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Bits and Bytes™

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2004 Court of Appeals Roundup Continued

In *Kazel v Kazel*, 3 N.Y.3d 331, 819 N.E.2d 1036, 786 N.Y.S.2d 420 (2004) the Court of Appeals held that a judgment of divorce and qualified domestic relations order (QDRO) awarding an interest in the husband's pension plan do not automatically include preretirement death benefits available under the plan. If the intent is to distribute such benefits, that should be separately, and explicitly, stated.

The parties 1991 divorce judgment distributed the marital property by, among other things, dividing the husband's pension plan between the parties pursuant to the equitable distribution formula established in *Majauskas v Majauskas* (61 NY2d 481 [1984]). The matrimonial court entered a QDRO directing that plaintiff wife begin to receive a fixed percentage of her former husband's monthly allowance either at such time as he "has retired from and is actually receiving a monthly allowance from his . . . Pension Plan" or, at plaintiff's option, "after the earlier to occur of the first date for payments allowed under the plan or after [he] reaches the earliest retirement age under the Plan." The husband died in 2001 before reaching retirement age, and never received any payments under the plan. Following his death, plaintiff sought to share with decedent's widow in preretirement death benefits payable under decedent's pension plan. Because the QDRO, by its plain terms, granted plaintiff an interest only in decedent's retirement annuity, and not in his death benefits, the plan administrator denied plaintiff any share of those benefits. Plaintiff sought to modify or supplement the QDRO to award her a share of such benefits. Supreme Court denied her motion, concluding that plaintiff had failed to establish that the intent of the underlying divorce decree had been to award her survivor benefits. The Court of Appeals noted that Employee Retirement Income Security Act of 1974 (29 USC 1001 et seq.) (ERISA) and the Internal Revenue Code of 1986 (IRC) require all pension plans to provide survivor benefits to a participant's surviving spouse (see ERISA [29 USC] 1055 [a]; Internal Revenue Code [26 USC] 401 [a] [11]; 417). Pursuant to a divorce, however, a QDRO can provide that a former spouse be treated as a surviving spouse--to the exclusion of the actually surviving spouse if, as here, the decedent had remarried--for purposes of ERISA and the joint and survivor rules of the IRC (see ERISA [29 USC] 1056 [d] [3] [F]; Internal Revenue Code [26 USC] 401 [a] [11]; 417, 414 [p] [5] [A]). Thus, a former spouse can overcome the right of an actually surviving spouse to receive a survivor annuity only if specifically awarded such benefits by the matrimonial court. Further, such an award must be reflected in a QDRO, evidenced by clear language designating the former spouse as the surviving spouse for purposes of the survivor benefits. The QDRO must reflect the intent of the underlying judgment of divorce, and must comply with its terms.

In *Covington v Walker*, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409 (2004) the Court of Appeals held that plaintiff's cause of action for divorce on the ground of imprisonment pursuant to Domestic Relations Law 170 (3), brought 16 years after the commencement of defendant's confinement, was not barred by the five-year statute of limitations as set forth in Domestic Relations Law 210. The statute of limitations is measured from the date of defendant's release from prison (see Domestic Relations Law 170 [3] [providing that an action for divorce may be maintained on the ground of the defendant's confinement in prison for a period of at least three consecutive years]). The Court concluded, based on the legislative history, and public policy, that the cause of action accrues on the date defendant completes his third consecutive year of incarceration, but the statute of limitations does not begin to run until the date he is released from prison. Thus, plaintiff's divorce action was not time-barred.

On May 12, 1983, plaintiff wife and defendant husband were married. In 1985 defendant was convicted of murder and robbery and sentenced to a prison term of 25 years to life. Defendant was incarcerated since the date of his arrest. Plaintiff was convicted of the same crimes as defendant and was incarcerated. On April 10, 2000, plaintiff commenced an action for divorce on the ground that defendant has been confined for a period of three or more consecutive years after their marriage (Domestic Relations Law 170 [3]). Plaintiff moved for summary judgment of divorce and in opposition, defendant asserted defenses, including the five-year statute of limitations in Domestic Relations Law 210. Supreme Court dismissed plaintiff's action on summary judgment. The Appellate Division affirmed.

The Court of Appeals reversed. It held that a cause of action for divorce based on the ground of imprisonment continues to arise anew for statute of limitations purposes on each day the defendant spouse remains in prison for "three or more consecutive years" until the defendant is released. The purpose of the requirement that the defendant be incarcerated for three years prior to the commencement of an action for divorce is to give the convicted party an opportunity to obtain release from prison and to prevent the "natural but sometimes too rash inclination to dissolve a marriage" upon a spouse's conviction. Nothing in the legislative history suggests, however, that Domestic Relations Law 170 (3) was intended to start the statute of limitations running against the plaintiff spouse as early as possible so as to create the potential for a spouse, who may have missed the five-year window. The words "or more" in Domestic Relations Law 170 (3) suggest that divorce actions based on imprisonment are actions involving recurring injuries to the parties which implicate the continuous wrong doctrine. The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive trespass. The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission. Under a continuous wrong or violation rule, where a defendant spouse is incarcerated for a consecutive period exceeding three years, each day of continued confinement beyond three years inflicts new injury on the plaintiff spouse. Thus, although this ground for divorce arises originally at the conclusion of the third consecutive year of a defendant's incarceration, it continues to arise anew each day thereafter until the defendant is released from prison. An action based on this continuous wrong is barred only by the expiration of the five-year limitations period measured from the date upon which the defendant is released from prison.

Procedure for Collecting Maintenance Clarified

In *Matter of Balanoff v Niosi*, __AD2d__, 2004 WL 3171130 (N.Y.A.D. 2 Dept.) the Second Department clarified the procedure for enforcing a judgment against an award of maintenance. The respondent Niosi and his former wife, Ditroia, were divorced pursuant to a judgment entered in the Supreme Court, Suffolk County, which provided that Niosi would make monthly maintenance payments to Ditroia. Upon Niosi's failure to make these payments, the Supreme Court, Suffolk County, entered an income execution for support directing Niosi's employer, the respondent Prospective Computer to deduct the maintenance payments from Niosi's income and to pay them over to Ditroia on a monthly basis. In July 2002, the petitioner obtained a judgment against Ditroia on her default in Supreme Court, Nassau County, for unpaid legal services. The petitioner served the respondents, Niosi and Prospective Computer, with restraining notices alleging that the respondents were in possession of property in which the petitioner had an interest, i.e., Ditroia's monthly maintenance payments. When the respondents refused to pay the petitioner, he commenced a proceeding to enforce the restraining notices in Supreme Court, Nassau County, on notice to Ditroia. The Supreme Court held that the respondents did not violate the restraining notices because their payment of Ditroia's monthly maintenance was exempt from restraint pursuant to CPLR 5205(d)(3). The court further stated that any determination of the extent to which the maintenance was not exempt should be made by the court that issued the award (i.e., the Supreme Court, Suffolk County). It dismissed the petition and vacated the previously-issued restraining notices. The Appellate Division affirmed. It held that the petitioner took the wrong initial steps in his attempt to enforce his money judgment against Ditroia's award of maintenance. Ditroia's burden to claim and prove her exemption would not be triggered until the petitioner submits a proper application for an installment payment order to reach the amount of Ditroia's maintenance in excess of her reasonable requirements.

Under the CPLR an application for an installment payment order remains the expedient for accessing exempt salary and wages. Reinforcing this procedure, CPLR 5222(a) prohibits a judgment creditor from serving a restraining notice upon the judgment debtor's employer where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor (see CPLR 5222[a]; *Silbert v. Silbert*, 25 A.D.2d 570). Such restraining notices are not given any binding effect. The Second Department held that the same is true within the limited context of the case. Maintenance is a form of "income" that is exempt, just like 90% of a debtor's salary, and such clearly exempt income, when sought at its source, can only be divested of its exempt status upon proper application to a court for a determination of the judgment debtor's reasonable requirements (see CPLR 5205[d]). In order to reach Ditroia's maintenance, the petitioner is required to make a motion for an installment payment order in the action in which he recovered judgment against Ditroia in the Supreme Court, Nassau County. He must raise the issue of Ditroia's reasonable requirements in his motion papers. Upon this motion, the Supreme Court, Nassau County, must transfer the action to the Supreme Court, Suffolk County (the matrimonial court) for a determination of Ditroia's reasonable requirements pursuant to CPLR 5205(d)(3). In those proceedings Ditroia bears the ultimate burden of establishing her reasonable requirements and she may not continue to benefit from her default. Once the Supreme Court, Suffolk County, determines the amount in excess of Ditroia's reasonable requirements, the petitioner may also secure an order against third parties, like the respondents, to access payment of Ditroia's surplus maintenance at its source.

Trial Evidence Bits and Bytes

Valuation Methodology

Nasca v Nasca, AD2d , 754 NYS2d 502 (4th Dept.,2003) [Proper to value ring based on 1987 appraisal which was not disputed]

Braun v Braun, 11 AD3d 423, 782 NYS2d 785 (2d Dept.,2004) [Proper to award business to husband and house to wife where it was virtually impossible to value the husbands business because he was not forthcoming with all the necessary documents to make that evaluation.]

Cahen-Vorberger v Vorberger , 785 NYS2d 435 (1st Dept.,2004) [Proper in valuing husbands business interest at \$9.75 million for courts expert to formulate a fair indirect methodology because of inadequate documentation from husband. Proper to value increase in value of business from zero where defendant failed to offer evidence of its value at time of marriage and did not deny that wife contributed to appreciation in value of this separate property by being a homemaker and care giver.]

Spillman-Conklin v Conklin, 783 NYS2d 114 (3d Dept.,2004) [Proper to value timeshare based on value listed in net worth statement and included in proposed findings of fact. Proper to use purchase price, rather than market price, to determine value of jewelry, where no other proof offered by husband, leaving court free to credit wife's testimony.]

Valuation Date Outside DRL 236[B][4] Parameters

Dashinaw v Dashinaw, 11 AD3d 732, 783 NYS2d 93 (3d Dept.,2004) [Proper to use purchase price of the rental properties, rather than their fair market value, in valuing husbands gift equity in them Proper to value certain personalty as of date of purchase, rather than date of commencement or trial, where only evidence was wife's testimony and no opposing proof from husband about fair market value.]

Preclusion For Failure to Disclose

Berk v Berk, 5 AD3d 165, 773 NYS2d 53 (1st Dept., 2004) [Proper for trial court to preclude husband from offering evidence on financial issues considering that he repeatedly violated orders, his persistent refusal to provide financial disclosure, his failure to pay his share of the fee for the neutral appraiser and his failure to appear for his deposition and a court appearance.]

Cahen-Vorberger v Vorberger , 785 NYS2d 435 (1st Dept.,2004) [Preclusion order and default judgment was supported by ample evidence of husbands contumacious failure to provide disclosure.]

Proof of Separate Property

Kenney v Lureman, 778 NYS2d 821 (4th Dept.,2004) [Wife sustained her burden of establishing that stockholdings were her separate property based upon her uncontroverted testimony that she either inherited them or purchased them with inherited funds]

Chiotti v Chiotti, 785 NYS2d 157 (3d Dept.,2004) [Inability to produce a complete paper trail from a gift or inheritance does not require a contrary finding where not evidence suggesting other possible sources of the funds and no contradictory evidence offered.]

Admissibility of Expert Opinion

Matter of D'Esposito v Kepler, 88 N.Y.S.2d 169, (2d Dept,2005) [Family Court improvidently exercised its discretion in admitting into evidence the report of the neutral forensic psychologist, since the report was not submitted under oath (citing 22 NYCRR 202.16[g][2]) and relied on information other than that upon which an expert may properly base an opinion. Nevertheless, even without considering the experts report and testimony, it found that Family Court providently

exercised its discretion in requiring that the residence of the subject child, who had been relocated by the appellant to California, be returned to New York by the mother

Jemmott v Lazofsky, 5 A.D.3d 558, 772 N.Y.S.2d 840 (2d Dept., 2004) ["It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is accompanied by evidence establishing its reliability".]

Wagman v. Bradshaw, 292 A.D.2d 84, 86-87, 739 N.Y.S.2d 421. [The Court of Appeals has held that an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (see, Hamsch v. New York City Tr. Auth., 63 N.Y.2d 723, 480 N.Y.S.2d 195, 469 N.E.2d 516). While the expert witness's testimony of reliance upon out-of-court material to form an opinion may be received in evidence, provided there is proof of reliability, testimony as to the express contents of the out-of-court material is inadmissible. Expert opinion, based on unreliable secondary evidence, is nothing more than conjecture. Admission into evidence of a written report prepared by a non-testifying person would violate the rule against hearsay and the best evidence rule. Inasmuch as such a written report is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence.

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