Mahoney-Buntzman, and *Johnson*: The Persisting Issues[1]

In *Mahoney-Buntzman v. Buntzman* 12 N.Y.3d 415, 881 N.Y.S.2d 369 (2009), and *Johnson v. Chapin* 12 N.Y.3d 461, 881 N.Y.S.2d 373(2009), argued together (March 30, 2009) and handed down together (May 7, 2009), the Court of Appeals resolved a key issue: payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not the type of liabilities entitled to recoupment by the current spouse. Other important issues raised in *Mahoney-Buntzman* and *Johnson* remain inconclusive awaiting a future date in Albany.

Prior Court Ordered Payments

The husbands in *Mahoney-Buntzman* and *Johnson* had each been married previously and were making court ordered payments to their prior families during their subsequent marriages. First and Second Department precedent authority *[Kohl v. Kohl* 24 A.D.3d 219 (1st Dept., 2005); *Dewell v. Dewell* 288 A.D.2d 252 (2nd Dept., 2001)*]* credited current wives for court ordered payments to prior families on the thesis that marital funds ought not be applied to pay off separate liabilities – strikingly, however, gratuitous gifts did not yield any credit.

– *Johnson*, Dissent

Justice James McGuire's compelling dissent in *Johnson*,[2] joined by Justice David Friedman, expressed concerns anchored in "bad public policy" regarding "the spectre of a remarriage penalty that will loom over many second marriages" which would discourage remarriage or [trigger] early divorce for spouses obligated to make enforceable support or property distribution payments to prior families while creating a windfall for current spouses. Applying *a fortiori* reasoning, the dissent considered this logically illogical:

> No rational public policy could support a rule of law that favors the making of the gratuitous payment even as it discourages the making of the legally required payment.

– *Mahoney-Buntzman*, *Johnson*

Mahoney-Buntzman and *Johnson* reversed *Kohl* and *Dewell*. *Mahoney-Buntzman* begins by encasing the philosophy that divorce court should not entertain quibbling over honestly expended funds during a marriage:

> The Domestic Relations Law recognizes that the marriage relationship is an economic partnership ... during the life of a marriage spouses share in both its profits and losses ... many payments are made, whether of debts old or new, or simply current expenses. If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage

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[1] This article appeared in the New York Law Journal, June 29, 2009.

[2] Johnson v. Chapin, 49 A.D.3d 348 (1st Dept., 2008); E. Scheinberg, Community Property in the Equitable Distribution Law (7/2/2008 N.Y.L.J. 4, (col. 4)).

> seeking review of every debit and credit incurred. As a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the non-titled spouse exclusively.[3] The parties' choice of how to spend funds during the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end.

The Court, in reliance on Domestic Relations Law § 236(B)(5)(d)(13) ("any other factor which the court shall expressly find to be just and proper"), underscored that although marital expenditures may be reviewed "where equity requires a credit to one spouse for marital property used to pay off [] separate debt [] or add to the value of [] separate property ... [or] [] expenditures are truly excessive ... [or] a 'wasteful dissipation of assets' ... [nevertheless] *the payment of maintenance to a former spouse does not fall under either of these categories*."

The observation that such court-ordered "expenditures are obligations that do not enure solely to the benefit of one spouse" appears to adopt *sotto voce* Justice McGuire's "assumption of the risk"-like theory: the second wife, mindful of the husband's financial obligations, nevertheless, perceived overriding benefits to be realized from the new marriage and took him "as is":

> With the 'good' of the husband's divorce judgment (i.e., the ability to marry the husband and the benefits, tangible and intangible, she realized over the course of their marriage), the wife took the 'bad' (i.e., the husband's financial obligations to his former spouse and their children).

The observation about "respecting" and "not second guessing" a couple's "choice of how to spend funds" and "the[ir] economic decisions during a marriage" appears to be a continuation of the dictum in *Matisoff v. Dobi* 90 N.Y.2d 127 (1997), wherein a postnuptial agreement was held unenforceable due to an absent acknowledgment. In the dictum the Court emphasized that while the agreement failed on procedural grounds, the Appellate Division could, on remand, consider the manner in which the parties maintained their economic affairs when distributing the property.

In brief: court-ordered payments are not subject to credit but other payments just might be. Fiscal Armageddon during divorce litigation thus remains robust.

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[3] It is unclear what situation the Court intended this sentence to address.

***Micha*, Unjust Enrichment**

Citing *Micha v. Micha* 213 A.D.2d 956 (3rd Dept., 1995), *Mahoney-Buntzman* stated: "There may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property." *Micha* is representative of a line of cases which addresses the application of marital funds towards separate real property either by way of mortgage reduction or improvements.[4] *Micha* can, however, easily be construed as the broad mantra for all instances of unjust enrichment, irrespective of the nature of the asset. The unanswered question is will it be limited to real property?

Judicial Estoppel

Judicial estoppel requires a three prong inquiry: a representation made in a prior action, success based on that representation, and an inconsistent position in a subsequent action. *Martin v. C.A. Productions Co*. 8 N.Y.2d 226 (1960), explained:

> By reason of the successful position thus taken by him in the prior action, defendant comes within the rule that a claim made or position taken in a former action or judicial proceeding will estop the party from making any inconsistent claim or taking a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.

Even a lenient prison sentence achieved by specific representations constitutes a "benefit" under judicial estoppel *[Festinger v. Edrich* 32 A.D.3d 412 (2nd Dept.,2006)*]*. This principle applies equally to administrative agencies, such as, taxing authorities,[5] as *quasi estoppel*.

In *Mahoney-Buntzman,* the Court affirmed a finding of judicial estoppel against the husband's sale of stock, which he had sold to his father for a payment to be reported on a "1099" form. To account for his increased tax liability as a consequence of treating the payment as ordinary income rather than as a sale of stock, the payment was increased by 17%. The payment as business income was sworn to as true on the parties' joint tax return. He was thus estopped from claiming those funds as his separate property. The trial court had noted that, in his Judgment of Divorce from his first wife, he represented no stock ownership, contrary to his current position.

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[4] Spilman-Conklin v. Conklin 11 A.D.3d 798 (3rd Dept.,2004); Lewis v. Lewis 6 A.D.3d 837 (3rd Dept.,2004); Carr v. Carr 291 A.D.2d 672 (3rd Dept.,2002); Alessi v. Alessi 289 A.D.2d 782 (3rd Dept.,2001); Burgio v. Burgio, 278 A.D.2d 767 (3rd Dept., 2000); Markopoulos v. Markopoulos, 274 A.D.2d 457 (2nd Dept., 2000); Vail-Beserini v. Beserini, 237 A.D.2d 658 (3rd Dept., 1997).

[5] See Zemel v. Horowitz 11 Misc.3d 1058(A) (Sup.Ct. 2006); Meyer v. Insurance Co. of America 1998 WL 709854 [SD N.Y.1998]; Estate of Ginor v. Landsberg 1998 WL 514304 [2d Cir1998]; Naghavi v. N.Y. Life Ins. Co. 260 A.D.2d 252 (1st Dept 1999).

Substantial v. Sole Cause

It was anticipated that the Court of Appeals would arbiter the divide between the First and Second Departments regarding the quantum of contribution necessary by the spouse seeking to lock in the commencement date of the action of an actively appreciated asset as the valuation date of the asset so as to preclude the distribution of its increased value beyond that point.

The First Department requires no more than a *role* in its appreciation, such as, when third parties or forces are also responsible for the appreciation. In *Heine v. Heine* 176 A.D.2d 77 (1st Dept., 1992)**,** cited by the trial court, in *Mahoney-Buntzman,*[6] the husband's mere role in the decision to take the company private was sufficient to fix its valuation date as of the commencement date. The trial court noted that *sole* causality in *Heine* "would have been impossible [because] there were other directors involved in the decision making process."

The Second Department,[7] however, imposes an onerous test: the party seeking to limit valuation of an asset to the commencement date, must "prove that any change in value of that asset was due *solely* to his efforts [or "complete control"[8]] to the exclusion of all other factors" – clearly impossible where third party leadership or other forces are involved in the business' management and operations.

Mr. Buntzman and another individual formed a corporation, EVCI, during the marriage. At the time of the action, the husband held shares and options in EVCI, all acquired during marriage. The trial court found that the husband played only a *substantial role* in changing the direction of the company and in its expansion – the appreciation had not been due *solely* to his efforts but also to significant third party participation. Plainly sympathetic to Mr. Buntzman, *à la Heine*, the trial court was "constrained" to follow departmental law and decide against him.

The Second Department affirmed without comment. The Court of Appeals preserved the debate for a later date: without opinion, it affirmed the trial court's "*discretion*" in fixing the valuation date as the date of trial – but neither was there nor could there have been any discretion because the selection was ordained by the laws of the Second Department.

The Court of Appeals could have resolved this departmental schism by expanding the definition of "active contribution" to include those attributable to associates of the titled spouse who are clearly acting in concert with him, irrespective of whether midlevel or upper level management, to the exclusion of passive market forces. An alternate method by which the party seeking to salvage post-commencement date contributions in multi-tiered business operations can

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[6] Mahoney-Buntzman v. Buntzman, 13 Misc.3d 1216(A) (Sup.Ct. 2006).

[7] Breese v. Breese 256 A.D.2d 433 (2nd Dept.1998); Barbuto v. Barbuto 286 A.D.2d 741 (2nd Dept.2001); Scharfman v. Scharfman 19 A.D.3d 474 (2nd Dept 2005).

[8] Siegel v. Siegel, 132 A.D.2d 247 (2nd Dept., 1987).

satisfy his burden of proof is to apply the modality in *Hartog v. Hartog* 85 N.Y.2d 36 (1995) – parse the appreciation into its components: (1) the party's individual efforts; (2) market/passive influences; and (3) those of third parties.

Mr. Buntzman's PhD

Mr. Buntzman earned a doctorate in education during the marriage funded by a student loan, which he repaid during the marriage. Expert testimony showed that his advanced degree did not enhance his earning capacity and his wife would not realize any benefit therefrom. The Appellate Division awarded her a 50% credit for the student loan. The Court of Appeals dismissed the credit because, had his degree conferred an economic benefit, she would have been entitled to a share in its value. Thus, the loan was deemed "a marital obligation [] to be shared between the parties." Had the student loan remained outstanding, it "*may* have been appropriate to assign the balance of the debt to the husband alone."

Query: assume his wife's indulgence had been regular beauty treatments, trips, tennis, or anything else, while his was the love of learning as a perennial student, or channel surfing as a spare time existential couch potato. What if the cost of her indulgences remained outstanding at the date of the commencement of the action. Can anyone imagine the argument that her pleasures would not be protected as a standard of living? Why should the perennial student differ?

Burden to Value

Marital property is construed broadly and separate property is construed narrowly *[Price v. Price* 69 N.Y.2d 8 (1986)*]*. Although the burden of proof rests upon the party claiming separate property *[Price]*, the Appellate Division gave Mr. Chapin a *sua sponte* "market force" credit which was affirmed without comment. Before the marriage, the husband owned a home on approximately 160 acres of land, which underwent a $2 million lavish remodelling throughout the marriage. The improvements were deemed 100% marital because joint efforts and marital funds had been applied. The husband received a separate property value credit. The Appellate Division reduced the wife's share of the property's appreciation from 50% to 25% because, it postulated, "[m]arket forces over the approximately 11 years of marriage accounted for *some* of the property's increased value." It was the husband's burden to present expert testimony to identify and quantify the separate appreciation.

Recoupment of Interim Support Overpayment

Haas v. Haas 271 A.D. 107 (2nd Dept. 1946), explained why restitution or recoupment of interim support overpayments is generally rejected on strong public policy grounds:[9]

> ... temporary alimony rests on and grows out of a showing of necessity. The award is not in the nature of a judgment; it is merely a temporary provision resting on public policy which exacts support from the husband pending a determination of

[9] Annette M.R. v. John W.R. 45 A.D.3d 1306 (4th Dept.,2007); Rodgers v. Rodgers 98 A.D.2d 386 (2nd Dept., 1983), appeal dismissed, 62 N.Y.2d 646 (1984); Rosenberg v. Sack 46 A.D.3d 1273 (3rd Dept.,2007).

> conflicting contentions respecting permanent support.[10] Its nature and purpose negatives the existence of a right to restitution, such as would exist if it were a judgment, or to recoupment, in the absence of a statute giving such a remedy. It may not be recovered directly by restitution, or indirectly by recoupment. This also applies to permanent alimony.

Nevertheless, the First, Second, and Third Departments[11] sparked a trend which permits recoupment, under the nomenclature of "adjustments" during equitable distribution for excessive interim spousal maintenance awards. Relying on DRL 236 [B][5][d][5] ("... [i]n determining an equitable disposition of property ... the court shall consider: any award of maintenance"), the Court of Appeals, in *Johnson*, affirmed this method of recoupment. Mr. Chapin's interim support obligation was predicated on an imputed annual salary of $2 million, which at trial proved to be significantly lower.

Johnson, however, did not address the inextricable interplay between property distribution and spousal maintenance.[12] The statutory sequence prioritizes property distribution (DRL § 236B(5)) over spousal maintenance (DRL § 236B(6)) in that property awards and their income generating potential must be considered ahead of maintenance allocations.[13] During *Johnson*'s pendency, the wife had not yet received her income generating assets and was thus not compensated for the use of those funds. Such imbalance can be remedied with retroactive interest on the distributive award.

Interim Child Support

Recoupment of overpaid child support remains unclear. The Court of Appeals rebuffed Mr. Chapin's claim for such a credit because of the "strong public policy against restitution or recoupment of support overpayments (Baraby v. Baraby, 250 A.D.2d 201 (3rd Dept 1998); Rosenberg v. Rosenberg, 42 A.D.2d 590 (2nd Dept 1973)." Interestingly, the combined reading of *Baraby* and *Rosenberg* evidences a total rejection of recoupment for any kind of overpaid support: *Baraby* addressed child support, *Rosenberg* involved alimony. Is this combined rejection absolute? Apparently not because, *Rosenberg* notwithstanding, the Court of Appeals granted Mr. Chapin credit for overpaid spousal maintenance only one paragraph earlier. Additionally, other

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[10] Surut v. Surut, 191 A.D. 570 (1st Dept. 1920).

[11] Pickard v. Pickard 33 A.D.3d 202 (1st Dept., 2006), appeal dismissed 7 N.Y.3d 897 (2006); Gad v. Gad 283 A.D.2d 200 (1st Dept., 2001); Galvano v. Galvano 303 A.D.2d 206 (2nd Dept., 2003); Fox v. Fox 306 A.D.2d 583 (3rd Dept., 2003), appeal dismissed 1 N.Y.3d 622 (2004).

[12] Kaplan v. Kaplan 82 N.Y.2d 300 (1993).

[13] Grumet v. Grumet 37 A.D.3d 534 (2nd Dept., 2007); Griggs v. Griggs 44 A.D.3d 710 (2nd Dept., 2007).

cases allow credit for overpaid child support:

- *Hamza v. Hamza* 268 A.D.2d 459 (2nd Dept. 2000): "under certain [unidentified] circumstances";

- *Colicci v. Ruhm* 20 A.D.3d 891 (4th Dept.,2005): " under limited circumstances" – a mathematical error i

- *Aaronson v. Aaronson* 3 A.D.3d 588 (2nd Dept.,2004): "under limited circumstances" – temporary excess support solely due to the court's improper application of the CSSA;

- *Thomas v. Commissioner of Social Services ex rel. Lewis* 287 A.D.2d 642 (2nd Dept. 2001): order of filiation and ensuing support orders vacated based on evidence that respondent was not the child's biological father.

It is, therefore, uncertain whether and to what extent these cases remain intact.

Conclusion

While we now know with certainty that there is no credit for court-ordered payments to a prior family, significant issues remain rife for future determination.