To be argued by: Bruce J. Wagner
Time Requested: 10 minutes
Brief Completed: March 15, 2004

State of NEW YORK
COURT OF APPEALS

AMY N. HOLTERMAN,

Plaintiff-Respondent,

-against-

ROBERT K. HOLTERMAN,

Defendant-Appellant.

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

APPELLATE DIVISION, THIRD DEPARTMENT CASE NO. 92888

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QUESTIONS PRESENTED FOR REVIEW

I. Whether and to what extent should a trial court, in awarding maintenance and child support payable by a professional license holder to a non-titled spouse, be required to ensure that the total economic award for maintenance, child support and enhanced earnings comports with economic reality and is capable of being paid by the payor spouse?
Supreme Court and the Appellate Division found that Defendant herein was capable of paying the sums awarded.

II. Whether and to what extent should a Court, in directing that maintenance, child support and a distributive award be paid by a professional license holder to a non-titled spouse, be required to ensure that so much of the payor's income as has been converted to into an asset for purposes of the distributive award is not counted and paid a second time as child support?
Supreme Court and the Appellate Division rejected Defendant's contention that this issue be considered.

PRELIMINARY STATEMENT

The Order of the Appellate Division, Third Judicial Department, entered July 3, 2003, raises legal issues, the scope and application of which are of significant and statewide importance ranging far beyond the interests of Plaintiff and Defendant herein. Therefore, the AAML NY Chapter respectfully requests this Court to grant the within motion for leave to appear as amicus curiae on submission and argument of the appeal and for leave to file the within proposed brief.

JURISDICTION OF MOTION AND APPEAL

The Court of Appeals has jurisdiction to entertain the within Motion for amicus curiae relief by virtue of the authority of 22 NYCRR §500.11(e). This Court also invited amicus participation by "Notice to the Bar" dated October 21, 2003. http://www.courts.state.ny.us/ctapps/nottobarholt.pdf. The Court of Appeals has jurisdiction to entertain Defendant's appeal upon the ground that this Court granted Defendant leave to appeal by Order entered October 21, 2003. Holterman v. Holterman, 100 NY2d 514 (Oct. 21, 2003).

STATEMENT OF THE CASE

The parties hereto were married on August 1, 1981 and are the parents of two children born April 18, 1985 and April 6, 1991. (Defendant's Brief at 3). The within matrimonial action was tried before Supreme Court in August 2001 and the Court rendered a written decision on April 12, 2002. The parties were divorced by a Judgment of Divorce of the Supreme Court (Cannizzaro, J.) entered October 25, 2002 in Albany County.

Supreme Court, insofar as is pertinent to the arguments of amicus, found that Defendant's year 2000 gross income was in the sum of $171,337, plus $10,500 in compensation voluntarily deferred. The Judgment of Supreme Court directed Defendant to pay lifetime maintenance to Plaintiff in the sum of $35,000 per year for the first 5 years and thereafter in the sum of $20,000 per year, to terminate sooner upon Plaintiff's death or remarriage. Supreme Court further directed Defendant to pay Plaintiff a cash distributive award in the sum of $184,931.52, in monthly installments over 15 years, plus 6% interest per annum, retroactive to the August 9, 2000 date of commencement of the matrimonial action. Supreme Court also directed Defendant to pay full CSSA child support to Plaintiff, computed upon Defendant's entire annual income ($181,837), at the rate of $34,875.65 annually, in monthly installments of $2,906.30.

As set forth in Defendant's Brief (pages 9-10), it appears that given Defendant's gross income of $181,837 per year, after payment of taxes, maintenance, child support, distributive award and interest thereon (not counting the $20,000 counsel fee award), Defendant will have about $36,389 per year with which to meet his own expenses, plus the costs of the court-ordered obligations for life insurance, health and dental insurance, counsel fees and uninsured health expenses. (Defendant's Brief at 23). Notably, Supreme Court found that Defendant's reasonable expenses were in the sum of $42,816 per year. (Defendant's Brief at 5). Plaintiff, on the other hand, assuming she earns no income, will have $91,163 per year to live on. Inasmuch as Plaintiff's Statement of Net Worth indicated, and Supreme Court so found, that Plaintiff's reasonable needs were in the sum of $6,768 per month, or just over $81,000 per year (Defendant's Brief at 5), Supreme Court's award appears to have exceeded Plaintiff's reasonable needs by about $10,000 per year, despite the fact that Plaintiff's own expert, whom Supreme Court found to be credible, opined that Plaintiff could earn at least $19,450 per year within 2 years. Supreme Court further awarded the marital residence to Plaintiff, plus 50% of the deferred compensation accounts.

Upon the Defendant-husband's appeal to the Appellate Division, the Third Judicial Department affirmed all aspects of Supreme Court's Judgment, except for making a modification with respect to defendant's obligation to maintain life insurance, which is not an issue addressed by amicus. Holterman v. Holterman, 307 AD2d 442 (3d Dept. July 3, 2003). Defendant moved this Court by Notice of Motion dated July 30, 2003 for leave to appeal. This Court granted Defendant's motion for leave to appeal by Order entered October 21, 2003. Holterman v. Holterman, 100 NY2d 514 (Oct. 21, 2003).

ARGUMENT

POINT I

THIS COURT SHOULD CAUTION TRIAL COURTS TO MAKE AWARDS WHICH COMPORT WITH ECONOMIC REALITY

As set forth in Defendant's Brief (pages 9-10), this appeal will provide this Court with the opportunity to speak to an 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 appeal presents this Court with the opportunity to discourage Supreme Court and the Appellate Division from rendering economic awards with which compliance simply cannot be had. Respect for the judiciary is not engendered by an award that cannot be paid, and which makes enforcement an exercise in futility, or in the alternative, puts the payor on the path to bankruptcy.

The Appellate Divisions have recognized the importance of fashioning comprehensive awards for equitable distribution, maintenance and child support, and to a limited extent, the importance of comporting with economic reality. Madori v. Madori, 201 AD2d 859 (3d Dept. 1994); Aborn v. Aborn, 196 AD2d 561 (2d Dept. 1993); Mullin v. Mullin, 187 AD2d 913 (3d Dept. 1992). Without specific guidance from this Court, however, the application of this concept by the trial courts and the Appellate Divisions will continue to be uneven. Economic results may continue to be inequitably skewed in favor of the non-titled spouse, as appears to be the case on this record. (Defendant's Brief at 9-10).

In this case, Supreme Court awarded economic relief to Plaintiff in the total sum of over $91,000 per year (not including the $20,000 counsel fee award), which sum was about $10,000 per year more than Supreme Court had itself found that Plaintiff reasonably needed. At the same time, the total economic award herein left Defendant with only $36,389 per year with which to meet both his own expenses and the costs of his court-ordered obligations to provide life insurance, health and dental insurance for the children, counsel fees and uninsured health expenses for the children. (Defendant's Brief at 23). Notably, Supreme Court found that Defendant's reasonable expenses for his own needs were in the sum of $42,816 per year.

It therefore appears that Supreme Court's total economic award does not comport with the economic realities of this case. Indeed, Supreme Court seems to have disregarded its own findings as to each party's reasonable needs. Specifically, Supreme Court awarded Plaintiff about $10,000 more per year than it found that she needed, while, at the same time, forced Defendant to meet his needs, plus court-ordered obligations, with $6,000 less per year than it found that Defendant reasonably needed for his own expenses. Surely, this award runs afoul of the Appellate Division decisions in Aborn and Mullin, supra, which encouraged trial Courts to consider economic realities. As the Third Department stated in Mullin:

> Domestic Relations Law §§236(B)(5) and (6) mandate that in fashioning a financial settlement upon divorce, courts should not treat property distribution and maintenance as two separate and discrete items, but rather should set each with a view toward the other in an effort to arrive at a fully integrated and complete financial resolution that is best suited to the parties' particular financial situation and their respective needs (citations omitted). In our view, such was not done in this case. *** Against this backdrop, the structuring of the property distribution in such a manner as to require defendant to make monthly payments for 8.5 years to plaintiff out of his current earnings, which has the effect of rendering him financially unable to make needed maintenance payments, is in our view inappropriate (see, Kyle v. Kyle, 156 A.D.2d 508, 548 N.Y.S.2d 781).
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> Mullin, 187 AD2d at 914-915.

It has been stated that "The distribution of marital property and the allocation of marital liability are necessarily part of an interrelated whole which must be *** addressed, in a comprehensive decision which includes consideration of maintenance and child custody issues." Madori, 201 AD2d at 860. Clearly, Supreme Court's awards herein neither comport with the economic realties of this case, nor do the awards consider all elements of the economic award as an integrated whole.

For these reasons, amicus submits that reversal of the order appealed from is mandated, with instructions to the Appellate Division and Supreme Court to render its financial awards in a manner which comports with the economic realities of the case.

POINT II

THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO DECIDE WHETHER THERE SHOULD BE A PROSCRIPTION AGAINST TRIPLE COUNTING

The second legal issue posed by the order appealed from, which also has implications which extend beyond the interests of the two litigants involved in this appeal, is whether a Court, in directing that maintenance, child support and a distributive award be paid by a professional license holder to a non-titled spouse, should be required to ensure that so much of the payor's income, as has been converted into an asset for purposes of the distributive award, is not counted and paid a second time as child support. As cogently argued by Defendant (Defendant's Brief at Point III), and supported by the testimony of Plaintiff's own expert, the within appeal presents the Court of Appeals with the opportunity to enunciate a rule against "triple counting" of income, where, as here, maintenance, child support and distributive award are all ordered to be paid from one stream of income.

In this case, Supreme Court found that Defendant's income was $181,837. As set forth in Defendant's Brief (pages 21-22), the record appears to indicate that after annual deductions for FICA, maintenance paid to Plaintiff, and Plaintiff's distributive award with interest, Defendant, in reality, has only $111,789 in income available for child support purposes. This fact, as argued by Defendant, should have led Supreme Court to award 25% of $111,789 as child support, which would have computed to $27,947 per year. Supreme Court, however, chose to ignore this economic reality and, instead, awarded child support to Plaintiff based on Defendant's entire gross income, including income voluntarily deferred, in the sum of $181,837 per year.

It is submitted that in addition to failing to recognize the economic realities of this particular record, both Supreme Court and the Appellate Division erred by not considering the fact that the award of maintenance, child support and distributive award will all be paid from the same future stream of income. It appears that from

Defendant's income of $181,837, he must pay FICA ($7,403) and income taxes ($46,882), which leaves him with $127,552 in annual disposable income. It is from this disposable income that all three awards must be satisfied. From this annual disposable income of $127,552, Supreme Court awarded maintenance ($35,000), child support ($34,875) and distributive award ($21,288), leaving Defendant with only $36,389, or 28% of his disposable income, while conferring 72% of the disposable income upon Plaintiff.

Analyzed from another vantage point, Defendant's baseline earnings herein were in the sum of $69,000. (Defendant's Brief at 22). The remainder of Defendant's income, the "excess earnings," which were capitalized to determine enhanced earning capacity, were in the sum of $112,837. Under this Court's opinions in Grunfeld v. Grunfeld, 94 NY2d 696, 707 (2000) and McSparron v. McSparron, 87 NY2d 275, 286 (1995), it is from the payor's baseline earnings, only (in this case $69,000), that maintenance is to be awarded, because the remainder of the income stream, over and above the baseline sum of $69,000 per year, was used to calculate the enhanced earnings, and, thus, the distributive award to be paid to the non-licensed spouse. Here, Supreme Court, as affirmed by the Third Department, awarded maintenance in the sum of $35,000 per year and annual child support in the sum of $34,875, a total of $69,875, thus consuming all of Defendant's baseline earnings, plus $875, which leaves Defendant with absolutely no income which has not been "spoken for" by an economic award payable to Plaintiff.

It is submitted that the reasoning of the Appellate Division on this issue is flawed. The Order of the Appellate Division states in pertinent part:

> Defendant's enhanced earnings were calculated by subtracting his baseline earnings (without a medical license) of $69,000 from his gross earnings as a licensed medical doctor of $183,000. A coverture factor of 70% was applied to the $114,000 difference and the result of $79,800 was capitalized to determine the value of the license to be equitably distributed. Thus, the $79,800 provides the source for paying the equitable distribution award, but is no longer available for the maintenance calculation (see Grunfeld v. Grunfeld, 94 NY2d 696, 707 [2000]; see also Erickson v. Erickson, 281 AD2d 862, 863 [2001]). Defendant's remaining income of $103,200 ($183,000 minus $79,800) is more than adequate to support the award of maintenance.
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> Holterman v. Holterman, 307 AD2d at 443.

The problem with the foregoing reasoning is that the “remaining income of $103,200" must support not one, but three considerations: maintenance in the sum of $35,000 per year, annual child support in the sum of $34,875, and Defendant’s reasonable needs, which Supreme Court found to be in the sum of $42,816 per year, which three items total $112,691 – - notably, $9,491 more than even the Appellate Division stated constituted Defendant’s “remaining income of $103,200.” Clearly, both Supreme Court and the Appellate Division engaged in double counting, if not triple counting, of Defendant’s income, by awarding maintenance, child support and distributive award from the same stream of income, and erred further by failing to consider the economic realities of Defendant’s own reasonable needs.

It is submitted that when this Court examines the record herein, and analyzes the manner in which the three awards of child support, maintenance and enhanced earnings actually impact upon the economic realities herein, the sensibility of a proscription against “triple counting” will be the logical conclusion. Therefore, this Court is urged to give careful consideration to the reasoning of Justice Ross in Goodman v. Goodman, 195 Misc.2d 204 (Sup. Ct. Nassau Co. 2003). Amicus notes that Plaintiff’s March 1, 2004 Brief fails to address the reasoning of Goodman or its application to the facts of this case.

For these reasons, it is submitted that the Order of the Appellate Division should be reversed, with instructions to the Appellate Division and Supreme Court to avoid triple counting of income.

CONCLUSION

The NYAAML respectfully requests this Court to grant the NYAAML leave to appear as amicus curiae on the submission and argument of the within appeal and to accept the brief submitted herewith as filed.

Dated: Albany, New York
March 15, 2004

Respectfully submitted,

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