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Chairman's Column

Sale of the Marital Home Due To Cohabitation: A Change in the Law?

by Frank A. Louis

In my last column, I pointed out certain issues I felt were interesting, important, and needed judicial clarification. The response has made me more willing to comment upon substantive law. A recent Appellate Division opinion, in my judgment, dramatically changes the way we settle cases and should be highlighted to Section members if we are to fulfill our obligation to keep members informed of new trends in the law. A careful reading of the opinion will require changes in the typical language inserted in Property Settlement Agreements involving contingencies under which the marital home is to be sold.

The Appellate Division in *Pugh v. Pugh* (decided January 26, 1987) has recently held that a Property Settlement Agreement containing language requiring a marital home to be sold upon "cohabitation" must be interpreted, in what the Court characterized as the public policy of the state, in the light of the economic contribution rule set forth in *Gayet v. Gayet*, 92 N.J. 19 (1983). Interestingly, the non-occupying spouse did not participate in the appeal, thus the Court did not have the benefit of argument on both sides of the issue.

In *Gayet*, the Supreme Court adopted an economic needs test to determine whether cohabitation requires modification of an alimony reward relying, in part, upon prior alimony decisional law. See *Garlinger v. Garlinger*, 137 N.J. Super. 56 (App. Div. 1975). The rationale was simply that cohabitation constituted a change in circumstances only if the cohabitant supports or subsidizes the ex-spouse since if such contributions can be proven, they directly affect

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Equitable Distribution Lessons From New Jersey For New York

by William G. and Elinor P. Mulligan

In 1980, New York saw the equitable distribution dawn come up like thunder out of Jersey 'cross the Bay. Since then, with New Jersey decisions above all others as their guideposts, New York courts have pointed out oversights in New York's Domestic Relations Law ("DRL"), which, in most instances, the Legislature in Albany has taken steps to correct.

What has most troubled New York judges is the shibboleth that marriage is an economic partnership — the hype that proponents of the 1980 law reform advertised to get the Equitable Distribution Law ("EDL") enacted and signed by Governor Hugh Carey. If marriage really is an economic partnership, then one partner should not be permitted to squirrel away separate (and hence immune) assets, develop and enlarge these non-partnership assets during the marriage partnership, out of sight of the other partner, and keep all the capital increments thereon for his/her exclusive ownership.

Jolis v. Jolis, 98 N.Y. App. Div. 692 (1983), was the first case to go the full route of plenary hearing, decision, and appeal after the EDL took effect. *Jolis* showed how distant marriage can be from a legal partnership. In a 40-year marriage, the husband's inherited and, for additional reasons, immune stock interest in a diamond distributing business had advanced in value because of "diamond fever" while his family company accumulated over $8 million in retained earnings. New York's EDL defined marital property as including all property acquired during the marriage, but it excepted separate property, defined as property acquired before marriage or acquired by bequest, devise, or descent or a gift from a party other than the spouse; the definition of separate property also included increments in value of separate property "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse." Finding that Mrs. Jolis had made no such direct contributions or efforts productive of the increment, the trial court brushed aside her claims based upon having borne four sons and helped entertain her husband's associates in the diamond business, and the court ruled out of the marital category all of the husband's stock values, both original and incremental. Although the court gave the wife one-half of the

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Recent Cases

by Myra T. Peterson

***EQUITABLE DISTRIBUTION*—DEBTS—Even if Debt Beyond Statute of Limitations and Law Division Suit on Debt is Pending, Family Court May Apportion Debt**

(*Strijek v. Strijek;* A-4842-84T1)

An appeal was brought *inter alia* on the trial court's decision to apportion responsibility for repayment of $31,500 borrowed by or gifted to the parties from the defendant-wife's father to purchase the marital home. The wife had acknowledged the $31,500 as a debt and had made some payments thereon. The husband testified that he did not remember telling his father-in-law that the monies were a gift not a loan nor his father-in-law telling him that the monies were a gift. The trial court found that there was a debt of $31,500 to the defendant's father and directed that the parties share repayment of the debt.

At the time of trial, there was a Law Division suit pending wherein the father-in-law sought repayment of the monies.

On appeal, the plaintiff claimed that the trial court erred in requiring him to repay the $31,500 and that the adjudication as to the debt was improper because the defendant's father was not a party to the suit.

The Appellate Division stated:

> Plaintiff misconceives the role of the divorce judgment in repayment of debts to the third parties. The court here only concluded that if defendant's father were to be repaid, the debt must be borne by both parties equally. . . .The trial court has a responsibility to allocate marital debts irrespective of the independent lawsuits of the parties.

The Statute of Limitations defense was a defense to be raised in the Law Division suit.

The Appellate Division affirmed on this issue.

(*Comment: It is the rare case in which gifts that were given to both parties by their parents to purchase a home do not become loans when divorce ensues or that loans on which no payment was ever made suddenly require payment.*

If the practitioner represents a parent who is to make such a loan to a couple, whether it be one to be repaid on a regular basis or "when you can afford to pay back," such should be in writing and secured by a mortgage, and payments of some kind should be made.

This court called the monies given to the couple a loan; other courts customarily do not. It is rare that the parent of one spouse intends to give the spouse divorcing his or her child a windfall. While mortgages may be as unpopular and considered as contraindicative of parental love and generosity as a prenuptial agreement, if parents are to be protected on the breakup of their child's marriage, such may be the only form of protection for the parents.)

Strijek v. Strijek, A4842-8T1 (App. Div., Decided November 21, 1986) (Greenberg & Gruccio, J.J.A.D.) (Not yet approved for publication). □

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the *need* to receive alimony and, hence, a change in circumstances exists. The Court, after reviewing some of the public policy considerations inherent in its decision, observed that it was "best to adhere" to the statutory language of *N.J.S.A.* 2A:34-23 stressing the concepts of need and ability to pay, as well as prior decisional law, which had predicated alimony reflecting the economic needs of the parties.

Yet, *Pugh* was not an alimony case and dealt solely with the conditions under which an equitable distribution asset (the marital home) was to be sold. The facts in *Pugh*, while interesting, were not that unique since the cohabitant maintained his own residence and had not fully "moved in" with the defendant-wife. The Appellate Division concluded factually that "they are not continuously together, nor do they hold themselves out or conduct themselves as husband and wife. They have not established a single economic or domestic unit." The Court went on to note that they were "disinclined to apply the contract language in a way that conflicts with our stated public policy to guarantee individual privacy, autonomy, and the right to develop personal relationships," relying upon *Gayet, supra*, at 151. Continuing, the *Pugh* court observed that:

> Reasonably, in light of our public policy, the agreement should be regarded as *having principally an economic purpose*, that is, to assure that Plaintiff's interest in the former marital home is not used to subsidize Defendant's relationship with a male cohabitant. As *Gayet* puts it in a cognate setting, the test is whether one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the support spouse relief. (emphasis added)

Since the trial judge's factual findings, which the Appellate Division accepted, did not include a finding that the cohabitant was supporting the ex-spouse, the *Gayet* public policy considerations did not compel sale, and the trial court's decision compelling sale, based on cohabitation, was reversed. The *Pugh* Court did not specifically discuss who had the burden of proving an economic contribution, but since it relied on *Gayet*, presumably, the burden is on the non-occupying spouse.

The opinion is particularly significant since the language in the *Pugh's* Property Settlement Agreement was fairly typical, thus it impacts on virtually every dissolution case involving delayed distribution of the marital home. The custodial parent was permitted exclusive occupancy of the home, which was to be sold upon the first occurrence of the child's graduation from high school, the wife's remarriage or if "the defendant lives with a non-related adult male." That common language must now be interpreted, under the *Gayet* reasoning, to mean that even if cohabitation is proven, *i.e.*, the parties are living together on a full-time basis, if no proof exists of economic contributions, or any other form of "sub-

sidization," there is no cohabitation. In other words, cohabitation by itself, does not constitute cohabitation within the meaning of a freely negotiated Property Settlement Agreement, which does not specifically refer to economic contributions.

My own experience, and those with whom I have discussed the *Pugh* decision, is that a contingency requiring sale of the marital residence, in the equitable distribution context, was designed to permit the non-occupying spouse to receive the equity if the occupant spouse was living with an unrelated party by blood or marriage regardless of whether economic contributions occur. The key question in the negotiations was the concept of cohabitation not economic contributions but that now has been changed. In the light of *Pugh*, it seems clear that the drafting of Property Settlement Agreements must include two major considerations. Prudence now dictates that cohabitation itself be defined and, further, if this is the parties' intent, that the presence, or absence of economic contributions be specified so it is clear to a reviewing court whether this was within the contemplation of the parties.

Tischler Award

The annual dinner, held April 7 at L'Affaire Restaurant, was a huge success with almost 250 people attending. My personal thanks to Bill Brigiani of Middlesex County who, once again, demonstrated his unique ability to entertain. Our Editor-in-Chief has already written a lengthy editorial concerning Gary Skoloff's receipt of the Tischler Award, and I can only emphasize my agreement with his comments. It is important to observe that the decision to give this award to Gary Skoloff was made approximately one year ago and reflects a career-long commitment to the Section, the profession, and the practice of law. It was and will always be totally unrelated to any particular case regardless of the coverage that case might have received. His contributions have spanned years and the Section quite properly honored him for those years of service and his contributions to the improvement of the professionalism of our members. On behalf of the Section, we thank Gary once again. □

Equitable Distribution Lessons From New Jersey For New York

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marital property as so restricted, the question became, 50 percent of what?

As Women's Bar Associations stampeded and stormed, other cases wound their ways upward. In the next three years, along came three rulings of New York's highest court: *Majauskas*, 61 N.Y. 2d 48 (1984); *O'Brien*, 66 N.Y. 2d 576 (1975); and *Price, New York Law Journal* 12/26/1986, 69 N.Y. 2d 8 (1986).

In *Price*, the New York Court of Appeals decided to bite what Shakespeare called "these paper bullets of the brain" (MUCH ADO, Act II, Scene 3). It ruled appreciation in value during the marriage of the husband's ownership interest in Unity Stove Company (all gifts from his father, some before and others during the marriage) were to be added to the marital property category to the extent that the increment could be traced wholly or partly to the wife's indirect contributions and efforts both as homemaker and as mother, and to contributions she had made by working for six months at Unity early in the marriage.[1]

Summarizing *Price* briefly, that decision added to marital property all appreciations during marriage in the value of separate property to the extent these appreciations can be attributed to efforts of *either* spouse, but *not* purely passive appreciations, as will shortly appear.

The most recent and most sweeping landmark case in New York *Price* deserves notice for its departure from certain New Jersey substantive rulings and also for its lockstep with New Jersey's procedural decisions. This brief exercise in contrast and comparison suggests how practitioners in these sister states can learn from each other and from the uses of comparative law.

One of the results reached in *Price* was that appreciation of a separate asset during marriage and before institution of dissolution proceedings is marital property, if attributable to efforts of the non-titled spouse. This much accords with New Jersey's ruling in *Scherzer*, 136 N.J. Super. 398, 401 (App. Div. 1975). There the Appellate Division ruled that such appreciation is marital "to the extent that it may be attributable to the expenditures of the effort of plaintiff wife." *See, Painter v. Painter*, (65 N.J. 196 (1974)] at 196 (sic)." The reference to *Painter* should have been to page 214 where the Supreme Court said:

> "Clearly, any property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will not qualify as an asset eligible for distribution. As to this, the statute is explicit. We also hold that if such property, owned at the time of the marriage, later increases in value, such increment enjoys a like immunity. Furthermore, the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse. The burden of establishing such immunity as to any particular asset will rest upon the spouse who asserts it."

In a footnote to the above statement, the New Jersey Supreme Court wrote:

> The immunity of incremental value to which we refer is not necessarily intended to include elements of value contributed by the other spouse, nor those for which husband and wife are jointly responsible.

Scherzer remanded the case to the trial court "for determination of plaintiff's right to equitable distribution in defendant's stock interest in Successful Creations, Inc. In determining the value of such interest, the judge should determine the extent to which defendant's original investment has been enhanced by the contributions of either spouse." (136 N.J. Super. at 401)

Turning back to *Price*, we find a difference between the states: *Scherzer* adds appreciation of separate property to the marital grouping only to the extent attributable to efforts of the non-titled spouse, while New