FAMILY

# Reallocation of Inequitability

By Vesselin Mitev

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"Subject to reallocation," a favorite catchphrase of matrimonial litigators, and one eagerly adopted by their triers of fact, is a wonderful example of an abstract principle that oftentimes fails to carry out its intended purpose when applied to actual practice. Since the overwhelming majority of divorces settle, monies advanced from the marital pie coffers during the proceeding (usually by the monied spouse), the thought goes, should be able to be re-allocated, or credited to the spouse that either laid out the money or debited from the spouse that received the benefit.

The practical problem, of course, is that by the time settlement discussions have either reached a fever pitch or broken down completely, these interim advanced payments are often chaff by the wayside, both for the clients and for the lawyers negotiating the deal; economists call this phenomenon "sunk costs;" and, given that both economic theory and law are premised on the (faulty) assumptions that people are a) reasonable and b) rational, on paper these tenets seemingly make sense.

A secondary problem is that the asset(s) from where the money was advanced may be completely depleted by the time we get around to divvying up the aforesaid pie, and in the very real sense, the spouse that advanced the money is 100 percent out of luck, for example, advancing payments from a 401k during the pendency of the divorce towards a home loan modification, only to have that modification be denied and the property sold in foreclosure by the end of the divorce.

Yet try telling a client that the $15,000.00 they advanced during the litigation for various interim payments that were purportedly "subject to reallocation" now have nowhere to be reallocated to, is to see just how quietly, calmly and reasonably rational people react.

Complicating the matter is that during the pendency of the action, valuations of retirement-type accounts are usually not completed until before (or after) trial, a practical issue that cannot be squared away with the cornerstone of matrimonial jurisprudence that post-commencement, every dollar earned and every dollar spent is presumptively the parties' separate property. So, while it's easy to seek, say $25,000 from the monied spouse's retirement account, to pay for — insert grossly inflated interim expense here — a practical application of this approach can render inequitable results.

What to do then if the matter does not settle, payments have been advanced by one spouse, and the assets have been drained, in large part due to one spouse's recalcitrance, obstructionism, and otherwise general bad-faith conduct?

In a stark reminder that "equitable does not mean equal" and that the trial court retains the power to control the conduct of litigants in its courtroom, by *inter alia* — awarding less of the marital pie to the litigious, obstinate party — the Appellate Division, Second Department, in *D'Alauro v D'Alauro*, 2017 NY Slip Op 03480, recently upheld the trial court's order directing that the wife receive only 30 and 40 percent of the defendant's pensions, respectively, in a long-term marriage, as a result of the wife's tactics during trial, which included her refusal to sign a pension application (so that both parties could start receiving payments); her repeated thwarting and interfering with the receiver-husband's efforts to sell the marital home; and failure to appear on several scheduled trial dates.

In *Michaelessi v. Michaelessi*, 59 AD3d 688 (2d Dept. 2009), the Appellate Division also upheld the trial court's award to the plaintiff of only 25 percent of the value of the defendant's pension, in part because: "The plaintiff admitted that she did not truthfully fill out her net worth statement, and failed to provide an adequate explanation as to how she was able to afford to pay for a significant elective-surgical procedure with her claimed level of assets…"

The trier of fact then retains significant latitude to tailor the division of the marital pie to comport with the parties' conduct while within its penumbra. Thus, a prospective "re-allocation," which is what occurs when there aren't enough assets to "credit" the initially allocating spouse, is the only option, such as in the form of reducing the amount of money a spouse would stand to get at a future time, such as from a retirement account; or in the event of the sale or liquidation of an asset, limiting that spouse's share concomitantly.

While it's obvious child support is verboten as a reallocation source (under the rubric that children should not be punished for their parent's sins), maintenance and counsel fees are also fertile tracts from which to deduct the "credit," either because simple mathematical terms dictate such a reallocation, or because a litigant's deleterious conduct merits it.

*Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals. He represented the respondent in D'Alauro v. D'Alauro.*