

FAMILY LAW

'Equitable' Distribution Isn't Always 'Equal'

By Tracy Julian

"Equitable distribution" is the process by which marital assets are allocated to the parties upon divorce. To effectuate the process, the court is required to make specific findings of fact identifying the assets subject to distribution and the value of each asset. *Rothman v. Rothman*, 65 N.J. 219, 232-33 (1974). The court then analyzes the factors set forth in N.J.S.A. 2A:34-23.1 to establish a plan for dividing the assets between the parties. The goal is to achieve a "fair and just" division of marital property. *Steneken v. Steneken*, 183 N.J. 290, 299 (2005).

While N.J.S.A. 2A:34-23.1 establishes a rebuttable presumption that each party made substantial contributions to acquire assets and income during the marriage, the statute does not provide for an automatic equal division of assets on that premise. See *Rothman*, 65 N.J. at 232-33 n. 6 (rejecting a presumption of equal distribution of marital assets); *Clementi v. Clementi*, 434 N.J. Super. 529 (Ch. Div. 2013) (holding that neither party is automatically entitled to



50 percent of any asset, including the marital residence). Rather, the statute compels the court to consider the statutory factors on a case-by-case basis and consider the complete factual circumstances surrounding each relationship. *McGee v. McGee*, 277 N.J. Super. 1 (App. Div. 1994).

The N.J.S.A. 2A:34-23.1 Factors

The 16 factors N.J.S.A. 2A:34-23.1 obligates the court to consider when making an equitable distribution of property include:

- (a) The duration of the marriage or civil union;
- (b) The age and physical and emotional health of the parties;
- (c) The income or property brought to the marriage or civil union by each party;

(d) The standard of living established during the marriage or civil union;

(e) Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;

(f) The economic circumstances of each party at the time the division of property becomes effective;

(g) The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

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(h) The contribution by each party to the education, training or earning power of the other;

(i) The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

(j) The tax consequences of the proposed distribution to each party;

(k) The present value of the property;

(l) The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

(m) The debts and liabilities of the parties;

(n) The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

(o) The extent to which a party deferred achieving their career goals; and

(p) Any other factors which the court may deem relevant.

In analyzing the factors, courts should not emphasize any one factor over the others, but, rather, must consider all the factors to allocate the assets consistent with the “unique needs of the parties.” *DeVane v. DeVane*, 280 N.J. Super. 488, 493 (App. Div. 1995). Much to the surprise of many divorce litigants, a thorough application of the factors to the litigants’ circumstances could compel the court to award one spouse more than 50 percent of the property in order to achieve an “equitable” result.

The fact-sensitive nature of the N.J.S.A. 2A:34-23.1 equitable distribution analysis lends itself to rich caselaw interpreting the statute. In this

regard, the trial court judge is afforded broad discretion to make a distribution of assets and, absent an abuse of discretion, the analysis will be affirmed on appeal. *LaSala v. LaSala*, 335 N.J. Super. 1, 6 (App. Div. 2000) (citing *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 443–44 (App. Div. 1978)). Still, despite the case-by-case nature of the analysis, the following are certain common fact patterns where a disproportionate distribution of the marital property is warranted.

Written Agreement Before or During the Marriage

Perhaps the most obvious circumstance dictating a disproportionate distribution of assets occurs when the parties contract for the same in a written agreement before or during the marriage, such as in prenuptial/pre-civil union agreements, reconciliation agreements, and matrimonial settlement agreements. N.J.S.A. 2A:34-23.1(e).

Prenuptial or pre-civil union agreements are presumed valid and enforceable pursuant to N.J.S.A. 37:2-38, and the court will honor a disproportionate distribution of assets under such an agreement. In contrast, mid-marriage agreements, or agreements executed during the life of the marriage prior to evidence that the marriage has deteriorated, are generally unenforceable. *Pacelli v. Pacelli*, 319 N.J. Super. 185 (App. Div. 1999). Such agreements lack consideration and are viewed with skepticism because one party may use the threat of divorce to coerce the second party to agree to accept an otherwise unfair distribution.

Reconciliation agreements, or agreements executed after separation and upon an agreement to reconcile, are viewed slightly more favorably than mid-marriage contracts and, in certain

circumstances, will be enforced where the party seeking enforcement can establish that the agreement is “fair and equitable.” *Nicholson v. Nicholson*, 199 N.J. Super. 525 (App. Div. 1985). Finally, matrimonial settlement agreements negotiated during the dissolution of the marriage are enforceable and may be incorporated into the judgment of divorce.

Dissimilar Economic Circumstances of Parties at Time of Distribution

N.J.S.A. 2A:34-23.1(f) requires judges to consider the specific economic circumstances of each party at the time of the distribution. In this regard, where one spouse enjoys a superior economic circumstance at the time of the divorce, the court may order a disproportionate allocation of marital assets to the party with the inferior position to achieve a more “fair” result.

For example, N.J.S.A. 2A:34-23(h) specifically excludes property acquired by a spouse vis-à-vis a gift, devise or intestate succession from the marital estate and, thus, from equitable distribution. Likewise, premarital assets are generally considered separate property and are also exempt from distribution. *Elrom v. Elrom*, 439 N.J. Super. 424, 444 (App. Div. 2015).

Consequently, where a party has substantial premarital assets or other separate assets exempt from distribution as the result of a gift or inheritance, the court may order an unequal distribution in favor of the spouse without the gift or inheritance to more fairly equalize the value of property available to each spouse at the time of the distribution.

Skewed Earning Capacity and One Spouse’s Contribution to Education, Training or Earning Power of the Other

N.J.S.A. 2A:34-23.1(g) requires consideration of “the income and

earning potential of each party,” including background, training, experience, etc., when dividing marital property and, similarly, subsection (h) mandates consideration of the “contribution by each party to the education, training or earning power of the other.”

Analysis under these factors first requires the parties to specifically identify the education or earning potential which the parties assert is relevant. For example, “good will” in a business or trade can be assigned a value and is includable in the marital estate for purposes of distribution *Dugan v. Dugan*, 92 N.J. 423 (1983) (holding that good will in a law practice can be valued and is subject to equitable distribution). Where one party enjoys “good will” or enhanced earning potential post-divorce as a result of the reputation that spouse built during the marriage, the second spouse is entitled to a credit for a portion of the value of the first spouse’s “good will.”

In contrast, a professional degree or license is not considered property and is not subject to distribution under the statute. *Mahoney v. Mahoney*, 91 N.J. 488 (1982) (holding that an M.B.A. is not “property” for purposes of N.J.S.A. 2A:34-23). However, where one spouse earned and/or paid for a professional degree during the marriage, the second spouse is nonetheless entitled to a credit for a portion of the “value” of their “contribution”—financial or non-financial—to the spouse’s ability to earn the degree. See *Gibbons v. Gibbons*, 174 N.J. Super. 107 (App. Div. 1980), *rev’d on other grounds*, 86 N.J. 515 (1981) (recognizing the totality of the marital partnership and

non-pecuniary contribution of wife to a husband’s education).

Wrongful Dissipation of Marital Assets

N.J.S.A. 2A:34-23.1(i) requires the court to consider either party’s “dissipation” of marital assets when making an award of property. The Appellate Division has observed that “dissipation” is undefined by statute and, thus, must be identified on an individual case basis. *Kothari v. Kothari*, 255 N.J. Super. 500, 506 (App. Div. 1992). In *Kothari*, the court stated that “dissipation may be found where a spouse uses marital property for his or her own benefit and for a purpose unrelated to the marriage at a time when the marriage relationship was in serious jeopardy.” *Id.* (citation omitted). The question is whether one spouse is expending assets with the intent of diminishing the other spouse’s share of the marital estate. For example, dissipation is deemed to have occurred when one spouse uses marital assets to support a lifestyle outside the marriage, to support or entertain a paramour, or where one party has gambled and lost marital funds.

In dissipation cases, the court has the power to consider the same in an award of equitable distribution and make an unequal distribution of property in favor of the non-dissipating spouse. If adequate marital property does not exist at the time of the distribution to properly compensate the spouse, the court may impose cash indebtedness upon one spouse in favor of the other.

Egregious Bad Acts of One Spouse

While marital fault is not a factor set forth in N.J.S.A. 2A:34-23.1

and is generally not considered in the equitable distribution analysis, an egregious bad act of one spouse toward the other, such as murder or attempted murder, may be considered in the distribution of marital property. For example, where a husband contracted to pay a third party to murder his wife, the trial court determined that it must consider the husband’s “marital fault” regarding equitable distribution. *D’Arc v. D’Arc*, 164 N.J. Super. 226 (Ch. Div. 1978). Likewise, in *Wasserman v. Schwartz*, 364 N.J. Super. 399 (Law Div. 201), where the husband murdered the wife, her estate was entitled to equitable distribution of marital assets held in husband’s name just as she would have been if the marriage terminated as result of divorce rather than murder.

Conclusion

While there is a rebuttable presumption that both parties contributed to the acquisition of assets and earnings during a marriage, and many divorce litigants assume that each marital asset will automatically be divided equally upon divorce, N.J.S.A. 2A:34-23.1 and relevant caselaw dictate that courts conduct a far more thorough and comprehensive analysis of the litigants’ circumstances prior to entering an equitable distribution award. In many cases, the application of the 16 statutory factors will result in a disproportionate distribution of the assets to achieve equity in light of the entire circumstances. ■