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That Double-Dipping Grunfeld

By Peter Galasso

Matrimonial practitioners are uniformly cynical about how the Court of Appeals decides family law matters. Indeed, it is generally acknowledged among the more erudite in the matrimonial community that one of their main and most noble priorities[1] over the past decade has been to protect and empower women. However, the unfortunate consequence of their zeal has been to establish precedent which episodically perverts the very equity they were sworn to promote.

On April 4, the Court of Appeals entertained oral argument in the case of *Grunfeld v. Grunfeld*[2], a long-awaited event for the matrimonial community, segments of which chartered buses to Albany to witness it. The most pressing issue to be resolved by the high court in *Grunfeld* turned on whether the husband would have to pay support from the same dollar of earnings used to calculate the value of his license to practice law.

In *McSparron v. McSparron*[3], decided in 1995, the Court of Appeals solidified its view, which was first articulated in the 1986 landmark case of *O'Brien v. O'Brien*[4], that a license, advanced degree, or certain other career enhancements that produced quantifiably greater earnings are marital assets subject to equitable distribution. Before *O'Brien*, even contending, that a degree or license was a distributable asset might have earned an attorney sanctions for frivolous conduct from some of our more traditional jurists. In that regard, the Court's stubborn return to its holding in *O'Brien* greatly disappointed the pragmatists among us who continue to believe that *O'Brien* was simply a case where bad facts produced bad law.

Perceiving at least one potential inequity that it was unwilling to tolerate, the *McSparron* Court cautioned that the lower courts should "be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses." However, as the conflict among the lower courts[5] revealed, the lack of guidance extended by the *McSparron* Court opened the proverbial barn doors to varying interpretations of that concept.

In *Grunfeld*, the Court seized the opportunity to better define how "double-dipping" could be avoided by establishing an equation that can be applied by the lower courts with at least some measure of uniformity. However, in managing all this suspense, the Court's decision on May 11th was more of a disappointment than a revelation. While it acknowledged once again its commitment to the double dipping phenomenon, the high court devoted little thought to how inequitably the parties divide the marital assets in the "normal" license case.

As held by the Court in *Grunfeld*:

> To the extent, then, that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged with the distribution of the same marital asset value, or with sharing the same income with the non-licensed spouse.
>
> Whereupon, the Court went on to hold:
>
> To comply with *McSparron*, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution or some combination of the two. Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout [citation omitted]...
>
> Where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income [citation omitted]...

One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce. . . This method is also consistent with our observation that in particular cases the value of the license "may be nominal" [citation omitted].

On the other hand, there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (see Domestic Relations Law §236 [B][6] [a] [1]), Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer to actually distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance.

While serious matrimonial minds are already at work planning to exploit the flexibility the *Grunfeld* court has given the lower courts, the paradox is that while the husband is awarded his license and practice as his share of the marital estate, the wife receives as an offset against the value of such assets, which simply enable the husband to work, virtually all of the parties' more enjoyable assets, including the marital residence, the parties' savings and, in many instances, even the husband's retirement account.

Because the various departments have already seen fit to award child support as a statutory percentage of as much as $300,000 in income without a seriously developed link to the child's needs[6], practitioners walk into Court with great trepidation when representing the more affluent spouse. Indeed, complementing child support of 25 percent with maintenance to prolong the wife's pre-separation standard of living[7], and a distributive award of the husband's license and practice, leaves the working spouse wondering why he is working. Moreover, due to the Court's willingness to impute greater income to these who accept a lesser paying job[8], the "monied" spouse is generally locked into a profession until all support obligations are paid. Hence, "equity" has officially left the building.

My personal litmus test is rather simple: If the total monthly obligations of the monied spouse (i.e. child support, maintenance and a distributive award) leaves less money in his hands monthly than his dependent family, something is wrong. Indeed, it reminds me of the days before the 70 percent income tax rate was finally repealed. The fear then was primarily focused on America's productivity. It was believed that pocketing only 30 cents out of every dollar earned discouraged further initiative. It is high time that the High Court articulate a more pragmatic overall approach to resolving complex matrimonials. For leaving it to attorneys to advocate for common sense over their client's best case scenario is simply too risky.

1 "Extreme Measures," Galasso, Peter, NYLJ January 3, 1997, p. 2

2 NYLJ, May 12, 2000, p. 27, C3

3 87 N.Y.2d 275, 639 N.Y.S2d 265 (1995)

4 O'Brien v. O'Brien 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1986)

5 See Grunfeld, generally

6 See e.g. Kosovsky v. Zahl, May 4, 2000 NYLJ p. 27 C1 (1st Dept. 2000); Jones v. Reese, 629 N.Y.S.2d 311 (3rd Dept. 1996)

7 Hartog v. Hartog 85 NY2d 647, 623 N.Y.S2d 537 (1995)

8 See Hickland v. Hickland, 39 NY2d (1976); Liadis v. Liadis, 207 AD2d 331 (2nd Dept. 1994)

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