215 A.D.3d 656
Supreme Court, Appellate Division,
Second Department, New York.

Stacee LIEBERMAN–**MASSONI**, appellant-respondent,
v.
John **MASSONI**, respondent-appellant.

2019–02938
|
(Index No. 2175/12)
|
Argued—May 12, 2022
|
April 5, 2023

Synopsis

Background: Wife brought action against husband for divorce and ancillary relief. After trial on issues of equitable distribution, maintenance, and child support, the Supreme Court, Westchester County, Lawrence H. Ecker, J., granted wife's motion to reopen trial on ground of newly discovered evidence regarding husband's business. Husband appealed. The Supreme Court, Appellate Division, affirmed, 146 A.D.3d 869, 46 N.Y.S.3d 126. Following new trial, the Supreme Court, Westchester County, Gretchen Walsh, J., entered judgment of divorce which awarded wife a percentage of value of husband's shares in certain company, and ordered husband to pay 70% of wife's reasonable and necessary attorney's fees and expert fees. Wife appealed and husband cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] awarding wife 35% of value of husband's shares in company and 35% of husband's distribution from sale of one of divisions of husband's employer was appropriate;

[2] certain of husband's shares in company that employed him were husband's separate property;

[3] not imputing as income apartment in Los Angeles that was maintained for husband by his employer, for purposes of calculating child support, was appropriate;

[4] awarding husband credit of 50% of reduction of mortgage principal during pendency of divorce was appropriate;

[5] wife should have been awarded $5,000 of cash that was secured in safe in Los Angeles; and

[6] directing husband to pay 70% of wife's reasonable and necessary attorney's fees and expert fees was appropriate.

Affirmed as modified.

See also 2023 WL 2778339.

Procedural Posture(s): On Appeal; Petition for Divorce or Dissolution; Motion for Attorney's Fees; Petition to Set Child Support.

West Headnotes (28)

[1] **Divorce** Employment benefits in general

Determination that valuation date for husband's shares in company that employed him that were granted before divorce should be from date immediately prior to second trial was appropriate, in divorce proceeding, although husband was high-ranking executive at his corporate employer, where value of shares was not solely attributable to husband's actions.

[2] **Divorce** Hearing

Divorce Disposition of Property

Equitable distribution in divorce proceedings presents issues of fact to be resolved by trial court and should not be disturbed on appeal unless shown to be improvident exercise of discretion.

[3] **Divorce** Time of valuation in general

The Supreme Court has broad discretion in selecting the dates for the valuation of marital assets and, depending on the particular circumstances of the case, may appropriately fix different valuation dates for different assets, for purposes of equitable distribution.

[4] **Divorce** Time of valuation in general

Divorce Businesses and associated assets in general

Divorce Stocks, bonds, and other investments

Courts have discretion to value "active assets" such as a professional practice on the commencement date of the divorce action, while "passive assets" such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial, but such formulation should be treated as helpful guideposts and not immutable rules, in determining equitable distribution.

1 Case that cites this headnote

[5] **Divorce** Distribution in kind

Awarding wife percentage of value of husband's shares in company that employed him, rather than percentage of shares themselves, was appropriate, in divorce proceeding; record did not demonstrate that distribution of shares in kind by transferring percentage to wife, by assigning percentage of interest to wife, or by distributing percentage of husband's future distributions to wife was practicable or not unduly burdensome, and husband's promotion after he was awarded shares provided him more active role in operation of his corporate employer.

[6] **Divorce** Weight and sufficiency

Evidence Value

Crediting husband's expert valuation of shares in company that employed him, which he was granted from his employer, was appropriate, in divorce proceeding; wife's expert did not discount valuation of shares based upon lack of marketability and control, and husband's expert's formula for determining value more closely approximated fair market value of shares than value based on potential sale of company because there was no evidence that sale of company was imminent.

[7] **Divorce** Valuation, Division or Distribution of Particular Property or Interests

Divorce Verdict, Findings, or Determination

The valuation of a marital asset must be founded in economic reality, for purposes of equitable distribution, and the determination of the value of business interests is a function properly within the fact-finding power of the court.

[8] **Divorce** Businesses and associated assets in general

There is no uniform rule for fixing the value of a business for the purpose of equitable distribution in a divorce.

1 Case that cites this headnote

[9] **Divorce** Businesses and associated assets in general

Evidence Value

Valuation of a business is an exercise properly within the fact-finding power of the trial court, guided by expert testimony, for purposes of equitable distribution in a divorce.

2 Cases that cite this headnote

[10] **Divorce** Valuation

The determination of the factfinder as to the value of a business, if within the range of the testimony presented, will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques, for purposes of equitable distribution in a divorce.

2 Cases that cite this headnote

[11] **Divorce** Employment benefits in general

Awarding wife 35% of value of husband's shares in company that employed him, which were granted to him by company, as of date of commencement of second trial and 35% of husband's distribution from sale of one of

divisions of husband's employer, based on his shares, was appropriate, in divorce proceeding, given wife's substantial indirect contributions to husband's business, including caring for parties' children and maintaining parties' residence in New York while husband worked for majority of time in Los Angeles.

[12] **Divorce** Length of marriage, living standard and lifestyle

Divorce Contributions during marriage in general; marital role

Although in a marriage of long duration, where both parties have made significant contributions to the marriage, a division of marital assets should be made as equal as possible, there is no requirement that the distribution of each item of marital property be made on an equal basis.

1 Case that cites this headnote

[13] **Divorce** Contributions during marriage in general; marital role

The distribution of marital assets in a divorce depends not only on the financial contribution of the parties but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home.

[14] **Divorce** Employment benefits in general

Certain of husband's shares in company that employed him that were granted to him by his employer were husband's separate property, in determining equitable distribution in divorce proceeding; shares were granted to husband three years after commencement of divorce proceedings, and they were an incentive for future performance, not compensation for work done during the marriage.

[15] **Divorce** Income and refunds

Bonus payments, though paid after commencement of a matrimonial action, may be viewed as marital property where such payments are compensation for past performance and are not tied to future performance; however, where a bonus is an incentive for future services to be rendered after commencement of an action, the bonus is separate property.

[16] **Child Support** Construction, operation, and effect of guidelines

The Child Support Standards Act (CSSA) sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment. N.Y. Dom. Rel. Law § 240(1-b).

[17] **Child Support** Incomes outside guidelines range

With respect to combined parental income exceeding the statutory cap for using formula set forth in Child Support Standards Act (CSSA), the court has the discretion to apply the statutory child support percentage or to apply the statutory factors to determine amount of child support, or to utilize some combination of those two methods. N.Y. Dom. Rel. Law § 240(1-b)(f).

[18] **Child Support** Decision, findings, or verdict as to guidelines

The hearing court must articulate its reason or reasons for its determination of whether to apply the statutory child support percentage, to apply the statutory factors to determine amount of child support, or to utilize some combination of those two methods, in determining child support when combined parental income exceeds statutory cap, which should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there should or should not be a departure from the prescribed statutory percentage calculated using

statutory formula. N.Y. Dom. Rel. Law § 240(1-b).

[19] **Child Support** Imputed income of obligor

Not imputing as income apartment in Los Angeles that was maintained for husband by his employer, for purposes of calculating child support, was appropriate, in divorce proceeding, where husband traveled to Los Angeles for business on regular basis.

[20] **Child Support** Imputed income of obligor

Child Support Imputed income of custodian

In calculating a party's income pursuant to the Child Support Standards Act (CSSA), a court may impute income based upon various factors, including automobiles or other perquisites that are provided as part of compensation for employment, and fringe benefits provided as part of compensation for employment; however, the Supreme Court is afforded considerable discretion in determining whether to impute income to a parent.

1 Case that cites this headnote

[21] **Divorce** Effect of contributions; reimbursement

Awarding husband credit of 50% of reduction of mortgage principal on marital residence during pendency of divorce was appropriate; husband paid for all of parties' household expenses out of joint checking account, he funded account with earnings from after commencement of divorce proceedings, and wife's spending during pendency of action, which far exceeded parties' agreed-to pre-commencement standard of living, had nearly depleted all of parties' joint accounts.

2 Cases that cite this headnote

[22] **Divorce** Reduction of indebtedness; contributions

Divorce Effect of contributions; reimbursement

Where party has paid other party's share of what proves to be marital debt, such as mortgage, taxes, and insurance on marital residence, reimbursement is required, in divorce proceedings.

1 Case that cites this headnote

[23] **Divorce** Nature of property or interest in general

Wife should have been awarded $5,000 of cash that was secured in safe in Los Angeles, in addition to $5,000 that was awarded to her from safe in New York, in divorce proceeding, where husband deposited all but $10,000 from his safe in Los Angeles into parties' joint account.

[24] **Divorce** Financial condition and resources in general

Divorce Effect of divorce recoveries

Directing husband to pay 70% of wife's reasonable and necessary attorney's fees and expert fees was appropriate, in divorce proceeding, considering relative financial circumstances of parties, including award of maintenance to wife and equitable division of parties' marital assets. N.Y. Dom. Rel. Law § 237(a).

1 Case that cites this headnote

[25] **Divorce** Authority and discretion of court

Divorce Appeal or review

The decision to award an attorney's fee in a matrimonial action lies, in the first instance, in the discretion of the trial court and then in the Appellate Division, whose discretionary authority is as broad as that of the trial court.

[26] **Divorce** Temporary and pendente lite awards

The purpose of awarding attorney's fees in a matrimonial action is to redress the economic

disparity between the monied spouse and the nonmonied spouse by ensuring that the latter will be able to litigate the action on equal footing with the former. N.Y. Dom. Rel. Law § 237(a).

[27] **Divorce** Grounds and Considerations for Award or Amount in General

In exercising its discretion to award attorney's fees in a matrimonial action, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions. N.Y. Dom. Rel. Law § 237(a).

[28] **Divorce** Conduct of litigation; misconduct in general

In exercising its discretion to award attorney's fees in a matrimonial action, the court may consider whether one party has engaged in conduct or taken positions resulting in a delay of the proceedings or engaged in unnecessary litigation. N.Y. Dom. Rel. Law § 237(a).

Attorneys and Law Firms

***339** Hasapidis Law Offices, South Salem, NY (Annette G. Hasapidis of counsel), for appellant-respondent.

Joseph R. Miano, White Plains, NY, for respondent-appellant.

COLLEEN D. DUFFY, J.P., ANGELA G. IANNACCI, REINALDO E. RIVERA, JOSEPH A. ZAYAS, JJ.

DECISION & ORDER

***656** In an action for a divorce and ancillary relief, the plaintiff appeals, and the defendant cross-appeals, from stated portions of a judgment of divorce of the Supreme Court, Westchester County (Gretchen Walsh, J.), dated December 21, 2018. The ***657** judgment of divorce, insofar as appealed from, upon a decision of the same court dated October 5, 2018, made after a nonjury trial, inter alia, awarded the plaintiff a ***340** percentage of the value of the defendant's shares in a certain company. The judgment of divorce, insofar as cross-appealed from, among other things, directed the defendant to pay 70% of the plaintiff's reasonable and necessary attorney's fees and expert fees.

ORDERED that the judgment of divorce is modified, on the law and the facts, by deleting the provision thereof awarding the plaintiff the sum of $5,000 from "the New York safe," and substituting therefor a provision awarding the plaintiff the sum of $5,000 from the New York safe and $5,000 from the defendant's safe in Los Angeles; as so modified, the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The parties were married on August 31, 1997, and have two children. In February 2012, the plaintiff commenced this action for a divorce and ancillary relief. A trial on the issues of equitable distribution, maintenance, and child support commenced in June 2014 (hereinafter the first trial). Evidence at the first trial showed that the defendant, a high-ranking executive at his corporate employer, had received several grants of shares in the company, called B–Units, throughout his employment. The parties' neutral appraiser, Steven Kaplan, testified that the value of the defendant's B–Units as of the date of commencement of this action was $1,126,000, based upon a formula value set forth in the employer's operating agreement and a discount for lack of marketability and control. The defendant testified that the business as of the time of trial was "horrendous." However, approximately two weeks after the close of the first trial, the plaintiff discovered that the defendant's corporate employer had sold one of its divisions for a significant sum, which yielded the defendant a distribution of more than $8 million, based upon his B–Units. The plaintiff moved, inter alia, to reopen the trial. In an order dated December 4, 2014 (hereinafter the December 2014 order), the Supreme Court, among other things, granted that branch of the motion. The court also reopened discovery. The defendant appealed the December 2014 order, which this Court affirmed (*see Lieberman–**Massoni** v. **Massoni***, 146 A.D.3d 869, 46 N.Y.S.3d 126).

The new trial was held in September 2017 (hereinafter the second trial). The Supreme Court issued a decision after trial dated October 5, 2018 (hereinafter the October 2018 trial decision). A judgment of divorce dated December 21, 2018, was entered upon the October 2018 trial decision.

The plaintiff appeals, ***658** and the defendant cross-appeals, from stated portions of the judgment of divorce.

[1] [2] [3] [4] " 'Equitable distribution presents issues of fact to be resolved by the trial court and should not be disturbed on appeal unless shown to be an improvident exercise of discretion' " (*Kattan v. Kattan,* 202 A.D.3d 771, 773, 163 N.Y.S.3d 170, quoting *Santamaria v. Santamaria,* 177 A.D.3d 802, 804, 112 N.Y.S.3d 751 [internal quotation marks omitted]). The Supreme Court has "broad discretion in selecting the dates for the valuation of marital assets and, depending on the particular circumstances of the case, may appropriately fix different valuation dates for different assets" (*Pappas v. Pappas,* 140 A.D.3d 838, 840, 36 N.Y.S.3d 661). " 'Courts have discretion to value "active assets" such as a professional practice on the commencement date [of the action], while "passive assets" such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial' but such formulation should be treated as helpful guideposts and not immutable rules" (***341** *Daniel v. Friedman,* 22 A.D.3d 707, 708, 803 N.Y.S.2d 129, quoting *Grunfeld v. Grunfeld,* 94 N.Y.2d 696, 707, 709 N.Y.S.2d 486, 731 N.E.2d 142). Here, the Supreme Court providently exercised its discretion in determining that the defendant's B–Units that were granted before 2015 should be valued as of June 2017, immediately prior to the second trial (*see Mahoney–Buntzman v. Buntzman,* 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 909 N.E.2d 62), but that the plaintiff should be awarded only a percentage of the value of the B–Units as of that date, not a percentage of the B–Units themselves (*see e.g. Katz v. Katz,* 153 A.D.3d 912, 914, 60 N.Y.S.3d 418; *Sutaria v. Sutaria,* 123 A.D.3d 909, 910, 2 N.Y.S.3d 124). Although the defendant was a high-ranking executive at his corporate employer, the court correctly determined that the value of these B–Units was not solely attributable to his actions (*see Mahoney–Buntzman v. Buntzman,* 12 N.Y.3d at 422, 881 N.Y.S.2d 369, 909 N.E.2d 62; *Wegman v. Wegman,* 123 A.D.2d 220, 237, 509 N.Y.S.2d 342). The court providently exercised its discretion, based on equitable and other considerations, to set the valuation date as of June 2017 (*see Domino v. Domino,* 115 A.D.3d 906, 982 N.Y.S.2d 548; *Daniel v. Friedman,* 22 A.D.3d at 708, 803 N.Y.S.2d 129), rather than at the commencement of this action.

[5] "Whether marital property shall be distributed or a distributive award shall be made in lieu of, or to supplement, facilitate or effectuate a distribution of marital property are matters committed by section 236 (part B, subd 5) of the Domestic Relations Law to the discretion of the Trial Judge in the first instance" (*Majauskas v. Majauskas,* 61 N.Y.2d 481, 493, 474 N.Y.S.2d 699, 463 N.E.2d 15). Here, contrary to the plaintiff's contention, the Supreme Court did not improvidently exercise its discretion in awarding the ***659** plaintiff a percentage of the value of the defendant's B–Units rather than a percentage of the B-units themselves as the record did not demonstrate that the distribution of the B–Units in-kind by transferring a percentage of the B–Units to her, by assigning a percentage of the interest to her, or by distributing a percentage of the defendant's future distributions to her would be practicable and not unduly burdensome (*see e.g. id.* at 485, 474 N.Y.S.2d 699, 463 N.E.2d 15; *Repetti v. Repetti,* 147 A.D.3d 1094, 1099, 47 N.Y.S.3d 447). The court's determination that the plaintiff should not share in future distributions, nor benefit in any value increases of the B–Units subsequent to June 2017, was a provident exercise of discretion in light of the defendant's promotion in 2015 which provided him a more active role in the operation of his corporate employer (*see e.g. Trivedi v. Trivedi,* 222 A.D.2d 499, 499, 635 N.Y.S.2d 78).

[6] [7] [8] [9] [10] Nor did the Supreme Court improvidently exercise its discretion in crediting the defendant's expert valuation of the B–Units over the valuation of the plaintiff's experts. "The valuation of a marital asset must be founded in economic reality" (*Sheehan v. Sheehan,* 161 A.D.3d 912, 914, 77 N.Y.S.3d 152), and "[t]he determination of the value of business interests is a function properly within the fact-finding power of the court" (*Daddino v. Daddino,* 37 A.D.3d 518, 519, 830 N.Y.S.2d 278). "However, '[t]here is no uniform rule for fixing the value of a business for the purpose of equitable distribution. Valuation is an exercise properly within the fact-finding power of the trial court, guided by expert testimony. The determination of the factfinder as to the value of a business, if within the range of the testimony presented, will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques' " (***342** *Davenport v. Davenport,* 199 A.D.3d 637, 640, 158 N.Y.S.3d 116, quoting *Wasserman v. Wasserman,* 66 A.D.3d 880, 882, 888 N.Y.S.2d 90). Since the plaintiff's experts failed to discount the valuation of the B–Units based upon a lack of marketability and control (*see Nadasi v. Nadel–Nadasi,* 153 A.D.3d 1346, 1349, 60 N.Y.S.3d 488), the court did not improvidently exercise its discretion in adopting the valuation of the defendant's expert. Further, the court did not improvidently exercise its discretion in determining that the formula value testified to by the defendant's expert more

closely approximated the fair market value of the defendant's B–Units than the value based upon a potential sale of the company, where there was no evidence that the sale of the corporate employer was imminent.

[11] **[12]** **[13]** "Although in a marriage of long duration, where both parties have made significant contributions to the marriage, a division ***660** of marital assets should be made as equal as possible, there is no requirement that the distribution of each item of marital property be made on an equal basis" (*Chalif v. Chalif,* 298 A.D.2d 348, 349, 751 N.Y.S.2d 197 [citation omitted]; *see Repetti v. Repetti,* 147 A.D.3d at 1098, 47 N.Y.S.3d 447). "The distribution of marital assets depends not only on the financial contribution of the parties 'but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home' " (*K. v. B.,* 13 A.D.3d 12, 17, 784 N.Y.S.2d 76, quoting *Brennan v. Brennan,* 103 A.D.2d 48, 52, 479 N.Y.S.2d 877). Here, considering the plaintiff's substantial indirect contributions to the defendant's business, including caring for the parties' children and maintaining the parties' residence in New York while the defendant worked for the majority of the time in Los Angeles, the Supreme Court providently exercised its discretion in awarding the plaintiff 35% of the value of the defendant's B–Units as of the date of commencement of the second trial, as well as 35% of the defendant's distribution from the 2014 sale of one of the divisions of the defendant's corporate employer (*see Kattan v. Kattan,* 202 A.D.3d 771, 163 N.Y.S.3d 170; *Klestadt v. Klestadt,* 182 A.D.3d 592, 594, 120 N.Y.S.3d 813).

[14] **[15]** Contrary to the plaintiff's contention, the Supreme Court also providently exercised its discretion in determining that certain other B–Units that the defendant was granted in 2015 were his separate property. "Bonus payments, though paid after commencement of a matrimonial action, may be viewed as marital property where such payments are compensation for past performance and are not tied to future performance. However, where a bonus is an incentive for future services to be rendered after commencement of an action, the bonus is separate property" (*Kaufman v. Kaufman,* 189 A.D.3d 31, 63, 133 N.Y.S.3d 54 [citations omitted]). Here, the evidence showed that the B–Units granted to the defendant in 2015, three years after the commencement of this action, were an incentive for future performance, not compensation for work done during the marriage.

[16] **[17]** **[18]** The Child Support Standards Act (hereinafter CSSA) "sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment" (*McCoy v. McCoy,* 107 A.D.3d 857, 858, 967 N.Y.S.2d 137). "With respect to combined parental income exceeding that amount, the court ***661** has the discretion to apply the statutory child ***343** support percentage or to apply the factors set forth in Domestic Relations Law § 240(1–b)(f), or to utilize some combination of those two methods" (*Matter of Fanelli v. Orticelli,* 170 A.D.3d 831, 832, 96 N.Y.S.3d 136 [citation omitted]). "The hearing court must 'articulate its reason or reasons for [that determination], which should reflect a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there [should or] should not be a departure from the prescribed percentage' " (*id.* at 832, 96 N.Y.S.3d 136, quoting *Wagner v. Dunetz,* 299 A.D.2d 347, 350–351, 749 N.Y.S.2d 545 [internal quotation marks omitted]). Here, the Supreme Court articulated its reasons for determining that a $400,000 parental income cap was appropriate as detailed in the October 2018 trial decision.

[19] **[20]** Contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in determining the defendant's income for child support purposes. "In calculating a party's income pursuant to the CSSA, a court ... may impute income based upon various factors, including automobiles or other perquisites that are provided as part of compensation for employment, and fringe benefits provided as part of compensation for employment" (*Matter of Geller v. Geller,* 133 A.D.3d 599, 600, 20 N.Y.S.3d 379 [internal quotation marks omitted]). However, the Supreme Court " 'is afforded considerable discretion in determining whether to impute income to a parent' " (*Morille–Hinds v. Hinds,* 169 A.D.3d 896, 899, 94 N.Y.S.3d 336, quoting *Filippazzo v. Filippazzo,* 121 A.D.3d 835, 836, 994 N.Y.S.2d 671). Here, contrary to the plaintiff's contention, the court did not improvidently exercise its discretion in declining to impute as income the cost of the apartment that the defendant's corporate employer maintained for him in Los Angeles. The defendant testified at the second trial that he was again traveling there for business on a regular basis (*see Morille–Hinds v. Hinds,* 169 A.D.3d at 899, 94 N.Y.S.3d 336).

[21] **[22]** "Where ... a party has paid the other party's share of what proves to be marital debt, such as the mortgage, taxes, and insurance on the marital residence, reimbursement

is required" (*Morales v. Carvajal,* 153 A.D.3d 514, 515, 60 N.Y.S.3d 228). Although the defendant paid for all of the parties' household expenses out of a joint checking account, it is also undisputed that the defendant funded the account with post-commencement earnings. Further, the plaintiff's spending during the pendency of the action, which far exceeded the parties' agreed-to "pre-commencement standard of living," had nearly depleted all of the parties' joint accounts. Accordingly, the Supreme Court did not improvidently exercise its discretion when it awarded the ***662** defendant a credit of 50% of the reduction in the mortgage principal made during the pendency of the action (*see Westbrook v. Westbrook,* 164 A.D.3d 939, 944, 83 N.Y.S.3d 560).

[23] With respect to the cash contained in two safes maintained by the defendant, the Supreme Court should have awarded the plaintiff $5,000 of the cash that was secured in a safe in Los Angeles, as well as the $5,000 that was awarded to the plaintiff that was secured by the defendant in a safe in New York. At the second trial, the defendant testified that he had deposited all but $10,000 from his safe in Los Angeles back into the parties' joint account, which testimony the court credited. However, the court did not address that remaining $10,000 in the safe in Los Angeles. Thus, the plaintiff should have been awarded a distributive award of $5,000 for the cash held in the Los Angeles safe, in ***344** addition to the distributive award of $5,000 for the cash held in the New York safe.

[24] [25] [26] [27] [28] " 'The decision to award an attorney's fee in a matrimonial action lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as that of the trial court' " (*Klein v. Klein,* 178 A.D.3d 802, 805, 116 N.Y.S.3d 92, quoting *Black v. Black,* 140 A.D.3d 816, 816, 33 N.Y.S.3d 379). "There is a statutory 'rebuttable presumption that counsel fees shall be awarded to the less monied spouse' " (*Piccininni v. Piccininni,* 176 A.D.3d 880, 881, 107 N.Y.S.3d 873, quoting Domestic Relations Law § 237[a]). The purpose of awarding attorney's fees "is to redress the economic disparity between the monied spouse and the nonmonied spouse by ensuring that the latter will be able to litigate the action on equal footing with the former" (*Giasemis v. Giasemis,* 187 A.D.3d 718, 719, 130 N.Y.S.3d 386 [internal quotation marks omitted]). "In exercising its discretion, a court should 'review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions' " (*Zehner v. Zehner,* 186 A.D.3d 784, 785–786, 129 N.Y.S.3d 132, quoting *Duval v. Duval,* 144 A.D.3d 739, 743, 40 N.Y.S.3d 535 [internal quotation marks omitted]). "Additionally, the court may also consider whether one party has engaged in conduct or taken positions resulting in a delay of the proceedings or engaged in unnecessary litigation" (*Klein v. Klein,* 178 A.D.3d at 805, 116 N.Y.S.3d 92). Considering the relative financial circumstances of the parties, including the award of maintenance to the plaintiff and the equitable division of the parties' marital assets, under the circumstances of this case, the Supreme Court providently exercised its discretion in directing the defendant to pay 70% of the plaintiff's reasonable and necessary attorney's fees and expert fees (*see* ***663** *e.g. Weiss v. Nelson,* 196 A.D.3d 722, 726, 152 N.Y.S.3d 143).

DUFFY, J.P., IANNACCI, RIVERA and ZAYAS, JJ., concur.

All Citations

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