III. Executive Compensation, Restricted Stock, and *DeJesus* (1997) and its Progeny

Submitted by

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DE JESUS AND ITS PRACTICAL IMPLICATIONS

DE JESUS

1997 COURT OF APPEALS OPINION BY JUSTICE CIPARICK

NOT A DECISION ON MERITS - REMANDED TO DETERMINE IF STOCK OPTION AND RSU's WERE FOR *PAST SERVICES* OR *INCENTIVE COMPENSATION*

(LOWER COURT ENDED UP DECIDING ALL INCENTIVE COMPENSATION)

DEJESUS MARRIED IN 1979 – 7 MONTHS LATER HUSBAND STARTED WORKING AT ASTORIA

1993 ASTORIA GRANTED HUSBAND 2 STOCK OPTION PLANS:

INCENTIVE STOCK OPTION PLAN (ISO)

RECOGNITION AND RETENTION PLAN (RRP)

1 YEAR LATER WIFE SUED FOR DIVORCE

TRIAL COURT TREATED OPTIONS AS ALL MARITAL BECAUSE ALL GRANTED DURING MARRIAGE (PARTIES HAD AGREED TO SPLIT THEM EQUALLY)

HUSBAND ARGUED SINCE OPTIONS WERE GRANTED 9 MONTHS BEFORE WIFE SUED FOR DIVORCE, SHE SHOULD GET A FRACTION, NUMERATOR *9 MOS* AND DENOMINATOR of which IS *YEARS HUSBAND MAY EXERCISE UNDER PLAN* (GAVE WIFE ABOUT 10% OF OPTIONS)

APPELLATE DIVISON AFFIRMED TRIAL COURT HOLDING THAT ALL OPTIONS WERE MARITAL TO BE EQUALLY SPLIT

COURT OF APPEALS SAID INSUFFICIENT EVIDENCE TO SEE IF PLANS WERE FOR PAST SERVICES OR INCENTIVE COMPENSATION FOR FUTURE SERVICES

2 DIFFERENT FORMULAS:

IF FOR PAST SERVICES, **NUMERATOR IS *BEGINNING OF MARRIAGE*** *(OR DATE OF EMPLOYMENT IF LATER)* ***TO DATE OF STOCK GRANT*** AND **DENOMINATOR IS *BEGINNING OF EMPLOYMENT TO DATE OF STOCK GRANT***

IN DEJESUS THIS WOULD BE **13** (1979 to 1993) **over 14** (1980 to 1993)

IF **FOR FUTURE SERVICES**, **NUMERATOR IS *DATE OF GRANT TO DATE OF COMMENCEMENT OF DIVORCE*** AND **DENOMINATOR IS *DATE OF GRANT TO DATE STOCK PLAN MATURES***

IN DEJESUS THIS WOULD BE **1** (1993 to 1994) **OVER 7** (1993-2000)

NOW LET'S LOOK AT CHARACTERISTICS OF TWO PLANS

INCENTIVE STOCK OPTION (ISO) IS CALLED *INCENTIVE*

IT VESTED SO LONG AS HUSBAND REMAINED EMPLOYED OR DIED OR BECAME DISABLED OR RETIRED OR THERE WAS CHANGE IN CONTROL OF COMPANY

IF THE HUSBAND WAS DISCHARGED FOR CAUSE, HIS RIGHTS EXPIRED BUT IF HE WAS TERMINATED FOR ANY OTHER REASON, HE RETAINED THE OPTIONS FOR ADDITIONAL 3 MONTHS.

SO WHILE PLAN CALLED INCENTIVE IT SEEMED TO **VEST WHETHER OR NOT ALIVE, WORKING OR EVEN FIRED (SO LONG AS NOT FOR CAUSE)**

OTHER PLAN IS CALLED **RECOGNITION AND RETENTION PLAN** FOR OFFICERS (RRP)

IN EVENT OF DEATH, DISABILITY, RETIREMENT OR CHANGE IN CONTROL OF COMPANY ALL SHARES DEEMED *EARNED*.

TERMINATION FOR ANY OTHER REASON RESULTED IN *FORFEITURE OF SHARES*.

WHILE IT WOULD SEEM TO BE BACKWARD-LOOKING IN ITS TITLE "RECOGNITION" (AS IN PAST SERVICES) **IT ENDED IF YOU WERE FIRED, WHICH SEEMS TO SUGGEST YOUR FUTURE EMPLOYMENT IN GOOD STEAD WAS REQUIRED TO GET THE STOCK**.

THE COURT OF APPEALS HELD THAT THERE WAS NO COMPETENT EVIDENCE AS TO WHETHER AND TO WHAT EXTENT THE STOCK PLANS WERE GRANTED AS COMPENSATION FOR PAST SERVICES OR INCENTIVE FOR FUTURE SERVICES

COURT WENT ON TO SAY: ”THE RECORD DOES NOT REVEAL WHETHER THE EMPLOYER WAS REWARDING THE HUSBAND AS A VALUED EMPLOYEE FOR PAST SERVICES, AS WELL AS PROVIDING A FINANCIAL INCENTIVE TO RETAIN HIM AS AN OFFICER, NOR WHETHER THESE PLANS CONSTITUTED A PART OF A KEY EMPLOYEE COMPENSATION PACKAGE, GIVEN THAT THE EMPLOYER WAS IN THE PROCESS OF RESTRUCTURING ITS CORPORATE OWNERSHIP AND GOING PUBLIC. WE DO NOT KNOW WHAT THESE STOCK PLANS REPRESENT OR HOW THE HUSBAND’S ENTITLEMENT WAS CALCULATED BY ASTORIA (HIS EMPLOYER).

THE PARTIES’ SUBMISSION, ABSENT SWORN TESTIMONY OR DOCUMENTATION FROM PERSONS WITH KNOWLEDGE OF JUST HOW AND WHY THESE STOCK PLANS CAME TO BE, DO NOT SUFFICE TO ENABLE THE COURT TO DETERMINE WHAT PORTIONS OF THE PLANS AT ISSUE, IF ANY,CONSTITUTE MARITAL PROPERTY.

CONSEQUENTLY A REMITTAL TO THE TRIAL COURT IS NECESSARY TO MAKE SPECIFIC FINDINGS UPON FURTHER APPROPRIATE PROCEEDINGS.

WHAT IS THE PRACTICE TAKEAWAY FROM DEJESUS?

CONDUCT EARLY EXTENSIVE DISCOVERY OF THE EXECUTIVE AND, OF THE COMPANY (IF THE COURT LETS YOU) TO ASCERTAIN HOW THE OPTIONS AND/OR RSUS ARE VIEWED AND TO **ASCERTAIN UNDER WHAT CIRCUMSTANCES THEY ARE PAID**

HERE ARE SOME QUESTIONS TO CONSIDER IN DEPOSITION OF EMPLOYEE OR HUMAN RESOURCES EMPLOYEE OR PLAN ADMINISTRATOR

- HOW AND WHY DID THESE PLANS COME TO EXIST?
- WAS IT INCLUDED IN AN OFFER OR EMPLOYMENT LETTER?
- WHAT WAS IT CALLED: INCENTIVE OR RETENTION?
- WAS IT PART OF A KEY ELEMENT OF THE COMPENSATION TO INCENTIVIZE EMPLOYEE TO STAY AT COMPANY?
- WAS THERE A CORPORATE RESTRUCTURING OR IPO OR OTHER MAJOR FIRM EVENT BEING CONTEMPLATED AT TIME OPTIONS WERE GRANTED?
- WAS AWARD PERFORMANCE BASED AND DOES IT VEST ONLY IF EXECUTIVE MEETS EARNINGS TARGET?

HERE ARE SOME DOCUMENTS TO REQUEST IN ORDER TO FIND OUT THIS INFORMATION

- PLAN DOCUMENTS, INCLUDING SUMMARIES
- DOCUMENT SHOWING VESTING SCHEDULES AND DATES OF GRANTS DOCUMENTS
- EMPLOYMENT AGREEMENT OR OFFER LETTERS AND EVEN JOB DESCRIPTIONS
- ANY DOCUMENT WHICH DETAILS CONDITIONS AND RESTRICTIONS ON VESTING
- DOCUMENTS CONCERNING TRANSFERABILITY
- STATEMENTS OF THE HOLDER'S INTEREST IN THE PLAN AS FAR BACK AS AVAILABLE
- DOCUMENTS RELATING TO VESTING OR SALE OF OPTIONS OR RSU'S
- IF PUBLIC COMPANY, PROXY STATEMENT SHOULD DISCLOSE SHARES HELD AND BONUSES AND NONCASH AWARDS
- BANK AND BROKERAGE STATEMENTS BEFORE AND AFTER YEAR END AS MECHANISM TO TRACK TIMING OF BONUS AND OPTIONS
- LOAN APPLICATIONS AND PERSONAL FINANCIAL STATEMENTS
- TAX RETURNS, W-2s.

CASE LAW POST DE JESUS

2 IMPORTANT TRIAL COURT DECISIONS INTERPRETING DEJESUS

BALANCE OF CASES APPLY DEJESUS BUT LITTLE EXPLANATION: PUDLEWSKI 309 AD2d 1296 (4th Dept. 2003); CAFFREY 2 AD3rd 309 (lst Dept 2003) and DeGroat 84 AD3d 1012 (2d Dept 2011)

STANG v LANGE NEW YORK COUNTY 2007 DECISION 17 MISC. 5d 1124; 851 NYS 2d 74 (in your materials)

AND

SH v. EH WESTCHESTER COUNTY 2014 DECISION (NYLJ 120267652939 at 1) (in your materials)

STANG v LANGE

4 YEAR MARRIAGE WITH 2 CHILDREN

H WORKED 15 YEARS IN INVESTMENT FIELD AND DEVELOPED INVESTMENT STRATEGIES USED AT S SQUARED, WHERE HE BEGAN WORK IN 1995

IN FIRST 2 YEARS OF MARRIAGE H RECEIVED ENORMOUS BONUSES

1999: $3.1 MILLION (RECEIVED 10 DAYS AFTER MARRIAGE)

2000: 2 BONUSES $14.3 MILLION IN MARCH AND $4.3 MILLION IN OCTOBER

2001: NO BONUS

23 DAY TRIAL WITH PARTY EXPERTS

COURT FINDS FIRST BONUS USED FOR MARITAL PURPOSES NOT SEPARATELY MAINTAINED

HUSBAND'S EXPERT APPLIED DEJESUS FRACTION STARTING WHEN *HE FIRST STARTED DEVELOPING INVESTMENT STRATEGIES* AND ENDING WITH *DATE OF PERFORMANCE PERIOD WHICH UNDERLIES BONUS*

COURT HELD HUSBAND COULD NOT EVEN EARN BONUS UNTIL HE STARTED WORKING FOR S SQUARED SO COVERTURE WOULD BE FROM 1995 BUT HUSBAND'S EXPERT DID NOT DO THAT CALCULATION

COURT HELD TO USE DE JESUS **COVERTURE FRACTION NEEDED FIXED STARTING POINT OF DATE OF EMPLOYMENT** OR **DATE OF MARRIAGE**, NOT SOME SPECULATIVE PERIOD WHEN FIRST STARTED USING INVESTMENT STRATEGIES

COURT HELD **BONUSES RECEIVED DURING MARRIAGE AS RESULT OF FINANCIAL GAINS ACCRUED DURING MARRIAGE WERE MARITAL PROPERTY**

COURT THEN DIVIDED MOST OF THE INVESTMENTS MADE WITH THE BONUSES 80% TO HUSBAND 20% TO WIFE

SH v. ES

THIS WAS A 15 YEAR MARRIAGE WITH 4 CHILDREN.

HUSBAND'S EMPLOYMENT WITH BANK COMMENCED IN 2008 AND HE COMMENCED DIVORCE IN 2009. HE WAS DIRECTOR AND HEAD OF MAJOR DIVISION OF BANK

PRIOR TO BANK, HUSBAND HAD WORKED FOR ANOTHER BANK THAT HAD FILED FOR BANKRUPTCY

HUSBAND'S COMPENSATION WAS DEFERRED FOR 5 YEARS SO HE LOST $20 MILLION WHEN BANK WENT BANKRUPT

IN 2009 HUSBAND'S INCOME WAS $4.8 MILLLION

IN 2010 HIS INCOME WAS $3.6 MILLION

WHAT WAS CONTESTED, AMONG OTHER ITEMS, WERE *OPTIONS AND BONUSES HE RECEIVED*

SPECIAL CASH AWARD (SCA) OF $1,750,000 PAID PER OFFER LETTTER HALF IN 2009 AND HALF ON FIRST ANNIVERSARY REFERRED TO AS RETENTION BONUSES.

AT ISSUE WAS SECOND HALF BONUS. HUSBAND SAID ONLY PARTLY MARITAL PER DEJESUS

WIFE SAID ALL MARITAL AS SIGNING BONUS GUARANTEED WHEN JOINED IN 2009

COURT HELD **NO SPECIFIC REQUIREMENTS HUSBAND HAD TO MEET TO RECEIVE AWARD, OTHER THAN REMAINING EMPLOYED**

NOT BASED ON HUSBAND'S PERFORMANCE NOR THAT OF BANK - OFFER LETTER CALLED IT A *BONUS EARNED DURING MARRIAGE JUST PAID OUT OVER 2 YEARS*

DELAY IN RECEIVING AWARD ALONE IS NOT ENOUGH TO CALL IT INCENTIVE

COURT HELD **MARITAL - WIFE ENTITLED TO 50%**

2008 EQUITY PARTICIPATION PLAN (EPP)

432,923 SHARES GRANTED TO BE PAID OVER 3-5 YEARS AT DISCRETION OF PLAN TRUSTEE

20% BONUS AWARD OF 84,786 SHARES AND 10% BONUS AWARD OF 42,393 SHARES

COURT HELD **AWARD WAS *INCENTIVE PLAN*, NOT A BONUS**

PLAN DOCUMENT STATED PURPOSES OF **PLAN WAS TO ALIGN KEY EMPLOYEES WITH THOSE OF BANK**

DE JESUS FORMULA APPLIED AND WIFE RECEIVED **50% OF MARITAL SHARE**

INCENTIVE SHARE PLAN (ISP)

GRANTED TO HUSBAND APRIL 3, 2007, 7 MONTHS BEFORE DIVORCE COMMENCED

AWARD LETTER STATED SHARES EARMARKED FOR HUSBAND BUT NO RIGHT TO THEM UNTIL 3RD ANNIVERSARY OF AWARD DATE AT DISCRETION OF TRUSTEE

COURT HELD **AWARD WAS *INCENTIVE* - CALLED INCENTIVE AND WORDING MADE CLEAR IT WAS INCENTIVE**

EARNED BETWEEN 4/3/2009 AND 4/3/2012 7 MONTHS OF WHICH DURING MARRIAGE

DEJESUS FORMULA APPLIED AND WIFE **RECEIVED 50% OF MARITAL SHARE**

CASH VALUE INCENTIVE PLAN (CVIP)

GRANTED IN AUGUST, 2010 AFTER DIVORCE ACTION COMMENCED

LETTER FROM 2009 SAID PLAN RECOMMENDED FOR 2009-2011

COURT HELD ***INCENTIVE* BUT INCLUDED COMPENSATION FOR WORK DURING MARRIAGE IN 2009**

DEJESUS FORMULA APPLIED AND **WIFE RECEIVED 50% OF MARITAL SHARE, WHICH WAS 28%** (DEJESUS FRACTION BASED ON PERIOD OF MARRIAGE COVERED BY AWARD VS ENTIRE PERIOD OF AWARD THROUGH 2011)

ONE-OFF PAYMENT

BY LETTER DATED 12/17/2009 HUSBAND WAS TOLD HE WOULD RECEIVE ONE TIME PAYMENT OF $45,955, NET OF TAXES IN JANUARY 2010 IN EXCHANGE FOR AGREEMENT TO GIVE 3 MONTHS NOTICE OF TERMINATION

COURT HELD ***HUSBAND'S SEPARATE PROPERTY*** AS IT IS POST COMMENCEMENT COMPENSATION FOR FUTURE POST COMMENCEMENT ACTS, NAMELY GIVING NOTICE OF TERMINATION.

COURT HELD ALL THESE OPTIONS WERE *DIVISION OF INCOME* NOT *BUSINESS ASSETS* THEREFORE SPLIT 50/50. HUSBAND HAD ARGUED WIFE SHOULD RECEIVE LESS THAN 50% AS IN BUSINESS VALUATIONS.

SAMPLE FORENSIC REPORT

- DETERMINATION DATE IS DATE OF COMMENCEMENT
- LOOK AT PAST PRACTICE IN TERMS OF EMPLOYER - GRANT EVERY JANUARY AND FEBRUARY
- VESTS OVER 3-4 YEARS AFTER DATE OF GRANT
- FORFEIT IF LEAVES OR IF BANK EXPERIENCES ADVERSE OUTCOME AND EMPLOYEE DEEMED LIABLE
- GRANTS EARN INTEREST UNTIL PAID ON VESTING DATE
- BASED ON STATED INTENTION AND VESTING- FORENSIC FOUND INCENTIVE AND APPLIED DEJESUS FRACTION
- TABLE 1 IS CHART WITH COVERTURE FRACTION RECITED
- SAME ANALYSIS DONE FOR DEFERRED STOCK AWARDS
- ALTERNATIVE OF IF AS AND WHEN TO DISTRIBUTE AFTER TAX PROCEEDS IN FUTURE
- OBVIATES NEED TO TAX IMPACT AND DISCOUNT FOR LACK OF MARKETABILITY

TABLE 4 and TABLE 5 APPLIES *TAX TO CASH AWARDS* AND *TAX AND DISCOUNT FOR LACK OF MARKETABILITY AND ILLIQUDITY* BECAUSE STOCK AWARDS NOT LIQUIDATED UNTIL DATES OF VESTING

ALSO ALTERNATIVE OF PAYING GROSS PROCEEDS AS TAXABLE MAINTENANCE RECITED. THIS MAY BE BENEFICIAL IF TAX RATES BETWEEN PAYOR AND PAYEE ARE SUBSTANTIALLY DIFFERENT.

ALTERNATIVES OF" IF AS AND WHEN" OR MAINTENANCE ARE SETTLEMENT ALTERNATIVES

COURTS ARE OFTEN LOATH TO DO EITHER

SEE ***PICKARD v. PICKARD 33 AD3d 202; 820 NYS2d 547 (lst DEPT 2006)*** (in your materials) - TRIAL COURT DECLINED TO DISTRIBUTE PRESENT VALUE OF INTEREST IN HOLDING COMPANY THAT OWNED APT BLDGS AS WHOLLY SPECULATIVE INSTEAD DIRECTING DIVISION" IF AS AND WHEN" APT UNITS SOLD

APPELLATE DIVISION (FIRST DEPT) MODIFIED AND SAID VALUE NOT TOO SPECULATIVE TO DETERMINE JUST NEED TO APPLY DISCOUNTING FACTORS TO FUTURE VALUE- CASE REMANDED FOR CALCULATION OF PRESENT VALUE

"DISTRIBUTION OF ASSETS SHOULD NOT BE LEFT UNRESOLVED AT TIME OF DIVORCE WHERE IT CAN BE EFFECTUATED AT THAT TIME"

BEARING IN MIND THAT YOU CAN, IN SETTLEMENT, CRAFT "IF AS AND WHEN" OR MAINTENANCE IN LIEU OF CALCULATION SHOWN BY FORENSIC REPORT, WE HAVE INCLUDED SOME POTENTIAL AGREEMENT CLAUSES TO COVER THESE ALTERNATIVES

EXAMPLE 1- AND **1A –"** IF, AS AND WHEN" ASCERTAINS NET AFTER TAX DISTRIBUTABLE SHARES TO BE DISTRIBUTED TO NON EMPLOYEE SPOUSE - EMPLOYEE RETAINS SOLE DISCRETION WHETHER TO EXERCISE OPTIONS AND PROVIDE PROOF AND DOCUMENTATION REGARDING EXERCISE

ANY DISAGREEMENT AS TO INCOME TAXES PAYABLE SUBMIT TO CPA

EXAMPLE 2 – "IF, AS AND WHEN" RECEIVE 50% OF ATER TAX COST CASH PROCEEDS UPON EXERCISE GIVES NONEMPLOYEE RIGHT TO SELL OPTIONS WHEN EMPLOYEE ELECTS NOT TO SELL COSTS AND TAXES AT EMPLOYEE'S LEVEL

EXAMPLE 3 – "IF AS AND WHEN" TAKEN AS MAINTENANCE- PAY NONEMPLOYEE SPOUSE AS TAXABLE MAINTENANCE AFTER AWARDS VESTED EARNED AND PAID TO EMPLOYEE

Nancy DeJesus, Respondent, v. Wilfred DeJesus, Appellant.

No. 161

COURT OF APPEALS OF NEW YORK

90 N.Y.2d 643; 687 N.E.2d 1319; 665 N.Y.S.2d 36; 1997 N.Y. LEXIS 3233

September 9, 1997, Argued
October 30, 1997, Decided

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 28, 1996, which affirmed so much of a judgment of the Supreme Court (Howard Miller, J.; *see*, opn 163 Misc 2d 267), entered in Rockland County, as granted plaintiff wife a 50% interest in all rights and benefits awarded under defendant husband's Incentive Stock Option Plan and Recognition and Retention Plan.

DeJesus v DeJesus, 227 AD2d 583, reversed.

DISPOSITION: Order reversed, with costs, and case remitted to Supreme Court, Rockland County, for further proceedings in accordance with the opinion herein.

CASE SUMMARY
PROCEDURAL POSTURE: Appellant husband sought review of an order entered by the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed so much of a judgment of the Supreme Court of Rockland County (New York), and found that respondent wife was entitled to a 50 percent interest in all rights and benefits awarded under the husband's restricted stock benefit plans.

OVERVIEW: The wife filed an action for divorce against her husband. The parties agreed to the equitable distribution of all assets, but could not agree as to how much of the husband's two restricted stock benefits plans (plans) constituted marital property subject to the stipulated equitable distribution. On appeal, the husband asserted that because his interest in the plans would not vest until several years after the divorce, it was erroneous to conclude that the whole of the plans was marital property. The court held that the evidence was insufficient to determine what portions of the plans constituted marital property. The court found that it was not sufficiently clear as to whether the plans were solely deferred compensation for employment during the marriage or whether some portion of the plans was purely incentive for future services. Any part of the plans that was granted in consideration of future services did not constitute marital property because the husband had not performed those services. Therefore, further findings were necessary as to whether any part of the plans was granted as incentive.

OUTCOME: The court reversed the order of the lower court and remitted the case for further proceedings.

CORE TERMS: stock, marriage, marital property, spouse, stock option, past services, future services, equitable, marital, pension, time rule, matrimonial action, titled, commencement, benefit plans, deferred compensation, denominator, numerator, divorce, vest, period of time, nonvested, distributed, exercisable, traceable, mature, ownership, separation agreement, personnel, issuing

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Civil Procedure > Appeals > Standards of Review > De Novo Review

Family Law > Marital Duties & Rights > Property Rights > Characterization > Separate Property

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > General Overview

HN1 While the method of equitable distribution of marital property is properly a matter within the trial court's discretion, the initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal. More Like This Headnote | *Shepardize:* Restrict By Headnote

Family Law > Marital Duties & Rights > Property Rights > Characterization > Marital Property

Family Law > Marital Duties & Rights > Property Rights > Postnuptial & Separation Agreements > General Overview

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Marital Property

HN2 N.Y. Dom. Rel. Law § 236(B)(1)(c) defines marital property as all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action. The statute is sweeping and recognizes that spouses have an equitable claim to things of value arising out of the marital relationship. Consequently, "marital property" includes a wide range of intangible interests which in other contexts might not be recognized as divisible property at all. More Like This Headnote | *Shepardize:* Restrict By Headnote

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Separate Property

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Stocks

Pensions & Benefits Law > Employee Benefit Plans > Welfare Benefit Plans

HN3 A stock plan may have elements which are compensatory for past services and elements which are incentive for future services. To the extent that a stock plan is compensation for past services rendered by the employee during the marriage and up until the time of the grant, it is marital property, and to the extent that a stock plan is granted as incentive for future services, it is not earned until those services are performed. Even then, however, the incentive stock plan can still be marital property if the marriage is in existence between the time of the grant and the time that the stock plan vests. More Like This Headnote | *Shepardize:* Restrict By Headnote

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Marital Property

Pensions & Benefits Law > Employee Benefit Plans > Welfare Benefit Plans

HN4 The marital portion of stock plans is a function of four separate calculations: (1) the relative shares traceable to past and future services must be determined; (2) any portions of the stock plans which are intended as compensation for past services are deemed marital property to the extent that the marriage coincides with the period of the titled spouse's employment, up until the time of the grant; (3) of that portion intended as incentive for future services, the marital portion is determined by a time rule; and (4) all portions found to be marital property may be divided between the spouses. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Inferences & Presumptions > Exceptions > Statutory Presumptions

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Presumptions > Marital Property

Pensions & Benefits Law > Employee Benefit Plans > Welfare Benefit Plans

HN5 In deciding upon and applying a rule for the equitable distribution of stock plans, the court must be guided by the statutory presumption that all property, unless clearly separate, is deemed marital property and must further recognize the titled spouse's burden to rebut that presumption. More Like This Headnote | *Shepardize:* Restrict By Headnote

Family Law > Marital Duties & Rights > Property Rights > Postnuptial & Separation Agreements > General Overview

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > General Overview

HN6 To portions of stock plans found to be compensation for past services, a time rule should be applied to factor out any value which may be traceable to the period before the marriage, where the numerator is the time from the later of the beginning of the titled spouse's employment with the issuing company, or the beginning of the marriage, until the date of the grant, and the denominator is the time from the beginning of the titled spouse's employment until the date of the grant. To portions found to be granted as incentive, a second time rule should be applied to determine the marital share, that is, accretions from the time of the grant until the matrimonial action was commenced, and any further accumulations attributable to the contributions of the nontitled spouse. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES / SYLLABUS Hide

HEADNOTES

Husband and Wife -- Equitable Distribution -- Restricted Stock and Stock Option Benefit Plans

1. An interest in restricted stock and stock option benefit plans provided by a spouse's employer may constitute marital property for the purposes of equitable distribution, where the plans come into being during the marriage but are contingent on the spouse's continued employment with the company after the divorce. The Trial Judge thus must first determine, based on competent evidence, whether and to what extent the stock plans were granted as compensation for the employee's past services or as incentive for the employee's future services. Relevant factors would include whether the stock plans are offered as a bonus or as an alternative to fixed salary, whether the value or quantity of the employee's shares is tied to future performance and whether the plan is being used to attract key personnel from other companies. To portions of the stock plans found to be compensation for past services, a time rule should be applied to factor out any value which may be traceable to the period before the marriage, where the numerator is the time from the later of the beginning of the titled spouse's employment with the issuing company, or the beginning of the marriage, until the date of the grant, and the denominator is the time from the beginning of the titled spouse's employment until the date of the grant. To portions found to be granted as incentive, a second time rule should be applied to determine the marital share, that is, accretions from the time of the grant until the matrimonial action was commenced, and any further accumulations attributable to the contributions of the nontitled spouse. Here, the numerator is the period of time from the date of the grant until the end of the marriage, which is the earlier of the date of the separation agreement or the commencement of the matrimonial action and the denominator is the period of time from the date of the grant until the stock plan matures. What is determined to be marital property may then be equitably distributed, generally according to the Judge's discretion.

Husband and Wife -- Equitable Distribution -- Restricted Stock and Stock Option Benefit Plans

2. In a matrimonial action, the courts below lacked a sufficient basis for their determinations that restricted stock and stock option benefit plans provided by defendant husband's employer constituted deferred compensation for employment during the marriage rather than some portion at least being purely incentive. The record does not reveal whether the employer was rewarding the husband as a valued employee for past services, as well as providing a financial incentive to retain him as an officer, nor whether these plans constituted a part of a key employee compensation package, given that the employer was in the process of restructuring its corporate ownership and "going public." It is not known what these stock plans represent, or how the husband's entitlement was calculated by the employer. The parties' submissions, absent sworn testimony or documentation from persons with knowledge of just how and why these stock plans came to be, do not suffice to enable the courts to determine what portions of the plans at issue, if any, constitute marital property. Consequently, a remittal to the trial court is necessary to make specific findings upon further appropriate proceedings.

COUNSEL: *Ochoa & Sebag*, Long Island City (*Enrique A. Ochoa* of counsel), for appellant. I. The nonvested, unmatured Incentive Stock Option Plan (ISOP) and Recognition and Retention Plan (RRP) stocks are divisible property and basically similar to nonvested, unmatured pension rights. (*Burns v Burns*, 84 NY2d 369.) II. By adopting the earned-when-received approach, the appellate court (a) made the fictional assumption that 100% of the ISOPs and RRPs represented compensation for appellant's past services, (b) disregarded the exacting precondition for appellant to earn all the ISOP and RRP benefits (i.e., to work for Astoria 54 months beyond the dissolution of the marriage), and (c) engaged in judicial legislation by redefining the statutory parameters that determine the corpus of marital property. (*Dolan v Dolan*, 78 NY2d 463; *Majauskas v Majauskas*, 61 NY2d 481; *Pajak v Pajak*, 56 NY2d 394; *City of Buffalo v Lawley*, 6 AD2d 66; *People v Kupprat*, 6 NY2d 88; *Olivo v Olivo*, 82 NY2d 202; *Damiano v Damiano*, 94 AD2d 132.) III. The *Majauskas* formula, modified by the "time rule" used in *In re Marriage of Nelson* (177 Cal App 3d 150), is the proper method for determining the corpus of the marital property in the ISOPs and RRPs subject to equitable distribution. (*Majauskas v Majauskas*, 61 NY2d 481.) IV. The ISOPs and RRPs are not compensation for appellant's past services to Astoria, and they represent marital property only to the extent of respondent's contribution for the first nine months after the stock grants. V. The application of *Majauskas'* modified "time rule" to the case at bar results in the correct division of ISOPs and RRPs between the parties.

Eric Ole Thorsen, New City, and *Ilene K. Graff* for respondent. I. Pursuant to New York's Equitable Distribution Law, all of the benefits arising under the ISOP and RRP constitute marital property and are subject to equitable distribution. (*O'Brien v O'Brien*, 66 NY2d 576; *Forcucci v Forcucci*, 83 AD2d 169; *Majauskas v Majauskas*, 61 NY2d 481; *Sarafian v Sarafian*, 140 AD2d 801; *Price v Price*, 69 NY2d 8; *Burns v Burns*, 84 NY2d 369.) II. The ISOP and RRP are not pension plans, and appellant's application of case law regarding the distribution of pension benefits is misplaced, inappropriate and not determinative in the case at hand. (*Majauskas v Majauskas*, 61 NY2d 481.) III. Appellant's reliance on California case law is misplaced. Application of the California "time rule" would be inequitable in light of the facts and

circumstances of the case at hand. IV. The Court below acted within its discretion in its determination that respondent was entitled to 50% of the benefits arising under the ISOP and RRP. (*Colon v Aetna Cas. & Sur. Co.*, 64 AD2d 498, 48 NY2d 570; *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418; *Olivo v Olivo*, 82 NY2d 202; *Damiano v Damiano*, 94 AD2d 132.)

JUDGES: Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine and Wesley concur.

OPINION BY: CIPARICK

OPINION

[*645] [***37] [**1320] Ciparick, J.

The issue on this appeal is whether and to what extent an interest in restricted stock and stock option benefit plans provided by a spouse's employer constitutes marital property for the purposes of equitable distribution, where the plans come into being during the marriage but are contingent on the spouse's continued employment with the company after the divorce. Because we conclude that the record was insufficient to allow the Trial Judge to make that determination, we reverse and remit to Supreme Court for further proceedings.

[*646] The parties were married on October 14, 1979, seven months after the husband had begun his employment with Astoria Financial Corporation. Two children were born of the marriage, in October 1986, and in April 1991. Over the course of the marriage, the husband was steadily promoted at Astoria, attaining the position of First Assistant Vice-President in December 1993. The wife worked until October 1986, but thereafter devoted her efforts primarily to maintaining the marital household and raising their children.

On November 18, 1993, Astoria granted the husband two restricted stock benefit plans, the Incentive Stock Option Plan (ISOP) and the Recognition and Retention Plan (RRP). The ISOP provided for the husband to receive an option to purchase a total of 3,053 shares of Astoria stock at $ 25 per share, exercisable in three equal annual installments on January 10, 1997, 1998 and [***38] [**1321] 1999. Similarly, the RRP provided for the husband to receive outright a total of 2,036 shares of Astoria stock, in three equal annual installments, beginning on January 10, 1997. Both were contingent on the husband's continued employment with Astoria and both were described as "incentive" for corporate officers. [1] The husband acknowledges that both stock option plans are qualified deferred compensation plans enjoying favorable tax treatment afforded by the Internal Revenue Code.

FOOTNOTES

[1] The ISOP has as its stated purpose "to advance the interests of the Company by providing incentives to key employees of the Company and its Affiliates . . . in the form of opportunities

for stock ownership in the Company[.]" The RRP has as its stated purpose "to provide officers of the Association and its affiliates an incentive to achieve the long-term objectives of the Association by providing such key personnel with a proprietary interest in Astoria Financial Corporation ".

The wife commenced this divorce action on July 30, 1994. In Supreme Court, the parties stipulated to maintenance, child support and the equitable distribution of all assets, save the stock plans. The parties agreed to divide all marital property equally but requested the court to settle the question of how much of the stock plans constituted marital property subject to the stipulated 50/50 distribution. This last issue was resolved upon the submission of trial memoranda from both sides. On these facts, the trial court found that while the husband's rights to the stock plans "do not mature immediately and may never mature, depending on whether defendant continues in employment, they are tangible benefits which were bestowed on defendant during the marriage" (*De Jesus v De Jesus*, 163 Misc 2d 267, 270). [*647] Consequently, the trial court deemed all of the stock plans marital property, to be divided equally, with the husband to serve as constructive trustee of the wife's shares as they vest.

The husband appealed, arguing that, since his interest in the stock plans would not vest until several years after the commencement of the matrimonial action, it was error for the trial court to determine that the whole of both plans was marital property. Rather, he argued, the marital portion of the stock plans should have been determined using a time rule, similar conceptually to that enunciated by this Court in the context of pension rights in *Majauskas v Majauskas* (61 NY2d 481), with the portion of the stock plans comprising marital property being proportional to the ratio of (1) the time from Astoria's grant of the stock plans until the commencement of the divorce action over (2) the time from the grant until the husband's interest in the stocks vests. The Appellate Division affirmed, holding that "[c]onsidering the characteristics of the employee benefit plans ... both plans constituted deferred compensation for employment during the term of the marriage and are entirely marital property" (*DeJesus v DeJesus*, 227 AD2d 583). We granted leave to appeal.

Analysis

At the outset, we note that, HN1 while the method of equitable distribution of marital property is properly a matter within the trial court's discretion, the initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal.

HN2 The Domestic Relations Law defines marital property as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action" (Domestic Relations Law § 236 [B] [1] [c]). The statute is sweeping and "recognizes that spouses have an equitable claim to *things of value* arising out of the marital relationship" (*O'Brien v O'Brien*, 66 NY2d 576, 583 [emphasis added]). Consequently, this Court has held "marital property" to include a wide range of intangible

interests which in other contexts might not be recognized as divisible property at all.

In *Olivo v Olivo* (82 NY2d 202), for example, we held that the wife was entitled to share pro rata in the husband's early retirement pension acceleration, even though it had been [*648] awarded to him *after* their divorce, because the husband's right to the pension had [***39] [**1322] largely been earned during the marriage. The wife was not entitled to share, however, in Social Security bridge payments and a separation payment awarded to the husband contemporaneously with the accelerated pension, because the husband's right to these payments had arisen entirely after the marriage.

Similarly, in *Burns v Burns* (84 NY2d 369), where the question was whether and to what extent the husband's nonvested pension rights constituted marital property, we held that the nonvested pension's "value cannot reasonably be deemed to accrue only at the particular point in time when vesting occurs. Rather, the view that the nonvested pension has been earned gradually over a period of time that encompasses the marriage and should be distributed accordingly more appropriately reflects the economic realities" (*id.*, at 376). This Court applied the presumption in favor of marital property, premised on the contemporary view of marriage as an economic partnership, crediting each party's contributions, whether monetary or not, to the growth and value of the marriage.

Stock Plans Generally

Stock plans can vary widely and may possess many of the same characteristics as nonvested pension plans. They can be deferred compensation for past services or incentives for future services. They can be outright gifts or subject to purchase. This is the first time we are called upon to determine the manner in which stock plans are to be distributed in a matrimonial action, and we deem it instructive to review the approaches to distribution of nonvested stock plans of other States. Although we recognize that some of the referenced cases were decided in community property jurisdictions, the underlying considerations common to stock plan valuation and equitable distribution disputes are quite similar. [2]

FOOTNOTES

[2] Like stock plans themselves, the decisions have varied widely. A few courts have held that stock options which are not exercisable at the end of the marriage do not constitute marital property at all (*see*, *Hann v Hann*, 655 NE2d 566 [Ind App]; *Hall v Hall*, 88 NC App 297, 363 SE2d 189 ; *Ettinger v Ettinger*, 637 P2d 63 [Okla]). Other courts have deemed stock plans granted during the marriage to be wholly marital property (*see*, *Green v Green*, 64 Md App 122, 494 A2d 721 ; *Smith v Smith*, 682 SW2d 834 [Mo App]; *Chen v Chen*, 142 Wis 2d 7, 416 NW2d 661). Finally, many courts have chosen to apply various time rules, which

typically determine the marital share of the stock plans by dividing the period of the titled spouse's employment during the marriage by the time from the date that the titled spouse was hired by the issuing company until the stock plan vests (*see*, *In re Marriage of Hug*, 154 Cal App 3d 780, 201 Cal Rptr 676 ; *In re Marriage of Miller*, 915 P2d 1314 [Colo]; *In re Marriage of Frederick*, 218 Ill App 3d 533, 578 NE2d 612 ; *Goodwyne v Goodwyne*, 639 So 2d 1210 [La App]; *Salstrom v Salstrom*, 404 NW2d 848 [Minn App]; *Garcia v Mayer*, 122 NM 57, 920 P2d 522 [NM App]; *Dietz v Dietz*, 17 Va App 203, 436 SE2d 463 ; *In re Marriage of Short*, 125 Wash 2d 865, 890 P2d 12 [*en banc*]; *Kapfer v Kapfer*, 187 W Va 396, 419 SE2d 464).

[*649] Significant among these cases is the decision of the California Court of Appeals in *In re Marriage of Hug* (154 Cal App 3d 780, 201 Cal Rptr 676, *supra*). The parties in *Hug* were married in April 1956, and separated in June 1976. Mr. Hug began employment with Amdahl in November 1972. The trial court found that Amdahl's stock option plan had been adopted " 'for the purpose of attracting and retaining the services of selected directors, executives and other key employees and for the purpose of providing an incentive to encourage and stimulate increased efforts by them' " (154 Cal App 3d, at 783, 201 Cal Rptr, at 678). As in this case, the options at issue had been granted during the marriage, but were exercisable after the parties' separation.

The *Hug* court noted that stock options can be characterized as compensation for past, present or future services, depending on the circumstances involved in the grant of the particular option. It then held that, under the facts of that case, it was within the trial court's "broad discretion" to allocate the parties' community and separate property interests in certain stock options by applying a time rule. The number of options which were deemed community property would be the product of a fraction whose numerator was "the period in months between the commencement of the spouse's employment by the employer and the date of separation of [***40] [**1323] the parties," and whose denominator was "the period in months between commencement of employment and the date when each option is first exercisable" (154 Cal App 3d, at 782, 201 Cal Rptr, at 678).

Hug provides a useful examination of the competing considerations of law and equity, predictability and flexibility, past versus future services, and accrual outside of and within the marriage which a court must attempt to balance in developing a rule for the equitable distribution of stock plans (*see also*, *In re Marriage of Walker*, 216 Cal App 3d 644, 265 Cal Rptr 32; *In re Marriage of Harrison*, 179 Cal App 3d 1216, 225 Cal Rptr 234; *In re Marriage of Nelson*, 177 Cal App 3d 150, 222 Cal Rptr 790).

[*650] By contrast, the Supreme Court of Colorado in *In re Marriage of Miller* (915 P2d 1314 [Colo], *supra*) adopted a multitiered method of analysis to determine how much of the stock plan

was marital property. The parties in *Miller* were married in June 1983 and divorced in November 1992. Mr. Miller received stock option grants in 1988, 1990 and 1991, much of which would not vest until 1993 and later, after the dissolution of the marriage. The record on appeal in *Miller* does not indicate when Mr. Miller began his employment with Hewlett-Packard, the issuer of the stock plans in question. The *Miller* court held that, to the extent that a stock plan is granted for past services, it is wholly marital property. Conversely, "an employee stock option granted in consideration of future services does not constitute marital property until the employee has performed those future services." (915 P2d, at 1319.)

The *Miller* court thus recognized that HN3 a stock plan may have elements which are compensatory for past services and elements which are incentive for future services. To the extent that a stock plan is compensation for past services rendered by the employee during the marriage and up until the time of the grant, it is marital property, and to the extent that a stock plan is granted as incentive for future services, it is not earned until those services are performed. Even then, however, the incentive stock plan can still be marital property if the marriage is in existence between the time of the grant and the time that the stock plan vests.

Taking all of these considerations into account, the *Miller* court thus held that HN4 the marital portion of stock plans is a function of four separate calculations: (1) the relative shares traceable to past and future services must be determined; (2) any portions of the stock plans which are intended as compensation for past services are deemed marital property to the extent that the marriage coincides with the period of the titled spouse's employment, up until the time of the grant; (3) of that portion intended as incentive for future services, the marital portion is determined by a time rule like that employed by the California Court of Appeals in *In re Marriage of Nelson* (177 Cal App 3d 150, 222 Cal Rptr 790, *supra*); [3] and (4) all portions [*651] found to be marital property may be divided between the spouses.

FOOTNOTES

3 In *Nelson,* the California Court of Appeals found it within the trial court's " 'broad discretion' " to allocate stock options according to "a formula in which the numerator was the number of months from the date of grant of each block of options to the date of the couple's separation, while the denominator was the period from the time of each grant to its date of exercisability" (*In re Marriage of Nelson,* 177 Cal App 3d 150, 155, 222 Cal Rptr 790, 793 , *supra*).

[1] We are persuaded that a *Miller*-type analysis best accommodates the twin tensions between portions of stock plans acquired during the marriage versus those acquired outside of the marriage, and stock plans which are designed to compensate for past services versus those designed to compensate for future services.

The Plans at Issue on This Appeal

Here, the trial court, after placing a stipulation of settlement on the record as related to divorce, custody, visitation, distribution of property and maintenance and support obligations, adjourned for written submissions on the remaining open issue, namely the valuation and distribution of the stock plans. Then, without the benefit of any testimony from the husband, the husband's employer or a stock plan expert, the court distinguished the ISOP and RRP from a third stock benefit plan, the Employee Stock Ownership Plan [***41] [**1324] (ESOP), which the court found to be a fully vested pension plan subject to ERISA. As to the ISOP and RRP, the court declined to apply the *Majauskas* formula, although it did apply that formula both to the ESOP plan and to another pension, neither of which is contested on appeal. As noted above, the Appellate Division affirmed, holding that both plans constituted deferred compensation for the period of employment during the marriage and thus were entirely marital property.

[2] In our view, both courts lacked a sufficient basis for their determinations that the two stock plans constituted deferred compensation for employment during the marriage rather than some portion at least being purely incentive. The record does not reveal whether Astoria was rewarding the husband as a valued employee for past services, as well as providing a financial incentive to retain him as an officer. We do not know if these plans constituted a part of a key employee compensation package, given that Astoria was in the process of restructuring its corporate ownership and "going public." We do not know what these stock plans represent, or how the husband's entitlement was calculated by Astoria.

The parties' submissions, absent sworn testimony or documentation from persons with knowledge of just how and why [*652] these stock plans came to be, do not suffice to enable the courts to determine what portions of the plans at issue, if any, constitute marital property. Consequently, a remittal to the trial court is necessary to make specific findings upon further appropriate proceedings. [4]

FOOTNOTES

[4] We note that the Trial Judge here may well determine the apportionment of the ISOP and RRP shares to be different one from the other, because of the measurably different purposes and mechanisms of the plans. The decision whether to apportion the two plans differently can only be made after consideration of additional evidence.

Application of the Law to the Plans in Issue

HN5 In deciding upon and applying a rule for the equitable distribution of these stock plans, we must be guided by the statutory presumption that all property, unless clearly separate, is deemed marital property and must further recognize the titled spouse's burden to rebut that presumption.

[1] The Trial Judge thus must first determine, based on competent evidence, whether and to what

extent the stock plans were granted as compensation for the employee's past services or as incentive for the employee's future services. We recognize, as have other courts, that any list of pertinent considerations could only be illustrative and not exhaustive (*see, e.g.*, *In re Marriage of Miller*, 915 P2d 1314, 1319, n 9, *supra*). However, relevant factors would include whether the stock plans are offered as a bonus or as an alternative to fixed salary, whether the value or quantity of the employee's shares is tied to future performance and whether the plan is being used to attract key personnel from other companies.

HN6 To portions of the stock plans found to be compensation for past services, a time rule should be applied to factor out any value which may be traceable to the period before the marriage, where the numerator is the time from the later of the beginning of the titled spouse's employment with the issuing company, or the beginning of the marriage, until the date of the grant, and the denominator is the time from the beginning of the titled spouse's employment until the date of the grant. To portions found to be granted as incentive, a second time rule should be applied to determine the marital share, that is, accretions from the time of the grant until the matrimonial action was commenced, and any further accumulations attributable to the contributions of the nontitled spouse. Here, the numerator is the period of time from the date of the grant until the end of the marriage, which is the earlier of the date [*653] of the separation agreement or the commencement of the matrimonial action and the denominator is the period of time from the date of the grant until the stock plan matures.

Finally, what is determined to be marital property may then be equitably distributed, generally according to the Judge's discretion, here 50/50 as agreed by the parties.

[***42] [**1325] On remittal, application of the rules we have enunciated should resolve the issue of what portions of the plans constitute marital property, reflecting the wife's right to share in whatever value of the stock plans accrued during the marriage, during which time she contributed to her husband's successful career in banking through her services as wife and homemaker. The remainder would be separate property, not subject to equitable distribution, which the husband has the right to enjoy, as separate property traceable to the years outside of the marriage, the fruit of his sole labors.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine and Wesley concur.

Order reversed, etc.

REVERSED

Nancy De Jesus, Plaintiff, v. Wilfred De Jesus, Defendant.

Index No. 4493/94

SUPREME COURT OF NEW YORK, ROCKLAND COUNTY

163 Misc. 2d 267; 620 N.Y.S.2d 704; 1994 N.Y. Misc. LEXIS 538

November 29, 1994, Decided

NOTICE: [*1]** EDITED FOR PUBLICATION

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff wife and defendant husband stipulated to maintenance, child support, and equitable distribution of the parties' assets; however, two issues remained for determination by the court: equitable distribution of three employee benefit plans, and awarding of legal and accounting fees.

OVERVIEW: The wife and husband came before the court having already stipulated to the maintenance, child support, and equitable distribution of the parties' assets. However, two issues remained as to the distribution by the court regarding the equitable distribution of three employee benefit plans and the awarding of legal and accounting fees. At issue was the method of distribution; the husband argued that the plans should be distributed pursuant to a particular formula. However, the wife argued that two of the plans were not analogous to a pension or form of deferred compensation and that therefore the husband's formula was not appropriate. On ruling, the court noted that the method of distributing both vested and nonvested pension benefits lies within the reviewable discretion of the court and had to be contoured to suit the particular circumstances, needs, and means of the parties in the case. The court determined that the formula was not appropriate for two of the three plans as argued by the wife. Moreover, the court ruled that no further award of legal fees was warranted, and it awarded no accounting fees in that that there was no argument advanced as to the need for such fees.

OUTCOME: The court, in its discretion, distributed the relevant employee benefit plans contouring such distribution to suit the particular circumstances, needs, and means of the parties.

CORE TERMS: stock, formula, equitable, pension plan, vested, notice, mature, pension benefits, marital property, right to purchase, number of shares, distributing, reviewable, nonvested, contoured, marriage, benefit plans, particular circumstances, option to purchase, diminution, forfeited, elect, shares of stock, child support, accounting fees, retirement, terminate, stock purchase, entitled to purchase, own benefit

LEXISNEXIS® HEADNOTES Hide

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > General Overview

HN1 The method of distributing both vested and nonvested pension benefits lies within the reviewable discretion of the court and must be contoured to suit the particular circumstances, needs, and means of the parties in the case. More Like This Headnote

HEADNOTES / SYLLABUS Hide

HEADNOTES

Husband and Wife - Equitable Distribution - Pension Plan Defendant husband's pension plan, which is subject to ERISA and involves release of stock shares as the defendant's employer satisfies a loan which financed the stock purchase, constitutes marital property and is subject to equitable distribution pursuant to the distributive formula employed in *Majauskas v Majauskas* (61 NY2d 481). The method of distributing vested and nonvested pension benefits lies within the reviewable discretion of the court and must be contoured to suit the particular circumstances, needs and means of the parties in the case. The pension plan here, akin to a traditional pension plan, may be equitably distributed pursuant to the *Majauskas* formula.

Husband and Wife - Equitable Distribution - Pension Plan Involving Option to Purchase Stock Defendant husband's pension plan, which grants the defendant a 10-year option to purchase shares of the employer's common stock, constitutes marital property but is not subject to equitable distribution pursuant to the formula employed in *Majauskas v Majauskas* (61 NY2d 481) since application of this formula would result in substantial diminution of the plaintiff's interest in stock rights which were acquired during the marriage. The method of distributing vested and nonvested pension benefits lies within the reviewable discretion of the court and must be contoured to suit the particular circumstances, needs and means of the parties in the case. Here, equity is obtained by granting the plaintiff a 50% interest in defendant's option right to the shares. Upon notice from defendant that his right to purchase the shares has accrued plaintiff may elect within 30 days to exercise her right to purchase all or a portion of her allotment of shares. Her right to such shares shall be forfeited if she fails to respond to defendant's notice within the 30-day period and defendant shall be entitled to purchase all or any part of the shares for his own benefit.

Husband and Wife - Equitable Distribution - Pension Plan Involving Earned Shares of Stock Defendant husband's pension plan, which grants the defendant a 20-year award to earn shares of the employer's stock, constitutes marital property but is not subject to equitable distribution pursuant to the formula employed in *Majauskas v Majauskas* (61 NY2d 481) since application of this formula would result in substantial diminution of the plaintiff's interest in stock rights which were acquired during the marriage. The method of distributing vested and nonvested pension benefits lies within the reviewable discretion of the court and must be contoured to suit the particular circumstances, needs and means of the parties in the case. Here, equity is obtained by granting the plaintiff a 50% interest in defendant's award rights. Within 10 days of receipt of the stock, defendant shall transfer to plaintiff one half of the total number of shares and/or cash received under the plan.

Husband and Wife - Counsel Fees In a divorce action where the parties equally divided their

assets and, after payment of maintenance, child support and day care, and applicable Federal and State taxes, the defendant husband's available income is far below plaintiff wife's income, no further counsel fees will be awarded, defendant having already paid $ 5,000 for plaintiff's legal fees.

COUNSEL: *Eric Ole Thorsen*, New City, for plaintiff. *Ochoa & Sebag,* Long Island City, for defendant.

JUDGES: HOWARD MILLER, J.

OPINION BY: Howard Miller, J.

OPINION

[*268] [705]** Howard Miller, J.

This matter having come on before me for trial in regular order on November 14, 1994, and the parties having stipulated to maintenance, child support and equitable distribution of the parties' assets (exclusive of three employee benefit plans), two issues remain for determination by the court: (1) equitable distribution of three employee benefit plans; (2) legal and accounting fees.

EMPLOYEE BENEFIT PLANS

On November 18, 1993, defendant became the recipient of three employee benefit plans created byAstoria Financial Corporation, with whom he had been employed since March 1979, as follows:

(1) Incentive Stock Option and Limited Rights Plan (ISOP). ISOP grants defendant a 10-year option to purchase 3,053 shares of common stock at $ 25. The option may be exercised **[*269]** so long as defendant remains employed at the rate of 33 1/3% per year, commencing in January 1997. If defendant dies, becomes disabled, retires, or there is a change **[***2]** in control of the company, the option vests immediately. If a change in control of the company occurs, defendant has the right to relinquish the option and to receive from Astoria a sum of cash equal to the difference between the option price and the market value of the shares. If defendant is discharged for cause, defendant's rights expire upon the date of termination. If defendant's employment terminates for any other reason, defendant's rights continue for an additional three-month period. The option is nontransferable during the defendant's lifetime.

(2) Recognition and Retention Plan for Officers (RRP). RRP grants defendant a 20-year award to earn 2,036 shares of stock. The shares are earned during defendant's employment at the rate of 33 1/3% per year, commencing in January 1997. In the event of defendant's death, disability, retirement, or a change in control of the company, all shares shall be deemed earned as of defendant's last day of service. Defendant's termination for any other reason results in forfeiture of any unearned shares.

(3) Employee Stock Ownership Plan (ESOP). ESOP is a pension plan subject to ERISA. 1,321,177 shares of stock are currently allocated **[***3]** to ESOP, which will be released

for plaintiff, until the shares may be transferred to plaintiff pursuant to the holding period as defined by the plan. If plaintiff elects not to exercise her right to purchase all or a portion of her allotment of shares, or fails to respond to defendant's notice within the 30-day period heretofore set forth, plaintiff's right to such shares shall be forfeited and defendant shall be entitled to purchase all or any part of the shares for his own benefit. Defendant shall, at the time of entry of judgment herein, designate plaintiff as beneficiary of 1,526.50 shares under ISOP, which amount shall be reduced as the options mature and plaintiff either purchases or forfeits her rights to those shares.

[*7]** Plaintiff shall be entitled to a 50% interest in defendant's award rights to 2,036 shares of stock under RRP. Within 10 days of receipt of such stock, defendant shall transfer to plaintiff one half of the total number of shares and/or cash received under RRP. Defendant shall at the time of entry of judgment herein designate plaintiff as beneficiary of 1,018 shares under RRP, which amount shall be reduced as shares are transferred to plaintiff.

In the event defendant's rights under ISOP and RRP fail to mature or are forfeited for any reason, plaintiff's interests therein will likewise terminate, it being understood that plaintiff's rights to such stock are no greater than those inuring to defendant. Defendant shall not be required to exercise his portion of the stock option purchase, nor shall he be required to continue employment with Astoria.

LEGAL AND ACCOUNTING FEES

The parties have equally divided their assets. After payment of maintenance, child support and day care, and applicable Federal and State taxes, defendant's available income is far below plaintiff's, and will continue to be so for a number of years. Defendant has already paid $ 5,000 for plaintiff's legal **[***8]** fees. Under the circumstances, no further award is made. There being no cogent argument advanced as to the need for accounting fees, none are awarded.

Susan S. Stang, Plaintiff, against Mark L. Lange, Defendant.

350422/03

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

17 Misc. 3d 1124(A); 851 N.Y.S.2d 74; 2007 N.Y. Misc. LEXIS 7451; 2007 NY Slip Op 52134(U)

September 28, 2007, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

CORE TERMS: marriage, bonus, marital property, bonuses, separate property, portfolio, commencement, marital, technology, valuation, stock, parties agree, financial expert, analyst, earning, child support, valued, carryover, managed, manager, husband's separate property, spent, career, main house, hedge, earn, real estate, pre-marital, retirement, attend

HEADNOTES

[*1124A] [**74] Husband and Wife--Equitable Distribution--Extraordinary Bonus.

Laura E. Drager, J.

The issues in this matrimonial action are equitable distribution of the marital property, child support, maintenance and attorney fees. A trial was held on April 11, 12, 13, 18, 19, 20, 21; May 2, 3, 4, 5, 9, 10, 11; August 8, 9, 10, 11; November 8, 9,14, 15, 16, and 17, 2006. The parties submitted post-trial briefs on March 30, 2007 and reply post-trial briefs on May 11, 2007. During the trial, Defendant (the "Husband") presented evidence to establish the grounds for the divorce on the theory of constructive abandonment [DRL § 170 (2)]. The parties entered into a stipulation resolving the issues of custody and parental access on September 23, 2005.

The parties married on February 22, 1999. The husband was 40 years old and the Plaintiff (the "Wife") 36 years old. It was the husband's first and the wife's second marriage. The parties have two children, born May 11, 1999 and June 10, 2002. The wife commenced this action in July 2003.

The wife graduated from Smith College and holds an MBA from the NYU Stern School of Business. Prior to the marriage, the wife was employed fourteen years in the finance industry. She worked primarily as [***2] a fixed income analyst for commercial banks, but had become a portfolio manager for Neuberger Berman, LLC ("Neuberger Berman") by the time the parties married.

The husband attended Columbia College and took post graduate courses at Columbia and Hunter

College in computer hardware design and language programming. He initially worked as a computer programmer, but in 1983 began working as a research analyst for the investment firm Legg Mason Wood Walker, Inc. ("Legg Mason"), and then Neuberger Barman in 1990. In April 1995, the husband became a portfolio manager for a hedge fund, S Squared Technology Corp. ("S Squared"), and worked for that entity throughout the marriage.

By the date the parties married, the husband had worked a total of fifteen years in the investment field, specializing in the research and analysis of the personal computer sector of the technology industry. His move to S Squared presented a sea change in his career since in this new position, rather than engaging in research, he managed investments in the technology industry sector.

The husband testified that prior to the marriage, he developed and implemented an investment strategy at S Squared. In April 1998, he concluded [***3] that the market for technology products, which had been depressed, had finally bottomed out. He believed that an expansion in earnings for a group of companies, some of which he had been following for years, would likely occur and he put into effect an investment plan to reap the benefits of these increased earnings. He acquired positions in 64 technology companies while their stock prices were still depressed. He began purchasing these stocks in 1998 and continued buying shares in 1999 and 2000 (see below for more detailed discussion).

Initially, his strategy proved overwhelmingly successful, resulting in his receipt of extraordinary bonuses. Because of positions he took in the portfolios he managed, the fund benefitted from the enormous profits earned during the period now commonly referred to as the technology bubble. On March 4, 1999, ten days after the parties married, he received a bonus of $ 3,100,000 (the "March 1999 Bonus"). In March 2000, shortly after the parties' first anniversary, he received a bonus in the amount of $ 14,323,122 (the "March 2000 Bonus"). In October 2000, 20 months after the parties married, he received a bonus in the amount of $ 4,316,556 (the "October [***4] 2000 Bonus"). [1]

FOOTNOTES

[1] These figures are before taxes.

Notwithstanding their good incomes prior to the bonuses, and even after the receipt of the bonuses, the parties lived a relatively modest lifestyle. At the time of the marriage, they resided in Manhattan in a two bedroom, one bathroom rental apartment. However, they spent most weekends in Southampton, New York where the husband owned property. They rarely traveled and did not dine out at fancy restaurants with any frequency Most of their free time was spent in Southampton, even off season.

After the birth of their first child, the wife stopped working outside the home. Both parties agreed to this arrangement. She was assisted by a housekeeper and nanny. Prior to the birth of their first child, the husband worked long hours and frequently traveled on business. After the child was born, he testified that he spent more time at home and traveled less often. However, he

still worked relatively long hours.

In 1999, the parties agreed that they did not want to raise their child in Manhattan, and ultimately decided to live in Southampton year round. They began to look for a house that would better accommodate their needs as a year-round residence [***5] than the property they used as their vacation home. On October 10, 2000 they acquired two pieces of property, purchased in the name of Patient Faith Farm, LLC, a limited liability company wholly owned by the husband ("Patient Farm").

One of the properties consisted of 9.6 acres located at 21 Southway Drive ("Southway"). This property contained an existing main house with a view of Shinnecock Bay, a dilapidated motel and a pool. They gut-renovated the main house to use as their primary residence. They did not demolish the motel structure. Directly across a small road was the second piece of property, 52 Westway Drive ("Westway"), consisting of .38 acres of undeveloped land fronting on Shinnecock Bay.

Prior to purchasing the properties, the parties had serious discussions about this investment since the Southway property would require major construction work. The husband expressed his concern that in purchasing these properties, they were committing a major portion of their assets to the project and had to be sure that they agreed on a long term commitment to the project and to living in Southampton. The wife agreed. They purchased the properties for $ 2,912,500. The husband presented [***6] evidence that after renovations, the total cost for acquisition and construction was $ 6,441,111.

Towards the end of 2000, the husband began to experience a reversal in his financial fortunes. In March 2000 many parts of the technology stock market crashed and, according to the husband, his 1998 investment thesis became ineffective. He claims there was a shift in the dynamics of the technology industry from the pre-internet PC era into the internet era, an area of the industry he had not fully appreciated. As a result, the portfolios he managed suffered severe losses and, by the parties' second anniversary, he was no longer eligible for a bonus. [2] In an effort to regain his success, he hired consultants to assist in revising his investment strategy. However, although he continued to work for S Squared past the commencement date of this action and until April 2004, the portfolios he managed never earned sufficient profits to enable him to again receive a bonus.

FOOTNOTES

[2] He received his last performance bonus on December 26, 2001 in the gross amount of $ 237,500, but this payment was based on earnings through September 2000 arising out of the management of a particular portfolio. He also received [***7] a bonus in July 2004 in the gross amount of $ 370,000, for money owed from his March 2000 bonus.

Along with the financial reversals, the husband became depressed, anxious and, at times agitated.

The wife testified to episodes when he was listless. As an example, she testified about how he spent an entire weekend without getting dressed or showering.

To support the family, the parties began to use some of their capital. The wife suggested that they sell some of their real estate. She also suggested that the husband consider quitting his job. She offered to return to work if he quit, but he did not leave his job and she did not look for a job.

By the spring of 2003, the tensions the parties faced caused them to engage in more serious arguments and fights and the wife consulted a divorce attorney. [3] After some additional incidents in June and early July 2003, the parties separated.

FOOTNOTES

[3] The wife acknowledged that she briefly considered getting a divorce in August or September 2001, but took no steps to do so at that time.

ASSETS AND LIABILITIES

Before deciding the appropriate distribution of the assets and liabilities of the marriage, the court must first determine what constitutes marital and [***8] separate property, as well as the value of the property. [DRL §§ 236 (B) (1) (d); (4) (b); (5)].

THE HUSBAND'S S SQUARED BONUSES

One of the most hotly litigated issues in this case is to what extent, if any, the bonuses received by the husband as a result of his employment at S Squared constitute separate property. It is his position that all or most of each bonus is his separate property. The wife contends that the bonuses were either transmuted into marital property or were always marital property. The husband received three bonuses during the marriage that are in issue. [4]

FOOTNOTES

[4] The December 26, 2001 bonus is not in issue. The husband received a bonus payment in July 2004, after the commencement of this action. That payment is discussed below.

The March 1999 Bonus

On March 4, 1999, ten days after the parties married, S Squared paid a bonus of $ 3,100,000 to the husband based on his management of portfolios for the year 1998. The net amount of the

bonus after tax withholdings was $ 1,952,409 [5].

FOOTNOTES

[5] The husband contends that after consideration of further tax implications, the value of this bonus is $ 1,705,000. However, the court is unaware of any evidence to support this claim. Indeed, the husband [***9] first asserts this contention in a footnote in his post-trial brief. The court will rely on the $ 1,952,409 figure.

The wife concedes that the proceeds of this bonus, if separately maintained, would be the husband's separate property. The husband argues that the entirety of the proceeds of this bonus should be deemed separate property. The husband points out that the wife acknowledges that this bonus was derived from pre-marital earnings. The wife concedes that portions of the bonus retain separate property status, but maintains that other portions of the bonus were either spent or transmuted into marital property. The court finds that the wife's analysis is correct. Most of this bonus was not maintained in separate accounts. The proceeds were spent or used to acquire or increase the value of other assets. Although the court may appropriately find a portion of those other assets to have a separate property component arising from this bonus, the analysis must be based on assets existing at the time of the commencement of the action. Thus, the court makes no finding with respect to the March 1999 Bonus as a whole, but will consider whether any portions of other assets of the marriage, [***10] derived from this bonus, should be treated as separate property.

The March 2000 Bonus and the October 2000 Bonus

In March 2000, S Squared paid a bonus of $ 14,323,122 to the husband. The husband testified that this bonus was based on gains in portfolios managed by the husband covering three separate periods determined by each portfolio's fiscal year. These periods were for 1) June 30 fiscal year portfolios, the period measured from July 1, 1998 to June 30, 1999 (with 8 of the 12 months pre-dating the marriage); 2) September 30 fiscal year portfolios, the period measured from October 1, 1998 to September 30, 1999 (with 5 of the 12 months pre-dating the marriage) and 3) December 31 fiscal year portfolios, the period measured from January 1, 1999 to December 31, 1999 (with 2 out of 12 months pre-dating the marriage). The husband proffered evidence that $ 1,531,332 of this bonus was attributable to the gains in the managed portfolios through the end of 1998, pre-dating the marriage. The bulk of the bonus, $ 12,791,790, was attributable to gains in 1999, including the two month period prior to the marriage. The wife rejects this analysis, claiming that the bonus was based on the performance [***11] of the fund by the end date of the period at issue and that there was insufficient evidence to support the husband's position that it was awarded solely for performance of the fund for any periods of time pre-dating the marriage. The net amount of the total bonus, after tax withholdings, $ 11,712,572, was deposited into two of the husband's pre-marital accounts. The bulk of this bonus, $ 11,500,000 was deposited into the husband's BONY Savings 6 account. $ 212,572 remained in the husband's BONY Checking-

3 account.

In October 2000, S Squared paid a bonus of $ 4,316,556 to the husband (the "October 2000 bonus"). The husband testified that this bonus was based on gains in portfolios managed by the husband where the fiscal year ended June 30, 2000 (with the gains measured form July 1, 1999 to June 30, 2000). According to the evidence presented by the husband, only a fraction of this bonus remained for the parties. First, the bonus was reduced by the sum of $ 857,000 which S Squared determined was an amount overpaid to the husband in his March 2000 bonus. In addition, substantial tax withholdings were required because insufficient tax withholdings were taken from the March 2000 bonus. Accordingly, [***12] only $ 253,965.94 remained for deposit into the husband's BONY Checking-3 account.

It is the husband's position that the March 2000 bonus and the October 2000 bonus are largely his separate property. He claims that these bonuses were derived from the positions he took in the shares of 64 companies based upon a thesis he developed and started implementing in April 1998. He began research on 60 of these companies before the marriage. He first began to research 14 of these companies when he worked for Legg Mason between 1983 to 1989 as a research analyst. He then began research on 19 of the companies while at Neuberger Berman between 1990 and 1994, and another 27 of the companies while at S Squared before the marriage, between 1995 and 1998. He concedes that he first researched 4 of the companies while at S Squared during the marriage.

The husband also presented evidence regarding his extensive research efforts and knowledge base developed about companies in the technology sub-sector on which he focused dating back to 1983. He proffered evidence regarding the particular specialty he developed with respect to the pre-internet personal computer technology sub-sector during his employment [***13] prior to and while working for S Squared. Not only had he conducted research from secondary sources, but his employment enabled him to visit facilities and meet with the officers of numerous technology companies enabling him develop a thorough understanding of the evolution of this particular sub-sector. He also testified about how he literally took apart computers to determine the manufacturers of component parts to help him assess future investment opportunities.

The evidence clearly revealed that much of the husband's research and knowledge about this technology sub-sector pre-dated his employment at S Squared and the marriage. Indeed, the husband's interest in technology and the stock market dated back to his childhood. His knowledge of the particular technology sub-sector concerning pre-internet personal computers was honed over his years of employment as a research analyst at various brokerage firms. Although he had only limited experience trading stock, it is obvious that he was hired by S Squared in 1995, five years prior to the marriage, to trade stock for this hedge fund because of his specialized knowledge.

Moreover, the husband contends that the size of the bonuses were the [***14] direct result of his pre-marital efforts at S Squared. Specifically, he argues that he tripled the size of portfolios he managed prior to the marriage, setting the groundwork for the large bonuses received. He also claims that prior to the marriage, he negotiated with the CEO of S Squared the very favorable

terms by which the bonuses were ultimately calculated (However, the wife presented evidence to suggest that some of these negotiations occurred during the marriage. Moreover, no one from S Squared testified to corroborate the husband's testimony regarding how the bonuses were calculated). And finally, the extraordinary market conditions of 1999 resulted in the large bonuses from the gains of the portfolios he managed. He argues that the bonuses were therefore largely derived from his pre-marital efforts and/or passive market conditions.

The husband's forensic accountant financial expert opined that there is a separate property component to the bonuses earned by the husband during the marriage that is subject to valuation. To determine the value of this separate property, the husband's financial expert testified that he used a "coverture-like analysis," using as the start of the period [***15] to be valued the approximate date when the husband first began to study each particular company that ultimately became one of the 64 companies in which the husband invested while at S Squared. The valuation period spanned periods of time even before the husband began to work at S Squared and trade shares of that particular company. To capture and quantify what the husband claims to be the pre-marital components of these bonuses, the husband's financial expert analyzed the bonuses by reviewing the individual stock performance of each of the 64 companies the husband traded during the particular performance measurement period and each stock's respective contribution to the overall bonus amount for that period. The bonuses were then allocated into marital and separate property components. This was done by applying to each stock's contribution to the bonus a time-based coverture fraction with (i) the denominator being the number of days between July 1 of the year the husband claimed he first commenced research on a particular company and the date the particular bonus period concluded, and (ii) the numerator of the fraction being the number of days between July 1 of the year the company [***16] was first researched through the date of marriage (to determine the separate property percentage) or from the date of marriage through the date the bonus measurement period concluded (to determine the marital property percentage).

The husband's financial expert stated that he fixed the July 1st date of each year for the commencement of the calculation in an effort to be fair to both parties. The husband's financial expert relied on the husband's statement of when he began studying a particular company. Since the husband's research often began many years before the valuation was done, he was often unable to give a specific date on which he began the research. However, he claimed he was able to remember the year. [6] The husband's financial expert used the mid-year point, contending that on some occasions the husband might have begun the research earlier in the year, and on other occasions later in the year. By always using a mid-year point, he favored neither side.

FOOTNOTES

[6] In some instances, but not all, the husband had retained memorandum that supported his recollection of when he began his research.

The husband's financial expert testified that he employed a time-based fraction as the recognized

[***17] methodology used to delineate between items of value that were acquired during the marriage but were due to pre-marital efforts [e.g. *DeJesus v. DeJesus*, 90 NY2d 643, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997); *Majauskas v. Majauskas*, 61 NY2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984)]. He testified that, "Having been a securities professional myself, having my Series 7 and 63 licenses, and having been part owner of a wealth management company, I understand the investment cycle. The investment cycle starts with the identification of companies, significant research, the performance of significant due diligence with respect to these companies followed by a decision to pull the trigger and buy when market conditions are ripe for that decision. . . The coverture fraction, then naturally for me would start on the date that company was first identified and first researched, and ending with the date of the performance period which underlies the bonus. *It's during that period of time, at least in my opinion, that - - in this case - - Mr. Lange earned the bonus.*" (Tr. 11/14/06 at 36, 38. Emphasis added.).

The problem with the husband's financial expert's analysis is that it assumes a path leading inexorably from the identification of and research about a company [***18] to the purchase of the stock and the end of the performance period underlying the bonus. But the husband could not earn that bonus until he was employed to trade stock for S Squared. It is only in 1995, when he was hired by S Squared that the ability to achieve the end goal of the bonuses became possible. Until then, the husband had been investigating technology companies almost exclusively as a research analyst, unrelated to trading stock for clients. His experience and knowledge may well have been relevant to his obtaining the job at S Squared, but could not serve as a basis for him to earn the S Squared bonuses until beginning in 1995. Application of a coverture fraction might then have been fair to determine the separate property portion of the bonuses earned from the date of employment at S Squared to the date of marriage. However, the husband offered no evidence to support the value of such a separate property analysis. [7]

FOOTNOTES

[7] The court surmises that the husband chose not to pursue this approach because the amount attributable as marital property would have been high.

Moreover, it is both arbitrary and subjective to use as the beginning date of the analysis, as the husband's financial [***19] expert did, the year the husband claimed he began to research a company. Without documentation, it is impossible to verify the husband's assertion that he began to focus on certain companies years ago. In addition, The husband's financial expert's reliance on a July 1st date in any given year to begin the valuation, though seemingly well intentioned, is admittedly a fiction because it is impossible in many instances to identify specifically when the husband began to research a company. Furthermore, the determination that the analysis should start on a date when the husband claimed he first investigated a company is capricious. Why not start the analysis on the date the husband got his first job as an analyst in the technology field or when he began to dabble in studying technology as a high school student?

More seriously, the husband's financial expert made no effort to discern the amount of time the

husband spent researching stock prior to 1995. His analysis assumed the husband spent an equal amount of time over many years researching each stock. No evidence was offered to support this assumption. Furthermore, The husband's financial expert failed to take into account that the husband [***20] was conducting research for other employers prior to 1995 and was paid for his efforts.

In sum, the court finds that the husband's financial expert's analysis lacks credibility. Not surprisingly, none of the cases relied on by the husband suggest application of a coverture fraction without a fixed starting point of either date of employment or date of marriage. Moreover, as pointed out by the wife's forensic accountant expert, the husband's "coverture-like" analysis in the manner applied by the husband's financial expert has never been used to value an employment bonus earned during the marriage in any other case nor established as a generally accepted accounting principle.

The court rejects the husband's analysis that portions of the October 2000 and March 2000 bonuses are separate property. The concept of "marital property" is created and specifically defined by statute. It means "all property acquired by either spouse or both spouses during the marriage and before . . . the commencement of a matrimonial action, regardless of the form in which title is held. . . . Marital property shall not include separate property." [DRL § 236 (B) (1) (c)]. The concept of "separate property" is also [***21] created and defined by statute. As is relevant here, separate property means "property *acquired* before marriage . . . (or) property acquired in exchange for or the increase 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" [DRL § 236B (1) (d) (1), (3). Emphasis added.] "(O)ur statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution *by focusing on the marital status of the parties at the time of acquisition."* O'Brien v. O'Brien, 66 NY2d 576, 583, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (Emphasis added); *Price v. Price*, 69 NY2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986). Here, not only were the bonuses received during the marriage, but largely resulted from financial gains that accrued during the marriage. The entirety of the October 2000 bonus was based on a period of time during the marriage and almost 89% of the March 2000 bonus (relying on the husband's assertions) was derived from financial results achieved during the marriage ($ 12,791,790). The court concludes that the bonuses, in their entirety, are marital property. However, this finding does not [***22] preclude the court from considering whether the husband's pre-marital efforts should affect the distribution of the assets in this case. *See, e.g.*, Kohl v. Kohl, 24 AD3d 219, 806 N.Y.S.2d 35(1st Dept. 2005).

SEPARATE PROPERTY

102 Little Neck Road, Southampton, NY

The parties concur that this piece of real estate is the husband's separate property and agree that its value is $ 1,492,967.

Brokerage Account-Schwab 1

The parties concur that this brokerage account is the husband's separate property and agree that its value is $ 1,955,369. This asset consists of $ 503,832 deposited by the husband prior to the marriage; $ 600,000 from the March 1999 bonus and a transfer of pre-marital funds from a Neuberger Berman account held by the husband.

Retirement accounts

The parties concur that the following retirement accounts are the husband's separate property. Although of little consequence, they disagree on the proper value of these accounts. The court concludes that the correct valuation is as of the date of the commencement of the action.

Lehman Savings Plan (Neuberger Berman Retirement funds) $ 210,149

Legg Mason IRA $ 100,634

Legg Mason 401K $ 22,048

The parties concur that the following retirement accounts are the wife's [***23] separate property and, as with the husband's separate retirement accounts set forth above, are valued as of the date of commencement of the action.

Morgan Stanley Retirement Account $ 44,708

Schwab IRA $ 3,002

MARITAL PROPERTY

21 Southway and 52 Westway

In 2001, the parties purchased the Westway and Southway properties in Southampton. The money used to purchase the properties came solely from the bonuses received by the husband in 2000. The wife made no financial contribution to the purchase of the properties. Relying on The husband's financial expert's analysis, the husband argues that a portion of the value of these properties should be deemed his separate property. For the reasons already stated, the court rejects that analysis and finds that these assets are marital property.

These pieces of property, purchased together, are separated by a small road. The Southway property is 9.6 acres. At the time of the purchase by the parties it consisted of a dilapidated main house and a motel, as well as a pool. The motel had not been used for years and the property had been on the market for a long time. The parties basically gut-renovated the main house (but did not expand it beyond its existing [***24] footprint). The motel rooms remain as they were when the property was purchased. The main house has views of Shinnecock Bay.

The Westway property is directly across the road from the Southway property. It is .38 acres in size and fronts on Shinnecock Bay.

The properties were appraised as of April 2006, the date of trial, by the neutral appointed expert, John B. Carson of Hampton Appraisal Service Corporation. Mr. Carson concluded that the highest and best use of each property was as a single-family dwelling. He testified that the Southway property was worth $ 7,000,000 and that the Westway property was worth $ 1,325,000. He employed the sales comparison approach. He recognized that the Westway property is a pre-existing, non-conforming lot in a subdivision. However, he assumed that, notwithstanding present code limitations, a single family home could be built on it. The attraction of the lot is that it is on the beach. He acknowledged that if the lot could not be improved, its value would be less. As for Southway, he noted that the property is unique and made adjustments because of certain aspects related to the property. For instance, the existence of the dilapidated motel rooms affected [***25] the value of the property. Moreover, notwithstanding the renovations completed by the parties, the main house did not have the kinds of amenities often found in comparable properties (e.g., media room, gym, wine cellar, finished basement).

Mr. Carson indicated that he had first valued the properties in 2004 at which time he appraised the Westway property as worth $ 1,200,000 and the Southway property as worth $ 5,000,000. The increase in value was due to market forces. He noted that the value of property in the area had increased by about 12%, but that a leveling of values developed in the summer of 2005.

Mr. Carson did not consider whether the value of the Southway property might increase if it was subdivided. In his opinion, the highest and best use of the property was as a single family residence. He noted that any subdivision might affect the views from the main house. He also noted that development of the Westway property might affect the water views of the main house on the Southway property.

Both parties presented additional experts regarding the value of the properties. The wife contended that the Southway property could be subdivided and that doing so would greatly increase [***26] the value of that property. The wife presented the expert testimony of a real estate appraiser and consultant, who valued only the Southway property. He concluded that a subdivision of the Southway property would result in its highest and best use. He determined that it could be subdivided into six lots, two vacant lots with water views, three vacant inland lots, and the sixth lot being the water view lot with the main house. Taking this subdivision into account, he opined that the value of the Southway property is $ 8,100,000.

The husband presented two experts with respect to the value of the real estate. Robert Smith, a licensed surveyor, presented evidence with respect to how many lots could be created if the Southway property was subdivided. A potentially significant issue with respect to the ability to subdivide this property existed if Indian artifacts were found during an excavation (the parties knew of this possibility at the time they purchased the property). If such artifacts were found, the subdivision might not be able to proceed or would be limited. Although it was not possible to determine if such artifacts existed without core testing of the grounds, the property was [***27] in an area designated by the town as likely to contain artifacts. [8] Mr. Smith concluded that five lots, including the lot with the existing house, could be generated without likely Indian artifact issues. Of these lots, only one additional lot would have a water view. Even apart from consideration of the Indian artifact issues, Mr. Smith testified that the subdivision conceived of

by the wife's expert was not feasible due to zoning restrictions.

FOOTNOTES

[8] The properties are located very near to the Shinnecock Indian reservation. The town has imposed rules that must be followed if Indian artifacts are found on property, including the possibility that portions of land could not be improved.

In addition, the husband presented the testimony of a real estate appraiser expert based in Manhattan, who admitted to having little experience valuing property on the east end of Long Island. He concluded that the highest and best use of the property was as a subdivision. Relying on discussions he had with real estate brokers on the east end and their research, his personal inspection of comparable properties, and discussions with Mr. Smith, the husband's real estate appraiser expert initially concluded that [***28] the value of the property is $ 6,800,000. He later modified that conclusion, based on the issues attendant to the Indian artifacts, to $ 6,000,000. However, the husband's real estate appraiser also opined that a present-day buyer, might well consider buying the property for use as a single-family resident with only the possibility of at some time subdividing the property.

After consideration of all of the evidence, the court concludes that the most reliable opinion as to the value of the properties came from the neutral appraiser. In considering expert opinion, it is important not to lose sight of actual facts. Although each side contends that a subdivision would result in the highest and best highest use of the property, the reality is that no real estate developer engaged in subdividing land on the east end of Long Island was interested in purchasing this property for that purpose. The undisputed evidence by Mr. Smith (who the court found to be credible) and the testimony of the husband, indicated that both properties had been on the market for some period of time before the parties bought them. There was no evidence that they became involved in a bidding war against a potential [***29] developer. One would assume that if subdivision of this water view property in Southampton was economically viable, a commercial enterprise would have purchased the property well before the parties became interested in it.

Moreover, the court concludes from the various expert opinions that setting a value on a potential subdivision of the property is far too speculative. The court finds that the opinion of the wife's expert is suspect because he could not explain how he determined that six lots could be created from the site or where those lots would be situated. The husband's experts, although satisfactorily indicating how five lots could be created, could not clearly delineate how the location of houses might affect the value of those lots. Furthermore, it is impossible to know what might be the economic impact on the value of any subdivision if Indian artifacts were found on the property. The fact that in completing their own renovation of the main house the parties did not go beyond the building's original footprint suggests that they were concerned about the possibility of finding Indian artifacts on the land.

There is no evidence that at the time the parties purchased the properties [***30] they gave serious consideration to the possibility of subdividing it. If that had been the case, they would not have put so much effort into renovating the main house of the property before planning the subdivision. [9] Moreover, the parties would have taken immediate steps to demolish the motel rooms. The court concludes that the most accurate value of the Southway property is as a single-family property as stated by Mr. Carson. The court found his impartial explanation of how he reached his valuation figure credible. Accordingly, the court accepts Mr. Carson's valuation of the property as $ 7,000,000. [10]

FOOTNOTES

[9] A far more likely scenario, if any of the property was to be sold, would be to sell off only lots north of the house so as not to affect the privacy or views from the main house. However, no valuation was done to see if such a plan would have any impact of the value of the property.

[10] The husband argues in his brief that the appropriate date of valuation is April 2004 when the neutral appraiser did an initial valuation. The husband gives no legal basis to have that date declared the appropriate valuation date and the court rejects it.

Neither party questioned Mr. Carson's value of [***31] the Westway property. Accordingly, the court finds the value of that property to be $ 1,325,000.

The parties concur that the following assets are marital property or part marital and part separate property. The parties further agree to the separate and marital property components of these assets, if relevant.

Chase checking-5

The parties agree that this account should be valued as of the date of commencement of the action. Its value on that date was $ 8,150 of which $ 3,392 is the husband's separate property and $ 4,758 is marital property.

Chase savings account-1

The parties agree that this account should be valued as of the date of commencement of the action. Its value on that date was $ 32,723 of which $ 6,592 is the husband's separate property and $ 26,131 is marital property.

Chase checking-8

The parties agree that this account should be valued as of the date of commencement of the

action. Its value on that date was $ 4,080, all of which constitutes marital property.

Chase checking-1

The parties agree that this account should be valued as of the date of commencement of this action. Its value on that date was $ 16,409, all of which constitutes marital property.

The parties agree to the [***32] value and/or distribution of certain personal items.

2003 Ford SUV and 1999 Jeep

The parties agree that the value of these vehicles, as of the date of trial, is $ 20,195, all of which constitutes marital property. They further agree that the husband shall retain possession of these vehicles.

BMW 330

The parties agree that the value of this vehicle, as of the date of trial, is $ 16,715. They further agree that the wife shall retain possession of this vehicle.

Home furnishings

Each party has possession of marital furnishings. The husband's furnishings are in the Southampton residences and an apartment he rented in Manhattan. The wife's furnishings are in an apartment she rented in Manhattan. Neither side proffered evidence as to the value of these furnishings. The parties agree that they will each retain possession of any furnishings they now hold.

Jewelry

The parties agree that a certain amount of jewelry was purchased during the marriage and is now in the wife's possession. The husband testified at trial to the purchase price of various items of jewelry, totaling $ 47,600. The wife offered no contrary evidence. Accordingly, the court accepts the husband's valuation and finds the jewelry worth [***33] $ 47,600. The parties agree that the wife shall retain the jewelry.

Music Equipment

The parties agree they possess music equipment worth $ 44,750. The wife claims that this equipment is marital property; the husband claims it is separate property. The husband offered no evidence to establish his separate property claim. The court finds the property is marital. The parties agree that the husband shall retain the music equipment.

With respect to the following assets, the parties agree on the valuation date and the value of each asset. They disagree either on whether some portion is separate property, and if so, how much.

BONY checking-3

The parties agree that the total value of this asset as of the date of commencement of the action is $ 25,243. Of this amount, the husband claims that $ 17,988 is his separate property, whereas the wife claims that only $ 17,222 is the husband's separate property. The difference arises from the husband's analysis granting him a separate property component for all funds received from the S Squared marital bonuses. The court rejected that analysis. Accordingly, the court finds that of this account, $ 17,222 is the husband's separate property and $ 8,021 is marital [***34] property.

BONY Savings-6

Both parties agree that this account should be valued as of the date of commencement of this action and that its value is $ 728,643. The husband opened this account prior to the marriage. On the date of marriage, this account held $ 12,217. This amount is the husband's separate property. All of the remaining funds deposited into this account came from deposits from the marital property bonuses. Although some of the deposits were from the March 1999 bonus, the evidence offered at trial indicates that all of the bonus money was co-mingled and most of the March 1999 bonus was spent or transferred to other accounts. Accordingly, the court finds that $ 716,426 of the funds in this account on the date of commencement of this action is marital property.

Patient Farm Chase Checking

Patient Farm Chase Money Mkt

These accounts were established by the husband to pay for the construction and renovation of the Southway property. Both parties agree that the accounts should be valued as of the date of commencement of this action and that the value of the checking account is $ 14,533 and the value of the money market account is $ 102. The funds for these accounts were derived from [***35] the bonuses received from S Squared. The husband's claim for separate property components of, respectively, $ 11,045 and $ 78 based on The husband's financial expert's analysis is rejected for the reasons set forth above. Accordingly, the court finds that the $ 14,533 and $ 102 in these accounts on the date of commencement of this action is marital property.

Morgan Money Market

The parties agree that this account should be valued as of the date of commencement of this action and that at that time the account held $ 219,820. The funds for this account came primarily from the March 2000 bonus. The husband's claim of a separate property component based on The husband's financial expert's analysis is rejected for the reasons set forth above. Accordingly, the court finds that the $ 219, 820 in this account on the date of commencement of this action is marital property.

SG Partners, LP

This entity is a portfolio of technology stocks managed by all of the portfolio managers of S

Squared. The husband acquired his interest in this asset as a limited partner prior to the marriage. He made no contributions to this asset during the marriage. On the date of marriage, the husband's interest in this [***36] asset was $ 720,985. It grew in value to $ 1,340,613 at the time this action commenced. The husband made no additional contributions to this account during the marriage. The husband argues that this entire asset is separate property. The wife counters that the husband along with three other portfolio managers at S Squared managed this portfolio. It is her contention that the increased value in this asset was in part the result of the husband's efforts and, therefore, is marital property. She also contends that this asset continued to increase in value after the commencement date to a total value of $ 1,531,773. She argues that the increased value of this asset to the date of trial, $ 810,788, is marital property.

The court concludes that this asset began as the husband's separate property. Prior to and during the marriage, the husband with three others actively managed this portfolio. Accordingly, even though the husband made no additional contribution to the asset during the marriage, the increased value of this asset is marital property. However, in accordance with the wife's own analysis, since the increased value of this asset accrued due to the husband's active management of this [***37] asset, the valuation date of this asset is as of commencement of this action. Accordingly, $ 619,628 ($ 1,340,613 - $ 720,985) is marital property and $ 720,985 is the husband's separate property.

Leaf Partners

On October 6, 2000, the husband transferred $ 500,000 from the BONY checking-743 account to Leaf Investment Partners, L.P. ("Leaf"). The initial investment was made after the husband received the March 2000 bonus. This entity was managed solely by the son of S Squared's President and was created for investment in small capitalization technology stocks. The money was invested outside of S Squared. The husband invested no additional money into this entity and played no part in managing its investments. Therefore, this is a passive asset. The husband withdrew the money from Leaf in three installments, two in May 2004 and the third in August 2004, for a total of $ 889,514. The husband claims that a portion of this asset is his separate property in reliance on the theory presented by the husband's financial expert which this court has rejected. Accordingly, this asset is marital property valued in the amount of $ 889,514.

S Squared 401 (K) account

When the husband began working for S [***38] Squared in 1995, he joined the fund's 401 (K) retirement plan. As of the date of trial, the stipulated value of the account was $ 108,154. In a post-trial stipulation, dated September 11, 2007, the parties agreed that the marital portion of this account is $ 55,159. The remaining amount of $ 52,995 is the husband's separate property.

July 2004 S Squared Payment

As of the date of commencement of this action, $ 370,000 remained unpaid by S Squared because of an erroneous deduction from the October 2000 Bonus. When the husband was fired from S Squared in April 2004, he requested payment of this amount and received, net of taxes, $ 208,309 (the "July 2004 S Squared Payment") which he deposited in the BONY Checking-743

account. The husband claims he spent this money for the parties' living expenses after he lost his job with S Squared. He remained unemployed through trial. He claims it should not be included in the distribution of assets. In the alternative, he claims the wife should receive only a fraction of these funds pursuant to The husband's financial expert's analysis. The wife claims the entire amount is marital property. The court rejected The husband's financial expert's analysis [***39] and concurs with the wife's assessment that this amount is marital property. The husband offered no proof that he specifically expended these funds. Accordingly, the $ 208,309 of this payment is marital property.

Wife's Schwab account

The parties agree that the wife held this brokerage account with Schwab prior to the marriage. The parties further agree that its value as of the date of commencement of this action was $ 1,531,286. The court finds that the date of commencement is the correct valuation date.

As of the date of the marriage, the account held $ 43,234 which the husband concedes is the wife's separate property. During the marriage, the wife transferred $ 107,815 from a pre-marital Neuberger Berman account into the Schwab account. The husband concedes that this amount is also the wife's separate property. In addition, the parties stipulated that the wife held $ 77,889 in a pre-marital Neuberger Berman account that she transferred into the Schwab account. Thus, $ 228,938 of the total account is the wife's separate property.

The husband contends that most of the remaining $ 1,302,348 is his separate property, in accordance with The husband's financial expert's theory, as it was [***40] all derived from his bonuses. He testified that he transferred $ 550,000 from his 1999 bonus to the wife's brokerage account. The remainder came from his 2000 bonuses. The husband gave this money to his wife, thereby transmuting it into marital property. Moreover, the court rejects The husband's financial expert's analysis and finds that the $ 1,302,348 is marital property. [11]

FOOTNOTES

[11] The wife's contention that the valuation date should be as of the date of trial because of expenses she needed to pay for this litigation is rejected. The wife does not grant the same consideration to the husband.

Wife's Lehman Savings Plan (Neuberger Berman Retirement)

The parties agree that the correct valuation date of this asset is the date of trial and that it's value on that date was $ 186,155. In a post-trial stipulation, dated September 11, 2007, the parties agreed that $ 26,062 of this asset is marital property. The remaining amount of $ 160,093 is the wife's separate property.

Capital Loss Carryover

The husband contends that the parties' 2003 joint federal tax return reflected a capital loss carryover resulting from prior losses incurred of funds held in the wife's Schwab-031 account that she will be [***41] entitled to use against both short term and long term capital gains going forward. The parties used a portion of this loss carryover for their 2004 joint tax return. The husband contends that there remains a value of $ 597,375 from this carryover that the wife will be able to use against capital gains on her future tax returns. The husband claims that since the losses relate to accounts titled in the wife's name, he cannot share in the use of this loss carryover. However, since the wife deposited into this account the bonus money the husband gave to her, he should receive a share of the benefit the wife will receive from the loss carryover.

The wife does not argue that the loss carryover exists. However, she contends that placing a value on this asset is too speculative. Whether the carryover has any value going forward depends on what gains, if any, the wife earns. The wife correctly points out that no evidence was presented at trial with respect to valuation of the carryover. Both sides agree that the only real evidence presented about the carryover is contained in the tax returns; no expert analysis regarding any potential valuation of this asset was offered. Accordingly, since insufficient [***42] evidence was presented with respect to any value of this carryover, it is not subject to distribution.

In sum, the court finds the following assets to be entirely marital property or to have a marital property component. The value of the marital property of these assets subject to distribution is as follows:

Westway $ 1,325,000

Southway 7,000,000

Chase checking-54,758

Chase savings-126,131

Chase checking-84,080

Chase checking-116,409

BONY checking-38,021

BONY savings-6716,426

Patient Farm checking and money market 14,635

Morgan money market 219,820

SG Partners, LP619,628

Leaf Partners 889,514

S Squared 401 (K)55,159

July 2004 S Squared Payment 208,309

Wife's Schwab 1,302,348

Wife's Lehman Savings Plan 26,062

STATUTORY FACTORS

Marital property must be distributed equitably upon consideration of the circumstances of the case and the respective parties. DRL § 236 (B) (5) (c). The court has considered each of the factors set forth in DRL § 236 (B) (5) (d) to the extent applicable in reaching its decision.

This was a short marriage of less than 4 1/2 years duration. The parties are middle-aged and of good health. Each party entered the marriage with assets, although the husband held assets of greater value. [***43] The wife holds an MBA and the husband is a college graduate with post-graduate training. Each party had an established career in the financial industry prior to the marriage. However, at the time of the commencement of the action, neither party was employed. The wife left the workforce after the first child of the marriage was born in 1999, shortly after the parties married. The husband was fired from his job in April 2004 as a result of his failure to make money as a portfolio manager at S Squared. However, his lack of investment success began earlier, in 2000. The husband had worked at S Squared since 1995. He did well and earned bonuses into 2000. But by the end of 2000 his investment strategies had begun to fail and his earnings declined precipitously.

The evidence revealed that the assets acquired during the marriage were derived from the husband's bonuses received in 1999 or 2000. Although largely transmuted into marital property, the wife acknowledged that the 1999 bonus was earned primarily before the marriage. The two 2000 bonuses were based on earnings largely within the first year of the marriage. The evidence supports the wife's contention that the husband actively traded [***44] stock for the portfolios he managed during the marriage. However, the record is clear that the bonuses were the result of investment strategies that were devised by the husband and put into place prior to the marriage. It is also evident that the husband developed his investment strategies as a result of the many years he had work as a research analyst studying the personal computer sector. He concluded that companies in this sector were undervalued. He took positions to take advantage of an anticipated increase in value of the stock of these companies. His analysis proved correct. But even more significant, as a result of the positions he took, the husband was able to benefit from, but did not predict, the extraordinary market forces of the technology bubble that occurred immediately prior to and during the first year of the marriage. However, without the knowledge he had acquired over approximately fifteen years, and the investment strategies he put into place before

the marriage, he would not have been able to profit from those market forces. [DRL §§ 236 (B) (5) (d) (1), (2), (13)].

The prospect of the husband ever again earning the kind of money he received in his S Squared bonuses [***45] is purely speculative. The husband had never before worked as a trader; his prior work experience was almost exclusively as a research analyst. The wife's own employment expert acknowledged that there is a high burnout factor for stockbrokers and hedge fund managers due to the heavy pressures brought to bear in trading stock for the benefit of other people. It is unclear if the husband has the stamina to successfully engage in such activity again. It is also unclear whether another hedge fund or brokerage firm would hire him as a trader given his ultimate lack of success at S Squared. Although the wife claimed that the husband was working on other investment strategies and was merely awaiting the end of this litigation to pursue them, there was insufficient evidence to support her contention. The husband has expressed a reluctance to return to the financial industry. But the evidence revealed that he could re-enter that industry as a financial analyst and earn a very good living. Even if he chooses to explore a different career, he will be able to draw on income from his assets to assist in his support.

Based on the testimony of both career counselors, the wife is readily able be able [***46] to return to the workforce. She earned a good living prior to the marriage, but not anywhere near the realm of earnings the husband acquired from his bonuses. There will be assets she will receive from which she can draw additional income to support herself. [DRL § 236 (B) (5) (d) (8)].

Each party made contributions to the marriage. Although each party had a career before the marriage, their partnership was fairly traditional with the husband as the breadwinner and the wife a stay-at-home mother. Plainly, the husband contributed extraordinary earnings in the first two years of the marriage. He also earned a salary during the remainder of the time the parties lived together. He willingly invested his money in an effort to secure the parties' financial future and pursue their stated dream of living in Southampton. He generously gave money to his wife and purchased jewelry for her. He also helped care for the children of the marriage, more than typically found in a traditional marriage. The wife took care of the home and children, but she had help in doing so from a nanny and a housekeeper, a well as the husband. Given her educational background and prior jobs, she was able to participate [***47] in meaningful discussions about her husband's work, although there was no evidence that she assisted in his investment strategies and she had no direct involvement in the husband's work. She did not entertain clients and had limited contact with his work colleagues. She never entertained his business associates at home. She helped maintain some of the family's personal finances, but these efforts were quite limited. Both parties participated in the purchase of Southway and Westway. They each worked on the renovation project of the Southway property. However, all of the funds for this project came from the husband and he was very active in supervising the construction. The wife reviewed the bills submitted by the contractor. [DRL § 236 (B) (5) (d) (6)].

The custodial parent, the wife, does not need to occupy the marital residence. Indeed, she sought to relocate to Manhattan to resume her career. [DRL § 236 (B) (5) (d) (3)]. There are no pensions; the retirement accounts that were acquired during the marriage are subject to distribution. Each party will receive assets acquired during the marriage that will help secure their financial futures. [DRL § 236 (B) (5) (d) (4)]. The court has considered [***48] the issue of maintenance and the interplay between the need for maintenance in light of the distribution of the marital assets (see below). [DRL § 236 (B) (5) (d) (5)].

Although the most valuable marital asset is real estate, there are also significant liquid assets available for distribution. There has been no difficulty in evaluating any component of the assets. [DRL §§ 236 (B) (5) (d) (7), (9)]. The only significant tax consequence caused by the distribution of the assets has already been addressed in the discussion of the tax loss carryover (see above). Although the tax carryover was not valued, the wife may receive a benefit in the future if she can apply it against any capital gains. As discussed below, the court has considered certain potential tax implications in the distribution of the real estate. [DRL § 236 (B) (5) (d) (10)].

There has been no wasteful dissipation of the assets by either spouse. However, the court notes that the wife began this action only months after the parties moved into their new Southampton home, after assuring the husband that she was aware of the long term commitment they were undertaking in purchasing and renovating the Southway property. While the husband's [***49] emotional distress may have become more evident in 2003, the wife conceded that she begun to think about a divorce as early as 2001. In addition, more than just seeking a divorce, the wife also wanted, and obtained, the right to relocate back to Manhattan, causing additional financial expenditures. Moreover, each party expended enormous amounts of money pursuing valuations of limited utility at trial. Fortunately, the parties' property has increased in value and there are substantial assets available for distribution. No transfer or encumbrance of any asset was made in contemplation of this action. The court has also considered its award of counsel fees (see below) in deciding the equitable distribution of the assets [DRL §§ 236 (B) (5) (d) (11), (12), (13)].

DISTRIBUTION

It has been held that there is no "strict mathematical formula" in determining the appropriate distribution of assets. Rather, the decision "rests in the discretion of the trial court and will depend on the circumstances of (the) particular case." *Butler v. Butler*, 171 AD2d 89, 90, 574 N.Y.S.2d 387 (2d Dept. 1991). Taking into account all of the factors set forth above, the court finds that each party is entitled to a distribution of the [***50] assets, but that this marriage does not warrant an equal split of the marital property. The brevity of the marriage and the means by which the assets were acquired warrant a finding that the husband should receive a greater portion of the assets. *Kohl v. Kohl, supra*. This is not a case where the work and struggles of the marital economic partnership culminated in the parties' financial rewards. Rather, the wife

became the fortuitous beneficiary of significant financial successes achieved largely within the first year and a half of the marriage. The court is convinced from all of the evidence that the bonuses acquired by the husband although marital property, were largely the result of his efforts prior to the marriage. They are the summation of his intense, fifteen year exploration of a portion of the computer industry. He was able to capitalize on the expertise he developed when given the opportunity to work as a portfolio manager at a hedge fund. However, he was also the beneficiary of unusual and not fully predicted market forces that resulted in the extraordinary bonuses he received. At the same time, the court recognizes the wife's contributions, including the care for the two [***51] young children of the marriage. Fortunately, there are sufficient assets to provide a level of financial security for each party. In addition, the court concludes that it is appropriate to distribute the assets in different proportions for the reasons given below. Equitable distribution does not mean equal distribution and there is no requirement that each asset be divided equally between the parties. *Arvantides v. Arvantides*, 64 NY2d 1033, 478 N.E.2d 199, 489 N.Y.S.2d 58 (1985); *Naimollah v. DeUgarte*, 18 AD3d 268, 795 N.Y.S.2d 525 (1st Dept. 2005).

Westway

This asset, valued at $ 1,325,000, was purchased with the husband's bonus money. The wife made no direct contribution to the purchase of this asset and no direct contribution to the husband's acquisition of his bonus. No construction was done on this property. The increased value was solely as a result of market forces. However, the wife made indirect contributions in her care of the husband and the children of the marriage. The court awards 80% of the value of this asset to the husband ($ 1,060,000) and 20% of the value of this asset to the wife ($ 265,000).

Southway

As with Westway, this asset was purchased with the husband's bonus money. The wife made no financial contribution [***52] to the purchase of this asset and no direct contribution to the husband's acquisition of his bonus. However, unlike Westway, the parties actively worked to increase the value of this asset and both parties contributed to that effort. Both parties participated in the design of the renovation and oversight of the construction effort. Each party contributed in the indirect support of being the other's spouse and raising the children. The court notes that although receiving the benefit of the use this house, the husband has been fully responsible for its upkeep over the course of this litigation. The court awards 65% of the value of this asset to the husband ($ 4,550,000) and 35% to the wife ($ 2,450,000).

The husband will retain ownership of both pieces of property (which are presently held by Patient Faith Farm). An additional reason for the appropriateness of this distribution is that the husband will bear any costs associated with selling the properties (e.g. broker fees, taxes) or any costs associated with developing the properties. It is conceivable (but speculative) that he may benefit from increased values, but the wife will have the immediate benefit of having her cash distribution [***53] now.

Chase checking-5

Chase savings-1

Chase checking-8

Chase checking-1

BONY checking-3

The marital portion of these assets total $ 59,399. All of this money was derived from the husband's bonuses. However, these accounts appear to be the source of the family's daily expenditures. The court awards 50% of these assets to each party ($ 29,699.50).

BONY savings-6

The marital portion of this asset totals $ 716,426. All of this money is derived from the husband's bonuses. It appears that this money merely accrued as the parties' savings. The wife made no direct contribution to these funds. The court awards to the husband 80% of the value of this asset ($ 573,141) and 20% to the wife ($ 143,285).

PFF checking and money market

The total value of these assets is $ 14,635. These accounts are used to maintain the Westway and Southway properties, which has been the husband's responsibility. The court awards 100% of these funds to the husband ($ 14,635).

Morgan money market

The total marital portion of this asset is $ 219,820. The source of these funds was the husband's March 2000 bonus. Any increase in value of these funds was from market forces. The court awards to the husband 80% of this asset ($ 175,856) [***54] and 20% to the wife ($ 43,964).

SG Partners, LP

The marital portion of this asset is $ 619,628. This asset is the increased value of funds deposited in this portfolio prior to the marriage. However, because the husband participated in the management of this fund, the court deemed it marital property. The husband, however, did not solely control the investments of this fund. He was one of four portfolio managers. But he played an active role in the management of the fund during the marriage. The court has considered the wife's indirect contribution in caring for the children while the husband worked. The court awards to the husband 75% of this asset ($ 464,721) and 25% to the wife ($ 154,907).

Leaf Partners

The marital portion of this asset is $ 889,514. This asset is derived from an investment of $ 500,000 from the husband's March 2000 bonus into this fund. The husband played no part in the management of the fund. The court awards 80% of this asset to the husband ($ 711,611) and 20% to the wife ($ 177,903).

S Squared 401 (K)

The marital portion of this asset is $ 55,159. The source of these funds was from the husband's salary at S Squared. He played an active role in the acquisition of this [***55] asset. Moreover, this asset was acquired from the day-to-day work performed by the husband during the marriage. The wife played an indirect role in its acquisition by her care of the children. The court awards to the husband 50% of this asset ($ 27,579.50) and 50% of this asset to the wife ($ 27,579.50).

July 2004 S Squared Payment

This asset is valued at $ 208,309. It was a final payment on the March 2000 bonus made to the husband after the commencement of the action. At the time the husband was fired in April 2004, after the commencement date, he negotiated with S Squared to obtain payment of this asset. The court awards 80% of this asset to the husband ($ 166,647) and 20% to the wife ($ 41,662).

Wife's Schwab

The value of the marital portion of this fund is $ 1,302,348. All of this money is derived from the husband's bonuses. Of this amount, $ 550,000 came from the husband's 1999 bonus which, the wife concedes, would have been the husband's separate property if he had maintained it in his separate account. On the other hand, the husband gave these assets to his wife during the marriage. The court awards 50% of this asset to each party ($ 651,174).

Wife's Lehman Savings Plan

The value [***56] of the marital portion of this asset is $ 26,062. Neither party played any direct part in the increase of the value of this asset. The court awards 80% of this asset to the wife ($ 20,850) and 20% to the husband ($ 5,212).

In addition to these distributions, the husband shall retain two automobiles and music equipment for a total value of $ 64,945 and the wife shall retain one automobile and jewelry for a total value of $ 64,315. They will each also retain the home furnishings they presently possess.

In sum, the wife will receive $ 4,006,024 as a distribution of the marital property. She will also retain her separate property totaling $ 436,741 and the $ 64,315 in assets of personal property,

for a total of $ 4,507,080. In addition, the wife will enjoy whatever benefit she may be entitled to receive from the tax loss carryover. Of the wife's share of the marital property to be provided by the husband $ 651,174 shall come from his share of the wife's Schwab-0031 account, $ 5,212 from the wife's Lehman Savings Plan and $ 8,205 from the wife's Chase Checking account-691 for a total of $ 664,591. The wife already holds in her accounts marital property totaling $ 680,227 (Schwab-0031: $ [***57] 651,174; Lehman Savings Plan: $ 20,849; and Chase Checking-691: $ 8,204). After subtraction of these amounts from the wife's share of the marital property, the husband shall pay to the wife to satisfy the remaining distribution of marital property owed to her the amount of $ 2,661,206 ($ 4,006,024 - 664,174 - 680,227). The husband shall therefore receive as his distribution of the marital property $ 8,430,276. He will also retain his separate property totaling $ 4,594,570 and the $ 64,945 in assets of personal property for a total of $ 13,089,791. The husband shall pay to the wife $ 1,331,206 within 30 days of this decision, $ 1,000,000 within 120 days of this decision, and the remaining $ 330,000 within six months of this decision.

MAINTENANCE

The court may award maintenance where justice requires, having regard for the standard of living established during the marriage, the lack of sufficient income and property to provide for the reasonable needs of the recipient, and the ability to pay by the other party, as well as the circumstances of the case and the respective parties. DRL § 236 (B) (6) (a). This court has considered each of the factors set forth in DRL § 236 (B) (6) (a) to the [***58] extent applicable in reaching its findings.

As previously noted, this was a short marriage of only 4 1/2 years duration. Prior to the marriage, the wife had obtained her MBA degree and had a successful career in commercial banking. The wife is now 43 years old and in good health. In February 2003 the parties moved to Southampton, New York, as had been contemplated by them since 2001. However, when this action began in July 2003, the wife made known her desire to relocate back to New York City. Her stated reason for this relocation was to enable her to resume work and become financially independent. As part of the resolution of the custody issues of this case, the wife was allowed to relocate back to New York City in August 2006. Even accepting the wife's contention that she could not look for work until she moved back to the city, she has had a year to conduct a job search. The testimony phase of this trial concluded November 17, 2006 freeing her from court appearances. Although the children of the marriage reside primarily with the wife, both attend school. Accordingly, the wife has been free from any impediment to resume her career in New York City, as she requested, since November [***59] 2006. [DRL § 236 (B) (6) (a) (2), (3), (4), (6)]

The wife's own employment expert, Edwin S. Mruk, of Mruk & EMA Partners International, testified that, in his opinion, the wife would be able to obtain a job within six to nine months of beginning her search and that she would be able to earn over $ 200,000. The husband's employment expert, Lee Miller, of Advanced Human Resources Group, Inc., testified that, in his

opinion, the wife would be able to obtain employment within six months of beginning her search and could earn $ 350,000. Both experts testified that she is an attractive candidate with excellent references. There is no indication that her time away from the workforce will reduce her earning capacity. [DRL § 236 (B) (6) (a) (3), (5)]

The court has considered the manner in which the parties lived during the marriage, and finds no basis to award support because of the marital lifestyle. Not only was this a very short marriage, but the parties did not live extravagantly. Shortly after their marriage, the wife gave birth to their first child and she became pregnant again relatively soon thereafter. Perhaps as a result of the children, their vacations were spent in the United States. [***60] To the extent they went anywhere besides Southampton, they visited relatives. They did not frequently dine out at expensive restaurants. Most of their free time was devoted to buying and renovating their new Southampton home.

The court also notes that the wife has been receiving support from the husband for four years during this litigation. Although for much of this time, the wife was required to reside in Southampton, she was not precluded from exploring career options. Even if she did not want to work before both children attended school, she was free to take courses to enhance her career goals and to maintain and develop business contacts in light of her professed interest in returning to the workforce. Moreover, the court has taken into consideration the fact that the wife will receive significant assets from the distribution of the marital property. The proceeds of these assets will provide her financial security in addition to her own earnings. [DRL § 236 (B) (6) (a) (1)] Furthermore, she will be the indirect beneficiary of the child support awarded in this case.

For all of these reasons, the court denies any further award of maintenance. The existing *pendente lite* award of maintenance [***61] in the amount of $ 4,000 per month, shall end upon the husband's payment of the first ordered distribution of assets as set forth above.

The husband shall continue covering the wife on his health insurance policy until entry of the divorce judgment. The husband shall cooperate with the wife to enable her, if she so desires, to apply thereafter for COBRA under his policy at her own expense.

CHILD SUPPORT

In determining an award of child support, a court shall be guided by the provisions of the Child Support Standards Act (DRL § 240 (1-b)). In the first step of the analysis, the court must determine the income of each parent.

As of the conclusion of the trial, neither party was employed. Each party presented expert testimony with respect to the future employment prospects of each spouse. At the time of the marriage, the wife was working as a bond portfolio manager for Neuberger Berman. She testified that her base salary was $ 190-195,000, although there was some evidence that the wife's income may have been higher. It was certainly likely that if she had stayed with the position, she would

have been eligible for a bonus that would have significantly increased her income. However, most [***62] of her experience had been as a research analyst. Her own employment expert opined that it was more likely she would find a position as an analyst and anticipated that she could earn in the range of $ 175,000 to $ 225,000. The husband's employment expert agreed that the wife could easily find work as a research analyst, but opined that the wife could earn $ 350,000, including base salary and bonus. He based his conclusion on a review of employment surveys and discussions with recruiters. Both experts concluded that the wife is an attractive job candidate and would have little trouble finding employment, notwithstanding her absence from the job market. For all of these reasons, the court imputes employment income to the wife of $ 275,000. The court will not deduct FICA or New York City taxes since it has no basis to do so. In addition, the court attributes an additional $ 25,000 income to the wife attributed to investment income derived from her assets. [12] Thus, her total income for consideration by this court for child support purposes is $ 300,000. [DRL §§ 240 (1-b) (b) (5) (ii); (v); (vii) (G), (H)].

FOOTNOTES

[12] The court has considered that the wife might use some of her assets to buy an apartment [***63] or save for future retirement.

The husband testified that he wishes to undertake an entirely new direction in his life. He claims that in light of his experience at the hedge fund, he is no longer interested in employment in the financial industry. He is working on computer software projects, although it is unclear if those projects will evolve into commercially successful endeavors. He also manages his own stock portfolio. [13] The husband's employment expert opined that, in light of the losses suffered by the husband at S Squared, it is unlikely that he could again find work at a hedge fund as a portfolio manager. He believed the husband would more likely find employment as a research analyst, earning approximately $ 350,000. However, this conclusion was based on what the average analyst is capable of earning, providing no gradation for a person with specialized analytical knowledge.

FOOTNOTES

[13] The husband also expressed an interest in teaching at the primary school level. However, he has taken no steps to fulfill that expressed interest.

The wife's employment expert opined that the husband would be able to obtain employment as a hedge fund manager earning potential $ 2.5 to 3 million and as [***64] a manager of a mutual

fund earning $ 1.7-2 million. The court finds that it is difficult to predict if the husband could again work as a hedge fund manager. The wife correctly points out that notwithstanding the losses he sustained, the husband continued to work at S Squared until 2004. However, the wife's own testimony supports the conclusion that the husband's emotional state seriously deteriorated after he sustained the losses at the fund. It is therefore hard to predict whether he could again enjoy significant success in the pressure-filled work atmosphere of a hedge fund. At the same time, the court finds that the husband lacks credibility in suggesting that he will not return to work in some capacity in the finance industry. The husband has devoted his life to studying the market. His own witness, Jill Hauser, a research analyst colleague, testified to the husband's original research regarding valuation of technology stock. The technology sector has not disappeared. The court does not doubt that the husband is capable of refreshing (if he has not already done so) his knowledge of the industry and can again provide useful advice as an analyst, whether for a hedge fund or other [***65] financial investment entity. Moreover, in light of the fact that the husband has two young children to support, he cannot minimize his responsibility to them by reducing his earning potential.

The court concludes that of the various career tracks available, it is most likely that the husband could readily gain employment as a highly sought after research analyst in the computer technology sector, a field of great interest to investors. According to the husband's testimony, in the early 1990s he earned, on average, $ 300,000 when he last worked as a research analyst. [14] The court has also considered the husband's earnings at S Squared, less the bonuses he received. From all of these factors, the court concludes that it is reasonable to impute income of $ 450,000 to the husband for work as a research analyst specializing in the technology sector. The court will not deduct FICA or New York City taxes since it has no basis to do so. In addition, the court imputes interest income derived from the husband's liquid investments in the amount of $ 150,000. [15] Accordingly, the court finds the husband's income for child support purposes to be $ 600,000. [DRL §§ 240 (1-b) (b) (5) (ii); (v); (vii) (G), [***66] (H)].

FOOTNOTES

[14] The court concludes that his earnings in the same job would be significantly greater in 2007.

[15] The court has considered the payout to the wife, the costs the husband has borne in the support of the wife and children already, and possible costs of this litigation although the husband has provided no specific information with respect to those cost. However, the court notes that although the husband claims he has had to use assets to support the parties' lifestyle during this litigation, he apparently has not felt sufficiently stressed financially to obtain a job. The court notes that in addition to paying $ 11,000 per month in support, he has also been able

to rent an apartment in Manhattan and maintain all of the properties in Southampton. The court concludes that he can draw income from his assets and will have sufficient assets after this litigation to continue to draw some income.

The court concludes that the combined parental income for purposes of DRL § 240 (1-b)(c) is $ 900,000 The prorated responsibility between the parents for child support obligations is 67 % for the husband and 33 % for the wife. On the first $ 80,000 of combined income, applying a child support percentage [***67] of 25% [DRL § 240 (1-b) (b) (3) (ii)], the Husband's annual obligation would be $ 13,400 for basic child support.

However, since the combined parental income exceeds $ 80,000, the court must decide whether to make an award based on the additional income and, if so, whether to apply the statutory formula and/or rely on the factors set forth in DRL § 240 (1-b)(f). *See*, A.D. Scheinkman, McKinneys Practice Commentaries, C 240:27A.; DRL § 240 (1-b)(c)(3). Where the court awards support above $ 80,000, irrespective of the statutory method used, the court must articulate a rationale for its determination. *Matter of Cassano v. Cassano*, 85 NY2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995); *Anonymous v. Anonymous*, 12/8/99 NYLJ 27, (co.6) *affd*, 286 AD2d 585, 729 N.Y.S.2d 890 (1st Dep't. 2001).

The court finds that an award based on income above $ 80,000 is appropriate. Given the combined parental income, the children would have enjoyed a very comfortable lifestyle had the marriage not ended. However, the court further concludes that the award should not be based on the full combined parental income. *Kosovsky v. Zahl*, 272 AD2d 59, 707 N.Y.S.2d 168 (1st Dep't. 2000). It is not necessary for either parent to commit all of his or her income to meet the needs of the [***68] children, even recognizing the parties' substantial assets. The court also notes that the husband enjoys substantial access to the children, thereby decreasing some of the wife's expenditures for the children's benefit. Finally, the court is aware that it has of necessity imputed income to both parents. For these reasons, the court concludes that $ 375,000 shall be the total combined marital income subject to basic child support consideration.

The court also determines that it is appropriate to apply the statutory percentage formula to the amount over $ 80,000. Even upon consideration of the paragraph (f) factors, the court concludes that reliance on the statutory percentage formula is neither unjust nor inappropriate. Although the parties have significant assets, they led a relatively modest lifestyle. Much of their free time was spent in Southampton, a pleasure the children will still be able to enjoy. Although it appears that one of the children may have special needs, there are sufficient assets to allow both children to attend private school and receive any medical or psychological assistance they need. However, the court has considered that there will be significant "add-on" costs [***69] for each child and the wife will be required to contribute to those costs. A significant basic child support will help enable the wife to support the daily needs of the children and contribute to their "add on" costs.

The court concludes that each party has the ability contribute financially to meet the children's needs. Use of the statutory formula allows those needs to be met in proportion to the money available to each party.

Applying the statutory formula to the total combined income of $ 375,000, and attributing to the non-custodial husband his pro rata obligation of 67%, the court finds the Husband's annual child support obligation to be $ 62,812 with the monthly basic child support obligation to be $ 5,234. This amount shall be paid in two equal installments by the husband on the first and fifteenth date of each month. In light of the support payments previously made, this support payment shall commence with October 1, 2007.

With respect to "add-on" costs, one of the children attended private school in Southampton before this action began. They each now attend private schools in Manhattan. It appears that at least one of the children has special needs that may make attendance [***70] for that child at a private school in his best interests. It appears that the parties agree that the children should continue in private school and have the means to enable them to do so. Commencing with the 2007-08 academic year, the husband shall pay 67% and the wife 33% of the costs of private school and related expenses, including books, computers, school supplies, and tutoring if necessary. [16] The parties have given no evidence of any costs needed for religious education.

FOOTNOTES

[16] The parties are, of course, free to decide in accordance with their custody agreement to allow either or both children to attend public school. The parties would then share proportionately the reduction of this "add on" cost.

The husband shall maintain the children on his health insurance policy and shall pay 100% of this cost. Commencing October 1, 2007, each party shall contribute to any non-reimbursed medical costs, with the husband to pay 67% and the wife to pay 33% of these costs. These costs shall include medical, dental, ophthalmology and mental health treatments.

Commencing with the 2007-08 academic year, the husband shall contribute 67% and the wife 33% of the costs of the children's extracurricular [***71] activities, including after school, weekend and summer activities.

The husband shall contribute 67% and the wife 33% of the costs of the children attending a private university or college, including tuition, room and board, books, computers, and reasonable transportation costs for four round trips between home and school each year, if such costs are necessary. It is appropriate to determine this cost at this time so that the parties can save

money to meet the needs of the two children. Clearly it is the desire of both parties that the children attend private colleges given that the parties themselves attended private colleges and the children now attend private schools. As each child attends college, if the school is away from home, the husband may apply to the court for a reduction in basic child support if the parties cannot themselves reach agreement on an appropriate reduction. Furthermore, if either child otherwise becomes emancipated in accordance with the Child Support Standards Act, the husband may apply to a court for a reduction in child support payments if the parties themselves cannot reach an agreement.

The husband shall pay 67% and the wife 33% of the childcare costs incurred [***72] by the mother, provided she is actually working outside the home. The wife must provide proof of the child care costs and that the wife works. The costs will be limited to childcare expenses for up to 40 hours per week if warranted by the wife's work schedule. The husband's obligation for childcare costs will cease when the youngest child turns 12 years old. The wife may apply to the court for childcare costs if she can show that she is working at home to earn income and needs childcare to enable her to perform that work and if the parties cannot themselves reach agreement. Each party shall be responsible for any babysitting costs either incurs beyond the costs necessary for the wife to attend work as set forth in this paragraph.

The husband is entitled to a credit for any "add on" child support costs he has paid for which the wife now owes a contribution. If the parties cannot otherwise agree on how that credit shall be addressed, the husband shall deduct the agreed upon amount from the final distribution of assets payment.

Each party shall be entitled to take one of the children as a deduction for tax purposes.

The husband shall maintain a life insurance policy for the benefit of each [***73] child in the amount of one million dollars until that child is emancipated.

ATTORNEY FEES

The wife seeks an award of attorney fees. She asserts that she has expended $ 1.37 million dollars for attorney and expert fees and court reports. The court awarded $ 100,000 in *pendente lite* fees.

The case began in July 2003. Eight trial days were expended before the parties reached a settlement on custody. Twenty-three days were spent on the trial of the financial issues.

The decision to award counsel and expert fees is left to the sound discretion of the court. Indigence is not a requirement. *De Cabrera v. De Cabrera-Rosete*, 70 NY2d 879, 518 N.E.2d 1168, 524 N.Y.S.2d 176 (1987). "The issue of counsel fees is controlled by the equities and circumstances of each particular case and the Court must consider the relative merits of the parties and their respective financial positions in determining whether an award is appropriate.

(citations omitted)" *Hackett v. Hackett*, 147 AD2d 611, 538 N.Y.S.2d 20 (2d Dept. 1989). An award of counsel fees is appropriate where there is a disparity of income and earnings capacity. *Merzon v. Merzon*, 210 AD2d 462, 620 N.Y.S.2d 832 (2d Dept. 1994); *Denholz v. Denholz*, 147 AD2d 522, 537 N.Y.S.2d 607 (2d Dept. 1989).

At the same time, the court should also consider [***74] if either party has been responsible for the escalation of legal costs. *Chamberlain v. Chamberlain*, 24 AD3d 589, 808 N.Y.S.2d 352 (2d Dept. 2005); *Kessler v. Kessler*, 33 AD3d 42, 818 N.Y.S.2d 571 (2d Dept. 2006).

The court finds that each party was at fault in the amount of time expended on this case. The length of the custody trial was necessitated, in part, by the wife's decision to seek to relocate to Manhattan with the children, notwithstanding the extraordinary expenditures made by the parties to enable them to live year round in Southampton and having severed their ties to Manhattan only months before she left the marriage. However, the husband also unreasonably delayed the ultimate resolution of that portion of the case by questioning some of the professional assessments of the children's needs.

Each party also contributed to the lengthy financial trial. The husband pursued a theory with respect to a separate property claim unsupported by any case law or accepted accounting principles. On the other hand, the wife pursued an analysis of a potential subdivision of the parties' real estate where her own expert failed to provide a modicum of meaningful evidence to support his suggested subdivision. An inordinate amount [***75] of trial time was taken up each party giving convoluted answers to simple questions.

Although the husband is leaving the marriage with the greater portion of the assets, the wife will leave the marriage with over $ 4 million derived from the marriage and over $ 450,000 of her own separate assets. After payment of the distribution to the wife, the husband will receive only one million dollars more than the wife of the marital property. Moreover, the wife was granted her request to return to New York City to resume her career enabling her to earn substantial income. This is not a case where the disparity of income or assets warrants an award of all of the wife's litigation expenses. However, without some award of attorney fees, the wife will be left with a reduction of the assets awarded to her and the court's purpose of providing each party with financial security will be defeated. But the wife must bear a significant portion of the costs she incurred and the court finds she can afford to do so. Moreover, the court has considered the substantial support payments the husband has already paid to the wife. Accordingly, the husband shall pay $ 250,000 in additional attorney fees to the [***76] wife's attorney, $ 100,000 to be paid by the husband to the wife's attorney within 30 days of the date of this decision and $ 150,000 to be paid to the wife's attorney within 120 days of the date of this decision.

Accordingly, it is hereby

ORDERED, that the husband shall pay to the wife $ 2,661,206 as distribution of the marital property not already held by the wife. The husband shall pay to the wife $ 1,331,206 within 30

days, $ 1,000,000 within 90 days and $ 330,000 within 120 days of the date of this decision and order, without notice of entry; and it is further

ORDERED, that the husband shall retain possession and ownership of the Westway and Southway properties (which are presently held by Patient Faith Farm, LLC, a limited liability company wholly owned by the husband); and it is further

ORDERED, that, pursuant to the parties' stipulation, the husband shall retain possession and ownership of the music equipment, the home furnishings in the Southampton residences and his New York City apartment, and the 2003 Ford SUV and 1999 Jeep automobiles. Pursuant to the parties' stipulation, the wife shall retain ownership of the jewelry in her possession, the home furnishings in her New York [***77] City apartment, and the BMW 330 automobile; and it is further

ORDERED, that, subject to the distribution to the wife of her share of the marital property, each party shall thereafter retain ownership and control of any accounts in his or her name and the funds held therein. Any remaining accounts in their joint names shall be closed and the funds transferred to the husband upon his payment of the final distributive award to the wife; and it is further

ORDERED, that the wife's application for maintenance is denied, except that the $ 4,000 *pendente lite* maintenance award shall continue until the husband makes the first payment of the distributive award of $ 1,349,638 at which time the *pendente lite* maintenance award payments shall cease; and it is further

ORDERED, that the husband shall continue the wife's coverage under his health insurance policy until entry of the divorce judgment. The husband shall cooperate with the wife to enable her, if she so desires, to apply for COBRA under his policy at her own expense; and it is further

ORDERED, that the husband shall pay basic child support in the amount of $ 5,234 each month, to be paid in equal installments on the first and fifteenth date [***78] of each month. This order of support shall commence October 1, 2007; and it is further

ORDERED, that, commencing with the 2007-08 academic year, the husband shall pay 67% and the wife shall pay 33% of the costs of private school, and related expenses, including books, computers, school supplies, and tutoring if necessary; and it is further

ORDERED, that the husband shall maintain the children on his health insurance policy and shall pay 100% of that cost. Commencing October 1, 2007, the husband shall pay 67% and the wife shall pay 33% of any of the children's non-reimbursed medical costs, including medical, dental, ophthalmology and mental health treatments; and it is further

ORDERED, that, commencing with the 2007-08 academic year, the husband shall pay 67% and

the wife shall pay 33% of the costs of the children's extracurricular activities, including after-school, weekend and summer activities; and it is further

ORDERED, that the husband shall pay 67% and the wife shall pay 33% of the costs of the children attending a private university or college, including tuition, room and board, books, computers, and reasonable transportation costs for four round trips between home and school each [***79] year, if such costs are necessary; and it is further

ORDERED, that as each child attends college, if the school is away from home, or if a child becomes emancipated in accordance with the provisions of the Child Support standards Act, the husband may apply to the court for a reduction in basic child support if the parties themselves cannot themselves reach an agreement on an appropriate reduction; and it is further

ORDERED, that the husband shall pay 67% and the wife shall pay 33% of the childcare costs incurred by the wife, provided she is actually working outside the home. The wife must provide proof to the husband of the childcare costs and that the wife works. The costs will be limited to up to 40 hours each week if warranted by the wife's work schedule. The father's obligation for childcare costs will cease when the youngest child turns 12 years old. The wife may apply to the court for childcare costs if she can prove that she is working at home to earn income and needs childcare to enable her to perform that work and if the parties themselves cannot themselves reach agreement. Each party shall be responsible for any babysitting costs either incurs beyond the costs necessary for [***80] the wife to attend work as set forth herein; and it is further

ORDERED, that the husband is entitled to a credit for any child related expenses he has already paid and which the wife has now been ordered to pay. If the parties cannot otherwise agree on the manner in which the credit shall be paid, the husband shall deduct the agreed upon amount from the final distribution of marital assets payment; and it is further

ORDERED, that the husband shall maintain a life insurance policy for the benefit of each child in the amount of one million dollars until that child is emancipated and it is further

ORDERED, that each parent shall be entitled to take one of the children as a deduction for tax purposes and shall cooperate to enable this arrangement.

ORDERED, that the husband shall pay $ 500,000 in additional attorney fees to the wife's attorney, $ 250,000 to be paid by the husband to the wife's attorney within 30 days of the date of this decision and $ 250,000 to be paid by the husband to the wife's attorney within 120 days of the date of this decision, without notice of entry.

This opinion constitutes the decision and order of the court.

Dated: September 28, 2007

Hon. Laura E. Drager

S. H., Plaintiff v. E. S., Defendant, Caseindex_

November 18, 2014

Cite as: S. H. v. E. S., xxxxxx, NYLJ 1202676582939, at *1 (Sup., WE, Decided October 24, 2014)

Caseindex_

Justice Linda Christopher

Read Summary of Decision

Decided: October 24, 2014

ATTORNEYS

Attorneys for the Plaintiff: Teitler & Teitler LLP, New York, NY.

Attorneys for the Defendant: Cohen Clair Lans Greifer & Thorpe LLP, New York, NY.

AMENDED DECISION AFTER TRIAL[1]

*1

This action for divorce was commenced on November 4, 2009. On September 8, 2011 the Court granted defendant a divorce based on cruel and inhuman treatment. The plaintiff did not contest the divorce. The parties entered into a stipulation entitled Custody and Parenting Agreement on September 9, 2010. The Court held a trial for 28 days on the issues of equitable distribution, child support, professional fees and maintenance over a period commencing September 8, 2011 and concluding January 23, 2012. The trial did not continue day to day due to some medical issues of one of the trial attorneys as well as certain scheduling issues of the attorneys and the Court. Upon conclusion of the trial, the Court took an unexpected medical

leave of absence that extended for the better part of 2012.

The witnesses who testified before the Court included both parties as well as a number of

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experts whose reports were also submitted into evidence:

Experts

Reports from the following experts were submitted by the Husband:

a. Jonathan Miller, Michael J. Grassi, Richard A. Carlson, Miller-Samuel, Inc. — expert and reply reports for Westchester County House, Amagansett Beach House and Westchester County House #2.

b. Joan Lipton, ParenteBeard LLC. — Expert and Reply Report for Expense Analysis and Compensation

c. Rona Wexler, Wexler Consulting LLC. — Expert Report Reports from the following experts were submitted by the Wife:

a. John R. Johnson and Thomas A. Hutson, BST Valuation & Litigation Advisors, LLC — expert report and reply report.

b. Peter N. Davidson, MBA, ASA, Peter N. Davidson Co. — expert report and reply report.

c. John Philip Mason, Mason Appraisal Services — expert report and reply report.

d. Steven M. Kaplan, CPA/ABV, MBA, Eisman, Zucker, Klein & Ruttenberg, LLP — expert report and reply report.

e. Lynn Mizzy Jonas.

Christopher Gaillard, Jason Preston, and Edward Lewand of Gurr-Johns International were retained jointly by the Husband and the Wife and issued expert reports to both with respect to the valuation of personal property. The parties agree upon the valuations contained in these reports.

At the conclusion of the trial, the Court reserved decision, and the Court received post trial memoranda, as well as Stipulations compiled and submitted by each side.

After considering the testimony of the parties and the witnesses, a careful review of the

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documents admitted into evidence which include numerous "plan" documents and expert reports that the Court spent many, many hours reviewing, the parties' Net Worth Statements, Stipulation of Facts Not in Dispute and the post trial memoranda, the Court makes the following findings of facts deemed established by the evidence and reaches the following conclusions of law.

Divorce Grounds

After inquest, the defendant is granted a divorce on the ground of cruel and inhuman treatment by the plaintiff. The plaintiff did not contest the defendant's testimony on grounds and consented to the divorce to defendant based on cruel and inhuman treatment.

Background

The parties were married on —, 1994. The action for divorce was commenced on November 4, 2009. Plaintiff, S. H. ("Husband"), was born — 1964 (age 46 at the time the trial commenced). Defendant, E. S. ("Wife"), was born on —, 1965 (age 46 at the time the trial commenced).

The parties have four children, R. H., born on —, 1994 (age 17 at the time of trial), social security number xxx-xx-xxxx, W. H., born on —, 1996 (age 15 at the time of trial), social security number xxx-xx-xxxx, G. H., born on —, 1999 (age 12 at the time of trial), social security number xxx-xx-xxxx, and A. H., born on —, 2002 (age 9 at the time of trial), social security number xxx-xx-xxxx.

The issues of custody, access and decision-making were resolved by a Custody and Parenting Agreement dated September 2010. The terms will be incorporated by reference into the Judgment of Divorce.

The parties jointly own a house known as Westchester County House, New York. The parties purchased the marital residence in or about —, 2005 for $8 million and the house is

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encumbered by both a home equity line of credit and a mortgage. The parties made significant improvements to the residence.

The Wife presently resides at Westchester County House, New York, with the parties' children.

The Husband presently resides at Westchester County House #2, New York, which he purchased in or about —, 2010, with his separate property.

The parties jointly own a house known as —, Amagansett, New York (the beach house). This house was purchased in or about —, 2000 and is currently encumbered by a mortgage. They agreed upon its value at $7,425,000.

The parties' jointly owned vacation properties known as Weeks 10 and 47 at the —, Colorado. They have been sold and the net proceeds from the sale were divided equally between the parties pursuant to the Stipulation dated September 10, 2010 ("September 10, 2010 Stipulation").

The parties did not value their interests in either H., Ltd. or R., LLC, and such interests are to be divided equally upon sale pursuant to Stipulation dated September 10, 2010.

Each party took an advance against equitable distribution and agreed to payment of interim living expenses pursuant to a Stipulation dated January 2010 (the "January 2010 Stipulation"). The complete terms and conditions of the January 2010 Stipulation are incorporated herein by reference.

Each party received from the parties' joint Bank account an advance on equitable distribution pursuant to Stipulation dated April 2010 (the "April 2010 Stipulation"). The complete terms and conditions of the April 2010 Stipulation are incorporated herein by reference.

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Each party received as an advance on equitable distribution securities from the parties' joint B.'s investment account -3798 and distributed other assets pursuant to the Stipulation dated October, 2010 (the "October 2010 Stipulation"). The complete terms and conditions of the October 2010 Stipulation are incorporated herein by reference.

The parties entered into a confidentiality Stipulation concerning documents or information relating to B. PLC and Bank Capital, dated June 17, 2010. The complete terms and conditions of the Confidentiality Stipulation are incorporated herein by reference.

The parties entered into another stipulation regarding interim living expenses on June 1, 2011, the complete terms and conditions of which are incorporated herein by reference.

Plaintiff was employed by prior Bank from July 1993 until September 2008 at which time prior Bank went bankrupt and as of September 2008 Mr. H. ceased to be employed by prior Bank. The Husband's employment with Bank Capital commenced on September 22, 2008.

The Wife was employed by M. A. & S. from the summer of 1987 through February 1994.

The parties' children, ages 17, 15, 12 and 9, each attended private schools.

STIPULATED ASSETS AND VALUES

C. Accounts

Plaintiff's C. Checking Account x7117 had a balance of $0.00 as of the date of commencement.

Plaintiff's C. Account x0638 had a balance of $0.00 as of November 1, 2009.

F. R. ("FR") Accounts

Plaintiff's FR-6274 had a balance of $2,194 as of November 1, 2009. This is the Husband's separate property.

W. ("W") Accounts

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Defendant's W-0605 had a balance of $17,760 as of November 6, 2009. This is the Wife's separate property.

Defendant's W-2130 had a balance of $14,098 as of November 6, 2009, which is marital property.

Defendant's W-7367 had a balance of $12,821 as of November 6, 2009. This is the Wife's separate property.

Defendant's W-9190 had a balance of $47,587 as of November 6, 2009, which is marital property.

Bank ("B") Accounts

The joint B-3798 had a balance net of margin debt of $13,400,175 as of November 1, 2009. This account had a balance net of margin debt of $15,406,788 as of July 31, 2011. This account is marital property.

Plaintiff's B-0957 had a balance net of margin of $3,393, 463.78 as of July 31, 2011. This account is the husband's separate property.

Plaintiff's F. 401k Account # 4452

The marital portion shall be distributed equally between the parties by QDRO or other order.

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Prior Bank Pension Plan

The marital portion will be QDRO'd pursuant to Stipulation of the parties.

Westchester County House

Agreed fair market value of property is $7,600,000. Mortgage as of July 15, 2011 — principal balance $1,995,322. HELOC as of July 15, 2011 — principal balance $1,189,808. Wife's installation of pool — Wife to receive a credit of $100,000. Wife's completion of Nanny Suite — Wife entitled to a credit (no stipulation as to the value of the credit). Westchester County House Furnishings — Wife entitled to keep and to be assessed the value pursuant to Stipulation of the parties.

Amagansett House

Stipulation FMV is $7,425,000. Furnishings to be dealt with pursuant to Stipulation. No Stipulation as to the distribution of the asset.

— P. Road

Purchased by Husband with advances against equitable distribution; this is the Husband's separate property. Furnishings and 2008 Aston Martin pursuant to Stipulation.

2009 Suburban and ES 2009 Lexus GX470

Husband to keep his Suburban/Wife to keep her Lexus. Wife to pay Husband $6,500 to equalize.

Bank 2010 and 2011 Share Value Plan (SVP)

Husband's separate property pursuant to Stipulation.

Bank 2011 Contingent Capital Plan

Husband's separate property pursuant to Stipulation.

Bank 2010 Plan Cycle Capital Value Incentive Plan

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Husband's separate property pursuant to Stipulation.

Bank 2010 Cash Value Plan (CVP)

Husband's separate property pursuant to Stipulation.

Frequent Flyer/Hotel Points

Agreed to pursuant to Stipulation.

Children's Accounts

To be maintained as they are currently set up.

Business Interests

H., Ltd. — To be sold pursuant to Stipulation and proceeds divided equally.

R., LLC — To be sold pursuant to Stipulation and proceeds divided equally.

— Colorado Weeks 10 and 47

Sold pursuant to Stipulation and proceeds equally divided.

MLP's

Master Limited Partnership shall be divided equally between the parties including embedded taxes. (The issue of imbedded taxes continued past the trial with the parties arguing what they agreed to.) As a result of the parties being unable to agree on the issue of the embedded taxes of capital loss carry forwards, the parties shall divide the assets "in kind" that contain such capital loss carry forwards.

R. M. LLP

Husband's separate property.

*9

Other

Defendant's C. S. B. IRA Account xxx-xxx-xxxx-xxx had a balance of $141,220 as of July 31, 2011. This account is the Wife's separate property.

Defendant's C. S. B. Account xxx-xxxxx-xx-xxx had a balance of $4,723,849 as of July 31, 2011. This account is the Wife's separate property.

The Facts and Analysis

Mr. H., who worked his way up from modest means, graduated from NYU Business School with an MBA in the early 1990's and began working full time with O. the same year, in their equity research department. In 1993, he started with former Bank. In March, 1994, he became a father and married Ms. S. the same year. Ms. S., who prefers to be called "B." is a 46 year old (at the time of trial) graduate of Trinity College. While employed by M. A. & S., she was a stock analyst who passed three levels of the CFA exam. At first, the parties were living in B., New York. Within a year, they moved to L., New York. They soon bought a house in Westchester County (prior to the second home they bought in Westchester County where the defendant currently lives.) It was approximately 5300 square feet on 2/3 acre. They renovated the house and bought the lot next door. The parties sold the house in 2005 for $2,995,000 and the lot for $950,000.

Mr. H.'s schedule called for him to generate work very early during the week and afforded him weekends off to spend with his family. He was actively involved as their Little League coach, with soccer and other sports. Mr. H.'s adjusted gross income for the years 1997 — 2010 was as follows:

1997 — $1,821,563 (Ex 327)

1998 — $1,676,000 (Ex 328)

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1999 — $1,854,696 (Ex 329)

2000 — $2,081,091 (Ex 331)

2001 — $3,601,482 (Ex 331)

2002 — $4,938.970 (Ex 330)

2003 — $7,294,030 (Ex 147)

2004 — $5,900,762 (Ex 146)

2005 — $15,127,479 (Ex 145)

2006 — $10,624,565 (Ex 144)

2007 — $10,168,407 (Ex 143)

2008 — $2.8 Million (Ex 80)

2009 — $4.8 Million (Ex148)

2010 — $3.6 Million (Ex 299)

Between 1997 — 2004, the parties sold their first beach house and bought another. They bought more cars and began to employ more help.

As shown above, Mr. H.'s income surged in 2005 as a result of both increased income and vesting of deferred compensation. As he testified, the parties decided to "buy and renovate a mansion". In 2005, they sold first Westchester County Home and moved into second Westchester County Home, which is 15,000 square feet, 35 rooms on 4.5 acres. Mr. H. described the result as a "disaster". The parties lost $4 — $5 million and they engaged in marital strife over the maintenance and renovation of the house.

The cost to the parties of maintenance, property taxes, domestic help, renovation costs, and landscaping all increased dramatically, as did the household staff. The parties embarked on major renovations and B. went off to Europe and India to find furniture and rugs appropriate for

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their mansion. In 2006, Mr. H. earned $10,624,565 (Ex 144). In 2007, he earned $10,168,407 (Ex 143).

As early as 2003, the parties smartly decided to diversify their investments into non-Wall Street connected investments, such as coal, natural gas and health care. These and other investment decisions were made by the parties together. The defendant's experience as a stock analyst was helpful as she studied and made investment decisions with plaintiff.

Mr. H. remained at former Bank through the fall of 2008, despite their filing for bankruptcy in September, 2008. Unfortunately approximately 50-60 percent of Mr. H.'s annual compensation had been deferred for five (5) years. Hence, when former Bank went bankrupt, the H.'s lost about $20 million.

Nevertheless in 2008, with a new employer, Bank, Mr. H. earned $2,809,903 (Ex 80). The breakdown of his compensation (as opposed to earnings) is as follows:

$200,000 Base

$2,910,000 Cash bonus received in February 2009 and reported on 2009 tax return

$890,000 EPP Incentive Award Plan (not received at time of trial)

(The parties split the cash bonus award received February, 2009 50/50 pre-commencement.)

His position there is Director and Head of a major Division of a major bank. In 2009 his income was $4.8 million. In 2010, it was $3.6 million.

DISCUSSION/ANALYSIS

Equitable Distribution

The premise of the equitable distribution law is that "a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or

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homemaker." O'Brien v. O'Brien, 66 NY2d 576, 585 (1985). "The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends 'not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home (citations omitted).'" Price v. Price, 69 NY2d 8, 14 (1986).

Although equitable distribution does not necessarily mean equal distribution, the general rule calls for an equal distribution of the marital assets, unless the equities of an individual case require an unequal distribution. See, Conner v. Conner, 97 AD2d 88, 96 (2nd Dept. 1983). The basic premise of equitable distribution is that

'modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and the ability to pay. From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal, and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case.'

Conner, 97 AD2d at 96, citing, 11C Zett-Kaufman-Kraut, N.Y.Civ.Prac., Appendix B, p.8.

'"The trial court is vested with broad discretion in making an equitable distribution of marital property'…and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed (citations omitted)." Michaelessi v. Michaelessi, 59 AD3d 688, 689 (2nd Dept. 2009). At the time of the commencement of this action, Domestic Relations Law §236B (5)(d), required the Court to consider the following 14 factors in making an equitable distribution of the marital property:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

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(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) the loss of health insurance benefits upon dissolution of the marriage;

(6) any award of maintenance under DRL §236 B(6);

(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(8) the liquid or non-liquid character of all marital property;

(9) the probable future financial circumstances of each party;

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(14) any other factor which the court shall expressly find to be just and proper.

Marital property is defined in Domestic Relations Law §236 B(1)(c) as "all property acquired by either or both spouses during the marriage…" Separate property is " property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse…". DRL§236 B(1)(d)(1). Under the law of equitable distribution, there is a presumption that all property acquired by either spouse during the marriage is marital property. See, DRL§236 B(1)(c). Separate property also includes "property acquired in exchange for or the increase 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." DRL§236 B(1)(d)(3).

Guided by these principles of law, the statutory factors, and the equities of the parties'

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circumstances, the Court makes an award of equitable distribution of the marital property as set forth below.

CONTESTED ISSUES AND DETERMINATION

Classification of Assets

Unfortunately, the parties in this case were unable to agree upon how to equitably distribute much of their marital estate which included significant assets. In particular, many of the various bonuses received by plaintiff incident to his employment were contested as to whether they

were separate or marital property and if marital, what portion defendant would be entitled to receive as her equitable share.

Special Cash Award (SCA)

This is an award of $1,750,000 that plaintiff received pursuant to the employer letter of September 26, 2008 (TR Ex 102) when S. H. joined Bank. The SCA was given to plaintiff upon joining Bank; half payable on the first anniversary of his starting date September 22, 2009 (referred to by his attorney as the first retention bonus) after tax amount of $470,000 and the remainder payable on the second anniversary of his starting date (referred to as the second retention bonus) also $470,000 after taxes and paid September 22, 2010. The parties agreed that the first half was marital. The issue before the Court relates to the second half. The award letter reads,

"It is understood that you must be in active working status at the time the payments are due in order to receive them. Future *bonus* payments will be discretionary unless expressly stated otherwise in accordance with Bank practice." (emphasis added)

(TR Ex 102)

Plaintiff's position is that the second payment is only partially marital and that the Court should use the analysis set forth in DeJesus v. DeJesus, 90 NY2d 643 (1997). Defendant argues it is all marital and subject to an equal split without a DeJesus diminution. She claims that the

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award was, essentially a "signing bonus" and or "replacement compensation" resulting from the husband's commencement of new employment with Bank following the bankruptcy of former Bank, his former employer. The Court agrees with defendant. The "Offer of Employment" letter, itself, refers to the Special Cash Award as a bonus when it cautions that, "…future *bonus* (emphasis added) payments will be discretionary unless expressly stated otherwise." (Tr Ex 102) This Special Cash Award was not based on plaintiff's performance nor that of the Company's. It came due only two years after signing on. He simply had to remain employed.

The Court concludes this upon a review of the DeJesus decision. DeJesus requires that, in certain cases, one should apply the "DeJesus formula", whereby "the numerator is the period of time from the date of the grant until the end of the marriage…and the denominator is the period of time from the date of the grant until the stock plan matures." Id. at 652. The marital property may then be equitably distributed. However, before one applies this formula to apportion the marital share, one must first determine whether the asset in question is one that calls for the use of said formula. In DeJesus, insufficient testimony and evidence existed to make such a determination and the matter was remitted to the trial Court to determine what, if any, portion under consideration with DeJesus was for past compensation and what, if any, portion was incentive. The Court of Appeals directed the trial court to consider the following factors: Was this a reward for past services, as a valued employee or to incentivise Mr. DeJesus to retain him as an officer? Were the plans part of a "key employee compensation package?". Id at 651. What did the stock plans represent and how was the husband's entitlement calculated? Id.

These questions illuminate the issues courts must consider in determining whether a DeJesus analysis applies.

Regarding the case before the Court, each party presented expert testimony and offered copies of plans and letters. This Court's opinion based upon a review of all the evidence, is as

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follows: Mr. H. is a highly compensated employee as Director and Head of a major Division of a major bank. One million seven hundred fifty thousand dollars was awarded to him on September 26, 2008, pursuant to the letter offering him employment that he accepted. Pursuant to said terms, there are no specific requirements that plaintiff must meet to receive the Special Cash Award, other than remaining employed. While anyone would admit that just remaining employed in S. H.'s position is no small feat, there remains the DeJesus requirement that this award be determined marital if it fails to meet certain criteria laid out by the DeJesus Court. Defendant argues that property acquired during the marriage is presumed to be marital property absent clear and convincing evidence to the contrary. The burden of demonstrating that property acquired during the marriage is separate property is upon the spouse who seeks to retain the property for himself.

DRL §236B(l)(c) defines "marital property" as "all property acquired by either or both spouses during the marriage and before…the commencement of a matrimonial action, regardless of the form in which title is held." In the seminal case of Price v. Price, 69 NY2d 8, 15 (1986), the Court of Appeals reaffirmed that "marital property" should be read as broadly as possible:

The Legislature, in defining this basic term "marital property", we have held, intended that the term should be construed broadly in order to give effect to the "economic partnership" concept of the marriage relationship recognized in the statute (see, Majauskas v. Majauskas, 61 NY2d 481, 489, 490). The term "separate property", on the other hand, which is described in the statute as an exception to marital property, we have stated, should be construed narrowly (Majauskas v. Majauskas, supra, at p. 489).

Id.

In keeping with this mandate, there is a strong and clear presumption in favor of classifying an asset as "marital" where, as here, it was acquired during the marriage, and courts routinely reject separate property claims asserted over property acquired during the marriage.

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See, Raviv v. Raviv, 153 AD2d 932 (2nd Dept. 1989) (husband failed to overcome presumption that option to purchase property, acquired during the marriage, was marital property); Lischynsky v. Lischynsky, 120 AD2d 824 (3rd Dept. 1986) (real property purchased during marriage presumed to be marital, notwithstanding husband's claims to the contrary). A party

seeking to show that property is separate must overcome the marital property presumption by clear and convincing evidence. In Parker v. Parker, 240 AD2d 554, 555 (2nd Dept. 1997), for example, the Second Department rejected the husband's claim that property inherited from a family member and property gifted to him by another family member were his separate property because his claims "were not established by *clear and convincing evidence*"(emphasis added). Id.

In the instant case, the Special Cash Award to plaintiff of $1,750,000 was made on September 26, 2008 (paid out over two payments). The Court agrees with defendant that this was, essentially, a "signing bonus", and was fully "vested" prior to the date of commencement. He met all of the criteria necessary to receive the award at the time the award was made. There were no corporate or personal performance conditions to be met in order to receive the award. It would be forfeited only if the plaintiff voluntarily resigned or was terminated for cause. One might argue as plaintiff did, that this was an incentive award because the delay in receiving the award was an incentive to keep plaintiff employed. However, if all such awards were determined incentive awards, then the DeJesus Court might simply have said, "If the award is delayed, it is an incentive award." It did not.

Based on the entirety of the circumstances of this case, the Court views the Special Cash Award as a signing bonus with payments made over the course of two years, and finds the award is a marital asset subject to equitable distribution without a DeJesus diminution. The Court awards defendant 50 percent of the Special Cash Award.

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The 2008 EPP Award

Plaintiff's new employment was convenient to him as apparently he did not even need to move his office because he stayed in the same physical space. However, this convenience became a source of contention as plaintiff argued new employment/new compensation package, and defendant argued same office/not really new compensation package. Defendant claims that when viewing plaintiff's compensation package, particularly those items that require years to vest, essentially, plaintiff just had to be employed and alive, in order to collect at the end of the vesting period. Moreover, he did not really change jobs, she claimed. Proof positive was that he occupied the same corner office. Plaintiff responded that these packages were much more akin to discretionary, long term incentive awards designed to retain key employees. (See Ex 68).

The "Plan" documents were used by the Court to assess marital versus separate allocations. (Ex 68). According to the plan, if an employee leaves to go to work for another company, the award is forfeited. If he dies, it is not. Things in the employee's control result in forfeiture as opposed to things not in his control. (Trial transcript p 449). However, plaintiff's 2008 $890,000 EPP Inventive Award, is an Executive Share Award Scheme Equity Participation Plan. "EPP is an equity based award consisting of three key components — basic award (423,928 shares), plus 20 percent bonus award (84,786 shares) and 10 percent bonus award (42,393 shares). The award shares are provisionally granted and released (*at the discretion of the trustees of the plan*) (emphasis added) over a period of three to five years. Dividends received are normally

awarded as additional shares and released at the same time." (Ex 68, p 2)

Defendant's expert, John Johnson, argued that this award was compensatory and hence, the Court should determine it is 100 percent marital.

According to the EPP Brochure (e.g. "Bank's Capital Guidance Notes"), it explicitly states that its primary purpose is to align key employees' interests with those of Bank Group Shareholders. This is an incentivizing purpose. According to ParenteBeard's report by Joan

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Lipton, the Guidance Note for Equity Participation Plan specifically states the EPP awards are designed to reward and retain key individuals by allowing them to share in the long-terms growth and success of the Company during their continued employment. (Ex 69, p 2)

Unvested compensation that is granted as incentive for future services, and requires future employment to vest is separate to the extent of the required future employment. See, DeJesus, 90 N.Y.2d at 646, 652-53 (marital portion excludes that portion of the grant or award that "come[s] into being during the marriage but [is] contingent on the spouse's continued employment with the company after the divorce."); Caffrey v. Caffrey, 2 A.D.3d 309 (1st Dept. 2003) (marital portion of stock options granted during marriage as incentive for future services but which vest after the commencement of the action, should be determined utilizing the fractional formula in DeJesus); Pudlewski v. Pudlewski, 309 A.D.2d 1296 (4th Dep't 2003) (plaintiff's share of stock options received by defendant as incentive for future continued performance properly calculated using formula set forth in DeJesus).

Plaintiff's expert, Dr. Lipton, propounded two alternative analyses of the $890,000 EPP award (both using the DeJesus analysis) that "cliff" vests. The first assumption is that Mr. H. holds his basic and 20 percent bonus shares after they vest on April 27, 2012 but then sells them before the fifth anniversary of the grant, that is before April 27, 2014. The second analysis is based upon him holding onto the shares past April 27, 2014 and thus being entitled to the 10 percent bonus shares. There is no information before the Court that would call for Mr. H. selling his shares before April 27, 2014 (such as economic necessity for example), so the Court chooses the second variant. Using this analysis, results in an aggregate marital component, including dividend shares, of 94,163 and the aggregate separate component of 463,308 shares. This analysis is based on the precepts set forth in DeJesus v. DeJesus, used by plaintiff's expert in arriving at these proportions. The Court agrees with Dr. Lipton's analysis and finds that this was an incentive type award, given to incentivise Mr. H. to come on board, stay and work hard and, of

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course, deliver. All of which he apparently did. The Court awards defendant 50 percent of the marital share as calculated above by Joan Lipton.

The Incentive Share Plan

The Incentive Share Plan (ISP) was granted to plaintiff on April 30, 2009 pursuant to letter dated May 5, 2009. (Plaintiff's Tr, Ex 133). Plaintiff was awarded 54,799 shares and has also accrued 633 accrued dividend shares at a price of 2.51726 British Pounds. Upon issuing the award letter, A. Trust (the designated Trustee of the Plan) wrote, "Your award is in the form of a provisional allocation, which means that we have earmarked Incentive Shares for release to you in three years time, *but you have no right to them or any interest in them until any release is made to you* (emphasis added). We will normally consider releasing your Incentive Shares to you on the third anniversary of your award dates." (See Ex 140).

Plaintiff's expert, Joan Lipton, quipped that the very name of the Plan, "Incentive Share Plan", denotes it's character as one of incentive. Defendant countered that it was fully "vested" prior to date of commencement. The Court disagrees. The language, "…but you have no right to them [the shares] or any interest in them until any release is made to you," belies defendant's claim. The ISP shares cliff vest after three (3) years, garnering them a 17.2 percent marital designation. (See Ex 199) The Court awards defendant 50 percent of said marital share.

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Cash Value Plan and SVP Shares

The cash value plan and the SVP shares were granted after commencement and are separate property (See Ex. 68 and 69), pursuant to stipulation.

2009 CVIP Plan

The Capital Value Incentive Plan (CVIP) is another award given by Bank to eligible executives who were recommended for participation. "Participants in the Plan are the most highly valued executives in the firm and membership is a reflection of my assessment of your past and potential future contribution to exceptional business performance." (Tr Ex 138). What makes this asset complicated in determining its character, whether marital or separate, is that it was "awarded" in August, 2010, but "recommended" in 2009 (the precise date is unknown) for plan cycle 2009 — 2011.

That this is an incentive award is unchallenged. To participate in the pool of the available award, the executive's area must meet certain goals. As set forth in BST's CVIP Report, at p 3, the plan documents state that the aims of the CVIP are as follows:

(1) create an opportunity for participating executives to earn additional rewards for continued superior performance over and above any annual discretionary incentive award bonuses they received, (2) encourage a strong focus on the medium term performance of Bank Capital as a whole, and (3) encourage and reinforce cross-business co-operation and vision and to foster a partnership culture amongst senior executives.

Any Award made under the CVIP plan is not considered part of the executive's "Total Compensation" (see SRH07320 at Appendix E). It is over and above the total compensation provided to each participating executive each year.

The report sets forth when awards are used:

A CVIP Plan Award is made to a participant if: (1) the Plan Cycle has ended and the performance goal is achieved (hurdle rate is exceeded), (2) the Remuneration Committee, after consulting with the Group Chief Executive and Chief Executive, decides that the participant's performance merits an Award, (3) the participant is employed by Bank and is not working out a period of notice on the

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date the Awards are made, and (4) the Remuneration Committee determines that the underlying financial health of the Bank Group has not significantly deteriorated over the relevant Plan Cycle. If a participant is dismissed for misconduct before the release date of any ESAS shares awarded under the plan the Remuneration Committee will recommend that their provisional allocation should lapse. If a Participant leaves for any other reason the Group Chief Executive and Chief Executive will, at their discretion, make a recommendation as to whether any ESAS shares and Associated Dividend Shares should be released by the ESAS Trustee (see SRH07324 at Appendix E).

Plaintiff argues that the award was not made until August, 2010. Hence the award is separate property, pure and simple. According to Dr. Lipton, the fact that the award was recommended in 2009 is irrelevant. It is the award date that controls. Plaintiff argues that because the value of the CVIP Award will not be determined or distributed to him until after the commencement of this action, the award is entirely his separate property. This argument is noteworthy but unpersuasive because: 1) The asset is as set forth above, is clearly an incentive award; 2) A portion of the award is for work done during the marriage (most of 2009); and 3) The third prong, resting on when the award was given, resolves in favor of the wife. The question presented is, was the award made when Mr. H. was recommended to be included in this Award Pool (sometime in 2009) or, was it made when he got the letter advising him of his inclusion in August, 2010? Here, the argument resolves in favor of the wife because first, the asset is marital unless shown to be separate by clear and convincing evidence. Parker, 240 AD2d 554. Second, it was for work done during the marriage. Failing to put forth proof that this is separate property, plaintiff's position fails and causes the Court to find in favor of the wife for some of the reasons set forth below.

The Court of Appeals directs that "…under the broad interpretation given marital property, formalized concepts such as 'vesting' and 'maturity' are not determinative." DeLuca v. DeLuca, 97 NY2d 139, 144 (2001). Rather, the Courts are charged with fostering a "a view of marital property that emphasize[s] the purpose of the [plan]…[and] [t]o the extent such plans

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[are] compensation for past services, the fact that they came into being shortly before the divorce [is] not determinative of their status as marital property." Id. at 45. Whether an award relates to past services or is an incentive for future services, the relevant inquiry is whether and to what extent the benefit is attributable to the years of service rendered by the participant during the marriage and not the date on which the value of the award is determined or paid to the titled spouse. DeLuca, 97 NY2d 139, DeJesus, 90 NY2d 643 (1997).

In Olivo v. Olivo, 82 NY2d 202, 207 (1993), considering a pension, the Court of Appeals stated:

Even though workers are unable to gain access to the money until retirement, their right to it accrues incrementally during the years of employment. Thus, that portion of a pension based on years of employment during the marriage is marital property.

At issue in Olivo was whether a nontitled spouse was entitled to share in an early retirement incentive award made after the divorce was finalized, where the titled spouse's pension was subject to a Qualified Domestic Relations Order providing the nontitled spouse with a pro rata share based on the "Majauskas" formula [see, Majauskas v. Majauskas, 61 N.Y.2d 481 (1984)], i.e., calculated on the basis of the number of years of marriage and working as a fraction of the total number of years of employment. Specifically, the early retirement incentive award allowed retirees to collect full pension benefits even though they had not worked the requisite number of years. Olivo, 87 NY2d at 205-206.

The Court of Appeals concluded that the value of the pension would necessarily change by factors beyond the control of either party after the judgment of divorce was entered and those changes (such as an early retirement incentive benefit or the final salary level achieved by the employee spouse) do not affect the nontitled spouse's entitlement. The Court reasoned, that, " [w]hat the nonemployee spouse possesses, in short, is the right to share in the pension as it is ultimately determined…" and that "…the enhancement was a modification of an asset not the

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creation of a new one." Olivo, 82 N.Y.2d at 210.

This analysis has repeatedly been employed. For example, in Beiter v. Beiter, 67 AD3d 1415 (4th Dept. 2009), which also involved an early retirement incentive, the appellate court cited to Olivo, DeLuca, (discussed infra), and Majauskas, to reject plaintiff's contention that the post divorce change in his pension plan allowing him to receive benefits after only 20 years of service as opposed to 25, which occurred after the commencement of the divorce action, resulted in a new benefit that was his separate property.

In Osorio v. Osorio, 84 AD3d 1333 (2nd Dept. 2011), the wife had been employed and contributing toward her pension with AT&T during the marriage. Pursuant to the judgment of divorce, the husband was entitled to receive his pro rata Majauskas share of the pension. The wife was subsequently terminated but was thereafter hired by Lucent, whose pension plan credited the years of service with AT&T during the marriage, notwithstanding that the wife had started working for her employer Lucent well after the judgment of divorce was granted. The

Court found that "[t]o the extent the Lucent pension was compensation for past service to AT&T during the marriage, it constituted marital property (citations omitted)." Osorio, 84 AD3d at 1335.

There is also a presumption of marital property, premised on the contemporary view of marriage as an economic partnership, crediting each party's contributions, whether monetary or not, to the growth and value of the marriage, and their marital property subject to equitable distribution consists of a wide range of intangible interests which in other context might not be recognized as divisible property at all. See, O'Brien, 66 NY2d 576. The Court finds that a portion of the CVIP is marital. BST, by Thomas A. Hutson CPA/ABV CFP CFF, Partner, detailed the calculations of the wife's share as follows:

Mr. H. is a Participant in the 2009 Plan Cycle, which runs from January 1, 2009 through December 31, 2011, a total of 1,095 days. The date of commencement of the matrimonial action was

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November 4, 2009, 308 days after the start of the Plan Cycle.

Since 308 days out of a total of 1,095 days of the Plan Cycle occurred during the marriage, 28.127854 percent of the Award is marital property. The Award is expected to be delivered during the first few months of 2012 (see SRH07323 at Appendix E). Mr. D.'s letter to Mr. H. and the document titled "2009 Plan Cycle — A Brief Summary" indicate that it is expected that 50 percent of the 2009 Plan Cycle Award will be made in cash and that the other 50 percent will be delivered by means of a provisional allocation of Bank PLC shares under ESAS. Following the allocation of the shares in early 2012 the only thing necessary for the benefit to be realized is that Mr. H. remains employed for a stated period of time or until the shares are earlier released.

(See BST's CVIP Report.)

Defendant is awarded 50 percent of the 28.127854 percent of the award as if and when it is paid to Mr. H.

The One Off Payment

By letter dated December 17, 2009, plaintiff received a "one off" payment of $45,955 net of taxes in January, 2010. (See Tr Tr 125 and 1905). Essentially, in exchange for the payment, plaintiff agreed to give three months notice of intent to leave or forfeit the payment. Defendant seeks equitable distribution of this payment, arguing it is partial compensation for past services. The plaintiff submits it is received post commencement in exchange for plaintiff's agreement to provide three months notice of intent to leave employment. The Court agrees with plaintiff. This payment, while calculated based on the past employment, constituted post commencement compensation for future acts, i.e. in exchange for an agreement to abide by the terms of the agreement as it relates to future services. As the Court of Appeals found in Olivo, 82 NY2d 202 and reiterated in DeLuca, 97 NY2d 139 "a blanket 'length of service' rule…could lead to absurd results." Id. at 145. "…[P]ayments intended to compensate for events after the divorce, such as

severance pay, were separate property not subject to equitable distribution (citations omitted)." Id. Hence, the analysis in the instant case leads to the conclusion that the "one off"

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payment is not a form of deferred compensation. Plaintiff had no right to this payment during the marriage. Therefore, it is separate property and is awarded to plaintiff husband, not subject to equitable distribution.

Division of the Foregoing Awards

Plaintiff argues that Defendant should, in keeping with the direction taken by the Second Department in dividing business assets, receive an interest of less than 50 percent in the marital assets plaintiff earned while working at Bank.

He argues that defendant did not entertain his clients or business associates to any great degree, that he was off on weekends and available at that time for the children to as great an extent as his wife and that she, essentially, hired help to take care of the domestic chores, including cooks, housekeepers and chauffeurs for the children.

This Court disagrees with his argument requesting less than 50/50 division of marital assets. Plaintiff has confused the concepts used in cases involving the equitable division of a business owned by a party as opposed to that of the division of income and assets earned from working for a business. Plaintiff does not have an ownership interest in Bank other than the stock given as part of his compensation. However, this Court does not find that the ownership of a small (by comparison) amount of stock in this huge financial organization is the type of ownership interest the Appellate Courts had in mind when they refused to place an owner of a business in the poor house in order to pay his or her spouse their equitable interest, nor to double dip when an business owner is ordered to pay maintenance. Obviously, no professional license is at issue.

A review of cases dealing with this issue is instructive. In Grunfeld v. Grunfeld, 94 NY2d 696 (2000), the Court of Appeals, commenting on McSparron v. McSparron, 87 NY2d 275 (1995), wrote

Most significantly for the case at hand, McSparron also cautioned

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lower courts to "be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses" (id.). To allow such duplication would, in effect, result in inequitable, rather than equitable, distribution. In contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the

future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent, then that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged with distribution of the same marital asset value, or with sharing the same income with the nonlicensed spouse.

Id at 704-705.

The analysis in Keane v. Keane, 8 NY3d 115 (2006), commenting upon Grunfeld provides further illumination regarding the issues presented. The Keane Court wrote,

Double counting may occur when marital property includes intangible assets such as professional licenses or goodwill, or the value of a service business. As we said in Grunfeld, "[i]n contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the future labor of the licensee" (citations omitted). It is only where "[t]he asset is totally indistinguishable and has no existence separate from the [income stream] from which it is derived" (id.) that double counting results.

Here, the rental property was split between the parties for distributive purposes. The rental income from that property was then considered in determining maintenance. The property will continue to exist, quite possibly in the husband's hands, long after the lease term has expired, as a marketable asset separate and distinguishable from the lease payments. The mortgage payments, in contrast, were properly distributed as an asset and not counted for maintenance purposes because the payments themselves were the marital asset.

Id at 122.

The plaintiff's argument is inapposite to the issues before the Court. Plaintiff's assets to be divided were neither an intangible asset nor business to be distributed. Rather, the assets are

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more akin to the real property division referred to in Keane which would be equitably distributed and taken into account when determining maintenance.

Accordingly, defendant is awarded 50 percent of the SCA, 50 percent of the marital share of the 2008 EPP Award, 50 percent of the marital share of the ISP Award, and 50 percent of the marital share of the 2009 CVIP Award.

With regard to the Bank's incentive compensation being distributed in part to Ms. S., it is the net after tax proceeds of the awards that are to be divided.

The Westchester County House and the Beach House

The Westchester County House

The cost of running a mansion in Westchester comes at a price. Upon this, the parties agreed. They argued, however, as to the actual cost of maintaining the Westchester County house. They also argued as to what was a reasonable expense for certain construction and maintenance expenses. For example, they argued over whether it was appropriate for B. to put in full grown trees as opposed to less expensive, smaller trees but finally agreed upon a middle ground, only after presenting significant testimony on the issues. Likewise they disagreed as to the reasonable and necessary costs of a nanny suite.

Plaintiff sought the immediate sale of the residence, claiming there was too much conflict between the parties to allow them to retain it. Defendant sought exclusive possession until fall, 2017. At this time, G., the second youngest child, will be off to college, she argued. "[E]xclusive possession of the marital residence is usually granted to the spouse who has custody of the minor children of the marriage." Goldblum v. Goldblum, 301 AD23d 567, 568 (2nd Dept. 2003). In making this determination, "the need of the custodial parent to occupy the marital residence is weighed against the financial need of the parties." Id. While there is a preference for allowing a custodial parent to remain in the marital residence until the youngest child becomes 18, the court must consider the cost of comparable available housing in the same area at

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a lower cost and the parties' financial difficulties. See, Campbell v. Campbell, 286 AD2d 467, 468 (2nd Dept. 2001). In making such an award, the court "should give weight to the relative financial resources of the parties, the need of either party for occupancy of the home, and the duration of the exclusive possession." Ripp v. Ripp, 38 AD2d 65, 69 [2nd Dept. 1971), aff'd, 32 NY2d 755 (1973.) The court should consider such factors as "the cost of maintaining the home in comparison to the benefits received, the financial hardship suffered by either party by the refusal to authorize a sale of the property, the presence or absence of children to enjoy the use of the home, or the size and expansiveness of the home in relation to the expected use." Id.

In the case at bar, the defendant has already had the benefit of continued residence with the children in the marital residence; in essence, exclusive possession. The parties have been financially able to support this which has provided the children with a stable home. However, the oldest child left for college in 2012 (presumably) and W. will leave for college this fall. This will leave only two children at home. In an effort to give the parties an opportunity to resolve all outstanding issues set forth below (the Bank's 3798 account and final accounting and distribution of all accounts) and so as to provide defendant an opportunity to prepare for sale, the Court directs the parties to list the Westchester County residence for sale on or before March 1, 2015. In the interim, defendant will continue to have exclusive possession of the Westchester County house. For, while the parties may be able to afford to have defendant and children remain in the Westchester County house beyond 2017, it is a significant asset, it is expensive to maintain and the parties have had significant conflict over it. Furthermore, defendant and the children will have the Amagansett house.

Commencing April 1, 2010 the defendant shall be responsible for the carrying costs of the Westchester County house, including, but not limited to the mortgage, taxes, HELOC, homeowner's insurance and ordinary maintenance and upkeep, if any. Any major repairs, (defined as a repair in excess of $15,000 per repair), are to be agreed upon by the parties in

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writing, except in the case of an emergency. The cost of a major repair shall be shared equally by the parties. At the time of sale the defendant shall be entitled to a credit for 50 percent of difference between the principal balance of the mortgage on April 1, 2010 and the amount due at closing.

It is hereby directed that the Westchester County house be listed for sale at a listing price to be agreed upon between the parties and a broker to be agreed upon. If the parties are unable to agree upon a price, they shall list it at the agreed upon value of $7,600,000. If they are unable to agree upon a broker, they shall each choose one and the two brokers shall agree upon a third with whom the parties shall list the marital residence. Each of the parties shall receive one-half of the net proceeds after sale and payment of the mortgage and HELOC as well as the broker's commission, transfer tax and usual and customary costs of sale. In addition, the wife shall receive, prior to division of net proceeds, from the sale of the residence, the agreed upon sum of $100,000 (the cost paid by the wife for installing the pool) and the sum of $68,900 as credit to her for the expense of constructing the nanny suite. The total spent by defendant on the nanny suite was $68,902. This was a capital improvement to the marital residence and, as such, shall be paid for equally by both parties.

The Amagansett Beach House (The Beach House)

The parties stipulated to the value of the Beach House as $7,425,000 (Tr p. 1619). Plaintiff requests that the Court order it sold. Defendant asks that it be awarded to her. Plaintiff argues that she cannot afford it and if awarded to her, he should not be charged with a higher amount of maintenance caused by her retaining the beach house. (Plaintiff initially set forth in his statement of proposed disposition that it should be awarded to him then changed his request to ask that it be ordered sold. Defendant argues that this was a cloaked request to allow him to buy it away from her.) Plaintiff's argument is essentially that, owning the beach house would add too much in the expense column and B. could, just as easily, rent or buy a less expensive beach alternative. Defendant, on the other hand, argues that the beach house was important to

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the family life that she maintained. She and the children spent entire summers at the beach house, she argued, so plaintiff should simply pay her maintenance sufficient to enable her to continue her pre-divorce standard of living which included the beach house.

Hence, the issue of who gets the beach house is inextricably intertwined with the maintenance issue, discussed herein later.

The court views the issue as follows: Plaintiff first asked that it be awarded to him, claiming he was the first one to rent beach houses (before he even met B.) and that it is really his by right,

so to speak. While this might hold true for certain issues, (although none come to mind) the fact is, in this case, for years the family has vacationed at the beach house. As the defendant will be selling the marital residence (to be listed within a year), she has sufficient assets to "buy out" the plaintiff's share and the children will be able to continue to vacation in the beach house. The Court awards the beach house to defendant who shall pay plaintiff one-half the net value after deducting the mortgage and any HELOC from her share of the assets, said "buy out" to take place in coordination with the final accounting as set forth in this Decision.

Commencing April 1, 2010 the defendant shall be responsible for all the carrying costs of the beach house, including, but not limited to the mortgage, taxes, HELOC, homeowner's insurance and maintenance and upkeep, if any.

In support of this decision, the Court makes reference to the cases cited above in awarding defendant exclusive possession of the Westchester County house to the extent that this Court takes into account the fact that this was a home that was important to the lives of this family that spent its summers at the beach. It will provide continuity to the children, especially once the Westchester County house is sold.

The defendant argued that she should be entitled to deduct the capital gains tax she will have to pay upon the sale and transfer tax upon sale. In support of this proposal, defendant cites to a corporate dissolution decision. In the Matter of Edward Murphy, et al. v. United States

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Dredging Corporation, 74 AD3d 815 (2nd Dept. 2010). In this case, the Second Department actually found that the Supreme Court, "properly *limited* (emphasis added) the liability for taxes on unrealized capital gains, referred to as built-in gains, to the present value…The Supreme Court made this determination on its conclusion that the Corporation's intention was to hold its real property for a lengthy period of time…[T]he Corporation had sufficient cash to pay the judgment without liquidating any of its assets to which a built-in gains tax applied." Id. at 818.

If any analogy is to be made from a review of the case above to the case at bar, it is that one should not impute taxes as argued by defendant because she has no stated interest in selling the beach house. To reduce her buyout cost by a capital gains rate in effect today and transfer tax in effect today as well as a possible real estate commission is unreasonable given that she gave no indication that she would ever sell the beach house.

A. Club

The parties are joint members of the A. Club. There is no bond. Each party wants the Club membership awarded to them. The parties advised that the Club will not allow them to both continue to be members based on the contentious nature of their divorce. Plaintiff's argument is that defendant rarely uses it, unlike he who regularly golfs there and uses the facilities. Defendant claimed the family frequently used the Club for special occasions like Thanksgiving, the Christmas holidays, and birthdays. The husband argued that defendant, besides rarely using the Club, also has a pool at her home.

The Court hereby awards the A. Club membership to the husband. Particularly, as the defendant will have the year round use of the beach house, it seems only fair that plaintiff be awarded the Club membership.

Distribution of Assets

The following is partially agreed upon and the balance are Court determined awards:

Bank: F. R. ("FR" Accounts

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Name on Account

Account# Plaintiff Defendant Date Amount H W Marital

6258 X X DoC $65,187 X ag

+1,520 (paycheck)

(Bal. is Pl's.)

6266 1st ret. Bonus X DoC 17,854 X ag

6274 X DoC 2,194 X ag

7460 1st ret. Bonus X DoC 369,893 X ag

9536 X 0

5518 2nd ret.bonus X 470,575 X*

4245 CVP 3/10 X 116,000 X

* as determd by ct

W.

Name on Account Distribution

Account # Plaintiff Defendant Date Amount H W Marital

2130 X X DoC $14,098 Xag

9190 X X DoC 47,587 Xag

7367 X DoC 12,821 Xag

0605 X DoC 17,760 Xag

8326) Joint) — Husband DoC 1,700 Xag

2792) Joint) received Combined Xag

1249) Joint) Xag

M. S.

Name on Account

Account # Plaintiff Defendant Date Amount H W Marital

4507 (advance on E.D.) X 7/31/11 $4,723,849 Xag

C. S. B. IRA

Name on Account

Account # Plaintiff Defendant Date Amount H W Marital

2507 (see Stip of Facts not in dispute para. 39) X 7/31/11 $141,220 Xag

Bank

Name on Account

Account # Plaintiff Defendant Date Amount H W Marital

3798 X X 11/1/09 $13,400,175 Xag

(net of margin debt)

7/31/11 $15,406,788

(net of margin)

0957 X 7/31/11 $3,393,463 Xag

(net of margin)

F. L. Savings Plan

Name on Account

Account # Plaintiff Defendant Date Amount H W Marital

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4452 11/1/09 $195,187 X (Agreed to QDRO)

Prior Bank Pension Plan

Agreed to QDRO Marital Portion.

Claim Against Prior Bank

Defendant is awarded 50 percent of the value plaintiff may receive as a result of his claim against prior Bank for unvested stock owed to plaintiff at the time of the prior Bank's bankruptcy.

The Security Deposit for Q. Road

The security deposit for Q. Road shall be equally distributed.

PERSONAL PROPERTY

Plaintiff shall retain his Suburban and defendant shall retain her Lexus as his/her respective sole and separate property and defendant shall make a distributive award to plaintiff in the amount of $6,500 to reflect the difference in values between the vehicles, as agreed to by the parties.

Plaintiff shall retain the appraised personal property previously located at — Q. Road (including his jewelry and his Aston Martin car) and pay defendant $36,721, representing fifty (50 percent) of the value of said property.

Defendant shall retain the appraised personal property located at the Westchester County House (including her jewelry) and pay plaintiff a distributive award equal to fifty percent (50 percent) of the value of the property, in the amount of $86,298.

Defendant shall retain the appraised personal property located at the Beach House and pay plaintiff a distributive award equal to fifty percent (50 percent) of the value of the property, in the amount of $13,350.

The parties shall agree to the disposition of items regarding the children, including photographs and other items of sentimental value.

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Division of Property

All marital property shall be divided equally unless specifically determined otherwise. Interest

accrued on awards shall be divided in the same proportion as the award has been determined.

MAINTENANCE

"'The amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts'. 'The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become selfsupporting.'" Kilkenny v. Kilkenny, 54 AD3d 816, 820 (2nd Dept. 2006). "In fixing the amount of a maintenance award, a court must consider the financial circumstances of both parties, including their reasonable needs and means, the payor spouse's present and anticipated income, the benefitting spouse's present and future earning capacity, and both parties' standard of living (citation omitted)." Morrissey v. Morrissey, 259 AD2d 472, 473 (2nd Dept. 1999). "The main purpose of a maintenance award is to give the nonmonied spouse economic independence (citation omitted)." Giokas v. Giokas, 73 AD3d 688 (2nd Dept. 2010).

At the time of commencement of this action, DRL §236 B(6)(a) required the Court to consider the following factors in determining the appropriate amount and duration of maintenance:

1. The income and property of the respective parties including marital property distributed pursuant to subdivision five of DRL §236;

2. The duration of the marriage and the age and health of both parties;

3. The present and future earning capacity of both parties;

4. The ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

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5. Reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;

6. The presence of children of the marriage in the respective homes of the parties;

7. The tax consequences to each party;

8. Contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party;

9. The wasteful dissipation of marital property by either spouse;

10. Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

11. The loss of health insurance benefits upon dissolution of the marriage; and

12. Any other factor which the court shall expressly find to be just and proper.

In addition to these enumerated factors, the parties' pre-divorce standard of living is an essential component of evaluating and properly determining the duration and amount of the maintenance award to be accorded a spouse. Hartog v. Hartog, 85 NY2d 36, 50-51 (1995).

In determining a party's support obligation, "the court need not rely upon a party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential." Brown v. Brown, 239 AD2d 535 (2nd Dept. 1997). "[W]here a party's account is not believable, the court is justified in finding a true or potential income higher than that claimed." Rohrs v. Rohrs, 297 AD2d 317, 318 (2nd Dept. 2002).

The parties each spent considerable time and expense setting forth the plaintiff's realistic income and the defendant's realistic expenses as compared to her expected income.

Mr. H. is the proverbial self made man. He came from modest means, starting out as a teenager working in a gas station and ending up a world class financier. He took pains to explain that while he and defendant may now own a $8 million beach house in Amagansett, in addition

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to the mansion in Westchester County, he started out with a more pedestrian beach house that cost less than $1 million. Likewise, while the parties currently own the most prestigious house in Westchester County and certainly one of the premier mansions in Westchester, they only recently acquired such a luxurious home. Before this, they sold their home at — M. in 2005 for $3 million plus $1 million for the adjacent lot. All of this, he argues is a result of the parties' most recently acquired substantial wealth. During most of their marriage, they were "well off", not super rich. As a result, Mr. H. argues, Ms. S. is not entitled to continue this lifestyle of largess on his dime because the Great Gatsby life, as it were, was a flash in the pan.

Ms. S., however, looks to continue that to which she has become accustomed. She worked hard supporting her husband by managing the home and children, she argues. She downplayed the cooks and the drivers, the maids and the gardeners, with explanations such as, they simply dropped off pre-cooked food; she has four children to get to activities and she needs help getting them around.

As with most divorces, the answer lies somewhere in between these two divergent arguments.

While Ms. S. has devoted most of her married life to her family of four children and husband, she is not without substantial credentials. She herself worked in the world of finance and was a stock analyst until 1994. In fact, she has used her prowess in the financial field to pick stocks both with and without her husband. For example, after the parties separated, she chose Apple and did extremely well. But before the parties separated, she insisted, and her husband did not argue in the least, that she participate in choosing their portfolio. Unlike other women who have little to fall back on when the marriage dissolves, Ms. S. will be left with not only substantial

assets but the savvy and acumen to invest them wisely. Her argument aside, that she must invest mostly in very safe financial vehicles, Ms. S. will undoubtedly use her significant smarts and training to do quite well for herself.

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This does not mean, however, that Mr. H. should be entitled to go off as he will undoubtedly do and continue in his meteoric rise in the financial world making jaw dropping income, while Ms. S. is left with only her share of assets. Whether the parties lived their current lifestyle for years rather than decades, Ms. S. still gave up a lucrative career to be supportive to her husband and family. Mr. H. spent significant time with his children but Ms. S. was the family organizer and coordinator. Whether she had it done or did it herself, she made sure the family of six ran smoothly.

The following is the Court's analysis of the facts of this matter in consideration of the factors set forth in DRL §236 B(6):

1. The income and property of the respective parties, including marital property distributed pursuant to Domestic Relations Law section 236B(5).

Plaintiff argues that defendant wife should not receive maintenance for two reasons. First, he contends that to pay interim maintenance would amount to double dipping as he has, in essence, divided his income with her and secondly, she does not require long term maintenance based on her anticipated income from the assets that she can expect to have at the conclusion of the trial. In fact, when viewing this compared to her reasonable expenses, the husband argues, defendant will have a surplus.

The husband argues that the funds available to the parties prior to the first interim support stipulation dated January 22, 2010 were only the interest and dividends from the Bank Account #3798 and the 2009 Cash Bonus Award. All payments agreed to pursuant to this Stipulation were made without prejudice to any and all issues to be decided at trial, including retroactive spousal maintenance, child support, and professional and expert fees and disbursements and determination of equitable distribution (February 25, 2014 So Ordered Stipulation pp 5-6).

It is important to note, for a historical understanding of the parties' finances, that they actually separated in July, 2008. So, when Mr. H. received a cash bonus in February, 2009, he

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agreed to split it with his wife 50/50. The amount he received was $2.9 million, (Tr Transcript 123). Mr. H.'s income in 2009 was $4,846,796, (Tr Transcript p 125). It included the $2.9 million he received and split with defendant as well as his salary of $287,500. In addition, Mr. H. received, as part of his compensation package for 2009, a cash incentive award of $1,725,000 paid in February, 2010 and distributed to the parties, pursuant to Stipulation dated January 21,

2010, a share value plan of deferred stock paid out in thirds in 2011, 2012, and 2013 and a cash value plan as deferred cash (instead of stock) also paid out in thirds in 2011, 2012, and 2013. (Portions of which were determined to be marital.)

On her updated Net Worth Statement dated May 11, 2009, E. S. lists her net marital worth as $32,272,910. Her separate assets total $4,730,810. She lists monthly expenses of $105,265. She claims she requires $70,000 monthly maintenance to maintain her current lifestyle.

Mrs. S. spent the following according to the expert, Mr. Kaplan:

2005 — $1,369,869

2006 — 2,243,322

2007 — 1,461,491

2008 — 1,235,720 or $102,976/Month

2009 — 1,132,842 or $94,404/Month

(Tr Tr 2579-2581).

Plaintiff argues that defendant will walk away with between $15,730,599 to $13,230,395 of investable assets. He arrives at this conclusion by making the following assumptions if defendant receives 50 percent of the assets: There will be around $7,500,000 to be awarded to Ms. S. from the joint Bank Account (3798) net of margin; she will have $4,800,000 from her separate property previously divided; she will receive $2,782,000 from sale of the Beach House, $1,884,000 from sale of the Westchester County House (assuming she buys a house for $4,500,000 and takes out a $2,000,000 mortgage); $799,000 from sale of the businesses, $65,831

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from the 1st Tranche of the Bank Special Cash Award received September, 2009, net of taxes; $130,660 as her marital share of 55.6 percent of the 2nd Tranche of the Bank's Special Cash Award received September, 2010, net of taxes; $67,258 as her marital portion of $134,516 of the unvested Bank's Incentive Shares (2008 EPP of 89,677 shares) net of taxes; $7,131 as her marital share of the 2009 incentive share plan (9,508 shares); $33,296 from the F. R. 6258 and $7,049 from W. #2130 (marital); $23,794 from W. 9190 (marital); $12,821 from W. 7367 (Separate adv. on E.D.); and $1,776 W. 0605 (Separate adv. on E.D.). This excludes her share of her 401k, the husband's 401k and former Bank private equity (if any), personal property and autos.

After arriving at this figure, plaintiff argues that defendant, based on defendant's past investment behavior as well as the investment trends going back over a fourteen (14) year period, should be able to earn at least 3.5-4.5 percent investment income, after taxes. With this scenario, he argues, defendant will be in a surplus, especially in light of the fact that defendant's recent lifestyle is not the "marital lifestyle". Rather, it is "…the lifestyle of the few

years when Mr. H. had extraordinary income from appreciated stock in former Bank." (Plaintiff's Reply Trial Memorandum on certain issues p. 2). In support of this position, plaintiff presents an excerpt from N.Y. Law of Domestic Relations:

As the Hartog court cautioned, however, a lavish predivorce lifestyle will not be automatically preserved. For instance, in Pejo v. Pejo, [213 A.D.2d 918, 624 N.Y.S.2d 290 (3d Dep't 1995)], the court imposed a durational limitation on the wife's maintenance because financial reversals prevented the parties from maintaining their luxurious predivorce standard of living….. In Carr v. Carr, [291 A.D.2d 672, 738 N.Y.S.2d 415 (3d Dep't 2002)], maintenance of only one year was ordered despite the prior lavish lifestyle where the husband, an attorney, had sustained serious financial reversals and, under the circumstances, the court would not accept wife's contention that, despite her prior employment, she was under no obligation, other than dire necessity, to work.

A. Scheinkman, 11 N.Y.Prac., N.Y. Law of Domestic Relations, §15:5 ("Standard of Living").

Mr. H. argues that since former Bank went bankrupt, his income has fallen back to the

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levels of the years when the parties lived in a more modest home, their children attended public school and their spending levels were lower. Mr. H. puts forward evidence of his more modest current lifestyle. He resides in a house valued at $3.6 million and he rents a beach house for $35,000 monthly for eleven (11) weeks for $90,000 (Tr Tr at 1291).

Plaintiff laments that Ms. S. claims to be entitled to spend $100,000 monthly while residing in the Westchester County mansion and using the Amagansett Beach House. Moreover, he denounces her claim that she must adjust her investment strategy to one of little or no risk.

Plaintiff convincingly argues that defendant was fully informed (actually involved) in the joint investment account that produced capital appreciation of 7-3/4 percent — 12-1/8 percent plus 9 percent annual dividends (Tr Tr at 157; Tr Tr at 195). Ms. S., he argues never invested in tax free municipal bonds or US Treasuries. Plaintiff claims defendant will have a surplus when all is said and done.

Plaintiff's expert, Joan Lipton, testified as to the expenses that should be deducted from defendant's lifestyle analysis. Many of her points were quite valid. She reduced Mrs. S.'s expenses to reflect medical bills that were submitted for reimbursement ($8,475); expenses attributed to Mr. H. for 2008 ($22,734) plus clothing expenses for him ($3,604), Mr. H.'s dining out expenses ($3,746) and Yankee tickets based on what Ms. S. actually used ($22,000). Much of her testimony related to what she considered non-recurring and discretionary expenses. She also made adjustments to travel based on what she considered was appropriate because Mr. H. was traveling with Ms. S. during the years reviewed. She segregated the Beach House expenses because she did not know what the Court would do regarding this issue. She sorted out divorce related expenses ($191,000 yearly or $15,955 per month). After taking out many of these expenses, she came up with a calculation of $53,000 per month of what she claimed were "non-recurring expenses". Then she went about putting back in the budget for Ms. S. what Joan Lipton thought were more appropriate figures. Many of her points were valid. However,

many were not. For example, after taking out the Beach House expenses, she replaced them with the

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expense of $48,000 claiming this is what Mr. H. spent. (Tr Tr p 534). But he testified that he spent $90,000. (See Tr Tr 1291) She arbitrarily decided Ms. S.'s expenses would be one-half for a new home as compared to the Westchester County house. Dr. Lipton did a commendable job in sorting through the innumerable records but frankly the Court has difficulty agreeing with many of her cavalier assumptions regarding the lifestyle Ms. S. should live rather than the lifestyle she did live.

Moreover, the amount of assets Ms. S. will receive is a moving target. Joan Lipton testified defendant received $2.1 million and would receive $12 million plus $140,000 of investable assets for a total of about $14 million. This differs by about $1 million from the figures referred to in Plaintiff's Reply Trial Memorandum on Ceratin Issues, Exhibit 3.

Defendant argues that she will only have about $8,150,000 of investable assets according to her expert from BST, Mr. Kaplan (Tr Tr 2708). He supported defendant's position that she must only invest in low risk investments to preserve capital, avoid loss of purchasing power and to produce income. He criticized Joan Lipton's Rate of Return. He claimed the Court should only consider the income thrown off by the investment, not the growth because, "she can't rely on this." The expert provided in depth testimony as to why the Court should only consider interest income and not capital appreciation. However, if the Court were to do this, it would do so in the face of Ms. S.'s investments in Apple which paid no dividends but appreciated by 68 percent in eighteen (18) months that defendant held the stock and Nike that appreciated by 65.4 percent

The Court agrees with Joan Lipton and finds based on defendant's past history of investments, as well as her knowledge of investing, defendant will be able to receive 3.5 percent after tax revenue from her investable assets, which the Court finds to be approximately $11 million. This figure is arrived at by tallying the following assets:

Scenario 1 (Prior to Sale of Westchester County House)

The Bank 3798 account has increased from date of commencement when it was

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$11,000,000. Plaintiff alleges that as of February 24, 2012, it had increased $6 million to over $17,000,000 even after withdrawals.

EBS's one-half of Bank's #3798 $7,500,000

EBS separate property $4,800,000

Beach House due to husband -$2,782,000 (due husband)

50 percent of Businesses

[2]Businesses (Equity $1.7MM Less Ass'd 6 percent Sale Costs) To Be Divided 50-50 by Stipulation ($1,598,000 — S. H.Testimony and Wife's Net Worth Statement $799,000

Remainder of 1st Tranche Bank Special Cash Award Rec'd 9/09 Net of Tax PX219,220 $131,661 $65,831

Marital Portion of 2D Tranche Bank "Special Cash Award" Rec'd 9/10 Net of Tax Paid PXS69 (EX2). 218 & 225 $470,575 $235,287

Marital Portion of Unvested Bank Incentive Shares @$2.50/SH & Net of 40 percent Income Tax)

2008 EPP (89,677 Shares) PX69, EX. 2 $134,516 $67,258

2009 Incentive Share Plan (9,508 Shares) PX69, EX. 2 $14,262 $7,131

F. R. -6258 [Marital] PX256 $66,592 $33,296

W. -2130 [Marital] PX256 14,098 $7,049

W. -9190 [Marital] PX256 $47,587 $23,794

W. -7367 [W Separate Property

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Advance on ED] PX256 $12,821 $12,821

W. -0605 [W Separate Property Advance on ED] PX256 $17,760 $17,760

3.5 percent X $10,787,227

$377,553 divided by 12 = $31,462/Month Prior to Sale of Westchester County House

Scenario 2 (After the Sale of Westchester County House)

The Bank #3798 account has increased from date of commencement when it was $11,000,000. Plaintiff alleges that as of February 24, 2012, it had increased $6 million to over $17,000,000 even after withdrawals.

EBS's one-half of Bank's #3798 $7,500,000

EBS separate property 4,800,000

Beach House due to husband — $2,782,000 (due husband)

Westchester County House Sale +$7,600,000

Mortgage -$2,000,000

HELOC -$1,200,000

Cost of Sale -$532,000

Credit to Wife for Pool +$100,000

Credit to Wife for Nanny Suite +68,900

$4,036,900 $2,018,450

Replacement House $4,500,000

Mortgage -$2,000,000 -2,500,000

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50 percent of Businesses

[3]Businesses (Equity $1.7MM Less Ass'd 6 percent Sale Costs) To Be Divided 50-50 by Stipulation ($1,598,000 — S. H. Testimony and Wife's Net Worth Statement $799,000

Remainder of 1st Tranche Bank Special Cash Award Rec'd 9/09 Net of Tax PX219,220 $131,661 $65,831

Marital Portion of 2D Tranche Bank "Special Cash Award" Rec'd 9/10 Net of Tax Paid PXS69 (EX2). 218 & 225 $470,575 $235,287

Marital Portion of Unvested Bank Incentive Shares @$2.50/SH & Net of 40 percent Income Tax)

2008 EPP (89,677 Shares) PX69, EX. 2 $134,516 $67,258

2009 Incentive Share Plan PX69, EX. 2 $14,262 $7,131

(9,508 Shares)

F. R. -6258 [Marital] PX256 $ 66,592 $33,296

W. -2130 [Marital] PX256 14,098 $7,049

W. -9190 [Marital] PX256 $47,587 $23,794

W. -7367 [W Separate Property Advance on ED] PX256 $12,821 $12,821

W. -0605 [W Separate Property Advance on ED] PX256 $17,760 $17,760

3.5 percent X $10,305,677

$360,699 divided by 12 = $30,058/Month After Sale of Westchester County house

The wife claims that if she gets the Amagansett beach house, that she could only expect

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to earn 2 percent on her investments after tax and that she could only expect to earn $39,000 yearly upon her return to work. Based on these facts, she should receive $59,296 monthly until Mr. H. turns 65 or his full-time retirement. If the Court does not award her the Amagansett beach house but instead awards her the Westchester County family home, she will need more maintenance for a total of $75,873 monthly through September, 2017 and then $66,811 monthly until Mr. H. turns 65 or retires. This increase is due to her need for a comparable summer home in the Hamptons at the estimated cost of $350,000 per summer. She requested maintenance retroactive to April 1, 2010.

2. The duration of the marriage and the age and health of both parties.

As previously set forth, the parties were married fifteen (15) years as of the date of commencement. At the conclusion of trial (2012), Mr. H. was 47 (date of birth is —, 1964) and Ms. S. was 46 (date of birth is —, 1965). Both parties are in good health.

3. The present and future earning capacity of both parties.

Mrs. S. last worked for M. A. & S. from 1987 — 1993, earning $70,000 including bonus her last year there. She has not worked outside the home since 1994. She has a CFA, Chartered Financial Analyst, retired status. She will require updated training to re-enter the workforce and in order to activate her CFA designation. With minimal re-training, she could earn between $43,640 and $64,920 according to her expert Lynn Jonas.

Contrast this with Mr. H.'s recent earnings as follows:

2003 $7,294,030 Total income

2004 $5,900,762

2005 $15,127,479

2006 $10,624,565

2007 $10,168,407

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2008 $2.8 Million

2009 $4.8 Million

2010 $3.6 Million

His income when the parties were married in 1994, working for former Bank was $234,071.

Mr. H. has an earning history of approximately $6 million yearly if averaged over the past eight (8) years. If the most recently filed tax year is used, it is $4.8 million.

4. The ability of defendant to become self-supporting and the period of time and, if applicable, the period of time and training necessary therefore.

The defendant will have significant assets that will generate income approaching $400,000 annually without touching her assets of at least $11 million and not counting significant capital appreciation that Joan Lipton claimed was an average of 7.9 percent on investments. She will be able to earn close to $60,000 yearly. Maintenance should enable her to get back into the work force if she chooses and to earn a more substantial income, all of which will enable her to become self supporting.

5. Reduced or lost lifetime earning capacity of defendant as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage.

The wife has reduced current and potential income as a result of her years out of the workforce.

6. The presence of children of the marriage in the respective homes of the parties.

The wife has primary custody of the children but the children spend significant time with plaintiff.

7. Contributions and services of defendant as a spouse, parent, wage earner and homemaker and to the career potential of plaintiff.

Ms. S. has been and continues to be the children's primary caretaker. With four (4)

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children attending two schools on three different campuses, she was quite busy attending to their needs. The youngest, A., has been evaluated for "ADHD" and receives medication and language therapy.

The husband argued that the wife contributed little to his career, however, his wife provided him with the smoothly run management of the homes, four children and the accoutrements of a well run life. He had the luxury of devoting himself to his work knowing that his wife was taking care

of the other aspects of his life.

8. The tax consequences to each party.

Ms. S. seeks tax-free maintenance. The Court denies this request.

9. The wasteful dissipation of marital property by either spouse.

The wife claims her husband wastefully spent money with his paramour and rental furniture. Given the extent of the parties' assets and plaintiff's income, this claim is of little consequence. However, his payments made on behalf of his paramour will be charged against him. He admitted these expenses during his testimony.

10 Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

There were no transfers made in contemplation of the matrimonial action without fair consideration.

11. The loss of health insurance benefits upon dissolution of the marriage.

Ms. S. will lose her health insurance benefits upon divorce.

Plaintiff submits that defendant should not receive maintenance because he has already divided his assets with her. To do so, he argues, would be to double dip. The Court rejects this argument for the most part. While defendant received a substantial amount of assets from plaintiff's 2009 earnings, she only received 50 percent of the marital share of the 2008 and 2009 EPP Award, she received none of the CVP or SVP shares, only 50 percent of 28.127854 percent of the 2009 CVIP

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Plan Award and none of the "One Off" payment. Defendant did not even contest the 2010 awards.

However this issue is considered by the Court in making its award, as is the significant amount of assets distributed to defendant, in making its maintenance award.

Defendant argues that her expenses exceed $100,000 monthly. However, in reviewing her lifestyle analysis, the Court finds that her expense for furniture will be greatly reduced, her household maintenance figures will be significantly less than claimed because the Westchester County house has been extensively renovated, and that many expenses are optional. While the Court is attempting to ensure that defendant's lifestyle is not drastically altered, she, like most couples after divorce, must face the reality of an altered life as a result of having to maintain two households when there was previously only one.

Furthermore, the Court declines to order non-durational maintenance or maintenance until plaintiff turns 65 or retires.

To borrow from Justice Cooper's recent decision in Sykes v. Sykes, NY Slip Op 50731 (U), (Sup Ct, NY Cty, 2014) a strikingly similar case, in many respects,

There is nothing in the law that even suggests that equitable distribution awards are somehow inviolate and that the capital can never be invaded. To the contrary, case law establishes that a distributive award, like any other asset, is to be considered a source of funds upon which a party can draw so as to meet his or her needs, irrespective of the marital lifestyle (see Alexander v. Alexander, — AD3d —, 2014 NY Slip Op 02386 [1st Dept 2014] [affirming modest award of durational maintenance where distributive award totaled approximately $2,750,000]; Grumet v. Grumet, 37 AD3d 534 [2d Dept 2007] lv denied, 9 NY3d 818 [2008] [reducing amount of lifetime maintenance where trial court "failed to take into account the large distributive award wife will receive"]; Kohl v. Kohl, 6 Misc 3d 1009[A] [Sup Ct 2004] affd 24 AD3d 219 [1st Dept 2005][denying request for lifetime maintenance by finding that the "wife will have her own assets from which she can draw funds to support herself in a manner similar to the marital lifestyle"]).

The wife's papers focus much too narrowly on her expected

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income and completely ignore her ability to draw from her sizeable assets. The wife cites to no authority for her proposition that she should not have to dip into her plentiful assets. Of course, the maintenance statute expressly requires the Court to not only consider the receiving spouse's income but also her property.

15 Misc 3d 1105(A) at *35.

Although plaintiff is correct that defendant is not entitled to keep her multi-million dollar award of equitable distribution forever, whole and untouched, he cannot expect her to "dip into" it while at the same time seek to have her live off the income it is generating. The two are, to a large extent, mutually exclusive: the greater the utilization of the assets themselves, the less revenue they will produce.

Id.

Based on the foregoing factors and taken into consideration the wife's needs in addition to child support, this Court awards defendant the sum of $40,000 per month, commencing June 1, 2014 retroactive to April 1, 2010 and continuing until December 31, 2017, taxable as income to the wife and tax deductible to the husband to cease upon the earlier of December 31, 2017, "the death of either party or upon the [wife's] valid or invalid marriage, or upon modification pursuant to paragraph (b) of subdivision nine of [DRL §236 B] or [DRL §248]." DRL §236 B (1)(a).[4]

Child Support

This Court, pursuant to Domestic Relations Law §240(1-b), has considered the calculations delineated in Domestic Relations Law §240(1-b)(c) as well as the factors set forth in Domestic Relations Law §240(1-b)(f) which permit a deviation from the calculations set forth in Domestic

Relations Law §240(1-b)(c). If the combined parental income exceeds the statutory cap of $141,000, the Court must decide the amount of child support for the amount of the combined income in excess of the cap through consideration of the factors set forth in paragraph (f) of DRL §240(1-b) and/or the child support percentage, and the Court must articulate a

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rationale for its determination. Casano v. Cassano, 85 NY2d 649 (1995).

The paragraph (f) factors include:

1) The financial resources of the custodial and non-custodial parent, and those of the child;

(2) The physical and emotional health of the child and his/her special needs and aptitudes;

(3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;

(4) The tax consequences to the parties;

(5) The non-monetary contributions that the parents will make toward the care and wellbeing of the child;

(6) The educational needs of either parent;

(7) A determination that the gross income of one parent is substantially less than the other parent's gross income;

(8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the noncustodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

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(10) Any other factors the court determines are relevant.

The Court has considered these factors. Based upon the facts and circumstances of this matter, including the lifestyle and standard of living of the parties and the children established during the marriage, the standard of living the children would have enjoyed had the marriage not ended, the plaintiff's substantial income and the parties' substantial resources, the Court finds that applying the guidelines to income up to $350,000, the amount sought by the wife, is appropriate and would result in a just and appropriate award for child support. Matter of Cassano v.Cassano, 85 NY2d 649 (1995).

Defendant's income for support purposes is in the sum of $60,000. Plaintiff's income for support purposes is in the sum of $4,800,000. The defendant's pro rata share of the combined parental income is 1 percent and the plaintiff's pro rata share of the combined parental income is 99 percent. Applying the CSSA percentage of 31 percent for four children to the $350,000[5] income cap, the noncustodial parent's pro rata share (99 percent) of the basic child support obligation on income up to the statutory cap of $141,000 is $43,273 per year, or $3606 per month, and the non-custodial parent's pro-rata share (99 percent) of the basic child obligation on income in excess of the statutory cap and up to $350,000, ($209,000) is in the amount of $64,142 per year, or $5345 per month.

Accordingly, the defendant is awarded and the plaintiff is directed to pay the sum of $8951 per month as and for child support, directly to defendant, commencing on June 1, 2014, retroactive to date of commencement. Upon emancipation of each child, child support shall be recalculated.

Health Insurance

Plaintiff shall maintain in effect health care insurance for the benefit of the children until their emancipation. If requested, defendant shall pay her pro-rata share of the health insurance

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premium attributable to the children.

Add-Ons

Plaintiff is directed to pay 99 percent and defendant 1 percent of all the children's future unreimbursed health care expenses for which health insurance is available, but payment is excluded by the insurer as a co-payment or deductible. Defendant shall use in network providers unless otherwise agreed to in writing by the parties, or in the case of an emergency. Plaintiff shall pay 99 percent of other statutory add-ons and defendant shall pay 1 percent retroactive to date of commencement.

Private School and College

Pursuant to DRL §240(1-b)(c)(7)

Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses.

In this case private school is part of the family's lifestyle. Plaintiff shall pay 99 percent and defendant 1 percent of private school tuition including college for the parties' children retroactive to date of commencement.

Dependency Exemptions

While all four (4) children are under 21 years of age, the parties are each entitled to claim the dependency exemption for two (2) of the children. When the first child emancipates, the parties shall alternate claiming the dependency exemption for the three (3) unemancipated children with plaintiff claiming two (2) children the first year and defendant claiming one child, and alternating yearly thereafter. When the second child emancipates, each party shall be entitled to claim the dependency exemption for one (1) of the two (2) unemancipated children. When the third child emancipates, the parties shall alternate claiming the dependency exemption

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for the remaining unemancipated child with the defendant claiming the child the first year, and the parties alternating yearly thereafter.

Life Insurance

The husband shall maintain life insurance sufficient to insure his maintenance liabilities with the wife as irrevocable beneficiary; said policy may be in declining amounts sufficient to insure his obligation.

He shall also maintain life insurance sufficient to insure his child support obligation with the children as irrevocable beneficiaries and the wife as trustee. Said policy may also be in declining amounts sufficient to insure his obligation.

He shall provide proof of same upon request within 60 days of the Judgment of Divorce and annually thereafter.

Disability Insurance

The husband shall maintain disability insurance sufficient to insure his maintenance liabilities.

He shall also maintain disability insurance sufficient to insure his child support obligation.

He shall provide proof of same within 60 days of the Judgment of Divorce and annually thereafter.

Counsel Fees and Expert Fees

Defendant first retained Bodnar & Milone LLP, who represented her commencing in August 2008 until in or about October 2009, when she changed counsel and retained Cohen Lans LLP whose name was changed to Clair Lans Greifer & Thorpe LLP in May 2011. Defendant also retained various experts over the course of the litigation, most of whom submitted reports and/or testified. According to the wife, the total professional fees incurred by her through February 2012 were $2,316,952, and are comprised of counsel fees in the sum of $1,891,367,

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expert fees in the sum of $392,727 and payments totaling $32,857 made to court reporters from the parties' joint account.

The Court notes the following discrepancies between the amounts stated to have been paid/owed by defendant to various professionals as set forth in the billing statements, and the amounts set forth in her counsel's affirmation:

1. Defendant's counsel's affirmation states defendant has paid Cohen Clair Lans Greifer & Thorpe LLP $1,557,133 and that an additional $165,875 is outstanding; the billing statements submitted show that as of February 8, 2012, defendant had paid counsel $1,538,842, had a trial retainer balance of $25,000 and that an additional $165,875 is outstanding;[6]

2. Defendant's counsel's affirmation states defendant has paid Bodnar & Millone LLP $168,358.03; the billing statements submitted show that $162,858 was paid.

3. Defendant's counsel's affirmation states that defendant has paid BST Valuation & Litigation Advisors, LLC ("BST") $124,141 and that $15,123.46 additional fees are due and outstanding. BST's billing statements indicate that the total billed was $124,141, and of that amount, $15,123.46 is outstanding;

4. Defendant's counsel's affirmation and the Affidavit of Steven M. Kaplan state that he and his predecessor firm, Eisman, Zucker, Klein & Ruttenberg ("EZKR") have been paid $180,388 by defendant. Additionally, although Mr. Kaplan's affidavit indicates that there is work that has not yet been billed, he does not set forth the amount of payment that is due. However, defendant's counsel states that Mr. Kaplan informs him that there is at least $10,000 in work not yet billed.

5. Defendant's counsel's affirmation states that court reporters were paid $32,857 for transcripts of the trial. The billing statements evidence the total billed was $31,969.

The Court finds the total counsel fees incurred by defendant for services rendered by her

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prior counsel are in the amount of $162,858 the amount reflected by the billing statements, as opposed to $168,358, the amount claimed by defendant. The Court further finds that the total counsel fees incurred by defendant for services rendered by her current counsel are in the sum of $1,679,717 as opposed to $1,723,008, the amount claimed by defendant. The sum of $1,679,717 reflects the payments set forth on the billing statements in the sum of $1,538,842, plus the outstanding balance of $165,875, reduced by the trial retainer balance of $25,000.

With regard to the experts, the Court finds that the total expert fees incurred by defendant for her experts are in the amount of $326,789, as opposed to $351,912 claimed by defendant. The difference represents: 1) a reduction of $10,000 representing the $10,000 estimated outstanding balance due to EZKR that was not documented; and 2) a reduction of $15,123 representing the amount that defendant claims is due and owing to BST, in addition to payments made of $124,141 which would result in a total billed of $139,264. The bills submitted, as well as the affidavit of Thomas A. Hutson indicate that the total billed was actually $124,141, and that of that amount, $15,123 is outstanding. Therefore, the total expert fees incurred by defendant for her experts are comprised of the following: BST — $124,141; EZKR — $180,388; Peter Davidson — $13,500; John Saluto — $3350; John Mason — $3700; and Lynn Mizzy Jonas — $1710.

The total expert fees incurred for the parties' joint experts are in the amount of $40,815 comprised of the following: Gurr-Johns — $18,862 and Dr. L. Behrman — $21,953.

The Court finds the total fees paid to the court reporters are in the amount of $31,969, the amount reflected by the billing statements, as opposed to $32,857 the amount claimed by defendant.

The majority of the counsel fees and expert fees were paid from marital funds, although the defendant claims that $614,040 was paid with her separate funds, and she still owes $192,848. Defendant is requesting repayment by plaintiff of 100 percent of the attorney and

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professional fees paid from her separate assets, and assuming she would receive ½ of the value of the joint Bank investment account (-3798), she requests reimbursement to her of 50 percent of the attorney and professional fees paid from that account on her behalf (defendant claims her fees paid from marital funds are in the amount of $1,510,061.60). In summary, defendant is requesting reimbursement in the amount of $1,207,260 for counsel fees incurred in connection with representation by her current counsel; reimbursement in the amount of $84,179 for counsel fees incurred in connection with representation by her prior counsel; reimbursement in the amount of $254,052 for expert fees; and $16,428 for fees paid to court reporters.[7] Defendant is requesting that plaintiff pay a total of $1,561,920.60 as follows:

Entity Fees Paid From Request For

Cohen Clair Lans Greifer & Thorpe LLP/Cohen Lans LLP — Current Counsel $525,635.21 W's sep. funds Payment of $525,635.21

$1,031,498.42 Joint account Reimburse $515,749.21

$165,875.43 Outstanding Payment of $165,875.43

Bodnar & Milone — Prior Counsel $168,358.03 Marital assets Reimburse $84,179.01

BST — Assessment of Plaintiff's Compensatory Awards, Rate of return analysis $60,270.42 W's sep. funds Payment of $60,270.42

$63,870.59 Joint account Reimburse $31,935.30

$15,123.46 Outstanding Pay to Wife $15,123.46

EZKR/Steve Kaplan Lifestyle Analysis approx. $13,135.00 W's sep. funds Payment of $13,135.00

$167,253.00 Joint account Reimburse $83,626.50

$10,000 Outstanding Payment of $10,000

Peter Davidson Real Estate Appraisal of Beach house, etc. $13,500.00 W's sep. funds Pay to Wife $13,500

John Saluto — Report on real $1,500.00 W's sep. funds Payment of $1,500

$1,850.00 Outstanding Payment of $1,850

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estate taxes on $4-$5 million residences in Westchester County Houses

John Mason — Real Estate Appraisal of Marital Residence $3,700.00 Joint account Reimburse $1,850

Lynn Mizzy Jonas — Vocational Expert $1,710.00 Joint account Reimburse $855

Gurr-Johns — Joint appraisal of parties' personal property $18,862.09 Joint account Reimburse $9,431.05

Court Reporters $32,857.00 Joint account Reimburse $16,428.50

Dr. L. Behrman — Retained by both parties to assist parties in resolving divorce amicably $21,953.00 Joint account Reimburse $10,976.50

Total fees $2,316,951.65

—

Total request $1,561,920.60

The husband opposes the wife's request for professional fees and counter proposes that the parties should each bear the professional fees incurred by them, in the same proportion as they receive the marital assets; ie., if the defendant receives 50 percent of the assets (which according to plaintiff will give defendant at least $12.5 to $14.3 million investable assets, without counting Bank deferred compensation plus a $4 to $5 million dollar house), she should pay 50 percent of the fees. He asserts that the bulk of the fees were paid from investment income in the joint Bank investment account -3798, which has increased by $6 million during the pendency of the action, net of all withdrawals including fees. The plaintiff opines that defendant's share of the fees is only 6 percent — 7 percent of the investable assets she stands to receive in this matter, which is a fair result.

Plaintiff's position is that the bulk of the fees were paid from joint investment income, as there was effectively no other source of income with which to pay them, and that for the fees paid from said joint investment account, there need not be any readjustment. Plaintiff claims that the only funds available for professional fees were the cash bonuses either distributed as separate property, used to pay the parties' living expenses or preserved for distribution after trial, and the joint investment account.

Plaintiff further argues that a payment to plaintiff in the amount of $677,279 with each party paying their respective "outstanding" fees equalizes the parties' use of separate property to pay fees, so that each will have paid 50 percent of the total fees.[8] Plaintiff claims that the following

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separate property funds, totaling $1,547,406, were, or will be, expended by him for professional fees: 1) $576,064 to pay his own professional fees in the latter half of 2011; 2) $408,005 currently owed to plaintiff's counsel and his expert; and 3) $563,337 paid into the joint account over the period of time from July 2011 to November 2011 which was to fund deficits[9] in the joint Bank account. Plaintiff claims that all of the $563,337 went to fund professional fees; $155,320 of his fees, $387,144 of defendant's fees and $20,873 paid to court reporters. Plaintiff asserts that based on defendant's representation that her "outstanding" bills total $192,848, the total separate funds that will have been spent by both parties is $1,740,254 (($1,547,406 by plaintiff and $192,848 by defendant).[10] Therefore, based on plaintiff's position that both parties should spend an equal amount of separate funds on all professional fees, each party would spend $870,127 ($1,740,254/2), which would require defendant to pay her outstanding bill of $192,848 with her separate funds, and would require payment of $677,279 to plaintiff.

With regard to the amount of professional fees paid by plaintiff, defendant states that through November 2011, plaintiff expended $2,467,990 in legal and expert fees.

The court may, in its discretion, award counsel fees and experts fees, as justice requires, having regard for the circumstances of the case and of the respective parties. DRL §237(a); see, DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879 (1987); Morrissey v. Morrissey, 259 A.D.2d 472 (2nd Dept. 1999). The "court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions." DeCabrera, 70 NY2d at 881. "There shall be rebuttable presumption that

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counsel fees shall be awarded to the less monied spouse." DRL §237(a). Furthermore, where there is a marked disparity in the respective party's incomes, an award of counsel fees is warranted, [Litvak v. Litvak, 63 AD3d 691 (2nd Dept. 2009); Bogannam v. Bogannam, 60 AD3d 985 (2nd Dept. 2009)], and the fact that the distribution of the marital property resulted in a substantial award to the spouse with less income, does not preclude the award of counsel fees to that spouse [McCracken v. McCracken, 12 AD3d 1201 (4th Dept. 2004); Hackett v. Hackett, 147 AD2d 611 (2nd Dept. 1989)]. "The mere fact that [defendant] may have been able to pay her own fees is but one factor to be considered by the court (citation omitted)." Vicinanzo v. Vicinanzo, 193 AD2d 962, 966 (3rd Dept. 1993). Additionally, a counsel fee award is warranted where the other party's negotiating positions and trial tactics contribute to a significant portion of the protracted litigation. McCully v. McCully, 306 AD2d 329 (2nd Dept. 2003). "'An appropriate award of attorney's fees should take into account the parties' ability to pay, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fees under all of the circumstances' (Grumet v. Grumet, 37 AD3d 534, 536)." Kessler v. Kessler, 111 AD3d 894 (2nd Dept. 2013).

With regard to the merits of the parties' positions, each party prevailed on some of the contested issues. The issues of the parties' standard of living, the defendant's need for maintenance and counsel fees in light of the significant assets she would be receiving, as well as the equitable distribution of plaintiff's various deferred compensation awards, the equitable distribution of the marital residence and the Amagansett beach house, and whether defendant was entitled to 50 percent or a lesser percentage of the marital estate were hotly contested. At the end of the day, after millions spent, not surprisingly, neither party's position was totally embraced by the Court. On the issue of maintenance, while plaintiff's position was that defendant would have more than enough income from her considerable investable assets to support herself, negating

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the need for any maintenance, defendant was granted a substantial maintenance award for a number of years. On the issue of plaintiff's many deferred compensation awards, while the Special Cash Award was found to be all marital as was argued by defendant, the many other awards were found to be plaintiff's separate property or only partially marital. With regard to the beach house, defendant prevailed, having been awarded the right to purchase same. She also prevailed on the issue of her entitlement to 50 percent of the marital assets.

Both parties also argue that the other party engaged in tactics that prolonged the litigation, was unreasonable and refused to settle, ultimately forcing the case to trial and escalating the legal fees. "However, an award of [counsel fees]…is not intended to address a party's decision to proceed to trial rather than agree to a settlement (citation omitted)." Comstock v. Comstock, 1 AD3d 307 (2d Dept. 2003). Defendant also complains of the lack of cooperation exhibited by

plaintiff's counsel throughout this matter. The behavior engaged in by the parties and counsel goes with the territory of a highly contentious matrimonial matter where millions of dollars are at stake, and did not rise to a level of obfuscation or unreasonableness as to impact an award of counsel fees.

The purpose of a counsel fee award is to create a level playing field and while both parties emerge from this divorce with a great deal of wealth, and have the ability to pay the counsel fees at issue, the ability to pay is not the only factor to be considered. Vicinanzo, 193 AD2d at 966.; DRL §237(a). While the assets and wealth of the parties in this matter are in excess of the "usual" finances dealt with by the Courts in counsel fee matters, the basic premises remain the same. At the end of the day, while both parties are extremely financially well off, they are not in financial parity. See, Costa v. Costa, 46 AD3d 495 (1st Dept. 2007). A substantial distribution of marital assets as well as an award of adequate maintenance does not preclude an award of counsel fees, but are factors to be considered when the Court determines the appropriate amount of the award. See, Hackett, 147 AD2d 611. Defendant is entitled to

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comparable representation with comparable fees to that which her husband has had the benefit of, without having to deplete her assets in the amount required to satisfy the fees incurred in this matter.

The Court recognizes that defendant is receiving one half of the substantial marital estate resulting in her receipt of assets of $12-13.5 million, but plaintiff too, will receive assets of at least this value and then some. Plaintiff also has the benefit of the deferred compensation awards that were determined by the Court to be his separate property. The Court has determined that defendant's assets can feasibly generate after tax income of about $30,000 per month, and has awarded defendant maintenance of $40,000 per month, and child support of $8951 per month, which even in conjunction with the earnings of up to $60,000 per year imputed to her yield her a potential income of $84,000 per month, for her and the parties' four children. This is compared to plaintiff's annual earnings found to be in the sum of an average of $6 million and his 2009 income of $4.8 million (which was his income used at the time of trial for purposes of calculating support), which is in addition to income he will receive from the investable assets awarded to him in this matter. Notwithstanding plaintiff's claims that he is earning less income than in past years, especially 2005, when he earned approximately $15 million, his compensation is still in the millions. And while the Court is cognizant that plaintiff's income is reduced by the maintenance and child support he is paying to defendant, he still remains in a financial position superior to that of defendant. Moreover, defendant is unemployed and has not worked outside of the home during most of the 15 year marriage, while plaintiff will continue to work and earn income in amounts that will far surpass any earnings defendant may have, resulting in a greater disparity in income in the future.

In considering the reasonableness and necessity of the counsel fees incurred the court must review "the difficulty of the questions involved, the skill required to handle the case, specifics as to the time and labor required, the [attorney's] experience, ability and reputation, and

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the customary fee charged for similar services (citations omitted)." Sand v. Lammers, 150 AD2d 355, 356 (2nd Dept. 1989). "In determining the appropriateness and necessity of [awarding expert] fees the court shall consider: 1. [t]he nature of the marital property involved; 2. [t]he difficulties involved, if any, in identifying and evaluating the marital property; 3. [t]he services rendered and an estimate of the time involved; and 4. [t]he applicant's financial status." DRL §237(d).

Defendant's counsel fees total $1,842,575. Of this amount, $162,858 was charged by her prior counsel, who were retained to negotiate a separation agreement with plaintiff, and who represented her for approximately one year prior to this action being commenced. Defendant's fees incurred for services rendered by her current counsel who represented her during the pendency of the is action, are in the sum of $1,679,717. There is no question that counsel are highly regarded, experienced matrimonial litigators, and that the hourly rates were commensurate with compensation for attorneys of their professional standing and experience. The Court finds that the counsel fees incurred were reasonable and necessary for a high asset matrimonial case, with extremely complex financial issues, which resulted in a 28 day trial to determine, inter alia, issues regarding the parties' standard of living, defendant's need for maintenance and professional fees in light of the significant assets she would be receiving, equitable distribution of plaintiff's various deferred compensation awards, the equitable distribution of the marital residence and the Amagansett beach house, and whether defendant was entitled to 50 percent or a lesser percentage of the marital estate. Similarly, the expert fees incurred in the sum of $367,604 were reasonable and necessary, and are not out of the realm of what would be expected in litigating a matter involving millions of dollars in assets and income. The Court also notes that defendant's counsel fees and expert fees totaling $2,210,179, not including the fees in the sum of $31,969 paid to the court reporters, are no more extravagant than the amount of professional fees paid by plaintiff, which defendant claims were $2,467,990

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through November 2011.

Upon consideration of all of the circumstances of the matter, and all of the factors set forth hereinabove, the Court does not agree with either party's position with regard to professional fees. Plaintiff's argument that each party should pay one half of all fees incurred by both parties is not persuasive based on the Court's view of the finances as set forth herein. However, defendant's argument that plaintiff should be responsible for all of her professional fees is no more persuasive than plaintiff's. While the Court does not believe that plaintiff should be required to pay all of defendant's professional fees, and recognizes that defendant is able to afford to pay much of her own fees, the Court has determined that plaintiff should be required to pay a larger share than defendant in order to level the playing field.

Accordingly, the plaintiff shall be responsible for payment of $1,440,136 of the defendant's

counsel fees and expert fees, including fees paid to the court reporters. In making this award the Court has considered that with regard to the counsel fees paid to defendant's prior counsel, Bodnar & Milone LLP, and the fees paid to Dr. L. Behrman, whose assistance the parties jointly sought to resolve their divorce amicably, the Court has declined to award fees. According to defendant these fees were paid with marital assets/joint account, thus each party has paid half. Bodnar & Milone LLP's entire bill of $162,858 was incurred beginning approximately one year prior to commencement of the action and services were completed approximately one month prior to commencement. At this time the parties had divided some assets and it would appear that they had a common goal in attempting to resolve this matter without litigation. The Court finds that each party having paid one-half of these fees is not an unjust result. Although approximately one-half of the total fees in the amount of $21,953 sought in connection with Dr. Behrman's services were incurred subsequent to commencement, her services also appear to be entwined with the prior goal of settlement and similarly the Court finds that each party having contributed one-half is appropriate.

*65

Defendant shall not be responsible for payment of plaintiff's legal and professional fees.

The parties are to determine the amount of professional fees due to defendant from plaintiff, in accordance with this decision. In connection therewith, the parties are to determine any credits due plaintiff for payment of defendant's counsel fees and/or expert fees that have been paid for which defendant is seeking payment as set forth in this Decision, taking into account that fees paid from the joint Bank account -3798 were paid 50 percent by each party. Additionally, plaintiff may not seek a credit for fees paid for the services of Bodnar & Milone LLP and Dr. L. Behrman, as the Court has already considered those payments.

Accounting

Regarding the redistribution of assets and an accounting, the Court finds that the parties have successfully co-mingled their finances during the pendency of this action such that it is nearly impossible to sort them out. However, as to the F. R. Account 7460 savings account, used by plaintiff to deposit the first Special Cash Award (also referred to as the 1st retention bonus) of $470,000 and the checking account associated with it, that is account no. 6266, plaintiff testified that he used the account for various expenses, including all household expenses for his house, "B.'s house" the Beach House, some construction related expenses, professional fees related to the divorce and tuition related expenses. (Tr Tr p 597). The original $369,892 was reduced to $120,666 as of February 28, 2010. The money had been transferred into the checking account. The balance in the checking account was $17,854 as of October 31, 2009. (Tr Tr p 596). In support of his position, plaintiff attached checks from his checking account at F. R. #6274 to evidence this.

In addition, the parties entered into three stipulations referred to herein as to payment of expenses from the Bank #3798 account. Within 60 days from the date of this decision, the parties should attempt to agree on an accounting of the foregoing assets based on the Court's decision. If unable to do so, they shall submit separate accountings with explanatory affidavits

*66

in support of the proposed Findings and Judgment. When doing so, in accordance with the precepts of Mahoney-Buntzman v. Buntzman, 12 NY3d 415 (2009), they shall take into account that the parties were paying marital expenses such as the Loyola pledge and Brunswick, both agreed to during the marriage and which were marital expenses.

CONCLUSION

The Court has based its decision on a preponderance of the evidence except for those issues where clear and convincing evidence is required.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them to be without merit. Those matters, other than those stipulated to, not specifically addressed are denied in the Court's discretion.

Both parties are on notice pursuant to Domestic Relations Law §255 "…that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan."

Defendant's counsel is directed to settle proposed Findings of Fact and Judgment of Divorce, in accordance with this Decision, and including the usual and customary language not specifically contained herein, within 60 days of the date of this Decision.

*67

The forgoing constitutes the Decision of this Court.

Dated: October 24, 2014

White Plains, New York

ENTER

1. The Amendments to this Decision are made pursuant to the Court's Decision and Order, rendered from the bench on October 20, 2014 (post trial) in connection with plaintiff's motion filed July 28, 2014 and defendant's cross motion filed September 17, 2014, as well as the stipulations entered into by the parties on October 20, 2014 in connection with said motion and cross motion.

2. Regarding the Businesses, the Court has reviewed plaintiff's and defendant's Net Worth Statements, as well as plaintiff's and defendant's testimony and expert testimony regarding the value of the businesses. The value range from approximately $1.6 million to $916,520 (Steve

Kaplan, Tr Tr 2953), which would give defendant between $799,000 — $458,000 of investable assets or between $30,000 — $18,320 yearly income. As the asset was not valued, the court can only take from this that defendant will have between $18,320 — $30,000 of investment income from this asset.

3. Regarding the businesses, the Court has reviewed plaintiff's and defendant's Net Worth Statements, as well as plaintiff's and defendant's testimony and expert testimony regarding the value of the businesses. The value range from approximately $1.6 million to $916,520 (Steve Kaplan, Tr Tr 2953), which would give defendant between $799,000 — $458,000 of investable assets or between $30,000 — $18,320 yearly income. As the asset was not valued, the court can only take from this that defendant will have between $18,320 — $30,000 of investment income from this asset.

4. Since the issuance of the Decision After Trial, pursuant to plaintiff's motion filed July 28, 2014 and defendant's cross motion filed September 17, 2014, the parties have stipulated with respect to how to address the issue of "recapture".

5. In order to calculate the child support award under the CSSA, the maintenance award, which is made concurrently with the child support award, as well as FICA is deductible from the payor's income. However, considering the court imposed income cap, these deductions would not be appropriate.

6. Defendant's counsel provided a reasonable explanation for this apparent but not actual discrepancy.

7. Defendant states that in her request for relief she also has a claim for reimbursement for 50 percent of the total of the plaintiff's attorneys fees paid from the parties' marital assets.

8. Plaintiff's calculation is based on an assumption of 50/50 division of assets.

9. Pursuant to the Stipulations entered into by the parties on January 21, 2010 and June 1, 2011, the parties agreed, inter alia, that their legal and other professional fees in connection with this action would be paid from the parties' joint Bank account -3798. The June 1, 2011 Stipulation also provided that commencing June 17, 2011, to the extent "that Surplus Income is less than the sum of the outstanding Expenses, both as of the 17th (i.e., there is a Deficit), the Husband will deposit into the Joint Bank Account prior to the Expenses being paid his separate property in an amount equal to the Deficit."

10. However, according to defendant's claim, in addition to her outstanding balance of $192,848, she also has paid $614,040 of professional fees with her separate funds.

[*1] Chahee **Pickard,** Plaintiff-Appellant-Respondent, v Todd S. **Pickard,** Defendant-Respondent-Appellant.

7267, 7268, 7269, 7269A, Index 350344/00

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, **FIRST** DEPARTMENT

2006 NY Slip Op 6209; 2006 N.Y. App. Div. LEXIS 9961

August 10, 2006, Decided
August 10, 2006, Entered

PRIOR HISTORY: Cross appeals from a judgment of the Supreme Court, New York County (John E.H. Stackhouse, J.), entered November 24, 2004, and from prior orders, same court and Justice, entered October 31, 2003, February 19, 2004 and August 24, 2004, which, inter alia, distributed marital property, directed defendant husband to pay plaintiff wife lifetime maintenance, and directed defendant to pay for plaintiff's health insurance during the COBRA period.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant former husband and plaintiff former wife filed cross appeals from a judgment of the Supreme Court, New York County (New York), and from prior orders of the same trial court that, inter alia, distributed their marital property and directed the husband to pay lifetime maintenance to the wife and to pay for her health insurance during the COBRA period.

OVERVIEW: The trial court declined to distribute the present value of the parties' interest in a holding company that owned apartment buildings as wholly speculative, directing division if and when units were sold. The appellate court modified the judgment. The parties' bank accounts and retirement accounts were properly valued and distributed. The maintenance award was appropriate in view of the 23-year duration of the marriage, the wife's minimal job skills, and the parties' respective financial positions. The wife should have been awarded a distributive share of the nonvested portion of the husband's pension, and the husband should have been credited for 50% rather than 100% of maintenance and insurance payments on the marital apartment, since both parties benefited from its sale. The husband should have been directed to pay for the wife's health insurance until she obtained a job or qualified for Medicare. The value of the holding company was not too speculative to determine. The husband's expert properly applied discounting factors to its future value, but because the trial court properly found that the discount rate was arbitrary, further evaluation of the asset's value was required.

OUTCOME: The appellate court modified the judgment by awarding half of the husband's nonvested pension to the wife, reducing his credit for apartment expenses, directing him to pay for her health insurance until she qualified for benefits, and distributing the present value of their holding company interest. The matter was remanded for re-computation of distributive shares. As modified, the order was affirmed, and appeals from prior orders were dismissed.

CORE TERMS: apartment, valuation, present value, equitable, speculative, marital,

distributed, marital property, valued, distribute, health insurance, valuation date, date of trial, future income, marriage, appreciation, projected, occupied, evenly, hedge, distributive share, pension benefits, lifetime, marketability, appropriately, commencement, flexibility, unresolved, parameters, homeowner's

LexisNexis(R) Headnotes ♦ Hide Headnotes

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Valuation

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Equitable Distribution > General Overview

HN1 The value of an asset with limited marketability may be properly determined by standard valuation techniques for equitable distribution purposes. Rather than rendering the asset's value too speculative to determine, the marketability limitation simply creates the need to apply discounting factors to the future value. More Like This Headnote

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Equitable Distribution > General Overview

HN2 Distribution of assets should not be left unresolved at the time of the divorce where it can be effectuated at that time. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Evidence > Testimony > Experts > Court-Appointed Experts > Appointments

Evidence > Testimony > Experts > Credibility > General Overview

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Classification > Valuation

HN3 A trial court has the discretion to reject the valuation of an asset for equitable distribution purposes offered by a party's expert if a valid challenge to the expert's method is perceived. Under such circumstances, the trial court has the authority to appoint another expert, N.Y. Comp. Codes R. & Regs. tit. 22, § 202.18, and direct further proceedings for purposes of a more accurate appraisal. More Like This Headnote

COUNSEL: Blank Rome, LLP, New York (Leonard G. Florescue and Rachel Wilgoren of counsel), for appellant-respondent.

Krol & O'Connor, New York (Igor Krol of counsel), for respondent-appellant.

JUDGES: John T. Buckley, P.J., Richard T. Andrias, David B. Saxe, Eugene Nardelli, Bernard J. Malone, Jr., JJ. All concur except Andrias and Nardelli, JJ. who dissent in part in an Opinion by Andrias, J.

SAXE, J.

The judgment on appeal, bringing up for review the provisions of the order after trial, as **[*2]** amended, properly resolved, **[**2]** in large part, the distribution of the marital estate and issues of spousal support. However, in a few specifics we disagree with the trial court, and therefore, as explained below, modify and remand the matter at to those points. Of particular concern is the court's approach to valuation and distribution of a holding company which owns occupied rent-controlled or rent-stabilized Manhattan apartments.

Initially, the distribution of the amounts in the parties' various bank accounts was properly directed as of the commencement date of the action. Defendant's retirement accounts, which were held in the form of securities, were properly valued as of or close to the date of trial since they were passive assets (*see* Finkelstein v Finkelstein, 268 A.D.2d 273, 273, 701 N.Y.S.2d 52 [2000], *lv denied* 96 N.Y.2d 703, 723 N.Y.S.2d 130, 746 N.E.2d 185 [2001]; *Heine v Heine*, 176 A.D.2d 77, 87, 580 N.Y.S.2d 231 [1992], *lv denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632 [1992]). Lifetime maintenance of $ 3500 per month was appropriately awarded in view of the 23-year duration of the marriage, plaintiff's role in raising and educating the two children, her minimal job skills, her having been out of the workforce since **[**3]** 1977 and the parties' respective financial positions (*see* Silverman v Silverman, 304 A.D.2d 41, 51, 756 N.Y.S.2d 14 [2003]; *Kirschenbaum v Kirschenbaum*, 264 A.D.2d 344, 345, 693 N.Y.S.2d 149 [1999]). It was also proper to adjust plaintiff's equitable distribution award to give defendant credit for excess temporary maintenance payments (Domestic Relations Law § 236[B][5][d][5]; *see* Galvano v Galvano, 303 A.D.2d 206, 755 N.Y.S.2d 599 [2003]). Since plaintiff presented no evidence of the claimed tax implications of awarding defendant a credit against past excess payments, the court's failure to consider them was not error (*see* Vicinanzo v Vicinanzo, 193 A.D.2d 962, 968, 598 N.Y.S.2d 362 [1993]; *Gluck v Gluck*, 134 A.D.2d 237, 239, 520 N.Y.S.2d 581 [1987]).

We find, however, that plaintiff was improperly denied her distributive share of the nonvested portion of defendant's pension (*Burns v Burns*, 84 N.Y.2d 369, 376, 643 N.E.2d 80, 618 N.Y.S.2d 761 [1994]; *Jones v Jones*, 212 A.D.2d 1037, 624 N.Y.S.2d 1005 [1995]), requiring remand for determination of this asset. Additionally, defendant improperly received a 100% credit of $ 109,251 for maintenance payments and **[**4]** $ 6553 for homeowner's insurance for the marital apartment. Since these payments maintained the value of the marital residence and both parties benefitted from the sale of the residence, defendant should have received a 50% credit for these payments, i.e., $ 57,902, and we reduce plaintiff's credit for past temporary maintenance payments by that amount. We also find that given the disparity in the parties' future earning capacity and plaintiff's bleak work prospects, defendant should pay for plaintiff's health insurance until she obtains a job with benefits or is eligible for medicare.

Finally, the trial court erred in declining to distribute the present value of the parties' interest in KP Holdings, instead directing that this asset be divided on an "if, as and when" basis as the assets it holds are sold.

The asset in question is the parties' n1 25% interest in KP Holdings, a New York limited **[*3]** liability company which at the time of this action owned 11 occupied rent-controlled or rent-stabilized apartments in three buildings on the East Side of Manhattan. Defendant offered the testimony of an expert who appraised this asset

and concluded that the present value of KP Holdings **[**5]** at the time of the valuation was $ 340,000. The parties' 25% share was valued at $ 55,000 after applying a "minority discount" to take into account the lesser market value of a minority interest; without that discount, the parties' interest was valued at $ 85,000.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 While defendant asserts in a footnote that this asset is not marital property, his testimony that the funds to purchase this asset were obtained from "borrowing against securities that [he] inherited" was not sufficiently supported, and indeed, his net worth statement indicated that it was purchased with marital funds. It was therefore correctly treated as marital property (*see* Lischynsky v Lischynsky, 120 A.D.2d 824, 826, 501 N.Y.S.2d 938 [1986]).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The court rejected the validity of this expert's valuation, remarking on various ways that, in its view, the expert had erred. It observed that the expert referred to one of the buildings as a five-story walk-up at one point and as a five-story elevator building at another; it further remarked that **[**6]** the expert referred to five of the apartments in one of the buildings as studios when only three are studios. The court added that the expert did not know the start-up history or capitalization dates of KP Holdings, nor to whom the management fees and legal fees were paid. Finally, the court observed that the expert "acknowledged" that the apartments "could just as easily be worth 6 to 7 million." Based on these observations, the court concluded that the parties' interest in KP Holdings was "wholly speculative," thereby precluding accurate valuation and distribution of its present value, and requiring instead that any future distribution following a sale of a KP-owned apartment be split upon receipt.

Most of the court's criticisms lack validity. Review of the testimony and the appraisal report, including the annexed floor plans, reveals that the expert was fundamentally accurate as to the size and type of the apartments. Moreover, to the extent he did not provide certain information, it was of little if any relevance in arriving at a proper evaluation. As to the expert's reference to "6 to 7 million," what the expert was discussing was not the present value of KP Holdings, but the **[**7]** projected future reversionary value of the properties, that is, the predicted amount the apartments might *eventually* be sold for, projecting as far as 12 to 25 years in the future, to a time when the apartments would be vacated and salable.

The court's conclusion that the parties' interest in KP Holdings was "wholly speculative" seemed to be based primarily on an erroneous belief that the 6 to 7 million figure was a viable alternative valuation amount, making the expert's valuation of KP Holdings at $ 340,000 seem unreasonably low. However, the properties' total reversionary value should not have been relied upon to cast doubt on the expert's assessment of the *present* value of this investment. The present value of this asset is no more speculative than that of any other asset with limited marketability; HN1 it may be properly determined by standard valuation techniques. Rather than rendering the asset's value too speculative to determine, the marketability limitation simply creates the need to apply discounting factors to the future value - exactly the procedure the expert here employed. He properly

considered not only the projected sale prices some distance in the future, but **[**8]** then applied discounts to those projected prices to account for such factors as the likely length of time before the apartments will become available for sale, and the expected costs of ownership of the properties in the intervening years.

*Silverman v Silverman (*304 A.D.2d 41, 49-50, 756 N.Y.S.2d 14, *supra*), upon which the trial court relied in determining that the value of KP Holdings should be distributed as apartments are sold and distributions made to the partners, is inapposite. Nothing *in Silverman* stands for the proposition **[*4]** that the equitable way to distribute such an asset is "if, as and when" the apartments are actually sold. *Silverman* concerned *possible future fees* the husband could receive from a hedge fund he had helped set up and manage. *Neither* party in *Silverman* proposed a valuation for these possible future fees; the litigated issue was whether any such payments would constitute a distributable marital asset, rather than future, postjudgment earnings of the husband alone. We affirmed the determination in *Silverman* that any such earnings would constitute distributable marital property, best viewed as dividends or appreciation of **[**9]** the husband's interest in this fund, acquired during the marriage, to be divided evenly when received.

In contrast to an asset consisting of possible future fees, where the asset consists of residential apartments held in the name of a holding company, there is no impediment to determining and distributing a present value.

In one other context it is also sometimes appropriate to defer distribution: pension benefits are, under certain circumstances, appropriately awarded as a specified share of the periodic payments which the employee spouse will receive in the future (*see* *Bianco v Bianco*, 21 AD3d 918, 918-919, 801 N.Y.S.2d 338 [2005]; *Buzzeo v Buzzeo*, 141 A.D.2d 490, 491, 529 N.Y.S.2d 120 [1988]). However, an order directing future payment of pension benefits can be provided for in the divorce judgment and Qualified Domestic Relations Order, and thereafter administratively handled, without the parties having any further input or impact on the payments, and without any need for further court input. In contrast, here the directive that the KP Holdings proceeds be distributed evenly between the parties as the apartments are sold leaves many possible unresolved issues for dispute between **[**10]** the parties over the years, such as the extent to which defendant may claim reimbursement for capital contributions to maintain the apartments until they are sold. HN2 Distribution of assets should not be left unresolved at the time of the divorce where it can be effectuated at that time, as can the parties' interest in KP Holdings.

Notwithstanding the foregoing, we recognize that HN3 the trial court had the discretion to reject the valuation offered by defendant's expert if a valid challenge to the expert's method is perceived (*see* *Matter of Tamara B. v Pete F.*, 185 A.D.2d 157, 585 N.Y.S.2d 757 [1992], *lv denied* 81 N.Y.2d 703, 594 N.Y.S.2d 717, 610 N.E.2d 390 [1993], *cert denied* 510 U.S. 835, 114 S. Ct. 111, 126 L. Ed. 2d 77 [1993]). One of the court's reasons for rejecting the expert's conclusion was its observation that the discount rate seemed to have been arbitrarily selected. Indeed, the expert failed to adequately explain why 18% was the appropriate rate. Under such circumstances, the court had the authority to appoint another expert (22 NYCRR 202.18) and direct further proceedings for purposes of a more accurate appraisal.

Therefore, we conclude that the remand of this matter should **[**11]** include

further evaluation of the present value of the parties' interest in KP Holdings, and its distribution.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (John E.H. Stackhouse, J.), entered November 24, 2004, which, insofar as appealed from, distributed marital property, directed defendant husband to pay plaintiff wife lifetime maintenance of $ 3500 per month, and directed defendant to pay for plaintiff's health insurance during the COBRA period, should be modified, on the law and the facts, to (1) award plaintiff 50% of the nonvested portion of defendant's pension valued as of or closely as possible to the date of trial, (2) reduce defendant's credit for excess temporary support payments by $ 57,902, equaling 50% of the amounts paid for apartment maintenance and homeowner's insurance, (3) direct defendant to pay **[*5]** for plaintiff's health insurance until she obtains a job with health benefits or becomes eligible for medicare, and (4) distribute the present value of the parties' interest in KP Holdings, and the matter remanded for re-computation of plaintiff's **[**12]** distributive share, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered October 31, 2003, February 19, 2004 and August 24, 2004, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur except Andrias and Nardelli, JJ. who dissent in part in an Opinion by Andrias, J.

DISSENT BY: ANDRIAS (In Part)

DISSENT:

ANDRIAS, J. (dissenting in part)

We are in agreement with the majority's modification with one exception, namely whether the trial court, relying upon this Court's decision in *Silverman v Silverman* (304 A.D.2d 41, 756 N.Y.S.2d 14 [2003]), properly distributed the parties' interest in KP Holdings on an "if, as and when" basis given the speculative nature of the investment.

KP Holdings is a limited liability company that owns 11 unsold cooperative or condominium apartments on the East Side occupied by either rent controlled or rent stabilized tenants. The trial court rejected defendant's expert's valuation of defendant's 25% interest in KP Holdings at $ 55,000 since the expert acknowledged that the apartments could just as easily be worth six to seven million dollars. The court also noted that a vacant apartment **[**13]** had recently sold for $ 425,000 and defendant realized a $ 50,000 profit from that sale alone. Thus, citing this Court's decision in *Silverman v Silverman (supra)*, it held that the only equitable way to distribute the asset would be "if, as and when" the apartments are actually sold.

Relying upon Domestic Relations Law § 236(B)(4)(b), which requires the court as soon as practicable to set a valuation date somewhere between the date of commencement of the action and the date of trial, defendant argues that if the trial court wanted to reject his expert's valuation, it should have appointed its own valuation expert pursuant to 22 NYCRR 202.18. The majority adopts that position.

However, the issue here is not whether the trial court failed to set an appropriate valuation date within the parameters of the statute or whether it properly rejected the valuation of defendant's expert, but whether the asset should be distributed now or at an appropriate time in the future. Domestic Relations Law § 236(B)(4)(b) merely requires the court to set a valuation date within certain parameters. It does not require **[**14]** that the assets be sold or distributed within any particular time frame.

It is fundamental to the equitable distribution of marital assets and the valuation of such **[*6]** assets that the courts should be as flexible as possible in the particular circumstances of each case. " An important aspect of this [equitable distribution] legislation is the flexibility which is incorporated due to the tremendous variation in marital situations and the equities involved. Flexibility, rather than rigidity is essential for the fair disposition of a given case' (1980 NY Legis Ann, at 130)" (*Wegman v Wegman*, 123 A.D.2d 220, 234-235, 509 N.Y.S.2d 342 [1986]). Thus, despite the general rule regarding the valuation of active and passive assets, " a trial court must have the discretion to select a date appropriate to the case before it in light of the particular circumstances presented,'" such as the speculative nature of the value ascribed to the asset (*Smerling v Smerling*, 177 A.D.2d 429, 430, 576 N.Y.S.2d 271 [1991], quoting *Wegman v Wegman, supra* at 234).

The couple's share in KP Holdings is 25% of KP's only holdings, namely, the apartments. It is the value of those apartments **[**15]** that is speculative and, while I am sure that a real estate professional could, as defendant's expert did, give an educated guess as to their present value, their fully matured value will only be determined when they are actually sold. In *Silverman,* the issue was not the date of valuation, but whether future income from an investment was properly considered marital property. The rationale, however, is the same. There, this Court (per Saxe, J.) found that the husband's ongoing right to 25% of the partnership fees (an asset similar to defendant's 25% interest in KP Holdings) is better viewed as dividends or appreciation of the husband's interest, acquired and fostered during the marriage (304 A.D.2d at 50).

The majority's holding, on the basis of its dubious distinction of *Silverman*, defeats the purpose of the equitable distribution law and is neither fair nor equitable to plaintiff, who is forced to accept a presently low value for an asset (her 121/2;% interest in KP Holdings), at which point her ownership interest and income from that investment will cease. Defendant, on the other hand, without further effort on his part, will not only receive a 25% share of **[**16]** any future profits, but also retain the couple's full 25% interest in KP Holdings. If the majority thinks the present value of the parties' interest in KP Holdings should be determined now on the basis of expert testimony, then such value should be set by presently selling the asset and awarding the parties their respective equal shares of the proceeds, a result, I suggest, that would be unacceptable to both parties, but particularly unacceptable to defendant.

Here the parties' share in KP Holdings is a long-term investment purchased, as the majority specifically notes, with marital funds for the purpose of future appreciation. The majority disregards its own reasoning in *Silverman* and, in practical effect, permits defendant to buy out his former wife's 50% share of their joint interest in KP Holdings for a fraction of its true, albeit speculative value. The *Silverman* court, in effect, valued the wife's share of the husband's future income from the asset (25% of profits from an investment hedge fund) at 50%, which share was to be paid to her

at some indeterminate time in the future, when the husband received his 25% share of the as yet undetermined profits of the hedge fund, **[**17]** if any. Here, as noted by the majority, defendant also persists in the same argument made by the husband in *Silverman*, namely, that the couple's joint interest in KP Holdings is not marital property but if it is, his wife's entitlement to her equitable share of that marital asset should end with the divorce while his identical share in the identical asset should not.

The majority rejects the **first** part of the argument, but, in effect, adopts the second part ostensibly because the trial court's directive, that the proceeds from KP Holdings be distributed evenly between the parties as the apartments are sold, leaves many possible issues for dispute **[*7]** between the parties over the years. Such reasoning is unpersuasive, particularly where it would divest plaintiff of her share of the asset while leaving defendant with unfettered ownership and full entitlement to future income of the parties' joint investment. To force plaintiff to accept a distribution now will have the same effect as choosing an inappropriate valuation date and result in a windfall for defendant incompatible with the objective of equitable distribution (*cf.* Finkelstein v Finkelstein, 268 A.D.2d 273, 274, 701 N.Y.S.2d 52 [2000], **[**18]** *lv denied* 96 N.Y.2d 703, 723 N.Y.S.2d 130, 746 N.E.2d 185 [2001]).

How should such a result be characterized? Using poetic license and with due respect to a phrase **first** used in Sir John Harington's collection of "Epigrams" (published posthumously in 1618), later to become the title of a 1960's era anti-Communist political tract, "None dare call it equitable."

M-6017*Pickard v Pickard*

Motion seeking leave to strike reply brief denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, **FIRST** DEPARTMENT.

ENTERED: AUGUST 10, 2006

SAXBST
ACCOUNTING / TAX / ADVISORY

October 15, 2014

Mr. John Smith
c/o Janet Stevens, Esq.
21 East 57th Street, 4th Floor
New York, New York 10122

Ms. Mary Smith
c/o Larry Johnson, Esq.
123 Main Avenue, 24th Floor
New York, New York 23333

Re: Smith v. Smith[1]

Dear Mr. and Ms. Smith:

At your request, SaxBST LLP has completed this analysis of Mr. Smith's deferred cash and stock awards granted to him by Banking Big Global Markets, Inc. (a subsidiary of Banking Big, Inc.; *Ticker Symbol "Bank"*) during the marriage. The combined entity will be referred to herein as "Banking Big."

This report is comprised of three sections:

1. Overview of Mr. Smith's Deferred Cash and Stock Awards
2. Calculation of Mr. Smith's "Marital" Deferred Cash and Stock Awards[2]
3. Valuation of Mr. Smith's "Marital" Deferred Cash and Stock Awards.

The following sections provide an overview of the nature of Mr. Smith's cash and stock awards during the marriage, a valuation of the marital awards, and after-tax calculations of the marital awards.

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[1] Please note that this demonstration report is being used as a teaching tool. The specific facts of each case will determine the methodologies and assumptions employed, which may deviate from what was utilized herein.
[2] Please note that certain terms used in this report, such as "marital" and "separate," are a matter of law and should not be construed to be a conclusion of law. Rather, those terms are applied in the context of the matrimonial proceedings and our understanding of those terms.

1. Overview of Mr. Smith's Deferred Cash and Stock Awards

Mr. Smith received deferred cash and stock awards from his employer, Banking Big, from January 20, 2009 (JS00033) through February 18, 2014, the determination date ("DOC").[3] Based upon a review of the provided records, Banking Big has a practice of granting these awards to certain employees in January and February of each year. These awards are granted under the Deferred Cash Award Plan (beginning at page JS00152) and Capital Accumulation Program (beginning at page JS00135).

Under both plans, the awards vest in equal amounts in either three or four years following the date of grant. The employee forfeits any unvested awards if he or she voluntarily leaves employment. In addition, the unvested awards may be forfeited if Banking Big experiences a material adverse outcome (defined on JS00140) *and* the grantee is determined to have significant responsibility for that outcome. Employees generally pay ordinary income taxes upon the date of vesting rather than the date of grant. Upon vesting, the after-tax cash or shares are typically delivered to Mr. Smith's Banking Big Private Bank account (x-6883).

The deferred cash grants earn interest, compounded annually, and the principal and interest are paid to Mr. Smith upon the vesting date. For example, $1,980,000 in deferred cash was awarded to Mr. Smith on January 17, 2012 at a 3.55% interest rate. The award vests in four equal tranches of $495,000 on January 20 of 2013, 2014, 2015, and 2016. The first tranche vested on January 20, 2013 and $512,572.50 in deferred cash was paid to Mr. Smith (i.e., $495,000 in principle and $17,572.50 in interest).

The number of deferred shares of Banking Big stock are based upon the stock price on the date of grant, and the award amount. For example, $1,980,000 of shares were awarded to Mr. Smith on January 17, 2012. This amount equated to 64,841.50 shares of stock on the date of grant, which vest in four equal tranches of 16,210.38 each on January 20 of 2013, 2014, 2015, and 2016. On January 20, 2013, 16,210.38 shares vested, and 8,231 net shares (after estimated taxes) were delivered to Mr. Smith's Banking Big bank account. Since Mr. Smith pays ordinary income taxes on the shares on the date of vesting, his tax basis is equal to the market value of those shares on that date. If he sells the 8,231 shares in less than one year, the gains (if any) are taxed at short-term capital gains tax rates; if he sells the shares more than one year from the date of vesting, the gains (if any) are taxed at long-term capital gains tax rates. In addition to the

[3] This statement is based upon the award statements provided to SaxBST.

shares being delivered upon vesting, Mr. Smith regularly receives cash compensation in his payroll based upon the number of deferred shares that he owns and the dividend payment that he would have received on those shares had he owned them outright. This dividend equivalent payment is immaterial relative to the total value of the stock award. For example, on the $1,980,000 deferred stock award granted to him on January 17, 2012, he earned approximately $2,000 in dividend equivalent payments in 2012.

2. Calculation of Mr. Smith's "Marital" Deferred Cash and Stock Awards

In *DeJesus v DeJesus [C/A 90 N.Y.2d 643, 665 N.Y.S.2d 36 (1997)]*, the Court of Appeals ruled that stock plans provided by a spouse's employer may constitute distributable marital property even though the options granted during the marriage vest after dissolution of the marriage. In its decision, the Court adopted a four-tiered analysis to be used in determining spousal rights in unvested stock options. Those steps are as follows:

1. Differentiate shares traceable to past services from those traceable to future services.
2. Label as marital property portions of compensatory stock plans earned by the titled spouse during the marriage and before the time of grant.
3. Label as marital property portions of incentive stock plans by a time rule like that employed in *re: Nelson.*
4. Equitably distribute marital property.

The *Nelson* time rule referred to by the Court is described as a fraction where the denominator represents the time from the date of the grant to the date of first possible exercise, and the numerator represents the time from the date of the grant to the date of separation (assumed to be the date of commencement in this matter).

The deferred cash and stock awards to Mr. Smith are materially similar to the stock options granted in the DeJesus case in terms of their stated intention and vesting. Based on these facts, and following the Court's direction in *DeJesus*, we applied the *Nelson* formula to determine the marital component of the awards. Based upon the *DeJesus* decision, we computed the following marital coverture fractions.

Table 1: Determination of Mr. Smith's Marital Deferred Cash Awards

Deferred Cash Program							
Bates	Date of Grant (DOG)	Date of Full Vesting (DOFV)	Unvested Accrued Cash Balance[1]	Days from DOG to DOC	Days from DOG to DOFV	Marital Coverture Fraction	Pre-Tax "Marital" Cash[2]
JS00025	1/17/2012	1/20/2015	$ 530,769	763	1,099	69.4%	$ 368,496
JS00026	1/17/2012	1/20/2016	530,769	763	1,464	52.1%	276,623
JS00027	2/19/2013	1/20/2015	478,206	364	700	52.0%	248,667
JS00028	2/19/2013	1/20/2016	478,206	364	1,065	34.2%	163,443
JS00029	2/19/2013	1/20/2017	478,206	364	1,431	25.4%	121,640
JS00030	2/18/2014	1/20/2015	487,500	0	336	0.0%	-
JS00031	2/18/2014	1/20/2016	487,500	0	701	0.0%	-
JS00032	2/18/2014	1/20/2017	487,500	0	1,067	0.0%	-
JS00033	2/18/2014	1/20/2018	487,500	0	1,432	0.0%	-
	Total:		$ 4,446,156				$ 1,178,869

Notes:

1. The awards which were granted and vested before the date of commencement were excluded from this analysis as they became part of the marital estate.
2. This analysis assumes that the grants are incentive for future services, and not past services.

As shown in the previous table, the coverture fraction is calculated by dividing the time accrued from the date of grant to the date of commencement by the time accrued from the date of grant to the date of vesting. The deferred cash awards which vested prior to the date of commencement of the matrimonial action were liquidated and were either consumed by the marriage and/or are manifested somewhere else in the marital estate.

On January 20, 2014, prior to the date of commencement, two deferred cash awards vested; however, the Banking Big statements dated post-commencement show that these awards had not yet been delivered to Mr. Smith. This information is presented herein so that counsel may

incorporate these presumable "marital" amounts into the settlement agreement, since they are likely not captured in an investment account as of the date of commencement.

Table 2: Deferred Cash Awards Which Vested Prior to the DOC, But Are Yet to be Delivered

Bates #	Pre-Tax Award	Date of Vesting
JS00025	$ 530,769	1/20/2014
JS00039	$ 478,206	1/20/2014

(Continued on the following page)

The following table shows the computation of the marital coverture fractions to be applied to the deferred stock awards.

Table 3: Determination of Mr. Smith's Marital Deferred Stock Awards

Deferred Stock Program							
Bates	Date of Grant (DOG)	Date of Full Vesting (DOFV)	Unvested Deferred Shares[1]	Days from DOG to DOC	Days from DOG to DOFV	Marital Coverture Fraction	Pre-Tax "Marital" Shares[2]
JS00027	1/17/2012	1/20/2015	16,210	763	1,099	69.4%	11,254
JS00028	1/17/2012	1/20/2016	16,210	763	1,464	52.1%	8,448
JS00029	1/18/2011	1/20/2015	21,962	1,127	1,463	77.0%	16,918
JS00030	2/19/2013	1/20/2015	10,585	364	700	52.0%	5,504
JS00031	2/19/2013	1/20/2016	10,585	364	1,065	34.2%	3,618
JS00032	2/19/2013	1/20/2017	10,585	364	1,431	25.4%	2,692
JS00033	2/18/2014	1/20/2015	9,816	0	336	0.0%	0
JS00034	2/18/2014	1/20/2016	9,816	0	701	0.0%	0
JS00035	2/18/2014	1/20/2017	9,816	0	1,067	0.0%	0
JS00036	2/18/2014	1/20/2018	9,816	0	1,432	0.0%	0
	Total:		125,402				48,435

Notes:

1. The awards which were granted and vested before the date of commencement were excluded from this analysis as they became part of the marital estate.
2. This analysis assumes that the grants are incentive for future services, and not past services.

The same formula was applied to calculate the marital coverture fractions for the deferred stock awards as was applied to the deferred cash awards. The following section shows the valuation of the deferred cash and stock awards, and the after-tax values.

The alternative to valuing the unvested cash and stock awards is to distribute them on an "if, as, and when realized" basis (*i.e.*, when a tranche of deferred cash or stock vests, the marital portion

of the net after-tax proceeds are distributed at that future date).[4] Distribution on an "if, as and when realized" basis obviates the need to currently tax impact the deferred cash and stock values, and the need to apply a discount for lack of marketability to the unvested shares of stock.

Another alternative is to pay the gross proceeds as taxable maintenance, not subject to modification and non-terminus on remarriage. Since maintenance (alimony) must terminate on the death of the payee spouse, life insurance can be used to insure against Ms. Smith's premature demise, as well as Mr. Smith's. Taxable maintenance may be especially beneficial if there is a material disparity in marginal income tax rates between the parties, i.e., if Ms. Smith's marginal tax rate is significantly less than Mr. Smith's rate, this would provide a Federal and State tax subsidy to both parties.

(Continued on the following page)

[4] Whether or not the "marital" awards are valued or distributed on an "if, as, and when realized" basis is ultimately the decision of the trier of fact and the observations contained herein are based upon the appraiser's previous experiences with these types of equity awards.

3. Valuation of Mr. Smith's "Marital" Deferred Cash and Stock Awards

The deferred cash awards are based upon a set value as of the date of grant, and are not subject to fluctuations in Banking Big's stock price. Therefore, additional valuation adjustments are not required. However, other than the application of the coverture fractions, which segregate marital and non-marital value based upon a time-rule, no consideration has been given to the possibility of Mr. Smith's voluntarily termination of employment. The following table shows the application of the marginal income tax rates for Federal, State, and Medicare taxes.

Table 4: After-Tax Value of the Marital Deferred Cash Awards as of the Date of Commencement

Deferred Cash Program			
Bates	Pre-Tax "Marital" Cash	Marginal Income Tax Rate	After-Tax Marital Value as of DOC
JS00025	$ 368,496	47.3%	$ 194,281
JS00026	276,623	47.3%	145,843
JS00027	248,667	47.3%	131,104
JS00028	163,443	47.3%	86,172
JS00029	121,640	47.3%	64,132
JS00030	-	47.3%	-
JS00031	-	47.3%	-
JS00032	-	47.3%	-
JS00033	-	47.3%	-
	$1,178,869		$ 621,532

The applicable marginal income tax rate was computed through the use of SaxBST's internal income tax software, and confirmed through a review of income tax rates published by the IRS and New York State. The utilized tax rate takes into consideration the tax deductible benefit of state taxes.

The deferred stock awards are based upon a certain number of deferred shares issued on the date of grant, and the ultimate realized value is based upon Banking Big's stock price on the date of vesting. Due to the fact that the marital shares are subject to fluctuations in Banking Big's stock price from the date of commencement to the date of vesting (and Mr. Smith cannot realize the publicly traded stock price until the vesting date), discounts for lack of marketability/illiquidity ("DLOM" and "DLOL") were applied to the value of the deferred stock awards. Marginal income tax rates were also applied for Federal, State, and Medicare taxes, as shown in the following table.

Table 5: After-Tax Value of the Marital Deferred Stock Awards as of the Date of Commencement

Deferred Stock Program							
Bates	Pre-Tax "Marital" Shares	Stock Price as of DOC	Gross Value of Unvested Marital Shares as of DOC	DLOM / DLOL Percentage[1]	Fair Market Value of Unvested Marital Shares as of DOC	Marginal Income Tax Rate	After-Tax Marital Value as of DOC
JS00027	11,254	$49.38	$ 555,739	9.6%	$ 502,444	47.3%	$ 264,902
JS00028	8,448	$49.38	417,184	13.5%	360,876	47.3%	190,264
JS00029	16,918	$49.38	835,422	9.6%	755,305	47.3%	398,217
JS00030	5,504	$49.38	271,797	9.6%	245,732	47.3%	129,557
JS00031	3,618	$49.38	178,646	13.5%	154,534	47.3%	81,474
JS00032	2,692	$49.38	132,955	16.0%	111,639	47.3%	58,859
JS00033	0	$49.38	-	0.0%	-	0.0%	-
JS00034	0	$49.38	-	0.0%	-	0.0%	-
JS00035	0	$49.38	-	0.0%	-	0.0%	-
JS00036	0	$49.38	-	0.0%	-	0.0%	-
	48,435		$ 2,391,743		$ 2,130,529		$ 1,123,273

Notes:
1. The discounts for lack of marketability / illiquidity (DLOM/DLOL) were applied because the stock awards are not liquidated until the dates of vesting. Therefore, a stock-put (*i.e.*, a right to sell stock at a future date) was calculated for each unvested tranche of stock award, and the cost of the stock-put was utilized to assess the respective discount.

Given the fact that Mr. Smith does not have access to the value of the unvested deferred shares until they vest, they are less valuable than Banking Big's publicly traded stock price. Based upon the volatility of Banking Big's stock price, holding period of the deferred shares, and

Banking Big's dividend yield, a protective stock-put was calculated for each tranche. A protective stock-put with an exercise price equal to the stock price on the date of valuation allows the purchaser of the stock-put to hypothetically sell the stock at a future date and therefore protect the current value from declines. However, the purchaser of the stock put has to pay a fee for the option, and that fee may be used as a proxy for a discount for lack of marketability / illiquidity. In this case, the Black-Scholes option pricing model was utilized to compute the cost of the protective stock-put.[5] The computed discounts do not take into account the risk that Mr. Smith may forfeit his unvested awards.

Summary

The following table contains a summary of the pre-tax and after-tax values of the unvested deferred cash and stock awarded to Mr. Smith. These values may be used for current equitable distribution purposes. If the parties intend to distribute the marital deferred cash and shares on an "if, as, and when realized" basis, then the marital deferred cash figures in Table 1, and the number of marital shares in Table 3, should be used.

Table 6: Summary of Marital Value of Unvested Deferred Cash and Stock Awards

Unvested Awards	Pre-Tax Marital Value	After-Tax Marital Value
Deferred Cash	$1,178,869	$ 621,532
Deferred Stock	2,130,529	1,123,273
Total	$3,309,398	$1,744,805

[5] Messrs. Robert Merton and Myron Scholes, developed this stock option valuation method in close collaboration with Fischer Black. In 1973, Black and Scholes published what has come to be known as the Black-Scholes formulas. In 1997, Messrs. Merton and Scholes received the Nobel Prize in Economics for their work on this formula (Mr. Black died in 1995 and was not eligible to receive the prize).

Very truly yours,

SaxBST LLP

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