To be argued by: Bruce J. Wagner
Time Requested : 10 minutes

STATE OF NEW YORK COURT OF APPEALS

ROCHELLE GRUNFELD,

Plaintiff-Respondent

-against-

HAROLD M. GRUNFELD,

Defendant-Appellant.

BRIEF ON BEHALF OF AMICUS CURIAE, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, NEW YORK CHAPTER

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1. Whether and to what extent a professional license holder should be ordered to pay maintenance to a non-licensed spouse, where the non-licensed spouse receives a distributive award representing a share of such license, or a share of the license holder's professional practice, or both.
2. Whether and to what extent a trial Court in a matrimonial action is obligated to consider the payor spouse's ability to comply with the maintenance, child support and equitable distribution awards.
3. Where a professional practice is valued as of the date of commencement of the matrimonial action, as opposed to the date of the trial, when and to what extent should consideration be given to extrinsic circumstances occurring between the date of commencement and the date of trial which may reduce the value of said professional practice.

JURISDICTION TO ENTERTAIN APPEAL

The Court of Appeals has jurisdiction to entertain the within Appeal upon the ground that this action originated in the Supreme Court and the Appeal herein is taken from an Order of the Appellate Division, which finally determines the action and which is not appealable as of right. CPLR §5602(a)(1)(i). The Order of the Appellate Division herein, entered April 15, 1999, was unanimous, therefore precluding an Appeal by Defendant-Appellant as of right. CPLR §5601(a). The Order of the Appellate Division entered April 15, 1999 made its own factual determinations and finally disposed of all of the issues in the within matrimonial action. The April 15, 1999 Order of the Appellate Division is therefore final within the meaning of the Constitution of the State of New York. N.Y. Const. Art. 6, §3(a).

The Court of Appeals entered an Order on October 26, 1999, granting the motion of Defendant-Appellant, Harold M. Grunfeld, for leave to appeal from the

aforesaid Order of the Appellate Division entered April 15, 1999. The Court of Appeals entered a second Order on October 26, 1999, granting the motion of the American Academy of Matrimonial Lawyers, New York Chapter, to appear amicus curiae on the appeal herein.

INTEREST OF AMICUS

The American Academy of Matrimonial Lawyers (AAML) is a national association of more than 1,500 experienced matrimonial attorneys from almost all of the 50 United States, who specialize in issues related to marriage, divorce, annulment, custody, child visitation, property valuation, property distribution, maintenance and support. The AAML was founded in 1962 to "encourage the study, improve the practice, elevate the standards, and advance the cause of matrimonial law, with the end that the welfare of the family and society be preserved."

The New York Chapter (NYAAML) of the AAML, the amicus herein, was formed in 1966 as one the AAML's 30 state chapters. NYAAML's membership consists of more than 170 certified fellows, including counsel for the Defendant-Appellant and counsel for amicus herein, all of whom are experienced matrimonial practitioners and members of the New York Bar.

The Order of the Appellate Division, First Department, entered April 15, 1999, raises legal issues whose scope and application are of significant and statewide importance, and which transcend the interests of Plaintiff and Defendant herein.

STATEMENT OF FACTS

This matrimonial action was commenced by the filing of a Summons With Notice - Action for Divorce in the Office of the New York County Clerk on July 30, 1992. (R. 61). The action was tried before Supreme Court, without a jury, commencing on September 12, 1995 and concluding on October 11, 1995. (R. 16). Prior to a Decision being rendered by Supreme Court, this Court rendered its opinion in McSparron v. McSparron, 87 N.Y.2d 275 (1995). Supreme Court reopened the trial of this action on June 10, 1996, in order to consider the holding of the McSparron opinion, as applied to the facts of this case. (R. 16, 1753). Specifically, Supreme Court directed that further proof be submitted with respect to the value of Defendant's license to practice law, whereupon a determination could be made as to whether or not there should be a distribution of Defendant's license to practice law. (R. 30-37, 1753-1754).

At the trial level, this matter was determined pursuant to a resettled Judgment of the Supreme Court (Friedman, J.) entered June 18, 1997 in New York County (R. 49-58), upon a decision of the Court dated August 8, 1996. (R. 16-42). Supreme Court decided to use July 30, 1992, the date of commencement of the within action, as the date of valuation of Defendant's law practice, reasoning that "the cases support the general use of the commencement date absent some substantial reason for a different date." Rochelle G. v. Harold M.G., 170 Misc.2d 808, 813 (Sup. Ct. N.Y. Co. 1996); (R. 23). Supreme Court found that the value of Defendant's interest in his law practice as of the July 30, 1992 date of commencement was $2,581,760.00 and awarded Plaintiff a one-half (½) share thereof, in the sum of $1,290,880, payable in annual installments of $250,000.00. (R. 13, 30). Supreme Court valued the marital portion of Defendant's license to practice law at $1,547,000.00. Id. at 819; (R. 36). Plaintiff was awarded permanent maintenance in the sum of $180,000.00 per year, to be reduced to the sum of $102,000.00 per year upon the sale of the marital residence. (R. 50-51). Given the size of the maintenance award, Supreme Court found that it would be duplicative to award Plaintiff a share of *both* Defendant's interest in his law partnership *and* a share of the value of his license to practice law, upon the ground that the maintenance award "clearly exceeds" one-half (½) of the value of the license. Id. at 821; (R. 37).

Upon cross-appeals, the Appellate Division, First Judicial Department, entered an Order on April 15, 1999, modifying the judgment below, by awarding Plaintiff one-half (½) of the value of Defendant's license to practice law, which had been found by Supreme Court to be worth $1,547,000.00. Grunfeld v. Grunfeld, 255 A.D.2d 12 (1st Dept. 1999). The First Department also affirmed the distributive award to Plaintiff in the sum of $1,290,880.00, representing a one-half (½) share of the value of Defendant's law practice. The result of this modification by the Appellate Division was that Plaintiff's distributive award was increased by the sum of $773,500.00, to the total sum of $2,064,380.00. The Appellate Division further modified Supreme Court's Order, by: (a) postponing the reduction of Plaintiff's maintenance payments until Defendant's full payment of the distributive award due; and (b) by directing Defendant to pay interest on the unpaid balance of the distributive award at the statutory rate of nine percent (9%).

On July 15, 1999, the Appellate Division, First Judicial Department, denied Defendant's motion seeking leave to appeal to the Court of Appeals. The Court of Appeals granted Defendant's motion for leave to appeal by Order entered October 26, 1999. The Order of the Appellate Division entered April 15, 1999 made its own factual determinations and finally disposed of all of the issues in the within matrimonial action. The April 15, 1999 Order of the Appellate Division is therefore final within the meaning of the Constitution of the State of New York. N.Y. Const. Art. 6, §3(a).

ARGUMENT

POINT I

THE APPELLATE DIVISION FAILED TO FOLLOW McSPARRON'S CAUTION AGAINST DOUBLE RECOVERY

Supreme Court found that the value of Defendant's interest in his law practice as of the July 30, 1992 date of commencement was $2,581,760.00 (R. 13, 30), and awarded Plaintiff a one-half (½) share thereof, in the sum of $1,290,880.00, payable in annual installments of $250,000.00. (R. 13, 30). Supreme Court valued Defendant's license to practice law at $1,547,000.00. Rochelle G. v. Harold M.G., 170 Misc.2d 808, 819 (Sup. Ct. N.Y. Co. 1996); (R. 36). Given the fact that the maintenance award "clearly exceeds" 50% of the license value, Supreme Court correctly concluded that it would be duplicative, and thus inequitable, to award Plaintiff a share of both Defendant's interest in his law partnership and a share of the value of his license to practice law. (R. 37, citing, Wadsworth v. Wadsworth, 219 A.D.2d 410 [4th Dept. 1996]). Supreme Court's resolution of this issue was a sensible approach, which avoided a "double recovery" of maintenance and a distributive award representing a share of a professional license, out of the same income stream, against which this Court cautioned in McSparron. 87 N.Y.2d at 286.

Upon appeal, the First Department modified the judgment below, by awarding Plaintiff one-half (½) of the value of Defendant's license to practice law, which had been found by the Supreme Court to be worth $1,547,000.00. The First Department also affirmed the distributive award to Plaintiff in the sum of $1,290,880.00, representing a one-half (½) share of the value of Defendant's law practice. The result of this modification by the Appellate Division was that Plaintiff's distributive award was increased by the sum of $773,500.00, to the total sum of $2,064,380.00. The Appellate Division further modified Supreme Court's Order, by: (a) postponing the reduction of Plaintiff's maintenance payments until Defendant's full payment of the distributive award due; and (b) by directing Defendant to pay interest on the unpaid balance of the distributive award at the statutory rate of nine per cent (9%).

Amicus submits that given the sizeable maintenance award, plus the liquidity of the distributive award to Plaintiff, the Appellate Division's decision to award Plaintiff a share of both Defendant's law practice and license, demonstrates a conflict among the Appellate Divisions which should be resolved. Of equal importance, this case affords this Court an opportunity to decide if a trial court in a matrimonial action is obligated to consider whether or not the payor spouse is able to comply with the maintenance, child support and equitable distribution awards.

The Appellate Division modified Supreme Court's sensible resolution. Supreme Court correctly recognized that the distributive award that Plaintiff would have received for her 50% share of the value of Defendant's license to practice law, was less than the amount of the maintenance to be paid (R. 37). In essence, the trial Court concluded that it would be inequitable to permit a triple recovery to Plaintiff, all paid from the same income stream, to wit: a share of the license; a share of the practice; and maintenance. This approach was in accord with the holding of the Appellate Division, Fourth Department, in Wadsworth v. Wadsworth, 219 A.D.2d 410, 415 (4th Dept. 1996).

The Order of the First Department rejected the resolution of the "double-counting" problem posited by the Fourth Department in Wadsworth. In modifying the judgment of Supreme Court, the Appellate Division: increased Defendant's distributive award obligation from $1,290,880.00 to a total of $2,064,380.00; directed that maintenance in the sum of $180,000.00 annually continue during the entire repayment term of the distributive award ; and directed Defendant to pay statutory interest at the rate of 9 percent per annum upon the distributive award balance, which installment schedule the Appellate Division left undisturbed at the principal rate of $250,000.00 per year.

The conflict among the Appellate Divisions on the issue of whether a Court is obligated to reduce a license distribution to the non-titled spouse by the amount awarded in maintenance, in order to avoid the "double-recovery" against which this court cautioned in McSparron, could not be more pronounced. The Fourth Department has held that where maintenance and license issues arise together, "the court is obliged to reduce the value of the enhanced earnings by the amount awarded in maintenance. Not to do so would involve a double counting of the same income." Wadsworth, supra, at 415, citing, Scheinkman, 1995 Supplementary Practice Commentaries, McKinney's Consolidated Laws of NY, Book 14, Domestic Relations Law C236B:6, 1996 Supplementary Pamphlet, at 46. The Fourth Department applied their holding in Wadsworth in Reczek v. Reczek, 239 A.D.2d 867 (4th Dept. 1997).

The Second Department, using a similar rationale, has chosen to resolve this issue in yet another manner, by holding that where the non-titled spouse is granted a distributive award representing a share of the other spouse's professional license, there must be a corresponding reduction in the payor spouse's other obligations, including the obligation to pay maintenance. Seeman v. Seeman, 251 A.D.2d 487, 488 (2nd Dept 1998) [maintenance award reduced to four years]. That is to say, where maintenance and license issues appear together, the Second Department is inclined to reduce the duration of maintenance, while the Fourth Department *awards maintenance, but reduces the license award by the amount of the maintenance award.*

Trial Courts have chosen to follow one or another of the Appellate Division determinations mentioned above -- not necessarily even those within their own Departments. For example, Cadet v. Cadet, N.Y. Law Journal Dec. 11, 1996 at 31, col. 6, is a case where the Supreme Court, Rockland County, followed the reasoning of the Fourth Department in Wadsworth. In Goldman v. Goldman, N.Y. Law Journal April 24, 1998 at 25, col. 4, Supreme Court, New York County, followed the reasoning of the Second Department in Seeman, wherein it stated: "given the sizeable distributive award in this matter and its liquidity, the Court perceives no reason to make an award for maintenance."

The Order of the Appellate Division herein is not in accord with the opinions of either the Fourth Department in Wadsworth and Reczek or with the Second Department opinion in Seeman. The Order appealed from has created a triple recovery to Plaintiff (maintenance, share of license and share of practice), all to be paid from the same income stream, where one award is made without regard to the other. The First Department did not refrain from awarding maintenance, which was the method of resolution preferred by the Second Department in Seeman, nor did it employ the methodology used by the Fourth Department in Wadsworth and Reczek, where the distributive award otherwise payable for a share of the value of a professional license was reduced by the maintenance obligation.

The opinion of the First Department here -- a third approach to the resolution of the "double [or triple] recovery" problem, which this Court recognized in McSparron –- exacerbates the conflict which already existed between the Second Department (Seeman) and the Fourth Department (Wadsworth and Reczek). This Court may and should resolve, for the benefit of all matrimonial litigants statewide, the conflict which exists among the Appellate Divisions as to the application of this Court's opinion in McSparron. On a factual basis alone, Defendant is able to muster compelling arguments in support of his position. Well-respected legal commentators have already noted the far-reaching implications of the precedent set herein by the First Department. See, Samuelson, Appellate Division Turns Double-Dip into Banana Split, Family L. Rev. Vol. 31, No. 1 (March 1999) (copy annexed hereto as Exhibit "A"). Another noted author has characterized the April 15, 1999 Order of the Appellate Division herein as "the ideal vehicle" for a leave grant, "to enable the Court of Appeals to address the duplicative recovery question that was raised by McSparron v. McSparron." Florescue, The Recent Grunfeld Decision, N. Y. Law Journal, May 10, 1999 at 3, col. 3 (copy annexed hereto as Exhibit "B").

POINT II

THE APPELLATE DIVISION ERRED BY MAKING AN ECONOMIC AWARD WITH WHICH DEFENDANT CANNOT COMPLY

On a factual basis, making reference to Federal, New York State and New York City tax rates for 1998, of which statutes this Court may take judicial notice, the following calculations graphically illustrate the insoluble cash flow problems presented to Defendant herein in complying with the Order of the Appellate Division. Assuming, as did the Appellate Division, that Defendant's annual gross income is $1,000,000.00, the following is a cash flow analysis based upon actual Federal, New York State and New York City income tax rates for 1998:

Item	**Dollar Amount**
Gross Income	$1,000,000.00
self-Employment Tax on $1,000,000.00	($ 35,263.00)
Alimony	($ 180,000.00)
Federal Income Tax	($ 243,970.00)
State Income Tax	($ 52,897.00)
City Income Tax	($ 34,271.00)
Child Support	($ 24,000.00)
Educational Expenses	($ 36,000.00)
Distributive Award	($ 250,000.00)
Interest on Distributive Award	($ 185,794.00)
TOTAL DEFICIT:	**($ 42,195.00)**

A deficit of $42,195.00 is neither an equitable nor a logical result, especially where, as here, such a solution could have been avoided. Recognizing that $1,000,000.00 in income was an assumption, this Court may examine Defendant's separate 1994 income tax return, the most recently filed income tax return admitted into evidence, which sets forth gross income in the sum of $1,152,222.00 (R. 2548, line 22). When the excess of 1994 gross income over the $1,000,000.00 assumption set forth above ($152,222.00) is added to the above deficit of $42,195.00, the result is $110,027.00. Under this scenario, Defendant would then have to pay income taxes on the additional $152,222.00 of income (approximately 40.7% of $152,222.00 = $61,954.00, as calculated below), which yields disposable annual income in the sum of $90,268.00 [$152,222.00 less $61,954.00 in taxes = $90,268.00] -– hardly sufficient to meet Defendant's own needs, given the proven standard of living herein. (R. 2957-2958).

Should this Court not wish to refer to actual 1998 income tax rates and an assumed income of $1,000,000.00, an examination of Defendant's 1994 income tax return and the actual tax liabilities set forth therein, which is a part of the Record (R. 2548-2578), will support the foregoing cash flow analysis, keeping in mind that the alimony actually paid in 1994 ($120,062.00) was $59,938.00 less than the alimony ordered by Supreme Court ($180,000.00):

:

Item	**DollarAmount**
Gross Income	$1,152,222.00

Self-Employment Tax	$ 34,032.00)
Alimony	($ 120,062.00)
Federal Income Tax	($ 321,704.00)
State & Local Income Tax	($ 114,270.00)
Child Support	($ 24,000.00)
Educational Expenses	($ 36,000.00)
Distributive Award	($ 250,000.00)
Interest on Distributive Award	($ 185,794.00)
SUBTOTAL	**$ 66,360.00**
LESS ADDITIONAL ALIMONY ($180,000.00 -$120,062.00)	**($ 59,938.00)**
PLUS TAX SAVINGS FOR $59,938.00 IN DEDUCTIBLE ALIMONY, BASED UPON AN EFFECTIVE COMBINED 1994 INCOME TAX RATE REVEALED BY PLAINTIFF'S EXHIBIT 98 (R. 2548-2578) [Federal (30.8%) + State and City (9.9%) = 40.7%] $59,938.00 x 40.7% =	**$ 24,395.00**
DISPOSABLE, AFTER TAX INCOME REMAINING FOR DEFENDANT	**$ 30,817.00**

Based upon the foregoing economic realities, in addition to addressing the conflict among the Appellate Divisions on the issue of the interplay between professional practice and license valuation, and the relationship between those two items and an award of maintenance, this Court also has the opportunity to speak to another issue with far-reaching implications in every matrimonial case, to wit: the extent to which the trial court can and should consider whether a payor spouse is able to pay the total economic award. That is to say, this Court has the opportunity to discourage the lower courts from rendering economic awards with which the payor spouse simply cannot comply. Respect for the judiciary is not engendered by the rendering of monetary awards that cannot be paid, and which make enforcement an exercise in futility. As set forth below, a resolution of this problem by this Court would constitute a logical extension of prior Appellate Division opinions.

Indeed, it has been held that a trial court must consider cash flow in setting distributive award installment payment schedules, so as to ensure that the payor will have the income necessary to meet current living expenses. Aborn v. Aborn, 196 A.D.2d 561, 563 (2d Dept. 1993); Mullen v. Mullen, 187 A.D.2d 913, 915 (3d Dept. 1992). At least one Appellate Division has stated that it is improper for a trial court to determine the issue of spousal support with reference to the parties' gross, pre-tax incomes, and that the court needs to consider the parties' actual income tax liabilities when computing support. White v. White, 205 A.D.2d 957, 959 (3d Dept. 1994).

POINT III

THE APPELLATE DIVISION FAILED TO GIVE PROPER APPLICATION TO DOMESTIC RELATIONS LAW §236(B)(4)(b) VALUATION DATE ISSUES, IN CONTRAVENTION OF THIS COURT'S OPINION IN McSPARRON

The third legal issue arising from the Order of the Appellate Division herein, which implicates interests beyond those of the two parties herein, is the selection of a

proper valuation date for business interests, such as professional practices, under Domestic Relations Law §236(B)(4)(b). Both Supreme Court and the Appellate Division presumed that the proper valuation date for Mr. Grunfeld's law practice is the date of the commencement of the matrimonial action. The Appellate Division reasoned that "[t]he practice was an active, ongoing business, which type of asset is generally valued as of the date of commencement."Grunfeld, 255 A.D.2d at 17.

It is submitted that this presumption should have been more closely examined in this case, especially given this Court's suggestion in McSparron that "the active/passive asset" distinction was "too rigid to be useful" in many situations. 87 N.Y.2d at 287-288. This Court stated in McSparron that formulations such as the "active/passive asset distinction" should be regarded only as helpful guideposts and not as immutable rules of law." 87 N.Y.2d at 288.

This case presents this Court with an opportunity to provide guidance to the lower Courts of this State with respect to the "active/passive asset" distinction. The setting of a valuation date for a business or a professional practice continues to be a vexing problem; just three (3) weeks after this Court granted leave for the within appeal, an Appellate Division set a "time of trial" valuation date for an accounting business. Pearl v. Pearl, ___ A.D.2d __ (2d Dept. Nov. 15, 1999)(1999 Westlaw 1038600). Domestic Relations Law §236(B)(4)(b) clearly states that "the valuation date or dates may be anytime from the date of commencement to the date of trial." Presently, however, there are no specific criteria from this Court which may be consistently applied by the Appellate Divisions, and which could guide the Bench and Bar in determining this important question of statutory interpretation.

The reduction in the value of the Defendant's law practice, after this matrimonial action was commenced, was the result of external factors beyond Defendant's control. Specifically, Supreme Court noted: that the income from several major clients declined by approximately $2.4 million from 1992 to 1994; that firm income was "down about $1.7 million from 1992 to 1994"; and that the firm's attorneys "now bill 1,750 to 1,900 hours per year instead of the prior 2,200 to 2,500 hours." Rochelle G. v. Harold M.G., supra, at 811.

A close reading of the Order of the Appellate Division herein reveals a reluctance to consider seriously the possibility of setting a valuation date of Defendant's law practice, other than the date of commencement of the action. The Appellate Division recognized that a loss of a major client pendente lite might justify a date of trial valuation. 255 A.D.2d at 17, citing, LaBarre v. LaBarre, 251 A.D.2d 1008 (4th Dept. 1998). Yet, in this case, while the Appellate Division found that Defendant's law firm lost "several clients in the years following the commencement of this action," it concluded that this loss "was not the type of unusual post-commencement event as would necessarily have a substantial, long-lasting effect on its value." Id. It is submitted that this conclusion was erroneous, where, as here, the firm's income was diminished. The Appellate Division clearly recognized the existence of post commencement downturn in Defendant's business, stating: "the diminishment of the firm's income due to the loss of a client need not be considered in arriving at an appropriate valuation date." Id. The excess earnings method of valuation described by Revenue Ruling 68-609, used by both expert witnesses herein (R. 24), is based, among other criteria, upon an average of the income of a practice in the years immediately preceding the valuation date. As Supreme Court noted, "the more accurate method, adopted by every other expert who has testified over the years before this court, is to use a weighted average for a five year period." (R. 26). A weighted average is often weighted most heavily in the year or two prior to the chosen valuation date. Had the Appellate Division given greater heed to the importance of selecting the valuation date, it would have recognized the potential for prejudice to a person in the situation of Defendant, who had suffered a post-commencement loss in income, yet was penalized in the valuation process, due to the use of a date of commencement valuation. The use of the date of commencement as the valuation date fails to give due consideration to events occurring between the July 30, 1992 commencement of the action and the date of the trial, more than three (3) years later, and the re-opening of proof, nearly four (4) years later.

It is respectfully submitted that the reluctance of courts to use valuation dates other than the date of commencement of the matrimonial action is premised, in large part, upon the lack of specific guidance from this Court on this issue. Amicus urges this Court, when deciding this case, to fashion a set of criteria which may be used by the trial courts in setting valuation dates pursuant to Domestic Relations Law §236(B)(4)(b).

CONCLUSION

The American Academy of Matrimonial Lawyers, New York Chapter respectfully requests this Court to reverse the Order of the Appellate Division, Supreme

Court, First Judicial Department, entered April 15, 1999 and to modify said Order of the Appellate Division, so as to reinstate the Resettled Judgment of the Supreme Court (Friedman, J.) entered June 18, 1997 in New York County, and to grant such other and further relief as this Court may deem just and proper.

Dated: Albany, New York December 10, 1999

Respectfully submitted,

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