Choices Available When Distributing the Former Marital Home

by Frank A. Louis

Perhaps the most frequent issue confronting lawyers in a matrimonial case is equitable distribution of the marital residence when the children are involved. It is a particularly sensitive issue placing the non-custodial spouse's right to use and reinvest an otherwise frozen asset directly in conflict with the children's best interest in remaining in their home. Surprisingly, however, there are few cases providing guidelines to assist the lawyer and it is hoped this article may provide some guidance to the matrimonial attorney dealing with this issue on a day-to-day basis.

Equity Sharing, Second Mortgages or Joint Ownership

It should not be a surprise that a careful reading of the case law reveals that the best interest standard is the critical turning point in distributing a child's residence, yet, significantly the analysis commences rather than terminates there. In *Gemignani v. Gemignani,* 146 N.J. Super 278 (App. Div. 1978), the seminal case in New Jersey, the best interest standard was utilized by both the trial and appellate courts but with differing results. *cf; Painter v. Painter,* 65 N.J. 196, 212 (1974). While agreeing with the trial court that the children's welfare compelled a delay in any sale, it rejected transferring sole title to the wife since the non-custodial parent should not "be denied an equitable allocation simply because the primary asset is not or should not be liquidated." *Gemignani* at p. 284. Rather; the Court suggested that on remand consideration be given to transferring title to the wife subject to a mortgage in the husband's name in the amount of his equity. Thus was born the *Gemignani* mortgage. Except for noting that this was the appropriate procedure, after determining that the property should neither be sold nor joint title maintained, no further guidance was provided to the Bar. Interestingly, the Appellate Court noted that "the evident animosity and hostility between the parties precluded the possibility of the more 'typical' arrangement of retaining joint title," thus opening the door for imaginative counsel to introduce fault testimony, not on the quantum of equitable distribution, but the method. *Gemignani, supra* at 282.

Four years after *Gemignani,* the Appellate Division refined the "appropriate" procedure by proposing that where property may not be sold for a long period of time a "reservation of an equity interest" should be utilized. Yet the Court noted, however, that when property would be sold within a shorter period of time, a second mortgage is preferable. *Daly v. Daly,* 179 N.J. Super 344, 350 (App. Div. 1978). Since the children in *Daly* ranged in ages from 8 to 12, it appears the Court was recommending *Gemignani* mortgages if the delay was significantly shorter than 10 years. While not specifically defining a "reservation of an equity interest" it seems clear that the *Daly* Court was describing an equitable interest in property which would be paid upon the occurrence of certain contingencies. This equitable interest would presumably be embodied in a document and recorded with the County Clerk, thus protecting the non-custodial spouse's interest.

The *Daly* Court reversed an award of a 4 percent *Gemignani* mortgage at a time when the prime rate was 20 percent and first mortgage rates at 16½ percent. The *Daly* distinction between long-term equity sharing and short-term second mortgages should not be viewed as a firm guideline, particularly in a low inflationary, or even deflationary environment. Rather, the *Daly* reasoning must be applied to the economic circumstances at the time, reflecting the concept that distribution of assets is an equitable remedy which must remain flexible if equity is to be accomplished. It should be remembered that while changes in circumstances may permit modification of support under *Lepis v. Lepis,* 83 N.J. 139 (1980) the predominant view among attorneys is that, notwithstanding these changes, equitable distribution may not later be modified. Compare *Mendell v. Mendell,* 162 N.J. Super 469 (App. Div. 1978); but see *Schaffer v. Schaffer,* 184 N.J. Super 423, 429 (App. Div. 1982). A constantly changing economic climate precludes reliance upon firm guidelines making it essential for the attorney to consider all factors prior to advising a client which alternative, short of outright sale, is appropriate with the length of time until sale only one factor to be considered. Instead, there must be a weighing of all factors and if there is one firm rule, it is that there are no rules since this issue must not only be resolved after considering the traditional equitable distribution factors but also how distribution of the house interrelates with support, custody, debt allocation and other considerations. *Schaffer, supra* at p. 428; *Daly, supra* at p. 350.

Expense Sharing

Nevertheless, the *Daly* concept of equity reservation is an example of a classically flexible equitable response providing the non-custodial spouse with a right to share in the appreciation of the home's value without the potential problems or expenses of joint ownership. Yet, if there will be an actual sharing of proceeds, should not there be a similar sharing of expenses for maintenance of the property, above and beyond traditional support factors. Certainly, such an argument should be advanced by the occupying spouse, since with any right an obligation inevitably follows. Equity sharing is inappropriate if

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the amount of support paid is sufficient only for basic support necessities and not constituting any contribution to the maintenance of the residence. It would be inequitable to permit a later sharing in appreciation if the non-custodial's parent's support did not contribute to the upkeep and preservation of the property. Thus there should be a direct linkage between the quantum of support and method of distributing the marital home.

Three Distinctions

A distinction must be made in allocating responsibility for repairs, replacement of capital items and improvements since they represent three distinct items and depending upon the non-occupying spouse's position as joint owner, mortgagee or equity sharer, the responsibilities may differ. One who will later share in the profit from a sale, either as an owner or equity sharer should contribute to the expense for replacement of a boiler, or a roof, while a mortgagee, as a mere creditor, should be immune from such contingent liabilities. Thus the age and condition of a home becomes a significant factor to be considered in selecting the best option for your client. Similarly, if your client desires to make improvements to the property, such as finishing a basement, joint tenancy or equity sharing may ultimately lead to later disputes as to the allocation of appreciation unless specifically provided for in advance.

If a sharing of equity or joint ownership is selected there should be a distinction, as suggested in *Daly*, between a major and minor repair by selecting a dollar amount for defining a major repair, with the occupying tenant being solely responsible for minor repairs, with major repairs divided along a negotiated percentage. *Daly, supra* at p. 351. That dollar amount, however, should not be inflexible since a vast distinction exists between what constitutes a minor repair on a $60,000 residence as contrasted with a $250,000 residence. Moreover, in theory, a *Gemignani* mortgage immunizes the non-occupant from contributions for repairs, major or minor, or replacement of capital items, the ebb and flow of negotiation may not. Therefore, the mere selection of a mortgage, and status of a creditor, does not automatically eliminate the repair obligation. Equitable distribution of the marital home is vastly more complex than an action for partition in general equity.

Psychological and Practical Advantages

There are additional considerations that the occupying spouse should review prior to making the decision as to sole or joint ownership (even with equity sharing). For instance, sole ownership may permit overnight guests of the opposite sex or even cohabitation (in the absence of financial contribution) in a post-*Gayet* environment. See *Gayet v. Gayet*, 92 N.J. 149 (1983). As sole owner, the custodial parent may rent a portion of the property without interference, or claim of contribution, if economic considerations dictate. Moreover, if the non-occupant's financial situation is perilous, sole title may guarantee freedom from judgment creditors who ultimately may become unwanted co-tenants attempting to force a sale through partition. Sole ownership similarly eliminates the possibility of the co-tenant mortgaging his interest, and later defaulting, thus endangering the children's continued residence in the property. Nevertheless, I suspect that the perceived advantage, in a client's mind, with sole ownership may well be psychological and as a practical matter such considerations cannot be ignored.

In actuality, a major advantage of sole ownership is the right to solely receive the appreciation in value. Yet, consider if the Judge in your county awards second mortgages with interest at prevailing money market rates or even worse, mortgage rates. A house would have to appreciate 18 percent a year (assuming a 9 percent return in a money market fund) for the sole owner to break even. While the argument exists that marriage is not an investment and therefore resort to the marketplace for selection of an interest rate for a *Gemignani* mortgage is inappropriate, (*cf. Mahoney v. Mahoney*, 91 N.J. 488, 500 (1982)) most trial judges will remember the *Daly* admonition that a 4 percent return on a frozen asset is neither realistic nor fair. *Daly, supra* at 350. Thus, if the second mortgage bears interest at 9 percent, or better, the perceived economic advantage of sole ownership may be illusory. What is not illusory is the right to deduct the real estate taxes and the interest paid on the mortgage.

Equity sharing, in contrast, eliminates such market risks while having the additional advantage for the occupying spouse of receiving upon sale a credit for one half of the mortgage principal reduction and insurance premiums paid, since in theory they preserve the asset. *Daly, supra* at p. 351. It similarly gives some degree of protection against creditor interference, though it is questionable that the non-occupant spouse could immunize his interest from creditors altogether. Moreover, with equity sharing the occupying spouse can claim deduction for interest and real estate taxes. Yet, it generally requires a higher level of periodic support.

An unfortunate practical problem occasionally arising with joint ownership occurs when a defaulting non-occupant spouse flees the jurisdiction thus compelling, from economic necessity, a sale. Who signs the deed and affidavit of title to convey title? If the husband can be served, an attorney in fact may be appointed, but what if service cannot be effectuated. Equity sharing and *Gemignani* mortgages eliminate the problem and if flight is a possibility these options must be reviewed with the client prior to settlement, although the *Gemignani* mortgage is not the total solution since someone still must sign a mortgage discharge after payment has been made. Although a court may embody in the final judgment a provision authorizing the occupying spouse to sign documents effectuating a transfer of title and

in appropriate circumstances such an application should be made.

Whichever option is selected there must be a full and frank discussion with the client as to the advantages and disadvantages of each, but it must never be forgotten that resolution of this issue must be considered in conjunction with all other issues enabling the client to make an informed judgment upon the case in its totality.

To Sell or Not to Sell?

Selection of one of the three options actually is the second question, since the primary issue is whether, upon divorce, the home should be sold. Any attempt to delay sale must be based, in either economic or non-economic terms, on the best interest standard first noted in *Painter, supra* and articulated in *Gemignani* where the Court noted:

> the age and situation of the children of the marriage are such as to suggest the desirability of their being able to continue to live there with the custodial parent until their emancipation.

The three children in *Gemignani* ranged in age from seven to thirteen, yet aside from this basic fact no guidance was provided suggesting why it was desirable for the children to continue to reside in the home. Yet, common experience suggests areas which should be developed, for negotiation or trial, focusing upon the children and how any sale impacts upon them.

First and foremost is the obvious uprooting from their home, neighborhood, friends and school. This impact should be depicted as graphically as possible by demonstrating how the loss of home, friends and removal from a comfortable school environment adversely affects them. When viewed in conjunction with the traumatic effects of the family's dissolution, the foundation for an argument to delay sale predicated upon the children's best interests has been established. This foundation, however, must be built upon by detailed testimony relating to the children's extracurricular activities, the quality of the schools in the area and how well the children are doing in their particular classes. It should be supplemented by a description of the existing friendships in the neighborhood and the amenities in the house, i.e. each child having their own room, a basement play area, a swimming pool, swing sets, etc. While expert testimony as to the adverse psychological impact of a sale would be useful, as a practical matter it probably would be precluded by cost in the average case. It is essential to remember that these non-economic considerations, while important, probably will not be persuasive unless a cogent economic case can be established justifying any delay in sale. While perhaps not persuasive, they remain important and in the context of a trial if factually accepted by the court may, with economic consideration, provide a sufficient basis for the Court to exercise its discretion and delay sale.

Two Critical Factors

The amount of equity and the total monthly roof expenses are the two most critical economic factors. As a practical matter, if the expenses to maintain the house exceed the amount of available income and support, the court will be compelled out of necessity to order a sale. The existence of large debts which could be satisfied upon sale further complicates the issue. Thus, in close cases the non-economic considerations become more important and perhaps even critical.

The existence of debts is clearly a factor to be emphasized if your client is seeking an immediate sale. A strong argument can be made that both parties' overall financial situation would be improved if these debts were satisfied after a sale, although this question is dependent, in part, upon the source of the debt, other available methods of liquidating it, including the possibilty of remortgaging the residence and repaying the debts over a longer period of time with a consequent reduction in monthly debt service. The elimination of the debts, however, arguably frees additional discretionary funds for both parents, thus improving the children's quality of life and linking a sale to the ever present best interest standard.

If the equity in the home, in combination with the custodial spouse's income, is insufficient to permit purchase of a new residence, a credible argument can be made that not only will the children lose their home, but they will be "doomed" to an apartment until their emancipation. The emotional appeal of this argument is strengthened if the non-custodial parent's income permits purchase of another home, thus presenting an inequitable situation on its face. The inability of the custodial parent to purchase a subsequent home may also result in adverse tax consequences because any capital gain from sale of the marital home cannot be sheltered. When the roof expenses are not prohibitively high the court will examine the age of the children and the amount of equity. When the roof expenses are high, though arguably affordable, the issue becomes more difficult as the equity increases and the age of the children decreases.

Availability of Comparable Residence

The custodial parent in seeking a delay in any sale should also introduce testimony as to available rentals in various apartment complexes in the area and how that unfavorably compares to the marital residence. The availability of comparable alternative residences may be the most significant factor bearing upon a court's determination to order a sale. The determination on comparability must be made not only as to cost but after considering the quality of the alternative, thus once again linking the children's best interest to equitable distribution. The importance of tax advantages arising from home ownership should be linked to support and how, if they are lost,

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period of participation prior to the normal retirement date. (b) It can be made according to the ratio of the aggregate contributions made during the marriage compared to the total contributions anticipated to be made prior to the normal retirement date. (c) It can be made according to the amount of contributions and earnings which accrued during the marriage compared to the total amount expected to be accrued by the normal retirement date.

Leaving aside questions of vesting, the allocation of the rights in a defined contribution plan is generally considered to be relatively simple and is normally based upon the increase in the participant's account balance during the marriage. When dealing with a defined benefit plan, however, the analysis is far more complex but essentially entails calculation of the "present accrued benefit" and treats this amount as it would a defined contribution plan account balance.

Vested vs. Forfeitable Interests

If the employee-spouse's rights in the plan are not yet fully vested, it may be appropriate for the court to make an alternative distribution based on some discounted estimated value of the expectancy. However, since such a valuation would be complex, expensive and uncertain at best, an increasingly popular approach is to simply give the non-employee spouse a present right to the future benefit distribution—if and when it is made to the employee-spouse.

This column represents the first of two parts on the topic. The second part will appear in Mr. Flaster's January article.

Editor's View

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Although no statistics have been obtained, the general perception of the matrimonial bar is that few of its members have sought or obtained trial attorney certification. In one sense, this is curious because the heavy matrimonial practitioner, just as his negligence or criminal law counterpart, is a frequent denizen of the court house and in all likelihood has satisfied the specialty requirements of certification.

The family law attorney, however, is something more than just a trial lawyer. The family law attorney must have experience in how to deal with people undergoing the stress of marital discord. The family law attorney must have detailed knowledge of valuation methodologies and relevant tax law. The family law attorney must be skilled in negotiating techniques and even be attuned to mediation.

How frequently have we said that we are specialists? It is now time for our discipline to become certified specialists.

The parameters of such specialization must be defined. Should such specialization as juvenile or matrimonial lawyer exist? Alternately, should all family law specialists be required to have at least a journeyman's knowledge of juvenile law?

The idea of family law specialization is not new. Other jurisdictions have already embraced the concept. Indeed, family law specialization was recently discussed in a timely article by Ruth Miller entitled "Should Family Lawyers Be Identified As Specialists? How California Answered The Question" which appeared in the fall edition of the *ABA Family Advocate*. Ms. Miller's article reports that the title "family law specialist" became a reality in California on May 26, 1979 and that in March of 1982 the Board of Governors of the California Bar voted to replace the existing pilot program on legal specialization with a permanent program. As reported in the Miller article, the California program requires for certification five years of practice together with five contested trials, 20 contested hearings and 40 settlements. Like the New Jersey civil and criminal trial lawyer certification model, a continuing legal educational obligation, coupled with a written examination, are required.

The California experience is not cited with a view that it need necessarily be duplicated in New Jersey. Instead, it is cited merely to suggest that others have already addressed the specialization issue and have determined that the concept has merit. Clearly, the concept does have merit and deserves thoughtful study by the new Family Part Practice Committee and by the Supreme Court. Even were the Committee and the Court to embrace the concept, substantial lead time would be required to implement a specialization program. Standards would have to be established. A Certification Board would have to be appointed. Applications would have to be prepared and reviewed. An examination would have to be drafted, given and graded. The task is indeed formidable, but the work involved should not deter such an effort being made.

If specialists we are, then we should not be afraid to create mechanisms by which we might be independently certified as such.

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support levels would have to be increased accordingly, or alternatively, there would be less discretionary funds available thus adversely impacting upon the children.

Thus there are many factors which the matrimonial attorney must consider in advising a client as to equitable distribution of the marital residence. The quality of that advice will be directly related to the attorney's familiarity not only with the law in the area, but the particular facts of the case.