

Howe v. Howe: Troublesome Conclusion On Legislative Intent¹

Elliott Scheinberg

In *Howe v. Howe*, 886 N.Y.S.2d 722 (2nd Dept., 2009), the Appellate Division, in two discrete rulings, simultaneously amplified and upset the equilibrium of the equitable distribution universe. The first ruling dramatically relaxed the strict burden of proof upon the party asserting a separate property claim, to wit, the failure to proffer independent expert testimony or evidence was not deemed fatal to the application. Next, it reached the troublesome conclusion that the Legislature intended to exclude compensation for lost earnings arising from a personal injury claim, under Domestic Relations Law (DRL) § 236B(1)(d)(2), from the marital estate.

The Parties' Claims

The husband, a New York City firefighter, was disabled as a first responder following the September 11, 2001 tragedy. In addition to retiring with a disability pension, he received an award from the September 11th Victim Compensation Fund (“Fund”). The husband contended that a component of the disability pension represented his separate property for pain and suffering ((DRL § 236B(1)(d)(2)). The burden to distinguish the separate property component from the marital component (compensation for lost income) rests upon the party asserting the separate property claim.² Failing to meet his burden, the trial court distributed the entire pension as marital property. The husband argued that, his failed burden notwithstanding, the plan administrator could make the distinction.

The wife, on the other hand, sought a determination that the portion of the Fund, designated as compensation for economic loss, was marital property and not “compensation for personal injuries” within the meaning of § 236(B)(1)(d)(2).

The Appellate Division's Rulings

Disability Pension: The Appellate Division ruled that, although the burden of proof rests upon the party asserting a separate property credit, alternative methods, other than expert testimony, can satisfy the burden. Inherent in *Howe* is the determination that the ultimate arbiter to best extrapolate the separate property component from a disability pension is its plan administrator because it stands to reason that no independent expert possesses a more intimate operating knowledge of the plan. This is identical to the *Majauskas*³ formula where a party seeks a share of a spouse's future periodic pension benefits rather than a lump sum current distribution. Under *Majauskas*, the pension disbursement calculations, derived by means of a coverture

¹ N.Y.L.J., December 22, 2009.

² *Pulaski v. Pulaski*, 22 A.D.3d 820 (2nd Dept., 2005); *Cameron v. Cameron*, 22 A.D.3d 911 (3rd Dept., 2005).

³ *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

fraction, are consigned to the plan administrator “despite a failure [by the non-employee spouse] to sustain his or her burden of establishing its [present] value.”⁴ In sum, a party can meet the burden by guiding the court towards an authoritative source which will reliably implement the formula or the methodology – reliability is key. In *Howe*, the Second Department adopted the Third Department’s rationale (see FN3).

The Fund: The Appellate Division found that the phrase “‘compensation for personal injuries’ is not without ambiguity” and, impelled by its unique extrapolation of legislative intent, held that the portion of the Fund’s award “designated as compensation for economic loss” constituted his separate property, under § 236(B)(1)(d)(2).

Howe resorted to an extremely “rare” means of extracting legislative intent – a review of comments from an extrinsic source⁵ limited to one person. It relied upon snippets from three discrete paragraphs, in three separate writings, by Prof. Henry Foster, considered by many the father and the historian of the Equitable Distribution Law, and, with no more, toppled sound and invincible reasoning dating back a quarter century. However, a review of Foster’s complete writings compels a contrary conclusion consonant with *Dolan v. Dolan*,⁶ wherein the Court of Appeals stated: “to the extent plaintiff’s ordinary disability pension represents deferred compensation, it is indistinguishable from a retirement pension and therefore, to that extent, is subject to equitable distribution.” Curiously, *Howe* states that the Court of Appeals never addressed this issue – the inescapable parallel between disability pensions and compensation of lost earnings from personal injury awards was emphasized by the *Howe* court.

Howe’s Analysis

Howe began:

The phrase “compensation for personal injuries” [] is not without ambiguity. It can be read equally clearly as encompassing the entire award in a personal injury action or as limiting the marital share of that award to the portion constituting compensation for the actual injuries, i.e., the pain and suffering component. While a definition of the term separate property as “any recovery in a personal injury action” would be clear, that is not the phrase the Legislature used.

Citing *Hartog v. Hartog*, 85 N.Y.2d 36 (1995), *Howe* reasoned that “the purpose of the Equitable Distribution Law was to treat marriage in one respect as an economic partnership⁷ [see

⁴ *Pratt v. Pratt*, 282 A.D.2d 94 (3rd Dep’t 2001); *Matwijczuk v. Matwijczuk*, 261 A.D.2d 784 (3rd Dep’t 1999); *Church v. Church*, 169 A.D.2d 851 (3rd Dep’t 1991).

⁵ Stat. §191.

⁶ 78 N.Y.2d 463 (1991), see internal cites.

⁷ See *O’Brien v. O’Brien*, 66 N.Y.2d 576 (1985); *Price v. Price*, 69 N.Y.2d 8 (1986).

Governor's Memorandum⁸]. The economic portion of a personal injury award is compensation for a loss, presumably lost earnings, that is suffered by both spouses, since the earnings that were lost during the marriage would have been marital property. Since the loss is suffered by both spouses, the compensation for that loss should be shared by both as well.”

The Appellate Division analogized loss of earnings derived from personal injuries to severance pay, bonuses, and to disability pensions, wherein the portion of the pension that constitutes compensation for the disability is deemed separate property and the portion that constitutes deferred compensation is deemed marital property [à la *Dolan*]; pain and suffering is personal while economic compensation belongs to the marriage. *Howe* appeared poised to rule that the Fund's proceeds representing lost earnings were marital.

Nevertheless, *Howe*, erroneously construed the legislative intent behind § 236(B)(1)(d)(2) from no more than a few fragmented quotes, extracted from three lone shards of literature written by Foster, wherein he expressed unequivocal support for a construction that lost earnings arising from personal injury awards are marital property:

Professor Foster was the author of the original bill, and the bill jacket establishes that he was active throughout the Legislature's consideration of the bill. His commentary criticizing the exclusion clearly implies that it encompasses the economic component of a personal injury award. His explanation of the manner in which the exclusion came to be included in the legislation, published shortly after the law's enactment, is *compelling proof* that the proponents of the bill reluctantly acquiesced in the inclusion of the provision, despite its inconsistency with what was otherwise the intent of the legislation.

As [] Foster, who was actively involved in drafting of the equitable distribution law, explains in his treatise, the “[e]xemption (2) in DRL § 236(B)(1)(d) was added belatedly at the request of legislative counsel, shortly before the enactment of the Equitable Distribution Law” (3 Freed, Brandes and Weidman, *Law and the Family New York*, § 2.6, at 69-70) and “was accepted in order to obtain additional and important backing for the new law” (Henry H. Foster, *Commentary on Equitable Distribution*, 26 N.Y. Law Sch. L. Rev. 1 [1981]; see also Henry H. Foster, Jr., and Doris Jonas Freed, *Family Law*, 32 *Syracuse L. Rev.* 335, 344-345). Foster bemoans this compromise as “highly questionable both as a matter of logic and in view of the [premise] behind the new law” (Foster, *Commentary on Equitable Distribution*, at 9), and concludes that “it would have been better to separate items for mental pain and anguish from other items in compensation and to treat damages for loss of income and bills incurred as marital property ... Foster's analysis, however, recognizes that the statute's purpose was to exclude from marital property both the economic and the noneconomic portion of a personal injury award.

⁸ McKinney's 1980 Session Laws of NY, L. 1980, c. 281.

However, an examination of each paragraph, reprinted in full herein, requires an opposite conclusion. Foster's intimate participation in the gestational and birthing processes of the Equitable Distribution Law persuasively champions the thesis that economic losses attributable to personal injuries are marital property. Although Foster aimed an expression of discomfort at the Legislature for its failed precision, he unfalteringly exhorted marital classification:

Compensation for personal injuries was excluded from marital property, and was designated as separate property by a 1980 change in the equitable distribution measure, due to the insistence of Counsel for the Senate Judiciary Committee. As written, item 1(d)(2) is overbroad. *Although it is reasonable to provide that damages for mental pain and suffering should be separate property, it is highly questionable to provide that damages for loss of income, medical expenses, and comparable items are separate, rather than marital, property.* Presumably, such items of damages reflect a loss to the family or the expenditure of family assets. Perhaps a subsequent amendment may dispose of this issue if the provision as written proves inequitable.⁹

That the legislative intent cannot be as *Howe* construed is further evidenced from Foster's unsuccessful search for guidance from other jurisdictions' treatment of this issue. Had the legislative intent been firm, an extra-State study would have been unnecessary:

Compensation for personal injuries is another exclusion, but this exclusion is highly questionable both as a matter of logic and in view of the premises behind the new law. This exclusion first appeared in the bill in the Spring of 1980 and was accepted in order to obtain additional and important backing for the new law. *Logically, it would be more appropriate to view only damages for mental pain and suffering as individual or separate property. This separate property label is arbitrary and questionable, however, when applied to compensation or damage awards that are for such items as loss of earnings, medical and hospital bills, and other such expenses whose burden was equally borne by the marital partners.* The cases from other states are in conflict on this question, as well as on the question of spousal interest in "disability benefits," *so there is no definitive authority available for guidance.* Again, logic would dictate that it would have been better to separate items for mental pain and anguish from other items in compensation and to treat damages for loss of income and bills incurred as marital property. It is also likely that the term "compensation" will be given its broad meaning and will not be limited to workmens' compensation but instead will be held to mean payment of any damages for personal injuries.¹⁰

⁹ Henry H. Foster, Jr. and Doris Jonas Freed, 32 Syracuse L. Rev. 335, 344.

¹⁰ Commentary on Equitable Distribution, Henry H. Foster, 26 N.Y. Law Sch. L. Rev. 1, 9 [1981].

Foster's treatise (3 Freed, Brandes and Weidman, Law and the Family New York, § 2.6) underscores his certainty that compensation for lost earnings is marital property: Exemption (2) in [] § 236B(1)(d) was added belatedly at the request of legislative counsel, shortly before the enactment of the Equitable Distribution Law. It exempts from equitable distribution and designates as separate property "compensation for personal injuries." It may be proper to view damages reflecting individual pain and suffering as personal to the victim, but those damages compensating for loss of income, medical and hospital expenses and the like are family losses and deplete family assets. *This dichotomy is preferable and is supported by the overall policies of the Equitable Distribution Law and the evolving case law.*

Fleitz

Howe noted that "conventional wisdom that the economic component of a personal injury award is separate property is derived from the holding of the Third Department, in *Fleitz v. Fleitz*."¹¹ *Fleitz* is difficult:

Fleitz found § 236B(1)(d)(2) *unambiguous*. *Howe* found it *ambiguous*.

Although the policies in *Fleitz* were called "income insurance", they were compensation for personal injuries, albeit paid with marital property.¹²

While *Howe* states that the Second Department never cited *Fleitz*, *Bernstein v. Bernstein*, 18 A.D.3d 683 (2nd Dept., 2005), wherein the trial court wrestled with the same issue and was constrained to rule the entire award separate property, cited *Fleitz*.

Legislative Intent and Statutory Construction

Legislative intent is the ancestral DNA of a statute. An application of the canons of statutory construction militates in favor of classifying lost earnings compensation from personal injuries as marital property, per Foster: "This dichotomy is preferable and is supported by the overall policies of the EDL and the evolving case law."¹³

¹¹ 200 A.D.2d 874 (3rd Dept., 1994), leave to appeal dismissed, 84 N.Y.2d 849 (1994); lv. to appeal denied, 88 N.Y.2d 802 (1996).

¹² Cf., *Gann v. Gann*, 233 A.D.2d 188 (1st Dept., 1996), disability insurance policies held separate property where the premiums were paid from husband's separate funds constituting compensation for his personal injury which did not have a deferred income component as in disability pensions – "property acquired in exchange for or the increase in value of separate property" (§(1)(d)(3)).

¹³ 3 Freed, *id.*

The primary tenet upon which all others rest is that courts, in the construction of statutes, are to ascertain and give effect to the intention of the Legislature – which is the "fundamental rule," "the great principle which is to control," "the cardinal rule", and "the grand central light in which all statutes must be read."¹⁴ Legislative intent is to be effectuated and not frustrated.¹⁵

A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute.¹⁶ A statute must receive such reasonable construction as will, if possible, render all its parts consistent with its scope and purpose.¹⁷ It is necessary to “look beyond the statutory language and consider the history leading to the adoption of the Equitable Distribution Law and the legislative purpose and policy considerations underlying this radical change in the Domestic Relations Law”.¹⁸

Thus, *generally a particular provision of an act is not to receive a special meaning at variance with the general purpose and spirit of the act.* Inconsistency in the same statute is thought to be contrary to the intent of the lawmakers, and ... is to be avoided.

Statutes always have some purpose or object to accomplish, *whose sympathetic and imaginative discovery is the surest guide to their meaning*, and a basic and necessary consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment.¹⁹

Statutes §146 provides:

The Legislature is not lightly to be charged with enacting a statute which will operate harshly or unjustly; and, if a statute apparently has such effect, some other construction is to be sought if possible.

Where there is any doubt about the proper interpretation of a statute, it should receive that construction which would not work hardship or injustice. The courts should strive to avoid a construction which would make a statute unjust, or create

¹⁴ Stat. § 92.

¹⁵ Stat. § 96.

¹⁶ Stat. § 96.

¹⁷ Stat. § 98.

¹⁸ *Price, id.; Sutka v. Conners*, 73 N.Y.2d 395 (1989) (Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.); *Scotto v. Dinkins*, 85 N.Y.2d 209 (1995).

¹⁹ Stat. § 96.

a hardship. Thus if a fair construction can be found which gives force to the whole act and to the legislative intent, and does not work an injustice, it *must necessarily* be adopted.

Stat. § 152:

A construction of a statute which tends to sacrifice or prejudice the public interests will be avoided. The use of every effort on the part of the Legislature to enact laws which will promote the public interests will be presumed ...

Each generation of cases at all levels has made decided strides to broaden rather than to trim the borders of the marital estate: “The Legislature, in defining this basic term ‘marital property’ ... intended that the term should be construed broadly in order to give effect to the ‘economic partnership’ concept of the marriage relationship ... The term ‘separate property’ ... described in the statute as an exception to marital property ... should be construed narrowly.”²⁰ Compensation for lost earnings parallels the disability-pension paradigm and, per the canons of statutory construction, inescapably requires similar treatment to preserve the harmony of the statutory scheme.

Conclusion

The Second Department’s view of § 236B(1)(d)(2) as ambiguous led to its examination of Foster’s notes – akin to a past recollection recorded. It is the first time that an appellate court has delved into Foster’s mind to extract its legislative intent. Economic partnership is the ethos of the Equitable Distribution Law. It is, therefore, seamless and sensibly consistent to construe § 236B(1)(d)(2) concordant with Foster’s comprehension, which is simultaneously deferential to the continuing evolution of the principle of economic partnership. *Howe*’s profound analysis was perched at that very threshold. Absent a reversal by the authoring department, this issue must await a date in Albany.

Since the commencement of a matrimonial action excludes future earnings from the marital estate, the party alleging a separate property claim must proffer expert testimony to parse post-commencement lost compensation from the earnings attributable to the marriage.

²⁰ *Price*, id.