The Death of Double-Dipping?

Occasionally, the Appellate Division speaks with illuminating clarity. In Palydowycz v. Palydowycz (NYLJ 4-14-16), the Second Department did just that. In doing so, it had to overturn the contrary precedent established in 2010 by an appellate panel comprised of its very own members. It also abandoned a fundamentally logical and commonsensical rule of law that it had previously embraced for the prior six (6) years. Significant to the divorcing business owners out there, their maintenance payments under Payldowycz are likely to be far greater. To the maintenance payee counterpart, Palydowycz is a cause for celebration.

The central issue highlighted and decided by the Court in Palydowycz arguably put to rest the Second Department's prior vacillation on the rule against 'double dipping'. That rule comes into play in circumstances when the projected earnings used to value an intangible marital asset, such as a professional license, are simultaneously used to calculate a maintenance award. In Palydowycz, the Second Department unequivocally held that the excess earnings [1] of the husband's medical practice could be capitalized to calculate a value for his practice for equitable distribution purposes, and that same income stream could also be properly considered in computing the payor spouse's maintenance obligation. The Second Department went on to explicitly state that its contradictory 2010 holding on the exact same issue in Rodriguez v. Rodriguez (70 AD3d 799) is no longer to be followed.

In Rodriguez, four judges of a different appellate panel of the Second Department held that the lower court "impermissibly engaged in double counting of income in valuing [husband's] medical practice, which was equitably distributed as marital property, and in awarding maintenance to the [wife]… [in light of the fact that the] valuation of the [husband's] business involved calculating [his] projected future earnings." Id at 801. The paradox is that the Rodriguez decision itself completely eviscerated the Second Department's 2007 contrary decision in Griggs v. Griggs (44 AD3d 710), where a completely different panel of appellate judges held that a portion of the value of the husband's medical practice could be equitably distributed to the wife based upon the same income considered in awarding the wife maintenance without violating the rule against 'double dipping'. Palydowycz signaled that the Second Department's thinking on the issue had once again changed.

It is noteworthy that in reaching their decisions, the Palydowycz and Griggs appellate panels both relied on the Court of Appeals' decision in Keane v. Keane 8 NY3d 115, 119 (2006), where the High Court generically held "that the prohibition against double counting does not apply where, as here, the asset to be distributed is a "tangible income-producing asset," rather than an intangible asset, such as a professional license, the value of which can only be determined based on projected earnings." However, in Keane, unlike in Griggs and Palydowycz, the income-producing asset at issue was a commercial building that generated rental income and not a professional practice which solely relies on the work of professionals to generate an income. Apparently, in light of that distinguishing fact, the Rodriguez panel made no mention of

[1] Excess earnings of a medical practice in generic terms is equal to the difference between what the practice owner is paid in total compensation less the reasonable compensation he would otherwise be paid for performing his job as a physician for the practice absent his/her ownership interest.

Keane in its 2010 decision, evidently viewing an income producing asset like a building differently than it viewed an asset that owes its value to the people who generate the income. Although this philosophically irreconcilable conflict over the 'double dipping' issue is not between two different departments but manifested itself instead within one department, the Second Department's unsettling decisional seesaw[2] and abject indifference toward its own precedent begs the question of whether the High Court might want to grant leave next time the issue is placed before it. Otherwise, another Second Department panel will be free to abandon Palydowycz the next time the issue comes up before them and potentially return to the payor-spouse friendly perspective articulated in.

[2] Appellate Judge Sheri Roman sided with the majority in both Rodriguez and Palydowycz.