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Bits and Bytes™

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Welcome to *Bits and Bytes™*, our bi-monthly electronic newsletter published for attorneys registered with New York Divorce and Family Law. This electronic newsletter will be sent to you by email each a month to keep you up to date on important developments in New York Divorce and Family Law. If you do not wish to receive it or are receiving it in error, please send an email to unsubscribe@nysdivorce.com, with the words "unsubscribe" in the subject line.

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2005 Equitable Distribution Decisions Update

In *Hathaway v Hathaway*, 791 N.Y.S.2d 631 (2d Dept,2005) the Supreme Court, inter alia, dissolved the marriage, equitably distributed 70% of the marital assets to the plaintiff and 30% of the marital assets to him, awarded him maintenance in the sum of \$1,000 per month until July 15, 2003, and directed that the plaintiff's "outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." The Appellate Division modified the judgment on the law, by deleting the provision regarding the plaintiff's legal fees. It held that the distributive award of 70% of the marital assets to the plaintiff was a provident exercise of discretion. While the parties were married for a considerable period, approximately 33 years, and although the defendant devoted significant time to the parties' two daughters' educational and athletic activities during most of that time, the defendant refused to work, against the plaintiff's wishes, despite being skilled in the computer field and otherwise gainfully employable. The plaintiff was the sole wage earner, and the plaintiff also performed substantially all of the usual and customary housekeeping duties and was evenly involved with the upbringing of the children, while the defendant's contribution to the marriage was minimal. The defendant contended that the Supreme Court improperly awarded him rehabilitative maintenance in the sum of only \$1,000 per month until July 2003, as opposed to life-time maintenance for a much larger amount, due to, inter alia, his age, alleged poor health, claimed incapability of becoming self-supporting, and the plaintiff's superior financial position. The Appellate Division held that Supreme Court providently exercised its discretion in granting the defendant limited maintenance, since there was little to no evidence regarding the parties' pre-separation standard of living or any evidence regarding the defendant's needs, the defendant, who had a college education and worked during the early years of the marriage, had the skills for gainful employment in the computer field in which he worked following the parties' physical separation, and despite having been awarded only 30% of the marital property, the actual amount of his distributive award was relatively high. The Supreme Court erred in directing that the plaintiff's "outstanding legal fees ... and those fees paid previously from her separate property ... be paid to plaintiff's counsel and reimbursed to plaintiff, respectively, from the marital assets prior to the distribution to the parties." This provision effectively made the defendant, the non-monied spouse, pay a substantial portion of the counsel fees of the monied spouse, the plaintiff who was worth over \$1 million, in violation of Domestic Relations Law § 237 and, therefore, was improper.

Decisions of Interest

Necessary Joinder of Parties May Not be Necessary

In *Ramnarine v Ramnarine*, 792 N.Y.S.2d 40 (1st Dept,2005) the Appellate Division affirmed a judgment which dissolved the marriage and set aside a conveyance of the marital home to plaintiff husband's brother. It rejected the plaintiff's argument that the court could not divest his brother of title to the house unless and until the latter was formally joined as a party to this action. The brother, who was represented by plaintiff's attorney in connection with his own further conveyance of the house, had notice that his title was to be challenged at a hearing, appeared at the hearing without objection, offered testimony and documentary evidence, and otherwise had a full and fair opportunity to litigate the validity of his title. Even though he had the opportunity to do so, he never sought to intervene. Such participation

and indeed control of the hearing by the brother seriously undercut the jurisdictional objection he made, “through plaintiff” that he was a necessary party who must be formally joined.

No Waiver of Pension Rights Where Agreement Clear and Unambiguous

In *Valentin v New York City Police Pension Fund*, 792 N.Y.S.2d 22 (1st Dept,2005) the Appellate Division affirmed a Judgment which granted the petition to set aside respondent Pension Fund’s determination and remanded the matter for disbursement of death benefits to the decedent’s estate instead of to Selena Valentin. It held that the interpretation of an unambiguous marital agreement was a question of law for the court and did not require deference to any particular expertise of the administrative agency. In the agreement, involving a childless couple who had separated after less than a year of marriage, and which was executed just 18 days before decedent’s death, Selena Valentin waived any rights, title or interest in his pension or retirement benefits, and any other interest in his estate, specifically, a right to take under any “testamentary writing ... now or hereafter in force and effect.” The court held that this evinced a clear intent of the parties to separate their lives and finances, and was to be the sole expression of the division of their property and interests. Taken as a whole, this unambiguous contract was sufficiently specific to demonstrate, as a matter of law, that respondent-appellant waived any right to the death benefits she was awarded by the Pension Fund. The fact that the decedent did not remove his estranged wife as a named beneficiary on his pension during the last 18 days of his life was of no moment, nor was the fact that the agreement did not expressly include a waiver of pre-retirement death benefits.

Watch out for an unintended Waiver of Rights

In *Luce-Metcalf v Digati*, 792 N.Y.S.2d 267 (4th Dept.2005) the parties 1989 separation agreement, which was incorporated but not merged into their judgment of divorce, provided that the defendant retained the right to occupy the marital residence, owned by the parties during the marriage as tenants by the entirety, until his death or removal from the premises, at which juncture the premises were to be sold and one half of the net proceeds distributed to plaintiff. In 1998, the parties jointly conveyed the premises to their son for a nominal consideration, reserving a life estate to defendant. One year later, the son conveyed his remainder interest in the premises to defendant alone. Plaintiff moved in Supreme Court, which had granted the divorce, for an order compelling defendant to convey the premises to plaintiff and defendant, as a means of enforcing what plaintiff considered to be her continuing right under the separation agreement to share in the proceeds of any future resale of the premises. The court adjudged that plaintiff’s right to collect one half of the net proceeds of any future sale of the subject property, as set forth in the separation agreement, remained in full force and effect, and ordered that, upon a future sale of the premises, defendant shall share the proceeds with plaintiff pursuant to the terms of the separation agreement. The Appellate Division held that the court erred in determining that plaintiff retained any interest in the premises or any right under the separation agreement to share in the proceeds of any eventual resale. “In joining in the conveyance of the premises to her son, plaintiff alienated all of her right, title, and interest in the premises (see Real Property Law § 245). Concomitantly, plaintiff relinquished any expectancy in the proceeds of any future sale, thereby modifying the separation agreement to a corresponding extent, waiving her rights thereunder, and releasing defendant from his obligations thereunder.”

Large Counsel Fee to Wife Where Husband Had Resources to Litigate

In *Weinstein v Weinstein*, 2005 WL 1088251 (N.Y.A.D. 1 Dept.) the Appellate Division affirmed an order which granted plaintiff’s motion for an award of \$300,000 in counsel fees. It held that the court properly exercised its discretion in awarding counsel fees, given the parties’ respective financial circumstances and all the other circumstances of the case, stating that: “Defendant has always been far more able than plaintiff to pay legal fees in connection with this proceeding. His substantial resources have been a significant factor in achieving the desired outcome with regard to custody of the children. This has resulted in an escalation of legal fees for plaintiff.”

Did you know about this Recent Legislation?

CPLR 2103-a, Confidentiality of addresses in civil proceedings, provides that in any civil proceeding the court may authorize any party to keep his or her residential and business addresses and telephone numbers confidential from any other party where disclosure of the addresses or telephone numbers would pose an unreasonable risk to the health or safety of that party. Added by Laws of 2004, Ch. 111, § 1, effective July 15, 2004.

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