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Notes and Comments

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SLAVERY OR FREEDOM:
The Choice Is Yours

Two weeks after the most virulent and barbaric attack to our democracy that has ever taken place on American soil, I still find it difficult to comprehend the magnitude of this horrific act, or the fact that it even took place. Anger, remorse, fear, hatred, vengeance, retribution, resolve and courage are but a few of the words that have crept into our consciousness and onto the tongues of all Americans.

In thinking what positive measures could be taken by the organized bar and by the matrimonial bar in particular, I thought it was important for anyone in a position of leadership, whether in the government or not, to articulate what will be the challenges to all free thinking persons in democratic societies throughout the world, and the steps that must be taken in order to combat the evil that has pervaded our normal lives.

The choice is clear to me. Either we accept becoming enslaved by terrorists and terrorism, or we remain as free people. The slavery I speak of is the enslavement of one's mind, one's freedom of movement and, yes, the loss of a basic tenet of the Four Freedoms, articulated by Franklin Delano Roosevelt in a joint address to congress on January 6, 1941, some 60 years ago . . . the freedom from fear itself, as President Roosevelt earlier observed during the Depression.

Winston Churchill, in the depths of the London Blitz, rallied the British people, declaring that they would remain as free people and would not be overcome by the bombs that had devastated most of the city; that their spirits could not be broken; and that they would fight to the last man, albeit with only their fists and stones.

The road ahead will be difficult to traverse. At times, it will seem that, despite all of our efforts and despite the loss of lives that surely will occur, our goal to achieve freedom and avoid slavery will appear to be out of grasp. Such frustration will undoubtedly become another stark reality that may deter some from continuing the battle. Nonetheless, we must have the resolve to accept casualties, accept the fact that the battle continues to be waged without apparent immediate success, accept the fact that our economy has been damaged and may result in all of us adjusting our financial lives, yet

Inside

Who's on First?
Or, the Second Is on First and the First Is on Second

By Elliott Scheinberg

A not oft-encountered scenario has been gaining increasing prominence in the judicial limelight: when two divorce actions have been started, which is the correct date for the valuation of actively appreciated assets? The answer depends on the Department in which the case is pending. Until February 2001, only the Second Department, in a fully evolved body of decisional authority, had addressed the issue, holding that the first date is the correct date provided the parties had not resumed living together, *i.e.*, that no further benefits were derived from the marital partnership. Recently, Supreme Court, New York County, in *McMahon v. McMahon*,[1] weighed in on this issue as a case of first impression in that Department and concluded differently. It is submitted that *McMahon* erroneously analyzed governing case law and, therefore, reached the wrong conclusion.

DRL § 236B(4) Directs a Court to Fix the Value of Each Asset as Soon as Practicable

Firstly, the statute and appellate authority encourage us to make an application as early as possible to determine the valuation dates of certain assets. DRL 236B(4) states:

> 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.

Antenucci v. Antenucci,[2] an appeal transferred to the Third Department from the Second Department, involved a pretrial application to classify property wherein the court stated: "we encourage a pretrial classification of assets whenever possible."

The early fixing of a valuation date is significantly beneficial because extraordinary savings can be realized by obviating potentially needless costs associated with litigation, including but not limited to trial preparation, trial preparation of expert witnesses, court time for expert witnesses, trial time, duplicative costs in the event of a remand and judicial economy in the event of a remand.

The Bright Line for Determining the Valuation Date in Cases Where a Prior Action Was Commenced Is: Did the Parties Resume Living Together After the First Action?

It is settled law that a tolling of assets occurs once a prior action has been commenced and the parties did not resume living together. A party may not thereafter be unjustly enriched by converting what would have been separate property into marital property when neither party derived any benefits from the marital partnership. In determining the correct valuation date, a court must, therefore, first examine whether the parties had ever reconciled, as defined by decisional authority, subsequent to the commencement of the first action. If they did not so reconcile, then the first action must be fixed for valuation purposes.

In *Lamba v. Lamba*,[3] the Second Department repeated the bright line to be applied in cases where two actions have been commenced, to wit, "whether after the commencement of the [first] action the parties reconciled and continued to receive the benefits of the marital relationship."

> The Supreme Court erred in granting the plaintiff's motion to have the defendant's pension valued as of July 6, 1994, the date the instant action was commenced, as opposed to the date that a previous, discontinued, divorce action between the parties was commenced in or about May 1989, since her moving papers contained no evidence that the parties reconciled and continued to receive the benefits of the marital relationship. The court compounded that error when it subsequently denied the plaintiff the opportunity to present such evidence at trial. Inasmuch as the plaintiff was required to make such a showing before the court could grant her motion (see, *Gonzalez v. Gonzalez*, 240 AD2d 630, 659 N.Y.S.2d 499; *Thomas v. Thomas*, 221 AD2d 621, 634 N.Y.S.2d 496; *Marcus v. Marcus*, 137 AD2d 131, 525 N.Y.S.2d 238).

In *Gonzalez v. Gonzalez*,[4] the Appellate Division held:

> Domestic Relations Law § 236(B)(1)(c) defines "marital property" as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial 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" (*Cohn v. Cohn*, 155 AD2d 412, 413, 547 N.Y.S.2d 85; *Kirshenbaum v. Kirshenbaum*, 203 AD2d 534, 611 N.Y.S.2d 228). Here, in considering what valuation date should be applied, the trial court must determine whether after the commencement of the 1982 action the parties reconciled and continued to receive the benefits of the marital relationship (see, *Thomas v. Thomas*, 221 632 AD2d 621, 634 N.Y.S.2d 496; *Marcus v. Marcus*, 137 AD2d 131, 525 N.Y.S.2d 238).

Fuegel v. Fuegel,[5] a relatively recent, however, sparsely worded opinion by the Second Department, continues the chain of decisional authority regarding the causal relationship between resumption of living together and continued derivation of benefits as the exclusive criteria for the fixing of valuation dates. The relevant language in *Fuegel* is set forth below in its entirety:

> Contrary to the defendant's contention, the court properly determined that the appropriate date for the valuation of the marital property was the commencement date of the instant action rather than the commencement of a prior dismissed divorce action (see, *Nicit v. Nicit*, 217 AD2d 1006, 631 N.Y.S.2d 271; *Sullivan v. Sullivan*, 201 AD2d 417, 607 N.Y.S.2d 937; *Marcus v. Marcus*, 135 AD2d 216, 525 N.Y.S.2d 238).

Firstly, although devoid of any facts or details behind the case, the underlying facts in *Fuegel* strongly support the conclusion. The author of this article gratefully acknowledges the assistance of Perry Satz, Esq., counsel for Mr. Fuegel, who explained that the record on appeal evidenced that the parties had attempted a reconciliation for approximately one year which included: (1) living in the same house; (2) joint counseling; and (3) the purchase of flowers and chocolates.

Furthermore, the cases cited within *Fuegel* are didactic in that they underscore the Second Department's steadfast commitment to the selection of the earlier date where there has been no resumption of living together, thus making it consistent with the string of cases preceding it.

In *Thomas v. Thomas*,[6] the Second Department affirmed the lower court's ruling which fixed the first summons and complaint as the valuation date. *Thomas* emphasized that there had been no reconciliation after the commencement of the first action and 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."

> Domestic Relations Law § 236(B)(1)(c) excludes from marital property those assets acquired after the commencement of a divorce action. This court has previously held that such property may become marital property again where, for example, the action is discontinued and the parties either reconcile or continue the marital relationship and continue to receive the benefits of the relationship (see, *e.g.*, *Marcus v. Marcus*, *supra*).

Marcus v. Marcus,[7] the seminal decision to squarely address this issue, is cited in many of the decisions including *Fuegel*. *Marcus*, grounded on legislative intent, found actual reconciliation and a continued derivation of benefits by the husband and designated the second action as the cutoff date.

> Most significantly, however, the commencement of the first action did not signal the end of the parties' marital relationship; rather, the defendant continued to reside with the plaintiff and accepted the care of the plaintiff and the benefits of their marital relationship until 1982 when the plaintiff commenced the instant action.

Accordingly, the rule of law with respect to cases involving more than one commencement date is settled: The sole and exclusive criteria behind the fixing of a valuation date is whether the parties continued to reap the benefits of the marital partnership after the commencement of the first action. If the answer is no, then it is the first date which must be used.

Reconciliation Must Be Established Via "Unequivocal Acts" Including an Actual Resumption of the Marital Relationship; Intent to Reconcile or Mere Cohabitation Is Insufficient

Reconciliation must be proved via "unequivocal acts"—mere cohabitation, standing alone, is insufficient.

Rudansky v. Rudansky,[8] established the requisite criteria necessary to prove that an expression of intent to reconcile was not merely precatory but rather unequivocally actualized—nothing less satisfies the test.

> (1) a resumption of the marital relationship must be established via unequivocal acts (see, *Lippman v. Lippman*, 192 AD2d 1060, 1061, 596 N.Y.S.2d 241), (2) including living together and resuming marital relations, (3) their selling of their separate apartments and purchase of a new apartment, (4) plaintiff's quitting her job, (5) resuming a role as a housewife such as by traveling with and attending defendant's social and business gatherings, (6) defendant's giving plaintiff a weekly allowance to pay for their joint household expenses, and (7) their filing of joint tax returns and stating thereon that they were married (*Pasquale v. Pasquale*, 210 AD2d 387, 620 N.Y.S.2d 95).

In *Shatz v. Shatz*,[9] the Appellate Division held that reliance on representations of future reconciliation is unreasonable. Accordingly, talk of reconciliation, without concomitant unequivocal acts of reconciliation, does not vitiate the first service date as the cutoff point for valuation purposes.

In *Lippman v. Lippman*,[10] the Fourth Department held that "mere cohabitation" or "sporadic cohabitation and the intermittent resumption of sexual relations do not constitute a reconciliation." *Lippman* held that it is settled law that mere cohabitation is insufficient to constitute a reconciliation.

> it is clearly established that "[m]ere cohabitation following the execution of a separation agreement does not by itself destroy the validity of a separation agreement" (*Rosenhaus v. Rosenhaus*, 121 AD2d 707, 708, 503 N.Y.S.2d 892, lv. denied 68 N.Y.2d 997, 510 N.Y.S.2d 1028, 503 N.E.2d 125). It follows that "sporadic" cohabitation and the intermittent resumption of sexual relations will not vitiate a separation agreement (*Lotz v. Lotz, supra; Lapidus v. Lapidus, supra; Stim v. Stim*, 65 AD2d 790, 410 N.Y.S.2d 318).

In sum, nothing short of an actual resumption of living together constitutes reconciliation.

A Motion for Summary Judgment Is Appropriate Where There Has Been No Resumption of the Marital Relationship, thus Compelling the Other Party to Lay Bare His or Her Case in Evidentiary Fashion

Where there has been no reconciliation, the party seeking to fix the earlier date may be advised to make a motion for summary judgment for the aforementioned relief. This motion is an inexpensive and expedient method which forces the other party's hand at disclosing the strengths and weaknesses of his or her case while potentially pruning litigation costs.

CPLR 3212 addresses the issue of an application for summary judgment. It provides the nature of the evidence to be submitted in support of the respective arguments:

> CPLR 3212 (b) *Supporting proof; grounds; relief to either party* . . . The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

In *Lamba*, the Second Department held that the plaintiff had not established her case for the later date because she had not presented any evidence at the motion stage "that the parties reconciled and continued to receive the benefits of the marital relationship" (and was, thereafter, denied the opportunity to produce any such "evidence" at the time of trial).

Rudansky established "unequivocal proof" as the seeming evidentiary threshold required to prove reconciliation. The question, however, is did the Appellate Division carve out a new evidentiary standard regarding proof of reconciliation which is different from the standard in other civil cases?[11] Furthermore, where exactly "unequivocal proof" falls along the evidentiary

scale remains unclear: (1) is it the same, greater or less than clear and convincing; (2) is it the same, greater or less than a preponderance of the evidence; or, (3) is it somewhere in between both of them? Must the party opposing the motion for summary judgment meet the "unequivocal proof" test at the motion level as well, or does "unequivocal proof" apply only to the trial?

If the standard remains as before with respect to defeating a motion for summary judgment, then the McKinney Practice Commentary by Professor David Siegel is instructive regarding the nature and degree of evidence which a party opposing a motion for summary judgment *must lay bare* in the answering papers.[12]

> The summary judgment motion is not the occasion for the opposing party to pick and choose between the items of evidence to submit in opposition to the motion . . . When the movant's papers make out a prima facie basis for a grant of the motion, the opposing party must "come forward and lay bare his proofs of *evidentiary facts* showing that there is a bona fide issue requiring a trial . . . [He] cannot defeat this motion by general conclusory allegations which contain no specific factual references." *Hanson v. Ontario Milk Producers Coop., Income*, 58 Misc. 2d 138, 294 N.Y.S.2d 936 (1968).
>
> If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it. *Laye v. Shepard*, 48 Misc. 2d 478, 265 N.Y.S.2d 142 (1965), aff'd 25 AD2d 498, 267 N.Y.S.2d 477 (1st Dep't 1966).
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> Evasiveness in an opposing affidavit—indirect reference to the key facts, undue accent on immaterial points, and any other mode of behavior suggesting that the opposing party really can't deny the movant's evidence—will give it an aura of sham and increase the prospects of a grant of the motion.

Professor Siegel observes that the party opposing a motion for summary judgment will, as an anticipated perfunctory knee-jerk reaction, deny the facts set forth by the moving party. He, therefore, cautions against denying the motion merely because a denial was interposed.[13]

Professor Siegel further underscores that:

> Evasiveness in an opposing affidavit—indirect reference to the key facts, undue accent on immaterial points, and any other mode of behavior suggesting that the opposing party really can't deny the movant's evidence—will give it an aura of sham and increase the prospects of a grant of the motion.[14]

A party opposing a motion for summary judgment must present as much hard evidence as possible to oppose the motion for summary judgment, *e.g.*, joint tax returns, photo albums and other evidence typically available to a family living together.

The Underlying Principle Herein Is Founded in Prejudice, a Notion Which Evolved in a Body of Case Law Regarding Efforts to Voluntarily Discontinue a Divorce Action

That a court may not simply look toward the chronology of the marriage and blindly apply a durational test irrespective of whether any benefits were derived from the partnership, has been settled by *Marcus, et al.* The reason is prejudice and fairness: the avoidance of the inequitable result of allowing a party to share in an economic partnership where the party seeking distribution did not contribute to the partnership.

The current rule of law is, however, not novel. It is part of an ongoing process which has evolved parallel to another area of law, arising from divorce actions involving applications for leave to discontinue. Appellate courts statewide have held that the discontinuance of an existing action could not be permitted if it would lead to the inequitable result of allowing a party to realize an unjustifiable windfall. This corpus of authority bolsters the principle in *Marcus, et al.*

In *Tucker v. Tucker*,[16] the Court of Appeals held that "improper consequences flowing from a discontinuance" may make a denial of a discontinuance "obligatory."

> [O]rdinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (4 Weinstein-Korn-Miller, N.Y.Civ.Prac., paragraph. 3217.06). 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.

In *Cappa v. Cappa*,[17] the Fourth Department aligned with the Second Department in disallowing the discon-

tinuance of an action where the filing of a subsequent action "would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding":

> Supreme Court properly denied plaintiff's motion for a discontinuance of the divorce action. "[D]iscontinuance 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" (*Ruppert v. Ruppert*, 192 AD2d 925, 926, 597 N.Y.S.2d 196; see also, *Tucker v. Tucker*, 55 N.Y.2d 378, 383-384, 449 N.Y.S.2d 683, 434 N.E.2d 1050.

In *Ruppert v. Ruppert*,[18] an appeal transferred to the Third Department by order of the Second Department, the Appellate Division 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":

> Having determined that defendant demonstrated a reasonable excuse for his default and that he should be permitted to re-serve his answer, Supreme Court was then governed by the rather well-defined premise that once an answer has been served, discontinuance is a matter of discretion (see, *Winans v. Winans*, 124 N.Y. 140, 26 N.E. 293). Two factors exist here that persuade us that Supreme Court did not abuse its discretion. First, the interposition of a counterclaim by defendant militates against discontinuance (see, *e.g., Matter of Lasak*, 131 N.Y. 624, 30 N.E. 112). Second, 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 (see, *Majauskas v. Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15; *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050). It is apparent from a review of the record here that the parties have no intention of effecting a reconciliation, nor was that the reason for plaintiff's failure to diligently pursue prosecution of this action.

In *Kane v. Kane*,[19] the Second Department 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. That undue prejudice to the other side warrants a denial of such an application.

> Neither CPLR 104 nor CPLR 3217(b) supports the grant of a discontinuance by the court if unfair prejudice results to the adversary (see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3217:12). The court must consider whether substantial rights have accrued or his adversary's rights would be prejudiced thereby as well as the stage that litigation has reached; the later the stage, the greater should be the court's scrutiny of the plaintiff's motives. (see, *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050).

In *Giambrone v. Giambrone*,[15] the husband sought to discontinue an action which had been started by service of a summons with notice only. No complaint had been served. The First Department reversed the lower court which had denied the husband permission to discontinue voluntarily pursuant to 3217(a)(1). The Appellate Division held that a court may not prevent a party from exercising his statutory right to voluntarily discontinue within the permissible time frames except where equitable estoppel must intervene to prevent a discontinuance sought for "unfair or devious reasons." The Appellate Division further emphasized that, in other instances involving substantial litigation, a court must consider prejudice as a factor before granting such relief:

> It is only when litigation has progressed to the point of requiring a court order pursuant to CPLR 3217(b) that an application for discontinuance must be addressed to the court's discretion and may be denied where substantial rights have accrued or the adversary's rights would be prejudiced thereby [cites omitted].

In sum, the prejudice to the party whose separate property is sought to be divided is of primary and paramount concern, clearly, falling under the rubric of "unfair." Since divorce courts sit in equity, "unfairness" is the central focus of the determination.

McMahon v. McMahon

McMahon is a case of first impression within the First Department. The wife commenced the first action of divorce in March 1998 via service of a summons with notice only. No complaint was ever served and none was demanded. The action proceeded to a preliminary conference and full discovery. A firm trial date was, thereafter, set by the court.

Subsequent to the first action for divorce, the husband's employer, Goldman Sachs, made an IPO in May 1999. In the first action for divorce, the wife notified husband that she intended to assert a claim for equitable distribution of the IPO benefits. The husband argued that the rights only came into existence after the divorce action had been commenced and that she, therefore, had no such right.

In October 1999, just prior to trial, the wife served a notice to discontinue the first action for divorce. The court denied the husband's motion to vacate the notice of discontinuance. The husband protested that the discontinuance was only to obtain equitable distribution of the IPO in a divorce action that was surely to be subsequently commenced. The First Department affirmed the trial court's ruling that under CPLR 3217(a)(1) the wife had a right to discontinue her action, without court order, because no complaint had been served.

On appeal, the First Department: (1) rejected the husband's argument that there were equitable reasons to estop her from doing so; and (2) left the issue open whether the trial court could, in a subsequently commenced divorce action, utilize the commencement date of the first action for divorce in determining the extent of marital property.

McMahon Misinterpreted All the Governing Law on this Issue

For the reasons discussed below, *McMahon's* analysis of the decisional authority within the Second Department as well as the Court of Appeals' ruling in *Anglin v. Anglin*[20] is saturated with errors. Most significantly, *McMahon* erroneously paraphrased *Anglin*: "In general, the matrimonial action referred to in the statute is the action in which claims of equitable distribution are actually determined."[21]

The fact is that no such statement or proposition is to be found anywhere in *Anglin*, not even as *dicta*.

The Facts and Issues in *Anglin*

In 1982, the wife brought a contested *separation* action against her husband, which went to trial in January 1988. At times, after the separation action was commenced, the parties continued to live in the marital residence together and filed joint tax returns. As long as two years after the separation action was commenced, they also traveled to Tennessee together. Upon conclusion of the trial of the separation action, the wife was granted, *inter alia*, a judgment of separation.

In 1989, the wife commenced an action for divorce. The husband sought an order declaring that assets acquired after the commencement of the 1982 separation action were not marital property.

The Supreme Court took note of the divided views between the various Departments and fixed the commencement date of the divorce action as the marital asset accrual cutoff date. The Third Department affirmed:[22] "The dispositive issue on this appeal is whether plaintiff's prior separation action is 'a matrimonial action' for purposes of the foregoing statutory definition, the commencement of which would then have become the cut-off point for classification of spousal assets as marital property subject to equitable distribution."

The Court of Appeals affirmed:

> The appellant . . . presents a single statutory interpretation question for this Court to settle—whether a separation action ends the period for the accrual of marital property as prescribed by Domestic Relations Law § 236(B)(1)(c). The Appellate Division, agreeing with Supreme Court, held that the start of the separation action did not effect that end. We, too, conclude that a separation action does not, ipso facto, terminate the marital economic partnership and, therefore, does not preclude the subsequent accrual of marital property.[23]

Anglin Is Irrelevant in *McMahon*, Because the Issue in *Anglin* Was: Is an Earlier Action for a Separation "a Matrimonial Action," Where Property Distribution Is an Available Remedy?

Anglin is completely irrelevant to *McMahon*. The thrust behind *Anglin* devolved over whether the definition of "a matrimonial action," as set forth in the DRL, also included an action for separation. The Court of Appeals held that, under the DRL, "a matrimonial action" does not include an action for separation and, therefore, the commencement of an action for separation would not terminate the period for accrual of "marital property."

It was in response to this question, and to this question only, that the Court of Appeals held that "the economic partnership should be considered dissolved when "a matrimonial action" is commenced which

seeks divorce, dissolution, annulment or declaration of nullity of marriage, *i.e.*, an action in which equitable distribution is *available*."[24] The Court of Appeals was not confronted with the question of which of two divorce actions should be used in circumstances where the parties have not lived together subsequent to the commencement of the first action. The Second Department's rulings in *Marcus, Gonzalez, Thomas, Lamba* and *Fuegel*, all involved actions for divorce wherein equitable distribution was an available ancillary remedy.

In none of the cases cited in *McMahon* does the Second Department deviate from the Court of Appeals' ruling in *Anglin*. In fact, to assure that a party is not the beneficiary of an undeserved windfall, the Second Department applies an implicit two-prong test (which incorporates *Anglin*) which delves into the equity of the case: (1) was the first action "a matrimonial action" which allows for a distribution of property (pursuant to *Anglin*); and (2) did the parties live separately after the commencement of the first action?

(A) The only permutation which results in the fixing of the earlier commencement date is a "yes" to both (1) and (2).

(B) A "no" to either part will result in the fixing of the later date.

Accordingly, *Fuegel, Lamba, Thomas, Gonzalez* and *Marcus* are all consistent with *Anglin*.

It is also noteworthy that *Anglin* found that the parties had continued to live together, travel together, and had filed joint tax returns—all elements of *Rudansky, Shatz*, and *Lippman*. It is, therefore, doubtful that the first commencement date would have been used in *Anglin*, even if there had been two divorce actions.

McMahon Completely Miscomprehended the Second Department

Another fundamental error in *McMahon* lies within its declaration that "in the Second Department, utilizing an earlier action commencement date to classify marital property is the exception, not the norm." That is absolutely incorrect. The rule of law challenged by *McMahon* has been universally and consistently applied in each and every case in the Second Department, as demonstrated above. Not only is what *McMahon* erroneously declared as not being "the norm" within the Second Department, in fact, the settled law in the Second Department, but it is also the present rule of law of the state absent a contrary pronouncement by another appellate court or the Court of Appeals:[25]

> In urging this court to accept the earlier action commencement date, husband relies upon a line of cases decided in the Appellate Division, Second Department. Thus, in *Thomas v. Thomas* (221 AD2d 621 [2d Dep't 1995]) and *Lamba v. Lamba* (266 AD2d 515 [2d Dep't 1999]), the Second Department held that a prior discontinued action was the proper calculation date to value a pension in each respective action because to hold otherwise would confer a windfall on the other spouse. Significantly, even in the Second Department, utilizing an earlier action commencement date to classify marital property is the exception, not the norm. (*Fuegel v. Fuegel*, 271 AD2d 404 [2d Dep't 2000]; *Marcus v. Marcus*, 135 AD2d 216 [2d Dep't 1988]; see also, *Matter of Nicit v. Nicit*, 217 AD2d 1006 [4th Dep't 1995].)[26]

McMahon's misreading of *Fuegel* is, however, understandable due to the Second Department's failure to lay out any of the underlying facts therein. *McMahon* could not have known that the underlying facts were actually consistent with the string of cases in the Second Department.

McMahon Also Misread *Sullivan*, a First Department Case, and *Nicit*: In *Sullivan* and *Nicit*, the First Action Was a Foreign Divorce Action

McMahon also misread *Sullivan v. Sullivan*[27] and *Nicit v. Nicit*.[28]

In *Nicit*, the Appellate Division held that the later of the actions was to be applied because the proceeding seeking the distribution of marital property followed a foreign divorce action where equitable distribution was not available.

> In this proceeding to obtain a distribution of marital property following a foreign divorce judgment, 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 (see, *Sullivan v. Sullivan*, 201 AD2d 417, 607 N.Y.S.2d 937; see also, *Marcus v. Marcus*, 135 AD2d 216, 220-221, 137 AD2d 131, 525 N.Y.S.2d 238.

In *Sullivan*, (cited in *Fuegel* and *Nicit*), the First Department, in a briefly worded opinion, addressed the exclusive issue of the selection of valuation dates where a foreign divorce judgment had been obtained. In *Sullivan*, as in *Nicit*, the Appellate Division held that it was the commencement of the New York action which governed the valuation date rather than the date of the

commencement of the foreign divorce. The reasoning in *Sullivan* is consistent with *Anglin*.

> The instant proceeding seeking, inter alia, equitable distribution, is the first time that the matter of allocation of the marital property has ever come before a court. The Supreme Court appropriately concluded that the cutoff date for equitable distribution in this case was the commencement of this proceeding and not the divorce action in Illinois, since Domestic Relations Law § 236(B)(1)(c) defines "marital property" as all property acquired during the marriage and before the commencement of a matrimonial action, and § 236(B)(2) defines a matrimonial action to include "proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce." The validity of this approach is confirmed in *Anglin v. Anglin*, 80 N.Y.2d 553, 592 N.Y.S.2d 630, 607 N.E.2d 777, wherein the Court of Appeals deemed the availability of equitable distribution to be the critical factor in determining whether the commencement of a particular type of matrimonial action will act as the cutoff date.

Accordingly, *Nicit* and *Sullivan* are irrelevant to *McMahon*.

Awards Have Been Fashioned So As Not to Reward a Party Who Has Not Contributed to the Marital Partnership, Notwithstanding an Ongoing Chronological Marriage

In *Musumeci v. Musumeci*,[29] the court addressed the following issues: (1) how to fix the valuation date of the husband's pension plan where the parties had lived separate and apart for approximately four years while, nevertheless, being mindful of the directive in DRL § 236B(4) that the commencement of the action is the earliest date as of which an asset may valued; and (2) to do it in a manner where the application of a strict reading of DRL § 236B(4) does not work an injustice. The court pondered:

> Shall the computation of the marital portion of the pension which began on the date of the marriage be adjusted so as to equitably reflect the unfairness in terminating it on the date of the commencement of this action, rather than on the date of the abandonment. Obviously the use of twenty-nine months or seventy-five months as the numerator of the fraction will constitute a considerable difference in the final amount that the Wife will realize as her share of the pension.

Musumeci analyzed the intent and purpose behind the Equitable Distribution Law. The court then noted that, sitting in equity, it must do what is fair "as justice commands" because "to do otherwise would violate the spirit of the law."

The court further observed that to apply DRL § 236 B(4) with a broad stroke in every case, without considering the circumstances of each case, would result in a significant injustice. Significantly, *Musumeci* observed 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 equity to temper the result.

> The 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 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.[30]

Musumeci then turned for guidance to three different sources: (1) DRL 236B(5)(c); (2) *Coffey v. Coffey*, 119 AD2d 620, 622, 501 N.Y.S.2d 74; and (3) the Memorandum of Governor Carey to the Equitable Distribution Law, 1980 McKinney's Session Laws of N.Y., p. 1863, and concluded that "courts possess the flexibility required to mold a decree appropriate to a given situation, with fairness being the ultimate goal."[31]

> The solution to this dilemma can be found in the proper application of Section 236B(5)(c): "Marital property shall be distributed equitably between the parties, considering the circumstances of the case and the respective parties." The philosophy of the law is perhaps better set forth in *Coffey v. Coffey*, 119 AD2d 620, 622, 501 N.Y.S.2d 74: "At the outset, it is important to note that there

> is no requirement that the distribution of each item of marital property be on an equal basis (see *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 489 N.Y.S.2d 58; 478 N.E.2d 199; *Parsons v. Parsons* [101 AD2d 1017, 476 N.Y.S.2d 708] *supra*; *Ackley v. Ackley* [100 AD2d 153, 472 N.Y.S.2d 804] *supra*; *Rodgers v. Rodgers*, 98 AD2d 386, 390-391, 470 N.Y.S.2d 401, *appeal dismissed* 62 N.Y.2d 646). *Rather, property acquired during the marriage should be distributed 'in a manner which reflects the individual needs and circumstances of the parties'* (Memorandum of Governor Carey, 1980 McKinney's Session Laws of N.Y., p. 1863). *To this end, courts possess the flexibility required to mold a decree appropriate to a given situation, with fairness being the ultimate goal"* (see, *Rodgers v. Rodgers*, *supra*, at p. 391, 470 N.Y.S.2d 401). [emphasis added]

So as not to run afoul of DRL § 236B(4), the court then fixed the date of valuation as of the date of the commencement of the action. However, *Musumeci*, then divided the length of the marriage into two periods: (1) the period when the parties lived together, and (2) the period of separation just prior to the commencement of the action. The court awarded the wife 50 percent of that portion of the pension which accrued during the time they lived together—when the husband was still enjoying the benefits of the marriage, and 0 percent to the wife for the nearly four-year period during which they lived apart. Thereafter the court added the sum of the wife's contributions during the two different periods and arrived at its conclusion. Otherwise stated, the whole was equal to the sum of its parts.

McMahon, nevertheless, hinted at a possible *Musumeci*-like resolution upon the conclusion of a trial.

> Notably, the harm claimed is not as great as husband perceives. The court's right to exercise discretion in marital distribution cases does not lie in the statutory definitions which control classification of martial assets. The discretion lies in the court's power to determine a percentage of distribution that it considers equitable, depending upon the factors of each particular case. If husband succeeds in convincing this court that wife's contributions in obtaining the IPO benefits were negligible, then this court may take it into consideration when distributing this asset.[32]

Anglin Sounds a Tacit Approval of *Musumeci*

The language in *Anglin* more than suggests that, had the Court of Appeals reviewed the question of the selection of dates, where more than one divorce action had been commenced, the issue would have been resolved along the lines of the lines of the Second Department. The following language suggests a tacit endorsement of *Musumeci*[33]:

> Notably, the Legislature has given the courts significant flexibility in fashioning the appropriate remedy of equitable distribution of marital property. The 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.

Conclusion

Pursuant to *stare decisis*, and absent a contrary pronouncement from another Department or the Court of Appeals, the current rule of law of the state of New York with respect to this issue is the one set forth in the line of cases in the Second Department.

Endnotes

1. 187 Misc. 2d 364, 722 N.Y.S.2d 723 (2001).
2. *Antenucci v. Antenucci*, 597 N.Y.S.2d 805, 806, 193 AD2d 948, 949 (3d Dep't 1993).
3. 266 AD2d 515, 698 N.Y.S.2d 715 (2d Dep't 1999).
4. 240 AD2d 630, 659 N.Y.S.2d 499 (2d Dep't 1997).
5. 271 AD2d 404, 705 N.Y.S.2d 400 (2d Dep't 2000).
6. 221 AD2d 621, 634 N.Y.S.2d 496 (2d Dep't 1995).
7. 135 AD2d 216, 137 AD2d 131, 525 N.Y.S.2d 238 (2d Dep't 1988).
8. 223 AD2d 500, 637 N.Y.S.2d 97 (1st Dep't 1996).
9. 84 AD2d 833, 444 N.Y.S.2d 186 (2d Dep't 1981).
10. 192 AD2d 1060, 596 N.Y.S.2d 241 (4th Dep't 1993).
11. Courts have viewed divorce actions with greater scrutiny than other cases:

    Christian v. Christian, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977):

    > "Marriage being a status with which the State is deeply concerned, separation agreements subjected to attack are tested carefully. 'A court of equity does not limits inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract (between husband and wife) was just and fair, and equitably ought to be

enforced, and administers relief where both the contract and the circumstances require it' (cites omitted)." 42 N.Y.2d 63, 65, 851, 396 N.Y.S.2d 817, 819.

* * *

"There is a strict surveillance of all transactions between married persons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." 42 N.Y.2d 63, 72, 855, 396 N.Y.S.2d 817, 823.

Battaglia v. Battaglia, 90 AD2d 930, 931. "Because of the public interest, the court has been invested with a wider discretion in the control of the course of procedure in matrimonial actions than in others."

12. Siegel, McKinney Practice Commentary, CPLR 3212, C:3212:4 (1992) (reminding the courts that, in reviewing a motion for summary judgment, judges need to fall back on their common sense experience as attorneys, or, simply stated, their gut instinct. "Judges confronted with a motion for summary judgment must depend more on their experience as lawyers and jurists than on the law. They must examine the moving and opposing papers carefully and determine whether they present any issue of fact material enough to warrant a trial.").
13. *Id.* "Almost invariably, the opposing side will, in the answering papers, deny a material fact that the movant has offered proof of. That does not mandate a denial of the motion. How strong is the denial? Does the opposing side unequivocally dispute the fact, claiming first-hand knowledge and swearing that the fact is otherwise? Does that side deny only half-heartedly, or is it hedging in some way? Is there an aura of evasiveness in the opposing papers? These are the kinds of things the judge is faced with, and it is not the law but rather the judge's own experience and talent as a lawyer and jurist that must be relied on."
14. Siegel, McKinney Practice Commentary, CPLR 3212, C:3212:16 (1992).
15. 140 AD2d 206, 528 N.Y.S.2d 58 (1st Dep't 1988).
16. 55 N.Y.2d 378, 449 N.Y.S.2d 683 (1982).
17. 212 AD2d 1056, 624 N.Y.S.2d 1012 (4th Dep't 1995).
18. 192 AD2d 925, 597 N.Y.S.2d 196 (3d Dep't 1993).
19. 163 AD2d 568, 558 N.Y.S.2d 627 (2d Dep't 1990).
20. 80 N.Y.2d 553, 592 N.Y.S.2d 630 (1992).
21. *Anglin v. Anglin*, 80 N.Y.2d 553 (1992). Excerpt from *McMahon v. McMahon*, 187 Misc. 2d 364, 366.
22. 173 AD2d 133, 134, 577 N.Y.S.2d 963, 964 (3d Dep't 1992).
23. *Anglin v. Anglin*, 80 N.Y.2d 553, 554, 592 N.Y.S.2d 630, 631.
24. *Anglin v. Anglin*, 80 N.Y.2d 553, 557, 592 N.Y.S.2d 630, 632.
25. "The doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., Kirby v. Rouselle Corp., 108 Misc. 2d 291, 296, 437 N.Y.S.2d 512; Matter of Bonesteel, 38 Misc. 2d 219, 222, 238 N.Y.S.2d 164, affd. 16 AD2d 324, 228 N.Y.S.2d 301; 1 Carmody-Wait 2d, N.Y.Prac., § 2:63, p. 75). This is a general principle of appellate procedure (see, e.g., Auto Equity Sales v. Superior Court of Santa Clara County, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; Chapman v. Pinellas County, 423 So.2d 578, 580 [Fla.App.]; People v. Foote, 104 Ill.App.3d 581, 60 Ill.Dec. 355, 432 N.E.2d 1254), necessary to maintain uniformity and consistency (see Lee v. Consolidated Edison Co. of N.Y., 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826), and, consequently, any cases holding to the contrary (see, e.g., People v. Waterman, 122 Misc. 2d 489, 495, n.2, 471 N.Y.S.2d 968) are disapproved. Such considerations do not, of course, pertain to this court. While we should accept the decisions of sister departments as persuasive (see, e.g., Sheridan v. Tucker, 145 App.Div. 145, 147, 129 N.Y.S. 18; 1 Carmody-Wait 2d, N.Y.Prac., § 2:62; cf. Matter of Ruth H., 26 Cal.App.3d 77, 86, 102 Cal.Rptr. 534), we are free to reach a contrary result (*see, e.g., Matter of Johnson*, 93 AD2d 1, 16, 460 N.Y.S.2d 932, revd. on other grounds, 59 N.Y.2d 461, 465 N.Y.S.2d 900, 452 N.E.2d 1228; State v. Hayes, 333 So.2d 51, 53 [Fla.App.]; Glasco Elec. Co. v. Department of Revenue, 87 Ill.App.3d 1070, 42 Ill.Dec. 896, 409 N.E.2d 511, affd., 86 Ill.2d 346, 56 Ill.Dec. 10, 427 N.E.2d 90)." *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664, 476 N.Y.S.2d 918, 920 (2d Dep't 1984).
26. 187 Misc. 2d 364, 367, 722 N.Y.S.2d 723, 726.
27. 201 AD2d 417, 607 N.Y.S.2d 937 (1st Dep't 1994).
28. 217 AD2d 1006, 631 N.Y.S.2d 271 (4th Dep't 1995).
29. 133 Misc. 2d 139, 506 N.Y.S.2d 629 (1986); cited in *Mylett v. Mylett*, 163 AD2d 463, 558 N.Y.S.2d 160 (2d Dep't 1990).
30. 133 Misc. 2d 139, 142, 506 N.Y.S.2d 629, 631 (1986).
31. *Id.*
32. 187 Misc. 2d 364, 368.
33. *Anglin v. Anglin*, 80 N.Y.2d 553, 558; *Match v. Match*, 179 AD2d 124, 583 N.Y.S.2d 224 (1st Dep't 1992), indicated its tacit approval of *Musumeci* and a possible application of the principles set forth therein had they been applicable to the facts therein.