

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART J.H.O.

GERSON I. G,

Plaintiff,

- against -

ANGELA G,

Defendant.

X

INDEX NO. 8106/03

MEMORANDUM DECISION

X

STANLEY GARTENSTEIN, JUDICIAL HEARING OFFICER:

According to Dr. G, he possesses the unique distinction of having consistently cheated on his paramour with his lawfully wedded wife. This ongoing liaison with his wife, he explains, was necessary solely to satisfy his "male needs." That his lawfully wedded wife shared his sexual favors with his paramour does not, however, imply that he afforded either of them unequal treatment. Indeed, Dr. G was successful in impregnating both women almost simultaneously and, in fact, became the father of two children, each born to a different mother, within a two week interval. In his testimony, he referred to the three children born to his lawful wife as "mistakes." These "mistakes," he tells the court, were not his only ones. He confides that he "should have beaten" his wife but apparently, to his regret, did not.

The pivotal issue now calls upon the court to set a date for equitable distribution of Dr. G's considerable assets in the face of two divorce actions, the first commenced by his wife in

1986; the second by Dr. G 18 years later in 2003, after a court approved discontinuance of the first. In the interval between these actions, Dr. G's net worth has skyrocketed thereby making the date for equitable distribution the crucial issue. As would be expected, faced with an intervening discontinuance of the old action and commencement of a new one, the husband, as the monied spouse, urges a valuation of his assets to be equitably distributed as of commencement of the original action when his net worth was nominal. His wife responding to the reality of Dr. G's considerable increased wealth accumulated during the interim period urges that the valuation date be set as of commencement of this later action.

ORIGINAL ACTION

In the original action commenced by her husband in 1986, Mrs. G moved for and was awarded, child support, maintenance and a directive that he pay all household expenses. This first action (and the pendente lite order) continued on record with neither side apparently interested enough to move it to conclusion, until August 30, 2000 when it was discontinued by the wife. The following representation on the record by her counsel in open court was received by Justice Joseph P. Dorsa, without objection or dissent:

"My client has indicated that on an ongoing basis, the parties have cohabited, engaged in marital relations and continued on in their marital relationship, despite the fact that they had a divorce action still pending."

After allocution, Justice Dorsa solicited the position of the husband. His counsel then indicated on record that he "takes no position on the plaintiff's actions. It (sic) doesn't interpose any objection or consent to it."

The court then approved the discontinuance and dismissed the first action.

Unknown to either attorney at the time of these proceedings, the parties, both bypassing their own attorneys, had, on November 17, 1999, drawn an untitled document "discontinuing" and "withdrawing" the "matrimonial action and counteraction" which requested the court to

"Please dismiss and eliminate all records pertaining to our action. We will not bring any future divorce action against each other again."

This document was filed with the County Clerk. Counsel are at a loss to explain its existence on the one hand and the fact that motion practice went on almost a full year after its execution and filing without either attorney having been advised of its existence on the other. The discontinuance on record occurred approximately nine months after this document was executed and filed.

RECONCILIATION-LEGAL IMPORT

Where a prior action for divorce has been discontinued (or is still technically viable on record) and is followed by a second action, "It is well settled that the trial courts possess the discretion to select valuation dates for the parties' marital

assets which are appropriate and fair under the particular...circumstances" (Thomas v Thomas, 221 AD2d 621, [App Div 2nd Dept. 1995], citing Cohn v Cohn, 155 AD2d 412; Kirschenbaum v Kirschenbaum, 703 AD2d 534; Marcus v Marcus, 137 AD2d 131).

In Gonzalez v Gonzalez (240 AD2d 630), the Appellate Division, Second Department held that the trial court in determining the effective date for equitable distribution, faced with the discontinuance of a first action and commencement of a second one, must look to factors outside the parameters of the formal discontinuance. Standing alone, a discontinuance of the first action is legally insufficient to divest either party of the equities as they stood upon commencement of that action, without an additional finding that said discontinuance had not been followed by a reconciliation of the parties (citing Thomas v Thomas, 221 AD2d 621). The Appellate Division thus placed upon trial courts the duty to "...determine whether, after the commencement of the (first) action the parties reconciled and continued to receive the benefits of the marital relationship." (See also Lamba v Lamba, 266 AD2d 515; Miller v Miller, 304 AD2d 727.)

Dr. G denies any reconciliation with his wife notwithstanding that they filed joint tax returns for the period in question (he pleaded the Fifth Amendment when questioned about forging her signature); notwithstanding a vacation trip with her and their family to the Bahamas as recently as a year before

discontinuance of the first action; notwithstanding his payment of \$100,000 for improvements to the marital domicile in 1992; notwithstanding that he gave her credit cards and cash for spending money until 2000; and notwithstanding that in 1993, he paid for her trip to England to visit his dying father. In the face of all this, he claims he never really intended to reconcile. It is settled law that intent is measured objectively by a person's actions notwithstanding what he/she claims to have been actual intent (Brown Bros. v Beam Construction Corp., 41 NY2d 397; Am Jur 2d, Contracts § 31).

Nisi prius trial courts have consistently been held by appellate tribunals to be in the best position to assess the credibility of a witness or party having observed personally those dynamics of the trial which never make their way into a lifeless transcript - demeanor of the parties toward each other and the court; reaction to direct and cross-examination; and all those intangibles colloquially referred to as the "atmosphere of the trial." We have presided over the spectacle of Dr. G calling his wife's counsel a "mother-f----r, son of a b--ch" on the record; of his invoking the Constitutional privilege against self-incrimination both as to his alleged forgery of his wife's signature on joint tax returns as well as his falsifying a copy of a tax return for court filing claiming income for one particular year of \$160,000 when the actual return filed with IRS admitted income of \$737,000; and in confiding that he "should have beaten"

his wife. Ultimately, when pressed to explain his actions, Dr. G resorted to the old favorite of blaming his lawyer's advice for every step he took both in and out of court and for everything which has transpired herein notwithstanding that he had done the very same thing behind his lawyer's back some nine months previously. His testimony is replete with contradictions and outright lies. We disbelieve it in its entirety.

We find that the parties did in fact reconcile and reap the benefits of marriage during the substantial period after commencement of the first action for a period up to, including and following both discontinuances.

We set the date for evaluation of marital assets and equitable distribution as of commencement of the second action. This determination does not in any manner supercede or nullify existing stare decisis with reference to differentiation between active and/or passive assets or any other considerations otherwise made relevant and/or dispositive by statute or case law.

This matter is accordingly respectfully re-referred to the IAS part of origin for proceedings consistent with this decision and order.

Dated: February 3, 2006

STANLEY GARTENSTEIN
Judicial Hearing Officer