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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. DARRELL L. GAVRIN MM PART 52  
Acting Justice

FRANK KAMMERER

Plaintiff,

- against -

MARY ANN KAMMERER

Defendant.

INDEX  
NUMBER ..3336/98..

MOTION  
DATE ..3/29/01..

MOTION  
CAL.NUMBER ...1...

The following papers numbered 1 to 11 read on this motion:

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Defendant moves for, *inter alia*, an Order: [1] staying the judgment of divorce, [2] modifying the judgment of divorce to provide for equitable distribution of the plaintiff's pension, or in the alternative, issuing a Qualified Domestic Relations Order and [3] an award of counsel fees.

Plaintiff cross-moves for, *inter alia*, an award of counsel fees.

The motion and cross-motion are decided as follows:

The parties entered into a separation agreement on August 1, 1984. The agreement was silent as to the distribution of the plaintiff's pension. On February 18, 1998, plaintiff commenced an action for divorce pursuant to Domestic Relations Law §170[6].

Defendant served a verified answer wherein she interposed a counterclaim to set aside the agreement as unconscionable. In another counterclaim, the defendant sought equitable distribution of the plaintiff's pension.

In a decision dated November 17, 1999, Justice Flug dismissed both counterclaims. The Appellate Division, Second Department affirmed Justice Flug's dismissal of the counterclaim to set aside the separation agreement, but reversed the portion of her decision that dismissed the counterclaim for distribution of the pension. (*Kammerer v. Kammerer*, \_\_\_ A.D.2d \_\_\_, 717 N.Y.S.2d 322 [2d Dept. 2000]) The case was remanded for equitable distribution of the plaintiff's pension. The judgment of divorce was signed by this Court on December 7, 2000.

As framed by the parties, the primary issue concerns fixing the valuation date for plaintiff's pension. Defendant claims the pension should be valued as of February 18, 1998, the date of the commencement of the divorce action. Plaintiff avers the pension should be valued as of August 1, 1984, the date the parties executed their separation agreement. On August 1, 1984 plaintiff's pension had an approximate value of \$13,500. At the time of commencement of the action, plaintiff's pension had an approximate value of \$159,000.

Citing seemingly contradictory sections of the Domestic Relations Law, each party is confident the decision to be made in this case is a clear one. The Court is not as certain as the litigants. Upon close examination, the parties have presented a "perplexing and difficult problem" (*Wegman v. Wegman*, 123 A.D.2d 220, 230 [2d Dept. 1986])

Plaintiff claims the definition of marital property is the controlling statute. This section provides that marital assets consist of "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" (DRL §236[B][1][c]) This statutory provision is based on the well established concept that a marriage is an economic partnership and that upon execution of a separation agreement or initiation of a divorce proceeding the partnership is dissolved. (*Anglin v. Anglin*, 80 N.Y.2d 553, 557 [1992]) In the present case, it is averred by plaintiff that upon execution of the parties' separation agreement the accumulation of marital assets ceased for all purposes and, therefore, the plaintiff's contributions to his pension after execution of the agreement were separate property not subject to equitable distribution.

The defendant relies heavily on section 236[B][4][b] which provides as follows:

As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

Defendant avers this section requires the setting a valuation date for the pension as of the commencement of the divorce proceeding.

Classification of assets and the determination of valuation dates are usually distinct functions. (See, *McMahon v. McMahon*, \_\_\_ Misc. 2d \_\_\_, 2001 N.Y. Misc. LEXIS 45, at \*5 n1) However, these concepts appear to coincide when applied to pensions. (See, *Wegman v. Wegman*, supra at 234) Classifying what portion of a pension is marital and subject to equitable distribution will simultaneously determine the closing date for valuation of that portion of the pension. Likewise, setting a valuation date will have the effect of apportioning the pension into marital and separate property.

In applying these statutes, a court will, customarily, first determine whether an asset is marital or separate property, then assign a valuation date. (Id.) But, mechanistic application of DRL §236[B][4][b] in this case is simply not appropriate as it renders the definition of marital property under DRL §236[B][1][c] a nullity. The rules of statutory construction prohibit such a result. In interpreting statutes, the court must read all parts of a statute as a whole and, wherever possible, harmonize contradicting provisions. (Statutes §97, §98[a]) Where irreconcilable conflicts arise, "the court must preserve the paramount intention although this may lead to the rejection of some subordinate and secondary provision." (Statutes §98[b])

While this Court could not find any case addressing this particular set of circumstances and seems to present a unique question, a number of other courts have dealt with these statutes in a somewhat analogous situation. Addressing these cases does shed light on resolving the statutory conflict before this court. The cases referred to involve a situation where two or more matrimonial actions were commenced serially and the courts involved chose the commencement date of the latest, pending action to "value" the pension, rather than the commencement date of the earlier matrimonial proceeding.

Defendant cites a number of these cases for support averring that in each the courts chose the latest commencement date because equitable distribution was left "unresolved" in the prior proceedings. Therefore, defendant asserts, since distribution of the plaintiff's pension was similarly left "unresolved" by the separation agreement, the commencement date of the divorce action should be utilized as the valuation date.

Defendant's argument is flawed for several reasons. Preliminarily, this is an area of the law that is by no means settled. (Scheinkman, Practice Commentary, McKinney's Cons Laws of NY, Book 14, DRL C236B:26 at 424) Lower courts, along with the Appellate Divisions, have rendered a seemingly irreconcilable body of case law on both sides of this issue.<sup>1</sup> Second, none of the courts in the cases cited by the defendant and in the

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<sup>1</sup> Compare, *Fuegel v. Fuegel*, 271 A.D.2d 404 [2d Dept. 2000] [commencement date of instant action used for valuation of marital assets rather than earlier dismissed action] and *Nee v. Nee*, 240 A.D.2d 478 [2d Dept. 1997] ["not improvident exercise of discretion for the Supreme Court to value the defendant's pension as of the date that plaintiff commenced the instant divorce action as opposed to the date that a previous, discontinued divorce action between the parties was commenced"] and *Marconi v. Marconi*, 240 A.D.2d 641 [2d Dept. 1997] [Where two prior actions were dismissed, trial court's selection of commencement date of the third action as valuation date of husband's pension was not an improvident exercise of discretion] and *Nicit v. Nicit*, 217 A.D.2d 1006 [4<sup>th</sup> Dept. 1995] ["Supreme Court properly determined that the appropriate date for the valuation of marital property was the commencement date of the instant proceeding rather than the commencement date of the prior unsuccessful divorce action"] and *McMahon v. McMahon*, supra [Wife's tactical discontinuance of divorce permitted and court valued marital assets as of latter divorce proceeding] with *Lamba v. Lamba*, 266 A.D.2d 515 [2d Dept. 1999] [Supreme Court's setting valuation date of pension as commencement date of instant action rather than prior discontinued divorce action reversed and remitted for hearing to determine whether parties reconciled and continued to receive the benefits of marital relationship] and *Gonzalez v. Gonzalez*, 240 A.D.2d 630 [2d Dept. 1997] [Case remitted to trial court for determination of "whether after the commencement of the 1982 action the parties reconciled and continued to received the benefits of the marital relationship] and *Thomas v. Thomas*, 221 A.D.2d 621 [2d Dept. 1995] [Where wife's discontinuance of divorce was a tactic and no evidence existed that the parties either reconciled or continued the marital relationship and continued to receive the benefits of the relationship, court acted within its discretion in setting commencement date of first action as valuation date] and *Marcus v. Marcus*, 137 A.D.2d 131 [2d Dept. 1988]

footnote, supra, drew upon the defendant's reasoning to justify their decisions to use the commencement date of the latest action to "value" the marital assets involved. In this Court's assessment, the logic behind those decisions defendant claims supports her position is precisely the element that distinguishes them from the present case. The common factor in each of these cases was that the prior action was either discontinued or dismissed. Hence, it can be argued that upon cessation, not only were the prior actions nullified, so were the unilateral terminations of economic partnerships that occurred with commencement of the action. The Appellate Division, Second Department in *Marcus v. Marcus*, 137 A.D.2d 131, 136 [2d Dept. 1988], recognized this reasoning when it held it would contravene the policy of the Equitable Distribution Law to permit a baseless action to cut off a "spouse's right to share in subsequently obtained property which would otherwise constitute marital property" In the instant case, the event triggering the termination of the parties' economic union was established by mutual agreement, not the unilateral act of one party. That compact was twice ruled valid and enforceable and the parties lived separate and apart pursuant to it for nearly fourteen years.

With explicitly ruling so, what the seemingly incompatible conclusions drawn by these courts does reveal is that courts are afforded with great discretion in the construction and application of the Equitable Distribution Law. "As was stated in the Assembly memorandum accompanying the equitable distribution legislation in 1980: 'An important aspect of this legislation is flexibility which is incorporated due to the tremendous variation in marital situations and the equities involved. Flexibility, rather than rigidity is essential for the fair disposition of a given case.'" [citations omitted] (*Wegman v. Wegman*, supra at 234-35)

In this Court's opinion, the primary provision to be given effect here is the definition of marital property. Permitting the defendant to share in sums accumulated in the plaintiff's pension after the parties mutually decided to terminate their economic partnership would be fundamentally unfair, particularly since further contributions to the pension were due exclusively to the labors of the plaintiff. (See generally, *Anglin v. Anglin*, supra) Accordingly, the Court finds plaintiff's contributions to his pension up until August 1, 1984 are marital assets, but all contributions after that date are separate property not subject to equitable distribution.

Unless the parties stipulate and agree to the value of the

pension as of August 1, 1984, the distributive share due to the defendant, the form for payment of the distributive award -- either by lump sum or Qualified Domestic Relations Order-- as well as amendment of the judgment of divorce to reflect said agreement, all parties are directed to appear for a **TRIAL** of these issues at **9:30a.m. on July 25, 2001, in Part 52, Courtroom 68, at the Courthouse located to 88-11 Sutphin Blvd, Jamaica, NY 11435.**

The motion to stay the judgment of divorce is denied. The motion and cross-motion for counsel fees are deferred until after the trial of this matter.

A copy of this order has been mailed to the parties and/or their respective counsel.

Dated: July 6, 2001

\_\_\_\_\_/s/\_\_\_\_\_  
**DARRELL L. GAVRIN, A.J.S.C.**