Mesholam: Prior Action May Not Be Valuation Date[1]

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Domestic Relations Law (DRL) § 236B(4)(b) directs that the valuation of assets subject to equitable distribution be either as of the commencement date of the action or the date of trial. However, can the commencement of a prior discontinued divorce action serve as the valuation date for marital property for purposes of equitable distribution in a later divorce action?[2] The significance of which valuation date governs is critical to the titled spouse when a lengthy hiatus between the two actions has dramatically impelled asset values as well as the tolling period for the acquisition of additional marital property. In *Mesholam v. Mesholam*,[3] the Court of Appeals held that the prior action may not serve as the cut off point.

Until *Mesholam* the answer to the question was Department driven. The Second Department first raised this issue but left it unanswered in *Wegman v. Wegman*, 123 A.D.2d 220 (2nd Dept., 1986). It eventually stood alone in a fully developed equity based body of law[4] grounded in economic partnership,[5] fashioned to avoid unjust enrichment by not permitting a party to convert what would have been separate property into marital property when parties lived separately and neither party derived any further benefits from the marital partnership. It held that absent inequities or other circumstances, a tolling of asset valuation and categorization occurred upon the commencement of the first matrimonial action (DRL § 236B(5)).

In the final analysis *Mesholam* conducted statutory housekeeping and the practical outcome may remain as it did under Second Department thinking, only by way of a different route.

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[1] N.Y.L.J., August 26, 2008.

[2] I express thanks to Charles Holster, III, Esq., the husband's appellate counsel, for shedding light on this case and for the Appendix to the Trial Record.

[3] Mesholam v. Mesholam, 11 N.Y.3d 24, 862 N.Y.S.2d 453 (2008).

[4] Miller v. Miller, 304 A.D.2d 727 (2nd Dept.,2003), leave to appeal denied, 100 N.Y.2d 615 (2003); Gonzalez v. Gonzalez, 240 A.D.2d 630 (2nd Dept., 1997); Thomas v. Thomas, 221 A.D.2d 621 (2nd Dept.,1995) (there was no reconciliation after the commencement of the first action and the court refused to allow the wife to "enlarge the pot to be distributed during the period between the commencement of the first and second actions as a marital asset."); Marcus v. Marcus, 135 A.D.2d 216 (2nd Dept., 1988); Fuegel v. Fuegel, 271 A.D.2d 404 (2nd Dept., 2000); Lamba v. Lamba, 266 A.D.2d 515 (2nd Dept., 1999); et al.

[5] Majauskas v. Majauskas, 61 N.Y.2d 481 (1984); O'Brien v. O'Brien, 66 N.Y.2d 576 (1985).

Facts in *Mesholam*

The facts presented by the Court of Appeals are most interesting because they differ from the events captured in court minutes. *Mesholam* relates that following five years of "long and contentious pretrial proceedings", Supreme Court "granted the wife's motion to discontinue the action and denied the husband's cross motion" to amend his answer to assert a counterclaim for divorce. The Appendix to the Record on Appeal[6] shows that, in the first action (1999), the wife had made an oral application only for a three month adjournment, not a discontinuance.[7] The motion court did no more than to reason that a party who does not want to proceed may not be compelled to do so,[8] and somehow converted her application into one for discontinuance and "declared a mistrial"[9] – the court never reached or made any findings regarding the wife's "wrongdoing or ill-motive" or her ability to proceed.

Almost immediately following the discontinuance, the husband commenced an action for divorce which was granted. Surprisingly, although the trial court that presided over the second action (commenced by the husband) four years later (2003) puzzlingly observed: "The reasons for the discontinuance are unclear",[10] it, nevertheless, improperly imputed an absence of "ill motive" in the wife's motion.[11] This unfound "finding" took root.

Supreme Court valued his pension as of the latter commencement date, rather than the commencement date of the wife's action, because DRL § 236(B)(4)(b) precludes the selection of a valuation date earlier than the commencement of the pending action. The Second Department reversed and held that the "appropriate valuation date was the commencement date of the wife's prior action" because there had been no evidence of reconciliation and continued receipt of benefits from the marital relationship after the prior action was commenced.

Reversal

Focusing on the statutory language and its own precedents, the Court of Appeals reversed the Second Department: (1) DRL § 236(B)(1)(c) defines marital property as all property acquired "during the marriage and before the execution of a separation agreement or the commencement

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[6] Appendix, pp. A34 - 46.

[7] Appendix, A37: "[Wife's Counsel]: ... 'plaintiff [] does not want to proceed. The guardian ad litem has indicated that she should not be forced to proceed and has asked for a three month adjournment.'" The trial court erroneously stated that the wife had *filed* a motion to discontinue (Appendix 11).

[8] Appendix, A41 - 46.

[9] Appendix, A46.

[10] Appendix, A11.

[11] Appendix, 14. The trial court erred in its characterization of the standard in the Second Department, it is not ill motive but rather continued receipt of benefits of the marital relationship.

of a matrimonial action"; (2) in the absence of a separation agreement, the commencement date of a matrimonial action demarcates "the termination point for the further accrual of marital property"; and (3) the definition of "marital property" "should be construed broadly in order to give effect to the 'economic partnership' concept of the marriage relationship recognized in the statute." However, once property is classified as marital or separate, the trial court has broad discretion to select an "appropriate date for measuring the value of [the] property", however, the valuation date can only be between the commencement date of a matrimonial action and the date of trial" (DRL § 236[B][4][b]).

Since there can be no equitable distribution where there is no divorce (DRL § 236[B][5]), the preservation of the statutory scheme requires that the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce. Nevertheless, although the commencement date of the later completed action is the earliest permissible valuation date for marital property, appreciated values and assets acquired following the first filing are not automatically subject to distribution. The Court underscored that all intervening circumstances from the time of the first filing until the second filing "*can and should be considered* as a factor by [the trial court], among other relevant factors ..." (emphasis provided).

Equity is not smothered by the statute; *Mesholam* thrives in harmony with other of the Court's precedent decisions. In *Anglin v. Anglin*, 80 N.Y.2d 553 (1992), the Court held that although a separation action does not trigger property distribution and, therefore, does not terminate further accrual of marital property, "[t]he commencement of a separation action may be considered as a factor by courts, among other relevant factors, as they attempt to calibrate the ultimate equitable distribution of marital economic partnership property acquired after the start of such an action by either spouse." *Anglin*'s message was that matrimonial courts, sitting in equity, possess broad discretion to avoid property awards that are unjustifiable under the principle of marital-economic partnership. It is noteworthy that *Mesholam* echoes this language nearly verbatim

In *Matisoff v. Dobi*,[12] the Court emphasized, in dictum, that although its decision was grounded in the bright line ruling engraved in the statute (DRL § 236B(3)), "the equitable factors ... may be relevant to the Appellate Division's review of the award."

Mesholam's emphasis on the five year "long and contentious pretrial proceedings" is telling that equity rather than a cold application of the statute should govern the outcome.

Ill Motives, Parallel Reasoning

The Court of Appeals' reference to "ill motive" will assuredly be the focus in future multiple action cases and, therefore, requires reexamination. A review of the body of pre-*Mesholam* law in the Second Department shows that it was not without foundation. It drew strength from prior decisional authority from the Court of Appeals originating from late-date

[12] Matisoff v. Dobi, 90 N.Y.2d 127 (1997).

discontinuances of pre-Equitable Distribution Law actions immediately after the enactment of the Equitable Distribution Law (EDL). Despite the Legislature's directive that all pre-EDL actions were to be resolved under the terms of the old statute, non-titled spouses attempted to do an end run around their pending pre-EDL actions in order to obtain larger awards under the new law. The Court of Appeals and the various Departments severely restricted discontinuances if they might have lead to inequitable and unjustifiable windfalls.

In *Tucker v. Tucker,*[13] the Court of Appeals held that although, ordinarily, a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted, "improper consequences flowing from a discontinuance" may lead to an "obligatory" denial of a discontinuance. Although this language appeared in many cases thereafter, courts tempered discontinuances with prejudice designed to prevent any benefits in later actions.[14] *Tucker* held:

> [A] [party] who has commenced a matrimonial action prior to the effective date of the 'Equitable Distribution Law' may not discontinue that action for the purpose of instituting a second action after that date in order to obtain benefits under the broader provisions relating to distribution of marital property applicable in actions commenced after the statute became effective ... Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or, as the Appellate Division correctly held in this case, obligatory."

Tucker also mused as to "what the rule should be in an instance in which the plaintiff is less open in disclosing the objective behind his or her motion to discontinue, or even affirmatively masks its ulterior purpose." The Court suggested a solution that makes motive irrelevant and result primary: a "court might assure accomplishment of the legislative intent by exercising its statutory authority to impose appropriate terms and conditions on a discontinuance (CPLR 3217[b]), as for example, by granting the application to discontinue with prejudice to institution of a subsequent matrimonial action based on any conduct which might have been the basis for an action prior to July 19, 1980."

In *Cappa v. Cappa*,[15] the Fourth Department disallowed the discontinuance of an action where the filing of a subsequent action "would result in converting what had otherwise been separate property into marital property upon the commencement of any new proceeding."

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[13] Tucker v. Tucker 55 N.Y.2d 378 (1982).

[14] Knobel v. Knobel 60 N.Y.2d 672 (1983); Zuckerman v. Zuckerman, 105 A.D.2d 782 (2nd Dept., 1984); Leites v. Leites 104 A.D.2d 342 (1st Dept.,1984); Michael v. Michael 209 A.D.2d 1055 (4th Dept.,1994); Arsenault v. Arsenault 192 A.D.2d 1120 (4th Dept.,1993); Westchester County v. Welton Becket Associates 102 A.D.2d 34 (2nd Dept.,1984), appeal dismissed, 64 N.Y.2d 734 (1984); et al.

[15] Cappa v. Cappa, 212 A.D.2d 1056 (4th Dept.,1995).

Ruppert v. Ruppert,[16] an appeal transferred to the Third Department by the Second Department, citing *Tucker*, affirmed the denial of a discontinuance where "the parties had no intention of effecting a reconciliation", and the "discontinuance would work particular prejudice against defendant in that it would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding."

In *Kane v. Kane*,[17] the Second Department, citing *Tucker*, held that a court "must consider whether substantial rights have accrued or the adversary's rights would be prejudiced" before allowing a discontinuance of a prior action. CPLR 3217(b) does not support the grant of a discontinuance by the court if unfair undue prejudice to the other side warrants a denial of such an application.

Prejudice v. Motive

An application of the Court's directive that "the circumstances surrounding the commencement of the earlier action can and should 'be considered as a factor by [the trial court], among other relevant factors'", begs the question, which is the predominant factor, ill motive by the party seeking discontinuance, or prejudice to the spouse opposing the discontinuance? Plainly, the two are inextricably intertwined.

CPLR § 3217(b) provides that once the absolute right to discontinue an action under § 3217(a) is no longer available, "an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." The statute directs courts to do equity. There is nothing in either legislative scheme that precludes or limits a court's authority to exercise broad based equity in cases involving multiple matrimonial actions. Sections 236B(4)(b) and 3217(b) are neither incompatible nor mutually exclusive, they coexist harmoniously. Had the Legislature intended to abate § 3217(b)'s applicability to matrimonial actions it could have done so as it has done with other statutes (see CPLR § 3212(e); CPLR § 211(e); CPLR §§ 5241, 5242). Prejudice is thus the determinant.

Conclusion

A solution offered by the late Justice Ralph Yachnin is brilliant in its simplicity. In *Musumeci v. Musumeci*,[18] Justice Yachnin valued the husband's pension where the parties' had been separated for four years. He enforced § 236B(4)(b)'s directive regarding the selection of valuation dates without compromising the spirit of equity grounded in partnership principles. *Musumeci* emphasized that the underlying principle of a marital partnership and the contribution by each party could be lost if the selection of the valuation dates were blindly applied without allowing equity to assuage the result because "[t]he purpose of equitable distribution is to allow the parties to keep a share of what they mutually earned during the marriage":

There is no doubt that if during the period of time that the parties lived together

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[16] Ruppert v. Ruppert, 192 A.D.2d 925 (3rd Dept.,1993).

[17] Kane v. Kane, 163 A.D.2d 568 (2nd Dept., 1990).

[18] Musumeci v. Musumeci, 133 Misc.2d 139 (Sup.Ct. Suffolk Co. 1986).

> there was a joining of resources and the sharing of the benefits, then the non-pensioned party should share in the pension for that period. However, during the latter forty six months when the parties were not living together, it is obvious that the Wife did nothing to contribute to the appreciation of the pension other than to be married to the defendant in name only.

Citing governing law that property distribution be mindful of fairness as the ultimate goal while "reflecting the individual needs and circumstances of the parties," *Musumeci* divided the marriage into two periods: (1) when the parties lived together, and (2) the four year separation prior to the commencement of the action. The wife was awarded 50% of that portion of the pension which accrued while the parties lived together – when the husband was still reaping the benefits of the marriage – and 0% for the nearly four years during which they lived apart. The court added the sum of the wife's contributions during the two periods – the whole is equal to the sum of its parts – and § 236B(4) had been complied with in letter and spirit.

The Court of Appeals, in *Mesholam*, reenforced equitable considerations. Results may remain as before in the Second Department, irrespective of who held the burden of proof before *Mesholam* and who holds it now. Ultimately, the inquiry will explore "all intervening circumstances from the time of the first filing until the second filing", including, but not limited to, any continued benefits from the marital relationship.