

LAW AND THE FAMILY

"Defining Marital Property"

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IN *McMahon v. McMahon* [FN1] the First Department affirmed an Order of the Supreme Court which, inter alia, denied defendant-husband's motion to vacate the plaintiff-wife's notice of discontinuance of the action.

The wife commenced an action for divorce by service on the husband of a summons, but no complaint, on April 1, 1998. Although the husband acknowledged service of the summons, and served a Notice of Appearance directing that a copy of all papers be served on his attorneys, he never demanded a complaint, nor did he serve an answer, intending to negotiate the financial aspects of the divorce prior to the service of the pleadings and their allegations of fault.

On May 7, 1999, Goldman Sachs, the husband's employer, made an Initial Public Offering (IPO) to take the firm from a private partnership to public ownership. The husband's shares of stock and his stock options appreciated considerably, apparently to the amount of some \$30 million. On Oct. 29, 1999, the wife served a notice of discontinuance of the action.

The Appellate Division held that the wife had a right to discontinue the action pursuant to CPLR 3217 (a), at any time before a responsive pleading was served or within 20 days after service of the pleading asserting the claim, notwithstanding the substantial discovery and the scheduling of trial dates, and thus, as a practical matter, retain a marital interest in the benefits accruing to the husband from the IPO. [FN2]

Marital Property Defined

Domestic Relations Law 236[B][1][c] defines "marital property" as:

All property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

CPLR 304 provides that matrimonial actions are commenced by filing of a summons. As McMahon demonstrates questions arise with regard to property acquired after the commencement of an action for divorce or separation, where the separation is granted or the divorce is denied or the action is discontinued, and later a new action is commenced.

In *Forcucci v. Forcucci*, [FN3] the major issue was the status of a "Nut Shoppe" acquired by the wife during the marriage which had increased in value during that time. To support her claim that the "Nut Shoppe" was her separate property, and not marital property, the wife pointed to her 1971 legal separation decree, saying that it sub silentio resolved the issue and made the "Nut Shoppe" her separate property. The Appellate Division rejected her argument, holding that the prior separation judgment was not altered or resolved by the intermittent reconciliation and cohabitation of the parties. In *Petre v. Petre*, [FN4] the wife had obtained a judicial separation and subsequently she brought an action for a conversion divorce. The court held that a "matrimonial action," the commencement of which stops the accumulation of marital property, does not include a separation action and property accumulated following a separation judgment is to be considered as marital property for "divorce distribution purposes" inasmuch as the statute defining "matrimonial actions" excludes separation actions.

In *Anglin v. Anglin*, [FN5] the plaintiff commenced a separation action against defendant in 1982, which was not disposed of until January 1988 when the parties stipulated to the entry of a judgment of separation. Twenty months after entry of the judgment, the plaintiff brought an action for divorce pursuant to DRL 170(5). The Third Department affirmed an order of Supreme Court ruling that all property acquired by either party up to the commencement of the divorce action was marital property. It held that the commencement of plaintiffs' prior separation action was not "a matrimonial action" for purposes of the definition of marital property under DRL 236[B][1][c].

The court rejected defendants' argument that DRL 236[B][two] entitled "Matrimonial Actions" governs for purposes of DRL 236[B][1][c] because that statute includes actions for a separation, actions to declare the nullity of a foreign divorce and to declare the validity of a marriage as "matrimonial actions" and they are actions in which the marriage is continued, not terminated. It found that it would be totally inconsistent with

the letter and spirit of the equitable distribution law to make the commencement of such actions an event which terminates further accruals of marital property for equitable distribution purposes in some future divorce action.

It pointed out that DRL 236 [B] [5] which provides for equitable distribution, expressly applies only in actions whose objective is either the formal termination of the marriage or the distribution of marital property following a foreign divorce. A separation action is not one of the listed actions in which equitable distribution is available. It concluded that the commencement of a separation action may be considered by the court, among other factors, in actually making an equitable division of subsequently acquired property of either spouse.

The Court of Appeals affirmed. [FN6] It held that a separation action does not, ipso facto, terminate the marital economic partnership and, therefore, does not preclude the subsequent accrual of marital property. It stated that for the purpose of defining the termination point for the further accrual of marital property, the term "matrimonial action," must instead acquire its meaning in relation to the overall legislative intent of the Domestic Relations Law. It held that the matrimonial economic partnership should be considered dissolved when a matrimonial action is "commenced" in which equitable distribution is available. The Court made it clear that the date of commencement of the action that dissolves the marriage is the only cutoff date for the acquisition of marital property.

Commencement 'Cut-Off' Date

In *Match v. Match*, [FN7] the First Department adopted the reasoning of *Anglin* when it held that the term "commencement of a matrimonial action" for the purpose of establishing a "cut-off" date for the acquisition and distribution of marital property meant the date of the commencement of the parties' action for divorce (in which a divorce was granted) rather than the earlier date that the wife commenced her separation action. In 1983, the husband commenced an action for divorce which was withdrawn by stipulation in 1984. On the same day, the wife commenced an action for separation. In 1986, the husband commenced an action for divorce. In December 1986, while that action was pending, the wife obtained a judgment of separation. The husband commenced his action for divorce, pursuant to DRL 170(5), in 1988.

The Appellate Division held that the IAS Court properly utilized the date the husband commenced the divorce action in 1988, rather than the date

the wife commenced her separation action in 1984, for the purpose of distributing the husband's pension, which had increased by \$475,000 between the two dates.

DRL 236 [B][6], [7] and [8] provide authority for the court to make awards of maintenance, child support and special relief "in any matrimonial action." This includes actions for a separation. However, equitable distribution is only available in the specified matrimonial actions listed in DRL 236[B][5], only when a dissolution is granted and the partnership is irrevocably terminated and wound up. "Matrimonial actions" has one meaning for purposes of awarding maintenance, child support and special relief in all actions under DRL 236 [B], and it has another meaning in the context of DRL 236[B][5] (equitable distribution) in certain actions, i.e., those actions where the marriage is terminated.

The Second Department

The Second Department has taken a different approach. In *Lennon v. Lennon*, [FN8] the parties were separated pursuant to a judgment of separation in 1970. The Second Department found that the EDL provides that marital property is property acquired before the commencement of a "matrimonial action," and that the separation action commenced by the wife in 1970 was a "matrimonial action" under DRL 236[B][2], which signaled the end of the economic partnership.

It held that any assets acquired by the husband after the date of the action for a separation and not otherwise the product of a sale or exchange of any marital property should be characterized as separate rather than marital property. In *Butti v. Butti*, [FN9] the Second Department held that the husband's commencement of an action which culminated in a 1985 judgment of separation signaled the end of the parties' economic partnership for purposes of determining which assets are part of the marital estate.

In *Marcus v. Marcus*, [FN10] the husband commenced an action for divorce on July 18, 1980, the day before the EDL became effective, solely for the purpose of avoiding the annunciation of the EDL. It was dismissed in October 1980 for failure to serve a complaint after he suffered a heart attack in September 1980 and returned to the marital home and care of the plaintiff. The wife commenced an action for divorce in January 1982.

The Appellate Division held that the commencement of the first action "did not signal the end of the parties marital relationship" as the parties

continued to reside together and the defendant accepted the care of the plaintiff and the benefits of the marriage until the commencement of the divorce action in 1982. It held that to utilize July 18, 1980 for the cut-off date of marital property "would be contrary to the fundamental policy" underlying the EDL and would enable a spouse to commence a "baseless matrimonial action" for the purpose of cutting off her spouse's right to a share in subsequently obtained property, which would otherwise constitute marital property, while at the same time receiving the benefits of the parties ongoing marital relationship.

The 'Thomas' Case

In *Thomas v. Thomas* [FN11] the wife commenced an action for a divorce in 1984. The parties stipulated to discontinue it in 1992, and the wife served the husband with a summons commencing a new action on the same day. The Second Department held that the husband's pension should be valued as of the date of the commencement of the first action. It pointed out that it had previously held in *Marcus* that assets acquired after the commencement of a divorce action "may become marital property again where, for example, the action is discontinued and the parties either reconcile or continue the marital relationship and continue to receive the benefits of the relationship. Since the discontinuance was a tactic to enable her to share in assets not otherwise subject to equitable distribution, the court held that the valuation date was proper. [FN12] In *Lambda v. Lambda*, [FN13] the Second Department held that it was error to have the husband's pension valued as of the date of commencement of the action, as opposed to the date that a previous discontinued divorce action was commenced in 1989, where the wife did not present evidence that the parties had reconciled and continued to obtain the benefits of the marital relationship.

Where a separation judgment is granted the Second Department holds that it signals the end of the economic partnership and utilizes the date of the commencement of the separation action for purposes of valuation. However, assets acquired after the commencement of a divorce action "may become marital property again where, for example, the action is discontinued and the parties either reconcile or continue the marital relationship and continue to receive the benefits of the relationship." This approach ignores the statutory definition of "marital property," as well as the provisions of DRL 236 [b] [4][b] which require that "[T]he valuation date or dates may be anytime from the date of commencement of the action to the date of trial."

Conclusion

We believe that in accordance with the public policy expressed by the legislature, until there is a divorce or dissolution of the marriage, ending the economic partnership, marital property should continue to accrue, although where no subsequent contributions are made to it or the marital partnership its allocation should be disproportionate.

Otherwise, a spouse could commence a meritless "matrimonial action" at any time and cut off his or her spouse's right to share in property acquired after the action is commenced. New York is not a no-fault divorce state. In a long-term marriage there is a high burden of proof required to obtain a divorce. [FN14] The fact that a spouse commences an action for a divorce does not mean he will get a divorce, especially where the action is contested. The reality is that spouses remain married, with all the incidence of marriage, until there is a divorce. The commencement of a matrimonial action that does not end the marriage should not be the end of the marriage for purposes of equitable distribution.

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FN(1) ___ AD2d ___, 718 NYS2d 353 (1st Dept., 2001).

FN(2) The Supreme Court subsequently made such a finding in *McMahon v. McMahon*, NYLJ, 3/12/01, p. 25, col. 3, Sup. Ct. NY Co. (Gische, J.).

FN(3) (4th Dept.) 83 AD2d 169, 443 NYS2d 1013.

FN(4) 122 AD2d 559, 505 NYS2d 396 (4th Dept.).

FN(5) 173 AD2d 133, 577 NYS2d 964 (3d Dept., 1992).

FN(6) Anglin v. Anglin, (1992) 80 NY2d 553, 592 NYS2d 630, 607 NE2d 777.

FN(7) 179 AD2d 124, 583 NYS2d 224 (1st Dept., 1992).

FN(8) 124 AD2d 788, 508 NYS2d 507 (2d Dept., 1986).

FN(9) 154 AD2d 633, 543 NYS2d 94 (2d Dept., 1989).

FN(10) 135 AD2d 261, 137 AD2d 131, 525 NYS2d 238 (2d Dept., 1988).

FN(11) 221 AD2d 621, 634 NYS2d 496 (2d Dept. 1995).

FN(12) See also Gonzalez v. Gonzalez, 240 AD2d 630, 659 NYS2d 499 (2d Dept. 1997).

FN(13) 266 AD2d 515, 698 NYS2d 716 (2d Dept. 1999).

FN(14) See Hessen v. Hessen, 42 NY2d 210, 353 NYS2d 421. Hammer v. Hammer, 34 NY2d 545, 354 NYS2d 105.

4/24/2001 NYLJ 3, (col. 1)
