EQUITABLE DISTRIBUTION, SUMMARY JUDGMENT AND GRAND JURIES

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The Court of Appeals has handed down a raft of decisions as the end of the current term approaches. We discuss three of these. In *Holterman v. Holterman*, the Court held that distributive awards representing the future income stream from a professional license should not affect the calculation of the divorcing parents' respective income in setting child support obligations. In *Brill v. City of New York*, it directed that summary judgment motions made after the CPLR's deadline of 120 days from note of issue must be denied absent a showing of good cause for the delay, even if strict application of the deadline leads to the trial of a meritless case. And in *People v. Aarons*, it ruled that a formal vote of 12 grand jurors not to indict is necessary for dismissal of criminal charges.

Child Support "Double Dipping"

In *Holterman v. Holterman,* the Court declined to extent to child support its ruling in *Grunfeld v. Grunfeld,* 94 N.Y.2d 696, 705 (2000), that "[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout." Thus, the trial court was correct in declining to subtract from its calculation of the husband's income for child support purposes the distributive award to the wife of her share of the husband's enhanced earnings attributable to his medical license. The Court upheld an award of maintenance and child support that left the husband with $36,000 (pre-tax) of his $181,000 annual income.

The situation had its roots in the Court of Appeals' 1985 decision in *O'Brein v. O'Brien,* 66 N.Y.2d 576, which held that a professional license constitutes marital property. Thus, in the Holtermans' divorce the "marital portion" of the husband's medical license had to be divided between the spouses. The marital portion was derived by multiplying (1) the difference between the husband's income as a doctor and what his income would have without a medical license, and (2) the percentage of time during which the husband earned his license that the couple was married (70%). The trial court granted the wife 35% of the marital portion with a net present value of $214,000, which it directed the husband to pay over 15 years.

The husband argued that to avoid double counting, the $29,000 monthly payments should be deducted from his income and included in his wife's income in calculating child support. The Court of Appeals disagreed. The majority opinion, by Judge Victoria A.

Graffeo, relied upon the language of the Child Support Standards Act (CSSA) and its legislative purpose in ruling that the wife's distributive award should not be taken into account in determining each spouse's income.

The CSSA sets forth a multi-step process for determining a non-custodial parent's child support obligations. First, the parents' income is derived from the prior year's federal tax return. Second, specified deductions are made from each parent's income. Third, designated percentages are applied to combined parental income up to $80,000, and the court sets child support based upon sums over $80,000 by applying certain "paragraph (f)" factors. The financial resources of the two parents are one of the paragraph (f) factors. Finally, the court applies the paragraph (f) factors to assess whether the support payments resulting from this calculation are "unjust or inappropriate," in which case an adjustment may be made.

The Court noted that the Legislature did not include distributive award payments, whether based upon enhanced earning capacity from a license or otherwise, as one of the deductions from income made in the second step of the calculation process. Nor did the Legislature provide that receipt of distributive awards should be included in income. Thus, statute does not provide for the reallocation that the husband advocated. This plain reading of the CSSA is consistent with the Act's purpose of maintaining children's standard of living after their parents divorce. Moreover, the adjustment the husband proposed would be unworkable when a distributive award was paid in a lump sum.

There is one hope for a professional who finds him or herself in Dr. Holterman's predicament. The Court agreed that distributive payments may be taken into account under the paragraph (f) factor that allows consideration of parental financial resources to modify an unjust or inappropriate award. Here, however, the trial court did not abuse its discretion in failing to make an adjustment to the child support payments calculated pursuant to the statutory formula.

Judge Robert S. Smith authored a dissent in which Judge Susan Phillips Read concurred. The dissent argued that it was an abuse of discretion for the trial court not even to consider the cumulative effect on the husband of its various awards of maintenance, legal and expert fees, and child support. As to the main issue, the dissent characterized as "illogical and unfair" the method of income allocation mandated by the majority.

Along the way, the dissent suggested that *O'Brien v. O'Brien,* which it noted no other state high court has followed, should be applied only in the "'working-spouse/student-spouse' syndrome" circumstance in which it arose, i.e., where, upon obtaining a professional license, a person divorces the spouse who supported him or her during school and training. "*O'Brien* should not be used where, as here, the enhanced earning capacity associated with the professional license is already fully reflected in the license holder's earnings."

The dissent did not advocate deducting all equitably distributed property from income in calculating child support. When the asset is income-producing, however, reallocation of the resulting income is necessary to avoid double counting. The dissent saw no reason to distinguish a professional license from any other income-producing asset, such as a business. Holding that the CSSA forbids reallocation of income in these circumstances renders the statute "irrational," Judge Smith argued. Of course, if *O'Brien* were overruled or determined to be inapplicable in a case such as the Holtermans (who divorced after 19 years of marriage), there would be no "double dipping" as a result of awarding a spouse a portion of an income-producing license but ignoring the value of that income stream in calculating income under the CSSA.

Summary Judgment Timing

Practitioners be forewarned. The late filing of summary judgment motions will no longer be tolerated if there is no excuse for the untimliness. So held the Court (6-1) in *Brill v. City of New York*.

CPLR 3212(a) provides that the court may set a deadline for making summary judgment motions, as long as it is no less than 30 days after the filing of the note of issue. If the court does not set a date, the deadline is 120 days from note of issue, "except with leave of court on good cause shown." It seems clear that the statutory language refers to good cause for the delay. In order to avoid trying meritless cases, however, trial courts often have been forgiving of late filing when the plaintiff is not prejudiced by the delay, interpreting "good cause" to apply to the merits of the motion, as well. No more.

Chief Judge Judith S. Kaye's majority opinion held that CPRL 3212(a) "good cause" means a good cause for the failure to meet the deadline. Counsel must give "a satisfactory explanation for the untimliness."

The Court recognized that its ruling may result in meritorious motions being denied and trials when there is "nothing to try." That will be the result here when *Brill* is remanded. The plaintiff tripped on a sidewalk and sued New York City. The City waited almost a year after note of issue had been filed to make a motion for summary judgment on the basis that it had no notice of the defect, a prerequisite to municipal liability under the "pothole law." The City offered no explanation for its tardiness. The trial court nonetheless granted the motion, and the Appellate Division, Second Department, affirmed. Due to the Court of Appeals' reversal, the fatal lack of notice will have to be raised in a motion to dismiss at the end of plaintiff's case or for directed verdict at the close of the evidence, unless the parties settle.

The Court of Appeals expressed its hope that strict application of CPLR 3212(a) will reduce the instances in which counsel miss the deadline for seeking summary judgment without a good reason.

Judge George Bundy Smith dissented. He would have interpreted "good cause" to apply to the motion itself, as well as to the excuse for late filing. It decried the waste of time of litigants, jurors, judges and court personnel that may flow from the majority's ruling. Judge Smith recommended the imposition of costs and sanctions or preclusion of affirmative defenses as better means of addressing lawyers' failure to make summary judgment within the time prescribed.

Grand Jury Dismissal of Charges

The issue in *People v. Aarons*, as simply stated by Judge George Bundy Smith for the majority, was whether a formal vote of 12 grand jurors is necessary to dismiss a criminal charge. While the majority answered the question "yes," it was hardly an easy question, as evidenced by the lengthy dissenting opinion by Judge Carmen Beauchamp Ciparick, joined in by Chief Judge Judith S. Kaye, as well as the 3-2 Order in the Appellate Division that the Court affirmed.

Although all of the opinions that examined the issue placed emphasis upon the evolution of CPL 190, *et seq*., the decision turned upon whether, where the prosecutor had been informally advised that the grand jury could not "come to a decision either way" whether to indict, it was permissible for the prosecutor, without leave of court, to ask the grand jury to suspend its deliberations, and later reconvene the grand jury and present the testimony of another witness that quickly resulted in the indictment of the defendant. Was the prosecution entitled to what Aarons urged was "two bites at the apple," or was its procedure legitimate where the grand jury had never voted for dismissal of the charges or formally conveyed its decision not to indict.

The potential charges against Aarons were, *inter alia*, burglary, attempted robbery and criminal possession of a weapon. The charges arose out of his alleged gaining access to a home and seeking to commit an armed robbery. Two teenage children who were in the home were required at gunpoint to lead Aarons to where it was believed the mother of the children, who was not at home, kept money. The robbery was aborted and later the two children picked Aarons out of a police lineup as the perpetrator. The grand jury heard testimony from the police about the children's line-up identification, the testimony of the mother and, at the grand jury's specific request, the testimony of the mother's boyfriend, neither of whom knew Aarons. Aarons also testified, offering an alibi.

After explaining the law to the grand jury concerning the charges, the prosecutor asked the jurors to commence deliberations. What followed soon thereafter was an informal communication by the foreperson of the grand jury's impasse, a request by the prosecutor that the grand jury suspend deliberations, and soon thereafter the testimony of a new witness placing Aarons in the vicinity at the time of the alleged crime, presumably undermining Aarons' alibi. Indictment quickly followed.

Aarons' argument for dismissal was simple: the initial failure of the grand jury to garner 12 votes for an indictment constituted a dismissal, and therefore the proceedings should not have been reopened without leave of court. The motion judge agreed, the Appellate Division, First Department, reversed, and the Court of Appeals affirmed the Appellate Division.

The majority in sustaining the indictment concluded that that language in CPL 190, *et seq*., buttressed by prior statutory direction on the issue, dictated that dismissal by the grand jury of an indictment could not be inferred and that only a formal communication to the Court that the charges in the indictment should be dismissed would suffice. Accordingly, the informal conversation with the prosecutor communicating that the grand jury was having difficulty reaching a decision did not result in a dismissal; formal concurrence of 12 jurors was required.

The Court also declined to find that the prosecution had engaged in forum shopping because the testimony of the additional witness was presented to the same grand jury that had been unable earlier to decide whether to indict.

The dissent was largely based upon the language of CPL 190.25[1], which does not explicitly require "affirmative official action or decision" by the grand jury in order to effectuate a dismissal. In the dissent's view, absent a request by the grand jury for additional evidence, giving the prosecutor the opportunity, without leave, to provide such evidence was not proper.