When Enough is Enough

Unequal Equitable Distribution In Large Marital Estate Cases

By: Elliot H. Gourvitz and Ari Gourvitz

A soon-to-be published article co-authored by Philadelphia lawyer David N. Hofstein in the Journal of the American Academy of Matrimonial Lawyers raises an issue of significant interest and clearly controversial nature - whether or not in large marital estate cases there should be unequal division of assets, or unequal distribution.

The view here is there should be. Equitable does not necessarily mean equal.

Hofstein, former chairman of the Philadelphia Bar Association's Family Law Section, and co-authors Ellen Goldberg Weiner and Christopher Marrone get to the heart of the issue at the outset of their piece:

"As a marital estate increases in size, should a percentage distribution in favor of dependent spouse decrease?" they ask. "This can be a significant issue in equitable distribution states that afford no presumption of an equal division.

There are those that argue that a marriage is a partnership in which marital contributions to financial success are equivalent to non-marital, but equally critical, contributions of a home-maker and care giver. Others argue that the party who provides the 'spark' which financially creates the large marital estate should receive a higher percentage....It can only be assumed that courts will continue to wrestle between the opposing view points of 'I made it, I should keep it' and 'marriage is an equal partnership.'"

The quoted article centers on those states without a presumption of an equal equitable distribution and in each case is fact-sensitive. But how does this concept apply to New Jersey with it's equitable distribution statute?

NEW JERSEY LAW

Our statute was enacted to support the public policy that a wife - a reference or distinction no longer politically correct - should not become a public charge. Noting that alimony is inherently precarious because it ceases at the death of a former husband or become problematic should he experience financial misfortune, the statute set out to safeguard against a wife becoming a public charge. The result is an allocation of property to the wife at the time of divorce, providing her with some protection against such eventualities. As underscored in the statute, that division of property also gives recognition to the essential support or role played by the wife in the home, acknowledges her as home-maker, spouse and mother entitled to a share of the family assets accumulated during the marriage.

The Divorce Reform Act of 1971 has been amended several times, with an extensive amendment in 1988 which added, in part, the following 15 factors by which a judge should be guided in effectuating an equitable distribution award:

Duration of the marriage

Age and physical and emotional health of parties

Income or property brought to the marriage by each party

Standard of living during the marriage

Any written agreement made by parties before or during the marriage concerning property distribution

Economic circumstances or each party at the time of the division of property

Income and earning capacity of each party, including education, training, skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage

Contribution by each party to the education, training, or earning power of the other

Contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker

Tax consequences of the proposed distribution to each party

Present value of property

Need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects

Debts and liabilities of the parties

Need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children

Extent to which a party deferred achieving career goals

N.J.S.A. 2A:34-23, specifies that judges are to make specific findings of fact on all relevant issues, at the minimum covering all the facts above.

And it notes that it shall be a rebutable presumption that each party made the substantial financial or non-financial contribution to the acquisition of income and property during the marriage.

That would seem to indicate that we started a 50/50 distribution, and the party asserting the party should receive less, has the burden of proof.

Once the assets are identified, and assuming some allocation is to be made, the Judge enters into a three-step process, deciding what specific property of each spouse is eligible for distribution, determining its value, and concluding how allocation can most equitably be made.

Nowhere in the statute does it say equal distribution, nor does it say that one factor should be weighed more than the other.

Generally, matrimonial practitioners accept in the normal garden-variety case that in a long-term marriage, where all the assets were acquired during the union and absent any extraordinary circumstances, there should be an equal division of assets. Judges in pretrial conferences have this presumption and challenge the opposing attorney to rebut it. The assets are equally divided so that both parties could as best as possible maintain the same lifestyle as they had during the marriage.

However, this does not necessarily apply to high-asset cases, which Hofstein in his article, admittedly arbitrarily pegged at $3 million or more.

Experience shows that judges in conferences on these cases look primarily at the needs of the recipient and the dependent spouses' attorney to justify on equal division.

In these cases we do not have to worry about the dependent spouses becoming a public charge. In most instances they will be able to sustain the marital lifestyle from their share of equitable distribution; they just will not receive the same amount of money as the spouse who earned it during the marriage. Clearly, they are still recognized for their contribution to the marriage, both as a spouse and parent, but they are just not given the same amount of money as the earning spouse.

Thus, in the division of property, the Court is asked to put greater weight to one of the 15 factors for considering equitable distribution. And that is "the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount of the marital property", leaving off the contribution of the party as a home-maker.

NEW JERSEY EXPERIENCE

There are several New Jersey cases that provide some insight to this issue. In Daeschler v. Daeschler, the Appellate Division in 1986 noted that the touchstone of

equitable distribution is "equitable" and division need not be equal. It also warranted against an automatic 50-50 distribution of assets acquired during the marriage as being improper because it does not reflect the equitable principle of division. It cited the 1974 holding in Rothman v. Rothman that each case should be examined as an individual and particular entity.

More recently, the Appellate Division in McGee v. McGee in 1994) said that absent "specific testimony to support an unequal division, there is no justification for anything other than a 50-50 split of all 13 rooms of household furnishings." As far as personal property is concerned, this files in the face of the Rothman case.

FACTORS

Here are the nine factors in making an unequal distribution of assets, as Mr. Hoftstein and his co-authors found in their national survey of laws and decisions.

SIZE OF THE MARITAL ESTATE. It would seem the bigger the estate, the less necessity there is for equal distribution. Could a party maintain a lifestyle based on the division of $100 million, with a $30 million award instead of $50 million? One would imagine so. A court in Pennsylvania in 1984 in Anastasia v. Anastasia acknowledged that, but Courts in New Hampshire in Dombrowski v. Dombrowski in 1989 and in Michigan the same year in Dart v. Dart rejected it.

VALUATION OF ONE PARTY'S NON-MARITAL PROPERTY. In S.M. v. J.M., a federal case in Pennsylvania in 1999, the court noted the dependent spouse had assets of her own exceeding $2 million as one of the factors in giving her a smaller percentage of the marital estate. In another Pennsylvania case, Gill v. Gill the

Court in 1996 considered the wife's alimony of $30,000.00 a year substantial enough to justify giving her less than half of the marital assets.

REWARDING EFFORTS OF THE FINANCIAL SPOUSE. Courts often talk with admiration of the corporate-earning spouse, and although they do acknowledge the dependent spouse or corporate wife for her contributions as a spouse and mother, and even for her special corporate spouse's efforts, they may or may not give the wife equal division of the assets. In Went v. Went in Connecticut in 2000, the court awarded the wife, who made no direct financial contributions to the marital estate, $20 million in marital assets, but that still was less than half the marital estate. But in Goldman v. Goldman, a New York Supreme Court judge in 1998 did give the wife one-half of the marital estate's $90 million. Yet in an Indiana case in 1981, In the Marriage of Gray, the court, without explaining its rationale, gave the corporate wife just 20 percent of the marital estate. And in the 1984 Florida case, Casto v. Casto, the wife was awarded $1.50 million of an estate of between $4.7 million $10 million.

REWARDING DUAL ROLES. In a North Dakota case, Mellum v. Mellum where a dependent spouse not only raised four children, but was a homemaker and helped the husband in the construction business, she was awarded 65 percent of the marital estate. And in the Virginia case of Mathews v. Mathews in 1998 the Court gave the wife 50 percent of the marital assets, citing her dual role as homemaker and business associate. On the other hand, despite the financial role of the wife in the Tennessee case of Inman v. Inman in 1991, she only received one-third of the $9 million estate.

SACRIFICES OF DEPENDENT SPOUSE. There are cases showing that when the dependent spouses make various sacrifices, they receive a greater distribution of assets. For instance, in the 1995 Rhode Island case Wrobleski v. Wrobleski the wife made personal sacrifices to further her husband's medical career, including ending her own education. The court there awarded 60 percent of the marital assets.

In contrast, in the earlier mentioned Gill case the Pennsylvania court awarded the wife of 28 years 38 percent of the $4 million pot, even while acknowledging her contribution and sacrifices by relinquishing her career as a school teacher.

LENGTH OF THE MARRIAGE. The Minnesota case Miller v. Miller in 1984 involved a 20 year marriage with an estate of about $14 million. The court found that "equal division of wealth accumulated through the joint efforts of the parties is appropriate under dissolution of a long term marriage." Similarly, in the North Dakota case Fox v. Fox in 1999 involving a 32 year marriage, the Supreme Court there found "a lengthy marriage carries and supports an equal division of all marital assets."

ENOUGH IS ENOUGH. The argument is made that one's lifestyle can be sustained with an unequal division of property, that anything more than that is superfluous. If New Jersey is a "need"-based state, and all of the dependant spouses economic demands are met by less then an equal division, why does this spouse deserve more? In the 1993 Florida case DiPrima v. DiPrima the court only awarded the wife $650,000.00 of $2.6 million, stating that would allow her to live in the same manner as she was accustomed during the marriage. Essentially the same finding occurred in a 1981 Iowa case, In Re: Marriage of Wallace where the woman received $2.3 million of a $15 million estate. The assets primarily were the result of the husband's inheritance or gifts of stock from his family, rather than the work efforts by either party during the marriage. The court's philosophy in that case was important in regards to acquired wealth. The court said "if the total assets are so great as to enable each party to continue to live the same lifestyle is something less than half the total, then the division should be made so as to provide for that end without depriving the original recipient of the property of anything more than necessary to achieve it."

And in the Massachusetts case Bacon v. Bacon the court gave the husband $200,000.00 from an $8 million estate the wife received from a trust and other

family benefits. They found the husband made minimal contributions to the marriage and, in examining his expenses, said the $200,000 was ample for him to maintain an upper- middle-class lifestyle.

MARITAL MISCONDUCT. There are New Jersey cases that limited or eliminated the spouse's entitlement to equitable distribution. In Reid v. Reid, the Appellate Division in 1998 held the wife's embezzlement and misappropriation of the marital assets negatively impacted the husband and eliminated her right to equitable distribution. In the case of D'Arc v. D'Arc the Appellate Division in 1980 ruled the husband's plot to kill his wife eliminated his rights to equitable distribution.

In the New York case two years ago of Leroy v. Leroy dealing with the restauranteur of Tavern on the Green, the Court, while giving the wife credit for earlier involvement in the business during the 28 year marriage and citing her role as mother and corporate spouse, still penalized her. She was granted only 40 percent of the $19 million estate because at the time of her husband's illness, she spread a rumor to potential investors that he was dying.

WINDFALLS. Courts in New Jersey in DeVane v. DeVane in 1995 and Ulla v. Ulla in New York in 1990 opted for equal splits, rejecting the proposition that a spouse's winning lottery ticket was simply a fortuitous circumstance and should not be including in the marital estate because it was not a result of either spouse's labor.

In conclusion, equitable does not always mean equal. Under the correct circumstances - when, for example, there is more than enough money to go around - the spouse who has made the most contribution to the accumulation of finances should get a larger share of the marital pot. In short, there are times when enough is enough.