

## Matrimonial MATTERS

# Third Department does reality check

In October the Third Department Appellate Division tackled law versus real life. In *Button v. Button* (2018 NY Slip Op 07216), the court addressed application of the statutory maintenance guidelines and counsel fee award.

The Plaintiff Wife and Defendant Husband married in 2006 and had three children. In April 2015, the Wife and children left the marital residence and two months later she filed for divorce. Although the Wife had legal counsel, the Husband appeared *pro se*. The action resulted in a three-day non-jury trial. The Schenectady County Supreme Court granted the parties joint legal custody of the children, with the Wife having primary residency, ordered that the Husband pay biweekly child support (\$525) and spousal maintenance (\$550) and pay \$7,500 toward the Wife's attorney fees, and distributed the marital assets and debts. The Husband appealed.

The Appellate Court kept the custody provisions mostly intact, with some minor changes. Referencing the trial court's "substantial discretion" in equitable distribution awards, the Third Department did not disturb the lower court's distribution, saying that even though the trial court "did not specifically identify any statutory factors it may have considered, its factual findings reveal that it considered the statutory factors that are relevant in this case." The parties had substantial debts (around \$48,000 plus the home mortgage), and their main assets were net equity of around \$37,600 in the marital residence and the Husband's New York State pension plan.



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The Wife asked the trial court to order the marital residence sold and the net proceeds used to pay down the marital debt, and the Husband wanted the house to be awarded to him. The court did award the house and its debt to the husband *plus* \$40,000 of the marital debt, with the Wife being responsible for the remaining marital debt. The personal property was divided "substantially" equally, and the Wife was awarded her *Majauskas* share of the Husband's pension and the Husband was directed to name her as his beneficiary.

The Appellate Court was acquiescent with these distributions, with the exception that it agreed with the Husband that he should not be required to name the Wife as beneficiary of his postretirement death benefits. The court held that "it would be inequitable to require he name the Wife as a beneficiary of his retirement benefits and thereby precluded him from sharing those benefits with any other person," and pointed out that "the marital portion of the pension is small [and] the parties relatively young."

Additionally, the Third Department reduced the maintenance award to \$200 biweekly, saying, "The record establishes that neither party could continue to enjoy the predivorce standard of living, which was sustained

only by incurring substantial debt," and noted that "they were in significant financial distress at the time of trial." Further, "the obligations imposed on the husband by judgment total approximately \$48,806 annually," while his gross earnings were \$73,083. Meanwhile, the Wife's own living expenses were "modest" as she and the children lived with her parents and she had no vehicle to maintain, with her expenses "were limited to gas, food and clothing. Further, the Appellate Court cut the Wife's award of counsel fees in half, to \$3,750, noting, "The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees."

Unfortunately, the financial circumstances of the parties in this case are similar to those matrimonial practitioners here see all too often. The Supreme Court is a court of law and equity. Perhaps this decision by the Third Department will give both attorneys and trial courts some support in arguing for deviations from the maintenance guidelines and the counsel fee award presumption.

It should be noted that this case started before the effective date for the statutory maintenance calculations. However, with the looming shutdown of the tax deduction for spousal maintenance payments it is very likely that the statutory calculations will fall by the wayside.

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