

Herchenroder v Herchenroder
2014 NY Slip Op 00258
Decided on January 16, 2014
Appellate Division, Third Department
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Decided and Entered: January 16, 2014

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[*1]JEFFREY A. HERCHENRODER, Respondent,

v

CYNTHIA J. HERCHENRODER, Appellant.

Calendar Date: November 14, 2013

Before: Rose, J.P., Lahtinen, McCarthy and Garry, JJ.

Pro Bono Appeals Program, Albany (Elliot Scheinberg of counsel), for appellant.

Linda Berkowitz, Saratoga Springs, for respondent.

MEMORANDUM AND ORDER

Lahtinen, J.

Appeal from a judgment of the Supreme Court (McNamara, J.), entered December 2,

2011 in Albany County, granting plaintiff a divorce, upon a decision of the court.

Plaintiff (hereinafter the husband) and defendant (hereinafter the wife) were married in 1989 and the husband commenced this divorce action in 2009. The wife's answer and counterclaim included a demand for equitable distribution. On the first day of trial, the husband put in proof supporting the grounds that he had asserted for a divorce and he then rested. Before the second day of trial, the husband ostensibly contacted the wife indicating that he planned to seek permission to withdraw his complaint with leave to refile under the recently enacted no-fault cause of action (*see* Domestic Relations Law § 170 [7]). He made such application when the parties appeared in court the next morning, but Supreme Court denied the motion and directed the wife to proceed. However, she had excused her witnesses apparently upon the assumption that the husband's motion was going to be granted and she was thus not prepared to proceed. Based on the evidence from the first day of trial, Supreme Court then granted the husband a divorce on the ground of cruel and inhuman treatment. Further, the court noted the many delays that had already occurred and, because no proof had been presented relevant to equitable distribution, held that the parties had waived judicial intervention on the issue and made no award. The wife appeals.

In the absence of a duly executed agreement by the parties regarding distribution of their property, a judgment of divorce generally must include equitable distribution of the parties' [*2]property (*see* Domestic Relations Law § 236 [B] [5] [a]; [Chang v Yu-Jen Chang](#), 92 AD3d 1153, 1155 [2012], *lv dismissed* 19 NY3d 1005 [2012]; *Roberts v Roberts*, 138 AD2d 791, 792 [1988]). Here, there was not such an agreement. Moreover, it is apparent that the wife was making a claim for equitable distribution in the divorce action and had planned to present proof in such regard (*cf.* *Graham v Graham*, 293 AD2d 345, 346 [2002], *lv dismissed* 98 NY2d 692 [2002]). Her failure to be ready to proceed, particularly when considered in the context of her apparent history of delays and being unprepared as noted by Supreme Court, may have constituted sanctionable conduct (*see* 22 NYCRR part 130). Nevertheless, under the circumstances, we conclude that she should have been accorded a brief adjournment so as to be able to attempt to present her proof regarding equitable distribution. The remaining arguments are without merit.

Rose, J.P., McCarthy and Garry, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as failed to order equitable distribution of the parties' marital property; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

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