances there is no basis upon which to make any award for this business or the consequences of being unable to continue it. If made, any such award would be

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Ms. XXXX testified that it was likely that 60% of this venture's profit was generated in the months of September through August.

based on mere speculation. For the foregoing reasons, no award is made for the business or any consequence of being unable to continue it.

Ms. XXXX did testify that there is a $600.00 remaining liability from the business. This liability stems from a shortage when she returned the inventory. As the parties both played a role in seeking out and entering into this business opportunity, to the extent this was an outstanding liability as of the date of commencement of the divorce, each of them shall be liable and responsible for one half of it.

b) The Van, Computer and Camera

This leaves the division of the assets and liabilities of the marriage. The only assets identified are the van, the computer, and the camera. Computers have become essentially commodities rather than capital assets. It is undisputed that both the computer and the van are marital property.

At trial, Mr. XXXX stated that he did not want the van. He also stated that Ms. XXXX could have the rear seats for the van. Ms. XXXX is therefore awarded the van.

Mr. XXXX asked that a camera he owned be returned to him. It appears he has some experience with photography. His testimony is that he has used the camera in business in the past. Mr. XXXX is awarded the camera.

The testimony is that both parties had other computers. The computer in dispute is one they purchased through E-Bay for $500.00[13]. Ms. XXXX testified that Mr. XXXX purchased it with his credit card. As both parties maintained separate finances and it is undisputed that Mr.

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[13] It is quite likely that the computer has little or no value at this point as these items depreciate quite rapidly and are generally no longer treated as capital assets.

XXXX purchased the computer with his credit card, Mr. XXXX is awarded the computer that was used in the business.

Maintenance

Ms. XXXX seeks an award of maintenance. As stated earlier this is by all measures a short-term marriage. While she did leave her residence in California to meet and marry Mr. XXXX, it is their journey to Broome County that occurred while they were married. The move to Broome County was initiated by Ms. XXXX as a result of her obtaining employment here. It is difficult to see how this trip resulted in a sacrifice of an opportunity or otherwise. There is little evidence of what her employment history entailed prior to the move here.[14]

Simply stated, both Ms. XXXX and Mr. XXXX moved to Broome County with no significant ties or prospects of employment other than Ms. XXXX's initial employment at XXXX Central High School. Under these circumstances, it is difficult to see how an award of maintenance can be warranted.

The responsibility of the Court in determining if maintenance is appropriate is to " 'consider the payee spouse's reasonable needs and the predivorce standard of living in the context of the other enumerated statutory factors, and then, in [its] discretion, fashion a fair and equitable maintenance award accordingly' " *(Rosenkranse v. Rosenkranse*, 290 AD2d 685, 687 [3d Dept 2002], quoting *Hartog, v. Hartog*, 85 NY2d 36, 52 [1995]; *see also Zanger v. Zanger*, 1 AD3d 865, 867 [3d Dept 2003]). The applicable statutory standard is reasonably specific. The court should consider "the standard of living of the parties established during the marriage,

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[14] For example, it is not known how reliable or long term her employment had been up to that point.

whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties" (*see* Domestic Relations Law §236(B)(6)). Factors enumerated in that section as relevant here are: income and property of the parties, duration of the marriage, health and age of the parties, ability of the party seeking maintenance to become self-supporting, reduced or lost earning capacity by reason of the marriage and lost opportunities, etc., during the marriage, children in the home, contributions of one spouse to the career and earnings of the other and wasteful dissipation of assets (*see id.*).

Here, the duration of the marriage is short, and the parties had established whatever careers they would have long before the marriage. There is no evidence that either gave up opportunities for education, career, or earning capacity during the marriage. They were each self supporting prior to the marriage and nothing during the marriage took that away or impeded it. Neither significantly contributed to the others on going ability to earn income or have a career or profession.

If the basis for the claim for maintenance is that Ms. XXXX is now depressed or suffering from depression which began during the marriage, the evidence to support this is not clear. She testified that she suffers from depression. However, this could be due to the breakup of her third marriage while living in an area of the United States with which she had no ties prior to the marriage. Further, it is also not clear that this condition prevents her from gainful employment.

Therefore, no award of spousal maintenance is made in this matter.

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: January 29, 2007
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice