Death and Divorce: What Estate Planning and Family Law Attorneys Need to Know

November 17, 2015

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CBA Law Center

New Britain, CT

CT Bar Institute, Inc.

CLE Credit 3.0 Hours

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

DEATH AND DIVORCE:
WHAT ESTATE PLANNING AND
FAMILY LAW ATTORNEYS NEED TO KNOW

TABLE OF CONTENTS

BIOS……..……..4
Jeffrey L. Crown, Trustlawyer LLC, Rocky Hill … …….....……...……..7
Some Estate Planning Implications of Marriage and Divorce
David A. McGrath, Louden Caisse Hanney LLC, Hartford …….……20
CGS 46b-81
CGS 46b-82
Rubin v. Rubin, 204 Conn 224 (1987)
Bartlett v. Bartlett, 220 Conn. 372 (1991)
Spencer v. Spencer, 71 Conn. App. 475 (2002)
Standish v. Standish (1998)
Greenwich Trust Co. v. Tyson, 129 Conn. 211 (1942)
Sheetz v. Sheetz, 2001 Conn. Super. (2001)
Powell-Ferri v. Ferri, 2013 Conn. Super. (2013)
Powell-Ferri v. Ferri, 2014 Conn. Super. (2014)
Ferri v. Powell-Ferri, 317 Conn. 223 (2015)
Pfannenstiehl v. Pfannenstiehl, 88 Mass App. Ct. 121 (2014)
Edith McClure, Greater Hartford Legal Aid Inc., Hartford……..…129
McHugh v. McHugh
§ 46b-36d Content of premarital agreement
§ 46b-36f Amendment or revocation of premarital agreement after marriage
§ 46b-36g Enforcement of premarital agreement
Automatic orders and case cites
Elizabeth L. Leamon, Leckerling Ladwig & Leamon LLC,
Madison…….……..142
Until Death or Divorce Do Us Part
Discovery Samples
Bedrick v. Bedrick_ 300 Conn. 691
Centmehaiey v. Centmehaiey 2014 Conn. Super.
Fustini v. Fustini_ 2015 Conn. Super.
Hornung v. Hornung_ 2014 Conn. Super. - mod prenup upheld

Faculty Biographies

Jeff Crown

For over thirty years, Jeff Crown has had a deep interest in the psychological and emotional aspect of estate planning, administration and litigation. He has advised hundreds of clients regarding complicated family dynamics, including sibling rivalries, substance abuse, "outlaw" in-laws and children who don't share their parents' values of work and thrift.

He has lectured widely at seminars throughout the country including the University of Miami and Notre Dame Estate Planning Institutes, The State Bar of Texas Advanced Probate Course and the New Mexico and Oklahoma Tax Institutes. He has written for publications including *J.K. Lasser's Estate Tax Techniques, The Review of Taxation of Individuals, Estate Planning* and *The Estates Gifts and Trusts Journal.* Jeff is a former associate editor of *Probate and Property* and is a member of the Connecticut Bar Association Estate and Probate Executive Committee. He is a former member of the Tax Management Estates, Gifts and Trusts Advisory Board and is a Fellow of the American College of Trust and Estate Counsel. He is listed in "The Best Lawyers in America" and in "Who's Who in American Law."

He is a graduate of the University of Connecticut Law School and has done graduate study in tax law at New York University.

Elizabeth L. Leamon

Elizabeth L. Leamon currently focuses her practice on estate settlement, estate planning and contested matters in probate court. Beth also has a litigation background with experience in divorce and appellate law. Beth works primarily with families and individuals providing counsel to craft sophisticated estate plans, including, wills, revocable and irrevocable trusts, special needs trusts, LGBT planning, and even pet trusts. She also works with clients to develop succession plans for family businesses and real estate, asset protection, including pre and post-martial agreements, and plans for charitable giving.

She was named a "Rising Star" among Connecticut lawyers by Connecticut Magazine from 2010-2013. She served as Chair of the New Haven County Bar Association Trusts, Estates and Probate Committee and a member of the Executive Committee of the Connecticut Bar Association, Estates and Probate Section.

From 2002 to 2003, she worked as Law Clerk to the Honorable Richard N. Palmer, Associate Justice of the Connecticut Supreme Court. Beth began private practice in 2003 at the Connecticut law firm of Tyler Cooper & Alcorn, LLP and thereafter, at Murtha Cullina LLP. She is currently a partner at the firm of Leckerling Ladwig & Leamon LLC.

Beth graduated from the University of Connecticut Law School with honors in 2002, New York University (M.A., 1991) and Connecticut College (B.A., cum laude, 1989), Phi Beta Kappa.

Edith McClure

Edith McClure, a 1960 graduate if Smith College, graduated from the University of Connecticut School of Law in 1980. She has practiced in the area of family law her admission to the bar in 1980.

Edith serves on the Executive Committee of the Family Law Section of the CBA and has been a fellow in the American Academy of Matrimonial Lawyers since 1986.

Edith has been instrumental in the creation of the Special Masters program in Hartford and throughout the state, currently serving as a Special Master in Hartford.

She is semi-retired, currently a volunteer staff attorney at Greater Hartford Legal Aid.

David McGrath

David McGrath graduated Cum Laude from St. Anselm College and with Honors from the University of Connecticut Law School.

David currently serves as Chair of the Family Law Committee of the Young Lawyers' Section of the Connecticut Bar Association, having previously served as a Director for the Section. In 2011, David was selected as a Rising Star for the Connecticut Bar Association Family Law Section and since that time has served on the Family Law Section Executive Committee.

In 2012, David was named "Star of the Year" by the Connecticut Bar Association's Young Lawyers' Section. He was also named a Rising Star in Family Law by Super Lawyers magazine in 2013, 2014 and 2015.

David is an associate at Louden, Caisse, Hanney, with office in Hartford and Norwich, practicing exclusively in the area of family law.

SOME ESTATE PLANNING IMPLICATIONS OF MARRIAGE AND DIVORCE *

by

Jeff Crown

TrustLawyer, LLC, Rocky Hill, CT

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For over thirty years, Jeff Crown has had a deep interest in the psychological and emotional aspect of estate planning, administration and litigation. He has advised hundreds of clients regarding complicated family dynamics, including sibling rivalries, substance abuse, "outlaw" in-laws and children who don't share their parents' values of work and thrift.

He has lectured widely at seminars throughout the country including the University of Miami and Notre Dame Estate Planning Institutes, The State Bar of Texas Advanced Probate Course and the New Mexico and Oklahoma Tax Institutes. He has written for publications including *J.K. Lasser's Estate Tax Techniques, The Review of Taxation of Individuals, Estate Planning* and *The Estates Gifts and Trusts Journal.* Jeff is a former associate editor of *Probate and Property* and is a member of the Connecticut Bar Association Estate and Probate Executive Committee. He is a former member of the Tax Management Estates, Gifts and Trusts Advisory Board and is a Fellow of the American College of Trust and Estate Counsel. He is listed in "The Best Lawyers in America" and in "Who's Who in American Law."

He is a graduate of the University of Connecticut Law School and has done graduate study in tax law at New York University.

PART ONE

PLANNING FOR MARRIAGE

FORGOTTEN FACTORS IN PRE-NUPTIAL AGREEMENTS

"Waiver" of spousal rights in retirement plans

The Retirement Equity Act

The Retirement Equity Act was supposed to ensure that the spouse of a qualified plan recipient receives survivor benefits from the plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984), amending 26 USC §401. The REA **established clear criteria for a waiver of benefits by the spouse.** No waiver shall be effective unless the participant's spouse consents in writing. The election may not be changed without the spouse's consent unless she has agreed to allow amendments.

The issue becomes whether, and **to what extent, a spouse may waive her rights in a prenuptial agreement?**

Effect of waivers – divorce

Several courts have held that, in the context of divorce, spousal rights in qualified plans may be waived prior to marriage. *Critchell v. Critchell, 746 A.2d., 282 (D.C. 2000); In re Marriage of Rahn, 914 P.2d. 463 (Colo. App. 1995); Richards v. Richards, 640 N.Y.S. 2d. 709 (1995).*

Effect of waivers – death

Death benefits under pension and profit sharing plans are treated differently. The statute states that, absent an effective waiver, a surviving spouse is automatically entitled to receive a "qualified pre-retirement annuity". The Treasury Regulations are specific that those benefits **may not be waived, except by a spouse**. "[A]n agreement entered into prior to marriage does not satisfy applicable consent requirements." Regs. §1.401(a)-20.

Since the parties to a prenuptial are not yet spouses, a waiver will most probably not be effective. See, e.g., *Hagwood v. Newton, 282 F. 3d 285 (C.A. 4, 2002); National Auto Dealers v. Arbeitman, 89 F. 3d 496 (C.A. 8, 1996); Pedro Ent. v. Perdue, 998 F. 2d 1214 (C.A. 7, 1993); Howard v. Branham & Baker Coal Co., 968 F. 2d 1214 (C.A. 6, 1992) Hurwitz v. Sher, 982 F.2d 778 (C.A. 2, 1992); Hawxhurst v.Hawxhurst, 723 A. 2d 58, 64 (N.J.Super. Ct., 1998).*

For an excellent discussion of REA and Pre-Nuptial Agreements, see Fields, "Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer," 21 J. Amer. Acad. of Matrimonial Lawyers, 413, 415 (2008) [www.aaml.org/sites/default/files/MAT210.pdf]

A possible solution

Perhaps a variation of a "no contest" clause would be useful. If the spouse agrees to waive her rights after marriage and has not done so, other provisions for her would be reduced by the value of the retirement benefits she received.

Note re subsequent marriage

REA does not just apply to beneficiaries designated during marriage. Marriage essentially voids all existing beneficiary designations.

EXAMPLE: Smedley is divorced with two children, whom he's named as beneficiaries of his profit sharing plan. After a two week whirlwind courtship, he marries Velveeta. The children are out. Velveeta is in.

Estate Tax

"Portability"

Until fairly recently, a person's unused estate tax exemption [properly called either a "unified credit" or "applicable exclusion amount") died with him or her. It could not be used by his or her surviving spouse. We now have "portability" and a new acronym, "DSUEA," – Deceased Spouse's Unused Exemption Amount."

A deceased person's **"excess" estate tax exemption can be, essentially, transferred to his or her spouse (as long as he or she does not remarry)**.

EXAMPLE: Elmer has $2 Million of assets. His wife, Elsie, has cashed in on her commercial success and is worth $7 Million. Assuming that Elsie doesn't remarry and that Elmer's executor prepares and files certain documents, Elsie could use a portion of Elmer's exemption against her own estate tax. With today's $5 Million exemption, Elsie could pass her entire estate to her beneficiaries tax free.

What to do

In order to take advantage of portability, the deceased spouse's executor has to prepare and file a Federal estate tax return. In many cases, that return would otherwise not be required. This could create more work and expense for his

executor, possibly with no benefit to the deceased spouse's beneficiaries. Since the surviving spouse will benefit from this effort, she should be paying for it.

You might want to provide, in a Pre-Nuptial Agreement, that:

► If, when the first spouse dies, they are married to each other, the deceased spouse's executor will, upon the survivor's request, sign and file a Federal estate tax return.

► If that return would otherwise not be necessary, the surviving spouse will pay the costs of preparing it, including all fees for lawyers, accountants, appraisers, etc. If a return is necessary, the survivor agrees to pay the incremental cost of complying with the portability provisions.

► The executor will file all documents necessary to make an election under Section 2010(c)(5) of the Internal Revenue Code.

► Each spouse agrees to provide that her or his executor is authorized or required to make the election.

Income and gift tax

Allocation on joint income tax returns.

Consider language similar to this:

> "If JOHN and MARY file a joint income tax return for any year, each of them shall pay his and her proportionate share of the taxes reflected on that return, and any interest and penalties on it.

> That proportionate share shall be based upon their respective incomes, reduced by their respective credits and deductions. Any income tax refund for any year for which JOHN and MARY have filed a joint income tax return shall be allocated between them in the same proportion that the tax paid by each of them bears to the total taxes paid. The term 'income tax return' includes all Federal, state and local income tax returns reporting any one or more items of income, gains, profits and avails, including earned income, dividends, interest and capital gains."

Gift splitting

Generally. Gifts made to third parties may be treated as having been made one-half by the donor's spouse by signifying her consent on a gift tax return.. Especially if one spouse will never need her entire gift tax exemption, it might make sense to have her agree to consent to gift splitting. The agreement should provide that the donor spouse pay the costs of preparing her gift tax return.

Annual exclusion gifts only. Alternatively, the agreement might provide that each spouse consents to split gifts within the annual gift tax exclusion (currently $14,000 per donee.) NOTE: One cannot selectively split gifts, for example, by consenting only up to the annual exclusion. The consent applies to all gifts by the donor spouse in the applicable year.

What rights are being waived?

Many pre-nuptial agreements waive the spousal elective share, support allowance and other monetary rights in a deceased spouse's estate. The parties

may wish to consider waiving other "marital benefits" as well. The following list is not exhaustive

- To contest provisions of a will, trust, conveyance or beneficiary designation.
- To be named as an administrator.
- To be a conservator
- To receive proceeds of personal injury or wrongful death action
- Homestead
- To serve as a health care representative
- To consent or object to anatomical gifts
- To receive assets as an heir at law
- To any widow's elective share
- Dower or curtesy
- Alimony or separate maintenance
- To act as administrator or as preliminary administrator
- To receive damages for wrongful death.

Protect Closely Held business Interests

Chances are that, if your client were to be divorced, he would not be ecstatic about his "former spouse to be" playing a role in the family business.

Although "buy and sell" agreements commonly restrict the owners' rights to

dispose of their stock during lifetime and at death, most of those agreements are silent on transfers incident to divorce. The majority rule is that restrictions on the transfer of corporate stock do not encompass "involuntary" tranfers. See Zaritsky, "*Forgotten Provisions In Buy-Sell Agreements*," U. of Miami 19th Inst. On Est. Plnng., Ch. 6 (1985).

> "…the transfer of stock ordered by the court in a marriage dissolution proceeding is an involuntary transfer not prohibited under a corporation's general restriction against transfers unless the restriction expressly prohibits involuntary transfers. Ordinarily, for drafting purposes, we think use of the phrase 'involutary transfers' would be deemed to encompass divorce court transfers." ***Castonguay v. Castonguay***, 306 N.W.2d. 143 (Minn. 1981).

Partnership and LLC interests might conceivably be treated differently. The Uniform Partnership Act provides that an involuntary transferee is an assignee, and not a partner. Nevertheless, it would make sense to insert clearly worded restrictions in both partnership and corporate agreements to the effect that any attempt by a spouse or creditor to reach the assets will be treated as an offer to buy by an outsider. Consider language such as the following:

> "**Section ?. Security Transfers.**
> All involuntary encumbrances, pledges, attachments, levies, executions and other legal or equitable means to take or reach a Shareholder's Stock Interest, including transfers incident to divorce, are called 'Security Transfers.' The Shareholder against whom a security transfer is made, filed or recorded, is called the 'Deemed Offeror.' The making, filing or recording of any

> Security Transfer shall have the same effect as if the Deemed Offeror had notified the other Shareholder of his intent to transfer stock under Subsection 1 of Section A of this ARTICLE FOUR. All of the provisions of that Subsection 1 shall apply, except that the purchase right shall remain in effect for one hundred eighty days, rather than for thirty days."

Treating an attempted involuntary transfer as an offer to purchase could lead to inequities if the affected owner's interest is bought out by his partners. The ***Castonguay*** case seems to suggest that an outright prohibition on involuntary transfers would be respected.

Miscellaneous provisions

What are home maintenance expenses and who pays them?

If joint or tenants in common property is sold, who is entitled to the proceeds?

CONTEMPLATION OF MARRIAGE PROVISIONS

Consider providing that the will (and revocable trust) is not revoked if the testator marries in haste, giving no thought to his will. Language such as the following may be included:

> "**Section ?. Marriage to Have No Effect on Will.** If I marry after executing this Will, I direct that my marriage have no effect upon this Will. I intend that all of the beneficial provisions of this Will and the provisions appointing my Executor remain in full force and effect, notwithstanding the fact that I marry after I execute this Will."

PART TWO

PLANNING FOR DIVORCE

Make sure that Ex-Spouse is not the Beneficiary of Non-Testamentary Dispositions

The statute eliminating provisions for spouses upon divorce only applies to wills. Life insurance policies, retirement plans, jointly owned assets, revocable trusts and other "will substitutes" may be unaffected. Have your client provide a complete list of assets and check to see that the former spouse is not still a taker (no pun intended).

Safeguarding What's Yours

Revocable Trusts

Consider creating and funding a revocable trust See, e.g., ***Cherniack v. Home National Bank,*** 158 Conn. 367, 198 A.2d. 58 (1964). See also: ***Soltis v. First of America Bank-Muskegon,*** 203 Mich. App., 435, 513 N.W.2d 148 (1994), where the court found that the trust was not testamentary or illusory and held that:

> "Absent any showing of fraud upon [the surviving spouse's] marital rights, we must conclude that decedent's assets in the inter vivos trust do not fall within the spousal election provision."

Qualified Personal Residence Trusts (QPRTs)

If a personal residence is a significant asset, creating a Qualified Personal Residence Trust could possibly remove it from the reach of an after acquired spouse. But query, if the spouse is considered a creditor, might she be able to make a claim on the value of retained occupancy right? See, e.g., ***Greenwich Trust Co. v. Tyson,*** 129 Conn. 211, 27 A.2d. 166 (1942).

Family Limited Partnerships (FLPs)

Transferring securities, real property, business interests and other assets to an FLP or LLC, and making gifts of some of the limited interests to trusts for children might be helpful in mitigating or eliminating claims of an after-acquired spouse, especially where remarriage to a specific individual is not contemplated.

Gifts will only be rescinded as being fraudulent if the donor has present, or reasonably contemplated, creditors. As long as no claims loom on the horizon, the gift should be respected. Presumably, the same logic should apply to spousal rights. If the donor is single, and not contemplating marriage, then attacks by a subsequent spouse might be blunted

Family limited partnerships have been the focus of many estate planning articles, mostly discussing valuation discounts. A donor who is not inclined to make outright gifts in contemplation of the possibility of marriage might be willing to make gifts if he could retain control as a general partner or manager of an LLC. Protection from claims of a possible future spouse is certainly a non-tax "business purpose" which would help negate a claim by the Service that the transaction was entered into primarily for tax reasons.

Review all Divorce Decrees

Disposition May Violate Provisions of Decree

Bequests and devises which deviate from the terms of a divorce decree may be void or may give rise to a will contest. The writer was involved as an expert witness in the well publicized "***Johnson v. Johnson"*** litigation. Mr. Johnson's divorce decree provided that he leave a percentage of his estate to his children by a prior marriage. He and his ex-wife made an "extra judicial modification" to the decree.

His will left his entire estate to his third wife, Barbara. The children eventually received over $100 Million and Barbara brought a malpractice action against the draftsmen alleging, in part, that they knew or should have known that, under local law, a modification of a divorce decree which was not entered as a judgment was invalid.

Marital Deduction May Be in Jeopardy

Whenever a client has been divorced, or is married to someone who has, we need to obtain all of the facts surrounding the divorce(s) if any decree was entered in a state or country other than that of the residence of the client and his or her spouse. Did the court have personal jurisdiction over the parties? Did the defendant appear or was the decree entered ex parte? Was the divorce entered on grounds which were insufficient in the couple's state of residence?

Copies of all divorce decrees, as well as local law, should be examined to determine the couple's "tax marital status." In ***Borax v. Comm'r***, C.A.2, 349 Fd.2d. 666 (1965) cert. den. 383 U.S. 935 (1966) a foreign divorce decree was accorded validity despite having been voided by a state court judgment. The court stated that "the subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence." The Service does not follow the ***Borax*** decision and will follow the later judgment if the court had either personal or subject matter jurisdiction. Rev. Rul. 67-442, 1967-2C.B. 65. Some courts have taken a "middle ground" position between the wooden results in ***Borax*** and the Ruling. Several cases have held that where there are conflicting decrees, the decision which courts in the decedent's domiciliary estate would follow will control for federal estate tax purposes. ***Spalding v. Comm'r***, C.A.2, 537 F.2d.

666 (1976); ***Goldwater v. Comm'r***, C.A.2, 539 F.2d. 878 (1976) and ***Steffke v. Comm'r***, C.A.7. 538 F.2d. 730 (1976). See Crown, Divorce, Remarriage and the Marital Deduction, The Estates, Gifts and Trusts Journal, September-October, 1978, p. 18.

CONCLUSION

Many trust and estate lawyers, including the writer of this outline, never took family law in law school. Conversely, many family law practitioners have only a basic knowledge of trust, estate and tax law. Especially in more complex or high dollar situations it would make sense for us to collaborate with a lawyer in the other practice area.

The intersection of estate law and marital law should be marked with a large "CAUTION" sign. Ignorance is not bliss, as Thomas Gray wrote in "Ode on a Distant Prospect of Eton College." Be careful out there.

§ 46b-81. (Formerly Sec. 46-51). Assignment of property and transfer of title.

Connecticut Statutes

Title 46B. FAMILY LAW

Chapter 815J. DISSOLUTION OF MARRIAGE, LEGAL SEPARATION AND ANNULMENT

Current through the 2015 First Special Session

§ 46b-81. (Formerly Sec. 46-51). Assignment of property and transfer of title

(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect.

(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

Cite as Conn. Gen. Stat. § 46b-81

Source:

P.A. 73-373, S. 20; P.A. 75-331; P.A. 78-230, S. 36, 54; P.A. 13-0213, S. 2.

History. P.A. 75-331 authorized court to pass title to real property to either party or a third person or to order sale of property and added provisions relating to transfer or sale of property; P.A. 78-230 divided section into Subsecs. and changed wording slightly; Sec. 46-51 transferred to Sec. 46b-81 in 1979 and references to other sections within provisions revised as necessary to reflect their transfer; P.A. 13-0213 amended Subsec. (a) by replacing "the husband or wife" with "spouse" and by making a technical change and amended Subsec. (c) by replacing "hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51" with "considering all the evidence presented by each party" and by adding "earning capacity" and "education" as factors considered by the court in fixing the nature and value of the property to be assigned.

§ 46b-82. (Formerly Sec. 46-52). Alimony.

Connecticut Statutes

Title 46B. FAMILY LAW

Chapter 815J. DISSOLUTION OF MARRIAGE, LEGAL SEPARATION AND ANNULMENT

Current through the 2015 First Special Session

§ 46b-82. (Formerly Sec. 46-52). Alimony

(a) At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment.

(b) If the court, following a trial or hearing on the merits, enters an order pursuant to subsection (a) of this section, or section 46b-86, and such order by its terms will terminate only upon the death of either party or the remarriage of the alimony recipient, the court shall articulate with specificity the basis for such order.

(c) Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony.

Cite as Conn. Gen. Stat. § 46b-82

Source:

P.A. 73-373, S. 21; P.A. 78-230, S. 37, 54; P.A. 83-527, S. 1; P.A. 03-130, S. 3; 03-202, S. 23; P.A. 13-0213, S. 3.

History. P.A. 78-230 restated provisions; Sec. 46-52 transferred to Sec. 46b-82 in 1979 and references to other sections within provisions revised as necessary to reflect their transfer; P.A. 83-527 added provision that court may order either party to contract with a third party for periodic payments or payments contingent on a life to the other party; P.A. 03-130 designated existing provisions as Subsec. (a), adding provision re order pursuant to Subsec. (b) therein, and added Subsec. (b) re availability of postjudgment procedure; P.A. 03-202 added provision re order to obtain life insurance as security; P.A. 13-0213 amended Subsec. (a) by replacing "hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51," with "consider the evidence presented by each party and", by adding "earning capacity" and "education" re factors considered by the court in determining whether alimony

is to be awarded and by adding "and feasibility" re a custodial parent's ability to secure employment, added new Subsec. (b) re court's responsibility to articulate with specificity the basis for an order of alimony, entered following a trial or hearing on the merits, that is to terminate only upon the death of either party or the remarriage of the alimony recipient and redesignated existing Subsec. (b) as Subsec. (c).

204 Conn. 224 (Conn. 1987)
527 A.2d 1184
Yale RUBIN
v.
Shirley A. RUBIN.
13002.
Supreme Court of Connecticut.
June 30, 1987

Argued March 10, 1987.

[527 A.2d 1185] Francis M. Bosze, Bridgeport, for appellant (plaintiff).

Pasquale Young, New Haven, for appellee (defendant).

Before PETERS, C.J., and ARTHUR H. HEALEY, SHEA, SANTANIELLO and SCHALLER, JJ.

SHEA, Justice.

The Appellate Court upheld the judgment of the trial court, in an action for dissolution of marriage, ordering the plaintiff husband to pay to the defendant wife a share of the assets he may acquire under his mother's will and on termination of a revocable inter vivos trust created by her. *Rubin v. Rubin,* 7 Conn.App. 735, 510 A.2d 1000 (1986). This court granted the plaintiff's petition for certification and now addresses the issue of the propriety in a marriage dissolution judgment of such a contingent assignment of property that one party expects to acquire. We reverse the judgment of the Appellate Court.

The facts relating to the issues on appeal are not disputed. The parties were married in 1950. Due to the excessive use of alcohol by the plaintiff, the marital relationship broke down and the parties separated in 1978. The plaintiff, in his complaint, and the defendant, in her cross-complaint, each sought a dissolution of the marriage and an assignment of the other's estate pursuant to General Statutes § 46b-81. [1] Additionally, the

defendant sought alimony. At the time of the dissolution decree in 1985, the plaintiff was sixty-two years old and the defendant was fifty-six years old. There were no minor children of the marriage.

The plaintiff, who had received a degree in business administration Before taking over his father's scrap metal business, averred in his financial affidavit that he had no income from wages because his "business is now defunct." He admitted, however, that he had been receiving an annual gift of $10,000 from his mother, and an additional $6000 per year from a trust fund set up by his sister's husband. By its terms, that trust will expire in 1988 unless its life is extended by the settlor. [2] The **[527 A.2d 1186]** plaintiff listed total assets of $95,050, which consisted of a home in Hamden, a car, a life insurance policy, and various items of personal property. His total liabilities of $17,280 included a $10,000 debt to his mother, and his estimate of weekly expenses of $513.22 included a contribution to the defendant of $105.76.

The financial affidavit of the defendant, who had received a high school education, showed a total weekly

Page 227

income of $55, total assets consisting of a car valued at $200, and total liabilities of $5343, which principally represented the cost of medical care for a chronic ailment. The defendant's weekly living expenses amounted to $252. Although the defendant has some work experience in the field of interior design, her prospects for future earnings are dim.

The plaintiff is the residuary beneficiary of a revocable inter vivos trust created by his mother, which is funded with approximately $225,000 in securities. At oral argument the plaintiff acknowledged that, for a while, money from his mother's trust fund had supported the marriage of the parties. Additionally, the plaintiff is one of two equal residuary legatees under the will executed by his mother, whose assets at the time of the dissolution were approximately $725,000. See generally *Rubin v. Rubin,* supra, at 736-38, 510 A.2d 1000.

In its decree dissolving the marriage, the trial court ordered (1) that the plaintiff pay the defendant as periodic alimony the weekly sum of $150, (2) that the plaintiff name the defendant as the irrevocable beneficiary of his $10,000 life insurance policy, (3) that the family residence, valued at $60,000 in the plaintiff's affidavit, and almost all of its contents be awarded to the defendant, (4) that the plaintiff pay all current debts of both parties, and (5) that the plaintiff pay to the defendant's counsel the sum of $1000 in attorney's fees. Id., at 738, 510 A.2d 1000. In addition the trial court ordered that the plaintiff pay to the defendant one third of the net estate that he may receive "from either the trust created by his mother and from her by way of a testamentary gift or other form of inheritance." On appeal the plaintiff challenges this contingent order and also claims that the court erred in allowing into evidence the trust agreement and his mother's deposition, which concerned her will and assets, and seeks a new trial at which such evidence would be excluded. We conclude

Page 228

that the contingent order cannot be sustained either as an assignment of property under General Statutes § 46b-81 or as an award of alimony under General Statutes § 46b-82. We also hold that the evidence concerning the plaintiff's expectancy was inadmissible in respect to the other issues in the case and, therefore, that a new trial is necessary.

I

Our analysis of this case requires an understanding of the distinction between alimony and a property division. "The purpose of alimony is to meet one's continuing duty to support; *Wood v. Wood,* 165 Conn. 777, 784, 345 A.2d 5 (1974); while the purpose of property division is to unscramble the ownership of property, giving to each spouse what is equitably his. *Beede v. Beede,* 186 Conn. 191, 195, 440 A.2d 283 (1982)." *Weiman v. Weiman,* 188 Conn. 232, 234, 449 A.2d 151 (1982). "The mode of the allowance or the name by which it is called does not determine its character, since the true test is the purpose for which it is made." *Maxwell v. Maxwell,* 11 Conn.Sup. 205, 207 (1942). Although alimony is usually payable periodically, whereas a property division usually is effectuated by a single transfer or payment, lump sum alimony awards as well as property divisions carried out by installment payments have often been decreed. "The form of

the order therefore does not always reveal its true substance." H. Clark, Domestic Relations in the United States (1968) § 14.8, p. 450. "It is easy to see how, relying upon a vague statutory power, the courts have come to blur the distinction between alimony orders and divisions of property." Id., p. 451.

While a divorce court, as a court of equity, has been deemed to possess the inherent power to adjudicate the property **[527 A.2d 1187]** rights of the parties Before it; see Singer v. Singer, 165 Ala. 144, 148, 51 So. 755 (1910); *Cole v.*

Page 229

Cole, 142 Ill. 19, 26, 31 N.E. 109 (1892); *Carnahan v. Carnahan,* 143 Mich. 390, 396-97, 107 N.W. 73 (1906); the power of a court to transfer property from one spouse to the other must rest upon an enabling statute. See *Connolly v. Connolly,* 191 Conn. 468, 476, 464 A.2d 837 (1983); *Valante v. Valante,* 180 Conn. 528, 532, 429 A.2d 964 (1980); see also *Riggers v. Riggers,* 81 Idaho 570, 573-74, 347 P.2d 762 (1959); *Emery v. Emery,* 122 Mont. 201, 224, 200 P.2d 251 (1948). Authority in Connecticut for such a transfer of property is found in General Statutes § 46b-81, which provides in part that "[a]t the time of entering a decree ... dissolving a marriage ... the superior court may assign to either the husband or wife all or any part of the estate of the other.... In fixing the nature and value of the property, if any, to be assigned, the court ... shall consider the ... needs of each of the parties and the opportunity of each for future acquisition of capital assets and income."

In *Krause v. Krause,* 174 Conn. 361, 387 A.2d 548 (1978), this court construed the predecessor of § 46b-81, despite the reference to "the opportunity ... for future acquisition of capital assets," not to permit the consideration of evidence of a "potential inheritance." We upheld the ruling of the trial court sustaining an objection to the admission of testimony regarding the net worth of the plaintiff wife's mother, who had prepared a will naming the wife as a beneficiary. We stated: "The court's ruling cannot be said to be an abuse of discretion since under the circumstances surrounding the vesting of a 'potential inheritance of the wife,' as the defendant describes it, the expectancy according to the testimony elicited and appearing in the finding and transcript is, at best, speculative. ' "Expectancy" is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property, and

Page 230

the interest to which it relates is at the time nonexistent and may never exist.' *Johnson v. Breeding,* 136 Tenn. 528, 529, 190 S.W. 545 [1916]." *Krause v. Krause,* supra, 174 Conn. at 365, 387 A.2d 548.

Distinguishing Krause from the present case, the Appellate Court stated: "Superficially, and resting on its own language, Krause would appear to bar the evidence and orders involved in this case. A fundamental difference, however, between Krause and this case distinguishes its holding. In Krause, the defendant was seeking a present order based on a totally speculative and uncertain future happening, while, in the present case, the defendant spouse was awarded a future share contingent on the plaintiff's receipt of certain benefits." (Emphasis in original.) *Rubin v. Rubin,* supra, 7 Conn.App. at 740, 510 A.2d 1000. Because the Appellate Court viewed Krause, which

dealt only with issues of property transfer, [3] as the precedent most apposite to the disposition of the present case, its decision may plausibly be read to regard the challenged order, that the plaintiff pay to the defendant one third of the net estate he may acquire from his mother's will or inter vivos trust, as similarly representing a property transfer.

We decline to adopt the position that the challenged order in the present case, involving a contingent award of expected property, can be upheld as a property transfer authorized by § 46b-81. As we have stated, § 46b-81 authorizes the court to assign to either spouse "all or any part of the estate of the other," and prescribes that, in fixing the value of such "property," the court shall consider, inter alia, "the opportunity of each for future acquisition of capital assets and income." The terms "estate" and "property," as used in the statute, connote presently existing interests. "Property" entails

Page 231

"interests that a person has already acquired in specific benefits." *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548 (1972); see also *Millard v.*

[527 A.2d 1188] C *onnecticut Personnel Appeal Board,* 170 Conn. 541, 546, 368 A.2d 121 (1976).

Where the trial court had ordered the defendant husband, whose property had a net worth of $62,112.99 but who was expecting an inheritance valued at $198,045, to pay to the plaintiff wife, inter alia, the sum of $100,000 within four years of the decree of divorce, the Supreme Court of Wyoming reversed. *Storm v. Storm,* 470 P.2d 367 (Wyo.1970). The Storm court stated: "Equitably speaking, it is reasonable to consider the inheritance under consideration the same as future property. With respect to future property, we think the rule must be that, when a court divides property incidental to the granting of a divorce, the court is limited by the amount of property in its hands for division and a mere expectancy is not subject to division." Id., at 370; accord *Loeb v. Loeb,* 261 Ind. 193, 201-202, 301 N.E.2d 349 (1973); *Davidson v. Davidson,* 19 Mass.App. 364, 374-75, 474 N.E.2d 1137 (1985). We agree with the view that the relevance of probable future income "in determining the fair and equitable division of existing property ... does not establish jurisdiction to make allowances from ... property other than that held at the time." *Beres v. Beres,* 52 Del. 133, 137-38, 154 A.2d 384 (1959). Even where a dissolution judgment has become final, it has been held that the provision of the decree awarding the wife one half of any property the husband might receive by will or inheritance from his father, who died ten years after the dissolution, was "utterly void and ineffectual," because the husband's expectancy was not part of his estate from which such an allowance could be made. *Meeks v. Kirkland,* 228 Ga. 607, 608, 187 S.E.2d 296 (1972); see also *Trammell v. West,* 224 Ga. 365, 162 S.E.2d 353 (1968).

Page 232

We are not persuaded that the contingent nature of the award of expected property in the present case brings that award within the ambit of § 46b-81. That the plaintiff must pay the defendant a one third share of the assets he may acquire under his mother's will and on termination of her inter vivos trust only if and when this acquisition materializes does not transmute such expected assets into "property" of the plaintiff. We note, moreover, that property distributions, unlike alimony awards, cannot be modified to alleviate hardships that may result from enforcement of the original dissolution decree in the face of changes in the situation of either party. See *Connolly v. Connolly,*

supra, 191 Conn. at 477, 464 A.2d 837; H. Clark, supra, § 14.8, p. 449, and § 14.9, p. 453. The present order, while contingent, is definite; yet the date upon which it may take effect, as well as the situation of the parties upon that date, is necessarily uncertain. Until our legislature amends § 46b-81 to authorize contingent transfers of expected property, we shall not read such an intent into the statute.

II

We have concluded that the award to the defendant of a share of the plaintiff's expectancy cannot be sustained as a permissible transfer of property under § 46b-81. We must nevertheless consider whether the challenged order can be supported upon some alternative ground. See *Pepe v. New Britain,* 203 Conn. 281, 292, 524 A.2d 629 (1987); *Henderson v. Department of Motor Vehicles,* 202 Conn. 453, 461, 521 A.2d 1040 (1987); *W.J. Megin, Inc. v. State,* 181 Conn. 47, 54, 434 A.2d 306 (1980). If the Appellate Court has erroneously upheld the award as an assignment under § 46b-81, we would properly affirm the judgment "if the same result is required by law." *A & H Corporation v. Bridgeport,* 180 Conn. 435, 443, 430 A.2d 25 (1980); *Morris v. Costa,* 174 Conn. 592, 597-98, 392 A.2d 468 (1978).

Page 233

General Statutes § 46b-82, [4] which currently authorizes the court to order alimony, **[527 A.2d 1189]** neither defines the term "alimony" nor restricts the scope of the award. In conferring discretion upon the court to determine "whether alimony shall be awarded, and the duration and amount of the award," § 46b-82 directs the court to consider "the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81...." We have often stated that the type and amount of alimony awarded under a decree dissolving a marriage is within the sound discretion of the trial court. *Tworek v. Tworek,* 170 Conn. 159, 160, 365 A.2d 392 (1976); *Krieble v. Krieble,* 168 Conn. 7, 7, 357 A.2d 475 (1975).

We are not aware of any principle of law that necessarily precludes a trial court, in exercising its discretion to fashion an alimony award, from ordering a payment that is contingent upon some future event. Such contingent awards often appear in judgments that

Page 234

have incorporated agreements of the parties that provide for adjustment of the amount of support or alimony to be paid in relation to the earnings of the parties. For instance, in Silver v. Silver, 170 Conn. 305, 365 A.2d 1188 (1976), this court had occasion to construe such an alimony provision taken from the parties' separation agreement [5] that included the following: " 'In the event the defendant's salary shall during any future calendar year exceed his salary for the current calendar year by Three Thousand Dollars ($3000.00) or more, then the defendant agrees [sic] to pay to the plaintiff, as additional alimony, 15% of such increase over his salary for the current year, such additional alimony to be paid on or Before January 31 of the year following the year in which such increase shall have occurred.' " Id., at 306, 365 A.2d 1188; see also *Lescher v. Lescher,* 679 S.W.2d 463, 465-66 (Tenn.App.1984). We do not regard the consent of the parties to be essential

to the validity of a contingent alimony award, although it may be relevant to the wisdom of such an order.

It must be remembered, however, that an alimony order is predicated upon the obligation of support that spouses assume toward each other by virtue of the marriage. A judgment contingently awarding a share of one spouse's expectancy to the other may often prove illusory. Because such an order is not supportable as an assignment of property, it ordinarily terminates upon the death of either spouse. H. Clark, supra, § 14.9, pp. 461-63; see *McCann v. McCann,* 191 Conn. 447, 452, 464 A.2d 825 (1983); *McDonnell v. McDonnell,* 166 Conn. 146, 150, 348 A.2d 575 (1974); *Harrison v. Union & New Haven Trust Co.,* 147 Conn. 435, 440, 162 A.2d 182 (1960). The circumstances of the parties may have changed substantially by the time the expectancy is fulfilled, warranting a modification of the order. Continuing orders, such as those for periodic alimony, are

Page 235

subject to modification for changes in the circumstances of either party. General Statutes § 46b-86; *Connolly v. Connolly,* supra, 191 Conn. at 473, 464 A.2d 837; *Sanchione v. Sanchione,* 173 Conn. 397, 407, 378 A.2d 522 (1977). The expectancy may never be realized because of diminution of the donor's wealth or a change in the planned disposition of his property. Indeed, the existence of an order that a prospective beneficiary share his future inheritance with his former spouse may well inhibit the donor in selecting the recipients **[527 A.2d 1190]** of his estate or induce resort to various devices, such as spendthrift trusts, in order to circumvent the alimony award. Relying upon such an illusory order, a court may assume that adequate provision has been made for a needy spouse and neglect to provide more dependable means of support, such as a sufficient periodic alimony order or a greater share of assets owned at the time of the decree. To uphold the award of a share of an expectancy as contingent alimony might fairly be viewed as sanctioning in a different guise an assignment of property not then within the jurisdiction of the court, which we have concluded § 46b-81 does not authorize.

The trial court may well have thought it had gone as far as possible in ordering the conventional forms of alimony, such as the order of $150 per week, and that the defendant had been given the maximum share of the total assets of the parties that could be justified. The court properly was concerned that the difficult economic circumstances of the parties at the time of the judgment made it impossible to provide adequate support for the defendant wife and that this deficiency in the award should be redressed whenever the plaintiff should acquire his anticipated wealth. We can perceive no advantage, however, in attempting to make such an adjustment prospectively rather than wait until the contingency has been resolved. Because periodic alimony orders are modifiable when changes in circumstances

Page 236

occur, the increase in the plaintiff's financial ability that may occur upon his mother's death would constitute a change of circumstances ordinarily warranting an increase in the weekly alimony payment order corresponding to the defendant's support requirements at that time. *Shrager v. Shrager,* 144 Conn. 483, 487, 134 A.2d 69 (1957); H. Clark, supra, § 14.9, pp. 460-61. The court will be in a far better position to make an appropriate order once the plaintiff has acquired the

property he expects to receive from his mother. His own needs, as well as those of the defendant, may then be different from those presented at trial. Our modification statute, § 46b-86, reflects the legislative judgment that continuing alimony payments should be based on current conditions. Any prediction of what justice between the parties may require when a future event may occur is likely to be less well considered than a determination made after the event, when speculation as to the circumstances involved has been supplanted by actuality. We conclude, therefore, that in the absence of some necessity not presented by this case it is erroneous to award alimony in the form of a share of the assets a spouse may receive upon fulfillment of an expectancy. Accordingly, we reverse the judgment of the Appellate Court upholding such an award.

III

Our conclusion that the award of a share of the plaintiff's prospective acquisition of property from his mother cannot be upheld as an assignment of property or as alimony does not fully resolve the issue concerning the admissibility of evidence relating to his expectancy. The plaintiff claims not only that the provision of the judgment containing this award is invalid, but also that he is entitled to a new trial because the evidence relating to his mother's wealth should have been excluded and its admission over his objection "affected

Page 237

the outcome of the entire case." We must therefore decide whether such evidence may be considered in making a property division of presently owned property or in awarding alimony.

In *Krause v. Krause,* supra, 174 Conn. at 364-65, 387 A.2d 548, this court upheld a ruling of the trial court that excluded evidence of the potential inheritance of a wife from her mother, claimed to be relevant to the husband's demand for an assignment of a share of the property held by his wife. "Unlike future earnings, prospects for increase in the husband's property through gift or inheritance generally may not enter into the computation of alimony. Such sources of wealth are outside the husband's control and subject to the will of the donor or relative." H. Clark, supra, § 14.5, p. 444. As we indicated in Krause, we approve the view of those **[527 A.2d 1191]** courts that have held evidence of a possible future inheritance to be inadmissible for the purpose of a property assignment or alimony award. *Whitney v. Whitney,* 164 Cal.App.2d 577, 330 P.2d 947 (1958); McCloskey v. McCloskey, 359 So.2d 494 (Fla.App.1978); *Turi v. Turi,* 34 N.J.Super. 313, 112 A.2d 278 (1955); see *Hillery v. Hillery,* 342 Mass. 371, 173 N.E.2d 269 (1961). Many of the reasons we have advanced for invalidating the award to the defendant of a share of the plaintiff's expectancy as either an assignment of property or as alimony apply also to the consideration of such evidence in respect to other issues. To base a division of property, which is not ordinarily subject to modification, upon the possibility of a future inheritance might often prove to be unfair in the light of subsequent events. A periodic alimony order, disobedience of which invokes the penalty of contempt, should not exceed the current financial ability to meet it of the party on whom it is imposed and, therefore, should not be premised upon predictions as to future income that depend wholly upon the generosity of others for realization. The authority of a court

Page 238

to modify a periodic alimony order to correspond with changes in the financial circumstances of the obligor removes any necessity for considering such a contingency as the possibility of a future

inheritance.

The Appellate Court concluded that the prohibition expressed in Krause against the introduction of evidence of a possible inheritance by a spouse had been modified by our decision in *Anderson v. Anderson,* 191 Conn. 46, 55-57, 463 A.2d 578 (1983), where we upheld a finding that a wife had the possibility of future acquisitions of capital assets based upon evidence of substantial contributions made during the marriage by her mother and brother. [6] The Anderson opinion, however, recognized the continuing viability of Krause in respect to consideration of "an expectancy of an inheritance," but held that consideration of substantial gratuities received from relatives in the past was, nevertheless, permissible in formulating financial orders relating to a dissolution of marriage. Although reliance upon evidence of past gifts to a spouse from relatives carries some of the risks inherent in the consideration of a future inheritance, we view them as less significant. At least where the past gratuities have been made on a regular basis during the marriage, as in the present

Page 239

case where the plaintiff admittedly was receiving income of $6000 per year from the trust established by his brother-in-law and a $10,000 annual gift from his mother, the court may reasonably assume that those contributions will continue. If they should terminate, any periodic alimony award may be modified, although an assignment of property based upon the assumption that the contributions would continue could not be revised. We have found error in an alimony award to a wife predicated upon a finding that a husband would continue to receive a consistent and dependable flow of funds based upon sums his mother had advanced sporadically during the marriage for various purposes. *Schmidt v. Schmidt,* 180 Conn. 184, 187, 429 A.2d 470 (1980). Where financial orders are based upon a possible inheritance, which may never materialize in any form or at any time remotely corresponding to the trial court's assumptions, the risk of inequity is substantially greater. Furthermore,

[527 A.2d 1192] evidence of past gratuities does not inevitably entail the necessity of probing into the personal financial affairs of persons who have no other involvement in the marital dispute Before the court than their relationship to one of the parties. We continue to adhere to the Krause view that evidence of a prospective inheritance is inadmissible in a dissolution of marriage proceeding. See *Fattibene v. Fattibene,* 183 Conn. 433, 443, 441 A.2d 3 (1981). Our conclusion that the trial court erred in admitting evidence of the plaintiff's possible inheritance from his mother requires that we order a new trial rather than simply modify the judgment by invalidating the award of a share of his expectancy. It is impossible to ascertain the extent to which this inadmissible evidence may have affected the other financial orders, but we cannot regard the admission of the evidence as harmless error, except with respect to the portion of the decree dissolving the marriage.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to set

Page 240

aside the judgment, except for the provision thereof dissolving the marriage, and to order a new trial on the financial issues.

In this opinion the other Justices concurred.

Notes:

[1] "[General Statutes] Sec. 46b-81. (Formerly Sec. 46-51). ASSIGNMENT OF PROPERTY AND TRANSFER OF TITLE. (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

[2] The contingent assignment of property included in the dissolution judgment applies only to the "net estate which [the plaintiff] receives from either the trust created by his mother and from her by way of a testamentary gift or other form of inheritance." Thus the order does not involve the trust established by the husband of the defendant's sister.

[3] We note that in Krause the trial court's conclusion that neither party was entitled to alimony support payments was not challenged. See Krause v. Krause, 174 Conn. 361, 362, 387 A.2d 548 (1978).

[4] "[General Statutes] Sec. 46b-82. (Formerly Sec. 46-52). ALIMONY. At the time of entering the decree, the superior court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the

custody of minor children has been awarded, the desirability of such parent's securing employment."

[5] Silver v. Silver, A-606, Rec. & Briefs, Position 1, Rec. p. 20.

[6] The Appellate Court also relied upon Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981), where we found the admission of evidence of a potential inheritance to be a harmless error. The evidence in Thompson tended to show that the plaintiff wife and her mother jointly owned, inter alia, a savings account in the amount of $9886.93, and several savings certificates in the aggregate amount of $21,786.65. The plaintiff offered evidence indicating that she was to receive one fourth of her mother's estate upon her death. Addressing the plaintiff's claim that the trial court had erred in relying upon the evidence of the potential inheritance, we stated:

"Faced with the bare fact of joint ownership in the savings accounts, the court could well have treated the accounts as the plaintiff's assets. By taking into consideration the proffered evidence showing that only one quarter of these assets were destined for the plaintiff, the court diminished the size of her estate. This, of course, worked to her advantage. Because the court's action was favorable to the plaintiff, it is not a ground for reversal. See Maltbie, Conn.App.Proc. § 39." Id., at 99, 438 A.2d 839.

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220 Conn. 372 (Conn. 1991)
599 A.2d 14
Gabrielle F. BARTLETT
v.
E. Lewis BARTLETT IV.
No. 14275.
Supreme Court of Connecticut.
November 12, 1991

Argued Sept. 24, 1991.

[599 A.2d 15] Richard F. Paladino, Old Saybrook, for appellant (plaintiff).

James D. Reardon, Old Saybrook, for appellee (defendant).

Before PETERS, C.J., and SHEA, CALLAHAN, GLASS and BORDEN, JJ.

SHEA, Justice.

This is an appeal from the denial by the trial court of the plaintiff's motion to open a judgment of dissolution for the purpose of modifying the award of periodic alimony. We are asked to decide whether the court was bound to consider an inheritance received by the defendant several years after the original alimony award, the assets of which had vested in him but had not yet been distributed to him. We answer this question in the affirmative and, therefore, reverse the judgment and remand the case for further proceedings.

The relevant facts are undisputed. On June 26, 1985, the trial court, D. Dorsey, J., rendered a judgment dissolving the twenty-one year marriage between Gabrielle F. Bartlett, the plaintiff, and E. Lewis Bartlett IV, the defendant. The court found that the marriage had broken down irretrievably and ordered the defendant to pay the plaintiff $7500 in attorney's fees, $194,000 in lump sum alimony, and $1900 in monthly periodic alimony and also to maintain health insurance for her benefit until March 26, 1986. The court awarded the defendant sole ownership of the house where the two had spent their married life.

During the trial of the marital dissolution action, the plaintiff had attempted to introduce evidence of a revocable trust created by the defendant's mother, from which she claimed the defendant would benefit upon his mother's death. She argued that evidence of the defendant's contingent interest in the trust was relevant to his financial circumstances, a significant factor for the court to consider when dividing the marital

property and fashioning an award of alimony. The court rejected this argument, stating that, because the defendant's mother retained the power to revoke the trust at any time, the potential inheritance was a mere expectancy, not a vested property interest, and was thus properly excluded according to the rule announced in *Krause v. Krause,* 174 Conn. 361, 387 A.2d 548 (1978). No appeal was taken from the original judgment of dissolution.

On September 13, 1990, the plaintiff filed a "Motion to Reopen and Modify Dissolution

Judgment," pursuant to General Statutes § 46b-86, [1] seeking an increase in the **[599 A.2d 16]** amount of periodic alimony originally awarded to her. She claimed that there had been a substantial change in circumstances since the dissolution in that (1) the defendant had finally acquired a sizable inheritance from his mother's estate, and (2) her health had deteriorated since the original judgment, causing her to incur greater health care expenses. She sought an additional $1100 per month in alimony and also requested that the defendant be ordered to pay for her health insurance coverage once again. [2]

Page 375

Evidence presented at the hearing on the motion revealed that the defendant's mother had died on July 28, 1990, leaving a last will and testament and a trust agreement executed in conjunction with the will. The will named the defendant as the legatee of certain items of personal property of no great monetary value and also provided that the residuary estate be transferred to the trust created at the time the will was executed. The trust agreement directed the trustee to "set out two-thirds (2/3) of the Trust Estate" for the defendant upon his mother's death. The estimated value of the whole trust estate, including the distribution to be received upon settlement of the probate estate, was between $2,000,000 and $3,000,000. A bank official testified, however, that it was likely to take approximately two years for the defendant to obtain actual possession of his inheritance because administrative matters, such as the payment of taxes, would delay the distribution. In addition, the marital home now owned solely by the defendant had appreciated in value from $300,000 at the time of the original judgment to $743,000 at the time the motion was being considered.

The trial court, Hon. Harry W. Edelberg, state trial referee, denied the motion for essentially two reasons. First, the court concluded that Judge Dorsey had already considered the possibility of the inheritance during the original dissolution proceeding when fashioning the award of alimony and the assignment of property. Second, the court interpreted our decision in *Rubin v. Rubin,* 204 Conn. 224, 527 A.2d 1184 (1987), to require exclusion of the evidence of the defendant's inheritance because he had not yet received any assets from the estate or from the trust. The plaintiff argues that the court was mistaken with respect to both issues [3]

Page 376

and seeks a reversal of the decision and a new hearing on the motion. We agree with this claim and grant the requested relief.

I

The first claim, that the trial court, Hon. Harry W. Edelberg, state trial referee, improperly concluded that Judge Dorsey had considered the possibility of the inheritance [4] for purposes of the original property division and alimony award, is easily resolved. In rendering the dissolution judgment, Judge Dorsey stated, with respect to the property division and alimony award, that he had considered "the health, the station, the occupation of both parties, the sources of income, the vocational skills, and the employability, the estate, and the liabilities and the needs of each party--and the opportunity for--of each for the future **[599 A.2d 17]** acquisition of capital assets and income." [5] While this language itself is ambiguous in that the defendant's then contingent interest in his mother's estate could conceivably have been classified as an "opportunity for ... the future

acquisition of capital assets and income," any doubt is dispelled by the court's earlier exclusion of the evidence of the revocable trust. The record indicates that Judge Dorsey had an extended colloquy with counsel for both parties, consulted case law on the subject and ultimately excluded evidence of the potential inheritance because it was a mere expectancy that had not yet vested. [6]

Page 377

The defendant argues that although the court purported to exclude that evidence, the fact that the plaintiff was awarded $194,000 in lump sum alimony and $1900 per month in periodic alimony, amounts he considers disproportionately large, indicates that the court must have considered the potential inheritance in arriving at its decision. In support of his argument, he notes that the lump sum alimony payment represented more than one half the value of the equity in the marital home at the time of the dissolution, [7] and that at the time the $1900 monthly alimony award was made, his income was shown to be only $1070 per week with expenses of $1448 per week. We are not persuaded by this argument.

No inference can be drawn from the terms of the marital dissolution judgment, which has become final and

Page 378

was never appealed, that its terms were influenced by improper consideration of a potential inheritance, especially when the court expressly excluded such evidence as irrelevant. A judgment that has become final must be presumed to have been based on the evidence adduced at trial and rendered in accordance with the law. *Kelly v. New Haven Steamboat Co.,* 75 Conn. 42, 46-47, 52 A. 261 (1902). In arriving at an equitable division of property and award of alimony, the court was not limited to a mechanical halving of the equity in the marital home or a simple subtraction of the defendant's expenses from his income. General Statutes §§ 46b-81 and 46b-82 set forth a host of factors to be considered, [8]

[599 A.2d 18] and the court was entitled to exercise wide latitude in varying the weight placed upon each factor in light of the particular circumstances of the case. *Carpenter v. Carpenter,* 188 Conn. 736, 741, 453 A.2d 1151 (1982); *Valante v. Valante,* 180 Conn. 528, 531, 429 A.2d 964 (1980). The claim that the award of alimony and the division of property in the original judgment were unduly favorable to the plaintiff unless the court considered the defendant's potential inheritance is refuted by the many factors actually relied upon by Judge Dorsey in rendering his decision. [9] Thus the inference the defendant seeks to draw from the terms of the judgment is unfounded.

Page 379

II

The second claim advanced by the plaintiff is that the trial court, in entertaining her motion to modify the periodic alimony award, improperly excluded the evidence of the defendant's inheritance. She argues that the inheritance vested in the defendant upon his mother's death and that it therefore should have been considered by the court because it was no longer a mere expectancy, as it had been at the time of the original dissolution proceedings in 1985.

The defendant disagrees not only with the plaintiff's view of which assets are properly

considered on a motion to modify alimony but also with her assertion that the inheritance had "vested" in him at all. He claims that, when his mother died, the inheritance vested not in him but in the trust created by his mother. He argues that the inheritance will not vest in him until the trustee distributes the proceeds to him, and that only then may the assets be considered for purposes of modifying the award of periodic alimony. This argument reveals a misunderstanding of the difference between the vesting of a property right and the possession of property.

It is well settled that a person's right of inheritance vests at the moment of the decedent's death; *Emanuelson v. Sullivan,* 147 Conn. 406, 409, 161 A.2d 788 (1960); and that "although distribution occurs a considerable time thereafter, it relates back to the date of the death as the time when the right of the beneficiary became fixed." *Blodgett v. Bridgeport City Trust Co.,* 115 Conn. 127, 144, 161 A. 83 (1932). In this case, it was not necessary for the plaintiff to prove that the

Page 380

defendant had acquired actual possession of the assets of his mother's estate in order to make the necessary showing of a substantial change in circumstances not contemplated at the time of dissolution. Proof of the vesting of the defendant's right to his inheritance was sufficient to support the motion to modify the award of periodic alimony. It is of no moment that the assets to which the defendant was entitled were temporarily held in a trust, pending settlement of his mother's estate. The trust was merely an administrative vehicle that could not alter in any way the defendant's right to his inheritance, which vested in him at the moment of his mother's death. Krause v. Krause, supra; *Kingsbury v. Scovill's Admr.,* 26 Conn. 349, 352 (1857).

Having determined that the defendant's inheritance did vest in him upon the death of his mother, we hold that the trial court was bound to consider that inheritance in ruling on the motion for an increase in alimony, despite the fact that the assets of the inheritance had not yet been distributed to him. The trial court, in ruling on the motion, misconstrued our decision in Rubin v. Rubin, supra, when it limited its inquiry to the defendant's earnings. In Rubin, the trial court, after hearing evidence that the husband was a residuary beneficiary of a revocable inter vivos trust created by his mother and was one of **[599 A.2d 19]** two equal residuary legatees under his mother's will, ordered the husband to pay to his wife "one third of the net estate that he may receive 'from either the trust created by his mother and from her by way of a testamentary gift or other form of inheritance.' " Id. at 227, 527 A.2d 1184. The Appellate Court affirmed the trial court's ruling, but we reversed, holding that such a contingent order could not be upheld as a valid assignment of property under § 46b-81 or as a valid award of alimony under § 46b-82, because it was based upon a mere expectancy on the part of the plaintiff husband, rather than on a vested property right.

Page 381

We determined that such an order was illusory because "[t]he expectancy may never be realized because of diminution of the donor's wealth or a change in the planned disposition of his property." Id. at 235, 527 A.2d 1184. We also pointed out that "[b]ecause periodic alimony orders are modifiable when changes in circumstances occur, the increase in the plaintiff's financial ability that may occur upon his mother's death would constitute a change of circumstances ordinarily

warranting an increase in the weekly alimony payment...." Id. at 235-36, 527 A.2d 1184.

In this case, the trial court in the dissolution action in 1985 properly excluded evidence of the defendant's potential inheritance of his mother's estate, because at that time, as was the case in Rubin, it was a mere expectancy, in that his mother retained the power to diminish the value of the estate or to revoke or reduce her son's contingent interest in it at any time. See also *Fattibene v. Fattibene,* 183 Conn. 433, 443, 441 A.2d 3 (1981); *Thompson v. Thompson,* 183 Conn. 96, 98-99, 438 A.2d 839 (1981); Krause v. Krause, supra. Once the defendant's mother died, however, precisely the situation contemplated in Rubin occurred: the defendant's financial circumstances changed substantially upon the vesting of his inheritance, warranting the plaintiff's motion to open the judgment to increase the award of periodic alimony. Accordingly, it was improper for the court not to consider the evidence of that vested interest.

The defendant further argues that, even if his inheritance vested upon his mother's death, the trial court was limited to evidence of liquid assets and income-producing real property for the purpose of modifying the alimony award. He admits, however, that a court may properly consider all assets, liquid and nonliquid alike, for the purpose of fashioning the original alimony award at the time of dissolution. We have stated in the past that "[t]he same criteria that determine

Page 382

an initial award of alimony are relevant to the question of modification, and these require the court to consider, without limitation, the needs and financial resources of each of the parties, as well as such factors as health, age and station in life. General Statutes § 46b-82." *Cummock v. Cummock,* 180 Conn. 218, 221-22, 429 A.2d 474 (1980). The defendant proffers, and we perceive, no logical reason to justify a departure from our decision in Cummock to draw the distinction he urges. On the contrary, logic and sound public policy dictate a rule that requires the consideration of all assets, because a contrary rule would encourage parties who acquire substantial amounts of nonliquid assets after the original judgment to insulate themselves from paying more alimony, despite their increased wealth, by simply delaying the liquidation of those assets. We therefore reject the argument that only liquid assets are relevant to alimony modification.

The final claim advanced by the defendant is that the trial court correctly excluded evidence of the inheritance because it was comprised of "property," and although the court had authority to modify the alimony award, it had no such authority to modify the original assignment of "property." See General Statutes § 46b-86, footnote 1, supra. In other words, he claims that the motion to modify alimony was nothing more than an artifice designed to effectuate a new distribution of the property inherited rather than to increase the alimony award. This argument is without merit. Although we agree that the court had no statutory authority to modify the original property assignment, that argument is irrelevant because the plaintiff did not seek to have a portion of the property inherited by the defendant assigned to **[599 A.2d 20]** her. She sought to increase the periodic alimony award because the defendant's financial circumstances had changed substantially due to his inheritance of certain property.

Page 383

Whether the defendant inherited "property" or cash is of no consequence; a substantial increase in wealth of any sort may form an appropriate ground for a motion to modify alimony.

Our conclusion that the trial court should have considered the defendant's vested inheritance for purposes of alimony modification comports with our recent decision in *Eslami v. Eslami,* 218 Conn. 801, 591 A.2d 411 (1991). In Eslami, the trial court failed to consider the plaintiff wife's vested interest in her father's estate, the assets of which she had not yet received, because the value of her interest could not be determined. Evidence at the trial showed that her brother had initiated a will contest which was still pending and that the value of her interest depended upon the resolution of that litigation. [10] We affirmed the judgment of the trial court, noting that "[a]lthough the interest involved here had vested in the wife at the time of trial, the court could reasonably have concluded that uncertainty as to the amount she would eventually receive from her father's estate militated against consideration of that interest for the purpose of financial awards." Id. at 807, 591 A.2d 411. We also indicated that modification of the alimony award would be appropriate when the value of her interest became ascertainable. Id. at 808, 591 A.2d 411.

In the case now Before us, the trial court never reached the issue of valuation of the inheritance, as the trial court in Eslami did, because it declined to consider the defendant's inheritance at all in ruling on the motion to modify alimony. The court's mistaken belief that the inheritance had not yet vested because the defendant had not yet received the proceeds prompted the court to deny the motion without attempting to ascertain the value of the inheritance. Had the court

made the appropriate inquiry, it would have had discretion to resolve the question in any number of ways. For example, if the court had been able to ascertain the value of the defendant's interest with reasonable certainty, it could have entered an order in which the increase in the award of periodic alimony would accrue until such time as he actually received the inheritance or was otherwise able to pay his obligation. Such an order would have extended the benefit of the modification to the plaintiff and would have simultaneously protected the defendant from the threat of being held in contempt for disobeying a modified alimony order that might have exceeded his current financial ability to meet it. See *Rubin v. Rubin,* supra, 204 Conn. at 237, 527 A.2d 1184. If, on the other hand, the court had not been able to make a proper valuation of the inheritance, it could have done what the trial court in Eslami effectively did: postpone consideration of the inheritance until such time as its value could be ascertained with reasonable certainty. Because the court never reached the issue of valuation, however, we cannot uphold its decision to deny the motion.

We note finally that the plaintiff should not be penalized by the passage of time from the date she filed the motion to modify alimony to the date on which the new hearing will be held. If, on rehearing, the trial court should decide that she is entitled to an increase in her award of periodic alimony, the court's order should be effective as of the date of service of notice of the motion upon the defendant so as to afford the plaintiff the benefit of the modification from the time when it was originally sought. General Statutes § 46b-86(a).

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other Justices concurred.

Notes:

[1] General Statutes § 46b-86 provides in pertinent part: "(a) Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support or an order for alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party.... This section shall not apply to assignments under section 46b-81 or to any assignment of the estate or a portion thereof of one party to the other under prior law. No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of such pending motion upon the opposing party pursuant to section 52-50." (Emphasis added.)

[2] In the alternative the plaintiff requested an increase of $1600 per month in alimony if she were required to purchase the health insurance coverage herself.

[3] The plaintiff has advanced no specific claim of error with respect to the court's failure to consider the appreciation in the value of the marital home in ruling on the motion. Consequently, we do not address that aspect of the court's ruling.

[4] For the sake of convenience we use the term "inheritance" to refer to the defendant's interest as beneficiary of both his mother's will and the trust created by her.

[5] This was essentially a recitation of the factors set forth in General Statutes §§ 46b-81 and 46b-82. See footnote 8, infra.

[6] After counsel for the defendant stated his first objection to admission of evidence of the potential inheritance, Judge Dorsey consulted case law during a recess. Upon returning, he gave a lengthy synopsis of the facts of Krause v. Krause, 174 Conn. 361, 387 A.2d 548 (1978), and then noted that "the court [in Krause] went on to say the expectancy, that is, the inheritance, is speculative.... Expectancy is the bare hope of succession. It is an inchoate hope. It has no attribute of property, and the interest to which it relates is at the time nonexistent, and may never exist. Meaning that, of course, a testator has the absolute right to cut anybody off up to the very last moment he breathes. And then it went on to say the moment of the decedent's death determines the right of inheritance...." Thereafter, the following colloquy took place between Judge Dorsey and counsel for the plaintiff about admission of the potential inheritance:

"Mr. Mikolitch: The primary beneficiary is--It's a revocable trust. The primary beneficiary is the donor, and at her death there would be certain--the defendant would be the primary beneficiary.

"The Court: It isn't any different than a will, except she can revoke it at any time.

"Mr. Mikolitch: Well, she can, but the point is that it's been in effect all these years.

"The Court: But she still has that power.

"Mr. Mikolitch: She still has that power, but--

"The Court: She could revoke it tomorrow.

"Mr. Mikolitch: That's true.

"The Court: I could enter an order against it, and she still would have the power to revoke it.

"Mr. Mikolitch: Well, she could. That's true.

"The Court: But I'm not going to let it in, based upon the Krause case."
(Emphasis added.)

[7] Undisputed evidence indicated that the house had an appraised value of $300,000 with an outstanding mortgage of $60,000 resulting in a value for the equity of $240,000 or $120,000 for each party.

[8] Under the provisions of both statutes, the trial court "shall consider the length of the marriage, the causes for the ... dissolution of the marriage ... the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties...." General Statutes § 46b-82. General Statutes § 46b-81(c) also provides for consideration of the "liabilities" of each of the parties. In assigning marital property, the trial court must also consider the opportunity for each party to acquire future capital assets and income, as well as the contribution of each of the parties toward the value of their respective estates. General Statutes § 46b-81(c).

[9] Rendering his decision orally, Judge Dorsey expressly found that the plaintiff was fifty-six years old at the time of dissolution, that she had high blood pressure and a residual nervous condition, that she had made substantial financial contributions to the marriage and the marital home, that the couple had been married for twenty-one years, and that there was greater fault on the part of the defendant with respect to the cause of the breakdown of the marriage.

[10] The wife expected to receive about $180,000 from the estate if the will were upheld as opposed to $80,000 if it were not upheld. Eslami v. Eslami, 218 Conn. 801, 806, 591 A.2d 411 (1991).

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71 Conn.App. 475 (Conn.App. 2002)
802 A.2d 215
Michelle L. SPENCER
v.
Edgar B. SPENCER III.
No. 21722.
Appellate Court of Connecticut.
August 6, 2002.

Argued May 1, 2002.

[802 A.2d 216] [Copyrighted Material Omitted]

[802 A.2d 217]

Walter A. Twachtman, Jr., Glastonbury, for the appellant (plaintiff).

Timothy J. Fitzgerald, with whom, on the brief, was J. Patrick Dwyer, Glastonbury, for the appellee (defendant).

LAVERY, C.J., and SCHALLER and MIHALAKOS, Js.

MIHALAKOS, J.

The plaintiff, Michelle L. Spencer, appeals from the order of the trial court modifying the alimony and child support awards to be paid by the defendant, Edgar B. Spencer III. Each of the plaintiff's claims on appeal centers on whether the court improperly found that the loss of the defendant's employment formed a sufficient basis for modification of the support awards despite of a trust fund in which the defendant was, at the time of the dissolution, and continues to be a beneficiary. [1] We affirm the order of the trial court.

[802 A.2d 218]

The following facts and procedural history are relevant to our consideration of the issues on appeal. On February 6, 1996, after a twenty-two year marriage, the plaintiff brought an action seeking dissolution of the marriage. The parties have three children: Colin and Martha were born on December 12, 1983; and Mallory was born on March 7, 1993. On May 14, 1998, the court, *Barall, J.,* rendered judgment dissolving the marriage and, by agreement of the parties, retained jurisdiction for a later determination of custody, alimony, child support, property disposition and fees.

In February, 1999, the court, *Bishop, J.,* heard evidence regarding the reserved issues and issued its memorandum of decision on March 23, 1999. The court awarded to the plaintiff the marital home located at 33 Hoskins Road in Bloomfield. The defendant had moved into his parents' former home on Duncaster Road, which also is in Bloomfield, after the parties separated in July, 1995. Recognizing that the parties resided fairly

close to one another, the court awarded joint physical and joint legal custody of the children. After

finding that the substantial amount of time the children were to be in the defendant's care warranted a deviation from the child support and arrearage guidelines, the court ordered the defendant to pay to the plaintiff $300 per week as child support for the three children and to purchase the children's clothing. In addition, the defendant was ordered to pay to the plaintiff $400 per week as alimony.

At the time of the dissolution hearing, the defendant was the president of Philbrook, Booth & Spencer, Inc. (Philbrook), a manufacturing firm that had been run by his family for many years, and earned a salary of $90,000 per year. The plaintiff was employed by Nadeau's Auction Gallery and was working eighteen hours a week for $9 an hour. The court found that the plaintiff held a bachelor of arts degree in art history and that she was underemployed.

In its memorandum of decision, the court also made certain findings pertaining to the trust. It found that the Margaret B. Spencer Irrevocable Trust was created for the benefit of the defendant and his sister. Furthermore, the court found that "the defendant is the beneficiary of an irrevocable trust which, in turn, is the beneficiary of an IRA with a principal value of approximately one million, one hundred and fifty thousand ($1,150,000) dollars as of December 31, 1998." The children's educational expenses were paid by the trust, and the defendant received direct distributions from the trust totaling $24,500 in the prior two years.

[802 A.2d 219] On February 2, 2000, the defendant filed a motion for modification of the alimony and child support payments. In his motion, the defendant claimed that the failure of Philbrook and his subsequent unemployment justified a modification of the support orders. After

hearing evidence, the court, *Gruendel, J.,* granted the defendant's motion for modification. In its memorandum of decision filed November 1, 2000, the court ordered him to pay to the plaintiff $125 per week for child support and reduced alimony to $1 per year. The court found that the "value of the trust has not changed substantially since the date of the judgment." Since the date of dissolution, the trust paid to the defendant $2500 per month from its income, totaling $30,000 per year. The defendant testified that he was in the process of changing the trustee and that the income generated by the trust was less than $2500 per month. The court found that "there is no evidence as to [the defendant's] present earning capacity. The court finds, however, that it is not less than the sum of $30,000 he had been receiving as direct income from the trust."

On November 20, 2000, the plaintiff filed a motion for rehearing or reargument to which the defendant objected. Thereafter, the court granted the plaintiff's motion, but denied the relief requested. This appeal followed.

In essence, the plaintiff argues that there was no substantial change in circumstances to form a basis for modification of the support orders. The linchpin of her argument is the defendant's interest in the trust. She argues that because the trust is worth approximately $1 million, the defendant's loss of his $90,000 salary is insignificant and does not constitute a substantial change in circumstances. The plaintiff's arguments are misplaced for two reasons: (1) the defendant's interest in the trust vested prior to the dissolution and was taken into account by the dissolution court; and (2) the trust contains a spendthrift provision that gives the trustee the sole discretion as to what, if any, funds are distributed to the defendant.

We first set forth our standard of review and the legal principles that govern our analysis of the issues on

Page 480

appeal. "A trial court is endowed with broad discretion in domestic relations cases. Our review of such decisions is confined to two questions: (1) whether the court correctly applied the law, and (2) whether it could reasonably have concluded as it did." (Internal quotation marks omitted.) *Denley v. Denley,* 38 Conn.App. 349, 351, 661 A.2d 628 (1995). "With respect to the financial awards in a dissolution action, great weight is given to the judgment of the trial court because of its opportunity to observe the parties and the evidence." (Internal quotation marks omitted.) *Bornemann v. Bornemann,* 245 Conn. 508, 530, 752 A.2d 978 (1998).

"[U]nder our statutes and cases, modification of alimony can be entertained and premised upon a showing of a substantial change in the circumstances of either party to the original dissolution decree.... Thus, once the trial court finds a substantial change in circumstances, it can properly consider a motion for modification of alimony. After the evidence introduced in support of the substantial change in circumstances establishes the threshold predicate for the trial court's ability to entertain a motion for modification ... it also naturally comes into play in the trial court's structuring of the modification orders." *Borkowski v. Borkowski,* 228 Conn. 729, 737, 638 A.2d 1060 (1994); see also **[802 A.2d 220]** General Statutes § 46b-86. [2] In general, the same factors used by the court to establish an initial award of alimony are relevant in deciding whether the decree may be modified. *Borkowski v. Borkowski,* supra, at 736, 638 A.2d 1060; see also General Statutes § 46b-82. [3] The party seeking

Page 481

modification must prove the existence of a substantial change in the circumstances. *Crowley v. Crowley,* 46 Conn.App. 87, 91, 699 A.2d 1029 (1997).

When determining whether there is a substantial change in circumstances, the court is limited in its consideration to conditions arising subsequent to the entry of the dissolution decree. *Schorsch v. Schorsch,* 53 Conn.App. 378, 382, 731 A.2d 330 (1999). "To permit the trial court to reconsider all evidence dating from Before the original divorce proceedings, in determining the adjustment of alimony, would be, in effect, to undermine the policy behind the well established rule of limiting proof of the substantial change of circumstances to events occurring subsequent to the latest alimony order-the avoidance of relitigating matters already settled." *Borkowski v. Borkowski,* supra, 228 Conn. at 738, 638 A.2d 1060.

As a preliminary matter, we note that the modification court found that the dissolution court had awarded the trust to the defendant as part of the property settlement. The modification court further noted that "[p]rofits from an asset received as part of a property settlement are not income for purposes of determining whether there has been a substantial change in circumstances. *Denley v. Denley,* [supra, 38 Conn.App. at 353-54, 661 A.2d 628]." The dissolution court acknowledged the existence of the trust and the defendant's interest in the trust, but did not award the trust to the defendant at the time of dissolution. As we will discuss, the court could not award the trust as part of the property settlement and, therefore, *Denley* does not apply to the present case.

To address the plaintiff's claims, we must also set forth the legal principles governing trusts generally and
Page 482
specifically the construction of a trust instrument. "The issue of intent as it relates to the interpretation of a trust instrument ... is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent.... The construction of a trust instrument presents a question of law to be determined in the light of facts that are found by the trial court or are undisputed or indisputable." (Citation omitted; internal quotation marks omitted.) *Cooley v. Cooley,* 32 Conn.App. 152, 159, 628 A.2d 608, cert. denied, 228 Conn. 901, 634 A.2d 295 (1993). "[W]e cannot rewrite ... a trust instrument. The expressed intent must control, although this is to be determined from reading the instrument **[802 A.2d 221]** as a whole in the light of the circumstances surrounding the ... settlor when the instrument was executed, including the condition of [her] estate, [her] relations to [her] family and beneficiaries, and their situation and condition. The construing court will put itself as far as possible in the position of the ... [settlor,] in the effort to construe ... [any] uncertain language used by [her] in such a way as shall, conformably to the language, give force and effect to [her] intention.... But [t]he quest is to determine the meaning of what the ... [settlor] said and not to speculate upon what [she] meant to say." (Internal quotation marks omitted.) Id.

On February 1, 1996, the defendant's mother created the Margaret B. Spencer Irrevocable Trust. During her life, Margaret Spencer was the sole beneficiary of the trust. The trust held certain real property, including the defendant's current home. The trust derives its income from an individual retirement account created for the benefit of Margaret Spencer pursuant to § 401 of the Internal Revenue Code and subject to the required minimum distributions prescribed by § 401(a)(9). See 26 U.S.C. § 401.
Page 483
After her death, the trust property was divided into two equal portions for the benefit of the defendant and his sister. We are concerned only with the defendant's share of the trust. Each portion was further divided into an exempt trust and a nonexempt trust to reduce the tax liability of the trust. Paragraph three of the trust instrument, which governs the exempt trust, states in relevant part: "(a) The Trustee shall pay to or for the benefit of the child, during his or her life, so much of the annual net income from the child's Exempt Trust as the Trustee deems necessary and advisable for the child's most comfortable maintenance and support and so much of the principal, even to the exhaustion thereof, as the Trustee deems necessary and advisable for the child's health. Subject to the needs of the child and with the prior written consent of the child, the Trustee shall pay to or for the benefit of the child's descendants, not necessarily in equal shares, so much of the remaining annual net income and principal as the Trustee deems necessary and advisable for their education, health, maintenance and support. The Trustee is requested to be generous in exercising its discretion to make expenditures to or for the benefit of my living children. The Trustee need not consider other resources available to the child and/or the child's descendants. The Trustee shall add undistributed annual net income to principal." The relevant portion of paragraph 4(a) of the trust instrument governing the nonexempt trust mirrors paragraph

3(a).

Margaret Spencer created the trust eight months after the parties separated and the defendant left the marital home. She specifically provided that the trust was for the benefit of "the child," i.e., the defendant, and "the child's descendants." Neither the trustee nor the court is authorized to change the beneficiary of the trust, but is bound by the terms of the trust instrument. "[G]enerally the administration of a trust must accord strictly

Page 484

with the intent of the settlor and the terms of the trust, and ... a court has no right to authorize the trustee to depart therefrom, and will do all within its power to see that the trust is executed in accordance with its terms...." 76 Am.Jur.2d, Trusts § 335 (1992). There is nothing within the trust instrument indicating that the settlor intended the plaintiff to benefit from the trust. Thus, the court could not order the trustee to allocate any portion of the trust for the benefit of the plaintiff.

The dissolution court did not distribute the trust as part of the marital property, **[802 A.2d 222]** but the court did acknowledge its existence and considered the trust when it fashioned its financial orders and the property distribution. Although the modification court improperly found that the trust was part of the initial property settlement, it correctly noted that the dissolution court "had Before it all of the relevant trust documents and income statements." It also found that the "value of the trust has not changed substantially since the date of the judgment." Therefore, the status of the trust remained unchanged.

We now turn to the plaintiff's claim that because she is not a creditor of the defendant, she is not precluded from seeking to participate in the income from the trust even though it contains a spendthrift provision. Paragraph 6(c) of the trust instrument states: "No interest of any beneficiary in any trust held under Paragraphs 3, 4 or 5 shall be subject to pledge, assignment, sale or transfer in any manner. No beneficiary shall have the power in any manner to anticipate, charge or encumber such interest. No such interest shall be liable or subject in any manner, while in the possession of the Trustee, for the beneficiary's debts, contracts, liabilities or torts."

"A trust which creates a fund for the benefit of another, secures it against the beneficiary's own

Page 485

improvidence, and places it beyond the reach of his creditors is a spendthrift trust." *Zeoli v. Commissioner of Social Services,* 179 Conn. 83, 88, 425 A.2d 553 (1979); see also General Statutes § 52-321. [4] "[A] spendthrift trust is one that restricts both the beneficiary's ability to alienate his interest in the fund and his creditor's ability to seize the property in satisfaction of his debts; in contrast to other types of protective trusts, a spendthrift trust in the technical sense exists where there is an express provision forbidding anticipatory alienations and attachments by creditors." 76 Am.Jur.2d, supra, at § 121. "Where by statute or the trust terms it is provided that the interest of a beneficiary is not to be available to his creditors, and the court decisions in the state hold the provision valid without limit or qualification, obviously creditors have no rights or remedies as far as the trust property and the beneficiary's interest in it or the income thereof are concerned. They are limited to collection from sums after payment to the beneficiary, and to the products of such payments and to nontrust property." G. Bogert, Trusts & Trustees (2d Ed.

Rev.1992) § 227, p. 499.

"The well-settled rule in this state is that the exercise of discretion by the trustee of a spendthrift trust is subject to the court's control only to the extent that an abuse has occurred...." *Zeoli v. Commissioner of Social Services,* supra, 179 Conn. at 89, 425 A.2d 553. Furthermore, "Connecticut bars creditors from reaching a distribution except, and until, it be in the hands of the beneficiary. *Olson v. Olson,* [Superior Court, judicial district of New London, Docket No. 513444, 1992 WL 310634 (Oct. 20, 1992) (7 C.S.C.R. 1247, 1248)]." *United States v. Cohn,* 855 F.

Page 486

Supp. 572, 576 (D.Conn.1994) . " 'No title in the income passes to [the beneficiary] unless and until it is appropriated to him by the trustee, and then only to the amount determined by [the trustee].' *Bridgeport-City Trust Co. v. Beach,* 119 Conn. 131, 140, 174 A. 308 (1934); *Reilly v.* **[802 A.2d 223]** *State of Connecticut,* 119 Conn. 508, 512, 177 A. 528 (1935)." *United States v. Cohn,* supra, at 576.

Our review of the clear and unambiguous language of the trust instrument reveals that Margaret Spencer intended to create a spendthrift trust that could not be reached by the defendant's creditors. Because the plaintiff obtained a judgment against the defendant for alimony and child support, her status is that of a creditor. [5] See *Cooley v. Cooley,* supra, 32 Conn.App. at 169, 628 A.2d 608 (judgment in dissolution action established plaintiff's status as judgment creditor); *Urrata v. Izzillo,* 1 Conn.App. 17, 18, 467 A.2d 943 (1983) (former spouse is judgment creditor pursuant to judgment for alimony, support). Thus, the plaintiff can reach neither the income nor the principal until it is distributed and in the hands of the defendant.

The plaintiff maintains that the trustee's characterization of the distributions of the IRA to the trust as "income" or "principal" were arbitrary. She further argues that because the distributions are fully taxed as ordinary income under § 691 of the Internal Revenue Code, [6] the distributions are income to the trust. Even if we were to agree with the plaintiff's contention, the income of the trust would still be unavailable to her. We cannot conclude on the record Before us that the trustee abused the powers granted to it in making the

Page 487

distributions as it did. The distributions made by the trustee were for the education of the parties' children, for the maintenance and repair of the real property held by the trust, and for the maintenance and support of the defendant. Each of those distributions fell within the purposes designated by the trust instrument. Because of the nature of a spendthrift trust, the plaintiff is not entitled to the income, regardless of how it is characterized by the trustee, prior to its distribution to the defendant.

As a final note, we address the plaintiff's claim that the court improperly disregarded the defendant's rent free use of the home owned by the trust, which is indirect income to the defendant. The plaintiff cites *Tremaine v. Tremaine,* 235 Conn. 45, 64, 663 A.2d 387 (1995), for the proposition that "the value of the house to the defendant is not what the house is worth, but rather how much the defendant's rent free use of the house saves him in living expenses." Even a cursory look at *Tremaine* reveals that the court, in construing the trust instrument, was called on to apply the law of the state of Ohio. Although it is axiomatic that this court is bound by the decisions

of our Supreme Court; see *State v. James,* 69 Conn.App. 130, 133-34, 793 A.2d 1200, cert. denied, 260 Conn. 936, 802 A.2d 89 (2002); those decisions interpreting the laws of our sister states have no relevance in our application of Connecticut law. Even if we were persuaded by our Supreme Court's application of Ohio law, it would be of no avail to the plaintiff. As previously mentioned, the defendant resided in the home at the time of the parties' separation. The dissolution court was aware of the use of the home and any indirect financial benefit to the defendant and, therefore, it cannot be considered as part of the modification equation.

[802 A.2d 224] Keeping the aforementioned principles in mind, and our conclusions derived therefrom, we now determine

whether the finding by the court of a substantial change in circumstances was an abuse of discretion. At the time of the dissolution, the defendant earned a $90,000 salary and received distributions from the trust. When Philbrook closed, the defendant lost his entire salary but received distributions from the trust totaling $30,000. Every other aspect of the defendant's financial situation remained static. Therefore, the court was limited in its consideration to only the defendant's loss of salary. Taking into account the distributions of the trust totaling $30,000, the defendant's income decreased by at least $60,000. We conclude that the court correctly applied the law governing modification of support orders in a dissolution matter and, on the basis of its subordinate findings, the court could reasonably have concluded that the defendant's decrease in income was a substantial change in circumstances warranting a modification.

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] In her statement of the issues and in the argument portion of her brief, the plaintiff presents six claims as follows:

"1. Did the court err in granting the defendant's motion to modify the alimony and child support awarded to the plaintiff in the original judgment of this case, notwithstanding the fact that the defendant had lost his job when the defendant and the children of the marriage are the beneficiaries of trusts that have about $1 million in resources and when the defendant has the rent free use of a substantial house owned by the trust for which the trust pays real estate taxes, maintenance and insurance? ...

"2. Did the court err in reducing the child support payable to the plaintiff when the evidence showed that the trusts which benefit the defendant and the children of the marriage, specifically allowed for payments of support for the children and where the defendant admitted that the trusts were set [up] to provide for payments for the support of the children and where the trusts had approximately $1 million in resources available for such payments? ...

"3. Did the court err in finding that '[t]he income received from the [individual retirement account (IRA), which is the funding vehicle for the trusts] provides the corpus of the exempt and nonexempt trusts? From this corpus, the trusts themselves realize the income that is available to fulfill the stated purpose of the trust,' when the evidence showed that the trustee received

distributions from the IRA and actually recorded it and used it as 'income' or 'principal' depending on what account needed the funds rather than on any legal categorizing of the distribution? ...
"4. Did the court err in finding that a new trustee had, '[i]ndicated that there is insufficient income to continue the practice of paying the defendant $2500 per month,' without any evidence from the new trustee after the court specifically found that the facts show that the defendant received $2500 per month, and that such sum exceeds the income generated by the exempt trust? ...
"5. Did the court err in not considering the defendant's rent free use of a house owned by the trust, for which the trust pays real estate taxes, maintenance and insurance, as an income factor to him which considerably raises his income and where his financial affidavit failed to show any credit for the benefit of the use of this house? ...
"6. Do the spendthrift provisions insulate the defendant from the claims of the plaintiff where a spouse or former spouse is not a 'creditor' subject to spendthrift provisions?"
[2] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support or an order for alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party...."
[3] General Statutes § 46b-82 provides in relevant part: "In determining whether alimony shall be awarded, and the duration and the amount of the award, the court shall hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the ... dissolution of the marriage ... the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81...."
[4] General Statutes § 52-321(a) provides: "If property has been given to trustees to pay over the income to any person, without provision for accumulation or express authorization to the trustees to withhold the income, and the income has not been expressly given for the support of the beneficiary or his family, the income shall be liable in equity to the claims of all creditors of the beneficiary."
[5] We note that our analysis and conclusion that the plaintiff is a judgment creditor of the defendant applies equally with regard to alimony and child support. In addition, the amount of the income generated by the trust is irrelevant because the distributions are within the discretion of the trustee. See *Zeoli v. Commissioner of Social Services,* supra, 179 Conn. at 89, 425 A.2d 553.
[6] See 26 U.S.C. § 691.

STANDISH V. STANDISH, NO. FA 92-0 50 79 79 S (NOV. 23, 1998)

GAIL M. STANDISH vs. JONATHAN K. STANDISH

No. FA 92-0 50 79 79 S

Connecticut Superior Court, Judicial District of Hartford at Hartford

November 23, 1998 CT Page 13521

MEMORANDUM OF DECISION

GRUENDEL, J.

This is an action brought by the plaintiff wife against the defendant husband for dissolution of their marriage on the grounds of irretrievable breakdown. The plaintiff's motion for contempt is also at issue. The matter was first tried to this court in June, 1994. By judgment dated September 19, 1994, the court dissolved the marriage and made certain financial orders. Thereafter, the plaintiff appealed the judgment. On December 16, 1994, the trial court issued an Amended Memorandum of Decision. On February 13, 1996 the Appellate Court reversed the judgment of the trial court as to all orders except the order dissolving the marriage, and remanded the case for a new trial. Standish v. Standish, 40 Conn. App. 298 (1996). A new trial requires the court to consider all financial matters and the issues between the parties as they are at the time of the new trial. See. Michel v. Michel, 31 Conn. App. 338, 341 (1993).

At trial, the parties testified, filed financial affidavits, submitted written proposed claims for relief, and introduced a large number of documentary materials, primarily financial, into evidence.

The parties made reference to financial affidavits filed by them at the June, 1994 trial, which were part of the court file. In addition, the plaintiff called a trust officer from Fleet Bank as a witness. Through counsel, the parties submitted briefs on the legal issues presented. The court observed the demeanor of the parties on the stand and assessed their credibility.

I.

Based upon the evidence, the court finds the following facts. The parties were intermarried at Cheshire, Connecticut on September 2, 1959. They had three children issue of the marriage, who are now 34, 32, and 30 years of age. The court has jurisdiction. CT Page 13522

The plaintiff, Mrs. Standish holds a bachelor s and a master s degree, and undertook additional graduate studies in the 1970's. She was employed as a school teacher during the early years of the marriage, but gave up that career to raise the parties' children. She has not worked in the field of education for more than thirty years, and is not licensed or certified as a teacher in Connecticut. Prior to the institution of the dissolution action, she took up gardening work at relatively insignificant wages, but her age and physical condition would not permit her to continue such work. Throughout the marriage, she was an active participant in her children's activities and in community and volunteer work.

Now sixty five years old, the plaintiff has worked in retail sales since the commencement of this action. She presently earns $159 to $189 per week from that employment, based upon an hourly rate of $10. She recently reduced to less than twenty the number of hours she had been working per week to make herself eligible for social security retirement benefits, and beginning in November will receive her first monthly check of $594. Her earnings and earning capacity is $175 per week, in addition to her social security income of $137 per week.

In 1978, the plaintiff was given a half interest in a shore cottage in Branford by her parents, and she inherited the remaining interest in the property upon her mother's death in 1995, after the first trial. The property has a value of $475,000, but is encumbered by a mortgage of $119,471 placed upon it by the plaintiff and her mother to provide funds for her father s convalescent care prior to his death. The equity in the property is $355,529. In addition, she received a gift of $96,000 from her parents prior to the commencement of this action, and since the dissolution of the marriage has inherited an additional $293,000, which is being held in escrow pending the resolution of litigation over her mother's estate. She will not receive less than the $293,000, but may receive more if her challenge to her mother's will is successful. Thus, she has acquired approximately $744,000 in net assets from her parents, most of it since the marriage was dissolved. However, of the $67,120 in debt listed on her financial affidavit, approximately $35,000 is attributable to attorney fees and other costs associated with her mother's estate.

During the marriage and until May, 1997, the defendant worked CT Page 13523 in management positions at various stock brokerage companies. His annual salary went from $158,657 in 1983 to approximately $450,000 in 1989, when the firm for which he worked was severely damaged by a securities scandal not involving the defendant, and he lost his job. His work as a manager for that company was extremely successful. He testified that his efforts had led to an increase of more than $5 million per year in annual revenues over six years for the branch office he managed.

Despite the defendant's nearly two million dollars in earnings over the last six years of the 1980's, the parties did not lead an extravagant life style. Expenses for their home including interest and real estate taxes were never greater than $18,000 per year, according to their tax returns. They paid normal expenses for their children including sums for tuition and activities, and purchased some antiques. However, they did not acquire substantial assets apart from some stocks which will be discussed below. Neither party is able to explain what happened to all the money the defendant earned during those years. The defendant was the primary financial manager for the household, and is in a better position to know. What is clear is that the parties

did not make a particular effort to save because they relied on a well-endowed trust established by the defendant's grandmother to see them through their declining years.

In addition to those substantial earnings during the 1980's, the defendant acquired substantial additional cash during the period between 1989 and 1992. In 1989, he liquidated $174,680 in stock, including approximately $120,000 in securities issued by his employer Drexel Burnham Lambert. In 1991, he liquidated additional stocks for the approximate sum of $155,000. Beginning in 1989, he drew down nearly all of the $100,000 equity mortgage on the marital residence, having drawn a modest portion of the total earlier. In 1991, he took a $93,000 early distribution on a retirement plan, and in 1992, after the commencement of this action, took an early distribution of $67,322.12 on an IRA. The defendant did not account for any of the funds realized from these liquidations, but it is clear that the sums would have been part of the marital estate had they been available for distribution at the first trial in 1994 or in the current proceeding. No such sums were included in the defendant's June 27, 1994 financial affidavit, which showed only $1,000 in savings, $42,800 in stock, and $335 in retirement accounts. In addition to these sums, the defendant received $141,000 in gifts from his parents prior to July 27, 1995. Although his June 27, CT Page 13524 1994 financial affidavit showed a "debt" of $95,000 to his parents, that "debt" evidently was liquidated after that date, since his current financial affidavit shows an additional "debt" of $90,000 to his mother incurred during 1995 and 1996, but makes no reference to the earlier sum.

The defendant possesses a vested interest in one half of a testamentary trust established for his benefit and the benefit of his brother, Welles Standish, II, equally, under the will of his grandmother, Nettye Standish, who died in 1966. The Nettye Standish Trust includes the following pertinent provisions:

1. The Trustee was to hold the principal of the trust during the life of the defendant's father, Welles Standish, and to pay him the net income after trust expenses for life. Dr. Standish died in 1997.

2. Upon Dr. Standish's death, the Trustee is required to hold and manage the principal of the trust during the life of his widow, the defendant's mother, Rosamind Standish, and to pay her the net income after trust expenses for life. Mrs. Standish is stilI living, and is 94 years old.

3. The trustee, in its sole discretion, has the authority to invade the principal of the trust for Mrs. Standish's comfortable maintenance. The Trustee has not exercised this power in the thirty two years the trust has been in existence.

4. Upon the death of Rosamind Standish, the trust passes to the defendant and his brother in equal shares, absolutely and free of trust. If either of them is not living at her death, his share passes to his issue.

5. No life beneficiary or remainderman has the power to anticipate proceeds or the power to appoint.

The present value of the trust is $2,007,000, and the present value of the defendant's vested share is therefore $1,003,500, according to Robert Bolgard, Trust Officer for Fleet Bank, the trustee. Mr. Bolgard testified and the court finds that the defendant will receive his share of the Nettye Standish Trust free of estate taxes.

The defendant is also a beneficiary of a testamentary trust established by his father. The Welles Standish trust originally CT Page 13525 possessed principal of approximately three quarters of a million dollars, but that amount has been diminished since Dr. Standish's death in May of 1997, and the current value of the trust is $676,355.58. The trust is divided into two portions, a marital trust and a residuary trust. The residuary trust consists of the first $625,000, and the marital trust contains the balance of principal at inception. With respect to the marital portion, the Trustee is required to pay Rosamind Standish, the defendant's mother, its income for life, and she or the trustee may invade principal for her "most comfortable maintenance and support." With respect to the residuary portion, the trustee may pay Rosamind Standish income or principal, or, subject to her needs, may pay income or principal to the defendant or his brother, such advances being deducted from whatever each will receive at the termination of the trust. The existence of the Welles Standish trust and its provisions for Rosamind Standish's benefit make it unlikely that the Trustee of the Nettye Standish Trust will need to invade its principal to provide for the elder Mrs. Standish.

In early 1997, the defendant was terminated from his job at a brokerage firm for lack of productivity, which he testified was brought about in part by his unhappiness with the position. Although he has not been employed since then, and receives only social security retirement income of $284 per week, he testified that he has not seriously looked for work during that period because of his family's request that he remain available to assist his mother. During the years between 1992 and his retirement, his earnings diminished but were still substantial. In 1992, he earned $122,553, working at two brokerage firms. In 1993, he earned $118,731. In 1995, he earned $81,291, and in 1996 he earned $24,604. In addition, he has received other sums from his family. In 1997, he inherited $19,575 from an aunt and received $40,000 in gifts from his parents. He has received between $3,000 and $4,600 monthly from his mother in 1998. To receive these funds, according to his testimony, he has only to ask for them.

The defendant bears the primary fault for the breakup of the marriage. He had several affairs during the marriage, but the most recent was the principal cause of the dissolution. The plaintiff learned of that affair when, some months before commencing the action, she accidently discovered intimate correspondence between the defendant and a co-worker of his. Although the defendant was embarrassed and inconvenienced by the plaintiff's poor housekeeping and her intemperate language toward CT Page 13526 and about the defendant, uttered both publicly and privately, neither that conduct nor his embarrassment about it constitutes a significant cause for the dissolution. The court does not find that the parties' abstinence from sexual relations during the twenty four years prior to the commencement of this action was a significant cause of the dissolution, but in any event finds that the defendant was more responsible than the plaintiff for the cessation of those relations.

The court finds that the defendant's testimony concerning financial matters was without credibility. His testimony, for example, that he did not know what happened to most of the

nearly $100,000 he drew down on the home equity loan does not square with his enormous success as a manager in the financial industry. His current financial affidavit attributes to his antiques a value of only $20,000, whereas his 1994 financial affidavit showed the value of such items as $303,000, of which $140,000 were items acquired during the marriage. He did not testify that he had disposed of any antiques except that he and the plaintiff had mutually divided some of them, each taking about sixty-five items. The plaintiff's testimony that the defendant had retained the more valuable Standish family heirlooms and antiques, including a clock valued in excess of $60,000, was not challenged. The court finds that the value of the defendant's antiques is in excess of $60,000, and based on a comparison of the defendant's June 27, 1994 financial affidavit and the testimony and financial affidavit in this proceeding is more likely than not in excess of $150,000.

The parties have divided their personal property by agreement, including the antiques. The marital home was sold. After payment of the first mortgage and the $100,000 line of credit, the sale of the home netted $84,000, of which the plaintiff has received $42,000 by agreement and $42,603 is being held in escrow, subject to an interpleader action in federal court in which the defendant, the Internal Revenue Service (IRS), and the escrow agent have asserted claims to the funds. The IRS's claim to the funds relates to its claim against the defendant for back taxes.

II.

In addition to the claims of the plaintiff for alimony, counsel fees, and equitable distribution of the parties' estate pursuant to Section 46b-81 of the Connecticut General Statutes, CT Page 13527 and the claims made by the parties in their proposed orders, this matter requires the resolution of three additional legal issues, as follows:

A. do the trusts, or either of them, of which the defendant is a beneficiary constitute a part of his estate subject to orders concerning alimony and/or property distribution;

B. does the defendant's regular receipt of funds from his parents constitute income which can be included in the calculation of any alimony order;

C. were the defendant's payments on the first mortgage, the equity line, and for property taxes during the period prior to the resolution of the appeal when he was obligated to pay alimony attributable to the satisfaction of the alimony order?

A.

Before deciding whether to distribute either or both of the trusts of which the defendant is the beneficiary between the parties, the court must first determine whether they constitute property which is part of the defendant's estate subject to distribution under Section 46b-81 of the General Statutes and, if so, their value. Krafick v. Krafick, 234 Conn. 783, 792-93 (1995). The court has valued the defendant's interest in the Nettye Standish Trust as $1,003,500. The value of the defendant's interest in the Welles Standish Trust is less certain because of the powers of the three beneficiaries to invade principal, and because there is insufficient evidence to determine the extent to which the defendant's expected share has already been diminished.

It is clear that the court cannot distribute the proceeds of a trust if it is a mere expectancy.

"Expectancy" is the bare hope of succession to the property of another, such as may be maintained by an heir apparent. Such a hope is inchoate. It has no attribute of property, and the interest to which it relates is at the time nonexistent and may never exist.

Rubin v. Rubin, 204 Conn. 224, 229-30 (1987). It is therefore necessary to determine whether either or both of the subject trusts constitute mere expectancies, or whether they have the CT Page 13528 attributes of property. "The terms `estate' and `property' as used in the statute (46b-81) connote presently existing interests. `Property' entails `interests that a person has already acquired in specific benefits." *Id*., 230-231.

In Rubin, the Supreme Court overturned a trial court decision awarding the wife a share of assets the husband might acquire under his mother's will or on the termination in his favor of a revocable intervivos trust created by her. The court considered both assets to be mere expectancies. There, the husband's mother had the power so long as she was alive to exclude her son from her will and to revoke the trust she had established for his benefit.

However, the fact that property has not yet come into the control of an individual does not in itself require a conclusion that the property comprises a mere expectancy. The court must consider, for the purposes of modification of alimony, an inheritance received by a party after an original alimony award where the assets had been vested in him but he had not yet received them. Bartlett v. Bartlett, 220 Conn. 372 (1991); also, see, Eslami v. Eslami. 218 Conn. 801 (1991) (appropriate for the court to consider an asset that has vested but not yet been received). Future benefits to be received by a party to a dissolution action for a specific indemnity award under the worker's compensation statute are property subject to distribution under Section 46b-81 of the General Statutes even where the amount of those benefits had not been determined at the time of dissolution. Tyc v. Tyc, 40 Conn. App. 562, 568-69 (1996). Similarly, vested pension benefits not yet subject to access by an individual constitutes property subject to distribution under 46b-81.

. . . vested pension benefits represent an employees right to receive payment in the future, subject ordinarily to his or her living until the age of retirement. "The fact that a contractual right is contingent upon future events does not degrade that right to an expectancy."

Krafick v. Krafick, 234 Conn. 783, 797 (1995).

The definition of property for purposes of Section 46b-81 of the General Statutes is broad and comprehensive, consistent with the purpose of the equitable division statute. *Id*., 795. The term is "used to denote everything which is the subject of ownership, CT Page 13529 corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments." *Id*., 794.

There are a number of ways that trusts can be created, see, e.g., Bogert, The Law of Trusts and Trustees, Vol. II, § 182, pp. 266-257, and a determination of whether a trust constitutes property requires an analysis of the trust itself. Here, the trust vested in the defendant thirty-two years ago, subject only to his surviving the life tenant. In such a case, the trust is vested, subject to divestiture on his failure to survive. See, *id.*, section 182, pp. 390-394, citing Bronson v. Pinney, 130 Conn. 262 (1943); McFarland v. Chase Manhattan Bank, 32 Conn. Sup. 20, aff'd. 168 Conn. 411 (1975).

The court concludes that the defendant's interest in the Nettye Standish Trust constitutes property subject to distribution in this action in accordance with the criteria set forth in Section 46b-81 of the General Statutes. His rights to the inheritance vested in 1966, when the trust was established. The present value of that interest can be determined. The principal has never been invaded, and is unlikely to be. The only contingency that would prevent his receipt of the property would be his failure to survive his mother. That contingency does not convert his vested contingent remainder interest from property to a mere expectancy. See, Krafick v. Krafick, 234 Conn. 783. 797 (1995), also see, Mahoney v. Mahoney, 98 Conn. 525 (1923). The court concludes, however, that the defendant's interest in the Welles Standish Trust cannot be considered for distribution under 46b-81 in this action. There is insufficient evidence from which to value that asset, even if it does constitute a part of the defendant's estate.

In reaching this conclusion, the court is conscious of the teaching of Rubin that the award of a portion of property from a party who has not yet obtained the asset to his spouse may prove illusory. Rubin v. Rubin, 204 Conn. 224, 234 (1987). Indeed, if the defendant does not survive his mother, he will not receive the asset, and the plaintiff may have no recourse. Under the facts and circumstances of this case, however, it would be inequitable for the court to deny to the plaintiff an opportunity to share this asset with her former husband. Without the trust, CT Page 13530 the defendant shows assets of only $30,500 on his current financial affidavit, although the court has determined that those assets are understated by at least $40,000 with respect to his valuation of antiques he owns. That amount would be insufficient to award the plaintiff an equitable share of the marital estate under the criteria set forth in Section 46b-81 of the General Statutes, particularly in view of the fact that the parties did not save for their declining years during their long marriage in reliance on existence of the Nettye Standish Trust.

Because the defendant receives no current income from the Nettye Standish Trust, the court will not take it into account in ordering current periodic alimony pursuant to Section 46b-82 of the Connecticut General Statutes. However, alimony will be modifiable, and the principal or income from the trust may be a factor a future court will consider in determining whether a modification is warranted once the defendant has actual possession of the asset.

B.

The plaintiff asserts that the court should consider the funds that the defendant has regularly received from his parents in fashioning an award of periodic alimony. The defendant received $141,000 from his parents prior to July 27, 1995, $40,000 in 1997, and between $3,000 and $4,600 per month in 1998. While the defendant's financial affidavit lists a $90,000 debt to his mother incurred during 1995 and 1996, there is no evidence that he executed a note or that he is

expected to repay the sum. Moreover, the terms of the Welles Standish Trust make clear that sums he receives from his mother are advances on his expected inheritance under that trust. "At least where the past gratuities have been made on a regular basis during the marriage . . . the court may reasonably assume that those contributions will continue." **Rubin v. Rubin**, 204 Conn. 224, 238-9 (1987).

"[R]egularly and consistently received gifts . . . are properly considered in determining alimony awards to the extent they increase the amount of income available for support purposes." **Unkelbach v. McNary**, 244 Conn. 350, 360-1 (1998). Should they terminate, the award may be modified. *Id*., at 361. Accordingly, the defendant s regular receipt of sums from his family will be considered in determining any award of alimony to the plaintiff. CT Page 13531

C.

The defendant asserts that he should be given credit with respect to an alimony arrearage for amounts he paid on the plaintiff's behalf during the pendency of the appeal, at a time when he had an obligation to pay the plaintiff $500 per week. The total due for alimony during that period was $36,500. The defendant made payments of $3,908.09 to West Hartford for real estate taxes on the marital home, $9,842.82 to Shawmut/Fleet Bank interest on the $100,000 equity line, and $4,744.85 to American Savings Bank for payments on the first mortgage. He also claims to have made payments of $10,988 directly to the plaintiff, but acknowledges that $500 of that total was meant as a gift. In addition, he made payments of $3,274.07 to Fleet Bank, $946.17 to American Savings Bank, and $500 directly to the plaintiff after February 13, 1996.

The purpose of alimony is to meet one's duty of support.Weiman v. Weiman, 188 Conn. 232, 234 (1982). "Alimony is always represented by money and is damages to compensate for loss of marital support and maintenance." Crowley v. Crowley, 46 Conn. App. 87, 98 (1997). In general, the dignity and independence of the recipient of alimony is enhanced by the direct receipt of the funds, and diminished when the obligor undertakes to make payments on the recipient's behalf to third parties. Here, the plaintiff was entitled under the judgment of the court to receive $500 per week, to spend as she might choose.

The defendant's reliance on cases where in-kind payments for mortgage. insurance. and similar expenses were upheld is misplaced. Those cases involved pendente lite orders, whereas in this case the orders for periodic alimony were part of a final judgment. The purposes of pendente lite awards and final orders are different. Wolk v. Wolk, 191 Conn. 328, 331 (1983). In addition, the court's order in the Wolk case required the husband to make mortgage payments as part of the pendente lite support orders, not in lieu of them.

The defendant's payments to Shawmut for the equity line, to American Savings Bank for the first mortgage, and to the Town of West Hartford for real estate taxes must be analyzed in light of the facts surrounding those payments, including the court orders in existence. With respect to the Shawmut payments, the defendant alone had access to the nearly $100,000 that had been drawn down on that account. In effect, he was paying interest for money only CT Page 13532 he had used. In addition, the court's Amended Memorandum of Decision dated December 16, 1994 required him to maintain the marital home, to pay the home equity loan, and to pay the real estate

taxes. Finally, under both the September 19, 1994 judgment and the December 16, 1994 amended judgment. he was to receive a benefit from the sale of the house. Under the circumstances, his dual claim that he made payments to Shawmut and the Town of West Hartford voluntarily and for the benefit of Mrs. Standish is not credible or viable. For these reasons, the defendant cannot sustain his burden of proving his claimed defenses of waiver, laches, or estoppel. However, the court will credit him with payments made on account of the first mortgage, since under the amended judgment Mrs. Standish was responsible for those payments.

Accordingly, the court finds that the defendant is in contempt of the orders of the court for his failure and refusal to make payments of alimony during the pendency of the appeal, and finds that his contempt was willful. The court finds that the defendant is in arrears in the amount of $21,167.15.

The defendant shall pay the plaintiff that sum, together with interest at the statutory rate, within sixty days hereof. This order is in addition to any other orders which will be entered in this case.

III.

The court has considered all of the evidence and its findings in the light of the criteria set forth in Sections 46b-62, 46b-81, and 46b-82 and the relevant case law.

The court orders:

1. The defendant husband shall pay the plaintiff wife the sum of $400 per week as periodic alimony. Alimony shall not terminate except upon the death or remarriage of the wife. Alimony shall be non-modifiable as to duration, but shall be subject to modification during its terms including when the parties receive the assets of the Nettye Standish Trust.

2. The defendant shall be responsible for the payment of any tax liabilities set forth on his financial affidavit, as well as any tax liabilities he may have incurred between 1994 and the date hereof, and shall indemnify and save the plaintiff harmless CT Page 13533 on account of them.

3. The plaintiff wife shall receive the entire amount of $42,603 proceeds from the sale of the marital home that is presently being held in escrow. The defendant shall cause the same to be released to the plaintiff within thirty days hereof.

4. Each party shall pay his or her own attorney fees.

5. The plaintiff shall receive as property distribution one quarter of the defendant's interest in the Nettye Standish Trust, payable within thirty days of the defendant's receipt of the trust assets.

6. Each party shall retain his or her own IRA or 401k accounts.

7. Each party shall be responsible for the debts which appear on his or her respective financial affidavits, and shall indemnify and hold the other harmless with respect to those debts.

8. Each party shall maintain his or her own health, life, casualty, automobile and other insurance.

Orders shall enter accordingly

BY THE COURT,

GRUENDEL, J

129 Conn. 211 (Conn. 1942)
27 A.2d 166
GREENWICH TRUST CO.
v.
TYSON et al.
Supreme Court of Errors of Connecticut.
July 1, 1942
[27 A.2d 167] [Copyrighted Material Omitted]
[27 A.2d 168] Appeal from Superior Court, Fairfield County; John A. Cornell, Judge.

Action in the nature of a creditor's bill by the Greenwich Trust Company, trustee of the estate of Jessie M. Converse, deceased, against John H. Tyson and others to collect the amount of a judgment for plaintiff against named defendant from the assets of a trust created by such defendant. Demurrers to plaintiff's amended complaint were overruled, and from a judgment for plaintiff after trial of the issues to the court, all parties appeal.

Error, judgment set aside, and case remanded, with direction.

In action in nature of creditor's bill to collect amount of judgment against one of defendants from assets of trust created by him for benefit of himself and others, trial court properly refused to order " marshaling of remedies" by requiring plaintiff to resort first to mortgage held by it as security for debt before proceeding against trust income which trustee, in its discretion, might have used for support and maintenance of others than settlor under trust instrument.

[27 A.2d 169]
Page 213
John Keogh, Jr., and Gerald R. Steinberg, both of South Norwalk, and Raymond T. Benedict, of Norwalk, for appellants-appellees Ruth T. Shoemaker and others.

William L. Tierney, Jr., of Greenwich, for appellants-appellees John H. Tyson and others.
Page 214
William C. Strong and William S. Hirschberg, both of Greenwich, for appellee-appellant.

Before MALTBIE, C.J., and AVERY, BROWN, JENNINGS, and ELLS, JJ.

MALTBIE, Chief Justice.

In this action the plaintiff, having recovered a judgment against John H. Tyson, sought to satisfy it from the income and principal of a trust which he had created. While the writ contained a direction for the garnishment of various persons, including the trustee, the action was treated in the trial court and before us as one in the nature of a creditor's bill in equity. The trial court made a decree in the plaintiff's favor. The plaintiff, Tyson, William L. Tierney, the trustee, and the beneficiaries under the trust other than Tyson have all appealed. The case as tried presented three issues. The first was the right of the plaintiff to reach one-half of the principal of the trust fund under a provision that, if at the expiration of ten years from its date Tyson was living, the trustee should pay and deliver that half to him. Tyson was alive at the expiration of that period and became entitled to one-half of the principal of the fund, but it is stipulated that the trustee still holds

it. There is no substantial dispute that, as the trial court held, the plaintiff has the right to avail itself of that portion of the fund. The second question was as to the right of the plaintiff to reach the income of the fund, which, under the agreement, might be paid to Tyson. The trial court held that it had the right to reach so much of that income as the trustee in his discretion did not deem to be required for the support and maintenance of the woman who was Tyson's wife at the time the trust was created and the support, education and maintenance of Tyson's children. The third question concerned the plaintiff's right to reach

Page 215

the remaining one-half of the principal, as to which the trial court ruled against its claim.

Since the argument of the appeal before us, Tyson has died, and his death put an end to any right he might have either in, or to dispose of, the income or principal of the fund. His executor has been made a party in his place by order of the Superior Court. He and the other parties have stipulated that there is in the possession of the trustee some undistributed income from the fund, and further that this court may proceed to decide all the issues presented on the record and in so doing may take cognizance of the fact of Tyson's death to any extent to which it affects those issues. As regards the income of the fund, his death is material only to the extent that the question now is as to the plaintiff's right to reach the accumulated income now in the possession of the trustee exclusive of any right it might otherwise have had to reach any income accruing to him in the future. As regards the plaintiff's right to reach the half of the principal to which Tyson did not become entitled at the expiration of the ten-year period, his death fixed the right of the parties, as we shall later point out. This is an equitable proceeding and the facts determinative of the rights of the parties are those in existence at the time of final hearing. *Duessel v. Proch,* 78 Conn. 343, 350, 62 A. 152, 3 L.R.A.N.S., 854. As there was error in the judgment in one respect, we shall set it aside and remand the case for the rendition of another judgment. The hearing upon which that judgment will be entered will be the **[27 A.2d 170]** final hearing, and facts then in existence, including Tyson's death, will determine the ultimate rights of the parties. To decide the issues in disregard of his death would be to determine questions which in the last analysis would be academic. Taking that death into account, the conclusion to which the trial

Page 216

court came as to the plaintiff's right to reach the half of the principal to which Tyson had not become entitled would be correct. We shall therefore act under the stipulation and determine the issues in the light of Tyson's death.

We turn, then, to the question whether the interest of Tyson in the income of the trust, which the defendants claim to be a spendthrift trust, may be reached in equity in order to satisfy from it the plaintiff's judgment. Tyson transferred a large amount of property to the trust under an instrument dated November 12, 1931. The instrument contained the following provisions: The trustee was ‘ to pay the net income therefrom or so much thereof as the Trustee may in its absolute discretion deem wise, to the Grantor, or to accumulate any part thereof, or to expend any part thereof directly for his support, or for the support and maintenance of his wife, or for the support, education and maintenance of his son Charles D. Tyson, or of other children if they be born to him, for a period of twenty years from the date hereof if he lives twenty years, or for so

much of said twenty year period as he does live.' If the grantor was alive at the expiration of ten years the trustee was to pay him one-half of the principal of the fund, the trust continuing as to the other half. If he was alive at the end of twenty years all the property in the fund, including accumulated interest, was to be paid to him and the trust terminated. Provisions were also made as to the disposition of principal and income should Tyson die either during the first or the second ten-year period; and, as regards the second period, which alone concerns us, the instrument stated that the one-half of the principal remaining in the fund should continue to be held in trust, the income to be paid to his widow, if she, but no children, survived him, until her death
Page 217
or remarriage and at that time the principal should be distributed in such manner as he might direct or will or, in default of direction, to his heirs-at-law; or if children, but no widow, survived him, the fund was to be divided into as many shares as there were children, the income of one share to be paid to each of them, and the principal to be paid to him, one-half when he reached the age of twenty-one and the remainder when he reached the age of forty, with further provisions by which the issue of any child who might die would take interest under the trust. The instrument also provided that the trustee should pay, without specifying whether from principal or income, a portion of the debts left by Tyson's father, whose estate was insufficient to meet them.

Two further provisions in the instrument should be noted: ' In the sole discretion of the Trustee and during the lifetime of the Grantor only, the Trustee may pay obligations of the Grantor, when requested by the Grantor so to do, out of the principal of the trust fund. After the death of the Grantor, the Trustee may in its absolute discretion pay any debts of the Grantor out of the trust funds in its possession. Nothing herein shall be construed to give a right to the Grantor to have such obligations paid or to any creditor of the Grantor either before or after his death to demand such payment from the Trustee.' ' The Grantor, with the consent and approval of the Trustee, may amend or amplify this trust indenture but not in such manner as to change the provisions for the disposition of principal and/or income prior to his death.'

The basis upon which rest trusts of a spendthrift nature is the right of a testator or donor to attach to a gift of property any condition he desires which is not contrary to law or public policy.
Page 218
In re Morgan's Estate, 223 Pa. 228, 230, 72 A. 498, 25 L.R.A.N.S., 236, 132 Am.St.Rep. 732; *Smith v. Towers,* 69 Md. 77, 89, 14 A. 497,15 A. 92,9 Am.St.Rep. 398. ' As a general rule, a testator has the right to impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as cestui que trust. He may not, however, impose one that is uncertain, unlawful, or opposed to public policy.' *Holmes v. Connecticut Trust & Safe Deposit Co.,* 92 Conn. 507, 514, 103 A. 640, 642, L.R.A.1918E, 368; *De Ladson v. Crawford,* 93 Conn. 402, 410, 106 A. 326; *Colonial Trust Co. v. Brown,* 105 Conn. 261, 284, 135 A. 555. In *Leavitt v. Beirne,* 21 Conn. 1, 8, we recognized that to uphold **[27 A.2d 171]** the validity of trusts in the nature of spendthrift trusts might open the way to abuses, but we sustained them upon the ground that they afford a proper means of enabling a man to assure protection to relatives or other persons in whom he is interested, and to whom he desires to donate his property, against its waste through their own improvidence or the unfortunate

influence of others. See *Nichols v. Eaton,* 91 U.S. 716, 727, 23 L.Ed. 254; 1Bogert, Trusts & Trustees, § 222, p. 721. This being the basis and justification of such trusts, it necessarily follows that the conception of them involves the idea of bounty extended by a person to others in whose welfare he is interested. ‘ The great current of modern authority in this country is to the effect that an equitable life estate under which the life tenant may have absolute rights may be appropriate language be created by one for the benefit of another, which shall be inalienable by the cestui que trust and beyond the reach of creditors.’ *Mason v. Rhode Island Hospital Trust Co.,* 78 Conn. 81, 85, 61 A. 57, 58,3 Ann.Cas. 586. ‘ The spendthrift trust is one which provides a fund for the benefit of another, and which secures it against his own improvidence, and places it beyond the reach
Page 219
of his creditors.’ *Carter v. Brownell,* 95 Conn. 216, 221, 111 A. 182, 184. The reference in these quotations to a fund created by one for the benefit of another was a recognition of the implications which underlie the whole doctrine of such trusts.

The attempt of a man to place his property in trust for his own benefit under limitations similar to those which characterize a spendthrift trust is a departure from the underlying basis for the creation of such trusts. That aside, the public policy which sustains such trusts when created for the benefit of another is, where the settlor is himself the beneficiary, overborne by other considerations. In *Johnson v. Connecticut Bank,* 21 Conn. 148, 158, where we were considering the right of the creditor of a beneficiary of a trust to secure satisfaction from the latter's right to the income, we stated: ‘ It is the policy of our law, that all the property of a debtor should be responsible for his debts. And his equitable estate may be taken, as well as his legal, provided it is subject to his control’ ; and, subject to definite limitations, that has always been the policy of our law. *D'Addario v. Abbott,* 128 Conn. 506, 509, 24 A.2d 245. To admit the validity of such trusts would open too wide an opportunity for a man to evade his just debts to be permissible unless sanctioned by statutory enactment. This is the reason why the overwhelming weight of authority holds ineffective attempts to establish them. 1 Scott, Trusts, § 156; 1 Bogert, Trusts & Trustees, § 224; Griswold, Spendthrift Trusts, § 474; note, 119 A.L.R. 35; Restatement, 1 Trusts, § 156. ‘ But when a man settles his property upon a trust in his own favor, with a clause retaining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is, that he
Page 220
transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts.’ *Pacific National Bank v. Windram,* 133 Mass. 175, 176. If such trusts were sustained, ‘ The owner need only select, as trustee, a near kinsman or tried friend, on whom he may rely for liberality, and thus indirectly accomplish what he cannot do directly.’ *Menken Co. v. Brinkley,* 94 Tenn. 721, 729, 31 S.W. 92, 94.

Trusts in the nature of spendthrift trusts are now controlled in this state by § 5723 of the General Statutes, which is quoted in part in the footnote.[1]

[27 A.2d 172] *Carter v. Brownell, supra*, 95 Conn. 223, 111 A. 182. This law was enacted in 1899. Public Acts, 1899, Chap. 210. When the bill which eventuated in this act was introduced into the

legislature, the case of *Huntington v. Jones,* 72 Conn. 45, 43 A. 564, was pending in our courts. In that case a judgment creditor of a beneficiary of a trust was seeking satisfaction of his judgment from the income of a trust to which the debtor was entitled under the provisions of a will, and the defendants claimed that the plaintiff could not prevail because, while the trustees
Page 221
had no power entirely to withhold the fund, they did have discretion to expend it for the debtor's use only if and when they deemed it proper to do so; Records & Briefs, First District, May Term, 1899, back of page 251; they concededly did not have ‘ express authorization’ to withhold such income. The plaintiff's attorney, Hon. Michael Kenealy, was a member of the legislature of 1899 and chairman for the House of its judiciary committee, which reported the bill to the Assembly for action. 90 Conn. 725. The bill as introduced provided that it should take effect on its passage, but before the matter was acted upon the Huntington case had been decided by our court in favor of the plaintiff, and, while this provision was retained, a further clause was added that the act should not apply to pending cases.

These circumstances surrounding the enactment of the law may be regarded in determining the legislative intent. *Glanz v. New Haven Board of Zoning Appeals,* 123 Conn. 311, 315, 195 A. 186. Their significance lies in their indication that the purpose was to regulate the conditions which must be met before the right of a beneficiary to receive income from a trust fund could be held to be beyond the reach of his creditors. As we pointed out in *Carter v. Brownell, supra*, 95 Conn. 223, 111 A. 185: ‘ This act included our law as to spendthrift trusts so far as we had developed it, but it carried it far beyond. It covered a substantial part of the so-called American doctrine, but it did not enact it in whole, and it attached conditions to the validity of spendthrift trusts unknown to the American doctrine. It was, we think, an attempt to broaden our law, and to attach certain definite conditions to all such trusts, whose presence should mark their validity, and whose absence should disclose their invalidity.’ The statute was not intended to give sanction to a
Page 222
type of trust which would depart from the fundamental basis upon which trusts in the nature of spendthrift trusts rest, and be opposed to sound considerations of public policy. In construing the act it is our duty to seek the real intent of the legislature, even though by so doing we may limit the literal meaning of the broad language used. *New Haven Savings Bank v. Warner,* 128 Conn, 662, 668, 25 A.2d 50; *Chambers v. Lowe,* 117 Conn. 624, 625, 169 A. 912; *Bridgeman v. Derby,* 104 Conn. 1, 8, 132 A. 25, 45 A.L.R. 728; *Bishop v. Vose,* 27 Conn. 1, 9. The situation is one where we must apply ‘ the rule that general words and phrases may be restricted in meaning to adapt their meaning to the subject-matter in reference to which they are used.’ *Barber v. Morgan,* 89 Conn. 583, 588, 94 A. 984, 986, Ann.Cas. 1616E, 102. Although the trust created by a man from his own property for his own benefit might fall within the literal wording of the statute, it does not fall within the legislative intent, and where the settlor is entitled to the income of the fund it is not protected from the just claims of his creditors. From the foregoing it necessarily follows that in the condition stated in the statute, ‘ the income shall not have been expressly given for the support of the beneficiary or his family,’ the word ‘ beneficiary’ does not include the settlor of the trust; see *Schenck v. Barnes,* 156 N.Y. 316, 320,50 N.E. 967,41 L.R.A. 395; and if the settlor is entitled to

receive income from it the statute does not exempt that income from the demands of his creditors.

The trust before us is not a spendthrift trust but, by reason of the discretion reposed in the trustee as to the use of the income, it is a ‘ discretionary’ trust. If in such a trust the settlor is the sole person entitled to the income, that income can be reached by his creditors. Griswold, op.cit., 481; Restatement, 1 Trusts, § 156(2). A provision in the trust instrument that

Page 223

the trustee might in his discretion withhold the income from the settlor and accumulate it would not in itself place the income beyond the reach of his creditors. *Petty v. Moores Brook Sanitarium,* 110 Va. 815, 817, 67 S.E. 355, 27 L.R.A.N.S., 800, 19 Ann.Cas. 271, and see *Warner v. Rice,* 66 Md. 436, 443, 8 A. 84. We are brought, then, to the question of the effect of the provision that the trustee in his ‘ absolute discretion’ might **[27 A.2d 173]** expend any part of the income for the support and maintenance of the wife of the settlor or the support, education and maintenance of a named son and of other children who might be born to him.

The various situations which may be presented where a creditor of a beneficiary of such a trust is seeking to satisfy his claim out of the income of the trust have been collated and ably analyzed by Professor Griswold in his work before referred to. See particularly §§ 424 et seq., 436, 439 et seq. and 484. He points out that there is considerable conflict in the authorities in cases where the settlor is not one of the beneficiaries. § 439 et seq. He finds very few cases, however, which deal with the situation where the settlor is among the group to whom the trustee may pay or for whose benefit or support he may expend the income. §§ 484, 485. Of these cases, only four deal with the question without the qualification of other distinguishing elements. In *Holmes v. Penney, 3 K. & J.* 90, 103, 69 Eng.Rep.R. 1035, *Johnston v. Zane's Trustees,* 11 Grat. 552,52 Va. 552, 570, and *Roanes v. Archer, 4 Leigh* 550,31 Va. 550, 568, the interest of the settlor in the income was held in such a situation not to be subject to be taken for his debts, while in *Bryan v. Knickerbacker, 1 Barb.Ch., N.Y.,* 409, 431, a contrary result was reached. None of these cases discuss the question at length, nor are they particularly persuasive.

The outstanding factor in the situation is that,

Page 224

under a trust where the trustee has absolute discretion to pay the income or expend it for the settlor's benefit, the trustee could, even though he had a like discretion to expend it for others, still pay it all to the settlor. Such a trust opens the way to the evasion by the settlor of his just debts, although he may still have the full enjoyment of the income from his property. To subject it to the claims of the settlor's creditors does not deprive others to whom the trustee might pay the income of anything to which they are entitled of right; they could not compel the trustee to use any of the income for them. The public policy which subjects to the demands of a settlor's creditors the income of a trust which the trustee in his discretion may pay to the settlor applies no less to a case where the trustee might in his discretion pay or use the income for others. The trial court was correct in holding that the plaintiff was entitled to reach the income if necessary to satisfy its judgment, but was in error in holding that its rights were limited to so much only of that income as the trustee in his discretion deemed not to be required for the support, maintenance or education of the settlor's wife and children.

The fact that the provisions of the trust agreement are ineffective to protect the income of the trust from the claims of Tyson's creditors does not invalidate the trust as a whole or in itself destroy the remainder interests created. *Egbert v. De Solms,* 218 Pa. 207, 209, 67 A. 212; *Mercantile Trust Co. v. Bergdorf & Goodman Co.,* 167 Md. 158, 166, 173 A. 31, 93 A.L.R. 1205; *Low v. Carter,* 21 N.H. 433, 435. Under the trust instrument, the rights of those designated to receive the remainder interest in the half of the principal continuing in the trust after the expiration of the first ten-year period were subject to two conditions. They would be defeated should the settlor be living at the expiration of that period and

Page 225

they might be defeated by virtue of the reservation to the settlor of the right, with the consent of the trustee, to amend or amplify the instrument, although not in such a manner as to change the provisions for the disposition of the principal or income prior to his death. Whether, under a trust such as the one before us, a creditor could reach the principal during the life of the settlor, we have now no occasion to decide. See *Jones v. Clifton,* 101 U.S. 225, 229, 25 L.Ed. 908; *Fidelity Trust Co. v. New York Finance Co., 3 Cir.,* 125 F. 275, 60 C.C.A. 189; *Benedict v. Benedict,* 261 Pa. 117, 104 A. 581; *Ward v. Marie,* 73 N.J.Eq. 510, 68 A. 1084; Mercantile Trust Co. v. Bergdorf & Goodman Co., *supra*; *Crawford v. Langmaid,* 171 Mass. 309, 50 N.E. 606; Griswold, op.cit., § 480; 19 Minn.L.Rev. 330; 48 Harv.L.Rev. 1197; Restatement, 1 Trusts, § 156, comment c. When Tyson died, the contingencies which might defeat the remainder interests could no longer happen, and those interests then became indefeasibly vested. *Bates v. Spooner,* 75 Conn. 501, 508, 54 A. 305; *Thomas v. Castle,* 76 Conn. 447, 451, 56 A. 854; *Daskam v. Lockwood,* 103 Conn. 54, 64, 130 A. 92. While we have found few cases dealing with a situation where the settlor of the trust, after reserving to himself the income for life, creates vested indefeasible interests, to take effect at his death, we have found none which subjects **[27 A.2d 174]** such interests to the demands of the settlor's creditors, and on principle there is no question that the creditors cannot reach those interests. Over them the settlor has no dominion, and his creditors have no more right to reach them than they would any interests in property formerly owned by him which has passed into the ownership of another. *Bryan v. Knicker-backer, supra*, 1 Barb.Ch., N.Y., 425; Griswold, op.cit., § 475; 1 Perry, Trusts, 7th Ed., p. 654.

It remains to consider the claim that the plaintiff

Page 226

has other remedy for the collection of the debt which debars it from relief in this action, in the nature of a creditor's bill. The judgment the plaintiff is now seeking to enforce was based upon the assumption by Tyson of a debt secured by a mortgage upon property he bought, and the plaintiff still holds that mortgage. The claim of the defendants is that the plaintiff must first exhaust its remedy upon the mortgage before resorting to relief by means of a creditor's bill. It is undoubtedly quite generally held that, before a creditor's bill will lie, the creditor must have obtained a judgment at law and have at least taken out execution. 4 Pomeroy, Eq.Jur. 5th Ed., p. 1068. In this state, however, we do not make any such technical requirement. Here a plaintiff may, in the same action, seek a judgment for the debt and relief by way of a creditor's bill; *Vail v. Hammond,* 60 Conn. 374, 383, 22 A. 954,25 Am.St.Rep. 330; *Bronson v. Thompson,* 77 Conn. 214, 217, 58 A.

692; and it would be anomalous to require that, if judgment at law is first obtained, the creditor must seek its satisfaction by issue of an execution before resorting to a creditor's bill. In *Lewisohn v. Stoddard,* 78 Conn. 575, 594, 63 A. 621, 629, we said: ‘ The main purpose of requiring the plaintiff, in a creditors' bill, to show that he had exhausted his remedy at law was to assure the determination of his status as a creditor by a jury, if a trial by jury should be claimed by any party adversely interested’ ; and we pointed out that our procedure left little room for the operation of the principle. See *Mathewson v. Wakelee,* 83 Conn. 75, 80, 75 A. 93. The only requirement for the maintenance of such a bill in this state is that the plaintiff does not have adequate remedy at law. The fact that the plaintiff held a mortgage which it might have foreclosed is not sufficient to prevent the bringing of the action. In the first place, an action to foreclose
Page 227
a mortgage is not a legal remedy. That aside, ordinarily a mortgagee may, at its option, proceed to collect the debt or to enforce the mortgage; *New Haven Savings Bank v. Warner,* 128 Conn. 662, 666, 25 A.2d 50, and, as stated in *Tucker v. McDonald,* 105 Mass. 423, 424, we see no reason for applying a different rule because the mortgagor is seeking to collect the debt by a creditor's bill. Moreover, in this case the amount of the judgment was $25,189.82, while the trial court has found that the fair market value of the property was $20,000. Aside from the delay which would follow an attempt to realize upon the mortgage, the full amount of the judgment could not be secured in that way. In *Finance Corporation of New England, Inc., v. Scard,* 100 Conn. 712, 716, 124 A. 715, it was held sufficient justification for resorting to a creditor's bill that the amount of property which might be realized by proceedings at law would fall short of the plaintiff's claim, and, while the discrepancy between the debt and the property there available as a result of proceedings at law was relatively greater than in the instant case, the decision is controlling as regards the principle.

The final claim of the defendants is that the court should have marshalled the remedies by requiring that the plaintiff first resort to the mortgage before proceeding against the income, which, in part at least, the trustee might, in his discretion, have used for their support and maintenance or education. The basis of marshalling is that, ‘ where one creditor has security on two funds of his debtor, and another creditor has security for his debt on only one of those funds, the latter has a right in equity to compel the former to resort to the other fund, if it is necessary for the satisfaction of both creditors, provided it will not prejudice the rights or interests of the party entitled to the
Page 228
double fund, nor do injustice to the common debtor, nor operate inequitably on the interests of other persons,’ *Ayres v. Husted,* 15 Conn. 504, 515. The defendants, for whose benefit a part of the income of the fund might be used, are not in the class of creditors, because that use was at the absolute discretion of the trustee and they could not compel it. That aside, the principle ordinarily applies only to secured creditors. 35 Am.Jur. 394, § 18; 2 Story,
[27 A.2d 175] Eq.Jur., 14th Ed., p. 232, note. Nor will the doctrine ordinarily be applied where the effect would be to compel one of the creditors to proceed by an independent action, such as for the foreclosure of a mortgage, because that would be to place an additional burden upon the creditor against whom the marshalling is sought. *Emmons v. Bradley,* 56 Me. 333, 338; *Wolf v. Smith,* 36 Iowa 454, 457; *Herriman v. Skillman,* 33 Barb, N.Y., 378, 384. The trial court correctly

refused to order marshalling in this case.

There is error, the judgment is set aside and the case is remanded with direction to the trial court to enter judgment for the plaintiff in accordance with that now on file except that, if application of the amount of the one-half of the principal to which Tyson became entitled at the expiration of ten years, in so far as the judgment directs that it shall be applied toward the satisfaction of the plaintiff's claim, is insufficient for that purpose, the trustee shall be directed to apply to the discharge of that claim any accumulation of income from the fund in his hands at Tyson's death.

In this opinion, the other Judges concurred.

Notes:

[1] ‘ Sec. 5723. Income of trust fund, to what extent liable to creditors. Expenses of trustee. Whenever property shall have been given to trustees to pay over the income to any person, without provision for accumulation or express authorization to the trustees to withhold such income, and the income shall not have been expressly given for the support of the beneficiary or his family, such income shall be liable in equity to the claims of all creditors of such beneficiary. Any creditor of such beneficiary may bring an action against him, and any court having jurisdiction may direct such trustees to pay over the net income derived from such trust estate to such creditor, as the same may accrue, until his debt shall be satisfied. When any such trust shall have been expressly provided to be for the support of the beneficiary or his family, a court of equity having jurisdiction may make such order regarding the surplus, if any, not required for the support of the beneficiary or his family, as justice and equity may require.’

SHEETZ V. SHEETZ, NO. FA99 0173524 S (MAR. 23, 2001)

MERYL SHEETZ v. MARK SHEETZ.

No. FA99 0173524 S

Connecticut Superior Court Stamford-Norwalk District at Stamford

March 23, 2001

MEMORANDUM OF DECISION

NOVACK, JUDGE TRIAL REFEREE.

The parties intermarried on August 28, 1983 at Cedarhurst, New York. The plaintiff has resided continuously in Connecticut for the last eight years, and all statutory stays have expired. There are two children, issue of the marriage. They are Julie, born June 5, 1985 and Suzanne, born November 5, 1986. The evidence indicates the marriage has irretrievably broken down. Judgment may enter dissolving the marriage on that ground.

The plaintiff, age 48, reports that her health is good. She holds a bachelor of fine arts degree from the Rochester Institute of Technology and a master's degree in the same field from Temple University. She has worked in the jewelry industry as a designer, and currently is self employed in that field. She has held no regular employment since 1985, and essentially has been occupied as a homemaker attending to the needs of the parties' daughters.

The defendant, age 52, also enjoys good health. He is a well educated gentleman. He has bachelor's degree from Dartmouth and masters degrees in international relations and political science. He is currently working on obtaining a Ph.D. in political science from Columbia University and expects to complete his work by the end of this summer. He intends to gain employment as a professor at an institute of higher learning. He previously had a career in the banking industry as a loan officer for several prestigious banking institutions.

During the early years of this marriage the defendant was gainfully employed and provided the major financial support for the family. Problems between the parties started to develop in 1990. In 1993, their relationship became increasingly strained because the defendant's employment at the Swiss Bank was terminated and he was spending more time at home.

In 1994, the defendant decided to choose a career in academia and CT Page 3973 pursue his doctorate. The defendant states that this career change was made with agreement of the plaintiff and with the understanding that the plaintiff's assets would be available for family support during the period the defendant completed his graduate school work. He claims his reliance on the plaintiff's promises resulted in the defendant's making this drastic change in his career.

The plaintiff disputes the defendant's version of this event. She admits to consenting to the defendant's returning to school only after the defendant assured the plaintiff he had sufficient savings to support the family while he completed his education.

Commencing in 1994, at the request of the defendant, the plaintiff started making financial contributions to meet the financial needs of the parties with her contributions ultimately approximately equaling those of the defendant. From mid 1999 on, the defendant has contributed nothing for family support.

The court has concluded that although the defendant may have expected his retirement years to be subsidized by access to his wife's assets, there were no such promises made by the plaintiff. Shortly after the defendant started attending Columbia, the plaintiff brought an action to dissolve the marriage. Although that action was subsequently withdrawn, it certainly put the defendant on notice that his marriage was in trouble. Also, the defendant, early in life demonstrated an interest in teaching. He spent time teaching in the Boston school system. He also admitted he was unhappy working in the banking industry. The defendant made the decision for a career change to satisfy his own needs and goals.

No convincing evidence was presented that either party alone was responsible for the breakdown of this relationship. Unfortunately, differences in values and goals played a significant role in leading to this dissolution. The court declines to assess fault to either party.

The court has carefully considered the statutory criteria set forth in Connecticut General Statutes, Sections 46b-81, 46b-82, 46b-62, 46b-84 and 46b-215a in reaching the decisions reflected in the orders that follow.

The plaintiff is a beneficiary of the following three trusts:

1. Phyllis Greenberg Irrevocable Life Insurance Trust dated December 15, 1987.

The plaintiff states that the current value of the trust is $5,045;

CT Page 3974

2. Milton Greenberg Irrevocable Trust dated April 5, 1989.

The plaintiff states the trust owns a life insurance policy with a face amount of $1,603,057;

3. Milton Greenberg Charitable Remainder Unitrust — July 2, 1996.

The plaintiff states the Trust holds securities and funds managed by Bessemer Trust of Florida. As of August 30, 1999, the Trust was valued at $946,402.

Each trust is irrevocable, and the plaintiff is entitled to a share of the principal in two trusts and income in all trusts upon the death of her mother. In each trust the trustee(s) may use the income and invade principal for the benefit of the plaintiff's mother.

The parties agree that the plaintiff has a vested interest in each trust, subject to her surviving her mother. The defendant claims that the interests are capable of being evaluated. He has presented the testimony of an expert witness who offered his opinion as to the present value of the plaintiff's interest in each trust. As a result, the defendant maintains that the ascertained values are assets the court should include in the distribution of assets between the parties.

The plaintiff opposes the defendant's position. She claims the court may not consider her interests in the three trusts because they are incapable of being evaluated because not only must the plaintiff survive her mother, but the trustees have the power to invade principal for the plaintiff's mother. Therefore, the plaintiff's interests cannot be evaluated.

The plaintiff has presented no expert witness on this issue but has elected to rely on her cross-examination of the defendant's witness.

The court agrees with both counsel that the plaintiff has a vested interest in each trust, subject to her surviving her mother. See George Gleason Bogert and George Taylor Bogert, the Law of Trusts and Trustees Section 181 (Rev.2d ed. 1979). See Carlisle v. Carlisle, 1994 Conn. Super. Lexis 2662. Therefore, under General Statutes Sections 46b-81 and 46b-82, as interpreted by case law, the plaintiff's interests are assets capable of being considered for financial orders in this dissolution action providing a present value can be ascertained.

The court accepts the defendant's expert's testimony that the CT Page 3975 plaintiff's interests can be evaluated. The expert rendered an opinion of present value in each trust, and the total present values, under his computations, amounted to $892,044.

The expert relied primarily on the values of assets on dates as stated by the plaintiff on her financial affidavit. He had no information as to the current values of the assets held by the trusts, composition of the assets to predict growth rates, nor any knowledge of whether there was a pattern of withdrawals of principal for the needs of the plaintiff's mother. As a result, he was required to make various assumptions to reach the conclusions he made. These assumptions are suspect because of the lack of information required to make an informed decision. Therefore, the court is unable to accept the values presented by the witness as an accurate statement of the present value of the plaintiff's interests in the trusts.

The court notes that it was impressed with the expert's credentials and his not being furnished with the necessary background information was not his fault.

Since the court was not presented with reliable evidence as to the present values of the plaintiff's interests in the three trusts, it has not attributed any value to those assets in the distribution set forth hereafter.

The court has included for distribution the assets listed on the plaintiff's financial affidavit, which state a value of $2,412,008, and those scheduled on the defendant's affidavit which indicate a value of $884,334. These funds provide sufficient assets to permit allocation to the defendant his equitable share after consideration of all the statutory criteria.

The following orders may enter:

(1) No periodic alimony is awarded to either party.

(2) The parties shall have joint legal custody of the minor children. The children's primary residence shall be with the plaintiff, and the defendant shall have reasonable rights of visitation. The court reserves jurisdiction to conduct a hearing as to visitation issues if the parties and the children's guardian ad litem are unable to agree.

(3) The defendant shall pay child support in accordance with the Child Support Guidelines. The defendant's obligation is $74 per week or $318 per month. Commencing April 1, 2001, the defendant shall pay to the plaintiff the sum of $318 per month and continuing on the first day of each month thereafter, in advance. The payments shall continue until the older child becomes emancipated, reaches majority, or the provisions of Section 46b-84 (b) apply, whichever event first occurs. At that time an appropriate child support order will be issued as to the younger child.

A contingent wage withholding order may enter.

(4) The plaintiff shall maintain the cost of medical and dental insurance for the benefit of the minor children. She shall also be responsible for all unreimbursed medical and dental expenses until such time as the defendant becomes regularly employed. At that time, the plaintiff may request a modification of this order as well as the child support order.

Section 46b-84 (e) of the General Statutes shall apply.

(5) The plaintiff's request for the defendant's maintaining life insurance during the children's minorities is denied. No evidence was presented as to the insurability of the defendant or the cost of obtaining life insurance.

(6) The plaintiff shall each year receive any federal or state tax benefit derived from the minor children, including any tax credits, deductions or exemptions.

(7) The defendant shall transfer to the plaintiff all his right, title and interest in and to the premises at 14 Highland Avenue, Darien, Connecticut, subject to the outstanding mortgage, which the plaintiff shall assume and indemnify and hold harmless the defendant from any

liability thereon. The defendant shall cause CT Page 3977 to be removed any notice of lis pendens filed on his behalf.

The plaintiff shall pay to the defendant for his interest in the premises, as an assignment of property, the sum of three hundred thousand ($300,000) dollars. The payment shall be by check no later than June 1, 2001.

(8) The plaintiff is awarded and shall retain her interests in the checking account, investments, retirement accounts, the Florida real estate, her interests in the three irrevocable trusts, her automobile, personal effects, and business furniture, all of which are listed on her financial affidavit.

(9) The plaintiff shall continue to act as custodian of the children's accounts scheduled on her affidavit.

(10) The defendant is awarded and shall retain his interests in the checking account, investments, IRA accounts, and furniture and personal effects, all of which are listed on his financial affidavit.

(11) The plaintiff shall pay to the defendant as an assignment of property the sum of two hundred fifty thousand ($250,000) dollars. The payment shall be by check no later than June 1, 2001.

(12) The defendant shall promptly pay to the plaintiff the sum of $617.85 for outstanding parking tickets incurred by the defendant while using the plaintiff's automobile.

(13) Each party shall be solely responsible for any debts that exist in her or his name individually.

(14) Each party shall pay her or his own counsel fees.

Judgment may enter accordingly.

CT Page 3978

NOVACK, JUDGE TRIAL REFEREE

Powell-Ferri v. Ferri, 102813 CTSUP, MMXCV116006351

Nancy POWELL-FERRI

v.

Paul John FERRI, Jr.

No. MMXCV116006351.

Superior Court of Connecticut, Judicial District of Middlesex.

October 28, 2013

Nusbaum & Parrino PC, Westport, for Nancy Powell-Ferri.

Hinckley Allen & Snyder LLP, Hartford, for Paul John Ferri Jr.

MUNRO, J.

The cross complaint defendant, Paul John Ferri, Jr. (Ferri) moves for summary judgment against the cross complaint plaintiff, Nancy Powell-Ferri (Powell-Ferri) on the cross complaint filed. Both parties have filed memorandum in support of their respective positions. In that cross complaint, Powell-Ferri claims her husband Ferri has breached his duty to preserve marital assets.

The salient facts are not in dispute. After Ferri was told by his brother that the trust had been decanted he has done nothing to recover the assets or contest the process. His reasoning is that he does not want to sue his family (his brother is a trustee and is also his business partner) and he believes the trustees are acting in his best interest. The assertion here by Powell-Ferri is that her husband's failure to take any affirmative acts to contest the decanting of the 1983 Trust assets into the 2011 Trust is a violation of his duty to preserve marital assets and amounts to dissipation under the law.

Powell-Ferri acknowledges that her cause of action is unique and has not been developed in academia or recognized in any jurisdiction. To that end, she argues that if the court were to conclude that it will not recognize this cause of action, it should not be done via a motion for summary judgment but instead via a motion to strike.

The proper mechanism to challenge the adequacy of a cause of action is normally a motion to strike. Ferri argues that a motion for summary judgment is appropriate when the cause of action being stricken cannot be revived.

" The use of a motion for summary judgment instead of a motion to strike [to challenge the legal sufficiency of a complaint] may be unfair to the nonmoving party because [t]he granting of a defendant's motion for summary judgment puts the plaintiff out of court ... [while the] granting of a motion to strike allows the plaintiff to replead his or her case." (Internal quotation marks omitted.) *Labriola v. McDonald,* 274 Conn. 394, 401, 876 A.2d 522 (2005). Pursuant to the standard established by the *Labriola* court, summary judgment is appropriate here only if Powell-Ferri has failed to state a legally recognized cause action and would not be able, even if permitted, to replead. *Id.*

The court re-recites the law regarding the recognition of a new tortious cause of action as stated in an earlier decision between the parties. In deciding whether to recognize the new cause of action, it is helpful to first consider the purpose of torts. " [T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to

responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct ... It is sometimes said that compensation for losses is the primary function of tort law ... [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required ... An equally compelling function of the tort system is the prophylactic factor of preventing future harm ... The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer ... [I]mposing liability for consequential damages often creates significant risks of affecting conduct in ways that are undesirable as a matter of policy. Before imposing such liability, it is incumbent upon us to consider those risks." (Internal quotation marks omitted.) (Citations omitted; internal quotation marks omitted.) *Lodge v. Arett Sales Corp.,* 246 Conn. 563, 578-79, 717 A.2d 215 (1998)." *Rizzuto v. Division Ladders, Inc.,* 280 Conn. 225, 235-36, 905 A.2d 1165 (2006).

In analyzing this matter, then, the court must weigh " four factors ... to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation [in the activity, while weighing the safety of the participants]; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Murillo v. Seymour Ambulance Ass'n, Inc.,* 264 Conn. 474, 480, 823 A.2d 1202 (2003).

There is a normal expectation of married individuals that they will act as fiduciary to each other during their marriage. This fiduciary responsibility has extended to the dissolution of marriage process so far as it imposes a responsibility on each spouse of full and open disclosure to each other. *Billington v. Billington,* 220 Conn. 212, 221, 595 A.2d 1377 (1991). That responsibility has not, however, extended to the requirement to recover assets to the marital estate. A canvas of the law finds that such a responsibility has been imposed upon a fiduciary only in the area of trust and bankruptcy law; see *Connecticut Nat. Bank v. D'Onofrio,* 46 Conn.App. 199, 214, 699 A.2d 237 (1997); *Bank of New York v. Bell,* 142 Conn.App. 125, 134 fn. 5, 63 A.3d 1026 (2013).

In defining dissipation, our Supreme Court held, " ... leading treatises on domestic relations law ... generally provide that a harmful or selfish expenditure of marital assets undertaken for a nonmarital purpose is required before one spouse can be found to have dissipated marital assets. See, e.g., 2 B. Turner, *supra,* §§ 6:102 and 6:107; 24 Am.Jur.2d, Divorce and Separation §§ 560 through 562 (1998). We conclude that, at a minimum, dissipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage." *Gershman v. Gershman,* 286 Conn. 341, 351, 943 A.2d 1091 (2008).

No allegation is present that Ferri engaged in intentional waste or selfish impropriety. If there was such conduct alleged then at least one element of the law would be present. The court might then be constrained to consider whether he owed a duty to act affirmatively to mitigate the effects of his own conduct. That is not present here. There is no societal expectation embodied in the law which impels or compels a divorcing spouse to take affirmative steps to recover an asset removed from the marital estate by the action of a third party alone. This would be a significant leap.

The implications of recognizing this cause of action are serious for the court system. It can

easily be anticipated that if this cause of action is recognized there will be a torrent of litigation by disgruntled (ex-) spouses where they believe that ‘ something’ should have been done to prevent loss of an asset. There is no other jurisdiction that has recognized a cause of action such as Powell-Ferri seeks here.

The court finds that this cause of action should not be recognized in the state of Connecticut. The motion for summary judgment as to the cross complaint is granted.

Powell-Ferri v. Ferri, 081214 CTSUP, MMXFA104014157

Nancy Powell-Ferri

v.

Paul John Ferri, Jr

No. MMXFA104014157

Superior Court of Connecticut, Judicial District of Middlesex, Middletown

August 12, 2014

MEMORANDUM OF DECISION

Lynda B. Munro, J.

This dissolution of marriage action was commenced on October 26, 2010 and came to court by return date of November 6, 2010. The matter was returnable to the Judicial District of Hartford and ultimately transferred to the Judicial District of Middlesex. Throughout the proceedings both parties were represented by counsel. The children's needs were protected by a guardian ad litem.

During the pendente lite period, after following a fully contested path which included a forensic custody evaluation by a psychologist, the parties came to a parenting plan and custody agreement that they seek to have incorporated in this decision. Therefore, with the exception of one discrete issue, the case was tried as a limited contested divorce. The trial was lengthy with hundreds of exhibits. That said, it was tried in an organized and cohesive manner. Both parties were witnesses. Each party had a financial expert witness. The defendant's mother and brother were witnesses as well.

This matter had an extraordinarily long pendente lite period because of its interconnection with a civil matter assigned to the Complex Litigation Docket, and captioned *Ferri, Trustee v. Ferri* (MMX-CV-6006351-S). Prior to the commencement of this dissolution of marriage action, the defendant was the beneficiary of a trust established by his father in 1983. The trust, throughout these proceedings, has been referred to as the 1983 Trust. By virtue of his birth date and the terms of the 1983 Trust, the defendant was entitled to request and receive 75% of the trust assets.

I

DISCOVERY

A discovery master was appointed by the court for this action and the associated civil action matter. The court issued commissions for out of state witnesses. The most elusive witness was the father of the defendant. Substantial litigation occurred in Massachusetts where the plaintiff sought to take the deposition of Paul John Ferri, (father). The process server in Massachusetts was never able to serve him. The plaintiff believed that the rules of discovery for the taking of this deposition were more advantageous to her in Massachusetts and not as beneficial in Florida. The defendant sought to depose his father in Florida. The defendant's request was initially denied pending the plaintiff's efforts toward taking the deposition in Massachusetts. In April 2014 the court granted the defendant's second request to depose his father in Florida. The parties attempted to cooperate with one another to obtain service on the defendant's father to allow for the deposition; however, they were unsuccessful in obtaining service or conducting the deposition.

The discovery master held many hearings in this matter and issued many recommended rulings. As described more fully below, the defendant is the beneficiary of two different trusts, one

created in 1983 and one in 2011. The Trustees of the earlier trust decanted its assets to the later created trust. The plaintiff's efforts at discovery from the Trusts were blocked at every turn. The trustee of both trusts and the defendant's older brother, Michael Ferri made clear that it was his goal to disclose as little as possible to the plaintiff through discovery. Therefore, the costs of discovery were significant and far greater than if discovery had been fully cooperative. The defendant argues that he should not be burdened by a court order to pay attorneys fees which are very high as a result of the increased costs to the plaintiff since he was not responsible for the non-cooperation by his father and the roadblocks created by his brother as trustee. While the court does not consider the defendant's behavior in this matter as sanctionable under *Ramin v. Ramin*, 281 Conn. 324, 915 A.2d 790 (2007), it must consider whether to award reasonable attorneys fees to the plaintiff in light of the difficulties encountered by the plaintiff in the discovery process.

When it became apparent that the civil case, and all of its appeals, would not be resolved for a very long time, the parties agreed to try the dissolution of marriage action in the alternative. That is, they have requested that this court consider the financial issues under two separate scenarios: one with the trust 'in', that is with the assets of the 2011 Trust restored to it, and, the other with the trust 'out', that is with the assets of the 2011 Trust undisturbed. Therefore, this decision has alternate orders depending upon the ultimate legal disposition of the decanting of the 1983 Trust.

II

THE PARTIES, THEIR MARRIAGE AND THEIR ESTATE

The parties were married on June 24, 1995. Both have lived in the state of Connecticut for more than a year before this action was brought. The plaintiff has three minor children born to her since the date of the marriage who are issue of the marriage: Katherine born December 27, 1997 and Caroline and Alexandra both born September 1, 2000. There are no other minor children born to the plaintiff since the date of the marriage; there are no other minor children issue of the marriage. The plaintiff is not pregnant. No one in the family has been a recipient of public assistance. The marriage has irretrievably broken down with no hope of reconciliation.

The plaintiff is 47 years old. She has a Bachelor's Degree from Colgate in psychology and neuroscience and a Master's Degree in Social Work from Simmons College both earned prior to the marriage. She worked in several hospitals in Boston. At the time the parties married she was a social worker at Boston City Hospital working in pediatric intensive care. She had a graduate degree in Social Work. She worked in this job until the parties' first child was born at the end of 1997. Except for a very brief return to that job, she has not been employed outside of the home since 1997. Her peak earnings at the end of 1997 were in the mid to upper range between $30, 000 and $40, 000 per year. Her social work license has lapsed. The plaintiff has been a homemaker throughout the marriage, taking care of all three children and the family household. She has had a myriad of health problems through the marriage, as described later in this decision. Of them, the most challenging for the future is back problems which have resulted in two surgeries to date. She is currently in good health with no debilitating conditions.

The defendant is 49 years old. He has a Bachelor's Degree from Colgate and a Master's Degree in Business Administration from New York University, both earned prior to the parties' marriage. He has complete (or nearly so) hearing loss in one ear. He has some intestinal

problems that are also residual from a congenital condition that required surgery as an infant. The defendant is currently in good health with no debilitating conditions.

The parties met at a Colgate reunion in 1992. They were attracted to each other's reserved qualities and sense of competence. As the parties were planning on marrying, the plaintiff met the defendant's family. The defendant looked at work in Syracuse but ultimately decided to work for his father after completing his Master's Degree. In 1993 the defendant went to work for his father, who was then the managing partner at Matrix Partners, a venture capital firm. The defendant worked as a researcher and made recommendations regarding the purchase or and sale of publicly traded technology stocks. He also managed Ferri family money in a variety of trusts benefitting different family members. The defendant was, and remains, very close to his nuclear family. During their courtship, the plaintiff found this an attractive quality. The defendant's parents have numerous homes at which they host their children and their children's families on a frequent and regular basis. The Ferri family is tightly woven financially and emotionally. While the benefits of such a close family were present, the phenomenon was also the major stressor for this family.

The parties lived in Weston, Massachusetts when they married. They lived in a home that was purchased by the defendant shortly before the marriage. The defendant's 1983 Trust provided $250, 000 for the purchase of the home. Weston is where the defendant's father, his brother and sister-in-law also lived, all within two miles of each other. The defendant's office headquarters were in Tolland, Connecticut and he commuted daily from Weston, Massachusetts with his brother Michael. After Michael decided to move to Simsbury, Connecticut, the parties decided to move as well, to cut down the defendant's commute. In 1998, after the birth of the parties' oldest daughter, the family moved to Farmington, Connecticut. They purchased a home for approximately $550, 000 that the plaintiff still lives in with the parties' children. The parties thought that the Farmington home was purchased with funds from the 1983 Trust. Ultimately, the defendant discovered the home was purchased with a loan from his father that has apparently been forgiven. Inexplicably, he forgot this transaction and simply assumed that the money was from the 1983 Trust.

The defendant's understanding is that the 1983 Trust funds were only to be used for things that would provide an economic investment return. The defendant's 1983 Trust provided $300, 000 toward home improvements for the parties over the life of their marriage, paid their taxes, purchased their Weston home (as stated above) and invested in the defendant's Valvoline franchise businesses.

This self-imposed limited use of funds from the 1983 Trust was another stressor in the marriage. The defendant assured the plaintiff that they had more money than they would ever need in their lifetime but he would not utilize it for non-investment purposes, requiring the family to live on his income for their needs. Only since the dissolution of marriage action commenced has the defendant's income doubled to what it is today. The defendant's ability to take dividends from the businesses he owned with his brother provided the additional income that the parties used to live the lifestyle they had developed for themselves and their children.

In 2000, the plaintiff was pregnant with the twins. During that time she also developed a herniated disc in her lower back. It was a difficult pregnancy and birth. She was on bed rest in the hospital for four weeks. While both babies were born healthy it was a difficult road physically for

the plaintiff. The paternal grandmother provided the funds to hire a doulah for nighttime who helped the plaintiff attend to the needs of the twins. In 2006[1] the plaintiff had pelvic surgery to repair three hernias and reposition her bladder. For that surgery she utilized pain medications, as prescribed, for a period of about 30 days and terminated their use thereafter.

Around this same time, the plaintiff found herself increasingly depressed in her marriage. She felt her husband was primarily attentive to his nuclear family and work and to her and their children only secondarily. She sought help and was prescribed an antidepressant at that time. She also was prescribed an anti-anxiety medication.

As the twins were able to travel, the family started spending more time on weekends with the defendant's family, particularly in the winter and summer. In the winter they all stayed at the grandparents' ski home in Vermont, where they lived and skied every weekend. Meals were communal efforts. Downtime off the slope was typically spent all together. In the summer, similar experiences were had at the grandparents' home in South Dartmouth, Massachusetts. Over time, the plaintiff went from appreciating the defendant's closeness with his family, which she had liked when they first met, to resenting it. The defendant was partially sympathetic to the plaintiff's feelings that his family's constant activity and involvement was too much for her, yet he felt she knew this is the way it was and that his family is a good and generous family that should not be resented. This environment was very difficult for the plaintiff.

The plaintiff felt that the Ferri family was in her business too much and that the defendant allowed it. They would argue about these things and it never resolved satisfactorily for the plaintiff. In 2002, the plaintiff decided to return to her equestrian passion. She had been a rider since she was about 6 years old, competing for many years. She loved riding but had gravitated away from it as a young adult. She went back to horseback riding because it made her happy. She would ride when the twins were in preschool, spending time at the barn around the children's schedule.

In 2007, the plaintiff started to compete in equestrian events and achieved championship status in a major regional event in 2009. The defendant was supportive of her interest in that he purchased a horse for her and showed interest in her achievements. He would polish her boots for competition. The plaintiff wanted her husband to come to the riding events but would not let him watch. Consequently, the defendant did not go to the events and the plaintiff felt unsupported as a result. She felt she had made skiing, a passion of the defendant's, a part of her life, yet and he could not reciprocate and support her athletic pursuits.[2] The defendant could concretely support the plaintiff's riding efforts but he was less able to support her through the emotional turmoil associated with her performing in front of him. This is not a fault of his but an area of disconnect for the two of them. It is emblematic of the communication difficulties in their marriage.

The plaintiff introduced the parties' children to riding. The oldest child loves riding and has become a prolific competitor. One of the twins also has become a competitive rider. In 2008, the parties purchased a horse, Layla, for $16, 000 for their oldest daughter to ride. After the horse developed a medical issue that rendered the horse uncompetitive, the daughter switched from riding Layla to riding the plaintiff's horse, Just Murphy. She rode Just Murphy through last year's season, but cannot compete on her this year because the horse is not suitable for the child's competition. The parties disagreed as to whether they should purchase or lease another horse for

the child. The plaintiff desires to purchase a horse, which cost would include board, shoeing and riding lessons for the child. The plaintiff estimates a horse of the stature needed for the child's level of competition would cost approximately $70, 000. The defendant opposes the purchase for several reasons. First he points out that he does not have the assets to purchase a horse. He is also concerned because he believes that the children should all be well rounded in their activities and the oldest child wants to focus exclusively on her equestrian competition. Another problem for the defendant in the purchase of the horse is the interrelationship of that purchase to the payment of education for the three children. The parties' three children have all attended private school for their entire education. The private school education has been paid for by the defendant's parents. He is concerned that if the family buys their eldest daughter a horse, they will be perceived as having sufficient funds such that they may lose the economic support for private school that they have received to date. In ruling on a pendente lite motion that was heard at the time of trial, the court allowed the plaintiff to withdraw funds from the home equity loan for the lease of a horse for the eldest child.

One other source of dissension for the defendant centers on the parties' different approaches to their child's physical health and condition. The defendant thought that his daughter's lack of pursuit of a rigorous cross training program reflected insufficient commitment to a competitive riding program. Connected to this concern was the significant tension in this family regarding their perceptions about the child's weight. The plaintiff found herself facing off with the defendant's parents on the issue. Everyone's concerns were out of love but the tension was enormous. The plaintiff found her in-laws intrusive on the issue. The defendant's father had unilaterally installed a calorie counter app on the child's cell phone. At times when the children ate meals with the grandparents they were limited in the amount of food they could eat. At a family event in Utah, the plaintiff walked in on a conversation the grandparents were having with the defendant on the topic. While the defendant did not approve of it and tried to cut the conversation off, the plaintiff still felt unsupported by him when she tried to deal with it. One of the reasons this was upsetting for the plaintiff was because her in-laws made hurtful comments to her about her weight, and the defendant would not say anything. She felt undefended for many years before she commenced the divorce action. The defendant's visit to an obesity specialist at the pediatrician's office in October 2010 became the tipping point. He made the appointment without telling the plaintiff and upon coming home announced that there were going to be major changes in the home on this issue because he thought the plaintiff had not been dealing with him squarely on it (when she had been telling him that the daughter's Body Mass. Index was within normal limits). The plaintiff, who had previously consulted an attorney, decided that she could not tolerate this attitude and filed this dissolution of marriage action.

The plaintiff self-medicated with alcohol when she had physical pain from her back until her surgery in 2010. The culture of her marriage was that they had drinks with company and when they went out. They kept alcohol in the house. For a time the defendant moved the alcohol out of the home to help the plaintiff. Her alcohol consumption became abusive for herself. She was drinking alcohol to dull the pain of her unhappiness in her marriage. By 2009, her use of alcohol was an issue in the marriage. She felt that the defendant did not adequately support her and that

made her situation worse. She became sloppy in public with family and friends. The defendant was embarrassed by her behavior. The plaintiff first sought help on line through a women's sobriety group.

In March 2010 the plaintiff reinjured a herniated disc when the greater Ferri family was in Utah for a ski trip. She took herself to the hospital for treatment while the defendant stayed with the children on the ski slopes. The defendant saw himself as doing the only sensible thing, confident the plaintiff could take care of herself. Once again, the plaintiff felt alone and unsupported by her husband. In August 2010, the plaintiff had back surgery to repair the herniated disc. She planned the surgery for when the children would be at overnight camp. The plaintiff took pain medication for the condition before and after the surgery. The defendant sought to prove that the plaintiff was addicted to painkillers. The defendant did not meet his burden of proof on this issue.

In 2010, the family did not spend many of the winter weekends together. The parties' oldest child had become involved in school activities, which included equestrian team sports. She and her mother had not gone to Vermont much of the ski season the past year. The house provided very little privacy as the children were all growing adolescents spreading out in the space. The plaintiff craved privacy and could not tolerate the constant level of activity in the house that she saw as chaotic. The defendant felt some of this and agreed to look for another ski home for their family. Ultimately during the summer of 2010, the defendant determined that it was not a good time to purchase a ski home for the family.

The plaintiff was also unhappy with the social outlook of her brother-in-law Michael who made racist jokes and was very conservative politically. The defendant spent a lot of time with his brother and did not object to his brother's jokes. The defendant became more economically conservative himself over time which made the plaintiff unsatisfied; she thought it was Michael's influence. At the same time, she found her husband to be a sensitive person. Clearly, these issues were not the cause of the breakdown of the marriage. In her unhappiness, matters of difference magnified.

The defendant believes that one of the causes of the breakdown of the marriage was infidelity by the plaintiff. He spied on the plaintiff, looking through her trash, with installing a keystroke detector program on a computer shared by her and her daughter and placing a camera in the garage. The latter act came out of concern regarding the plaintiff's alcohol consumption. The plaintiff has a female friend who lives in Europe and who she visited annually. In 2010, after the commencement of this divorcee action, the plaintiff altered a credit card bill to hide the 2009 payment by her of an airline ticket purchase for a visit from her friend. While this was inappropriate and wrong, it is not sufficient proof from which the court can conclude by inference that the plaintiff was having an affair with her female friend. The plaintiff's explanation for this subterfuge is that she knew the defendant thought she was having an affair and she did not want to provide him fodder. Her actions were deceptive, short-sighted and wrong. The defendant also relies on a text message from this female friend to the defendant which his counsel characterizes as intimate. The message was, " I miss you and I love you." This should not be construed as an intimate message; it is a common phrase used between close friends as a sign of friendship and support. This is not

sufficient proof that it is more likely than not that the plaintiff was having an extramarital affair with her female friend.

The court concludes that this was an incredibly complicated and tragic marriage of two good people who could not overcome their own respective needs to cling to their respective life patterns resulting in isolation from each other. The plaintiff was and remains an introverted person who seeks the attention and support of her spouse on a sustained basis. Her need for his support was more than he could deliver. The defendant grew up in a family where one shouldered their burdens silently and solitarily. Therefore, he was not open to the plaintiff's needs for support when she suffered physical adversity.[3] The defendant is thoroughly invested in his extended family of origin and looks to his family's culture of fierce interdependence for his support and locus of his being. The court does not find either party at greater fault for the breakdown of the marriage.

After the filing of the dissolution action, during the pendente lite period, the plaintiff relapsed in her consumption of alcohol. She lost her driver's license for a year as a result of driving under the influence of alcohol. She sought treatment in-patient locally. During that time the defendant was entirely responsible for the care of the children. After her discharge, in December 2012, agreed court orders were entered which provided for outpatient treatment by the plaintiff. Thereafter, on March 11, 2013, the parties entered into a custody/parenting agreement that became a court order. It provides, *inter alia*, for joint legal custody, a specific parenting schedule, and attendant other matters. Both parents agree that the March 11, 2013 custodial agreement remains in the best interest of all three of their children.

During the pendente lite period, the plaintiff hired a driver. The plaintiff's driver's license is due to be restored soon. Further, while it is no longer required, she still participates multiple times a day in an alcohol testing protocol (SoberLink). She finds it helpful to keep the protocol in place. She has been abstinent throughout her testing period, suffering no further relapses. She has been sober 18 months since early December 2012. She is invested in her sobriety; she is the moderator of the Farmington chapter of Women for Sobriety and volunteers one day a week as well with the Connecticut Community for Addiction Recovery, offering phone outreach for those newly in the recovery process.

The defendant lives in a home in Farmington, Connecticut that his father purchased for him to live in post-separation. The purchase price was $800, 000. The defendant pays the real estate taxes and utilities in lieu of rent. His parents also provided approximately $100, 000 worth of furnishings for the home. Additionally, the defendant's parents recently paid many of the costs of skiing for the defendant and the parties' children.

The plaintiff decided she wanted to go back to work when all three children were in grade school. The defendant objected for he was concerned it would result in the plaintiff being unavailable to the children and emotionally taxing for her. To return to work as a social worker now the plaintiff must partake in two years of supervised clinical work as well as pass the licensing exam. The defendant thinks employment will be appropriate for the plaintiff now, since the children are older. He asks the court to order only six years of alimony based upon the assumption that the plaintiff will successfully resume her career as a social worker and earn up to $75, 000 per year, the amount plaintiff believes social workers are making today. The plaintiff's social work license

lapsed many years ago. While the plaintiff is clearly bright, articulate and resourceful, the benchmarks she must reach for re-employment in her original field, and at the income level suggested by the defendant, are not assured. To terminate alimony in six years will leave the plaintiff at 53 years old solely dependent with modest resources and no future ability to improve her circumstances in an appreciable way, based on the facts before the court today. Conversely, the defendant will be 56 years old and still in his business career earning $400, 000 per year (his current income though that has doubled in the last four years). Further, he has demonstrated repeatedly that his father has allowed him to use other family assets to leverage the purchase of franchises where his ownership interest is modest.

All of the businesses that the defendant owns with his brother Michael started with the investment of family monies, the reinvestment of business profits from one or more of the businesses, Valvoline seed money and financing from an institutional level to the business--not the defendant's own personal wages and savings. The defendant has demonstrated that his resourcefulness as a businessman is vast, even if he must start over again after this dissolution of his marriage. Under these circumstances, time limited alimony, where there is insufficient earned income and/or income producing assets to reduce the need for alimony is inappropriate.

All three children attend private school. The oldest child is a day student at Miss Porter's School, the cost of which cost is $40, 245 for the 2013-2014 academic year. She will be entering her junior year of high school. Of the twins, one will be entering Holderness School for her freshman year. The cost for Holderness School as a boarding student was $52, 000 for the 2013-2014 academic year. The other twin will be a day student at Renbrook School for her freshman year of high school, the cost of which was $31, 100 for the 2013-2014 academic year. Renbrook is a junior school which ends after the ninth grade. Consequently, where the second twin will attend school for the balance of her high school years has not yet been determined. The costs for all the private schools can be expected to increase incrementally for each year.

Until this year, the children's paternal grandparents paid for their private school education. There is no clarity as to whether that generosity will continue. Each child is the beneficiary of her own trust established by her grandfather and also a beneficiary of the Ferri Grandchildren Trust, for all of the paternal grandparent's grandchildren. Neither the parties nor their children are presently in a position of authority relative to the decision as to how to utilize the grandchildren's trusts. Consequently, the court treats these present and future educational costs for the three children as unfunded for purposes of this decision. The evidence discloses that the parents agree that all three children should attend private school, each for different reasons. As to the only child whose future schooling is in doubt after her 9th grade year, the defendant is of the opinion that public school would be disastrous for her; she requires the attention and smaller classes of private school in order to flourish.

The Child Support Guidelines provide for a presumptive minimum child support due from the defendant to the plaintiff in the amount of $679.00 per week. Unreimbursed health expenditures under the guidelines, without regard to an alimony order, are allocated 86% to the father and 14% to the mother. An alimony order would serve to reduce this allocation accordingly.

The marital home at 8 Hatters Lane, Farmington, CT has a fair market value of $632, 000. It

is encumbered by a home equity line of credit with a current balance of $276, 000.

The plaintiff has two cars, a 2009 Audi 6 worth $18, 000 and a 2004 Volvo s40 worth $4, 500. The Audi will be operated by the plaintiff once her license is restored. The Volvo is used by the plaintiff's hired driver. The driver's services are expected to be terminated upon the reinstatement of the plaintiff's driver's license. She is currently paid $630 per week.

The plaintiff has bank accounts valued at $24, 000 though her monthly expenses are paid through the checking account. She has an IRA valued at $36, 447; the defendant's IRA has a gross balance of $66, 027 against which there is a loan of $14, 490. He has bank accounts valued at approximately $90, 000. These are funds he uses for his expenses as well.

The plaintiff owns several pieces of valuable jewelry, some of which were gifts from her husband and her in-laws. Based on the credible evidence before it, the court finds that the jewelry has a value of approximately $40, 000, not $20, 000 which is the sum the plaintiff estimates that she would receive upon its sale.[4] The plaintiff also owns furnishings and art valued at $20, 500. The defendant owns jewelry valued at $20, 000 and nearly new home furnishings valued of at $100, 000 value.

At the time of trial the plaintiff had a retainer credit balance of $7, 700 with her attorneys; her bills for trial exceed the credit. The defendant had a credit retainer of $126, 740. His bills for trial exceed the credit.

The defendant's trust interest has been well described, with its limitations, elsewhere later in this decision.

The defendant owns a $10, 000, 000 key man life insurance policy insured on the life of his brother Michael, (who has a corresponding policy insuring the defendant's life). The policy has a cash surrender value of $38, 613. The insurance was meant as protection of the businesses in the event of the death of either brother. These policies have remained in place notwithstanding the defendant's recent redemption of his business interests during this litigation as more thoroughly discussed below. The defendant also owns Capital Valley Glass, LLC a glass replacement business which has no positive value because of significant indebtedness. He also owns a half share of preferred stock in a company that has no value.

Other than the significant litigation costs discussed below the plaintiff has minimal debt. She had two credit card bills totaling $43, 862.19 at the time of trial. The defendant's indebtedness is unpaid 2012, 2013 and part of 2014 taxes of $1, 052, 233, loans from his father for attorneys fees of $537, 800, a $35, 000 loan from his brother to pay taxes and a $6, 650 balance due to the discovery master. The lion's share of the defendant's tax liability arises out of the taxes due upon his redemption of his business interests. He also has an unquantified inchoate liability for his personal guarantee of Valvoline franchises.

III

DEFENDANT'S BUSINESS INTERESTS

The defendant worked for Matrix Partners (one of his father's businesses) from 1993 to 1996. In 1996, the defendant and his brother Michael went into business together as Valvoline franchise owners. Throughout the years from the inception of Galena (an entity described with greater particularity below) in 1996, both the defendant and his brother Michael have been

employed by Galena. The defendant's role in the businesses has always been in the office operation. Galena Associates, LLC (" Galena I"), was set up in late 1996 for the purchase and operation of franchises. In October 1996, Galena I purchased 12 Valvoline franchises. Since then, the company purchased many other franchises. At the commencement of this action, the defendant and his brother each had an annual income of $200, 000 from Galena I. In 2012, their respective incomes increased to $300, 000 per year, and ultimately in early 2012 to $400, 000 per year. The decision to increase the income was made each time by the defendant and his brother. The defendant has also received income by way of distribution from the multiple entities set up for the franchise businesses. His distribution income has varied throughout the years. The largest distribution, $200, 000, was received by the defendant in 2013.

The franchises were owned by multiple entities (the Entities): Galena, LLC (I and II), Meadowbrook, LLC, High Line, LLC and Snowden, LLC. The lube franchises were purchased by the Entities with bank financing, retained earnings in one of the LLCs, funds from the trusts held for the benefit of each brother or another Ferri family trust and Valvoline seed money. Each time the brothers wanted to utilize their respective trusts or the grandchildren's trust to buy further franchise assets through one of the LLCs, the defendant consulted only with his father, not the trustee. The 1983 Trust contributions to lube franchise acquisitions totaled somewhere between $5-8 million. The defendant never put personal savings in any of the purchases.[5] The Entities owned over 100 lube franchises. This process and method of purchase has continued to the present time, with purchases continuing during these dissolution proceedings as well. The divorce, then, has not impaired the ability of these businesses to continue, expand and thrive.

The pendente lite court orders required the defendant to pay the plaintiff unallocated alimony and support of $5, 100 per week (with after tax dollars). On March 6, 2013, the defendant was ordered to pay a lump sum of $1, 000, 000 for plaintiff's attorneys fees and ongoing monthly installments of $100, 000 to plaintiff's counsel. Since March 6, 2013, the defendant has paid more than $2, 250, 000 in court ordered fees to plaintiff's counsel. In order to service the court orders for attorneys fees to plaintiff's counsel, the defendant redeemed his interest in all of the Entities.

The plaintiff argues that the redemptions were void because they did not have proper Valvoline approval. The plaintiff is not the right party to raise this claim. The entity who might have an interest in raising that argument is not a party to these proceedings. As between the parties here, the redemptions are treated as valid executed transactions.

The redemption prices in total were $5, 066, 808. The defendant's financial affidavit reflects the tax obligations outstanding on the redemptions. Although the redemptions are complete, the defendant has not yet sought relief from his personal guaranty to Valvoline as it relates to the franchises. Interestingly, during the trial, the defendant continued to refer to the entities as companies in the possessive, as if he still owned them. Whether this is a matter of habit, mistake or otherwise is not before the court. What the court sees, however, is an individual who lost ownership in the Entities yet retains all outward indicia of continuing ownership.

IV

COSTS OF LITIGATION

The expenditure of funds for attorneys, experts and attendant costs in this case has been

significant.

The plaintiff's lead firm Nusbaum and Parrino has billed $3, 071, 917.50 in fees and $363, 697.45 in disbursements which have included other law firms, experts, discovery master and costs. Fees of $2, 537, 895.31 have been received and paid out. As a result, the balances that the plaintiff owes are: Nusbaum and Parrino $897, 719.64, Louden, Caisse and Hanney $111, 920.73, Cummings and Lockwood $18, 945.00, and Horton, Shields and Knox $24, 879.00. She also owes expert fees of $129, 757.50 are due from the plaintiff to her retained expert's firm, Meyers, Harrison and Pia. Additionally, she owes the discovery special master $7, 469.19, the guardian ad litem $3, 901.25, her out of state counsel $60, 789.99 and two other out of state firms $319.01. Her total litigation indebtedness presently is $1, 255, 701.37.

The defendant's lead firm Broder and Orland has billed $2, 312, 554 and has been paid $2, 096, 654, leaving $215, 900 owed to it. The firm has paid expenses of $31, 888 and currently owes expenses of $61, 426.62. The defendant also paid fees to other firms. He paid a prior counsel approximately $340, 000, Wiggin and Dana, $42, 512 and $4, 200 to two other firms.

The court granted the defendant relief from the $100, 000 per month order on July 1, 2014 (effective after the payment due June 30, 2014/July 1, 2014 is made in accordance with the order). In lieu of the order, pendente lite, and while this decision is pending, the court ordered that the plaintiff's counsel was to be paid on an equal basis any monies paid to the defendant's counsel on account of fees or costs, whether paid by the defendant directly or a third party. The order also provided that defendant's counsel must account to the plaintiff's counsel for any such funds received.

V

SUPPLEMENTAL FINDINGS REGARDING THE 1983 TRUST/2011 TRUST

As recounted earlier under the terms of a Trust established for the benefit of the defendant by his father in 1983, the defendant had an absolute right to withdrawal of 75% of the 1983 Trust assets at the commencement of this dissolution of marriage action. In 2011, subsequent to the plaintiff's filing of this action, the trustees of the 1983 Trust decanted virtually all of the assets of the 1983 Trust into a new trust, known as the 2011 Trust. The terms of the 2011 Trust left to the trustees all of the control and decision-making as to whether its sole beneficiary, the defendant, would receive any of the 2011 Trust income or assets. Subsequent to the decanting, the defendant passed another birthday anniversary that has left him eligible to receive all of the assets of the 1983 Trust, upon written request had the assets not been decanted. The alleged reason for the decanting was the trustees felt insecure because the plaintiff was holding tax refund checks payable to her and the defendant. She was holding them until their use could be agreed by all. The trustees believed that this meant the 1983 Trust was 'under attack' by the plaintiff. The 1983 Trust had always paid the parties' taxes and then the parties in turn had handed over their tax refund checks to the 1983 Trust. An agreement was reached as to the disposition of the refund checks.

Under Connecticut law, the defendant's interest in the 1983 Trust is before this court as an asset of the marital estate for the court to consider in fashioning its orders under Gen. Stat. § 46b-81. By contrast, traditionally, under Connecticut law the defendant's interest in the 2011 Trust is

not before this court as an asset of the marital estate for the court to consider in fashioning its orders under Gen. Stat. § 46b-81. The 2011 Trust is in the nature of a spendthrift trust. " 'The spendthrift trust is one which provides a fund for the benefit of another, and which secures it against his own improvidence, and places it beyond the reach of his creditors.' *Carter v. Brownell*, 95 Conn. 216, 221, 111 A. 182, 184." *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 218-9, 27 A.2d 166 (1942). That is precisely the provision of the 2011 Trust.

The plaintiff argues that the court should consider the entire transferred pool of assets from the 1983 Trust now residing in the 2011 Trust as marital assets subject to distribution. The plaintiff seeks the court's equitable division of the 2011 Trust even if the decanting remains intact as a result of appellate decision; she also seeks the consideration of the 25% of the 1983 Trust that would not have belonged absolutely to the defendant under the terms of the 1983 Trust until December 21, 2011.

Plaintiff argues that in the recently released decision of *Reville v. Reville*, 312 Conn. 428, 93 A.3d 1076 (2014), the Supreme Court is pointing in the direction of a more expanded definition of property under Gen. Stat. § 46b-81. However, the argument is not well founded. In *Reville*, the issue at hand was the recognition of certain unvested pension benefits as property under Gen. Stat. § 46b-81, which was a part of a national trend. The plaintiff points to no national trend to recognize assets in a spendthrift trust as marital assets. Connecticut's law regarding the same is unequivocal. *Rubin v. Rubin*, 204 Conn. 224, 227-33, 527 A.2d 1184 (1987). Since *Rubin*, the Supreme Court has repeatedly sought to further define property subject to equitable division under the statute. After tracing the history of the development of the law on this issue, the Supreme Court noted that, " [i]n building on our prior cases, we expanded our notion of property under § 46b-81, recognizing that there is a spectrum of interests that do not fit comfortably into our traditional scheme and yet should be available in equity for courts to distribute." *Mickey v. Mickey*, 292 Conn. 597, 974 A.2d 641, 659-60 (2009).

The evolution of the definition of includable property in *Mickey* cannot be construed to extend to property of a trust that a beneficiary has no present or future legal entitlement to absent the approval of the trustee, where said approvals are solely in the trustee's discretion and control, as it is here with the in the 2011 Trust.

[W]e declared that " [u]nvested pension benefits . . . although dependent on certain future contingencies such as length of service and age [i.e., the mere passage of time], are simply not in [the] same speculative category [as a potential inheritance]. Moreover, unlike a potential inheritance, pension benefits represent a trade-off for potentially higher wages not earned during the marriage; they often represent . . . the only or principal material asset; and they are treated by employers and employees as property in the workplace." (Emphasis added. Footnote omitted.) *Bender v. Bender, supra*, at 754, 785 A.2d 197.

We conclude that *Bender* stands for the proposition that, even in the absence of a presently enforceable right to property based on contractual principles or a statutory entitlement, a party's expectant interest in property still may fall under § 46b-81 if the conditions precedent to the eventual acquisition of such a definitive right are not too speculative or unlikely. *Mickey*, 292 Conn. 627.

The 2011 Trust does not meet this definition. The defendant's expectant interest in the 2011 Trust is not in any way vested. The defendant as beneficiary has no control or legal right over the disposition of the assets of the trust. He cannot direct them to another or to himself. He is only able to ask for some of the assets and has no recourse if his request is denied. This expectancy is entirely conjectural and lacks any of the indicia of property contemplated to be included in the marital estate by the Supreme Court in *Mickey* .

If the court's order of restoration is upheld, similarly, the 25% of the 2011 Trust that was not the subject of the restoration order in the civil declaratory judgment action is not before this court for consideration for equitable division of property or alimony considerations (or attorneys fees and costs) because those assets remain in the spendthrift 2011 Trust.

Since the 2011 Trust is not available as an asset for consideration by this court (whether the remaining 25% or the entire corpus if the invalidation of decant is reversed), then it is also not available to the court in fashioning an alimony order. The interrelatedness of property and alimony under such circumstances has been recognized by our Supreme Court. " To uphold the award of a share of an expectancy as contingent alimony might fairly be viewed as sanctioning in a different guise an assignment of property not then within the jurisdiction of the court, which we have concluded § 46b-81 does not authorize." *Rubin*, 204 Conn. 234. Therefore, as the court considers the orders in the alternative, the alimony order should be ordered in the alternative; that is, with the 'trust in' and the 'trust out' as this have been defined and discussed in this decision.

As of the date of this decision, the assets of the 2011 Trust that were ordered restored to the 1983 Trust have not been transferred. Therefore, to determine the value of the 1983 Trust assets that will ultimately be placed back in the 1983 Trust, the parties provided evidence regarding the value of the 2011 Trust assets. As stated elsewhere, the 2011 Trust asset values are relevant only for that purpose. The order of restoration applied to 75% of the assets decanted from the 1983 Trust, because at the time of the decanting that is the percentage of the 1983 Trust assets that the defendant had an absolute right to under the terms of the 1983 Trust. The plaintiff urges the court to consider all of the 2011 Trust assets as available inasmuch as the defendant's age during the pendency of this action qualified him under the terms of the 1983 Trust to 100% of the assets. The defendant argues that the court should consider the decanting transfer between the two trusts invalid because at the time of the purported transfer, Michael Ferri had not yet been appointed the 1983 Trustee and therefore his acts of transfer were invalid. This claim of invalidity regarding the decanting to the 2011 Trust is a civil claim against a third party that has no place in this dissolution of marriage action. As noted *supra*, if the claim has legal viability it belongs elsewhere. For purposes of this litigation, the capacity of Michael to act as a trustee for purposes of the transfer is not considered by this court.

The trustees of the 2011 Trust valued the Trust assets at $69, 042, 271 in their accounting for the 2012 calendar year. The parties each presented evidence through expert testimony (and documents) regarding the value of the 2011 Trust property. The plaintiff's expert valued the 2011 Trust assets at $98, 108, 479 for the same period with the securities updated to June 19, 2014 and one of the 2011 Trust assets (Matrix Capital Management Fund, LP) updated to the end of calendar year 2013. The defendant's expert valued the 2011 Trust assets at $80, 546, 499

(without certain discounts he would apply) with securities valued to May 27, 2014 and the same valuation dates as plaintiff's expert for all other assets.

The defendant's expert, Daniel M. Kerrigan, has been with Management Planning, Inc. in Princeton, New Jersey since 1999; he is presently a managing director. Kerrigan holds a B.S. in Finance in 1999 from The College of New Jersey and a Master's Degree in Business Administration from The Wharton School, University of Pennsylvania, in 2010. He possesses a certification as a Chartered Financial Analyst (CFA).

The plaintiff's expert, Mark Harrison, is a principal at Meyers, Harrison and Pia in New Haven, Connecticut. He is a certified public accountant and licensed attorney. He holds the designations as Accredited in Business Valuation (ABV) and, Certified in Financial Forensics (CFF) (both designated by the American Institute of Certified Public Accountants). Harrison provided evidence of the fair value of the 2011 Trust. He determined the value as of December 31, 2012 (the most recent available information for all assets except one) to be $98, 108, 749. " Fair value" rather than " fair market value" is the standard utilized by Harrison because he had inadequate information as to the value of discounts or premiums to determine fair market value as to all of the assets. Further the fair value does not factor in any income that may be received for management fees or incentive fees by any of the entities.

The values of the securities held by the Trust, i.e., Cisco ($2, 896, 457), Comcast ($475, 084) and Symantec ($5, 872, 303) were valued as of the updated close of business near to the date of trial. Their values are not contested in these proceedings. Further, the 2011 Trust's cash on hand in the Morgan Stanley account ($19, 082) and the UBS account ($1, 504, 307) were not in dispute. Once the issue of Harrison's double counting was clarified, Kerrigan and Harrison were in agreement as to the value of these assets (except for different valuation dates for some of the assets).

There were two other classes of properties held by the 2011 Trust: (1) the Ferri Family and Matrix related hedge and investment fund assets and (2) the LLCs related to the lube business enterprises of the defendant and his brother Michael. These are the assets over which the experts had differences of opinions as to value and their methodology to arrive at the same. They will be discussed in turn.

A

PFFLP, Gothic and Matrix General Partners, LLC

The 2011 Trust holds a 30% interest in the Paul Ferri Family Limited Partnership (PFFLP) and a 20% interest in the Gothic Fund Limited Partnership (Gothic), as of the end of calendar year 2012. Both funds are hedge funds. The evidence supports a further finding that these assets, in these percentages, remain in the 2011 Trust at the time of this decision.

Harrison was unable to quantify any discounts applicable to PFFLP and Gothic because the historical data and the PFFLP and Gothic partnership and hedge fund agreements were not provided to him.[6] Without them he could not quantify any discounts for lack of control or marketability. The agreements may have controlled value determinations and, in their absence, no assumptions can be made as to whether or not to apply discounts, and, if so, at what level. The court agrees with Harrison that these missing agreements define the contractual relationships of

the investor to the asset. Those contractual relationships may include sale or transfer provisions or restrictions. Without them the application of a discount based upon assumptions not in the evidence amounts to nothing more than pure conjecture.

Harrison offered a fair value calculation based upon net asset value only as of year end 2012. The data used by Harrison to base the valuation of Gothic was the 2009-2012 K-1s. He also reviewed limited deposition testimony of Michael Ferri but the K-1s were his primary reference. He had no knowledge as to what, if any, investment role is assumed by Gothic.

Kerrigan's methodology for arriving at the fair market value (versus the fair value) of the 2011 Trust interest in the PFFLP and Gothic was to utilize the net asset value method. Kerrigan testified that in valuing PFFLP and Gothic, it was necessary to apply both a discount for lack of control and a discount for lack of marketability because the 2011 Trust's ownership interests was a minority interest as to both funds. Therefore, Kerrigan concluded the 2011 Trust had no control over the entity in the first instance, and, no market for sale of the interest in the second instance. Kerrigan's conclusions as to these matters was based upon deposition testimony of Michael Ferri which Kerrigan relied on upon for the truth of Michael's statements in reaching his conclusion. The plaintiff objected that Kerrigan's reliance on Michael's deposition testimony was inadmissible hearsay. The court reserved the question of this objection to this decision.

The most recent case on point is *Millíun v. New Milford Hosp* ., 310 Conn. 711, 727, 80 A.3d 887 (2013): " [A]n expert's opinion is not rendered inadmissible merely because it is based upon inadmissible hearsay, so long as the opinion is based upon trustworthy information and the expert has sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration . . ." *Millíun* instructs us to examine the trustworthiness of the information, in this case the deposition testimony of Michael, when determining whether the hearsay evidence is admissible. The court does not find Michael's testimony trustworthy for several reasons: (1) he sought to restrict the plaintiff's discovery in this case; (2) he is wholly aligned with the interests of the defendant; and (3) he is a trustee who decanted the 1983 Trust assets to frustrate the plaintiff's interests in this action and protect the defendant. The documents regarding PFFLP and Gothic are not in the control or possession of Michael notwithstanding his role as trustee. While he may naturally be knowledgeable as to the matters that Kerrigan sought to rely on concerning the impact of the 2011 Trust minority interest in both funds, Michael is not a disinterested person and his testimony and statements do not have the inherent indicia of reliable objectivity. Therefore, the plaintiff's hearsay objection is sustained.

Another asset of the 2011 Trust is Matrix General Partners, LLC (Matrix GP). The lack of disclosure of documents rendered Kerrigan unable to determine the value of management fees or incentive fees for Matrix GP. Notwithstanding discovery efforts, the necessary documents were never provided by the entity or its representatives. In the absence of such documents, Kerrigan made certain assumptions in his valuation: that there were $1.6 billion under management by Matrix GP, that the fees would have a return rate of 20% and that indeterminate management and incentive fees were paid. Further, while the actual numbers were not available, Kerrigan assumed a certain expense burden besides the fees.

The available K-1s assisted both experts in looking at the reporting provisions consistent

with GAAP accounting. In so doing, they both were able to determine that the asset was market to market, which is an accounting measurement of fairly tradable value of an asset. However, without the agreements, historical data and audited financial statements of the composite assets of the two funds, neither expert could determine whether the K-1 GAAP value reflected the appropriate discounts. The difference between Kerrigan and Harrison's valuation is the assumptions that Kerrigan imposed on his valuation methodology. The court rejects those assumptions as outside the evidence before the court and based upon unreliable information.

The question the court is confronted with as to these three assets Matrix GP, PFFLP and Gothic is whether it has sufficient evidence to find a fair market value of these assets. Common sense dictates that in the absence of an agreement to the contrary, the fair market value of the property will be affected by the lack of control of the investment funds by the 2011 Trust. Further, common sense also dictates that marketability of these assets may be adversely affected by the limited marketplace and controls on the asset. However, this evidence is not before the court. The court cannot determine whether each Fund's agreements with investors contain provisions that affect marketability or transferability. The court rejects Kerrigan's conclusion that one can assume standard discounts. Accordingly, the choice by Harrison to offer a fair value opinion as to Matrix GP, Gothic and PFFLP is accepted. There is nothing in the evidence that casts doubt on Harrison's fair value calculations.

Harrison's valuation of the PFFLP interest identified the assets in the 2011 Trust, which included 90% of its assets invested in a hedge fund known as Highfields Hedge Fund. He took the capital account value (from the K-1) as of year end 2012 and applied the publicly available 2013 performance of Highfields Hedge Fund to extrapolate to a fair value as of year end 2013. That fair value is $9, 594, 489. The court finds it the fair value as of the end of 2013, the most current valuation date available.

Harrison's fair value of Gothic is based upon the 2009-2012 K-1s. The fair value as of year end of 2012 was opined by Harrison to be $18, 310, 392. The court finds this is the fair value and cannot find a fair market value of the 2011 Trust interest in Gothic. There is inadequate evidence as well to find a more current valuation date. Harrison's fair value opinion of Matrix GP is $5, 570, 479 which is adopted by the court.

B

Matrix Capital Management Fund Limited Partnership

The same valuation challenges also exist for the other Matrix entities owned by the 2011 Trust. The 2011 Trust owns a 2.797915% in Matrix Capital Management Family Limited Partnership (Matrix CMFLP), a hedge fund. It holds securities as investment assets. It was valued by both experts. The K-1s were available. The experts did not have audited financial statements, tax returns or investor letters.

Kerrigan started with the net asset value of Matrix CMFLP. To find the net asset value he examined at the year end 2012 K-1, he noted it incorporated unrealized gains and losses, that it was a hedge fund with a capital value of $14, 237, 019 at that year's end. He noted that it was GAAP compliant and therefore the provisions related to marked to market were in force. He therefore assumed the net asset value was the capital account value, and then looked at

documents in the public domain, Bloomberg Financial, LP and determined that there had been a 61.78% return on investment in Matrix CMFLP in 2013. This brought the net asset value of the 2011 Trust interest in Matrix CMFLP to $23, 032, 649.

Thereafter, Kerrigan utilized a protective put analysis to determine what discount to apply to the net asset value to reflect the delay that an owner of the interest would likely experience if the owner wanted to sell that interest. Underlying this methodology was Kerrigan's assumption that the Matrix CMFLP would be similar to other hedge funds in that it was likely that there would be a six-month hold on an investor's ability to withdraw. A protective put analysis seeks to determine the cost of insurance to neutralize the risk of the delay; Kerrigan used the Black Scholes Option Pricing Model. After employing that formula, Kerrigan found that the pricing model computation of the cost of insurance to protect against the inability to sell (the protective put analysis) imputed a discount for the risk of delayed liquidity of 4.4% to be applied to the net asset value ($23, 032, 649) to arrive at a fair market value of $22, 019, 213 for the 2011 Trust interest in Matrix CMFLP. The weakness in this analysis, however, is that it relies on the assumption of a 6-month delay (inability to sell or transfer; i.e., 'lockout') period, without reference to what the Matrix CMFLP documents actually provide for. As discussed elsewhere, the only other source of this evidence is Michael Ferri, whose testimony the court finds unreliable as biased. Therefore, the court has insufficient evidence before it to determine whether there is a period an investor is tied-up, and if so, the length of that period. Because of this, the court cannot accept Kerrigan's opinion as to the value of the 2011 Trust interest in the Matrix CMFLP.

In his valuation of Matrix Capital Management, Harrison looked to publicly accessible information. At a website, InsiderMonkey.com, Harrison identified Matrix Capital Management with a portfolio value of $1, 394, 392, 000. The defendant sought to raise a doubt as to whether the fund identified by the website was the same fund in the family of Matrix funds as that held by the 2011 Trust. The defendant asserted that Harrison was looking at the wrong Matrix business based upon SEC filing documents, that he was looking at Matrix Capital Management Company, LLC instead of Matrix Capital Management Fund, LP. The court cannot conclusively agree with this. However, the inadequacy of evidence in general regarding the Matrix funds (though discovery was sought) leads the court to conclude that since values are only ranges here, with whole bases of value such as incentive and management fees missing from the available evidence and therefore equation, there is insufficient evidence to find hard and fast values anyway. " [W]e determine only that when neither party in a dissolution proceeding chooses to introduce detailed information as to the value of a given asset, neither party may later complain that it is not satisfied with the court's valuation of that asset. Both parties in a dissolution proceeding are required to itemize all of their assets in a financial affidavit and to provide the court with the approximate value of each asset. Practice Book (1998 Rev.) § 25-30, formerly § 463. If the parties fail to do so, the equitable nature of the proceedings precludes them from later seeking to have the financial orders overturned on the basis that the court had before it too little information as to the value of the assets distributed. In this case, it was not a misapplication of the law for the trial court to have valued the asset on the basis of the scant evidence provided and to have distributed the asset on the basis of that valuation." *Bornemann v. Bornemann*, 245 Conn. 508, 535-6, 752 A.2d 978 (1998).

The court accepts that the SEC filings reflect that more likely than not Kerrigan is valuing the asset held by the 2011 Trust. The court accepts, based upon the evidence that the fund Harrison reported from InsiderMonkey.com is more likely than not the same fund held by the 2011 Trust. The asset value offered by Kerrigan for this fund interest actually held by the 2011 Trust is $23, 032, 649. The court accepts this as the fair value of the fund interest of the 2011 Trust. The accounting provided by the Trustees as of year end 2012 provided a fair market value of $14, 237, 019 for this asset. While this accounting is substantial evidence of the fair market value of the 2011 Trust interest it: (1) does not reflect the apparent significant increase in value for the year 2013, whether reported by Bloomberg Financial, and (2) there is no ability to cross examine (and therefore for the court to weigh) the validity of the assumptions, where a major reporter for the information is Michael, as Trustee, a person the court has determined is a biased witness. All the court can conclude is that the fair market value as of the end of 2013 of the 2011 Trust interest is likely no more than $23, 032, 649 as to Matrix CMFLP.

Similarly the court cannot accept the Harrison testimony which conjectures incentive fees of $160, 000, 000 plus because the evidence is not fairly before the court. The court does note that this would bring the 2011 Trust value more in line with the defendant's statement to the forensic custody evaluator that his trust was worth between $150-200 million. However, the court credits Harrison's testimony that one of the components of a hedge fund's earnings is the direction of management and incentive fees to the management. The inability to quantify those reliably prevents the court from finding value based upon them as a stream of income.

C

Matrix Institutional Advisors, LLC and Matrix General Partner, LLC

The 2011 Trust owns an 11.37% interest in Matrix Institutional Advisors, LLC (Matrix IALLC) and an 11.40% interest in Matrix General Partner, LLC (Matrix GPLLC). Matrix IALLC is, as best as can be determined, an advisor to the Matrix Funds.[7]

Regarding the 2011 Trust interest, Harrison offers a fair value for both entities as of the end of 2012, based upon the capital account balance from the K-1s for each. He ascribes to Matrix IALLC a fair value of $5, 214 and for Matrix GPLLC a fair value of $5, 570, 479. Kerrigan offered essentially the same values as capital account statements.

Neither expert was able to determine whether either of these entities actually receives management or incentive fees. Kerrigan performed hypothetical fee structures to examine returns in his work papers. He assumed a fund of $1.6 billion with a hypothetical return of 20% yearly. He further assumed that Matrix IALLC would get the management fee and Matrix GPLLC would get the incentive fee. This assumption was based upon knowledge of common hedge fund scenarios. It is noted that the work Kerrigan did in this area is based upon assumptions regarding matters as to which there was no evidence. All the court can determine from the testimony of both experts regarding this matter is that if these entities have the right to receive management fees, they are likely significant and the assets are undervalued before the court. Harrison did not consider any right to receive fees when he valued Matrix GPLLC; instead he opined as to fair value based upon the capital account found in the K-1.

Finally, one undetermined asset is the Matrix Restricted Investment Fund GP, LLC.

Evidence shows it as an asset decanted from the 1983 Trust to the 2011 Trust. No evidence was presented as to the nature of the asset or its value. The plaintiff asserts that she was hamstrung in her discovery efforts by the Matrix representatives regarding this as well as the substantial missing documents regarding the Matrix entities. The court agrees with the plaintiff. The many holes in the evidence referenced throughout this decision are a direct result of non-disclosure by others, not lack of effort.

D

Lube Related Entities

The valuation of the lube related entities was far more straightforward. Kerrigan and Harrison valued the 2011 Trust 40.96% interest in Galena Associates, LLC at $5, 570, 479. This calculation was based upon the defendant's redemption of his 5.69% interest for $1, 123, 147. Both Kerrigan and Harrison valued the 2011 Trust's 49.50% interest in Meadowbrook Associates, LLC at $8, 972, 024. Similarly, this calculation was based upon the redemption price of the defendant's interest in Meadowbrook Associates, LLC. The defendant's expert agreed with these values. The values are accepted and found by the court.

Bernard Park, LLC is a real estate venture. The 2011 Trust holds a 33.33% interest per the K-1. Neither party retained a real estate appraiser to value the asset. Both Harrison and Kerrigan accepted the K-1 asset report as value, $308, 795. There being no contrary evidence, the court accepts this as the value of the 2011 Trust interest in Bernard Park, LLC.

In summary, assuming the civil decision is upheld, the court only considers 75% of the value of the 1983 Trust, which is comprised of 75% of the assets in the 2011 Trust, (because they have not yet been restored to the 1983 Trust). The analysis of the various composite assets of the 2011 Trust is so the court has before it an ascertainable value for purposes of its orders.

VI

INTER-RELATIONSHIP BETWEEN ALIMONY AND PROPERTY ORDERS

In considering alimony, one of the factors is a consideration of the property distribution under Gen. Stat. § 46b-81. Essentially, if the asset distribution to the plaintiff generates sufficient income to her to obviate the need for alimony then none should be ordered. Of course, each party has a significantly different notion of what that amount should be.

In ordering distribution of the marital estate, the court looks at the statutory factors under § 46b-81. Plaintiff seeks a property distribution that includes $27, 500, 000 immediately and 50% of the value of the 1983 Trust plus $10, 000, 000. However, as an apparent incentive the plaintiff seeks 25% of the 1983 Trust value instead if the civil matter resolves fully by December 1, 2014.

If the decanting of the 1983 Trust into the 2011 Trust is held invalid, the defendant seeks an order of $6, 000, 000 lump sum alimony paid by him in three equal installments over 3 years. This would not be a substitute for the time limited unallocated alimony and support that is a part of his claim for relief.

The court notes that the 1983 Trust does not result from the work of either party. Its use was a source of tension between the parties during their marriage. That said, the court does not find credible the defendant's view that the 1983 Trust assets were not considered by him and his wife as they thought of plans for their retirement. The deferred retirement assets of the defendant are

modest. Clearly, given the flow of cash in this family no significant savings plan was dedicated to retirement.

The plaintiff points to a recent decision in which the trial court's award of half of an inheritance was upheld, as authority for the proposition that the court can issue a similarly scoped order here regarding the value of the 1983 Trust. In that case, *Coleman v. Coleman*, 151 Conn.App. 613, 95 A.3d 569 (2014), the court ordered, essentially, an equal split of all of the assets after a 37-year marriage. Those assets included an inheritance that the husband received in 2007. On appeal, the Appellate Court declined an invitation from the defendant to carve out the inheritance from consideration under Gen.Stat. § 46b-81. There was no significant discussion of the circumstances of the parties in *Coleman* that can lead this court to see it as offering persuasive grounds for an equal split of the 1983 Trust asset value.

At the same time, the defendant reminds the court in his post-trial memorandum that all of the Matrix and lube related Entities have transfer restrictions that require owner approval, and therefore the court should not entertain any relief that might result in a transfer from within the 1983 Trust to the plaintiff. The court agrees that this is true.

Here the court must look at a variety of factors. The marital home, by both parties' requests, will stay with the plaintiff. It currently has taxes and a HELOC which must be paid. The plaintiff's ability to acquire future assets is severely limited. Even if she is able to go back to work in her chosen field, the income from social work will not allow her to acquire any significant personal estate. The defendant desires to continue in business and is likely to quickly pick up the pieces of his economic future after this case is over. The defendant's trust has routinely supported investments he (and his brother) sought to make.

The plaintiff's requests for relief are high based upon the findings of the court. They fail to take into account that the 1983 Trust asset was not the fruit of the parties' labor. It represents a sum of money that they knew they had in reserve and so would always be free from want or need in the lifestyle they had established. The court orders reflect the same.

Similarly the defendant's requests for relief fail to recognize the need of the plaintiff to be maintained by him beyond her ability to so provide for herself. The request that she share in his tax liability if he does not get the funds for the same from his trust (the 2011 Trust, assuming the 1983 Trust has not been restored its corpus) is simply not realistic. The effect would be that she loses her home while he lives in a $800, 000 mortgage-free home provided by his father. This is unfair.

The court finds that it is equitable to order a sufficient lump sum alimony order such that the plaintiff will have no need for dependency on the defendant in the future. Just as the defendant told her during the marriage that they had more money than they would ever need in their lifetimes, there are sufficient funds to assure that both parties have more money than they will ever need in their lifetimes. On the other hand, the award recognizes that the 1983 Trust is an asset that the defendant brought to the marriage, that it is the initial product of the labor of his father, not him, and that it should be left sufficiently intact so that it may be used for investment/growth purposes as the defendant had envisioned it.

VII

COURT ORDERS

The court orders:

1. Dissolution of the marriage.

2. The court incorporates the parties' March 11, 2013 parenting agreement into this judgment.

3. The defendant shall pay to the plaintiff child support in the amount of $679.00 per week, which is consistent with the Child Support Guidelines.

a. The defendant shall maintain health insurance for the three children.b. The parties shall each pay one-half of the children's health expenditures not paid by insurance, so long as the defendant has insurance comparable to what he has today. If he switches the children's coverage to a less comprehensive policy then he shall pay all of the uncovered health expenditures. This provision is a deviation from the Child Support Guidelines as a part of the overall financial orders in this case, and, it reflects the best interest of the children to get the care they need, regardless of cost.c. The defendant shall pay all of the children's ski costs; the plaintiff shall pay all of the children's equestrian costs. All other extra-curricular activities shall be paid for one-half by each parent.

4. The defendant shall pay the plaintiff alimony in the amount of $25, 000 per month on the first day of each month. Said payment shall terminate on the death of either party, the remarriage of the *plaintiff*, or the plaintiff's cohabitation with another which pursuant to statute could result in termination, modification or suspension, or the event of the defendant's payment of the first $5, 000, 000 to the plaintiff under the provisions of paragraph 6 *whichever shall first occur* . Said payment is taxable to the plaintiff and tax deductible by the defendant for any year that the defendant neither seeks nor receives ANY tax reimbursement from the 1983 Trust, the 2011 Trust or any other third-party person or entity for Federal or State taxes.

a. The defendant shall pay to the plaintiff 20% of any income (earned or unearned) he receives from whatever source over $500, 000 per year gross; said payment shall be made within 7 days of his receipt of the same, except to the extent that the income is from a source for the sole purpose of payment of attorney fees and utilized by him for those purposes and then said funds are subject to the order at paragraph 12.b. For purposes of this order the plaintiff may earn $75, 000 gross per year before her earned income shall be a basis for modification of this order.

5. The plaintiff shall be the sole owner of the home at 8 Hatters Lane, Farmington, Connecticut, free and clear of any claim of the defendant. She shall indemnify and hold him harmless on the indebtedness on said property.

a. The defendant shall purchase, and cause to be installed a generator at the 8 Hatters Lane, Farmington, CT property, the generator of the same model (or the replacement model if it has been discontinued) as the generator he removed. If the plaintiff has already replaced the generator he shall pay her the cost of its replacement and installation. These provisions shall be completed by October 1, 2014.

6. In the event that all appeals have expired or been withdrawn and the result is that the decanting of the 1983 Trust is not upheld, then the defendant shall pay to the plaintiff as lump sum alimony $12, 000, 000 as follows: $5, 000, 000 within 60 days of the final judgment regarding the issue, and then $5, 000, 000 two years later, and then $2, 000, 000 one year later. These payments are lump sum alimony and not taxable to the plaintiff nor deductible by the defendant.

These payments are due regardless of whether the plaintiff remarries, cohabits with another individual or dies.

7. Within 90 days of this judgment, the defendant shall purchase life insurance (term or otherwise) in the face amount of not less than $5, 000, 000 so long as he has an alimony or lump sum alimony obligation outstanding to the plaintiff. He shall provide proof of the insurance annually to the plaintiff by January 31 of each year.

8. Each party shall keep his/her respective jewelry, art and home furnishings in his/her respective current homes, retirement funds, automobiles and bank accounts free and clear of any claim of the other. The joint bank accounts that have been used pendente lite by the plaintiff shall belong to her solely. The horses and the Fidelity brokerage account shall belong to the plaintiff. The defendant may remove the safe from the plaintiff's home at his cost and expense on or before February 1, 2015 upon reasonable notice to the plaintiff. The cash surrender value of the plaintiff's life insurance, Capital Valley Glass and the Archway preferred stock shall be his sole property.

9. The defendant is solely responsible for the payment of all three children's private secondary school if they are not funded by a third-party source.

10. The defendant shall be solely responsible for all of the costs and expenses for college for all three children to the maximum amount a court may order under the educational support order statute then in effect at the time of the enrollment.

11. The parties shall each be entitled to one-half of the children dependency exemptions available for any given year. In a year that three are available, the plaintiff shall take the second exemption in odd numbered years and the defendant in even numbered years.

12. There being insufficient funds available for the plaintiff to pay her fees and costs related to this litigation, and the plaintiff having shouldered the larger share of the discovery efforts to obtain evidence that both parties sought as to the value of the properties in the 1983 and later the 2011 Trust, and to require her to shoulder these costs would be unduly burdensome and result in an undermining of these financial orders; now, therefore, of each dollar paid to any of the defendant's counsel in this case, or for costs incurred in this case, he shall pay $1.00 to the plaintiff's counsel. Once the defendant's counsel is paid in full, this obligation ends. Otherwise it shall continue until the declaratory judgment counts of the civil case has gone to final judgment and all appeals and statutory stays have expired. In the event the trial court decision is affirmed and the decanting is not permitted, then upon the defendant's first payment of $5, 000, 000 in paragraph 6 of these orders, the defendant will have no further obligation to pay plaintiff's counsel fees except if he has not been current in these orders, the arrearage of said payment shall immediately be paid in full. The bills subject to this order are for the amounts found in this decision, not for subsequent fees accrued.

13. Except as provided above, each party shall pay his/her own debts and indemnify and hold the other harmless on the same. To the extent the funds to purchase the Hatter's Lane property are still considered a loan by the defendant's father, then the defendant shall repay said loan as it is claimed due and indemnify and hold the plaintiff harmless on any fees or costs related thereto. This indemnification extends to any costs of obtaining releases that may be necessary for any refinance or sale of the property.

14. So long as there are child support, alimony or attorney fee payment obligations due under these orders, the parties shall share with each other their W-2s, 1099s and K-1s within 10 days receipt of the same and the first two pages of their Federal tax returns within 10 days filing of the same, yearly.

15. The plaintiff shall be responsible for the costs of her health insurance and the defendant shall cooperate in her election of COBRA.

Notes:

[1]The testimony varied as to whether this surgery was in 2006 or 2007.

[2]Additionally, as another stressor, the plaintiff was upset because members of the greater Ferri family did not support riding.

[3]On one occasion he told her the pain from a herniated disc was, " all in her head."

[4]In discussing the assets of the family here it is noted that the plaintiff has a remaining count in the civil action. Its value is unknown.

[5]For the very first purchases, the brothers took no pay for the first six months and lived off savings. The defendant did not tell the plaintiff this at the time.

[6]These were some of the documents that were unsuccessfully sought in discovery from Paul John Ferri, the defendant's father and from Matrix related potential deponents.

[7]There are a variety of Matrix Funds, both domestic and off-shore, which can be confusing because they share certain name parts with each other. Matrix CMPLP (discussed above) is a domestic fund. If the Trust has any holdings in an off-shore fund that is not apparent to the court from the evidence received.

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317 Conn. 223 (Conn. 2015)
116 A.3d 297
MICHAEL J. FERRI, TRUSTEE, ET AL.
v.
NANCY POWELL-FERRI ET AL
SC 19317
Supreme Court of Connecticut
June 16, 2015

Argued March 25, 2015.

[116 A.3d 298] [Copyrighted Material Omitted]

[116 A.3d 299] Action for a declaratory judgment to determine, inter alia, the validity of the transfer of certain trust assets by the plaintiffs, brought to the Superior Court in the judicial district of Middlesex, where the named defendant filed counterclaims against the plaintiffs and a cross complaint against the defendant Paul John Ferri, Jr.; thereafter, the court, Munro, J., granted the motion for summary judgment on the cross complaint filed by the defendant Paul John Ferri, Jr., and rendered partial judgment thereon in his favor, and the named defendant appealed.

Affirmed.

SYLLABUS

The plaintiffs M and A, the trustees of two trusts established for the benefit of the defendant F, sought a declaratory judgment to determine, inter alia, the legality of transferring certain assets from one of those trusts to the other. Specifically, M and A transferred a substantial portion of the assets from a trust that permitted F to withdraw principal to a trust that prohibited such withdrawals without the trustees' approval. The defendant P, who had previously filed a separate action seeking the dissolution of her marriage to F, filed a cross complaint alleging that F had breached his duty to preserve marital assets by failing to affirmatively contest the transfer of assets by M and A. Subsequently, F filed a motion for summary judgment claiming, inter alia, that P's cross complaint failed to state a cause of action. The trial court found that F took no affirmative steps to recover the assets of the first trust, and also found that F did not have a role in either the creation of the second trust or the transfer of assets to it. The trial court, concluding that there was no allegation that F had engaged in financial misconduct such as intentional waste or selfish impropriety and that no law required F to take affirmative steps to recover assets removed from the marital estate by the actions of a third party alone, granted F's motion for summary judgment and rendered judgment thereon, from which P appealed. Held that the trial court properly rendered summary judgment in favor of F, this court having concluded that the existing judicial sanctions were not so ineffective as to warrant the recognition of a new cause of action imposing an affirmative duty on a spouse to recover marital assets taken by a third party during the pendency of a dissolution where the statutes (§ § 46b-80 and 46b-81) setting forth the obligations of spouses during the pendency of a dissolution proceeding, the automatic orders relating to assets of the marital estate during the pendency of a dissolution proceeding required pursuant to the rules of

practice (§ 25-5), and the broad equitable powers available to the trial court when fashioning financial orders in a dissolution proceeding already provided significant remedies to P; furthermore, it was not procedurally improper for the trial court to decide the legal sufficiency of P's cross complaint within the context of a motion for summary judgment where, in light of this court's conclusion regarding P's cause of action, the defect could not be cured by repleading.

Kenneth J. Bartschi, with whom were Karen L. Dowd and, on the brief, Thomas P. Parrino and Laura Shattuck, for the appellant (named defendant).

Jeffrey J. Mirman, for the appellee (defendant Paul John Ferri, Jr.).

Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

OPINION

[116 A.3d 300]

Page 224

EVELEIGH, J.

This appeal arises from a dissolution action, dissolving the marriage of the named defendant, Nancy Powell-Ferri, and the defendant, Paul John Ferri, Jr. (Ferri). The dispositive issue in this appeal is whether the trial court properly rendered summary judgment in favor of Ferri on the cross complaint filed by Powell-Ferri on the ground that it failed to plead a legally sufficient cause of action. Specifically, Powell-Ferri's cross complaint alleged that Ferri had breached his duty to preserve marital assets during the pendency

Page 225

of their marital dissolution action by failing to take any affirmative steps to contest the decanting of certain assets from a trust by the plaintiffs, Michael Ferri and Anthony Medaglia, who were then serving as trustees.[1] We conclude that this state does not require a party to a dissolution action to take affirmative steps to recover marital assets taken by a third party and, accordingly, affirm the judgment of the trial court.

In its memorandum of decision, the trial court set forth the following relevant facts and procedural history. Powell-Ferri filed an action for dissolution of her marriage to Ferri on October 26, 2010, which is still pending. Ferri is the sole beneficiary of a trust created by his father, Paul John Ferri, Sr., in 1983 (1983 trust). The plaintiffs were named as trustees of the 1983 trust. Michael Ferri is Ferri's brother and business partner.

The 1983 trust provides that, after Ferri attained the age of thirty-five, he would have the right to withdraw principal from the trust in increasing percentages depending on his age. In March, 2011, while the underlying dissolution action was pending, the plaintiffs created a second trust whose sole beneficiary was Ferri (2011 trust). The plaintiffs then distributed a substantial portion of the assets in the 1983 trust to the 2011 trust.[2]

Unlike the terms of the 1983 trust, the terms of the 2011 trust do not allow Ferri to withdraw principal. Instead, under the terms of the 2011 trust, the plaintiffs

Page 226

have all of the control and decision-making power as to whether Ferri will receive any of the trust income or assets.

The trial court found that Ferri did not have a role in creating the 2011 trust or decanting any

of the assets from the 1983 trust. The trial court further found that it was undisputed that Ferri took no action to recover the trust assets when Michael **[116 A.3d 301]** Ferri informed him of the creation of the 2011 trust and the decanting of the assets. The trial court characterized the reasoning behind this inaction as follows: " [Ferri] does not want to sue his family . . . and he believes the [plaintiffs] are acting in his best interest."

After the plaintiffs created the 2011 trust and transferred the assets from the 1983 trust to it, they instituted the present declaratory judgment action seeking a ruling from the court that they had validly exercised their authority in transferring the assets and that Powell-Ferri had no interest in the 2011 trust assets. Powell-Ferri filed a counterclaim asserting claims of common-law and statutory fraud, civil conspiracy, and seeking a declaratory judgment. After the trial court struck counts alleging fraud and conspiracy, Powell-Ferri filed a second amended counterclaim, later revised, asserting claims of breach of fiduciary duty, breach of loyalty, tortious interference with an expectancy, and seeking a declaratory judgment, as well as the cross complaint that is the subject of this appeal.

Ferri filed a motion for summary judgment, claiming that the cross complaint failed to state a cause of action, and that even if it did set out a cause of action, there was no genuine issue of material fact to support Powell-Ferri's claims. Powell-Ferri opposed the motion on procedural grounds, namely that summary judgment is not the proper means to test the legal sufficiency of a complaint, and on the merits.

The trial court granted the motion for summary judgment, concluding that Powell-Ferri failed to state a cause of action. The trial court reasoned that, while marital partners have a fiduciary responsibility of full and open disclosure to each other, that responsibility does not extend to require spouses to recover assets belonging to the marital estate. The trial court observed that while spouses may not dissipate assets, " at a minimum dissipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage." *Gershman v. Gershman*, 286 Conn. 341, 350-51, 943 A.2d 1091 (2008). The trial court concluded that there was no allegation that Ferri " engaged in intentional waste or selfish impropriety." The court further reasoned that if such allegations were present, " [t]here is no societal expectation embodied in the law which impels or compels a divorcing spouse to take affirmative steps to recover an asset removed from the marital estate by the action of a third party alone." Accordingly, the court determined that the cause of action Powell-Ferri urged should not be recognized in Connecticut. This appeal followed.[3]

I

On appeal, Powell-Ferri first claims that the trial court improperly rendered summary judgment in favor of Ferri on the ground that her cross complaint did not plead a legally sufficient cause of action. Specifically, Powell-Ferri claims that the trial court improperly concluded that Ferri did not have a duty to act to preserve marital assets during the pendency of a dissolution action. In response, Ferri claims that the trial court

properly granted his motion for summary judgment because Connecticut should not recognize a new cause of action **[116 A.3d 302]** imposing a duty to act to preserve marital assets during the pendency of a dissolution action. We agree with Ferri.

We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. Practice Book § 17-49 provides that summary judgment " shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A party moving for summary judgment is held to a " strict standard." *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008). " To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Id.*

It is undisputed that, in this state, the question of whether a party to a dissolution action has a duty to act to preserve marital assets is an issue of first impression. Therefore, in this appeal we must determine whether we will recognize a new cause of action. " An exhaustive search of Connecticut case law reveals no hard and fast test that courts apply when determining whether to recognize new causes of action. We do have the inherent authority, pursuant to the state constitution, to create new causes of action. *Binette v. Sabo*, 244 Conn. 23, 34, 710 A.2d 688 (1998). Moreover, it is beyond dispute that we have the power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law. *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 235, 905 A.2d 1165 (2006); see, e.g., *Mead v. Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986) (recognizing action for damages under Connecticut Unfair Trade Practices Act for violations of Connecticut Unfair Insurance Practices Act); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 480, 427 A.2d 385 (1980) (recognizing tort of wrongful discharge); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 307, 93 A.2d 292 (1952) (recognizing torts of intentional and negligent infliction of emotional distress).

" When we acknowledge new causes of action, we also look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action. *Rizzuto v. Davidson Ladders, Inc.*, supra, 280 Conn. 235-36. To determine whether existing remedies are

sufficient to compensate those who seek the recognition of a new cause of action, we first analyze the scope and applicability of the current remedies under the facts alleged [in the operative pleading]. *Id.,* 236. Finally, we are mindful of growing **[116 A.3d 303]** judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent.

Page 230

Sheets v. Teddy's Frosted Foods, Inc., supra, 179 Conn. 480." *ATC Partnership v. Coats North America Consolidated, Inc.*, 284 Conn. 537, 552-53, 935 A.2d 115 (2007).

In the present case, the obligations of spouses to each other during the pendency of a dissolution action are set forth in General Statutes § § 46b-80 and 46b-81.[4] These statutes require parties to take certain steps in order to secure their financial interest in real property during the pendency of the dissolution and allow the court to order distribution of marital assets. Furthermore, this court has recognized that the trial court may consider a party's actions in dissipating marital assets when making its financial orders. See, e.g., *Finan v. Finan*, 287 Conn. 491, 508-509, 949 A.2d 468 (2008); *Gershman v. Gershman*, supra, 286 Conn. 346-47.

Page 231

Furthermore, Practice Book § 25-5 provides that automatic orders relating to the finances of the parties shall be served " with service of process of a complaint for dissolution of marriage or civil union, legal separation, or annulment . . . ." These automatic orders require parties to the dissolution action to exchange financial information in the form of sworn financial statements. The automatic orders also require parties to dissolution actions not to " sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action." Practice Book § 25-5 (b) (1). They also prohibit either party from concealing or encumbering any property. Practice Book § 25-5 (b) (2) through (3). Parties to dissolution actions are also ordered not to " cause any asset, or portion thereof, co-owned or held in joint name, to become held in his or her name solely without the consent of the **[116 A.3d 304]** other party, in writing, or an order of the judicial authority." Practice Book § 25-5 (b) (4). Further, " [n]either party shall incur unreasonable debts hereafter, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards." Practice Book § 25-5 (b) (5). Section 25-5 (c) (2) provides in relevant part that " [f]ailure to obey these orders may be punishable by contempt of court. . . ." As the foregoing demonstrates, our statutes and our rules of practice provide significant remedies for when a party to a dissolution action has been found to dissipate assets.

Powell-Ferri asserts that the public policy of the state supports the creation of a new cause of action requiring a party to a dissolution proceeding to take affirmative

Page 232

steps to recover marital assets taken by a third party. We disagree. Our review of the dissolution statutes and our rules of practice demonstrates that the public policy of this state is to attempt to

keep the financial situation of the parties at a status quo during the pendency of the dissolution action. " A party to an action for dissolution does not have unlimited power to frustrate orderly judicial adjudication of rights in marital property. While neither marriage nor an action for dissolution serves, in and of itself, to transfer an interest in property from one spouse to another; General Statutes § 46b-36; *Tobey v. Tobey*, 165 Conn. 742, 748, 345 A.2d 21 (1974); the institution of judicial proceedings serves, at least between the parties, to preserve the status quo from impairment by fraud. A transfer made after notice of an actual or imminent action seeking alimony or support may be found fraudulent and set aside. See *Pappas v. Pappas*, 164 Conn. 242, 244-45, 320 A.2d 809 (1973); *Harrison v. Harrison*, 228 Ga. 126, [126-27, 184 S.E.2d 147] (1971); *Sherrill v. Mallicote*, [57 Tenn.App. 241, 250, 417 S.W.2d 798 (1967)]." *Molitor v. Molitor*, 184 Conn. 530, 534, 440 A.2d 215 (1981).

Nevertheless, in *Gershman v. Gershman*, supra, 286 Conn. 351, this court found that a party to a dissolution proceeding does not dissipate assets in the absence of a finding of " either financial misconduct, e.g., intentional waste or a selfish financial transaction, or that the defendant had used marital assets for a nonmarital purpose with regard to either of these transactions." This court further explained that " [g]enerally, dissipation is intended to address the situation in which one spouse conceals, conveys or wastes marital assets in anticipation of a divorce. See 2 B. Turner, Equitable Distribution of Property (3d Ed. 2005) § 6:102, p. 539. Most courts have concluded that some type of improper conduct is required before a finding of dissipation can be made. Thus, courts have traditionally recognized dissipation

in the following paradigmatic contexts: gambling, support of a paramour, or the transfer of an asset to a third party for little or no consideration." (Footnotes omitted.) *Gershman v. Gershman*, supra, 346.

In *Finan v. Finan*, supra, 287 Conn. 499, this court concluded that " a trial court may consider evidence that a spouse dissipated marital assets prior to the couple's physical separation, for purposes of determining an equitable distribution of property under § 46b-81, so long as the actions constituting dissipation occur either: (1) in contemplation of divorce or separation; or (2) while the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." In doing so, this court examined the meaning of the term " preservation," which is not defined in § 46b-81. This court, therefore, turned **[116 A.3d 305]** to the ordinary understanding of the term. " The definition of `preserve' in the American Heritage Dictionary of the English Language (4th Ed. 2000) is `[t]o maintain in safety from injury, peril, or harm; protect. . . .' `Dissipation,' on the other hand, is defined as `[w]asteful expenditure or consumption. . . .' *Id*. Under the common usage of the terms, `dissipation' is the financial antithesis of `preservation.' More specifically, a party that dissipates assets detracts from the preservation of those assets. Accordingly, Connecticut trial courts have the statutory authority, under § 46b-81, to consider a spouse's dissipation of marital assets when determining the nature and value of property to be assigned to each respective spouse." (Footnote omitted.) *Finan v. Finan*, supra, 500-501.

A review of our statutes, rules of practice and case law demonstrates that the public policy of this state is to prohibit a party to a dissolution proceeding from removing marital assets for an

improper purpose and to maintain the status quo of the parties' assets during the pendency of the dissolution proceeding. In the present case, it is undisputed that Ferri did not have a role
Page 234
in creating the 2011 trust or decanting any of the assets from the 1983 trust. Accordingly, the public policy of prohibiting dissipation of assets by parties to a dissolution proceeding does not support the cause of action urged by Powell-Ferri.

A review of our statutory scheme and rules of practice further demonstrates that a party to a dissolution action that believes the other party improperly removed assets from the estate has adequate remedies available to it. First, the party that believes marital assets were fraudulently removed during the pendency of the appeal may ask that the court take such action into account when fashioning financial orders. Indeed, this court has repeatedly recognized that our statutory scheme empowers " trial courts to deal broadly with property and its equitable division incident to dissolution proceedings." *Lopiano v. Lopiano*, 247 Conn. 356, 365, 752 A.2d 1000 (1998). " [A]s a general matter, the trial court has wide discretion and broad equitable power to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. . . . *Passamano v. Passamano*, 228 Conn. 85, 95, 634 A.2d 891 (1993)." (Internal quotation marks omitted.) *Parisi v. Parisi*, 315 Conn. 370, 381, 107 A.3d 920 (2015). Also, under Practice Book § 25-5 (c) (2), the party that believes marital assets were fraudulently removed during the pendency of the appeal may file a motion for contempt of court for violation of the automatic order.

Indeed, as we explained previously herein, " [t]o determine whether existing remedies are sufficient to compensate those who seek the recognition of a new cause of action, we first analyze the scope and applicability of the current remedies under the facts alleged [in the operative pleading]." *ATC Partnership v. Coats North America Consolidated, Inc.*, supra, 284 Conn. 553. In the present case, although the facts do not seem to support a finding of dissipation under *Gershman v.*
Page 235
Gershman, supra, 286 Conn. 351, or the basis of a motion for contempt of court under Practice Book § 25-5 (c) (2), the broad equitable powers of the trial court in dissolution proceedings offers a remedy to Powell-Ferri. If the plaintiffs are allowed to decant the assets of the 1983 trust into the 2011 trust, which is solely for the benefit of Ferri, Powell-Ferri can ask the trial court to keep that transfer in mind when forming the mosaic of orders in the dissolution proceeding. In other words, in **[116 A.3d 306]** fashioning the financial orders of the dissolution proceeding, the trial court can take into account the significant assets that will be available to Ferri through the 2011 trust. " The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . ." (Internal quotation marks omitted.) *Passamano v. Passamano*, supra, 228 Conn. 95, quoting *Sunbury v. Sunbury*, 210 Conn. 170, 174, 553 A.2d 612 (1989).

Accordingly, we conclude that the judicial sanctions available are not so ineffective as to warrant the recognition of a new cause of action. See *ATC Partnership v. Coats North America Consolidated, Inc.*, supra, 284 Conn. 553 (" [w]hen we acknowledge new causes of action, we

also look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action").

Finally, Powell-Ferri does not cite, and we cannot find, any other jurisdiction that has recognized a cause of action against a party to a dissolution action for failing to take affirmative steps to recover marital assets from a third party. See id. (" we are mindful of growing judicial receptivity to the new cause of action"). Therefore, we decline the invitation to recognize such a cause of action in the present case.

Page 236

II

Powell-Ferri also claims that it was procedurally improper for the trial court to decide the legal sufficiency of her cross complaint within the context of a motion for summary judgment. In response, Ferri claims that it was proper for the trial court to grant summary judgment on the cross complaint because it was clear on the face of the complaint that it was legally insufficient and the defect could not be cured by repleading. We agree with Ferri.

We begin with the appropriate standard of review. " [W]e apply plenary review to the granting of either a motion for summary judgment or a motion to strike." *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 122, 971 A.2d 17 (2009).

" [T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading. *Larobina v. McDonald*, [274 Conn. 394, 401, 876 A.2d 522 (2005)]. [W]e will not reverse the trial court's ruling on a motion for summary judgment that was used to challenge the legal sufficiency of the complaint when it is clear that the motion was being used for that purpose and the nonmoving party, by failing to object to the procedure before the trial court, cannot demonstrate prejudice. A [party] should not be allowed to argue to the trial court that his complaint is legally sufficient and then argue on appeal that the trial court should have allowed him to amend his pleading to render it legally sufficient. Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade. . . .

Page 237

Id., 402." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, supra, 292 Conn. 121-22.

[116 A.3d 307] In doing so, this court has recognized that " there are competing concerns at issue when considering the propriety of using a motion for summary judgment for such a purpose. On the one hand, [i]f it is clear on the face of the complaint that it is legally insufficient and that an opportunity to amend it would not [cure that insufficiency], we can perceive no reason why [a] defendant should be prohibited from claiming that he is entitled to judgment as a matter of law and from invoking the only available procedure for raising such a claim after the pleadings are closed. . . . It is incumbent on a plaintiff to allege some recognizable cause of action in his complaint. . . . Thus, failure by [a defendant] to [strike] any portion of the . . . complaint does not prevent [that defendant] from claiming that the [plaintiff] had no cause of action and that [summary judgment

was] warranted. . . . [Indeed], this court repeatedly has recognized that the desire for judicial efficiency inherent in the summary judgment procedure would be frustrated if parties were forced to try a case where there was no real issue to be tried. . . . [*Larobina v. McDonald*, supra, 274 Conn. 401-402]. On the other hand, the use of a motion for summary judgment instead of a motion to strike may be unfair to the nonmoving party because [t]he granting of a defendant's motion for summary judgment puts [a] plaintiff out of court . . . [while the] granting of a motion to strike allows [a] plaintiff to replead his or her case. . . . *Id.,* 401; see Practice Book § § 10-44 and 17-49." (Internal quotation marks omitted.) *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, supra, 292 Conn. 120-21.

Page 238

In the present case, Powell-Ferri asserts that summary judgment was not appropriate and that she should have the opportunity to replead facts to state a legally sufficient cause of action. As we explained in part I of this opinion, we conclude that this court should not recognize any cause of action that would require a party to a dissolution proceeding to take affirmative steps to recover marital assets from a third party without a finding of dissipation. In light of that conclusion, there is no set of facts that Powell-Ferri could plead to state a legally sufficient cause of action under this theory and, therefore, we conclude that the trial court properly granted summary judgment in favor of Ferri.

The judgment is affirmed.

In this opinion the other justices concurred.

Notes:

[1]We note that, although Medaglia subsequently resigned from his position as trustee, he remains a plaintiff in the underlying action. On June 11, 2013, the trial court granted a motion seeking to add a new trustee, Maurice T. FitzMaurice, as a party plaintiff. The present appeal addresses only the judgment of the trial court on Powell-Ferri's cross complaint and, therefore, Michael Ferri, Medaglia, and FitzMaurice are not parties to this appeal. Because the facts underlying this appeal do not involve FitzMaurice, in the interest of simplicity, we refer to Michael Ferri and Medaglia collectively as the plaintiffs and individually by name.

[2]Ferri testified in his deposition that he thought the 1983 trust was worth between $60 and $70 million at some point before this transfer.

[3]Powell-Ferri appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4]General Statutes § 46b-81 provides: " (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect.

" (b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.
" (c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."
We note that, although § 46b-81 has recently been amended by our legislature; see Public Acts 2013, No. 13-213, § 2; that amendment has no bearing on the merits of the present appeal. In the interest of simplicity, we refer to the current revision of the statute.
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88 Mass.App.Ct. 121 (2015)

CURT F. PFANNENSTIEHL

v.

DIANE L. PFANNENSTIEHL (and two consolidated cases[1]).

Nos. 13-P-906, 13-P-686, 13-P-1385

Appeals Court of Massachusetts, Norfolk

August 27, 2015

Heard February 11, 2014.

Complaint for divorce filed in the Norfolk Division of the Probate and Family Court Department on September 22, 2010. The case was heard by Angela M. Ordonez, J.; a complaint for contempt, filed on January 24, 2013, was also heard by her; and a

motion to stay enforcement of the judgment pending appeal was considered by her.

A motion to stay the proceedings pending appeal was considered in this court by Vuono, J.

Robert J. O'Regan for the husband.

Jillian B. Hirsch for the wife.

Present: Kafker, C.J., Cypher, Kantrowitz, Berry, & Fecteau, JJ.[2]

BERRY, J.

The main issue presented — in what is the lead of three appeals[3]related to these divorce proceedings —concerns the decision of a judge of the Probate and Family Court (probate judge or judge) to include in the marital estate, for purposes of the G. L. c. 208, § 34, division, the husband's interest in a multi-million dollar trust established by the husband's father (the 2004 trust [4]). The principal of the 2004 trust was, in the main, associated with funding from the family's operation of corporations that own and operate for-profit colleges, including Bay State College in Massachusetts and Harrison College in Indiana.[5] The husband claims as error the assignment of $1, 333, 047 of the trust value to the wife and the requirement that the husband pay $48, 699.77 monthly for twenty-four months to effectuate the division of assets set forth in the amended judgment.[6]

As to this issue, the husband, citing a spendthrift provision in

the subject trust, argues that the 2004 trust value and income therefrom were isolated and were not within the marital estate, and, therefore, should have been excluded from consideration under G. L. c. 208, § 34.[7]

This spendthrift isolation theory, as detailed *infra*, is advanced notwithstanding that the 2004 trust had made distributions to the husband — including an outright $300, 000 in 2008 followed by 2009-2010 monthly payments of several thousand dollars — all of which were distributed from the 2004 trust to the husband, his twin brother, and a sister. *Only as* to the husband did these substantial monthly payments end, and *they did so precisely on the eve of the husband's divorce filing*. In contrast to the finale for the husband, the 2004 trust payments continued to the husband's

brother and sister. Specifically, there was a cutoff of the monthly payments to the husband of from $20, 000 to $65, 000 in August, 2010, one month before the commencement of divorce proceedings in September, 2010. This cutoff, of course, stands in stark contrast to the continuing pattern of distributions to the husband's two other siblings and undermines the husband's theory of exclusion of the 2004 trust.

For the reasons stated herein, we conclude that the record in the case, including but not limited to trust documentary exhibits, provides telling evidence that the spendthrift provision is being invoked as a subterfuge to mask the husband's income stream and thwart the division of the martial estate in the divorce. A chart set

Page 124

forth *infra* shows a spendthrift scheme that is virtually empty of purpose except as a form of insulation to inclusion and valuation in the divorce process. On this issue, we look to settled trust law, which holds that the mere statement of a spendthrift provision in a trust does not render distributions from a trust, such as this one, immune to inclusion in the marital estate for G. L. c. 208, § 34, calculations.

In addition to our determination that the probate judge correctly included the 2004 trust in the marital estate, we further conclude that the judge appropriately divided the marital estate by allocating sixty percent to the wife and forty percent to the husband.[8]

1. *Divorce appeal.*

a. *Factual background.*

The following is taken from the case record of the divorce. The parties were married in February, 2000, and last lived together in August, 2010. The parties have two children. At the time of trial, the son was eleven years old, and the daughter was eight years old. Both children have special needs. The son has been diagnosed with dyslexia and Attention Deficit Disorder (ADD) and attends a private school that specializes in teaching students with dyslexia. The daughter has been diagnosed with Down syndrome and has had significant medical and developmental issues throughout her life. The daughter currently is treated by nine specialists for her medical needs and attends a specialized school that provides her with physical, occupational, and speech therapy. She requires "around the clock supervision."

i. *The husband.*

At the time of the 2012 trial, the husband was forty-two years old. He had attended college for one and one-half years. He has dyslexia and ADD but is otherwise in good health. The husband comes from a family of substantial means. Those substantial family holdings are principally connected to the family's running of for-profit colleges. The tuition income from these for-profit educational businesses was substantial, and, indeed, was a main source of funding for the 2004 trust.

In addition, the husband was employed as an assistant bookstore manager for one such university and earned about $170, 000

Page 125

per year. The judge found that a "normal incumbent" in this assistant bookstore manager position would earn roughly $50, 000 to $60, 000 per year. The judge found that this handsome and

inflated salary flowed from the husband's "familial relations."[9]

Between 2008 and 2010, the husband received tax-free distributions from the 2004 trust as follows: $300, 000 received in one payment in 2008, $340, 000 received in six payments in 2009, and $160, 000 received at a rate of $20, 000 per month for the first eight months of 2010. Payments from the trust ceased after August, 2010, the month preceding the husband's filing for divorce.

In 2010, the husband's gross income, including the trust distributions of $160, 000, amounted to approximately $350, 000. At the time of trial, given the cessation of the trust income, the husband's gross annual income had diminished to $180, 000. The husband has substantial opportunities to acquire capital assets and income in the future.

ii. *The wife.*

The wife is forty-eight years old and is generally in good health. She is a college graduate who served as an officer in the United States Army Reserves for eighteen years. The wife left the military in 2004, just two years short of the twenty years of service that would have entitled her to a military pension. The decision to retire came after pressure from the husband and his family following the birth of the parties' daughter, who, as noted, is medically challenged. The wife currently works as an ultrasound technician one day each week and is paid approximately forty-six dollars per hour. At the time of trial, her gross yearly income from this position was $22,672.

The wife was the primary homemaker and caretaker of the two children throughout the entirety of the marriage. She has devoted extraordinary amounts of time and effort addressing the children's (and particularly the daughter's) personal, medical, educational, and extracurricular needs and activities. The judge found that the wife "currently spends most of her time caring for [the parties' daughter]." The daughter's needs are ongoing, and she will likely reside with the wife for numerous years to come. Although the wife has some opportunity to acquire assets in the

future, her opportunity is limited considerably by her care of the parties' daughter.

b. *The family lifestyle as interconnected to the 2004 trust distributions.*

During the marriage, the family was able to enjoy an upper middle class lifestyle. This expansive lifestyle was financially attributable, in large measure, to the distributions to the husband from the 2004 trust, the beneficence of the husband's father, and the rather large salary of $170, 000 which the husband received as the assistant bookstore manager. The probate judge did "not credit [the husband's] testimony that he lacked knowledge concerning where he spent the 2004 Trust distributions as well as whether he paid taxes on said distributions."

c. *The amended judgment.*

The pertinent parts of the judgment, as amended and dated August 13, 2012, are summarized as follows.

Including the husband's interest in the 2004 trust, the judge calculated the total value of the combined marital estate at $4, 305, 380. The judge divided assets in the marital estate (including the husband's interest in the 2004 trust) by allocating sixty percent to the wife and forty percent to the husband. In the final calculations including that division, and certain other assets, the wife received total assets valued at $2, 328, 688 and the husband received total assets valued at $1,

976, 692.

The judge found that the total value of the 2004 trust was $24, 920, 217.37. The judge calculated the husband's one-eleventh interest[10] in the trust at $2, 265, 474.31. The wife was allocated a portion of the 2004 trust worth $1, 133, 047.79. The husband retained a portion of the 2004 trust valued at $1, 132, 426.52.

To effectuate the asset transfers to the wife, the judge ordered the husband to make twenty-four monthly payments to the wife in the amount of $48, 699.77 .[11]

In other provisions of the amended judgment, the wife was designated the primary custodial parent of the children, subject to the husband's parenting schedule. The husband was ordered to pay child support in the amount of $1, 100 per week, an amount to which the parties stipulated. Neither party was awarded alimony.

Page 127

The judge also ordered the parties to maintain life insurance policies for the benefit of the children and, based on the judge's findings concerning the husband's obstructionist conduct at trial, ordered the husband to contribute $175, 000 towards the wife's attorney's fees. As we have indicated, both the husband and the wife have appealed.

d. *The 2004 trust.*

i. *General principles.*

At the outset, we set forth the general principles that bear upon the authority of the probate judge to determine whether to include an asset or an interest in the marital estate. In *D.L. v. G.L.*, 61 Mass.App.Ct. 488, 492-493 (2004), we stated:

"General Laws c. 208, § 34, defines the scope of a trial judge's discretion to assign interests in the marital estate to the wife or husband, based on a number of specified factors. . . . Separate from the division of assets within the estate is the question whether certain assets properly are considered a part of the estate. In making the determination of what to include in the estate, the judge is not bound by traditional concepts of title or property. 'Instead, we have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's estate for purposes of § 34.' *Baccanti v. Morton*, 434 Mass. 787, 794 (2001), quoting from *Lauricella v. Lauricella,* 409 Mass. 211, 214 (1991). 'When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under § 34.' *Williams v. Massa,* 431 Mass. 619, 628 (2000)."

D.L. v. G.L., *supra*, quoting from *S.L. v. R.L.*, 55 Mass.App.Ct. 880, 882-883 (2002) .[12]

In this case, we determine that the judge acted properly in including the husband's interest in the 2004 trust in the marital estate, which we further describe below, and appropriately valued and divided the trust assets.

ii. *Trust background.*

We outline the only parts of the 2004 trust material to these appeals. The 2004 trust is an irrevocable spendthrift

Page 128

trust that was established by the husband's father. The 2004 trust holds shares of stock in the husband's family-controlled private corporations, which corporations, in turn, own and operate for-

profit colleges.[13] Among additional assets and liabilities in the 2004 trust, there are promissory notes owed to the husband's father, and life insurance policies.[14]

There are two trustees of the 2004 trust. The husband's twin brother is one trustee. This brother is also vice-president and secretary of Educational Management Corporation and president and treasurer of Bay State College, which is owned by Bay State Education Corporation and holds stock in that particular for-profit college (see note 5, *supra*). The brother and the father serve as officers and directors of the corporations. Thus, in these corporate roles, the brother and father decide and control what dividends are to be paid to the trust, impacting the funding to the 2004 trust, and, in turn, the 2004 trust principal and income available for distributions.

The second trustee was ostensibly an outside trustee, but this trustee was also inextricably interconnected with, and aligned with, the husband's family. This trustee is a lawyer, and he and his law firm have represented the husband's father and his businesses since 1972. His law firm also represents the trustees of the 2004 trust. At trial, this trustee's testimony manifested not only hands-off administration, but also little, if any, scrutiny of the 2004 trust distributions; indeed, this trustee appeared unaware of the level of, or timing of, the distributions.

To use understatement: the record shows the 2004 trust was not administrated impartially by the two trustees. To the contrary, the judge expressly found that as the divorce began, "the proverbial

family wagons circled the family money." We have described some record facts that support the judge's graphic image and findings, but there are far more. Among other facts, the judge cited the cessation before the divorce of distributions to the husband and continuing pattern of monthly distributions to the husband's brother and sister; the judge also considered the unusual testimony of the supposedly independent cotrustee concerning the ongoing payments to the brother and sister. This trustee said that the reason why the distributions to the husband were discontinued was out of a concern that the intent of the donor (the husband's father) to keep funds within the family might be violated if distributions continued. This statement was not indicative of independence.

iii. *Chart showing cutoff of 2004 trust distributions to the husband.*

In calculating the 2004 trust distributions, the judge added the numbers as follows: between April, 2008, and August, 2010, the husband received $800, 000 from the trust and, since April, 2008, the husband's brother received $1, 133, 207 and his sister received $1, 180, 000.

The following chart reveals how the spigot from the 2004 trust of substantial monthly income distribution was deliberately and abruptly shut off for the husband *alone* as the divorce proceedings were in the immediate offing. (Again, to be noted is that this chart does not include the $300, 000 outright distribution in 2008.)

Date	Trust Funding from College	Trust Funding from Investment	Brother Distributions from Trust	*HUSBAND* Distributions from Trust	Sister Distributions fr

	ge Income	Account			
Jul-07	1, 584, 000	95, 000			
Aug-07					
Sep-07		30, 000			
Oct-07		130, 000			
Nov-07					
Dec-07					
Jan-08		90, 000			
Feb-08					
Mar-08					
Apr-08		90, 000			
May-08					
Jun-08	(1, 332, 000)				
Jul-08	1, 332, 000	95, 700			
Aug-08					
Sep-08					
Oct-08					
Nov-08					
Dec-08					
Jan-09		95, 000			
Feb-09					
Mar-09					
Apr-09		100, 000			
May-09		225, 000	(65, 000)	(65, 000)	(65, 000)
Jun-09		280, 000	(85, 000)	(85, 000)	(85, 000)
Jul-09		265, 000	(60, 000)	(60, 000)	(60, 000)
Aug-09		90, 000	(30, 000)	(30, 000)	(30, 000)

Sep-09	150, 000	(50, 000)	(50, 000)	(50, 000)
Oct-09	140, 000			
Nov-09	135, 000	(50, 000)	(50, 000)	
Dec-09	135, 000			
Jan-10	135, 000	(20, 000)		(20, 000)
Feb-10	135, 000	(20, 000)	(40, 000)	(20, 000)
Mar-10	135, 000	(20, 000)	(20, 000)	(20, 000)
Apr-10	877, 500		(20, 000)	(20, 000)
May-10	135, 000		(20, 000)	(20, 000)
Jun-10	135, 000	(13, 207)	(20, 000)	(20, 000)
Jul-10	225, 000	(20, 000)	(20, 000)	(20, 000)
Aug-10	225, 000	(20, 000)	(20, 000)	(20, 000)
Sep-10	225, 000	(20, 000)		(20, 000)
Oct-10	225, 000	(20, 000)		(20, 000)
Nov-10	225, 000	(20, 000)		(20, 000)
Dec-10	225, 000	(20, 000)		(20, 000)
Jan-11	253, 127	(20, 000)		(20, 000)
Feb-11	253, 127	(20, 000)		(20, 000)
Mar-11	253, 127	(20, 000)		(20, 000)
Apr-11	253, 127	(20, 000)		(20, 000)

May-11		(20, 000)	(20, 000)
Jun-11		(20, 000)	(20, 000)
Jul-11	253, 127	(20, 000)	(20, 000)
Aug-11	253, 127	(20, 000)	(20, 000)
Sep-11	253, 127	(20, 000)	(20, 000)
Oct-11	107, 207	(20, 000)	(20, 000)
Nov-11	107, 207	(20, 000)	(20, 000)
Dec-11	107, 207	(20, 000)	(20, 000)
Jan-12	154, 735	(20, 000)	(20, 000)
Feb-12	154, 735	(20, 000)	(20, 000)
Mar-12	154, 735	(20, 000)	(20, 000)

Page 131

It is clear that this cutoff of the distributions from the 2004 trust only to the husband and just on the eve of divorce was a deliberate manipulation to erase a major component of the husband's annual income and to silence his interest in the trust — for a convenient time while the divorce was ongoing. Significantly, the judge found it likely that the husband would receive distributions from the 2004 trust after the divorce was over. The judge found as follows. "The Court finds that the suspension of trust distributions occurred because [the husband] filed for divorce and the Trustees deemed it risky to give [the husband] money that might be shared with [the wife], a non-beneficiary. " The husband now seeks to cover this manipulation by invoking the spendthrift provision.[15]

iv. *The spendthrift provision.*

This pattern of distribution — substantial distributions before the divorce, then zero as the divorce loomed — belies the husband's invocation of a spendthrift provision to exclude the 2004 trust from his marital estate. The spendthrift provision provides as follows:

"Neither the principal nor income of any trust created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other

Page 132

seizure under any legal, equitable or other process."

It is well established by law that a trust, even one with a spendthrift provision, may be included in a marital estate for purposes of division under § 34. "Common sense and basic concepts of fairness support the notion that ownership of a valuable asset demonstrates ability to pay without further inquiry as to whether payment can be enforced directly against the asset. . . . The law does not require that an obligor be allowed to enjoy an asset —such as a valuable home or the beneficial interest in a spendthrift trust — while he neglects to provide for those persons whom he is legally required to support." *Krokyn v. Krokyn*, 378 Mass. 206, 213-214 (1979). Accord *Lauricella v. Lauricella*, 409 Mass. at 216. "[W]e have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's estate for purposes of § 34." *Id.* at 214. Thus, in *Lauricella* it was held that a trust with a spendthrift clause was includable under § 34. See *Davidson v. Davidson*, 19 Mass.App.Ct. 364, 371 (1985) (remainder interest subject to valid spendthrift clause included in estate for property division under § 34).

v. *The ascertainable distribution standard in the 2004 trust.*

We also consider, as did the probate judge, whether in this case the trust is subject to an ascertainable standard which supports the inclusion of this asset in the marital estate. The income stream was not too remote or speculative, nor purely discretionary.

As to the ascertainable standard for distribution, the 2004 trust provides in art. first, par. A, a common distribution standard tied to such life matters as support, welfare and maintenance. "Until the division of the Trust into separate shares pursuant to paragraph B below, the Trustee shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, *to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class* .... In the exercise of such discretion, the Trustee may take into account funds available from other sources for such needs of each beneficiary .... At the end of each taxable year, any net income which is not disposed of by the terms of this paragraph shall be added to the principal of the trust estate." (Emphasis added.)

Thus, the husband had a present enforceable right to distributions from the 2004 trust. That factor, among others, was appropriately assessed by the probate judge in weighing the value and manner of the total asset division to the wife. Significantly, the judge found it likely that the husband would receive distributions from the 2004 trust after the divorce was over.

In these respects, the 2004 trust differs from wholly discretionary trusts, with no distribution standards regarding support, health, maintenance, welfare, or education. Thus, we are not persuaded by the husband's citation to *D.L. v. G.L.*, 61 Mass.App.Ct. 488, because the trust at issue in that case involved payments that were wholly discretionary, and, consequently, the trust was not includable in the marital estate. (In *D.L.*, *supra*, neither income nor principal had ever been distributed from the subject trust to the husband, a marked contrast to this case where there were serial monthly distributions to the husband.)

Reduced to essentials, it is clear that the 2004 trust has an ascertainable standard pursuant to which the trustees, as fiduciaries, were obligated to, and actually did, distribute the trust assets to the beneficiaries, including the husband, for such things as comfortable support, health, maintenance, welfare, and education. Illustrative of ascertainable standards which govern trust distributions, see, e.g., *Marsman v. Nasca*, 30 Mass.App.Ct. 789, 795 (1991), quoting from *Woodbury v. Bunker*, 359 Mass. 239, 243 (1971) (language directing trustees to pay beneficiary such amounts as they "shall deem advisable for his comfortable support and maintenance" has been interpreted to set an ascertainable standard, namely to maintain life beneficiary "in accordance with the standard of living which was normal for him before he became a beneficiary of the trust"). See also *Dana v. Gring*, 374 Mass. 109, 117 (1977); *Dwight v. Dwight*, 52 Mass.App.Ct. 739, 744 n.5 (2001) ("the trustee would be under a duty to provide income from the trust to the husband should the trustee determine, upon inquiry, that the husband needed it") .

Given these ascertainable standards, the husband's interest in the trust is vested in possession, with a presently enforceable right to the trust distributions to support his lifestyle during his lifetime including for maintenance, welfare, and education (and including educational funds needed for the special needs of the two children). Indeed, the pattern of distributions up to the time of the divorce filing (with the husband regularly receiving distributions until the eve of the divorce filing) reflects distributions from the 2004 trust that fall within these ascertainable standards.

Page 134

Finally, it cannot be gainsaid that the substantial income distributions for support, maintenance, and welfare from the 2004 trust were woven into the fabric of the marriage. The 2004 trust distributions were integral to the family unit, and the family depended upon these trust distributions monies to meet their routine expenses and to maintain their standard of living. It was mostly the large cash distributions from the 2004 trust which allowed the husband and wife to live an upper middle class lifestyle, own an expensive home, supplement the expenses for their special needs children's services, and live well beyond the husband's inflated bookstore income of $170, 000. The judge found the husband had expenses of $3, 557 per week and wife had expenses of $2, 910. Their combined annual expenses are $336, 284. As the judge found, such high-level expenses could *only* have been met with augmentation from the 2004 trust distributions. Notably, the trust distributions were all tax-free, so the disposable income was significant. In short, the family lifestyle and expenses, as a matter of financial mathematics, could not have been met on the husband's after-tax net income *without* the 2004 trust income stream as woven into the marriage fabric.

Furthermore, upon termination of the distributions from the 2004 trust, the husband will receive a share equal to his siblings. The husband therefore has a vested beneficial interest subject to inclusion in the marital estate. Even a "remainder interest under [a] testamentary trust . . . constituted a sufficient property interest to make it a part of [the] estate for consideration in connection with a property division under § 34." *Davidson v. Davidson*, 19 Mass.App.Ct. at 372. [16]

vi. *The 2004 trust valuation and division.*

Having decided that the 2004 trust was includable in the marital estate, the judge had discretion to divide that asset. "Once the judge included these assets as part of the marital estate, [he] had broad discretion to determine how to divide the entire estate equitably . . . ." *Williams v. Massa*, 431 Mass. at 625-626. Moreover, the fact that the value of a vested, but not yet distributed, interest may not be susceptible of precise calculation "does not alter its character as a divisible asset." *Lauricella v. Lauricella*, 409 Mass. at 217. See *Davidson v. Davidson*, 19 Mass.App.Ct. at 373 n.12.

Our divorce law takes an expansive view of what may comprise

Page 135

the marital estate of a party, including a beneficial interest in a trust. In this case, the distributions to the husband from the 2004 trust from 2008 to 2010 (prior to the divorce) support including the 2004 trust in the estate of the recipient subject to division under G. L. c. 208, § 34. See *Earle v. Earle*, 13 Mass.App.Ct. 1062, 1063 (1982); *Davidson v. Davidson*, 19 Mass.App.Ct. at 37 4 n.13; *Comins v. Comins*, 33 Mass.App.Ct. at 30.

For these reasons, we conclude that the ascertainable standard embedded in the 2004 trust, the enforceability of that standard for distributions to the husband, and the vested nature of the husband's interest in the 2004 trust warranted the judge in including the 2004 trust in the marital estate.[17]

e. *Attorney's fees.*

The award of attorney's fees to the wife's counsel in the amount of $175, 000 was based, in large part, on the husband's failure to obtain information concerning, and to list a value for (other than as "uncertain"), his beneficial interest in the 2004 trust. On this record, including, but not limited to, the attorney's fees unnecessarily incurred by the wife in "scorched earth litigation" and discovery violations,[18] we conclude the fees awarded are reasonable and shall be affirmed.

2. *The contempt case.*

On January 24, 2013, the wife filed a complaint for contempt, alleging that the husband had failed to comply with the amended judgment of divorce because he had not made a required monthly payment in the amount of $48, 699.77.

The husband stated that he had no independent ability to make the monthly payments and, therefore, could not be adjudged in contempt. In his answer, and later through the representations of his counsel at the contempt hearing and in his own affidavit, the husband stated that while he had been making monthly payments to the wife in the required amount as a result of loans he had been receiving from his father, in January, 2013, his father had indicated that he would no longer be lending monies to the husband

Page 136

for this purpose.[19]

After his father decided to stop lending money to him, the husband requested, by letter, that the two trustees of the 2004 trust make distributions to him on a monthly basis so that he could comply with the judgment. Not surprisingly given the distribution cutoff, which was tied to the divorce, the trustees declined the husband's request for distributions.

After hearing, the husband was adjudicated guilty of contempt for failing to pay to the wife

each month the sum of $48, 699.77 for the period between January 15, 2013, and April 15, 2013. Arrearages (including the interest thereon) were fixed at $200, 634.05, and the husband was ordered to pay attorney's fees to the wife's counsel in the amount of $5, 250. The husband was ordered to jail for a period of sixty days unless released earlier by the payment of the amounts due. In her findings, the judge stated that the husband had violated a clear and unequivocal order and that he had sufficient assets to pay what he currently owed.

On this convoluted record, we are not persuaded that the contempt judgment can stand under the standard of *Birchall*, *petitioner*, 454 Mass. 837, 853 (2009). Here the husband did, or at least ostensibly tried to do, what he was supposed to do (write the letter to the trustees requesting distributions from the 2004 trust). Although one might be disposed to question the genuineness of all these machinations given the bias of the two trustees and the husband's father, the outcome of the matter is that it was not proved by clear and convincing evidence that the husband wilfully and intentionally violated a clear and unequivocal order. Accordingly, the judgment of contempt is set aside. See *Dominick v. Dominick*, 18 Mass.App.Ct. 85, 94 (1984); *Flaherty v. Flaherty*, 40 Mass.App.Ct. 289, 289 (1996).

3. *The motions to stay.*

Following the entry of the amended judgment of divorce, the husband filed a motion for stay pending appeal, which was denied by the probate judge on March 7, 2013. Thereafter, the husband filed a motion for stay in this court pursuant to Mass.R.A.P. 6(a), as appearing in 454 Mass. 1601 (2009), which was denied by a single justice, without comment, on April 12, 2013. The husband has appealed from the order of the single justice. We see no merit in this appeal. Indeed, we note that on February 11, 2014, a panel of this court stayed so much

of the amended judgment as required the husband to pay to the wife the monthly sum of $48, 699.77 for twenty-four months to effectuate the judgment.

As to the stay during this appeal, that stay shall be vacated upon entry of the rescript by this court.[20]

Conclusion.

In the divorce appeal, docket no. 13-P-906, the amended judgment is affirmed. In the contempt action, docket no. 13-P-1385, the judgment of contempt is vacated. The wife's request for appellate attorney's fees and costs is denied. In the appeal from the order of the single justice denying the stay pending appeal, docket no. 13-P-686, the appeal is dismissed.

So ordered.

FECTEAU, J. (dissenting, with whom Kantrowitz, J., joins).

In my view, the husband's interest in the 2004 income distribution trust (the 2004 trust) is too remote and speculative, too dependent on trustee discretion, and too elusive of valuation to have been included in the marital estate for purposes of division. Therefore, I respectfully dissent from that part of the majority opinion affirming the portion of the amended judgment that includes the husband's interest in the 2004 trust in the marital estate for purposes of division pursuant to G. L. c. 208, § 34.

I recognize, as the majority points out, that the existence of a spendthrift clause within a trust

instrument, such as the trust instrument at issue here, does not necessarily preclude the trust from being included in the marital estate. See *Lauricella v. Lauricella*, 409 Mass. 211, 216 (1991) . Moreover, it is also accurate for the majority to state that the uncertainty of value of a party's interest in an asset alone is not necessarily sufficient to

Page 138

preclude consideration of the interest as subject to division. See *Id.* at 217. Last, I agree that the trust at issue here contains an ascertainable standard — namely, the "comfortable support, health, maintenance, welfare, and education" of each member of the class. However, each of the aforementioned propositions cannot be viewed in isolation but, rather, must be read together and in the context of the entire trust instrument. As discussed further *infra*, the trust instrument as a whole, including but not specifically limited to the spendthrift clause, the uncertain value of the interest, and the discretionary nature of the instrument, renders the husband's interest in the trust too speculative and remote for inclusion in the divisible estate. See *D.L. v. G.L.*, 61 Mass.App.Ct. 488, 496-497 (2004).

At the outset, the wife's reliance upon *Comins v. Comins*, 33 Mass.App.Ct. 28 (1992), is misplaced, as it does not govern the present case in material respects. In *Comins*, the wife was the beneficiary of a fund "held as a separate trust, " for her sole benefit, that had been settled and funded by her father, the terms of which provided that "the trustee should 'in its discretion pay to [the wife] so much or all of the income and principal of [the trust] as in its discretion it deems advisable to provide for the *comfort, welfare, support, travel and happiness* of [the wife].'" *Id.* at 30 & n.4 (emphasis in original). The wife was also granted the power to appoint recipients of the trust corpus upon her death. *Ibid*. In addition, the trust had a fixed fair market value. *Id.* at 30. It was in this context that we concluded that the judge properly included in the marital estate the wife's interest in the trust, stating, inter alia, that "[a]s in *Lauricella* [*v. Lauricella*, 409 Mass. at 216,] the wife has a 'present, enforceable, equitable right to use the trust property for [her] benefit.'"[1] *Id*. at 31. Compare *Randolph v. Roberts*, 346 Mass. 578, 579(1964) (where Supreme Judicial Court, in discussing trust established for support of named beneficiary, stated: "[t]he trust confided exclusively to the discretion of the trustees the decision whether any principal should be used for the support of the defendant [beneficiary]. She has no absolute right to the use of any part of the principal, and could herself compel principal payments only by showing that the trustees had abused their discretion by acting arbitrarily, capriciously

Page 139

or in bad faith"); *Pemberton v. Pemberton*, 9 Mass.App.Ct. 9, 20-21 (1980) (where, in case in which trust appears to have contained ascertainable standard, we stated, "if even apart from the spendthrift clause a trustee is given the discretionary power to distribute income or principal to described beneficiaries, 'any right of any beneficiary to receive anything is subject to the condition precedent of the trustee having first exercised his discretion" [quotation and citation omitted]).

Unlike the trust in *Comins*, there are a number of considerations regarding the trust in the present case that militate against inclusion of the husband's interest in the trust, for purposes of a division of property in the marital estate. First, the trust at issue has an open class and multiple beneficiaries, in different generations, to whom the trustees owe fiduciary duties.[2] This is in

obvious contrast to the trust in *Comins*, which had as its sole beneficiary the wife, and the trust in *Lauricella*, of which the husband was one of two beneficiaries. Given that the trust at issue here has an open class, both the near-term and long-term interests of the beneficiaries are implicated. See *D.L. v. G.L.*, 61 Mass.App.Ct. at 497 (citing as one factor generational nature of trust in concluding that husband's interest in trust was too remote and speculative) .

Second, the "ascertainable standard" in the present case cannot be read in isolation. It must be considered in the context of the terms of discretion in which it is found and of the entire trust instrument. While the trust instrument evinces an intent on the part of the husband's father to benefit the husband (and the other beneficiaries) for specified purposes, it grants to the trustees discretion as to the amounts and timing of distributions and allows the trustees to take into account (among other factors) funds available from other sources. The trustees have made distributions in some years and not in others. In short, the husband's interest in the 2004 trust stands on different footing from a party's interest in cases where interests are more clearly fixed

and certain. Compare *Lauricella v. Lauricella*, 409 Mass. at 216-217 (husband's interest in trust rightfully included in marital estate where husband was one of two beneficiaries, and trust was completely funded by sole asset, which was house in which husband had regularly resided previously and from sale of which husband could profit); *Comins v. Comins*, 33 Mass.App.Ct. at 30-31 (wife's interest in trust properly included in marital estate where wife was sole beneficiary of separate trust which had fixed fair market value).

Significantly, valuation of the husband's interest is too speculative to stand and further demonstrates why the interest should not have been included in the estate. There are serious problems in this case with respect to the judge's determination that the husband has a one-eleventh interest in the 2004 trust which underscore the difficulty of establishing the husband's interest and undermine the judge's valuation of that interest.Simply put, the judge's determination of the husband's one-eleventh interest, and the valuation that flows therefrom, should not stand. Not only does the trust instrument make clear that the class of beneficiaries is open (and the number of beneficiaries may well increase), but the trust also allows for distributions to be made in equal or unequal shares, and upon consideration, in the trustees' discretion, of funds available from other sources for the needs of each beneficiary.[3] Furthermore, determination of the husband's interest in the principal amount at that time at one-eleventh places him, and the wife, by virtue of this ruling, in an unfair advantage, not only vis-a-vis possible additional beneficiaries, but also in the event of a deterioration in the trust corpus (which appears not unlikely given the scrutiny of "for-profit" educational institutions by the Federal government).[4] In the circumstances of this case, the fractional share methodology employed by the judge has

produced an arbitrary result. See *Adams v. Adams*, 459 Mass. 361, 386 (2011); *Ray-Tek Servs., Inc. v. Parker*, 64 Mass.App.Ct. 165, 175 (2005) ("Valuation of assets . . . should be based on evidence that shows it by a fair degree of certainty and accuracy" [citation omitted]).[5]

The majority makes note of what it considers machinations on the part of the trustees to discontinue trust payments to the husband on the eve of the divorce filing in an effort to paint the

husband's interest as remote and speculative where it never had been previously. However, the primary focus of the instant inquiry should be the terms of the trust instrument itself, not how those terms may be or have been manipulated. In other words, consideration of such manipulation must be secondary to the terms of the trust instrument itself.[6]

In addition to the aforementioned issues, inclusion of the husband's interest in the trust will create practical problems. Namely, the judge's decision to include the husband's beneficial interest in

the trust as a divisible asset of the marital estate means that administrative hardships — in the form of future litigation — are not only possible but very likely. See *Williams v. Massa*, 431 Mass. 619, 628 (2000) (court, in discussing husband's unspecified "contingent remainder interests, " stated: "[n]either the present assignment of a percentage of a contingent interest's value, nor a future award on an 'if and when' basis, avoids administrative hardships inherent in the valuation of expectant interests or in the requirement of continued court supervision"). Here, not only are there administrative hardships inherent in the valuation of the husband's interest, but continued court supervision looms large, as the judge's decision appears to envision future actions by the husband and the trustees (which could conceivably result in ancillary litigation) Also, it should be noted that, unlike alimony, property divisions are not subject to modification *See Hanify v Hanify,* 403 Mass. 184, 193 (1988) (Liacos, J, concurring in part and dissenting in part). This is important given that the class is open and subject to growth, thereby making the valuation even more dubious.

On all of the circumstances, the husband's interest in the trust should not have been included in the marital estate. Rather, this interest should have been weighed under the G. L. c. 208, § 34, criterion of "opportunity of each [spouse] for future acquisition of capital assets and income." For this reason, I dissent.

Notes:

[1] Both involving the same parties.

[2] These consolidated cases were initially heard by a panel comprised of Justices Kantrowitz, Berry, and Fecteau. After circulation of the opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Kafker and Justice Cypher. See *Sciaba Constr. Corp . v. Boston*, 35 Mass.App.Ct. 181, 181 n.2 (1993). Justice Kantrowitz participated in the deliberation on this case while an Associate Justice of this court, prior to his retirement.

[3] The three consolidated appeals are from the amended judgment of divorce, the judgment of contempt, and the single justice's order denying the motion for a stay.

[4] The legal title of the 2004 trust is the "Frederick G. Pfannenstiehl 2004 Trust."

[5] These two colleges are owned by Bay State Educational Corporation and Educational Management Corporation, corporations controlled by the husband's family. Bay State Education Corporation does business as Bay State College in Massachusetts. Educational Management Corporation does business as Harrison College which is a postsecondary higher education institution with thirteen to fourteen campuses in Indiana and surrounding States and which, at the time of trial, had an enrollment of approximately 6, 000 students. See note 13, *infra*.

[6] Other issues presented in the three consolidated appeals include the husband's arguments that he was denied his right to trial before an impartial magistrate; that many of the judge's findings of fact are plainly wrong; that the judge's award of attorney's fees to the wife was an abuse of discretion; that the judgment finding him in contempt was in error; and that an order denying his motion for a stay should be set aside.

In a cross appeal the wife argues that the award of attorney's fees was insufficient; that the judge erred by not considering future distributions from the 2004 trust as income in calculating support; and that the judge should have included the husband's hypothetical claim for breach of fiduciary duty in the marital estate.

We address these other issues, after first turning to the principal issue involving the 2004 trust. In summary, as to these various other issues, we determine with respect to the major claims that (1) the wife's attorney's fees were warranted; (2) the contempt finding against the husband is not sustainable; and (3) the stay which ordered no further payments to the wife pending appeal shall be vacated. The husband's claim that his case was not decided by an impartial magistrate lacks any merit.

[7] General Laws c. 208, § 34, as amended by St. 2011, c. 124, § 2, states:

"In fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each of the parties, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony . . . In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage . . . contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

[8] It is more than worthy of note that in this complicated, intensely litigated case with eight days of trial, this judge did a masterful job in marshalling the facts and compiling the record in a memorandum of decision spanning forty-two pages, including 344 fact findings (which often provide clarity in a maze of seemingly nontransparent financial arrangements) and accompanying legal analysis and rationale. That memorandum decision provides an insightful backdrop to the eight appellate briefs of 295 pages and the 4, 769 pages of record appendices submitted to this court in the three separate appeals.

[9] These same familial relations provided the husband the opportunity to take a four-year leave of absence from his employment between 2007 and 2011 to pursue carpentry and building work. During his leave of absence, the husband earned only modest income from his carpentry work and continued to receive his full salary as an assistant bookstore manager. The husband has also earned modest amounts as an on-call firefighter and a snowplow driver.

[10] The husband's interest was formulated on the basis of the current number of beneficiaries.

[11] These $48, 699.77 payments were the subject of the wife's contempt action against the husband, see part 2, and were stayed during a part of the pendency of this appeal, see part 3.

[12] Whether a party's interest in trust property is part of the marital estate for purposes of § 34

has been said to present a question of law. See *Lauricella v. Lauricella*, 409 Mass. at 213 & n.2; *D.L. v. G.L.*, *supra* at 493-494. The instant case also presents intensive and supported fact finding on the part of the probate judge concerning the distributions from the trust leading up to the time of the divorce and thereafter.

[13] The 2004 trust shares are comprised of thirty-six percent of the outstanding shares (i.e., currently 3, 600 shares) of Educational Management Corporation and fifteen percent of the outstanding shares (i.e., 1, 569 shares) of Bay State Education Corporation. The 2004 trust holds three life insurance policies on the life of the husband's father (which are intended to pay any estate tax in the event of his death) and a cash account.

[14] Thus, as of the date of trial, the husband's father had been paid close to $7 million on a promissory note from the trust. At the time of trial, approximately $5, 378, 701 in principal and interest were still owed to the husband's father pursuant to the promissory note and a later amended promissory note. The trust is also obligated to pay the premiums on the three life insurance policies held by the trust (annual payments amount to $435, 000 per year). Although not obligated to do so, the trust makes payments to the husband's father for taxes owed on income in addition to the principal and interest owed on the amended promissory note.

[15] Notwithstanding the significant assets and distributions, there were no annual accountings by the trustees of the 2004 trust.

[16] We reject the husband's argument that simply because the pool of beneficiaries remains open to future offspring, the 2004 trust is not subject to valuation and division as an asset of the marital estate.

[17] The value the judge assigned to the husband's interest in the 2004 trust was justified on the record.

[18] We note two limited examples, from an array of such tactics. In the husband's trial testimony (on a point *not* credited by the probate judge), the husband testified that he did *not* know what he did with $800, 000 in distributions he received. Likewise, in discovery, in an act reflecting his nonproduction of trust information, the husband in one of his financial statements referred to a beneficial interest in a trust set up by his father, but listed that trust as having *no value*.

[19] The wife acknowledges in her brief that the husband made five monthly payments to her from August 15, 2012, to December 15, 2012.

[20] Contrary to the wife's assertion, we decline to hold that the judge improperly failed to include the husband's hypothetical breach of fiduciary duty claim (which she values at $380, 000) as a marital asset under G. L. c. 208, § 34. Where, as here, there is no pending lawsuit against the trustees, contrast *Hanify v. Hanify*, 403 Mass. 184, 188 [1988]), and the record is devoid of indication that the husband intends to file such an action, we think the hypothetical breach of fiduciary duty claim is too speculative to be included in the marital estate.

We also reject the wife's argument that future trust distributions to the husband should have been included in the determination concerning alimony. The judge correctly decided that "[s]ince Husband's share of the 2004 trust is being divided, the court will not use any future stream of income from distributions in assessing alimony."

[1] The sole asset of the trust in *Lauricella* was a two-family house, and the Supreme Judicial

Court stated that the husband in that case had exercised his right to use the property during the marriage by residing in one of the dwelling units in the house. *Lauricella v. Lauricella*, 409 Mass. at 212, 216.

[2] There are currently eleven beneficiaries of the 2004 trust — the husband and his two siblings, and their eight children. The judge noted that neither the husband nor his siblings have grandchildren "at this time." Only the husband and his two siblings have received any distributions from the 2004 trust to date. The trust also provides that, until the death of the donor, the independent trustee is authorized, "in its sole and absolute discretion, to add one or more spouses of the Donor's issue as a permissible beneficiary of the income and principal of any trust established hereunder."

[3] Indeed, the judge acknowledged in her order denying the motion for stay pending appeal that the exact amount of the husband's interest in the trust may be uncertain.

[4] There are two additional problems relating to valuation of the stocks at issue. First, the nature of the corporations —for-profit colleges — is such that shareholders of the corporations, such as the trust, are obligated to contribute money to the corporations yearly when the corporations are attempting to comply with Federal rules and regulations. Therefore, the trust corpus can fluctuate greatly depending on the financial needs of the corporations in relation to compliance with Federal law. Second, the two corporations in which the trust owns stock are close family corporations and, thus, it appears that the stocks are not publicly traded. Common sense dictates that this fact renders the stock even more difficult to value and presumably more difficult to sell (if the trustees decided, in their discretion, to sell the stocks), and valuation necessarily depends on third-party appraisals only. It should also be noted that the trust's thirty-six percent share in one corporation is a nonvoting share, and the professional trustee testified that there would not be a buyer for nonvoting shares such as these.

[5] The wife, in her proposed rationale, took the position that a disposition of the husband's interest in the 2004 trust should not be made on an "if and when received" basis. Relying, in part, on *Krintzman v*. *Honig*, 73 Mass.App.Ct. 1124 (2009) (a case decided pursuant to Appeals Court rule 1:28), she asserted that such an approach is inappropriate (and essentially constitutes an illusory division) when it could enable the trustees to make distributions in a manner that would prevent her from obtaining the value of the marital asset to which she is entitled.

[6] It is worth noting that a trust for the parties' son was established by the husband's father when the son was born. The son's private school tuition is currently paid by the trust which, as of March, 2012, had a market value of approximately $158, 000. The husband's father and his husband's father's wife pay money into the trust and the husband is the trustee. The judge found that the husband's father had indicated at trial that if the husband could not pay for something in connection with the son's education, he and his wife would ensure that the son is taken care of through the age of twenty-three, or through an undergraduate program.

Similarly, the husband's father established a trust for the parties' daughter in her name. The husband's father and his wife deposit money into the trust and the husband is the trustee. As of March, 2012, the trust had a market value of approximately $157, 000. The judge found that the husband had indicated that should the funds in the daughter's trust become insufficient to meet

her needs, he would cover any expense. The husband's father also testified that that he and his wife would ensure that the needs of the parties' daughter were taken care of.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Simeone v. Simeone, Pa.Super., October 26, 1988

181 Conn. 482
Supreme Court of Connecticut.

Patricia M. McHUGH
v.
James J. McHUGH III.

Argued March 13, 1980. | Decided July 15, 1980.

In a marriage dissolution action, the Superior Court, District of New Haven, Mignone, J., entered judgment dissolving the marriage, and the husband appealed. The Supreme Court, Arthur H. Healey, J., held that: (1) an antenuptial agreement between the parties was valid and enforceable, and (2) the trial court did not err in ordering the husband to transfer his interest in the family home to the wife, who had been awarded custody of the parties' minor child.

No error.

West Headnotes (14)

[1] Husband and Wife
Validity of settlement in general

The validity of an antenuptial agreement depends on the circumstances of the particular case.

4 Cases that cite this headnote

[2] Husband and Wife
Validity of settlement in general

Antenuptial agreements relating to the property of the parties and, more specifically, to the rights of the parties to that property upon dissolution of the marriage are generally enforceable when the contract was validly entered into, its terms do not violate statute or public policy and the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time of the antenuptial contract as to cause its enforcement to work injustice.

57 Cases that cite this headnote

[3] Husband and Wife
Validity of settlement in general

An antenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law.

11 Cases that cite this headnote

[4] Husband and Wife
Validity of settlement in general

A disclosure by each party of the amount, character and value of individually owned property is an essential prerequisite to a valid antenuptial agreement containing a waiver of property rights unless the other party has independent knowledge of the amount, character and value of such property.

17 Cases that cite this headnote

[5] Husband and Wife
Validity of settlement in general

Among factors bearing on the validity of an antenuptial contract are which party drafted the agreement and whether the parties were represented by counsel.

Cases that cite this headnote

[6] Husband and Wife
Validity of settlement in general

In a case presenting a question as to the validity of an antenuptial agreement, the court's first task is to ascertain whether the agreement complies with ordinary principles of contract law and whether its terms and the circumstances surrounding its execution demonstrate that the parties knew of their legal rights and of their respective assets and liabilities and proceeded to alter those rights in a fair and voluntary manner.

29 Cases that cite this headnote

[7] Husband and Wife

Enforcement

Antenuptial agreements will not be enforced where to do so would violate statute or public policy.

1 Cases that cite this headnote

[8] Husband and Wife

Validity of settlement in general

While a prospective spouse's waiver of the right to claim entitlement to certain property upon dissolution of marriage could, under appropriate circumstances, be valid, a prospective spouse's contractual agreement not to be liable upon dissolution of marriage for the support of children the spouse otherwise has a duty to support would not be valid.

3 Cases that cite this headnote

[9] Husband and Wife

Validity of settlement in general

Antenuptial agreements that promote, facilitate or provide an incentive for separation or divorce are generally opposed to public policy and of dubious enforceability.

3 Cases that cite this headnote

[10] Husband and Wife

Validity of settlement in general

When a marriage is dissolved not because it has broken down irretrievably but because of the fault of one of the parties, an antenuptial waiver of rights executed by the innocent party may not be enforceable, depending upon the circumstances of the case and the language of the agreement.

5 Cases that cite this headnote

[11] Husband and Wife

Enforcement

Where the economic status of the parties has changed dramatically between date of antenuptial agreement and dissolution of marriage, literal enforcement of the agreement may be prevented by the fact that such enforcement would work an injustice.

9 Cases that cite this headnote

[12] Husband and Wife

Validity of settlement in general

Antenuptial agreement wherein parties stated that they intended to retain individual ownership of the property that each had acquired prior to marriage and went on to set out the particular property that was intended to be encompassed and which further provided that all earnings from employment of either party after the marriage would be joint funds in which each would have an undivided one-half interest was valid and enforceable where there was no suggestion that the circumstances of the parties at the time of dissolution had dramatically changed from the time the agreement was made some two years before and where the marriage had apparently ended without the legal fault of either party.

19 Cases that cite this headnote

[13] Husband and Wife

Construction and operation in general

Antenuptial agreements are to be construed according to the principles of construction applicable to contracts generally.

1 Cases that cite this headnote

[14] Divorce

Marital Residence or Homestead

Divorce

Effect of child custody

Divorce

Property included or affected in general

Though divorcing parties had executed a valid and enforceable antenuptial agreement wherein they stated that they intended to retain individual ownership of property that each had acquired before their marriage, where the agreement clearly listed the property encompassed by that provision and by its terms did not purport to affect the parties' rights to real property acquired during the marriage, it was not error for the trial

court to order the husband to transfer his interest in the family home, which was acquired after the marriage, to wife who had been awarded custody of the parties' minor child.

1 Cases that cite this headnote

Attorneys and Law Firms

****10** ***483** Marilyn P. A. Seichter, Hartford, for appellant (defendant).

Irving H. Perlmutter, New Haven, with whom, on the brief, was Gary P. Sklaver, New Haven, for appellee (plaintiff).

Before ***482** COTTER, C. J., and BOGDANSKI, PETERS, HEALEY and PARSKEY, JJ.

Opinion

ARTHUR H. HEALEY, Associate Justice.

This case concerns the effect of an antenuptial agreement between the parties upon the trial court's judgment dissolving their marriage and ordering a property settlement. The plaintiff and the defendant met in early 1974 and sometime in April 1974, decided to live together without being married. On February 20, 1976, the parties married and on April 22, 1976, the plaintiff gave birth to a child. In July, 1978, the parties' brief and stormy marriage was dissolved.

Prior to their marriage, the plaintiff and the defendant had entered into an antenuptial agreement. In that agreement the parties stated that they intended to retain individual ownership of the property that each had acquired prior to the marriage "to the same extent as if each had remained single." The agreement went on to set out the particular property it was intended to encompass, ***484** including the parties' automobiles, bank accounts, various items of personal property, and two parcels of real property owned by the defendant and located in Bethany, Connecticut. Paragraph three of the agreement provided that "(a)ll earnings from employment of either party after the marriage shall be considered joint funds, and each shall have an undivided one-half interest therein." Further provision was made for the parties' receipt of gifts during the marriage, for the sale of individually owned property during the marriage, and for the disposition of the parties' property at death.

The trial court, in the judgment dissolving the marriage, entered various orders, which provided, inter alia, that the plaintiff have custody of the minor child; that she be awarded lump sum alimony of $15,000 payable in certain installments; and that the defendant transfer his interest in the jointly owned family home in Woodbridge to the plaintiff.

On appeal, the defendant does not take serious issue with the alimony award or any other aspect of the trial court's judgment, [1] except that portion requiring him to transfer to the plaintiff his interest in the family home. [2] The defendant claims that the ***485** parties' ****11** antenuptial agreement is enforceable and that this order violates that agreement. He reasons that because a portion of the down payment on the home together with the mortgage payments derived from his income, the order awarding to the plaintiff his interest in this property violated the "earnings clause" of the antenuptial agreement. We do not agree.

[1] **[2]** Because this case involves a claim that the terms of an antenuptial agreement relating to the property of the parties is binding upon the court in a dissolution action, a question that this court has not previously decided, it is appropriate at the outset to consider generally the enforceability of such agreements. The validity of an antenuptial contract depends upon the circumstances of the particular case. Wulf v. Wulf, 129 Neb. 158, 161, 261 N.W. 159 (1935). Antenuptial agreements relating to the property of the parties, and more specifically to the rights of the parties to that property upon the dissolution of the marriage, are generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was ***486** entered into as to cause its enforcement to work injustice. See Clark, Law of Domestic Relations (1968) s 1.9; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts (Rev.Ed.1970) s 90; 1 Nelson, Divorce and Annulment (1945) s 13.03; 41 C.J.S. Husband and Wife s 80; 41 Am.Jur.2d, Husband and Wife, ss 283-305; annot., 57 A.L.R.2d 942.

[3] **[4]** **[5]** An antenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law. In re Estate of Luedtke, 65 Wis.2d 387, 222 N.W.2d 643 (1974); In re Estate of Rosenstein, 326 So.2d 239 (Fla.App.1976); 2 Lindey, op. cit. s 90, p. 90-68; Clark, op. cit. s 19, p. 27; see 41 Am.Jur.2d, Husband and Wife ss 283,

288. To determine whether an antenuptial agreement relating to property was valid when made, courts will inquire whether any waiver of statutory or common-law rights, or the right to a judicial determination in any matter, was voluntary and knowing. See, generally, 2 Lindey, op. cit. s 90, p. 90-77. A party must, of course, be aware of any right that he possesses prior to a proper waiver of it. Ibid.; see In re Estate of Taylor, 205 Kan. 347, 355, 469 P.2d 437 (1970); see also Stern & Co. v. International Harvester Co., 148 Conn. 527, 534, 172 A.2d 614 (1961). The duty of each party to disclose the amount, character, and value of individually owned property, absent the other's independent knowledge of the same, is an essential prerequisite to a valid antenuptial agreement containing a waiver of property rights. See Friedlander v. Friedlander, 80 Wash.2d 293, 300, 494 P.2d 208 (1972); Rosenberg v. Lipnick, 377 Mass. 666, 389 N.E.2d 385 (1979); Clark, op. cit. s 1.9, p. 30; 2 Lindey, op. cit. s 90, pp. 90-54 to 90-56. "The burden is not on either party to inquire, but on each ***487** to inform, for it is only by requiring full disclosure of the amount, character, and value of the parties' respective assets that courts can ensure intelligent waiver of the statutory rights involved. See, e. g.,Guhl v. Guhl, 376 Ill. 100, 33 N.E.2d 185 (1941); Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937); Denison v. Dawes, 121 Me. 402, 117 A. 314 (1922); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); In re Estate of Kaufmann, 404 Pa. 131, 171 A.2d 48 (1961); In re ****12** Estate of McClellan, 365 Pa. 401, 75 A.2d 595 (1950). See generally Annot., 27 A.L.R.2d 883, ss 3, 4 (1953 & Supp. 1978)." Rosenberg v. Lipnick, supra, 388; see also 41 Am.Jur.2d, Husband and Wife s 297. It has been said that "(u)nder ordinary circumstances, parties to an ante-nuptial agreement do not deal at arm's length; they stand in a relationship of mutual confidence that calls for the exercise of good faith, candor and sincerity in all matters bearing upon the agreement." 2 Lindey, op. cit. s 90, p. 90-47; see Rosenberg v. Lipnick, supra; see also Clark, Domestic Relations, loc. cit. Other factors that bear upon the validity of such contracts include which party drafted the agreement, by counsel or otherwise, and whether the parties were represented by counsel. 2 Lindey, op. cit. s 90, p. 90-70.

[6] In Sacksell v. Barrett, 132 Comm. 139, 43 A.2d 79 (1945), this court recognized the validity of an antenuptial agreement in which each party released any claim or right to any property owned by the other at the time of marriage and in which each had agreed that upon the death of the other, the survivor would have no claim to such property.[3] Quoting ***488** Staub's Appeal, 66 Conn. 127, 134, 33 A. 615 (1895), we stated in Sacksell that "(o)n principle there appears to be no good reason why such an agreement, if fairly made and entered into, by a (person) of full age, for adequate consideration received, should not be binding upon (him)." Sacksell v. Barrett, supra, 132 Conn. 145, 43 A.2d 81. The court's first inquiry, then, is to ascertain whether the agreement complies with the ordinary principles of contract law and whether its terms and the circumstances surrounding its execution are such as to demonstrate that the parties were aware of their legal rights and their respective assets and liabilities, and proceeded by the agreement to alter those rights in a fair and voluntary manner.

[7] **[8]** **[9]** It is clear that antenuptial agreements will not be enforced where to do so would violate the state statutes or public policy. See annot., 57 A.L.R.2d 942 s 2. In this regard, it is necessary to distinguish between the violation of statute and the informed and voluntary waiver of rights created by statute. The former is prohibited while the latter is typically the object of such agreements. See Sacksell v. Barrett, supra; 2 Lindey, op. cit. s 90, p. 90-74. A spouse's waiver of the right to claim entitlement to certain property upon dissolution of marriage, for example, could, under appropriate circumstances, be valid, while a spouse's contractual agreement not to be liable upon dissolution of marriage for the support of children he has a duty to support would not be. See Van Zandt v. Van Zandt, 15 Conn.Supp. 262, 263 (1947); Alves v. Alves, 262 A.2d 111, 117 (D.C.App.1970); 41 Am.Jur.2d, Husband and Wife s 283. Similarly, antenuptial agreements that promote, facilitate or provide an incentive for separation ***489** or divorce are generally opposed to public policy and of dubious enforceability. Volid v. Volid, 6 Ill.App.3d 386, 389-91, 286 N.E.2d 42 (1972); 2 Lindey, op. cit. s 90, p. 90-04; Restatement (Second) Contracts s 332 (Tent. Draft No. 12, 1977). Thus, a provision of an antenuptial agreement waiving the right to defend against a future divorce action, or one creating a substantial economic advantage upon dissolution irrespective of fault, or one relieving one spouse of the duty to support the other during the marriage, has been said to contravene public policy. See Clark, op. cit. s 1.9, p. 29; 2 Lindey, op. cit. s 90, pp. 90-94 to 90-95; 6A Corbin, Contracts (1962) s 1474; annot., 57 A.L.R.2d 942 s 2.

[10] **[11]** Finally, an antenuptial agreement will not be enforced where the circumstances of the parties at the time of the dissolution are so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice. See Clark, op. cit. s 1.9, pp. 28-29. Thus, where ****13** a marriage is

dissolved not because it has broken down irretrievably, but because of the fault of one of the parties, an antenuptial waiver of rights executed by the innocent party may not be enforceable, depending upon the circumstances of the particular case and the language of the agreement. See, e. g., Eule v. Eule, 24 Ill.App.3d 83, 87-88, 320 N.E.2d 506 (1974); Norris v. Norris, 174 N.W.2d 368, 370 (Iowa 1970). Likewise, where the economic status of parties has changed dramatically between the date of the agreement and the dissolution, literal enforcement of the agreement may work injustice. Absent such unusual circumstances, however, antenuptial agreements freely and fairly entered into will be honored and enforced by the courts as written. See id., 369.

***490** **[12]** There is no indication that the agreement entered into in this case violated any of the principles set out above.[4] The agreement was made by the parties in accordance with basic principles of contract law; it does not violate statute or public policy; and there is no suggestion that the circumstances of the parties at the time of the dissolution had dramatically changed from the time the agreement was made, two years earlier. Moreover, the trial court's conclusion that the parties' marriage had broken down irretrievably indicates that the marriage had ended without the legal fault of either party. See Joy v. Joy, 178 Conn. 254, 256, 423 A.2d 895 (1979). Finally, the agreement did not purport to absolve either party of any duty of support of the other during the marriage or of the duty of either to support any minor children of the marriage after dissolution. See Tomlinson v. Tomlinson, 352 N.E.2d 785, 791 (Ind.App.1976). The agreement was, therefore, valid and enforceable by the court.

[13] **[14]** We now consider specifically the defendant's claim that the trial court erred in ordering him to transfer his interest in the family home to the plaintiff. The family home was concededly acquired by the parties after the marriage and was, therefore, not within the purview of that portion of the antenuptial agreement relating to property acquired before the marriage. The agreement by its terms did not purport to affect the parties' rights to real property acquired during the marriage, as it easily could have. The defendant's argument that the ***491** "earnings clause" of the agreement required the trial court to conclude that the plaintiff was entitled to only a one-half interest in the family home because a portion of the down payment and the mortgage payments were made from his income is unpersuasive. As we have said above, antenuptial agreements are to be construed according to the principles of construction applicable to contracts generally. "The basic purpose of construction is to ascertain and give effect to the intention of the parties." Estate of Luedtke, 65 Wis.2d 387, 392, 222 N.W.2d 643, 646 (1974). Where there is no ambiguity, however, there is no occasion for construction and the agreement will be enforced as its terms direct. Id., 392-93, 222 N.W.2d 643, 2 Lindey, op. cit., s 90, pp. 90-68 to 90-69. While the defendant's metamorphic argument may have some appeal in logic, it does not reflect the agreement of the parties, which apparently was prepared by the attorney for the defendant. See 2 Lindey, op. cit. s 90, p. 90-70.[5] The court did not err in ordering the defendant to transfer his interest in the family home to the plaintiff, especially in ****14** view of the fact that the plaintiff was awarded custody of the minor child.[6]

There is no error.

In this opinion the other Judges concurred.

All Citations

181 Conn. 482, 436 A.2d 8

Footnotes

1 In his brief, the defendant suggests that even the award of alimony constituted an infringement on the parties' rights "to arrange their financial affairs privately and to avoid the interference of the state." An examination of the agreement discloses, however, that there is no provision of it that can be construed as even remotely governing the parties' rights to alimony upon dissolution of the marriage. Moreover, no such claim was raised by the defendant in his preliminary statement of issues.

2 In this dissolution action the defendant pleaded the antenuptial agreement of February 7, 1976, by way of special defense. In her reply to this special defense, the plaintiff admitted the allegations of the special defense and then alleged that (a) the agreement was unenforceable because it was coerced from her and that (b) it was also unenforceable because it conflicts with the provisions of General Statutes ss 46-42, 46-51 and 46-52. The defendant thereafter interposed a demurrer to that portion of the reply to the special defense, which was overruled by the court without a memorandum. The record discloses that the defendant filed in the trial court a notice of his intent to appeal from the overruling of his demurrer.

Practice Book, 1978, s 3001. On appeal, the defendant does not challenge the legal sufficiency of the plaintiff's reply to his special defense and the plaintiff does not pursue her two-pronged claim that the antenuptial agreement is unenforceable. Therefore, we only consider the defendant's claim that the trial court did not properly enforce the agreement.

3 In Sacksell we were called upon to construe General Statutes s 5156 (1930 Rev.), the predecessor of General Statutes s 45-273a, in determining the rights of the surviving spouse.

4 Although the plaintiff did claim at trial that she had been coerced into executing the antenuptial contract in question and that, therefore, the contract was unenforceable, no such finding was made by the trial court and, on appeal, no claim of error is directed to its failure to do so.

5 We do not suggest by our conclusion that it would never be appropriate to “trace” funds that originate from a party's earnings under a similar clause. We conclude only that under the facts of this case, neither the language of the contract itself nor equitable considerations militate in favor of adopting such an approach to this clause.

6 Because of our conclusion in this regard, we need not consider whether an antenuptial agreement containing a provision limiting the rights of a spouse to the family home upon dissolution would be enforceable where the provision would operate to the detriment of a minor child of the marriage.

Connecticut General Statutes Annotated
Title 46b. Family Law (Refs & Annos)
Chapter 815E. Marriage (Refs & Annos)

C.G.S.A. § 46b-36d

§ 46b-36d. Content of premarital agreement

Currentness

(a) Parties to a premarital agreement may contract with respect to:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) The modification or elimination of spousal support;

(5) The making of a will, trust or other arrangement to carry out the provisions of the agreement;

(6) The ownership rights in and disposition of the death benefit from a life insurance policy;

(7) The right of either party as a participant or participant's spouse under a retirement plan;

(8) The choice of law governing the construction of the agreement; and

(9) Any other matter, including their personal rights and obligations.

(b) No provision made under subdivisions (1) to (9), inclusive, of subsection (a) of this section may be in violation of public policy or of a statute imposing a criminal penalty.

(c) The right of a child to support may not be adversely affected by a premarital agreement. Any provision relating to the care, custody and visitation or other provisions affecting a child shall be subject to judicial review and modification.

Credits
(1995, P.A. 95-170, § 3.)

Notes of Decisions (8)

C. G. S. A. § 46b-36d, CT ST § 46b-36d
The statutes and Constitution are current with enactments from the 2015 Regular Session and the June Special Session.

End of Document

Connecticut General Statutes Annotated
Title 46b. Family Law (Refs & Annos)
Chapter 815E. Marriage (Refs & Annos)

C.G.S.A. § 46b-36f

§ 46b-36f. Amendment or revocation of premarital agreement after marriage

Currentness

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation shall be enforceable without consideration.

Credits
(1995, P.A. 95-170, § 5.)

C. G. S. A. § 46b-36f, CT ST § 46b-36f
The statutes and Constitution are current with enactments from the 2015 Regular Session and the June Special Session.

End of Document

Connecticut General Statutes Annotated
Title 46b. Family Law (Refs & Annos)
Chapter 815E. Marriage (Refs & Annos)

C.G.S.A. § 46b-36g

§ 46b-36g. Enforcement of premarital agreement

Currentness

(a) A premarital agreement or amendment shall not be enforceable if the party against whom enforcement is sought proves that:

(1) Such party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed or when enforcement is sought; or

(3) Before execution of the agreement, such party was not provided a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party; or

(4) Such party was not afforded a reasonable opportunity to consult with independent counsel.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and such modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

Credits
(1995, P.A. 95-170, § 6.)

Notes of Decisions (51)

C. G. S. A. § 46b-36g, CT ST § 46b-36g
The statutes and Constitution are current with enactments from the 2015 Regular Session and the June Special Session.

End of Document

NOTICE OF AUTOMATIC COURT ORDERS

JD-FM-158 Rev. 12-14
P.B. § 25-5

Attach to Divorce (Dissolution of Marriage) Complaint/Cross Complaint (JD-FM-159), Dissolution of Civil Union Complaint/Cross Complaint (JD-FM-159A), Custody/Visitation Application (JD-FM-161), and any Annulment or Legal Separation Complaint

www.jud.ct.gov

The following automatic orders shall apply to both parties, with service of the automatic orders to be made with service of process of a complaint for dissolution of marriage or civil union, legal separation, or annulment, or an application for custody or visitation. An automatic order shall not apply if there is a prior, contradictory order of a judicial authority. The automatic orders shall be effective with regard to the plaintiff or the applicant upon the signing of the complaint, or the application and with regard to the defendant or the respondent upon service and shall remain in place during the pendency of the action, unless terminated, modified, or amended by further order of a judicial authority upon motion of either of the parties:

In all cases involving a child or children, whether or not the parties are married or in a civil union:

(1) Neither party shall permanently remove the minor child or children from the state of Connecticut, without written consent of the other or order of a judicial authority.

(2) A party vacating the family residence shall notify the other party or the other party's attorney, in writing, within forty-eight hours of such move, of an address where the relocated party can receive communication. This provision shall not apply if and to the extent there is a prior, contradictory order of a judicial authority.

(3) If the parents of minor children live apart during this proceeding, they shall assist their children in having contact with both parties, which is consistent with the habits of the family, personally, by telephone, and in writing. This provision shall not apply if and to the extent there is a prior, contradictory order of a judicial authority.

(4) Neither party shall cause the children of the marriage or the civil union to be removed from any medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) The parties shall participate in the parenting education program within sixty days of the return day or the complaint or within sixty days from the filing of the application.

(6) These orders do not change or replace any existing court orders, including criminal protective and civil restraining orders.

In all cases involving a marriage or civil union, whether or not there are children:

(1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall conceal any property.

(3) Neither party shall encumber (except for the filing of a lis pendens) without the consent of the other party, in writing, or an order of a judicial authority, any property except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause any asset, or portion thereof, co-owned or held in joint name, to become held in his or her name solely without the consent of the other party, in writing, or an order of the judicial authority.

(5) Neither party shall incur unreasonable debts hereafter, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards.

(6) Neither party shall cause the other party to be removed from any medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(7) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners or renters insurance policies in full force and effect.

(8) If the parties are living together on the date of service of these orders, neither party may deny the other party use of the current primary residence of the parties, whether it be owned or rented property, without order of a judicial authority. This provision shall not apply if there is a prior, contradictory order of a judicial authority.

In all cases:

(1) The parties shall each complete and exchange sworn financial statements substantially in accordance with a form prescribed by the chief court administrator within thirty days of the return day. The parties may thereafter enter and submit to the court a stipulated interim order allocating income and expenses, including, if applicable, proposed orders in accordance with the uniform child support guidelines.

(2) The case management date for this case is _____. The parties shall comply with Section 25-50 to determine if their actual presence at the court is required on that date.

By Order Of The Court

Failure to obey these orders may be punishable by contempt of court. If you object to or seek modification of these orders during the pendency of the action, you have the right to a hearing before a judge within a reasonable time.

The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at *www.jud.ct.gov/ADA*.

(Continued on Page 2)

Summary Of Automatic Court Orders

The court orders on page 1 of this form apply to both parties in this case, unless there is already a court order which is different than one of these orders. The automatic court orders apply to the plaintiff or the applicant when the attached Complaint or Application is signed. They apply to the defendant or respondent when a copy of the Complaint or Application, and the Notice of Automatic Court Orders are served *(delivered to the defendant/respondent by an authorized person)*. The automatic court orders are summarized below, but you must follow the actual orders on page 1 of this form. If you do not understand the actual automatic court orders, you may want to talk to an attorney.

In all cases that involve a child, whether or not the parties are married or in a civil union:

- Neither party may permanently take the child(ren) from Connecticut without written agreement or a court order;
- If you move out of the family home, you must tell the other party in writing within 48 hours about your new address or a place where you can receive mail;
- If both parents of the child(ren) live apart, both parties must help the child(ren) continue usual contact with both parents in person, by telephone and in writing;
- Neither party may take the child(ren) off any existing medical, hospital, doctor, or dental insurance policy or let any such insurance policy end;
- Both parties must participate in a parenting education program within 60 days of the return date of the complaint or within 60 days from the filing of the application for custody or visitation;
- None of these orders change or replace any court order that already exists.

In all cases that involve a marriage or civil union, whether or not there are children, neither party may:

- Sell, exchange, take away, give away or dispose of any property without written agreement with the other party or a court order except in their usual business or for usual expenses for the home or for reasonable attorney's fees for this case;
- Hide any property;
- Mortgage any property except in their usual business or for usual expenses for the house or for reasonable attorney's fees for this case without written agreement or a court order;
- Have any asset or an asset that is owned by both parties become owned only by him or her without written agreement or a court order;
- Go into unreasonable debt by borrowing money or using credit cards or cash advances unreasonably;
- Take the other off any existing medical, hospital, doctor or dental insurance policy or let any such insurance coverage end;
- Change the terms or named beneficiaries of any existing insurance policy or let any existing insurance coverage end, including life, automobile, homeowner's or renter's insurance;
- Deny use of the family home to the other person without a court order, if you are living together on the date the court papers are delivered.

In all cases:

- Both parties must complete and give to each other sworn financial affidavits within 30 days of the return date;
- Both parties must attend a case management conference on the date given on page 1 of this form, unless you both agree on all issues and file a Case Management Agreement form with the court clerk on or before that date.

If you do not obey these orders while your case is pending, you may be punished by being held in contempt of court. If you object to these orders or want them changed, you have a right to a hearing before a judge within a reasonable time, by filing a motion to modify these orders with the court clerk.

CASE CITATIONS

Premarital Agreements:

McHugh v. McHugh – 181 Conn. 482 (1980)

Winchester v. McCue – 91 Conn. App. 721 (2005)

Crews v. Crews – 107 Conn. App. 279 (2008)
295 Conn. 153 (2010)

Friezo v. Friezo – 281 Conn. 166 (2007)

Oldani v. Oldani – 132 Conn. App. 609 (2007)

Postnuptual Agreements:

Bedrick v. Bedrick – 300 Conn. 691 (2011)

Automatic Orders:

Gershman v. Gershman – 286 Conn. 341 (2008)

Finnan v. Finnan – 287 Conn. 491 (2008)

Ferri v. Powell-Ferri - 317 Conn. 223 (2015)

Until Death (or Divorce) Do Us Part

Death and Divorce: What Estate Planning and Family Law Attorneys Need to Know

CBA Law Center

11/17/2015

By Elizabeth L. Leamon

Elizabeth L. Leamon currently focuses her practice on estate settlement, estate planning and contested matters in probate court. Beth also has a litigation background with experience in divorce and appellate law. Beth works primarily with families and individuals providing counsel to craft sophisticated estate plans, including, wills, revocable and irrevocable trusts, special needs trusts, LGBT planning, and even pet trusts. She also works with clients to develop succession plans for family businesses and real estate, asset protection, including pre and post-martial agreements, and plans for charitable giving.

She was named a "Rising Star" among Connecticut lawyers by *Connecticut Magazine* from 2010-2013. She served as Chair of the New Haven County Bar Association Trusts, Estates and Probate Committee and a member of the Executive Committee of the Connecticut Bar Association, Estates and Probate Section.

From 2002 to 2003, she worked as Law Clerk to the Honorable Richard N. Palmer, Associate Justice of the Connecticut Supreme Court. Beth began private practice in 2003 at the Connecticut law firm of Tyler Cooper & Alcorn, LLP and thereafter, at Murtha Cullina LLP. She is currently a partner at the firm of Leckerling Ladwig & Leamon LLC.

Beth graduated from the University of Connecticut Law School *with honors* in 2002, New York University (M.A., 1991) and Connecticut College (B.A., *cum laude*, 1989), *Phi Beta Kappa*.

I. Post-Marital Estate Planning

A. Postnuptial or anti-nuptial agreements have been held to be valid in the State of Connecticut. See Bedrick v. Bedrick, 300 Conn. 691 (2010). Copy of decisions cited herein are attached hereto.

B. In Bedrick the CT Supreme Court concluded that "postnuptial agreements are valid and enforceable and generally must comply with contract principles."

1. The CTSC determined that postnups are consistent with public policy protecting marriage.

2. However, postnups are subject to special and stricter scrutiny than premarital agreements and must be found to be (1) fair at the time of execution and (2) not unconscionable at the time of dissolution.

3. Standards governing enforcement:

Unlike prenups, postnups require adequate consideration. See Conn. Gen. Stat. 45b-36c

"A release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration." Bedrick at 703 N.5.

a) Voluntary and without undue influence.

b) Mandatory Disclosure: full, fair and reasonable disclosure of the amount, character and value of property, all financial obligations and income of the other party.

c) Unconscionable does not mean unfair or inequitable, but rather the court must decide if enforcement of the agreement "work an injustice."

C. Aftermath of Bedrick – facts and circumstances (of course!)

1.  The Court in Fustini v. Fustini, 2015 Conn. Super Lexis 1715, refused to uphold a postnup on the vague grounds that the ”circumstances surrounding the postnuptial agreement changed by the time of dissolution and the terms of the postnuptial agreement did not satisfy all the elements of a contract.”

Likewise in Centmehaiey v. Centmehaiey, 2014 Conn. Super Lexis 2167, the court overturned a Probate Court’s decision to enforce the postnuptial agreement. The Superior court found that the postnuptial agreement lacked adequate consideration and financial disclosure and that “there was duress when a 36-year-old woman with physical problems, who is unable to be employed, is told by her husband to ‘sign or get out’.”

2.  In Hornung v. Hornung 2014 Conn. Super Lexis 667, the court upheld a modification to a prenup after marriage. The Court applied the facts and circumstances as follows: “(1) Since the modified agreement had its origins as a prenuptial agreement, per statute, consideration should not be a factor; and (2) Since the modified agreement was executed during the marriage, the court should apply "special scrutiny" to the circumstances surrounding its execution and enforcement.”

3.  None that I found, yet!

II. Estate Planning During the Divorce Process

A. Introduction - Trusts pose unique challenges for classifying property during a divorce, but they are also powerful tools for dividing and safeguarding property in a divorce settlement.

B. Discovery – Knowledge is Power

1. P.B. Sec 25-32 Mandatory Disclosure and Production does not specifically ask for interests in trusts. Therefore, if the opposing party has an interest in trust, Interrogatories and Request for Production have to be specific. See Sample Interrogatories and Production Requests as they relate to trusts attached hereto.

2. Depositions – Consider deposing the Trustee who will have information concerning the Trust Property. If opposing party has interests in trusts ask:

(1) What type of trust is it

(2) Who funded the trust

(3) What funds are currently in the trust

(4) What right does the party have to assets of the trust

(5) What right does party have to an accounting

C. Update Estate Planning Documents: although automatic orders prevent client's from retitling ownership of assets and changing beneficiary designations to life insurance and retirement assets, clients can and should execute new powers of attorney, healthcare instructions, wills and revocable trusts. Indeed, attention to such matters will protect clients who become incapacitated or die during the pendency of a divorce action.

D. Trusts as Part of a Divorce Settlement

1. Irrevocable Trusts may hold property, tangible or intangible, for one spouse during life. This type of trust can provide that the remaining assets pass to children at the death of beneficiary spouse. The trust can also be structured so that the income taxes are attributable to the Grantor spouse.

2. Irrevocable Life Insurance Trusts (ILIT) own life insurance on a spouse, providing support for ex-spouse and/or children at spouse's death. The terms of the trust are not amendable by the Grantor spouse, assets are not included in either spouse's estate at death and neither spouse can change the beneficiary designation. Furthermore, a Trustee is in place to monitor and help ensure premium payments.

3. A Special Needs Trust should be considered by divorcing parents who have a child with special needs. This trust can be the benefit of a parent's life insurance policy or consider a second to die policy on both parents.

DEFENDANT'S SUPPLEMENTAL
INTERROGATORIES AND REQUESTS FOR PRODUCTION

The Defendant in the above entitled action, pursuant to Connecticut Practice Book, §13-6 *et seq*. & 13-9 *et seq*., hereby respectfully moves that the Plaintiff, within thirty (30) days of the date hereof, disclose the following information and produce for inspection and copying the documents requested below, which information and documents, if not within the exclusive knowledge, possession or power of said other party, can be provided by that party with substantially greater facility than same could otherwise be obtained by the moving party herein. Said disclosure of information and production of documents will directly assist the moving party in the preparation and proving of the case.

BY WAY OF INTERROGATORIES

1. List the name and address of all Trustees, past and present, of the following trusts: (1) _____; (2) _____(3) any and all other trusts for which you are grantor, settlor, trustee or beneficiary, from date of creation to and including the date of your answer hereto.

2. State the Trust Property or trust corpus and its fair market value for each Trust indicated in Paragraph 1 above, from the date of creation to and including the date of your answer hereto.

4. For each Trust indicated in Paragraph 1 above state the nature of your interest in the Trust.

5. Have you received distributions of income or principal from any of the Trusts listed in Paragraph 1 above, from date of creation to and including the date of your answer hereto?

6. If so, for such assets/monies received state:

(a) The amounts received

(b) The reason for the payments

(c) The names of the person, firm, corporation or trustee paying the same

(d) The dates of receipt of said monies

7. In addition to the income or sums actually received have expenses of any nature been paid on your behalf by any of the sources described above?

8. If so, for such payments state:

(a) The amounts paid

(b) To whom paid

(c) The reason for the payments

(d) The names of the person, firm or corporation paying the same

(e) The dates of the making of said payments

9. Are there any savings, checking or commercial accounts open for any Trusts indicated in Paragraph 1 above in any bank or financial institution, whether foreign or domestic?

10. If so, for each such account state:

(a) The name and address of the bank or financial institution

(b) The type of the account

(c) The name or names on the account and the form of ownership

(d) The person(s) authorized to draw on the account

(e) The date when the account was opened

(f) The date when the account was closed, if not still open

(g) The account number

(h) The amount of the last balance before the account was closed, if closed

(i) The current balance in said account, if still open

11. Have Tax Returns been filed for any of the entities indicated in Paragraph 1?

12. If so, for each return state:

(a) Whether you have a copy of the return.

(b) The amount of taxable income reported.

(c) The name and address of the party by whom the return was prepared.

13. Other than the entities described in Paragraph 1 hereof, does any person, firm, business or trust entity hold any property, real, personal or mixed for you or for your benefit?

14. If so, for each item of property, state:

(a) The name and address of each such person, firm, business or trust entity and the manner in which such property is held.

(b) A complete description of the property held for your benefit.

(c) The total value of such property.

(d) The conditions under which the property is held for your benefit.

(e) Your interest in said property and the net value of said interest.

(f) The manner of the computation of the said net value of your said interest.

15. Other than the entities described in Paragraph 1 hereof, are you the beneficiary or a remainderman of any trust fund?

16. If so, state:

(a) The name of the trust.

(b) The name and address of the trustee.

(c) The annual income received by you, if any, from such trust and the terms of the trust related to the distribution of income and/or corpus.

(d) The nature and extent of your interest.

(e) The date upon which the trust will terminate and the disposition to be made of the corpus, or, if indefinite, then the terms of the trust related to the termination and disposition of such corpus.

(f) The identity of any parties and their addresses who have copies of such written trust agreement, if any.

(g) The identification and value of those assets currently making up the corpus of such trust.

16. Other than those entities described in Paragraphs 1, hereof, do you have an interest which is vested, or as a remainderman in, or do you otherwise expect to receive income and/or corpus, even if not vested, from any trust fund in the future?

17. If so, state:

(a) The name of the trust.

(b) The name and address of the trustee.

(c) The nature and basis of your expected interest therein.

(d) The date(s) you expect to begin to receive proceeds thereof, and the amount of such proceeds, if known.

18. During the period of this marriage, have you received any inheritance or do you anticipate the receipt of any inheritance (including any estate currently in probate)?

19. If so, state:

(a) The name and location of the Estate and Court of Probate.

(b) The name and address of the Executor or Trustee.

(c) The property received or to be received and the net value thereof and the basis of your computation thereof.

(d) The date received, if received.

(e) If not received, the anticipated date of receipt.

(f) The identity and address of the attorney handling said estate.

BY WAY OF PRODUCTION – to the extent not previously provided

A. Produce copies of federal, state and local tax returns for the following Trust entities: (1) _____; (2) _____; (3) any and all other trusts for which you are grantor, settlor, trustee or beneficiary, for the period from creation to the present.

B. Produce copies of all balance sheets and financial statements for those entities indicated in Paragraph A above for the period indicated in said Paragraph and statements as to the fair market value of all such entities.

C. Produce all books, records, accounts, accountings, periodic statements, statements of transactions, appraisals, whether formal or informal or whether produced internally or by a third-party appraiser, and all other papers and memoranda of stock brokerage accounts for those entities indicated in Paragraph A above for the period indicated in said Paragraph.

D. Produce all statements of all accounts maintained with any financial institution, including banks, brokers and financial managers, including check registers and cancelled checks for those entities indicated in Paragraph A above for the period indicated in said Paragraph. .

E. Produce copies of all trust instruments and any and all amendments to the same for those entitles in Paragraph A above.

F. Produce all records, papers and memoranda concerning financial accounts and financial accountings for entities indicated in Paragraph A above for the period indicated in said Paragraphs.

G. Produce copies of any and all documentation evidencing the amount, nature and source of any income or payment of expenses which you have received in the period referenced in Paragraph A above, from those entities indicated in said Paragraph.

H. If any of the foregoing are not available, furnish properly executed authorizations to allow counsel to inspect and receive copies of same.

User Name: Elizabeth Leamon

Date and Time: Nov 14, 2015 10:28 a.m. EST

Job Number: 26231109

Document(1)

1. *Bedrick v. Bedrick, 300 Conn. 691*

Client/Matter: -None-

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Estate, Gift & Trust Law; Court: Connecticut

Bedrick v. *Bedrick*

Supreme Court of Connecticut

December 2, 2010, Argued; April 26, 2011, Officially Released

SC 18568

Reporter
300 Conn. 691; 17 A.3d 17; 2011 Conn. LEXIS 141; 77 A.L.R.6th 765

DEBORAH ***BEDRICK*** v. BRUCE L. ***BEDRICK***

Prior History: ***Bedrick*** v. ***Bedrick***, 2009 Conn. Super. LEXIS 1049 (Conn. Super. Ct., Apr. 24, 2009)

Core Terms

postnuptial, parties, spouses, prenuptial agreement, marriage, trial court, enforceability, unconscionable, circumstances, principles, dissolution, public policy, divorce, internal quotation marks, fair and equitable, unenforceable, time of dissolution, separate agreement, prenuptial, provides, adequate consideration, time of execution, injustice, Statutes, dissolution of marriage, contract law, settlement, alimony, marital, courts

Case Summary

Procedural Posture

Defendant husband sought review of a judgment from a Connecticut trial court, which found that the parties' postnuptial agreement (PNA) was not enforceable because the terms were not fair and equitable to plaintiff wife at the time of execution thereof. The matter arose in the parties' dissolution of marriage action. The matter was transferred from the Appellate Court.

Overview

The wife sought dissolution of the parties' marriage and ancillary relief. The husband sought enforcement of the parties' PNA. It was noted that after execution thereof, the PNA was modified on multiple occasions. The PNA provided, inter alia, that the wife would receive a cash settlement rather than alimony, and that she waived any interest in the husband's car wash business. The trial court found that the PNA was not fair and equitable, and that enforcement would work an injustice. Accordingly, it declined to enforce it. Rather, it ordered a large lump sum payment of alimony to the wife. Upon reargument, the trial court maintained its decision not to enforce the PNA. On appeal, the court noted the standard for review of a PNA was whether the terms thereof were fair and equitable at the time of execution, and whether the PNA was unconscionable at the time of parties' dissolution. The court agreed that the PNA was not enforceable in the circumstances, based on the dramatic change in the parties' economic circumstances since the execution thereof. It noted that the trial court's finding that enforcement would work an injustice was tantamount to a finding of unconscionability.

Outcome

The court affirmed the judgment of the trial court.

LexisNexis® Headnotes

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

HN1 A postnuptial agreement is distinguishable from both a prenuptial agreement and a separation agreement. Like a prenuptial agreement, a postnuptial agreement may determine, inter alia, each spouse's legal rights and obligations upon dissolution of the marriage. As the name suggests, however, a postnuptial agreement is entered into during marriage - after a couple weds, but before they separate, when the spouses "plan to continue their marriage"; and when "separation or divorce is not imminent."

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

HN2 Postnuptial agreements are valid and enforceable and generally must comply with contract principles. However, the terms of such agreements must be both

fair and equitable at the time of execution and not unconscionable at the time of dissolution.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Civil Procedure > Pleading & Practice > Pleadings > Answers

HN4 Conn. Gen. Prac. Book, R. Super. Ct. § 10-50 applies to pleadings in civil cases. Conn. Gen. Prac. Book, R. Super. Ct. § 25- 9 is applicable to family relations cases, and does not require that any defenses be pleaded specifically.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN3 Equitable considerations codified in Connecticut statutes have no bearing on whether a prenuptial agreement should be enforced. In other words, whether a court thinks the agreement is a good bargain for a plaintiff does not enter into the analysis of the issue.

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

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

HN5 The standard applicable to postnuptial agreements presents a question of law, over which the Connecticut Supreme Court's review is plenary.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN6 The State does not favor divorces. Its public policy is to maintain the family relationship as a life status. Accordingly, prenuptial agreements are generally held to violate public policy if they promote, facilitate or provide an incentive for separation or divorce. Similarly, a separation agreement is not necessarily contrary to public policy unless it is made to facilitate divorce or is concealed from a court. While contracts between husband and wife regarding property settlements entered into prior to instituting proceedings for divorce should be carefully examined, they are not necessarily contrary to public policy.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN7 The government has an interest in encouraging the incorporation of separation agreements into decrees for dissolution. Postnuptial agreements may also encourage the private resolution of family issues. In particular, they may allow couples to eliminate a source of emotional turmoil - usually, financial uncertainty - and focus instead on resolving other aspects of the marriage that may be problematic. By alleviating anxiety over uncertainty in the determination of legal rights and obligations upon dissolution, postnuptial agreements do not encourage or facilitate dissolution; in fact, they harmonize with Connecticut's public policy favoring enduring marriages. Such contracts may inhibit the dissolution of marriage, or may protect the interests of third parties such as children from a prior relationship.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN8 Postnuptial agreements are consistent with public policy; they realistically acknowledge the high incidence of divorce and its effect upon our population. Both the realities of our society and policy reasons favor judicial recognition of prenuptial agreements. Rather than inducing divorce, such agreements simply acknowledge its ordinariness. With divorce as likely an outcome of marriage as permanence, there is no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs. The reasoning that once found them contrary to public policy has no place in today's matrimonial law. Postnuptial agreements are no different than prenuptial agreements in this regard.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN10 Separation agreements are distinct from both prenuptial and postnuptial agreements and are entered into when spouses have determined to dissolve their marriage. Their enforcement is governed by Conn. Gen. Stat. § 46b-66(a), which provides in part that where the parties have submitted to a court an agreement concerning alimony or the disposition of property, the court shall determine whether the agreement of the spouses is fair and equitable under all the circumstances.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN9 Two different sets of principles govern decisions as to the enforceability of a prenuptial agreement; the date of the execution of the agreement determines which set of principles controls.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Uniform Premarital Agreement Act

HN11 Prenuptial agreements entered into on or after October 1, 1995 are governed by the Connecticut Premarital Agreement Act, *Conn. Gen. Stat. § 46b-36a et seq.* The statutory scheme provides that a prenuptial agreement is unenforceable when: (1) the challenger did not enter the agreement voluntarily; (2) the agreement was unconscionable when executed or enforced; (3) the challenger did not receive a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party before execution of the agreement; or (4) the challenger did not have a reasonable opportunity to consult with independent counsel. *Conn. Gen. Stat. § 46b-36g*.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN12 Prenuptial agreements entered into prior to October 1, 1995 are governed by the common law. Although a prenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law, the validity of such a contract depends on the circumstances of the particular case. Prenuptial agreements relating to the property of the parties, and more specifically, to the rights of the parties to that property upon the dissolution of the marriage, are generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice.

Evidence > Burdens of Proof > Allocation

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN13 To render unenforceable an otherwise valid prenuptial agreement, a court must determine: (1) the parties' intent and circumstances when they signed the prenuptial agreement; (2) the circumstances of the parties at the time of the dissolution of the marriage; (3) whether those circumstances are "so far beyond" the contemplation of the parties at the time of execution; and (4) if the circumstances are beyond the parties' initial contemplation, whether enforcement would cause an injustice. It is additionally clear that the party seeking to challenge the enforceability of the prenuptial contract bears a heavy burden. Where the economic status of the parties has changed dramatically between the date of the agreement and the dissolution, literal enforcement of the agreement may work injustice. Absent such unusual circumstances, however, prenuptial agreements freely and fairly entered into will be honored and enforced by the courts as written. This heavy burden comports with the well settled general principle that courts of law must allow parties to make their own contracts.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN14 Although courts view postnuptial agreements as encouraging the private resolution of family issues, they also recognize that spouses do not contract under the same conditions as either prospective spouses or spouses who have determined to dissolve their marriage. A postnuptial agreement stands on a different footing from both a prenuptial agreement and a separation agreement. Before marriage, the parties have greater freedom to reject an unsatisfactory prenuptial contract.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN15 A separation agreement is negotiated when a marriage has failed and the spouses intend a permanent separation or marital dissolution. The circumstances surrounding postnuptial agreements in contrast are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage. For these reasons, the Connecticut Supreme Court joins many other states in concluding that postnuptial agreements must be carefully scrutinized. A wife faces a more difficult choice than a bride who is presented with a demand for a pre-nuptial agreement. The cost to a wife is the destruction of a family and the stigma of a failed marriage. A spouse who bargains a settlement agreement, on the other hand, recognizes that the marriage is over, can look to

his or her economic rights; the relationship is adversarial. Thus, a spouse enters a postnuptial agreement under different conditions than a party entering either a pre-nuptial or a separation agreement.

Business & Corporate Law > Agency Relationships > Types > Husbands & Wives

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN16 Postnuptial agreements should not be treated as mere "business deals." Just like prospective spouses, parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust. Ordinarily and presumptively, a confidential relation or a relationship of special confidence exists between husband and wife. It includes, but is not limited to, a fiduciary duty between the spouses, of the highest degree.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN17 Prospective spouses share a "confidential relationship"; but spouses share the institution of marriage, one of the most fundamental of human relationships. Marriage is intimate to the degree of being sacred. It is an association that promotes a way of life, a harmony in living, a bilateral loyalty. Courts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length. Although marital parties are not necessarily in the relationship of fiduciary to beneficiary, full and frank disclosure is required of such parties when they come to court seeking to terminate their marriage. Because of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the other. Postnuptial agreements require stricter scrutiny than prenuptial agreements. In applying special scrutiny, a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution.

Contracts Law > Formation of Contracts > Consideration > Adequate Consideration

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Consideration

HN18 Conn. Gen. Stat. § 46b-36c expressly provides that prenuptial agreements are enforceable without consideration. Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. A release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

HN19 The Connecticut Supreme Court holds that the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse. This mandatory disclosure requirement is a result of the deeply personal marital relationship.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN20 Just as the validity of a prenuptial contract depends upon the circumstances of the particular case, in determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances surrounding execution. A court may consider various factors, including the nature and complexity of the agreement's terms, the extent of and disparity in assets brought to the marriage by each spouse, the parties' respective age, sophistication, education, employment, experience, prior marriages, or other traits potentially affecting the ability to read and understand an agreement's provisions, and the amount of time available to each spouse to reflect upon the agreement after first seeing its specific terms, and access to independent counsel prior to consenting to the contract terms.

Family Law > ... > Postnuptial & Separation Agreements > Defenses > Unconscionability

HN21 With regard to the determination of whether a postnuptial agreement is unconscionable at the time of dissolution, it is well established that the question of unconscionability is a matter of law to be decided by a court based on all the facts and circumstances of the case. The determination of unconscionability is to be made on a case-by-case basis, taking into account all of the relevant facts and circumstances.

Family Law > ... > Postnuptial & Separation Agreements > Defenses > Unconscionability

HN22 Unfairness or inequality alone does not render a postnuptial agreement unconscionable; spouses may agree on an unequal distribution of assets at dissolution. The mere fact that hindsight may indicate the provisions of the agreement were improvident does not render the agreement unconscionable. Instead, the question of whether enforcement of an agreement would be unconscionable is analogous to determining whether enforcement of an agreement would work an injustice. Marriage, by its very nature, is subject to unforeseeable developments, and no agreement can possibly anticipate all future events. Unforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable.

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

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN23 The question of whether a postnuptial agreement is enforceable is a mixed question of fact and law subject to plenary review.

Family Law > ... > Antenuptial & Premarital Agreements > Defenses > Unconscionability

HN24 The question of whether enforcement of a prenuptial agreement would be unconscionable is analogous to determining whether enforcement would work an injustice.

Counsel: **[***1]** Campbell D. Barrett, with whom were Jon T. Kukucka, and, on the brief, C. Michael Budlong and Felicia Hunt, for the appellant (defendant).

Barbara J. Ruhe, with whom, on the brief, was Jonathan W. A. Ruhe, for the appellee (plaintiff).

Kenneth J. McDonnell, for the minor child.

Judges: Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan and Eveleigh, Js. McLACHLAN, J. In this opinion the other justices concurred.

Opinion by: McLACHLAN

Opinion

[*693] **[**21]** McLACHLAN, J. This appeal involves a dissolution of marriage action in which the defendant, Bruce L. ***Bedrick***, seeks to enforce a postnuptial agreement. [1] Today we are presented for the first time with the issue of whether a postnuptial agreement is valid and enforceable in Connecticut.

The defendant appeals from the trial court's judgment in favor of the plaintiff, Deborah ***Bedrick***. The defendant claims that the trial court improperly relied upon principles of fairness and equity in concluding that the postnuptial agreement was unenforceable and, instead, should have applied only ordinary principles of contract law. ***HN2*** We conclude that postnuptial agreements are valid and enforceable and generally must comply with contract principles. We also conclude, however, that the terms of such agreements must be both fair and equitable at the time of execution and not unconscionable at the time of dissolution. Because the terms of the present agreement were unconscionable at the time of dissolution, we affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. In August, 2007, the plaintiff initiated this action, seeking dissolution of the parties' marriage, permanent alimony, an equitable **[**22]** distribution of the parties' real and personal property and other relief.

[1] ***HN1*** A postnuptial agreement is distinguishable from both a prenuptial agreement and a separation agreement. Like a prenuptial agreement, a postnuptial agreement may determine, inter alia, each spouse's legal rights and obligations upon dissolution of the marriage. As the name suggests, however, a postnuptial agreement is entered into during marriage—after a couple weds, but before they separate, when the spouses "plan to continue their marriage"; A.L.I., Principles of the Law of Family Dissolution: **[***2]** Analysis and Recommendations (2002) § 7.01 (1) (b), p. 1052; and when "separation or divorce is not imminent." Black's Law Dictionary (9th Ed. 2009).

The defendant filed **[***3]** a cross complaint, seeking to enforce a postnuptial agreement that the parties executed **[*694]** on December 10, 1977, and modified by way of handwritten addenda on five subsequent occasions, most recently on May 18, 1989.

The agreement provides that in the event of dissolution, neither party will pay alimony. Instead, the plaintiff will receive a cash settlement in an amount to be "reviewed from time to time." The May 18, 1989 addendum to the agreement provides for a cash settlement of $75,000. The agreement further provides that the plaintiff will waive her interests in the defendant's car wash business, and that the plaintiff will not be held liable for the defendant's personal and business loans.

In its memorandum of decision, the trial court stated that, although "[t]here is scant case law addressing the enforcement of postnuptial agreements in Connecticut . . . it is clear that a court may not enforce a postnuptial agreement if it is not fair and equitable. . . . [C]ourts have refused to enforce postnuptial agreements for lack of consideration, failure to disclose financial information, or an improper purpose." Concluding that the agreement was not fair and equitable, the trial court declined **[***4]** to enforce it. The court found that the value of the parties' combined assets was approximately $927,123, and ordered, inter alia, the defendant to pay lump sum alimony in the amount of $392,372 to the plaintiff. The defendant filed a motion to reargue claiming that the court should have applied principles of contract law in determining the enforceability of the agreement.

Following reargument, the trial court issued a second written decision, again declining to enforce the postnuptial agreement, and noting that the Connecticut appellate courts have not yet addressed the issue of the validity of such agreements. The court further declined to apply Connecticut's law governing prenuptial agreements, reasoning that, unlike a prenuptial **[*695]** agreement, a postnuptial agreement is "inherently coercive" because one spouse typically enters into it in order to preserve the marriage, while the other is primarily motivated by financial concerns.

The trial court additionally determined that, even if postnuptial agreements were valid and enforceable under Connecticut law, the present agreement did not comply with ordinary contract principles because it lacked adequate consideration. The court explained **[***5]** that, because past consideration cannot support the imposition of a new obligation, continuation of the marriage itself cannot constitute sufficient consideration to support a postnuptial agreement. Moreover, the trial court emphasized that the plaintiff did not knowingly waive her marital rights because she neither received a sworn financial affidavit from the defendant nor retained independent legal counsel to review the agreement.

The trial court also opined that enforcement of the agreement would have been unjust and was "not . . . a fair and equitable distribution of the parties' assets" because the financial circumstances of the parties had changed dramatically since the agreement was last modified in 1989. Since 1989, the parties had had a child together and the defendant's car wash business had both prospered and deteriorated. This appeal followed. [2]

[23]** I

The defendant contends that the trial court improperly applied equitable principles in determining whether **[***6]** the postnuptial agreement was enforceable and, instead, should have applied only principles of contract **[*696]** law. [3] Specifically, the defendant cites *Crews v. Crews, 295 Conn. 153, 167, 989 A.2d 1060 (2010)*, in which we stated that ***HN3*** "equitable considerations

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[2] The defendant appealed from the judgment of the trial court to the Appellate Court and we granted his subsequent motion to transfer the case to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] The defendant also argues that the trial court improperly considered issues that the plaintiff did not specifically plead. The defendant cites *McKenna v. Delente*, 123 Conn. App. 146, 156-59, 2 A.3d 38 (2010), to support the proposition that the proper way to attack the validity of a postnuptial agreement is by filing a special defense. We disagree, however, with the Appellate Court's decision in *McKenna*. The Appellate Court improperly relied on ***HN4*** Practice Book § 10-50, which applies to pleadings in civil cases, to hold that the defense of unconscionability to enforcement of a prenuptial agreement must be pleaded specially. Id., 159. In fact, Practice Book § 25-9 is applicable to family relations cases, and does not require that any defenses be pleaded specifically. To the extent that *Friezo v. Friezo*, 281 Conn. 166, 197, 914 A.2d 533 (2007), suggests to the contrary, we disavow any such suggestion.

Additionally, the defendant's argument fails because the prenuptial agreement in *McKenna* was reviewed pursuant to General Statutes § 46b-36g, which delineates the standards for the enforceability of prenuptial agreements. The issue of the

codified in our statutes . . . have no bearing on whether [a prenuptial] agreement should be enforced. . . . In other words, whether . . . [a] court . . . thinks the agreement was a good bargain for the plaintiff does not enter into the analysis of the issue." (Internal quotation marks omitted.) The defendant claims that *Crews* precludes the consideration of factors beyond those of pure contract law in determining whether an agreement is enforceable. Although we agree with the defendant that principles of contract law generally apply in determining the enforceability of a postnuptial **[*697]** agreement, we conclude that postnuptial agreements are subject to special scrutiny and the terms of such agreements must be both fair and equitable at the time of execution and not unconscionable at the time of dissolution. Because the terms of the present postnuptial agreement were unconscionable at the time of dissolution, the trial court properly concluded **[***7]** that the agreement was unenforceable.

HN5 The standard applicable to postnuptial agreements presents a question of law, over which our review is plenary. *Id., 161*. We begin our analysis of postnuptial agreements by considering the public policies served by the recognition of agreements regarding the dissolution of marriage, including prenuptial, postnuptial and separation agreements.

Historically, we have stated that ***HN6*** "[t]he state does **[***9]** not favor divorces. . . . Its [public] policy is to maintain the family relation [ship] as a life status." (Citation omitted.) *McCarthy v. Santangelo, 137 Conn. 410, 412, 78 A.2d 240 (1951)*. Accordingly, prenuptial agreements were generally held to violate public policy if **[**24]** they promoted, facilitated or provided an incentive for separation or divorce. *McHugh v. McHugh, 181 Conn. 482, 488-89, 436 A.2d 8 (1980)*. Similarly, a separation agreement is not necessarily contrary to public policy unless it is made to facilitate divorce or is concealed from the court. See *Rifkin v. Rifkin, 155 Conn. 7, 9-10, 229 A.2d 358 (1967)*; *Hooker v. Hooker, 130 Conn. 41, 47, 32 A.2d 68 (1943)*; *Felton v. Felton, 123 Conn. 564, 568, 196 A. 791 (1938)*. "While contracts between husband and wife regarding property settlements entered into prior to instituting proceedings for divorce should be carefully examined, they are not necessarily contrary to public policy . . . ." *Koster v. Koster, 137 Conn. 707, 711, 81 A.2d 355 (1951)*; see also *Lasprogato v. Lasprogato, 127 Conn. 510, 513-14, 18 A.2d 353 (1941)*; *Weil v. Poulsen, 121 Conn. 281, 286, 184 A. 580 (1936)*.

[*698] More recently, our court has acknowledged that ***HN7*** the **[***10]** government has an interest in encouraging the incorporation of separation agreements into decrees for dissolution. See, e.g., *Billington v. Billington, 220 Conn. 212, 221, 595 A.2d 1377 (1991)* ("private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine" [internal quotation marks omitted]). Postnuptial agreements may also encourage the private resolution of family issues. In particular, they may allow couples to eliminate a source of emotional turmoil—usually, financial uncertainty—and focus instead on resolving other aspects of the marriage that may be problematic. By alleviating anxiety over uncertainty in the determination of legal rights and obligations upon dissolution, postnuptial agreements do not encourage or facilitate dissolution; in fact, they harmonize with our public policy favoring enduring marriages. "Such contracts may inhibit the dissolution of marriage, or may protect the interests of third parties such as children from a prior relationship." *Ansin v. Craven-Ansin, 457 Mass. 283, 289, 929 N.E.2d 955 (2010)*.

HN8 Postnuptial agreements are consistent with public policy; they realistically acknowledge **[***11]** the high incidence of divorce and its effect upon our population. We recognize "the reality of the increasing rate of divorce and remarriage." *Heuer v. Heuer, 152 N.J. 226, 235, 704 A.2d 913 (1998)*. "[R]ecent statistics on divorce have forced people to deal with the reality that many marriages do not last a lifetime. As desirable as it may seem for couples to embark upon marriage in a state of optimism and hope, the reality is that many marriages end in divorce. There is a growing trend toward serial marriage; more people expect to have more than one spouse during their lifetime." T. Perry, "Dissolution Planning in Family Law: A Critique of Current Analyses

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enforceability **[***8]** of *postnuptial* agreements is not governed by statute and has not previously been addressed by an appellate court in Connecticut. "Because this case involves . . . a question that this court has not previously decided, it is appropriate at the outset to consider generally the enforceability of such agreements." *McHugh v. McHugh*, 181 Conn. 482, 485, 436 A.2d 8 (1980). Indeed, the trial court had an affirmative duty to discern and to apply the appropriate standard of enforceability. Although the rules of pleading with respect to both prenuptial agreements and postnuptial agreements normally should be the same, it would be unfair to both the parties and the trial court to limit the available defenses to enforcement of a postnuptial agreement to "special defenses" that have not previously been defined.

and a Look toward the Future," 24 Fam. L.Q. 77, 82 **[*699]** (1990). "[B]oth the realities of our society and policy reasons favor judicial recognition of prenuptial agreements. Rather than inducing divorce, such agreements simply acknowledge its ordinariness. With divorce as likely an outcome of marriage as permanence, we see no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs. . . . The reasoning that once found them contrary to public policy has no place in today's **[***12]** matrimonial law." (Internal quotation marks omitted.) *Brooks v. Brooks, 733 P.2d 1044 1050-51 (Alaska 1987)*. Postnuptial agreements are no different than prenuptial agreements in this regard.

Having determined that postnuptial agreements are consistent with public policy, we now must consider what standards govern their enforcement. Neither the **[**25]** legislature nor this court has addressed this question. To aid in our analysis of the enforceability of postnuptial agreements, we review our law on the enforceability of prenuptial agreements. [4] ***HN9*** Two different sets of principles govern decisions as to the enforceability of a prenuptial agreement; the date of the execution of the agreement determines which set of principles controls.

HN11 Prenuptial agreements entered into on or after October 1, 1995, are governed by the Connecticut Premarital Agreement Act, *General Statutes § 46b-36a et seq.* The statutory scheme provides that a prenuptial agreement is unenforceable when: (1) the challenger did not enter the agreement voluntarily; (2) the agreement was **[*700]** unconscionable when executed or enforced; (3) the challenger did not receive "a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party" before execution of the agreement; or (4) the challenger did not have "a reasonable opportunity to consult with independent counsel." *General Statutes § 46b-36g*; see also *Friezo v. Friezo, 281 Conn. 166, 182, 914 A.2d 533 (2007)*.

HN12 Prenuptial agreements entered into prior to October 1, 1995, however, are governed by the common law, which we analyzed in *McHugh v. McHugh, supra, 181 Conn. 482*. In *McHugh*, we explicitly determined that, although a prenuptial agreement "is a type of contract and must, therefore, comply with ordinary principles of contract law" **[***14]** the validity of such a contract depends on the circumstances of the particular case. *Id., 486*. Summarizing, we stated: "[Prenuptial] agreements relating to the property of the parties, and more specifically, to the rights of the parties to that property upon the dissolution of the marriage, are generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice." *Id., 485-86*.

HN13 "To render unenforceable an otherwise valid [prenuptial] agreement, a court must determine: (1) the parties' intent and circumstances when they signed the [prenuptial] agreement; (2) the circumstances of the parties at the time of the dissolution of the marriage; (3) whether those circumstances are 'so far beyond' the contemplation of the parties at the time of execution; and (4) if the circumstances are beyond the parties' initial contemplation, whether enforcement would cause an injustice." **[*701]** *Crews v. Crews, supra, 295 Conn. 168*. **[***15]** We further note that "[i]t is additionally clear that the party seeking to challenge the enforceability of the [prenuptial] contract bears a heavy burden. . . . [W]here the economic status of [the] parties has changed dramatically between the date of the agreement and the dissolution, literal enforcement of the agreement may work injustice. Absent such unusual circumstances, however, [prenuptial] agreements **[**26]** freely and fairly entered into will be honored and enforced by the courts as written. . . . This heavy burden comports with the well settled general principle that [c]ourts of law must allow parties to make their own contracts." (Citation omitted; internal quotation marks omitted.) *Id., 169*.

HN14 Although we view postnuptial agreements as encouraging the private resolution of family issues, we also recognize that spouses do not contract under the same conditions as either prospective spouses or

[4] We do not review our law on the enforceability of ***HN10*** separation agreements, which are distinct from both prenuptial and postnuptial agreements and are entered into when spouses have determined to dissolve their marriage. We merely note that their enforcement is governed by General Statutes § 46b-66 (a), which provides in relevant part that "where the parties have submitted to the court an agreement concerning . . . alimony or the disposition of property, the court shall **[***13]** . . . determine whether the agreement of the spouses is fair and equitable under all the circumstances. . . ."

spouses who have determined to dissolve their marriage. The Supreme Judicial Court of Massachusetts has noted that a postnuptial "agreement stands on a different footing from both a [prenuptial agreement] and a separation agreement. Before marriage, the parties have greater freedom to reject an **[***16]** unsatisfactory [prenuptial] contract. . . .

HN15 "A separation agreement, in turn, is negotiated when a marriage has failed and the spouses intend a permanent separation or marital dissolution. . . . The circumstances surrounding [postnuptial] agreements in contrast are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage. . . .

"For these reasons, we join many other [s]tates in concluding that [postnuptial] agreements must be carefully scrutinized." (Citations omitted; internal quotation marks omitted.) *Ansin v. Craven-Ansin, supra, 457* **[*702]** Mass. 289-90. The Appellate Division of the New Jersey Superior Court has also recognized this "contextual difference" and has noted that a wife "face[s] a more difficult choice than [a] bride who is presented with a demand for a pre-nuptial agreement. The cost to [a wife is] . . . the destruction of a family and the stigma of a failed marriage." *Pacelli v. Pacelli, 319 N.J. Super. 185, 190, 725 A.2d 56 (App. Div.)*, cert. denied, *161 N.J. 147, 735 A.2d 572 (1999)*. A spouse who bargains a settlement agreement, on the other hand, "recogniz[es] that the marriage is over, can look to his **[***17]** or her economic rights; the relationship is adversarial." *Id., 191*. Thus, a spouse enters a postnuptial agreement under different conditions than a party entering either a pre-nuptial or a separation agreement. *Davis v. Miller, 269 Kan. 732, 739, 7 P.3d 1223 (2000)* ("[p]arties entering into a postmarital agreement are in a vastly different position than parties entering into a [prenuptial] agreement").

Other state courts have not only observed that spouses contract under different conditions; they have also observed that ***HN16*** postnuptial agreements "should not be treated as mere 'business deals.'" *Stoner v. Stoner*, 572 Pa. 665, 672-73, 819 A.2d 529 (2003). They recognize that, just like prospective spouses, "parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust . . . ." (Internal quotation marks omitted.) *Id., 673*; see also *Ansin v. Craven-Ansin, supra, 457 Mass. 290-94* (spouses have "confidential relationship" and "'stand as fiduciaries to each other'"). "Ordinarily and presumptively, a confidential relation or a relationship of special confidence exists between husband and wife. **[***18]** It includes, but is not limited to, a fiduciary duty between the spouses, of the highest degree." 41 Am. Jur. 2d 72, Husband and Wife § 69 (2005).

[*703] ***HN17*** Prospective spouses share a "confidential relationship"; *Friezo v. Friezo, supra, 281 Conn. 189*; but spouses share the institution of marriage, "one of the most fundamental of human relationships . . . ." *Davis v. Davis, 119 Conn. 194, 203, 175 A. 574 (1934)*. **[**27]** Marriage is "intimate to the degree of being sacred. It is an association that promotes a way of life . . . a harmony in living . . . a bilateral loyalty . . . . *Griswold v. Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)*. Courts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length." (Internal quotation marks omitted.) *Billington v. Billington, supra, 220 Conn. 221*. "Although marital parties are not necessarily in the relationship of fiduciary to beneficiary . . . [full and frank] disclosure is required of such parties when they come to court seeking to terminate their marriage." Id.

Because of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in **[***19]** contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the other. This leads us to conclude that postnuptial agreements require stricter scrutiny than prenuptial agreements. In applying special scrutiny, a court may enforce a postnuptial agreement only if it complies with applicable contract principles, [5] and the terms of the agreement **[*704]** are both fair and equitable at the time of execution and not unconscionable at the time of dissolution.

HN19 We further hold that the terms of a postnuptial agreement are fair and equitable at the time of execution

[5] The defendant also argues that the trial court improperly concluded that the postnuptial agreement at issue failed to comply with contract principles because it lacked adequate consideration. Because we conclude that the trial court properly found that the present agreement was unenforceable, we need not address whether the agreement also could have failed for lack of consideration.

if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse. **[**28]** This mandatory disclosure requirement is a result of the deeply personal marital relationship. [6]

[*705] ***HN20*** Just as "[t]he validity of a [prenuptial] contract depends upon the circumstances of the particular case"; *McHugh v. McHugh, supra, 181 Conn. 485*; in determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances surrounding execution. A court may consider various factors, including "the nature and complexity of the agreement's terms, the extent of and disparity in assets brought to the marriage by each spouse, the parties' respective age, sophistication, education, employment, experience, prior marriages, or other traits potentially affecting the ability to read and **[***23]** understand an agreement's provisions, and the amount of time available to each spouse to reflect upon the agreement after first seeing its specific terms . . . [and] access to independent counsel prior to consenting to the contract terms." Annot., 53 A.L.R.4th 92-93, § 2 [a] (1987); id. (discussing factors that courts have considered in evaluating fairness of circumstances surrounding execution of pre-nuptial agreement).

HN21 With regard to the determination of whether a postnuptial agreement is unconscionable at the time of dissolution, "[i]t is well established that [t]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case." (Internal quotation marks omitted.) *Crews v. Crews, supra, 295 Conn. 163*. "The determination of unconscionability is to be made on a case-by-case basis, taking into account all of the relevant facts and circumstances." *Cheshire Mortgage Service, Inc. v. Montes, 223 Conn. 80, 89, 612 A.2d 1130 (1992)*.

HN22 Unfairness or inequality alone does not render a postnuptial agreement unconscionable; spouses may agree **[*706]** on an unequal distribution of assets at dissolution. "[T]he mere fact that hindsight may **[***24]** indicate the provisions of the agreement were improvident does not render the agreement unconscionable." (Internal quotation marks omitted.) *Lipic v. Lipic*, 103 S.W.3d 144, 150 (Mo. App. 2003). Instead, the question of whether enforcement of an agreement would be unconscionable is analogous to determining whether enforcement of an agreement would work an injustice. *Crews v. Crews, supra, 295 Conn. 163*. Marriage, by its very nature, is subject to unforeseeable developments, and no agreement can

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HN18 General Statutes § 46b-36c, however, expressly provides that prenuptial agreements are enforceable without consideration. Because no similar statute exists for postnuptial agreements, **[***20]** and because such agreements generally must comply with contract principles, the present agreement would require adequate consideration to be enforceable.

"Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Viera v. Cohen*, 283 Conn. 412, 440-41, 927 A.2d 843 (2007); *State Nat'l Bank v. Dick*, 164 Conn. 523, 529, 325 A.2d 235 (1973); see also *Finlay v. Swirsky*, 103 Conn. 624, 631, 131 A. 420 (1925). A release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration. See *People's Bank of Red Level v. Barrow & Wiggins*, 208 Ala. 433, 435, 94 So. 600 (1922); 41 Am. Jur. 2d 71, supra, § 67. In the present case, the plaintiff released, inter alia, her right to alimony and her interest in the defendant's car wash business, in exchange for, inter alia, the defendant's right to alimony and his release of the plaintiff's liability for the defendant's personal and business loans. Although the trial court found that the present agreement lacked adequate consideration, the agreement **[***21]** would not fail for lack of consideration.

In the present case, the defendant does not argue that a promise to remain married constitutes adequate consideration, and the postnuptial agreement does not refer to any promise to remain married or right to dissolution of marriage. Thus, for purposes of the present dispute, it is irrelevant whether a spouse's forbearance from bringing a claimed dissolution action and the continuation of the marriage provides adequate consideration for a postnuptial agreement.

[6] The defendant also argues that the trial court improperly determined that the agreement was unenforceable because the plaintiff did not consult with an attorney. **[***22]** The record, the defendant argues, establishes that the plaintiff had ample time to consult with an attorney, as stated in the text of the agreement itself. Because we conclude that the trial court properly found that the agreement was unenforceable, we do not address this argument beyond noting that, in evaluating the circumstances surrounding a particular agreement, the court should examine the parties' knowledge of their rights and obligations and whether they had a reasonable opportunity to confer with independent counsel.

possibly anticipate all future events. Unforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable.

II

Now that we have set forth the applicable legal standards for postnuptial agreements, we turn to the present case and address the question of whether the trial court properly concluded that the parties' **[**29]** postnuptial agreement should not be enforced.

Although we generally review a trial court's discretionary decision in a domestic relations case using the clearly erroneous standard of review; *Kiniry v. Kiniry, 299 Conn. 308, 315-16, 9 A.3d 708 (2010)*; in the present case, we must apply the legal **[***25]** standards described in this opinion, namely, whether the terms of the agreement were fair and equitable at the time of execution and not unconscionable at the time of dissolution, to the underlying facts. Accordingly, ***HN23*** the question of whether the agreement was enforceable is a mixed question of fact and law subject to plenary review. See *Friezo v. Friezo, supra, 281 Conn. 180*.

We therefore provide the following additional facts. Although the value of the parties combined assets is **[*707]** $927,123, the last addendum to the agreement, dated May 18, 1989, provides that the plaintiff will receive a cash settlement of only $75,000. This addendum was written prior to the initial success of the car wash business in the early 1990s, the birth of the parties' son in 1991, when the parties were forty-one years old, and the subsequent deterioration of the business in the 2000s. At the time of trial, the parties were both fifty-seven years old. Neither had a college degree. The defendant had been steadily employed by the car wash business since 1973. The plaintiff had worked for that business for thirty-five years, providing administrative and bookkeeping support, and since approximately 2001, when the **[***26]** business began to deteriorate, the plaintiff had managed all business operations excluding maintenance. In 2004, the plaintiff also had worked outside of the business in order to provide the family with additional income. Since approximately 2007, when the plaintiff stopped working for the business, the defendant had not been able to complete administrative or bookkeeping tasks, and had not filed taxes.

The trial court found that "[t]he economic circumstances of the parties had changed dramatically since the execution of the agreement" and that "enforcement of the postnuptial agreement would have worked injustice." It, therefore, concluded that the agreement was unenforceable. Although the trial court did not have guidance on the applicable legal standards for postnuptial agreements, which we set forth today, we previously have determined that ***HN24*** the question of whether enforcement of a prenuptial agreement would be unconscionable is analogous to determining whether enforcement would work an injustice. *Crews v. Crews, supra, 295 Conn. 163*. Thus, the trial court's finding that enforcement of the postnuptial agreement would work an injustice was tantamount to a finding that the agreement **[***27]** was unconscionable at the time the defendant sought **[*708]** to enforce it. We review the question of unconscionability as a matter of law. The facts and circumstances of the present case clearly support the findings of the trial court that, as a matter of law, enforcement of the agreement would be unconscionable. We therefore do not need to remand this case to the trial court because its findings satisfy the test for enforceability, which we articulate today. Accordingly, we hold that the trial court properly concluded that the agreement was unenforceable.

The judgment is affirmed.

In this opinion the other justices concurred.

User Name: Elizabeth Leamon
Date and Time: Nov 14, 2015 10:26 a.m. EST
Job Number: 26231209

Document(1)

1. *Centmehaiey v. Centmehaiey, 2014 Conn. Super. LEXIS 2167*

Client/Matter: -None-
Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Estate, Gift & Trust Law; Court: Connecticut

Centmehaiey v. Centmehaiey

Superior Court of Connecticut, Judicial District of New Haven at New Haven

September 3, 2014, Decided; September 3, 2014, Filed

NNHCV136039691S

Reporter
2014 Conn. Super. LEXIS 2167

Susan Centmehaiey v. Wendy Centmehaiey, Executrix for the Estate of Andrew L. Centmehaiey

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

postnuptial, spouse, marital, marriage, fair and equitable, time of execution, enforceable, disclosure, parties, terms, dissolution

Judges: **[*1]** William L. Hadden, Jr., Judge Trial Referee.

Opinion by: William L. Hadden, Jr.

Opinion

MEMORANDUM OF DECISION

The plaintiff Susan Centmehaiey (plaintiff or Susan) and her husband, Andrew L. Centmehaiey (Andrew) entered into a postnuptial agreement (Marital Agreement). Susan signed the Marital Agreement on March 9, 1990 and Andrew signed on March 23, 1990. Andrew died on June 4, 2007 and his daughter Wendy Centmehaiey (Wendy or Executrix) was appointed as Executrix of Andrew's estate by the Wallingford Probate Court. Susan notified the Executrix of her intention to take her statutory share of the estate pursuant to *Connecticut General Statutes Section 45a-436*. The Executrix objected to Susan's notice alleging that she had waived her right to take a spouses's statutory share by the terms of the Marital Agreement.

Susan's claim to take her statutory share pursuant to *Section 45a-436* was heard by the Honorable Probate Judge Philip T. Wright. On June 3, 2013 Judge Wright found the Marital Agreement to be valid and enforceable, and he sustained the objection of the Executrix to Susan's claim.

Susan has filed an appeal to this court from the decision of the Wallingford Probate Court. This court heard the appeal on January 17, February 21 and March 11, 2014. Appropriate briefs **[*2]** have been filed by Susan and the Executrix.

Based on the evidence offered in the trial and the reasonable inferences to be drawn from that evidence, the court finds the following facts and reaches the following conclusions.

Andrew was born on September 2, 1944 and Susan on April 8, 1954. They were married on July 10, 1976. Susan had been married previously and had one child, Scott Emmons, while Andrew had one child, Wendy, from one of his two prior marriages. At the time of their marriage Susan was 22 and Andrew was 34. Susan had dropped out of school in the 11th grade and Andrew completed one year of college.

When he married Susan, Andrew was employed as a motor vehicle body repairman at Barberino's Pontiac car dealership. Shortly after the marriage Andrew became employed by Allstate Insurance as an adjuster for the next 20 years. He was working as an adjuster making about $50,000 a year when the Marital Agreement was signed in March 1990.

Susan was working at UniMac Switch when she married Andrew but she injured her back at work shortly after the marriage and she has never returned to work. She has had approximately nine surgical procedures on her back and is a frequent user of pain **[*3]** medication. Susan settled her workers' compensation claim for $10,000.00 sometime before 1990 and she and Andrew used the money to go on a vacation. In 1990 Susan was

receiving $400.00 per month for disability benefits for her back.

After the first year of their marriage Andrew and Susan lived in a home at 681 Barnes Road, Wallingford which the parties and counsel believe was owned by Andrew's mother Lydia Centmehaiey. Exhibit I is a 1963 quit claim deed whereby presumably Lydia acquired title from Edwin Goodrich. There is no other evidence of a change in ownership until Lydia quit claimed her interest to Andrew on September 26, 1991. However, the 1963 deed conveyed title to Lydia and Andrew, which would make Andrew a 50% owner at the time the marital agreement was signed in March 1990.

In early March 1990 Andrew asked Susan to sign the postnuptial marital agreement which had been prepared by his attorney Norman Fishbein. When Susan indicated some reluctance to sign the agreement Andrew told her to "sign it or get out." Susan then took the agreement on March 9, 1990 to the Wallingford Town Hall where she had her signature notarized and returned the signed agreement to Andrew. He signed **[*4]** it on March 23, 1990, which was the same day that he signed his will. The will left his entire estate to his mother Lydia. If she were deceased then to Wendy, and if she were deceased then to Susan.

In the postnuptial agreement each party released all claims of dower, and all marital rights which he/she may acquire by reason of the marriage in the property of the other. The agreement also provided that the parties "acknowledge that they had full disclosure of the other's assets as set forth in Schedule A attached hereto." Schedule A—Assets listed under Susan's name a "1991 Pontiac." Under Andrew's name were listed "Possible inheritance from mother; 1985 Oldsmobile; Joint bank account with mother of approximately $8,000.00; Savings $2,800.00; 1974 Pontiac; 1959 Ford; Lionel trains and coin collection." Susan was given no other information about Andrew's assets.

Our Supreme Court recently has decided whether postnuptial agreements are valid and enforceable. "Today we are presented for the first time with the issue of whether a postnuptial agreement is valid and enforceable in Connecticut . . . We conclude that postnuptial agreements are valid and enforceable and generally must comply with **[*5]** contract principles. We also conclude, however, that the terms of such agreements must be both fair and equitable at the time of execution and not unconscionable at the time of dissolution." ***Bedrick*** v. ***Bedrick***, *300 Conn. 691, 17 A.3d 17 (2011)*.

The Supreme Court analyzed postnuptial agreements by considering the "public policies served by the recognition of agreements regarding the dissolution of marriage, including prenuptial, postnuptial and separation agreements. ***Bedrick*** v. ***Bedrick***, supra *697*, and concluded that postnuptial agreements are consistent with public policy.

The Supreme Court noted the special relationship that exists between spouses involved in a postnuptial agreement. "Other state courts have not only observed that spouses contract under different conditions; they have also observed that postnuptial agreements "should not be treated as mere 'business deals.'" *Stoner v. Stoner*, 572 Pa. 665, 672-73, 819 A.2d 529 (2003). They recognize that, just like prospective spouses, "parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust . . ." (Internal quotation marks omitted.) *Id.* 673; see also *Ansin v. Cravin-Ansin, supra, 457 Mass. 290-94* (spouses have "confidential relationship" and "'stand as fiduciaries to each other'"). "Ordinarily **[*6]** and presumptively, a confidential relation or a relationship of special confidence exists between husband and the wife. It includes, but is not limited to, a fiduciary duty between the spouses, of the highest degree." 41 Am.Jur.2d 72, Husband and Wife §69 (2005).

"Because of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the other. This leads us to conclude that postnuptial agreements require stricter scrutiny than prenuptial agreements. In applying special scrutiny, a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution.

"We further hold that the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, **[*7]** duress or similar defect. Moreover, each spouse must be given full, fair

and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse. This mandatory disclosure requirement is a result of the deeply personal marital relationship.

"Just as "[t]he validity of a [prenuptial] contract depends upon the circumstances of the particular case"; *McHugh v. McHugh, supra 181 Conn. 485*; in determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances surrounding execution. A court may consider various factors, including "the nature and complexity of the agreement's terms, the extent of and disparity in assets brought to the marriage by each spouse, the parties' respective age, sophistication, education, employment, experience, prior marriage, or other traits potentially affecting the ability to read and understand an agreement's provisions, and the amount of time available to each spouse to reflect upon the agreement after first seeing its specific terms . . . [and] access to independent counsel prior to consenting to the contract **[*8]** terms." ***Bedrick*** v. ***Bedrick***, *300 Conn. 691, 17 A.3d 17 (2011)*.

The Supreme Court also held specifically that postnuptial agreements require adequate consideration to be enforceable. "*General Statutes §46b-36c*, however, expressly provides that prenuptial agreements are enforceable without consideration. Because no similar statute exists for postnuptial agreements, and because such agreements generally must comply with contract principles, the present agreement would require adequate consideration to be enforceable.

"Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Viera v. Cohen, 283 Conn. 412, 440-41, 927 A.2d 843 (2007)*; *State Nat'l Bank v. Dick, 164 Conn. 523, 529, 325 A.2d 235 (1973)*; see also *Finlay v. Swirsky, 103 Conn. 624, 631, 131 A.420 (1925)*. A release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration." ***Bedrick*** v. ***Bedrick***, *300 Conn. 691, 703 n.5, 17 A.3d 17 (2011)*.

The agreement does not comply with the most basic contractual principle, adequate consideration. Susan had as her only asset a nine-year-old Pontiac and $400.00-a-month disability income which was not included in the list of assets attached to the agreement. She was in poor health, and had not been employed since her back injury almost 14 years ago. She had had 4 back operations, and was taking morphine, **[*9]** percocet, fentanyl, dilaudid, and methadone for pain 4 or 5 times per day. Her chances of increasing her income and assets were almost non-existent. She gained the minimal benefit of having her limited assets not available to Andrew in the event of marital discord. She gave up her valuable right to claim any alimony or property settlement from Andrew's assets. These assets included a 50% ownership in the property where they were living, and the potential of Andrew becoming the sole owner. It also included a yearly income of about $50,000.00 a year which was not on the list of assets.

In addition to being unenforceable as against Susan because of inadequate consideration, the agreement is unenforceable because it was not fair and equitable at the time it was entered into. ***Bedrick*** holds that the terms of a postnuptial agreement are "fair and equitable" at the time of execution if the agreement is made voluntarily and without any undue influence, fraud, coercion, duress or similar defect. Each spouse must be given a complete disclosure of all property held and all of the financial obligations and income of the other spouse. "This mandatory disclosure requirement is a result of the deeply **[*10]** personal marital relationship."

In this case there was duress when a 36-year-old woman with physical problems, who is unable to be employed, is told by her husband to "sign or get out." In addition there was no disclosure of Andrew's property and financial obligations and income, which is described by the Supreme Court as "mandatory."

And lastly, the Supreme Court in ***Bedrick*** stated that in determining whether a postnuptial agreement is fair and equitable at the time of execution a court should consider the totality of the circumstances surrounding the execution of the document and suggested various factors to consider. The court finds that the parties' ages, sophistication, education, employment, experience, prior marriages, the inability of Susan to read and comprehend the agreement, and the fact that Andrew had independent counsel and Susan did not, all tended to affect the fairness and equitability of the agreement in Andrew's favor, and to Susan's detriment at the time of execution. The court finds that the agreement was not fair and equitable for Susan at the time of execution.

During the trial the parties offered considerable evidence on the issue of whether the marital agreement **[*11]** was unconscionable at the time of the dissolution on the date of Andrew's death. In view of the court's finding that the agreement is unenforceable because it did not comply with contract principles, and that it was not fair and equitable at the time of execution, the court will not rule on whether the agreement was unconscionable at the time of dissolution.

The marital agreement between Andrew Centmehaiey and Susan Centmehaiey dated March 9 and 23, 1990 is declared unenforceable for the reasons set forth above. Susan Centmehaiey is entitled to take her statutory share of the Estate of Andrew Centmehaiey pursuant to *Connecticut General Statute Section 45a-436*.

William L. Hadden, Jr.

Judge Trial Referee

Document(1)

1. *Fustini v. Fustini, 2015 Conn. Super. LEXIS 1715*
   Client/Matter: -None-

Fustini v. Fustini

Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford

June 25, 2015, Decided; June 25, 2015, Filed

FSTFA020190158S

Reporter
2015 Conn. Super. LEXIS 1715

Carmen Fustini v. Fabian Fustini

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

intervenor, parties, postnuptial, marriage, visitation, spouse, dissolution, custody, orders, defense motion, court finds, terms, visitation rights, enforceable, Statutes, denies, dissolution action, statutory criteria, quotation marks, real property, circumstances, principles, equitable, declines, expenses, guardian, mortgage, married, litem

Judges: **[*1]** SYBIL V. RICHARDS, JUDGE.

Opinion by: SYBIL V. RICHARDS

Opinion

CORRECTED MEMORANDUM OF DECISION (Deleting n.6, pg. 8, everything after the word "marriage" on the last line of pg. 8 and n.7 on pg. 9; rephrasing the reference to the GAL's role on pg. 16; inserting a new sentence to the end of paragraph 2 on pg. 19 and minor stylistic changes.)

Many of the essential facts of this case are disputed by the parties. There is, however, one partially resolved fact that is the source of great consternation between the parties: the paternity of the two children who were born during the marriage. Once the results of DNA tests commissioned by the plaintiff, biological mother, and the defendant, putative father, confirmed that the intervenor,[1] Pasquale Cambareri, is the biological father of said children, namely, Stephanie Nicole Fustini, born on November 23, 1996, and Patrick Christopher Fustini, born on September 18, 1998, ultimately both parties agreed to petition the court to open a judgment of dissolution that entered on March 20, 2003[2] and vacate all orders relating thereto.[3]

This case involves a lengthy dissolution trial that was tried over a period of 19 non-consecutive days between

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[1] The intervenor filed a motion to intervene to obtain custody and visitation of the minor children, which was granted by the court (Richards, **[*2]** S., J.).

[2] It was an uncontested dissolution trial (Harrigan, J.T.R.). Interestingly, the court notes that count one of the plaintiff's complaint dated June 10, 2002 states that ″[t]here are two (2) minor children born to the plaintiff Wife since the date of this marriage.″

[3] There is a protracted procedural history that begins in 2011, but it is not necessary to detail it in this context. The parties' request would extend to their written separation agreement, dated on an even date therewith, which was incorporated into said judgment. The parties put their oral stipulation on the record on June 4, 2013, but the court (Richards, S., J.) ordered that a written motion be filed (which is pursuant to Practice Book §17-4). The defendant complied by filing a motion to open and set aside judgment, which requested that all orders related thereto be vacated. The court (Richards, S., J.) granted said motion. Subsequently, lengthy oral argument ensued during the trial about whether counsel for the defendant and the plaintiff's prior counsel agreed on June 4, 2013 that fraud would not be asserted when the prior judgment was opened. After reviewing the transcript relating thereto, the court finds that the record reflects that **[*3]** the parties agreed to open the judgment of dissolution without asserting fraud or any other grounds. Nothing in said transcript supports any contrary interpretation or otherwise limited or prevented either party from raising fraud or any other allegation after the judgment was opened. The plaintiff replied to the defendant's motion to open by filing a response in the nature of counterclaim and request for relief

April to October of 2014 at which time the court heard testimony from the parties, their witnesses and the guardian ad litem for the minor children and admitted exhibits into evidence. In rendering its decision and fashioning the ensuing orders, the court has carefully considered the statutory criteria in *General Statutes §46b-66a* as to the conveyance of real property, *§§46b-81* and *46b-82* regarding the assignment of the marital estate and alimony, respectively, and *§46b-62* regarding attorneys fees and the case law regarding these matters. The court has also **[*4]** considered the parties' proposed orders, briefs and outstanding motions. Additionally, the court has examined the parties' full exhibits and observed the demeanor of the witnesses during the trial. Based upon the relevant and credible evidence presented, the court makes the following findings of fact.

The plaintiff and the defendant are both high school graduates. Before marrying, neither party had assets of any significance. And the defendant was working as a limousine driver and the plaintiff was working as a babysitter and housecleaner for the intervenor's sister, the intervenor and his wife at their Mount Kisco, New York house and his store. Sometime in 1993 or the beginning of 1994, the intervenor and the plaintiff began having an affair. The plaintiff met the defendant in either 1994 or 1996. In 1996, the plaintiff found out she was pregnant. She shared this information with the intervenor, who informed her that he was going to purchase real property for the benefit of the unborn child, and with the defendant, who asked her to marry him. She ceased having an affair with the intervenor after she found out she was pregnant.[4] She and the defendant decided to get married. The plaintiff **[*5]** was 1 to 2 months pregnant at the time of the parties' marriage.

During the marriage, the plaintiff was a housewife but she helped cleaned the intervenor's house or his store and, in turn, he compensated her by paying her in cash and the defendant continued to work 12-hour days as a limousine driver. Problems between the parties surfaced early. The plaintiff was a calm person and the defendant was aggressive and this caused friction. They argued frequently. The defendant borrowed money from his sister Susan and friends to cover household expenses. When he needed business suits, the defendant turned to the intervenor for help and the intervenor, who used to be a tailor, retrofitted some of his own suits especially for the defendant. Approximately 3 months after the parties were married, they entered into a written postnuptial agreement that addressed their property rights in the event of a divorce.[5] In August of 1996, the intervenor purchased a multifamily home located at 12 Moore Street, Stamford, Connecticut **[*6]** (hereinafter referred to as the "Moore property"). By October of that same year, the parties did not execute a lease but were living at the Moore property rent free. The plaintiff managed the Moore property on behalf of the intervenor and, among other things, collected the rents and paid the mortgage on said property. From the time Stephanie was born on forward, the intervenor was ever present in her life. He gave the plaintiff money for groceries, diapers or whatever she needed for Stephanie. The intervenor and his wife visited the Moore property nearly every day. While they were there, intervenor would help cook meals for, feed and bathe Stephanie. At her christening, the intervenor and his wife became Stephanie's godparents. The intervenor also showered her with gifts, opened a joint bank account with the plaintiff for Stephanie's benefit, and, as Stephanie grew, attended some appointments with her pediatrician, went to parent-teacher conferences, school events and dropped her off at and picked her up from school. In 1998, the intervenor transferred a one-half interest in the Moore property to the plaintiff, although she claims she was unaware of this part of the transaction, and **[*7]** both of them were co-signers on a $176,000 mortgage on said property. When the youngest child, Patrick, was born, the intervenor was a constant presence in his life too from the very beginning and treated Patrick like Stephanie in every respect. He also intended to help the plaintiff purchase another piece of real property for Patrick's benefit.

At all times herein, the defendant held himself out to be the children's father. He was not as involved in the children's daily life as the intervenor because of his job schedule but the children loved him and a strong bond

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to the defendant's motion to open judgment. In her response, the plaintiff consented to the defendant's motion and agreed to contest paternity by agreement.

[4] The plaintiff and intervenor became intimate again, after the marriage of the parties, for the purpose of conceiving Patrick because the plaintiff wanted a sibling for Stephanie.

[5] The date of this agreement is June 21, 1996.

with defendant. In his spare time, he played with the children, watched television with them and took them to the playground. He even bought them a pricey swing set. After there was a fire at the Moore Street property, the plaintiff and the children stayed with the intervenor and his wife for 2 to 3 months while the defendant lived temporarily with one of the defendant's sisters. Following its repair, the parties decided not to return to the Moore property but instead moved into a multifamily house located at 83 Catoona Lane, Stamford, Connecticut (hereinafter known as the "Catoona **[*8]** property"). The plaintiff purchased it in her name only for $382,000 on April 19, 2001 with a down payment of nearly $40,000 that she saved from monies she received from the intervenor over time.[6] That same year, the plaintiff found out that the defendant was having an affair.

DISCUSSION

Inheritances and Gifts

"The division of property . . . in dissolution proceedings [is] governed by . . . *[§]46b-81(a)*." (Internal quotation marks omitted.) *Light v. Grimes, 136 Conn.App. 161, 167, 43 A.3d 808*, cert. denied, *305 Conn. 926, 47 A.3d 885 (2012)*. *Section 46b-81(a)* provides in relevant part: "At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either the husband or wife all or any part of the estate of the other . . ." Additionally, "*§46b-81(c)* directs the court to consider numerous separately listed criteria in distributing marital property at the time of the dissolution judgment." *Cottrell v. Cottrell, 133 Conn.App. 52, 56, 33 A.3d 839 (2012)*. *Section 46b-81(c)* provides in relevant part: "In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities **[*9]** and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

Importantly, "[a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant statutory criteria." (Internal quotation marks omitted.) *Boyne v. Boyne, 112 Conn.App. 279, 282, 962 A.2d 818 (2009)*. "While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case . . . In dividing up property, the court must take many factors into account . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Citations omitted; Internal quotation marks omitted.) *Lopiano v. Lopiano, 247 Conn. 356, 374-75, 752 A.2d 1000 (1998)*.

In applying these principles to the instant facts, it is obvious from the evidence **[*10]** in the record that the parties owned no valuable assets at the time of their marriage. The same record also shows that the intervenor transferred fifty percent of his ownership interest in the Moore property to the plaintiff two years later without any financial contribution from either party despite her testimony that she was unaware of this part of the real estate transaction with the intervenor and regardless of the inconsistencies in the defendant's testimony regarding his knowledge about when she acquired title to said property. Except for the rare occasions when the defendant collected rent from the tenants, the plaintiff managed the Moore property on completely on her own, identified the tenants and collected rent from them, caused the repairs of and maintenance to the Moore property and paid its mortgage, taxes and all expenses relating thereto. All shortages were covered by the intervenor and the plaintiff saved as much of the overages as possible. It was the same with her acquisition of the Catoona property and the intervenor, not the defendant, gave her the down payment for the purchase. It was also the intervenor who paid off the entire balance of the mortgage on the Catoona **[*11]** property.

The plaintiff admitted that she did not reveal the source of her funds for the financing and purchase of these two properties, and the defendant admitted that he did not provide her with money directly to do so for either of the properties. He testified that he gave her money, in the-form of cash or check, for household expenses, in general, to use as she saw fit. Nevertheless, for a housewife with minimal income performing work as a babysitter and housekeeper and a limousine driver

[6] Of that amount, $346,500 was financed by a mortgage.

earning a gross salary of roughly $100,000 a year, *before* deducting his expenses for his work vehicle, who had to borrow money to meet their living expenses and had to ask the intervenor to be a co-signor on and lend him a $5,000 loan for a down payment on the purchase of a $50,000 Mercedes Benz required by defendant's employer, the court is not persuaded by his testimony that he contributed to the plaintiff's acquisition and preservation of either the Moore property or the Catoona property. Further, this was a marriage of short duration, neither has a degree beyond high school, the defendant's wage history showed he made substantially more than she did and that, as a result, he may have a better **[*12]** opportunity to command a greater salary than the plaintiff will in the future and they were in their mid-thirties to early forties at the time of their marriage.

I. Postnuptial Agreement

Next, the court turns to the plaintiff's request for leave to amend the complaint to add the postnuptial agreement. A few years ago, our Supreme Court decided that postnuptial agreements are valid and enforceable.

"Today we are presented for the first time with the issue of whether a postnuptial agreement is valid and enforceable in Connecticut. We conclude that postnuptial agreements are valid and enforceable and generally must comply with contract principles. We also conclude, however, that the terms of such agreements must be both fair and equitable at the time of execution and not unconscionable at the time of dissolution." *Bedrick v. Bedrick, 300 Conn. 691, 17 A.3d 17 (2011)*.

Our Supreme Court concluded that postnuptial agreements are consistent with public policy after considering the "public policies served by the recognition of agreements regarding the dissolution of marriage, including prenuptial, postnuptial and separation agreements. *Bedrick v. Bedrick, supra at 697*. But it also recognized the uniqueness that exists in the relationship between spouses. **[*13]** "Other state courts have not only observed that spouses contract under different conditions; they have also observed that postnuptial agreements "should not be treated as mere 'business deals.'" *Stoner v. Stoner*, 572 Pa. 665, 672-73, 819 A.2d 529 (2003). They recognize that, just like prospective spouses, "parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust . . ." (Internal quotation marks omitted.) *Id.* at 673; see also *Ansin v. Craven-Ansin, supra, 457 Mass. at 290-94* (spouses have "confidential relationship" and "'stand as fiduciaries to each other'"). "Ordinarily and presumptively, a confidential relation or a relationship of special confidence exists between husband and the wife. It includes, but is not limited to, a fiduciary duty between the spouses, of the highest degree." 41 Am.Jur.2d 72, Husband and Wife §69 (2005). "Because of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the **[*14]** other. This leads us to conclude that postnuptial agreements require stricter scrutiny than prenuptial agreements. In applying special scrutiny, a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the-agreement are both fair and equitable at the time of execution and not unconscionable at the time of dissolution." n.3, *supra*.

"We further hold that the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse. This mandatory disclosure-requirement is a result of the deeply personal marital relationship."

"Just as "[t]he validity of a [prenuptial] contract depends upon the circumstances of the particular case"; *McHugh v. McHugh, supra 181 Conn. at 485*; in determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances **[*15]** surrounding execution. A court may consider various factors, including "the nature and complexity of the agreement's terms, the extent of and. disparity in assets brought to the marriage by each spouse, the parties' respective age, sophistication, education, employment, experience, prior marriage, or other traits potentially affecting the ability to read and understand an agreement's provisions, and the amount of time available to each spouse to reflect upon the agreement after first seeing its specific terms . . . [and] access to independent counsel prior to consenting to the contract terms." *Bedrick v. Bedrick, 300 Conn. 691, 17 A.3d 17 (2011)*.

The Supreme Court further held that adequate consideration is required for postnuptial agreements to be enforceable. "General Statues §46b-36c, however, expressly provides that prenuptial agreements are enforceable without consideration. Because no similar statute exists for postnuptial agreements, and because such agreements generally must comply with contract principles, the present agreement would require adequate consideration to be enforceable."

"Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) Viera v. Cohen, 283 Conn. 412, 440-41, 927 A.2d 843 (2007); State National Bank v. Dick, 164 Conn. 523, 529, 325 A.2d 235 (1973); see **[*16]** also Finlay v. Swirsky, 103 Conn. 624, 631, 131 A. 420 (1925). A release by one spouse of his or her interest in the estate of the other spouse, in exchange for a similar release by the other spouse, may constitute adequate consideration." Bedrick v. Bedrick, 300 Conn. 691, 703 n.5, 17 A.3d 17 (2011).

With these principles in mind, the court examines the facts presented in connection with the postnuptial agreement. Although the evidence reflects that neither party owned any assets at the time of the marriage (which was roughly three months prior to the date on which the-agreement was executed), that the plaintiff's attorney spoke a little bit of Spanish in communicating with the plaintiff, who is not fluent in English, to assist the plaintiff in understanding the terms of the agreement and that the plaintiff testified that she understood said terms except for the word "arbitration," there was no evidence that there was an exchange of the disclosure of the parties' assets, that there was any consideration, that the defendant had sufficient time to reflect on the proposed agreement or obtain the advice of counsel before he executed it, and the defendant had less than three days to review it and retain an attorney, although he declined to retain counsel, prior to the date of the parties' execution of **[*17]** the postnuptial agreement. Furthermore, while the deal may not have been an issue for either party at the time of its execution, the status of parties changed over the course of their short lived marriage and their circumstances changed at the time of the present dissolution action. At the conclusion of the dissolution action, the evidence proved that the plaintiff acquired an ownership interest in two houses in her own name during the parties' marriage and her health had deteriorated since the parties were married. Therefore, the circumstances surrounding the postnuptial agreement changed by the time of dissolution and the terms of the postnuptial agreement did not satisfy all the elements of a contract. For the foregoing reasons, the court grants the plaintiff's motion for leave to amend the complaint to add the postnuptial agreement, but denies the plaintiff's request to enforce the postnuptial agreement for the reasons set forth herein.

II. Intervenor's Motion for Custody and Visitation

Connecticut General Statutes §46b-59 states: "The Superior Court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according to the court's **[*18]** best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable, provided the grant of such visitation rights shall not be contingent upon any order of financial support by the court. In making, modifying or terminating such an order, the court shall be guided by the best interest of the child, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion. Visitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such visitation rights are granted. The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights." In Troxel v. Granville, 530 U.S. 57, 120 S.Ct 2054, 147 L.Ed.2d 49 (2000), the United States Supreme Court rules as unconstitutional a third-party visitation statute that had been enacted by the State of Washington. The statute allowed a court to award third-party visitation upon a showing that such visitation would **[*19]** be in the best interest of the child, even if the court's decision contravened the wishes of a fit custodial parent. The U.S. Supreme Court found that the statute violated the parent's fundamental liberty interests, guaranteed by the Fourteenth Amendment of the United States Constitution, to raise his or her child free of interference by the state. The High Court ruled in *Troxel* that: "Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the state to inject itself in the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel v. Granville, supra., at p. 68-69.

In light of the *Troxel* decision, the Connecticut Supreme Court has applied strict scrutiny to Connecticut's third-party visitation statutes. See *Roth v. Weston, 259 Conn. 202, 789 A.2d 431 (2002)*.

In *Roth v. Weston*, the Connecticut Supreme Court imposed a "judicial gloss upon the third-party visitation provisions of *Connecticut General Statute §46b-59*. Our Supreme Court held that in light of the constitutionally protected right of a presumably fit parent to make decisions about his or her children, a non-parent seeking visitation must allege and prove by clear and convincing evidence the following: (1) the **[*20]** existence of a parent-like relationship with the child; and (2) that denial of the visitation would cause real and significant harm to the child. The level of harm alleged and proven must be "akin to the level of harm that would allow the state to assume custody under *General Statutes §§46b-120* and *46b-129*, namely that the child is neglected, uncared for or dependent, as those terms have been defined." *Roth v. Weston, Id. at 226, 789 A.2d 431*.

Compared with most of the parties' testimony, which was either evasive, of questionable veracity, peppered with rampant inconsistencies or teeming with memory lapses of the "I don't know" or "I can't remember" variety, the intervenor's testimony about the nature and extent of his parentlike relationship with the children was very credible. He was able to recollect, with greater specificity, more details about the children than either of the parties. Based on his testimony and that of the parties, the court finds that the intervenor was indeed an integral part of the children's lives from the very beginning and met his burden of proving that he had a parent like relationship with the children. Without a doubt, the record shows that he was everywhere the children were as much as possible; the intervenor visited their **[*21]** house almost every single day, attended some of their extracurricular activities and some of their medical appointments and parent-teacher conferences. He also spent major holidays and weekend overnights with the children from Fridays through Sundays at his home in New York. He gave the plaintiff money for their support. He had the foresight to make plans for their future and, through the plaintiff, acquired investment properties to offer them financial security in case he was no longer able to do so. However, the court did not hear from the children concerning their opinion about the intervenor's request for visitation. Although the court heard testimony from the guardian ad litem, the scope of her role pertained to, *inter alia*, making a recommendation to the court, in the best interests of the children, relating to a possible therapeutic session or sessions between the children and the defendant so he could explain why he relocated to Florida and to give the children a sense of closure after feeling their former "daddy" did not love them. The court is unaware of any order that expanded her role to incorporate another recommendation to the court relating to the intervenor's motion. **[*22]** That being said, the court finds that the intervenor failed to satisfy the second prong of the statutory criteria set forth in *General Statutes §46b-59* by not proving, by clear and convincing evidence, that the denial of visitation would cause great harm to Patrick. The court also finds that Patrick is of sufficient age and intellect to convey his wishes to the court yet his preferences were not forthcoming. Therefore, the court further finds that there is insufficient evidence on which to base such an order as the intervenor failed to sustain his burden of proof and, consequently, denies the intervenor's motion. The court declines to make any orders relating to Stephanie as she has attained the age of majority.

As for the intervenor's request for custody pursuant to *General Statutes §46b-56*, the court finds that his paternity has been established already through the DNA tests. However, because said request was not properly pled, the court denies his request for shared custody of Patrick and declines to issue any custody orders regarding Stephanie as she has reached the age of majority.

III. Intervenor's Motion in Limine Objecting to the Defendant's Request for Fees

The court denies the intervenor's motion on the grounds that the court **[*23]** granted the intervenor's motion to intervene for the limited purpose of his petition relating to the custody of and visitation with the children and because the intervenor lacks standing to file such a motion in a dissolution action.

IV. Defendant's Request for Counsel Fees, Pendente Lite

The court denies the defendant's request for an order requiring the intervenor to pay the defendant's counsel's fees as the court finds that the present dissolution action is not the proper forum to seek such relief from the intervenor.

V. Defendant's Motion for Contempt

The court declines to issue any orders concerning the defendant's motion for contempt as the court finds that, by virtue of opening the original judgment of dissolution dated March 20, 2003 and vacating all orders relating thereto, the underlying basis supporting the defendant's allegations in said motion, specifically the parties' separation agreement that was incorporated into said judgment and the conferred joint legal custody and liberal and flexible visitation rights upon him, was also vacated. Therefore, the court concludes that the defendant's motion is moot.[7]

ORDERS

1. Relevant Historical and Procedural Facts:

a. The parties were intermarried on March 30, 1996 in Stamford, Connecticut.

b. There are no children who are the issue of the marriage of the parties.

c. The plaintiff has resided in the state of Connecticut for at least one year prior to the date of the filing of the divorce action.

d. Neither party has been the recipient of any state or municipal assistance.

e. All statutory stays have expired.

f. The court finds it has jurisdiction.

2. End of the Marriage: The court finds that the combination of the parties' infidelities, arguments, different temperaments and money management styles caused their marriage to break down irretrievably with each party sharing equal responsibility for the demise of their marriage. The parties are declared to be unmarried and single as of the date of the judgment of dissolution.

3. Name Restoration. The plaintiff's maiden name, Cannen Cosigna, shall be restored to her as of the date of the judgment of dissolution.

4. Alimony. Neither party shall pay alimony to the other party.

5. Real Property. The plaintiff shall retain 100% of her ownership interest in the **[*25]** Moore-property and the Catoona property, valued on her financial affidavit dated March 20, 2003,[8] to the exclusion of the defendant and shall hold the defendant harmless from all claims and liabilities therefrom.

6. Personal Property. Each party shall retain their own personal property, which has already been divided between the parties.

7. Automobiles. The parties shall retain their own vehicles listed on their own financial affidavits dated March 20, 2003. The plaintiff shall own the Infinity and Dodge Caravan to the exclusion of the defendant and shall hold the defendant harmless from all claims and liabilities therefrom and the defendant shall retain the Mercedes Benz to the exclusion of the plaintiff and shall hold the plaintiff harmless from all claims and liabilities therefrom.

8. Accounts. Each party shall retain their own bank accounts listed on their financial affidavits dated **[*26]** March 20, 2003.

9. Credit cards. The plaintiff shall be liable for $5,683 toward the outstanding credit card debt and the defendant shall also be liable for $5,683 toward the outstanding credit card debt listed on their respective March 20, 2003 financial affidavit.

10. Taxes. The defendant shall be liable for all joint tax returns for tax years 1999 to 2002.

11. Health Insurance and Life Insurance. Each party shall be responsible for his or her own health and life insurance.

12. Attorneys Fees. Each party shall be responsible for his or her own attorneys fees.

13. Guardian Ad Litem Fees. The plaintiff shall be 100% liable for the guardian ad litem fees.

14. The court denies the defendant's motion for visitation for the reasons set forth herein and the court grants the

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[7] Moreover, the court does not need to address either the guardian ad litem's **[*24]** original recommendation or her revised recommendation.

[8] The only real property listed on the plaintiff's March 20, 2003 financial affidavit is the Catoona property, which listed equity in the amount of $95,000. No evidence was admitted regarding the value of the Moore property and the court declines to treat its purchase price, which is in evidence, as its value.

defendant's motion for permission to file pleadings but not the relief requested therein.

15. The court is aware of the all of the other varied claims for relief made by the parties and the intervenor and, except as otherwise provided herein, declines to issue any further orders.

BY THE COURT

SYBIL V. RICHARDS, JUDGE

Document(1)

1. *Hornung v. Hornung, 2014 Conn. Super. LEXIS 667*
   Client/Matter: -None-

Hornung v. Hornung

Superior Court of Connecticut, Judicial District of Stamford-Norwalk at Stamford

March 20, 2014, Decided; March 20, 2014, Filed

FA114021104S

Reporter
2014 Conn. Super. LEXIS 667; 2014 WL 1568631

Marjorie Hornung v. Robert Hornung

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

parties, marriage, prenuptial agreement, Statutes, set forth, modified, alimony, commencement, postnuptial, separate property, minor child, disclosure, free and clear, child support, modification, circumstances, school vacation, factors, equitable, vacation, modification of the agreement, facts and circumstances, court finds, enforceable, activities, provisions, planning, spouses, terms, premarital agreement

Case Summary

Overview

HOLDINGS: [1]-The parties' prenuptial agreement was valid under the Premarital Agreement Act, Conn. Gen. Stat. § 46b-36b, because the wife had the benefit of counsel and each party disclosed the appropriate financial information; the agreement as modified during the pendency of the marriage was a unified whole, treated as a prenuptial agreement, and, as such, consideration for the modification was not a factor, Conn. Gen. Stat. § 46b-36f; [2]-The court applied "special scrutiny" to the circumstances surrounding the execution of the modified agreement and determined even with, inter alia, the husband's failure to make a full and fair disclosure of his current income for a period of approximately one and one-half years prior to execution of the modified agreement and the wife and her attorney having limited access to financial information, the agreement was not unconscionable.

Outcome

Marriage dissolved and various orders issued.

LexisNexis® Headnotes

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Frank & Full Disclosure

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

Contracts Law > Contract Interpretation > General Overview

HN1 In the area of marriage, there are three basic forms of written agreement between spouses or soon to be spouses: (1) the separation agreement; (2) the prenuptial agreement; and (3) the postnuptial agreement. Each of them shares many similarities with the others. For instance, they are all in writing and signed by the parties, and all demand a full and fair disclosure of a party's finances prior to execution of the instrument. They are treated as contracts, and, as such, are construed and interpreted under general principles governing the construction of contracts. In addition, each represents an effort to resolve differences of the parties in an amicable fashion. That alone has been long-regarded as a positive societal benefit, and something that should be encouraged and supported by the court.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

HN2 As to separation agreements, a court has a statutory duty to determine whether or not the agreement is "fair and equitable." In order to do so, the court is mandated to, among other things, inquire into the financial resources and actual needs of the spouses. Conn. Gen. Stat. § 46b-66(a). Moreover, in order for the court to get to that point, the parties must have a clear financial picture. Financial affidavits have "great

significance" to the court in family cases, and it is paramount that there be a "full and frank disclosure" by the spouses. In order to reach its decision, the court is mandated to take into consideration a dozen specific factors as set forth in Conn. Gen. Stat. § 46b-81.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > General Overview

HN3 As is the case with separation agreements, a prenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law. However, unlike a separation agreement, in order to determine whether or not a prenuptial agreement is enforceable, the court applies a two-step process. First, the court looks at both the facts and circumstances surrounding its execution, and secondly, it looks at the facts and circumstances at the time that implementation is sought. While the court must apply general contract principles, it must also consider equitable factors, particularly when it comes to the enforcement of a prenuptial agreement.

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Consideration

Contracts Law > Contract Modifications > General Overview

Contracts Law > Formation of Contracts > Execution

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Voluntary Execution

HN4 Effective October 1, 1995, all instruments purporting to be pre-marital agreements are governed by Conn. Gen. Stat. § 46b-36a et seq., otherwise known as the Connecticut Premarital Agreement Act. A premarital agreement is defined as an agreement between prospective spouses made in contemplation of marriage. Conn. Gen. Stat. § 46b-36b(1). While consideration is not required, a premarital agreement must be in writing and both parties must sign. Likewise, after its execution, a premarital agreement can be amended or revoked, in a writing signed by both parties, with or without consideration. Conn. Gen. Stat. § 46b-36f.

Contracts Law > Contract Modifications > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Formation of Contracts > Execution

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > General Overview

HN5 Whether a contract or a subsequent modification exists is a question of fact for the court to determine. A postnuptial agreement must also comply with general contract principles. A modification is defined as a change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject matter intact. Furthermore, it is axiomatic, that where a contract has been substantially modified, it is the entire contract as modified that becomes the operative legal instrument. Thus, where a postnuptial agreement modifies a prenuptial agreement, while the general purpose remains the same, it is the date of execution of the modification that controls.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > General Overview

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

HN6 What sets any postnuptial agreement apart from prenuptial and separation agreements is the status of an intact marriage.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

Contracts Law > Formation of Contracts > Consideration > Adequate Consideration

Contracts Law > Contract Modifications > General Overview

HN7 Postnuptial agreements do not come within the ambit of the Connecticut Premarital Agreement Act, and they must be based upon adequate consideration, which is defined as a benefit to the party promising, or a loss or detriment to whom the promise is made. The doctrine of consideration is fundamental in the law of contracts, the general rule being that in the absence of consideration an executory promise is unenforceable. A modification of an agreement must be supported by valid consideration and requires a party to do, or promise to do, something further than, or different from, that which he already bound to do.

Constitutional Law > Separation of Powers

HN8 Public policy is determined, not by the courts, but rather by the legislature. For a court to do so, it would be exceeding its constitutional limitations by infringing on the prerogative of the legislature to set public policy through its statutory enactments.

Governments > Legislation > Interpretation

HN9 When construing a statute, the fundamental objective is to ascertain and give effect to the apparent intent of the legislature. In order to ascertain the meaning of the statute, a court is first directed to apply the "plain meaning rule" as set forth in *Conn. Gen. Stat. § 1-2z*, in which it must look to the text of the statute itself and its relationship to other statutes. In the discharge of this duty, the court starts with the presumption that the legislature has enacted legislation that renders the body of law coherent and consistent.

Governments > Legislation > Interpretation

HN10 See *Conn. Gen. Stat. § 1-2z*.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Enforcement

HN11 In considering the validity of either a prenuptial or a postnuptial agreement, a court must consider the totality of the circumstances surrounding its execution.

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Frank & Full Disclosure

HN12 In the context of a prenuptial agreement, fair and reasonable disclosure refers to the nature, extent and accuracy of the information to be disclosed, and not to extraneous factors such as the timing of the disclosure. Put simply, the "substance" of the disclosure is more important than its "timing."

Family Law > ... > Antenuptial & Premarital Agreements > Requirements > Frank & Full Disclosure

HN13 For purposes of a prenuptial agreement, each spouse must be given full, fair and reasonable disclosure of all the financial obligations and income of the other spouse. This mandatory disclosure requirement is a result of the deeply personal marital relationship.

Civil Procedure > Trials > Bench Trials

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

HN14 In the context of a bench trial, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony and, therefore, is free to accept or reject, in whole or in part, the testimony offered by either party.

Contracts Law > Defenses > Unconscionable > General Overview

HN15 A determination of unconscionability in the enforcement of a contract is fact driven.

Family Law > ... > Marital Agreements > Antenuptial & Premarital Agreements > Enforcement

HN16 For purposes of enforcing a prenuptial agreement. whether or not a court believes that the underlying agreement was advantageous to one spouse or not is not a factor. Nor is a great disparity in the division of the wealth a controlling factor.

Family Law > ... > Support Obligations > Computation of Child Support > Guidelines

Family Law > Child Support > Procedures

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

HN17 In entering an order for child support, a court must consider both *Conn. Gen. Stat. § 46b-215b* and the Child Support and Arrearage Guidelines Regulations, as well as the factors set forth in *Conn. Gen. Stat. § 46b-84*. Alimony and child support orders must be based upon the net income of the parties.

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

Family Law > ... > Spousal Support > Obligations > Periodic Support

Family Law > ... > Spousal Support > Obligations > Lump Sum Support

HN18 Where time-limited alimony is awarded, there must be "sufficient evidence to support" the court's finding that it is appropriate. The purpose of periodic and lump sum alimony is to provide continuing support. While a court must consider the statutory factors set forth in *Conn. Gen. Stat. § 46b-82*, it may also consider any other factors which may be appropriate for a just and equitable resolution.

Judges: **[*1]** Michael E. Shay, J.

Opinion by: Michael E. Shay

Opinion

MEMORANDUM OF DECISION

The plaintiff wife ("wife"), whose birth name was Marjorie Kaye, and the defendant husband ("husband") were married on August 9, 1997, in Greenwich, Connecticut. They are the parents of four minor children, to wit: Jacqueline, age 15; Dayna, age 13; Jeff, age 12; and Margot, age 9. The parties entered into a Parenting Plan dated January 12, 2012, whereby each has joint legal custody. The children reside primarily with the wife at her home at 42 Compo Parkway, Westport, Connecticut, purchased by her during the pendency of this action. Three of the children have moderate learning issues. The husband resides in the former marital home at 53 Owenoke Park, Westport, Connecticut. The parties have lived separate and apart since April 2011.

The husband is 50 years old and in general good health. He described a painful bout of neuropathy at one point during the marriage, but he is not prevented from working full-time. The husband has a business degree from Syracuse University. His primary employment is with a family window company and its subsidiaries, which he operates along with his father and mother. It has proven to be very lucrative. **[*2]** He earns nearly $650,000.00 per annum from employment, and an additional $320,000.00 from his investments. The wife is 45 years old. She told the court that she suffers from a thyroid condition that affects her metabolism, for which she has taken Synthroid since 2004, and that she is borderline diabetic. The wife has a degree from Emerson College. She was employed at the time of the marriage, but for the greater portion, she has been a full-time homemaker, and, at least up to the filing of the action, she has been the primary caretaker of the children. When she was employed outside of the home, principally prior to and during the early years of her marriage, her average earnings were approximately $30,000.00 per annum, with a maximum of between $65,000.00 and $70,000.00 per year.

Prior to their marriage, the parties entered into a Prenuptial Agreement (Exhibit #19) dated July 14, 1997.[1] The wife testified as to her extreme distress, and of the intense pressure brought to bear on her by the husband for her to sign the instrument, including a threat to cancel the pending wedding. Both parties had the benefit of counsel, and each disclosed the appropriate financial information. One of **[*3]** the assets disclosed by the husband was his interest in a certain software program which he was working on and would continue to do so after marriage. Other personal property, not considered separate property, was to be divided by the parties. The evidence supports a finding that the parties had agreed that in the event of divorce, the husband would pay the wife pursuant to the original prenuptial agreement, in accordance with a formula based upon the length of marriage (as defined therein) and the number of children. In 2012, the husband advanced to the wife during the pendency of this action, principally to purchase her current residence sums totaling $2,468,000.00. In return for the payment, the wife signed a waiver of any future claims against the husband's estate and his separate property, as defined therein. The husband also advanced other funds to the wife during the pendency of the action, totaling more than $200,000.00. In addition, the agreement does not prohibit the award of alimony to the wife. Following their marriage, per the agreement, on December 1, 1997, the parties executed a document ratifying the prenuptial agreement, for the express stated purpose of preserving **[*4]** the wife's waiver of any interest in the husband's retirement accounts.

Within three years of the marriage, the software sold for $600,000,000.00 of which the husband's share was approximately $37,000,000.00. Eight years later, in July of 2008, the husband presented the wife with a proposed modification of the original agreement, which called for the payment of an additional $3,500,000.00, representing the wife's separate property interest in 53 Owenoke Park, Westport, but left the original provisions intact. Once again, the wife complained of pressure, extreme upset, and of humiliation, yet she ultimately signed the agreement. The validity and enforceability of these instruments has been the primary focus of the present litigation.

As to the breakdown of the marriage, the wife testified at length about the husband's frequent use of inappropriate language and his bizarre behavior, toward her and others, that was both demeaning and sophomorically and scatologically crude. In addition, he frequently

[1] Throughout this opinion, the court uses the terms "prenuptial" and "premarital" interchangeably.

mimicked her tendency to stuffer when placed in stressful situations. She admitted to a year-long **[*5]** affair late in the marriage. That relationship, now long since ended, was not the cause of the breakdown. Evidence supports a finding that the cause for the breakdown is primarily attributable to the husband. It is abundantly clear that right from the beginning, with the execution of the prenuptial agreement, that husband was not looking for a true marital partner, and has shut the wife out both fiscally and emotionally. He is a controlling, emotional bully, who has failed to appreciate his wife's true worth as a wife, let alone her contributions. He offers her the minimum which he believes that he can, in order to preserve the greater bulk of his assets for himself. The husband, she said, engaged in frequent, long-winded arguments about his plans, and badgered her to go along with his ideas, such as the prenuptial agreement. She told the court that she had a hard time being heard, that her husband ignored her important requests, and that she did not feel that she was a real partner.

The action was originally filed as a complaint for a legal separation, however, the court granted the wife's request to amend the complaint to that of seeking a dissolution of marriage. The parties reserved **[*6]** several pendente lite motions for the time of trial. The trial took place over the course of eleven days, including final argument, and the evidence closed on December 12, 2013.

LEGAL ARGUMENT

QUESTION PRESENTED: Where the parties have entered into a prenuptial agreement, which was amended or modified during the marriage, which standard should the court apply in testing the validity and enforceability of that legal instrument?

HN1 In the area of marriage, there are three basic forms of written agreement between spouses or soon to be spouses: (1) the separation agreement, (2) the prenuptial agreement, and (3) the postnuptial agreement. Each of them shares many similarities with the others. For instance, they are all in writing and signed by the parties, and all demand a full and fair disclosure of a party's finances prior to execution of the instrument. They are treated as contracts, and, as such, are construed and interpreted under "general principles governing the construction of contracts." *Issler v. Issler, 250 Conn. 226, 235, 737 A.2d 383 (1999)*. In addition, each represents an effort to resolve differences of the parties in an amicable fashion. That alone has been long-regarded as a positive societal **[*7]** benefit, and something that should be encouraged and supported by the court. *Hayes v. Beresford, 184 Conn. 558, 568, 440 A.2d 224 (1981)*.

HN2 As to separation agreements, it has long been the law that a court has a statutory duty to determine whether or not the agreement is "fair and equitable." *Monroe v. Monroe, 177 Conn. 173, 183-84, 413 A.2d 819 (1979)*. In order to do so, the court is mandated to, among other things, "inquire into the financial resources and actual needs of the spouses . . ." *General Statutes §46b-66(a)*. Moreover, in order for the court to get to that point, the parties must have a clear financial picture. Financial affidavits have "great significance" to the court in family cases, and it is paramount that there be a "full and frank disclosure" by the spouses. *Billington v. Billington, 220 Conn. 212, 219-220, 595 A.2d 1377 (1991)*. In order to reach its decision, the court is mandated to take into consideration a dozen specific factors as set forth in *General Statutes §46b-81*.

HN3 As is the case with separation agreements, a prenuptial agreement is "a type of contract and must, therefore, comply with ordinary principles of contract law." *McHugh v. McHugh, 181 Conn. 482, 486, 436 A.2d 8 (1980)*. However, unlike a separation agreement, **[*8]** in order to determine whether or not a prenuptial agreement is enforceable, the court applies a two-step process. First, the court looks at both the facts and circumstances surrounding its execution, and secondly, it looks at the facts and circumstances at the time that implementation is sought. While the court must apply general contract principles, it must also consider equitable factors, particularly when it comes to the enforcement of a prenuptial agreement.

HN4 Effective October 1, 1995, all instruments purporting to be pre-marital agreements are governed by *General Statutes §46b-36a et seq.*, otherwise known as the Connecticut Premarital Agreement Act. *Oldani v. Oldani, 132 Conn.App. 609, 614, 34 A.3d 407 (2011)*. A premarital agreement is defined as "an agreement between prospective spouses made in contemplation of marriage." *General Statutes §46b-36b(1)*. While consideration is not required, a premarital agreement must be in writing and both parties must sign. Likewise, after its execution, a premarital agreement can be amended or revoked, in a writing signed by both parties, with or without consideration. *General Statutes §46b-36f*. Under all the facts and circumstances, the

Prenuptial Agreement **[*9]** (Exhibit #19) executed by the parties on July 14, 1997, was fair and equitable at that time, and therefore a valid agreement. In short, the evidence supports a finding that there was a full and fair disclosure of income and assets, as well as an opportunity for both parties to have independent legal advice. The first step having been satisfied, the analysis shifts to enforcement.

If the issue were solely the question of the validity of the original instrument, that would be something else altogether. However, two substantial changes occurred subsequent to its execution that raise a question as to whether or not they would make it unconscionable to enforce. First, the birth of four children, for which the wife is the primary care giver, is significant. Secondly, the estimated value of the defendant's interest of the software called "On Link" that he listed on the Prenuptial Agreement was so grossly below what it actually sold for only three years later, represents a staggering differential. Initially, the husband estimated the value of his interest in the entire project to be between $275,000.00 and $550,000.00. However, when the entire package, which he had previously estimated to be **[*10]** between $1,500,000.00 and $3,000,000.00, sold three years later for $600,000.000.00, the husband received between $31,000,000.00 and $37,000,000.00. The difference between the husband's estimate and its actual value, coupled with the short time frame in between, it renders the initial estimate "implausible" at best. *Weinstein v. Weinstein, 275 Conn. 671, 688-95, 882 A.2d 53 (2005)*. The wife testified that at no time did the husband indicate to her such a substantially higher number. Notwithstanding the foregoing, the court finds that, under all the facts and circumstances, the Prenuptial Agreement is enforceable.

However, the execution of a modification agreement (Exhibit #20) on July 10, 2008, which was signed by the wife on August 1, 2008, thus subsequent to the marriage, and which instrument clarified one provision of the original prenuptial agreement and significantly modified another provision thereof, was of importance. The question for the court, therefore, is, given the timing of the modification (i.e. during the pendency of the marriage), is the subsequent modified agreement to be construed as a postnuptial agreement. ***HN5*** "Whether a contract or a subsequent modification exists is a question **[*11]** of fact for the court to determine." *Saye v. Howe, 92 Conn.App. 638, 643, 886 A.2d 1239 (2005)*. "A postnuptial agreement must also comply with general contract principles." *Bedrick v. Bedrick, 300 Conn. 691, 693, 17 A.3d 17 (2011)*. A modification is defined as "a change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject matter intact." *Jaser v. Jaser, 37 Conn.App. 194, 202, 655 A.2d 790 (1995)*. Furthermore, it is axiomatic, that where a contract has been substantially modified, it is the *entire contract as modified* that becomes the operative legal instrument. Thus, where, as here, a postnuptial agreement modifies a prenuptial agreement, while the general purpose remains the same, it is the date of execution of the modification that controls. The court finds that the fact that there was an intact marriage at the time of the modification is the controlling factor. That being the case, a court must apply the "special scrutiny" standard of *Bedrick* in its deliberations regarding the execution and enforcement of the modified agreement.

During a colloquy with counsel over the course of the trial, the court suggested that the **[*12]** present agreement was a "hybrid," since it contains elements of both forms of agreement. What distinguishes this agreement from the situation in the *Bedrick* case is that in it, the trial court was faced solely with a postnuptial agreement that had been modified several times over the course of the marriage. Here, the seminal document was a prenuptial agreement. ***HN6*** What sets any postnuptial agreement apart from prenuptial and separation agreements, is the status of an intact marriage. The parties entered into the agreement as a married couple, with no apparent intention to end the union. In this case, there was no credible evidence offered to the effect that the marriage had broken down at that point in time. *Venuti v. Venuti, 185 Conn. 156, 159, 440 A.2d 878 n2 (1981)*. The husband has asked the court to treat the agreement as a prenuptial agreement, because the instrument is entitled a "modification," and because the uniform act specifically provides for amendment or revocation after the parties have married. However, while the title of a legal instrument can be informative, it is not necessarily controlling. Therefore, under all the facts and circumstances, the court finds that the agreement as modified **[*13]** in July 2008, is a unified whole. That being the case, the question remains: Should it be treated as a postnuptial agreement or a prenuptial agreement?

One fact to consider is that ***HN7*** postnuptial agreements do not come within the ambit of the Connecticut Premarital Agreement Act, and they must be based

upon adequate consideration, which is defined as "a benefit to the party promising, or a loss or detriment to whom the promise is made." Bedrick v. Bedrick, 300 Conn. 691, 703, 17 A.3d 17 n5 (2011). "The doctrine of consideration is fundamental in the law of contracts, the general rule being that in the absence of consideration an executory promise is unenforceable . . . A modification of an agreement must be supported by valid consideration and requires a party to do, or promise to do, something further than, or different from, that which he already bound to do." Thermoglaze, Inc. v. Morningside Gardens Co., 23 Conn.App. 741, 745, 583 A.2d 1331 (1991), cert. denied, 217 Conn. 811, 587 A.2d 153 (1991); Urich v. Fish, 58 Conn.App. 176, 182, 753 A.2d 372 (2000) (addition of a motorized dinghy was sufficient consideration). The husband's obligation to pay an additional $3,500,000.00 is certainly more than the traditional "peppercorn," and the court **[*14]** is hard-pressed to say that there was a lack of consideration, where, in fact, there is more than enough consideration to support the modification.

However, the foregoing raises the question as to whether or not consideration is even a factor to be considered herein. At issue is whether the provisions of General Statutes §46b-36f, which provides for a modification or revocation of a premarital agreement after marriage without consideration, is at odds with the holding of Bedrick v. Bedrick, supra at 703 n5, to the effect that postnuptial agreements being outside the scope of the uniform act, require consideration to be effective. First and foremost, ***HN8*** public policy is determined, not by the courts, but rather by the legislature. For a court to do so, it would be "exceeding [its] constitutional limitations by infringing on the prerogative of the legislature to set public policy through its statutory enactments." State v. Reynolds, 264 Conn. 1, 79, 836 A.2d 224 (2003).***HN9*** "When construing a statute, . . . [the] fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . ." Fine Homebuilders, Inc. v. Diane Perrone et al., 98 Conn.App. 852, 856, 911 A.2d 1149 (2006). In order to ascertain **[*15]** the meaning of the statute, the court is first directed to apply the "plain meaning rule" as set forth in General Statutes §1-2z, in which it must look to "the text of the statute itself and its relationship to other statutes."[2] In the discharge of this duty, the court starts with the presumption that the legislature has enacted "legislation that renders the body of law coherent and consistent." Loughlin v. Loughlin, 280 Conn. 632, 644, 910 A.2d 963 (2006). The same can be said for the Connecticut Supreme Court.

Accordingly, the court believes that the way to reconcile the statute with the case law in this situation is to apply the facts and circumstances as follows: (1) Since the modified agreement had its origins as a prenuptial agreement, per statute, consideration should **[*16]** not be a factor; and (2) Since the modified agreement was executed during the marriage, the court should apply "special scrutiny" to the circumstances surrounding its execution and to its enforcement.

HN11 In considering the validity of either a prenuptial or a postnuptial agreement, the court must consider the totality of the circumstances surrounding its execution. Bedrick v. Bedrick, supra at 705, citing McHugh v. McHugh, 181 Conn. 482, 485, 436 A.2d 8 (1980). As to the execution of the modified agreement, the wife argues that since the fact that the husband's disclosure of his financial information was approximately six months in advance of the execution of the postnuptial agreement, when the evidence shows that he had available documentation supporting values virtually contemporaneous with said execution, that the court should find that his disclosure is fatally flawed. At first blush, that argument would appear valid. Moreover, the evidence supports a finding that the husband actually had available virtually all the asset figures on a contemporaneous basis, and by inference, his income figures as well. As inexplicable as the husband's choice of the date for disclosure is to the court, nevertheless, **[*17]** the wife's argument is misplaced. ***HN12*** "Fair and reasonable disclosure refers to the nature, extent and accuracy of the information to be disclosed, and not to extraneous factors such as the timing of the disclosure." Put simply, the "substance" of the disclosure is more important than its "timing." Friezo v. Friezo, 281 Conn. 166, 183, 187, 914 A.2d 533 (2007). In fact, the evidence shows that the values were marginally lower at the time of execution of the postnuptial agreement than those actually disclosed as of the previous December 31, six months before. Accordingly, viewed in that light, the

[2] General Statutes §1-2z. Plain meaning rule. ***HN10*** The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered.

evidence supports a finding that the husband's earlier disclosure of *assets* is substantially the same as the financial picture at the time the document was executed. The same, however, cannot be said for the husband's failure to adequately disclose his income for the year and one-half preceding the execution of the agreement in the summer of 2008. ***HN13*** "Each spouse must be given full, fair and reasonable disclosure . . . of all the financial obligations and *income* of the other spouse. This *mandatory disclosure requirement* is a result of the *deeply personal marital relationship*." (Emphasis added.) *Bedrick v. Bedrick, supra at 704*.

The **[*18]** court also heard the testimony of both parties as well as that of Attorney George Reilly and Attorney Ron Noren. The husband argues that the purpose of the agreement entered into in July 2008 was estate planning. While the court believes that the husband may have engaged Attorney Noren to do some estate planning, and, in fact, there may well have been an element of estate planning, he first told his wife that the *prenuptial* was necessary to protect his father's business. More important, the evidence supports a conclusion that the husband's principal purpose in raising the amount to be paid to the wife was to ensure the enforcement ("more enforceable") (TR 10/16/2013 @ 136) of the original prenuptial agreement, more than likely given the magnitude of the assets, and that this intention was made clear to Attorney Reilly.

HN14 "The trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony and, therefore, is free to accept or reject, in whole or in part, the testimony offered by either party." *LaBossiere v. Jones, 117 Conn.App. 211, 224, 979 A.2d 522 (2009)*. The court heard testimony that the husband and his counsel, William Fitzmaurice, were looking **[*19]** for an attorney for the wife that "would not cause trouble." Attorney George Reilly was selected by the wife from a list provided by the husband, and, in fact, Attorney Reilly met with Attorney Fitzmaurice long before he met with his client. More tellingly, the husband and his counsel went through the exercise of "tracing" the assets from the prenuptial, but never shared the results with attorney Reilly, who was told that it was essentially a "take it or leave it" proposition. Given the shifting nature of some assets, or at least the institutions that held them, such information would certainly give the wife a clearer picture of the assets she was being asked to waive. While the wife had "access" to counsel, under all the circumstances, the court has heard sufficient testimony to conclude that the wife's counsel was thwarted from rendering fully effective, independent legal advice to her concerning a document that she was already uncomfortable signing. *Bedrick v. Bedrick, supra at 705*.

Accordingly, the question for the court is, given the fact that: (1) the husband failed to make a full and fair disclosure of his current income for a period of approximately one and one-half years prior **[*20]** to execution of the modified agreement; and (2) the wife and her counsel had limited financial information to make an informed decision, such information being withheld from them, do these factors alone invalidate the agreement? The court finds that they do not. That being the case, the court must consider whether or not it would it be unconscionable to enforce the agreement as modified? In other words, does it shock the conscience or "work an injustice?" ***HN15*** A determination of unconscionability in the enforcement of a contract is fact driven. *Bedrick v. Bedrick, 300 Conn. 691, 707-08, 17 A.3d 17 (2011)* [post-nuptial agreement]; *Crews v. Crews, 295 Conn. 153, 163-64, 989 A.2d 1060 (2010)* [pre-nuptial agreement]. Does the addition to the above factors, the following: (1) the birth of four children, and (2) a more than 50-fold increase in the value of the asset known as "On Link" within a short period after the marriage, change the opinion of the court? Even after applying special scrutiny, the answer is no. ***HN16*** Whether or not the court believes that the underlying agreement was advantageous to the wife or not is not a factor. Nor is the great disparity in the division of the wealth a controlling factor. *Bedrick, supra 705-06*.

FINDINGS **[*21]** AS TO PENDENTE LITE MOTIONS

The court having heard the testimony of the parties and their witnesses, and considered the evidence, makes the following findings:

1. That on or after February 10, 2012, the wife received an advance equitable distribution in the amount of $200,000.00 pursuant to Paragraph 2 of a certain Stipulation (Exhibit #13) by and between the parties dated February 10, 2012; that on or after June 24, 2013, the wife received an additional payment from the husband in the amount of $200,000.00 pursuant to a certain Stipulation (Exhibit #49) by and between the parties dated June 24, 2013; that the parties did not specifically agree upon the nature of the second payment; that under all the circumstances, the court finds that said payment is also an advance equitable

distribution; and that the husband is entitled to a credit in the amount of $400,000.00 toward any sums due and owing to the wife pursuant to the modified prenuptial agreement.

2. That at the time of trial and during the pendency of this matter, Motions #194.00 and #221.00 were decided by Judge Richards, and they are therefore no longer pending; and that four other motions pending at the time of trial, all related **[*22]** to discovery (208.00/209.00, 211.00, 216.00, and 240.00), although preserved prior to trial, were not pursued at trial and are therefore moot.

3. That the issue of contempt pendente lite was addressed in a separate and distinct phase of the hearing, and under the holdings in *Evans v. Taylor, 67 Conn.App. 108, 786 A.2d 525 (2001)* and *Milbauer v. Milbauer, 54 Conn.App. 304, 733 A.2d 907 (1999)*, and that the issue has been adequately preserved.

4. That a finding of contempt must be based upon a willful failure to comply with a clear and unequivocal order of the court. *Sablosky v. Sablosky, 258 Conn. 713, 718, 784 A.2d 890 (2001)*.

5. That the Automatic orders set forth in *P.B. §25-5(b)(1)* allow for the payment of reasonable attorneys fees, pendente lite.

6. That the attorneys fees incurred by the husband, while extraordinarily high, given the customary rates charged by attorneys in Lower Fairfield County, the complexity of the issues, extensive discovery, and preparation for a lengthy trial, among other things, the court does not find that said fees were unreasonable under all the circumstances.

PENDENTE LITE ORDERS

IT IS HEREBY ORDERED THAT

For the reasons set forth above, the wife's Motion for Contempt (#255.00), pendente lite, dated **[*23]** October 24, 2013, is HEREBY DENIED. The court, having found the husband's attorneys fees to be reasonable, the wife's Motion to Enjoin (#256.00) dated October 24, 2013, is HEREBY DENIED, and the husband's Objection (#257.00) dated October 25, 2013, is HEREBY SUSTAINED.

FINDINGS AFTER TRIAL

The Court, having heard the testimony of both parties, and having considered the evidence presented at hearing, as well as, *inter alia*, the factors enumerated in *General Statutes §§46b-56*, *46b-56a*, *46b-56c*, *46b-81*, *46b-82*, *46b-84*, and *46b-215a*, including the Child Support and Arrearage Guidelines Regulations, hereby makes the following findings:

1. That it has jurisdiction.

2. That the allegations of the complaint, as amended to reflect a claim for dissolution of marriage, are proven and true.

3. That the marriage of the parties has broken down irretrievably, and that ample evidence exists that, while both parties have contributed to said breakdown, the husband must bear the greater share.

4. That during the marriage, neither party has received any aid or assistance from the State of Connecticut or any town or political subdivision thereof.

5. That the parties have entered into a "Parenting Plan" dated **[*24]** January 12, 2012, and which was previously approved by the court; and that under all the circumstances, said plan is in the best interest of the minor children. *Stahl v. Bayliss, 98 Conn.App. 63, 69-70, 907 A.2d 139 (2006)*.

6. That***HN17*** in entering an order for child support, a court must consider both *General Statutes §46b-215b* and the Child Support and Arrearage Guidelines Regulations ("Guidelines"), as well as the factors set forth in *General Statutes §46b-84*, *Maturo v. Maturo, 296 Conn. 80, 90-92, 995 A.2d 1 (2010)*; and that alimony and child support orders must be based upon the net income of the parties. *Morris v. Morris, 262 Conn. 299, 306, 811 A.2d 1283 (2003)*; *Ludgin v. McGowan, 64 Conn.App. 355, 358, 780 A.2d 198 (2001)*.

7. That based upon the financial affidavits of the parties as on file (#249.00 and #250.00), the net income of the wife is $0.00; that the net income of the husband from all sources is $12,097.00 per week; and that the combined net income of the parties of $12,097.00 per week is in excess of the Guidelines.

8. That pursuant to the Guidelines, the presumptive minimum child support is $795.00 per week; and that the Court finds it is appropriate and equitable to apply the deviation criteria set forth in *§46b-215a(b)(5)* **[*25]** of the Child Support and Arrearage Guidelines Regulations on the basis of the coordination of total family support.

9. That throughout the marriage, until their separation, both parties each made significant contributions to the acquisition, maintenance, and preservation of the family assets, including the real estate.

10. That ***HN18*** where time-limited alimony is awarded, there must be "sufficient evidence to support" the court's finding that it is appropriate. *Wolfburg v. Wolfburg, 27 Conn. App. 396, 399, 606 A.2d 48 (1992)*; *Marmo v. Marmo, 131 Conn.App. 43, 26 A.3d 652 (2011)*; and that taking into consideration the factors set forth in *General Statutes §46b-82*, including the age, education, previous earnings and work experience of the wife, in light of the facts and circumstances of this case, a time-limited award of alimony is appropriate. *Ippolito v. Ippolito, 28 Conn.App. 745, 612 A.2d 131*, cert. denied, *224 Conn. 905, 615 A.2d 1047 (1992)*; *Milbauer v. Milbauer, 54 Conn.App. 304, 312-15, 733 A.2d 907 (1999)*.

11. That "the purpose of periodic and lump sum alimony is to provide continuing support." *Dombrowski v. Noyes -Dombrowski, 273 Conn. 127, 132, 869 A.2d 164 (2005)* ($7,000.000.00 lottery winnings); and that while the court must consider the statutory factors set forth **[*26]** in *General Statutes §46b-82*, it "may also consider any other factors which may be appropriate for a just and equitable resolution." *Borkowski v. Borkowski, 228 Conn. 729, 743-44, 638 A.2d 1060 (1994)*.

12. That under all the circumstances, an award of lump sum alimony payable over time, in addition to the award of periodic alimony, is appropriate to provide for continuing support of the wife, in that, among other things, given the wife's health issues; her lack of recent employment; her primary child care responsibilities for four children, which limits her ability to enter the workforce on a full-time basis; and her limited opportunity to acquire assets in the future. *General Statutes §46b-82*; *Dombrowski v. Noyes-Dombrowski, 273 Conn. 127, 137, 869 A.2d 164 (2005)*; *Pacchiana v. McAree, 94 Conn.App. 61, 68-71, 891 A.2d 86 (2006)*.

13. That, for the reasons set forth above and under all the circumstances, the prenuptial agreement (Exhibit #19) entered into by the parties dated July 14, 1997 is valid and enforceable; that the parties entered into a postnuptial agreement (Exhibit #20) dated July 10, 2008, which significantly modifies the original prenuptial agreement, in that it called for the payment of additional monies to the **[*27]** wife in the event of a dissolution of marriage; that the two agreements have merged; that the agreement as modified should be viewed with a higher degree of scrutiny as it was executed during the marriage; and that, while the court has expressed its serious reservations regarding the motivation and actions of the husband, for the reasons set forth above and under all the circumstances, even after special scrutiny, the court finds that the agreement as modified is valid and enforceable.

14. That under the terms of the formula set forth in the prenuptial agreement, in the event of a dissolution of their marriage, the husband had an obligation to pay to the wife the sum of $1,250,000.00; that under the terms of the modified Prenuptial Agreement, he is obligated to pay her an additional $3,500,000.00, for a total of $4,750,000.00; that he has paid her the sum of $2,668,000.00, including an additional advance distribution in the amount of $200,000.00 in June 2013; and that the husband owes the wife a total balance of $2,082,000.00 under the terms of the Prenuptial Agreement as modified.

15. That the evidence would support a finding that had the marriage remained intact, it would be the wish **[*28]** of both parents that the children go to college; that the husband has indicated that he would pay for their college education; and that the parties have set aside certain §529 funds to help in this regard.

16. That the court has reviewed the Affidavit of Attorneys Fees (Exhibit #114) filed by the attorney for the wife dated October 17, 2013; that the attorneys fees incurred by the wife through October 16, 2013, in the amount of $116,103.24, are fair and reasonable under all the circumstances; that to require the wife, who has minimal earning capacity and the responsibility for the primary care of four minor children age 9 through 15, three of whom have learning issues, to pay these fees from her portion of the financial award by virtue of this Memorandum of Decision would undermine the purposes of same; and that it would be fair and equitable for the husband to pay same. *Maguire v. Maguire, 222 Conn. 32, 44, 608 A.2d 79 (1992)*.

17. That "the weight to be given the evidence and to the credibility of the witnesses are within the sole province of the trial court." *Stearns v. Stearns, 4 Conn.App. 323, 327, 494 A.2d 595 (1985)*.

ORDERS AFTER TRIAL

IT IS HEREBY ORDERED THAT

1. The marriage of the parties is hereby dissolved, **[*29]** and they are each hereby declared to be single and unmarried.

2. The parties shall share joint legal custody of the minor children, whose primary residence shall be with the wife, and parenting responsibilities shall be shared in accordance with a certain *Parenting Plan* dated January 12, 2012, which is hereby ordered made part of the court file and incorporated by reference herein, and which shall be attached hereto as *"Schedule A*."

3. Commencing April 1, 2014, and monthly thereafter, the husband shall pay to the wife the sum of $40,000.00 per month as and for periodic unallocated alimony and child support, until the death of either party, the remarriage of the wife, or March 31, 2029, whichever shall sooner occur. In the event that the alimony shall terminate for whatever reason and any of the children are minors, commencing with the first day of the first month following such termination, and monthly thereafter, the husband shall pay to the wife a sum consistent with the then existing Child Support Guidelines or as the court may otherwise direct, as and for child support, until such time as the oldest child (and each succeeding child) shall reach the age of eighteen years, at which **[*30]** time child support for the remaining children shall again be adjusted in accordance with the then existing Child Support Guidelines or as a Court may otherwise direct. The foregoing notwithstanding, if any child shall turn eighteen years old and is still in high school, then, in that event, the child support shall continue until the first day of next month following graduation from high school or their nineteenth birthday, whichever shall sooner occur, pursuant to *General Statutes §46b-84(b)*. *It is the intention of the court that, except for the foregoing, that the term of periodic alimony shall be non-modifiable by either party. It is the further intention of this court that, except as set forth above, the amount of alimony shall be non-modifiable by the husband where the sole basis for the modification is the annual gross earnings of the wife of $50,000.00 or less*.

4. The husband shall pay to the wife, as and for lump sum alimony, the sum of $7,500,000.00, payable as follows: Commencing June 1, 2014, and every six months thereafter (i.e. on June 1, 2014 and December 1, 2014) the husband shall pay to the wife the sum of $375,000.00, and a like sum semi-annually on each subsequent June **[*31]** 1 and December 1, until paid in full. The foregoing notwithstanding, nothing shall preclude the payment of this obligation by the husband in full or in part at any earlier time. *It is the intention of this court that this obligation shall be non-modifiable, survive the death of either party and the remarriage or cohabitation of the wife, and that it be non-taxable to wife and non-deductible by the husband*.

5. In addition to the sums set forth above, as and for additional child support, the husband shall contribute one-half of the cost of camp, tutors, lessons, ski programs and lessons, Bar/Bat Mitzvahs, and extracurricular activities of the minor children. Both parties shall confer with each other prior to incurring any expense for same.

6. The husband shall pay to the wife within sixty (60) days the remaining balance of his obligation under the terms of the Prenuptial Agreement in the amount of $2,082,000.00 as modified by the parties.

7. The husband shall promptly notify his employer as to the change of marital status and shall cooperate with the wife in obtaining continuation health insurance coverage as provided by state and federal law. In the event that the wife shall elect to obtain **[*32]** such coverage, the husband shall pay the premiums for continuation health insurance coverage for the wife for a period of thirty-six (36) months or until she no longer qualifies for such coverage, whichever shall sooner occur. Thereafter, wife shall be responsible for the payment of any premiums due for such coverage.

8. The husband shall maintain and pay for the current or comparable health and dental insurance plans for each of the minor children so long as he shall be obligated to pay child support for that child, including post-majority support pursuant to an educational support order or a written post-majority agreement. Un-reimbursed medical, dental, orthodontic, optical, pharmaceutical, psychiatric, and psychological expenses for the minor children, as well as speech, occupational, and physical therapies, including co-pays, shall be divided by the parties, 60% by the husband and 40% by the wife. The provisions of *General Statutes §46b-84(e)* shall apply.

9. Pursuant to *General Statutes §46b-84(f)*, as and for security for his alimony and support obligation hereunder, the husband shall maintain the existing life insurance in the amount of $3,000,000.00, and shall name the wife beneficiary **[*33]** thereof for so long as he has an obligation to pay alimony under the terms of this decree. In the event that his alimony obligation

hereunder ceases, for whatever reason, he shall name each child as the beneficiary in the amount $750,000.00 thereof for so long as he has an obligation to pay child support to that child under the terms of this decree. For purposes of the enforcement of this provision, a child support order shall include an educational support order pursuant to *General Statutes §46b-56c* or a written agreement of the parties for post-majority educational support.

10. The real property known as 53 Owenoke Park, Westport, Connecticut, currently occupied by the husband, being the separate property of the husband, the husband having otherwise made provision for the wife for her share therein, shall belong to the husband free and clear of any claims by the wife, subject to the existing mortgage.

11. The real property known as 42 Compo Parkway, Westport, Connecticut, currently occupied by the wife, being the separate property of the wife, shall belong to the wife free and clear of any claims by the husband.

12. The real property known as "Solstice 96A," Sun Bowl Ridge Road, West **[*34]** Wardsboro, Vermont, together with the membership rights to the Stratton Mountain Club and use of the facilities thereat, being separate property, shall belong to the husband free and clear of any claims by the wife, and the husband shall be entitled to the exclusive use and possession thereof. The wife shall remove her personal property therefrom at a mutually convenient time.

13. The husband's interest in certain Commercial Real Estate in Westport, Connecticut, being separate property, shall belong to the husband free and clear of any claims by the wife.

14. The court hereby reserves jurisdiction regarding the execution and implementation of the provisions of Sections 10 through 13 hereof; and the parties shall execute whatever documentation is necessary to effectuate said provisions.

15. Personal property shall be divided as follows:

A. The home furnishings, including silverware and artwork, having been already divided by the parties in accordance with Paragraph 3 of a certain Stipulation (Exhibit #13) dated February 10, 2012, as on file, each party shall retain such personal property already in their possession, and the court hereby makes no further order regarding same.

B. Each party **[*35]** shall be entitled to keep the automobile(s) which they are currently driving, subject to any existing liens, loans, or leases, free and clear of any claims by the other, and each party shall cooperate with the other regarding the execution of any documentation necessary to transfer and/or register same. Specifically, the husband drives a 2010 Lexus LX570.

C. Except as otherwise set forth herein, each party shall be entitled to keep their respective savings, checking, and money market accounts free and clear of any claims by the other.

D. Except as otherwise set forth herein, each party shall be entitled to retain their clothing and personal effects, including all jewelry, watches, and rings, free and clear of any claims by the other.

E. Except as otherwise set forth herein, the husband shall be entitled to retain his separate property free and clear of any claims by the wife as set forth on "Schedule B" attached hereto and made a part hereof.

F. Except as otherwise set forth herein, the wife shall be entitled to retain her separate property free and clear of any claims by the husband as set forth on "Schedule C" attached hereto and made a part hereof.

G. In accordance with the Stipulation **[*36]** of the parties dated April 23, 2012, and approved by the court on May 25, 2012, the refunds of approximately $84,887.00 from the 2011 joint state and federal income tax returns, currently being held in escrow, shall be divided equally.

H. The frequent flyer miles and rewards points accumulated by the parties shall be added together and divided equally, pro rata by account.

16. The Retirement Accounts shall be divided as follows:

A. Industrial Sales American Funds §401(k): Said account being the separate property of the husband, he shall be entitled to retain same free and clear of any claims by the wife.

B. Janney Montgomery Scott, Individual Retirement Account: Said account being the separate property of the husband, he shall be entitled to retain same free and clear of any claims by the wife.

C. Janney Montgomery Scott, SEP Individual Retirement Account: Said account being the

separate property of the wife, she shall be entitled to retain same free and clear of any claims by the husband.

17. The wife shall be entitled to claim the personal exemption for each of the minor children commencing with the tax year 2014 and thereafter.

18. Except as otherwise set forth herein, the parties shall **[*37]** each be responsible for the debts as shown on their respective financial affidavits, and they shall indemnify and hold each other harmless from any further liability thereon. In particular, the husband shall be responsible for his attorneys fees and costs incurred herein, and in addition thereto, for any deficiencies, including interest and penalties, arising out the joint state and federal income tax returns for the years 2010 and 2011, and the wife shall be responsible for her loan from Douglas Kaye.

19. Within thirty (30) days of this order, the husband shall pay to Wayne Effron, Esq. the sum of $100,000.00, as and for a contribution toward the legal fees, expenses, and costs of suit incurred by the wife in connection with this case.

20. After the application of any scholarship funds or monies available through a §529 plan set aside for the benefit of a particular child, the husband shall contribute to the necessary educational expenses of each of the four minor children in pursuit of a bachelor's degree or four full academic years of study toward same, whichever shall sooner occur, to include room, board, dues, tuition, fees, registration and application costs, as well as required **[*38]** text books and laboratory materials, and, in the absence of an agreement of the parties to exceed same, said expenses for each child shall not be more than the amount charged by The University of Connecticut for a full-time in-state student. All payments shall be made directly to the institution. The foregoing notwithstanding, the obligation of the husband hereunder shall, in all events, cease when each child reaches the age of twenty-three years. The court hereby reserves jurisdiction to modify and/or enforce said educational support order pursuant to *General Statutes §46b-56c*.

21. The Court hereby orders a Contingent Wage Withholding Order pursuant to *General Statutes §52-362(b)* in order to secure the payment of the alimony/child support order.

22. There having been a contested hearing at which the financial orders were in dispute, the financial affidavits of the parties are hereby unsealed per *P.B. §25-59A(h)*.

THE COURT

SHAY, J.

SCHEDULE A

PARENTING PLAN

The Plaintiff MARJORIE HORNUNG ("Wife") and the Defendant ROBERT HORNUNG ("Husband") stipulate and agree as follows:

1. Legal and Physical Custody

The Husband and Wife shall have joint legal custody of the minor children, Jacqueline Hornung, **[*39]** age 13; Dayna Hornung, age 11, Jeff Hornung, age 9 and Margot Hornung age 6 (hereinafter sometimes referred to in the singular as "child" or "minor child," in the plural as "children" or "minor children" or by their first names). The primary residence of the children shall be with the Wife.

2. Continuing Twenty-Eight-Day Rotation

Commencing at such time as the parties are domiciled in separate residences, the Husband shall have the following parenting time on a continuing twenty-eight-day rotation. For purposes of this paragraph 2, each week will begin and end on Sunday at 12:01 a.m.

(a) *Week One*:

(i) All four of the children shall be with the Husband on Monday (Day 2) from after school until 7:00 p.m. during which time they shall have dinner;

(ii) All four of the children shall be with the Husband on Thursday (Day 5) from 5:00 p.m. until the commencement of school on the following Monday[3] morning (Day 9) (or 9:00 a.m. if school is not in session).

(b) *Week Two*:

(i) All four of the children shall be with the Husband on Wednesday (Day 11) from after school until 7:00 p.m. during which time they shall have dinner;

[3] Sunday (Day 8) and Monday (Day 9) during this period are part of Week Two.

(ii) **[*40]** Jeff and Margot shall be with the Husband from Thursday (Day 12) at 5:00 p.m. until the commencement of school on the following Friday morning (Day 13) (or 9:00 a.m. if school is not in session).

(c) *Week Three*:

(i) Jeff shall be with the Husband from Monday (Day 16) at 5:00 p.m. until the commencement of school on the following Tuesday morning (Day 17) (or 9:00 a.m. if school is not in session);

(ii) All four of children shall be with the Husband from Thursday (Day 19) at 5:00 p.m. until the commencement of school on the following Monday[4] morning (Day 23) (or 9:00 a.m. if school is not in session).

(d) *Week Four*:

(i) Jacqueline and Dayna shall be with the Husband from Wednesday (Day 25) at 5:00 p.m. until the commencement of school on the following Thursday morning (Day 25) (or 9:00 a.m. if school is not in session).

(e) Subject to the provisions of paragraph 3, in the event that any of the Martin Luther King Day, Memorial Day (provided it is celebrated prior to termination of the school year), President's Day (provided it does not fall during **[*41]** the winter vacation), Labor Day (provided it is celebrated after commencement of the school year), Columbus Day or Veteran's Day holidays is observed on either Day 9 or Day 23 of the twenty-eight-day rotation, i.e. on a Monday which concludes the Thursday to Monday parenting time which the Husband enjoys every other week, then all four children shall remain with the Husband during such Monday holiday until 7:00 p.m.

(f) During all times when the children or any of them are not with the Husband pursuant to this schedule, they shall be in the Wife's care.

(g) Appended hereto as "Exhibit A" is a calendar setting forth the twenty-eight-day rotation.*

3. Holiday and Summer Parenting Time.[5]

(a) The parties shall alternate the February school vacation. In even-numbered years, the Wife shall have the children for the February school vacation and in odd-numbered years, the Husband shall have the children for the February school vacation.

(b) The parties shall alternate the spring (April) school vacation. In odd-numbered years, the Wife shall have the children for the spring school vacation and in even-numbered **[*42]** years, the Husband shall have the children for the spring school vacation.

(c) The parties shall alternate the Thanksgiving school vacation. The Husband shall have the children for the Thanksgiving vacation in odd-numbered years and the Wife in even-numbered years. For purposes of this Separation Agreement, the Thanksgiving vacation shall be defined as the period commencing after school on the children's last school day immediately prior to Thanksgiving and ending the following Sunday evening at 7:00 p.m.

(d) The parties shall divide the Christmas school vacation in two (and only two) consecutive equal parts. During each year the Husband shall have the children for that half of the Christmas school vacation during which Christmas day falls, and the Wife shall have the children for the other half.

(e) Not later than March 1 of each year, the parties shall determine the summer parenting time each shall have for an uninterrupted vacation with the children; provided the vacation time of neither party pursuant to this subparagraph (e) shall exceed two (2) weeks. In even-numbered years, the Husband shall have the first selection of dates (which dates shall not include dates during which the **[*43]** children are in camp or have other scheduled activities) for vacation time with the children, and in odd-numbered years, the Wife shall have the first selection of dates (which dates shall not include time during which the children are in camp or have other scheduled activities) for vacation time with the children. The party having first choice in accordance with the immediately preceding sentence shall choose summer parenting time so as not to preclude the other

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[4] Sunday (Day 22) and Monday (Day 23) during this period are part of Week Four.

*Editor's Note: The referenced attachment has not been included herein.

[5] Each segment of parenting time described in paragraph 3 shall pertain to all four minor children.

party from having an equal amount of summer parenting time with the children. Each party shall promptly notify the other as to his or her selection of dates for summer parenting time. In the event the parties are unable to agree as to dates for vacation time with the children, the matter shall be referred to a court of competent jurisdiction for resolution. In the alternative, should both parties first agree in writing, the matter may be referred to a mutually agreeable mediator. In making any judicial determination, the court shall be guided by the provisions of this subparagraph (e) and the children's best interests.

(f) The children shall be with the Wife for the first and second days of Passover, Rosh Hashanah and Hanukkah **[*44]** from after school on the first day of each holiday (or 3:00 p.m. if there is no school) until the commencement of school on the morning following the second day of such holiday (or 9:00 a.m. if school is not in session). The children shall be with the Wife from the day before Yom Kippur from after school (or 3:00 p.m. if there is no school) until 9:00 p.m. on the evening of Yom Kippur.

(g) The children shall be with the Wife on Mother's Day and the Husband on Father's Day from 10:00 a.m. until. 7:00 p.m. To the extent practicable each child shall spend time with each parent on his or her birthday.

(h) Unless otherwise stated in this paragraph 3, the parenting time for any vacation time with the children during the school year shall commence at 9:00 a.m. of the day after the last school day preceding the vacation in question and shall terminate at 7:00 p.m. of the evening preceding the first school day following the vacation.

(i) The party who has vacation parenting time with the children shall be responsible for picking up the children at the commencement of the parenting time at the other's home, if dictated by paragraph 2 of this Agreement, and dropping off the children at the conclusion **[*45]** of the parenting time at the other's home, if dictated by paragraph 2 of this Agreement.

(j) Parenting time for each parent, pursuant to this paragraph 3 shall supersede the continuing twenty-eight-day rotation in paragraph 2. During any period of parenting time enjoyed by one parent pursuant to this paragraph 3, the continuing twenty-eight-day rotation in paragraph 2 shall continue *sub silentio* for purposes of determining the schedule pursuant to paragraph 2 which will be in force when the vacation or summer parenting time in question is completed.

4. Inability to Care For Children

If either party will be unavailable to care for *all* of the children whom that party is to have in his or her custody pursuant to either paragraph 1 or paragraph 2, as the case may be, for a period of more than five (5) consecutive hours, that party shall first offer the children to the other party who may, in his or her discretion, elect to have the children with him or her. Any such time shall be in addition to, not in lieu of, the party's time with the children and shall not give rise to make-up time.

5. Changes or deviations to schedule

Changes or deviations from the aforesaid parenting access schedule will **[*46]** take place only by mutual consent in writing approved in advance by both parties. Neither party shall discuss such a change or deviation with the other in the presence of a child or children of the parties.

6. Overnight trips

When either party intends to travel overnight with the minor child, he or she shall inform the other of the planned itinerary and provide the other parent with the following written information: the duration of the trip, name of host or hotel, lodging addresses, land-line telephone numbers, airline flight numbers and travel information including means of travel, departure and arrival times and destinations. The traveling parent shall provide the foregoing information to the other parent at least five days prior to the scheduled travel or, if less than five days, as soon as the travel is planned.

7. Cost of Parenting Time

Any expense or cost involved in the Husband's exercise of his rights of parenting time shall be and remain his responsibility and will be paid for by him. Any such cost or expense incurred by the Husband in connection with the exercise of his rights of parenting time shall be separate and apart from and in addition to any and all payments to be made **[*47]** to the Wife by the Husband for the support of the children. Without limiting the generality of the foregoing, the Husband shall pay all transportation costs incurred in connection with his parenting time and all costs and expenses of the children incurred during the time when they are with the

Husband, including the costs of food and lodging, and the Husband shall not be entitled to any deduction from any payments to the Wife on account of amounts expended by him during the exercise of his parenting time.

8. Activities

Each party shall be responsible for ensuring that the children are transported to and from their activities, lessons, sports, doctor's appointments, therapy and tutoring which occur during the time the children are with him or her. Each parent may attend all activities of any child open to the public or to the parents of the children involved including recitals, sporting events, and practices for any school, camp, club or sports or arts activity engaged in by the children even if such activities do not occur during that parent's scheduled time with the children.

9. Homework

Each party shall ensure that the children complete all homework assignments while the children are **[*48]** with him or her. Each party shall inform the other of major homework or school projects assigned to a child at the time the parent in question becomes aware of same. The parties shall use their best efforts to coordinate the assistance each will give in overseeing or assisting with such projects.

10. Whereabouts of Children

Each of the parties agrees to keep the other reasonably informed at all times of the children's general whereabouts while with the Husband or Wife.

11. Encouraging Affection

To the fullest extent possible, the parties shall exert every reasonable effort to foster a feeling of affection between the children and each of the parties. Each party shall exert his and her best efforts to refrain from doing anything to estrange the children from the other party, or to disparage the opinion of the children as to their mother or father or the families of origin of the mother and father, or to act in such a way as to hamper the free and natural development of love and respect between parent and child.

12. Decisions re Best Interests of Children

All day-to-day decisions pertaining to the children shall be made by the parent who has the children on the day in question. The selection **[*49]** of summer camps for the children shall be made jointly by the parties; provided that in so doing the parties shall (a) recognize that each child's attending sleep-away summer camp is a priority and in his or her best interests; (b) take each child's wishes into account when selecting the camp and the duration of attendance for such child; (c) whenever possible, act consistently with camp attendance of the child in prior summers. The parties shall confer with each other on all major decisions pertaining to the children's health, education, welfare and upbringing, with a view to arriving at a harmonious policy calculated to promote the best interests of the children. All decisions shall be resolved on the basis of what is in the best interests of the child in question. If the parties cannot reach agreement as to any decision to be made pursuant to this paragraph 12, the dispute will be resolved by a court of competent jurisdiction; except that if both parties first agree in writing to do so, the matter shall initially be referred to a mutually agreeable person for mediation.

13. Reports From Schools and Professionals

Promptly upon receipt, each of the parties shall furnish the other with **[*50]** copies of any important reports from third persons or institutions concerning the health or education of the children; except that the Husband shall request of any school which a child attends that such school send duplicate reports to him directly.

14. Illness

If a parent has knowledge of an illness or accident or other circumstance affecting the care or welfare of the child, that parent shall promptly notify the other. In the event of an illness or injury that causes the child to be confined to bed for more than twenty-four hours, each parent shall be entitled to visit with the child at reasonable times and for reasonable periods.

15. Communication With Children

The parties shall have reasonable access to the children while they are with the other party, by mail, e-mail, telephonic text and telephone during reasonable hours of the day and evening.

MARJORIE HORNUNG, Plaintiff/Wife

ROBERT HORNUNG, Defendant/Husband

Schedule B Separate Property of Husband

Bank Accounts

1. People's Checking (#5876)

2. People's Savings (#5876)

Investment Accounts

1. Goldman Sachs (#081-8)

2. Goldman Sachs Onlink (#536-4)

3. UBS (#2L00098)

4. Janney Mongomery Scott (#8036)

5. Vertical Ventures, LLC (50%)

6. GSCP VI Parallel **[*51]** AIV, LP

7. MS Credit Partners on Shore Fdr.

8. McCandless Hotel Holdings

9. South Jordan Hotel Holdings

Business Interests

1. ISC (50%)

2. ISC South (33.33%)

3. ISC West (33.33%)

4. ISC Midwest (33.33%)

5. Sashlite, LLC (3 3.33%)

Miscellaneous Property

1. Cash value of 4 Northwestern Mutual Life Insurance Policies

2. Stratton Mountain Club Bond

Schedule C

Separate Property of Wife

Bank Accounts

1. Chase (#7861)

2. Chase (#9262)

3. Chase (#9270)

Investment Accounts

1. Ameritrade (#9803)