Equitable Distribution Should be Equitable -- Which is Not Always Equal

By: Sheryl J. Seiden, Esq.¹

As matrimonial practitioners, we have the responsibility of assisting parties in a divorce in equitably distributing their marital assets. Clients often assume that their marital assets should be equally divided. That is not always the case. The exercise of equitable distribution dictates that the parties’ marital assets be equitably, not equally divided.

In a case where one party has significant separate property, should the marital estate, which is worth significantly less than the spouse’s separate property, be equally divided between the parties? Where the marital estate increased in value during the parties’ ten year separation due to one party’s active efforts, should the marital assets be equally divided? When one party dissipates marital assets, significantly reducing the size of the marital estate, should the balance of the marital assets be equally divided? What if the parties were married for a relatively short duration and during that short duration, the monied spouse receives executive compensation which sky-rockets in value because of market appreciation, should the non-monied spouse be entitled to fifty-percent of this asset? There are many circumstances where the facts of a case may dictate that equitable distribution does not mean equal.

N.J.S.A. 2A:34-23(h) provides that a Court may “effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.” In determining equitable distribution, the Court must first identify the assets to be equitably distributed. Then the

¹ Sheryl Seiden is a partner at Ceconi & Cheifetz, LLC located in Summit, New Jersey.
Court must next determine the value of the assets at issue. Finally, the Court must determine an equitable distribution of the assets.

In determining the equitable distribution of the assets, the Court must decide how allocation of the parties’ eligible assets can most equitably be achieved. In determining what is equitable, N.J.S.A. § 2A:34-23.1 includes financial as well as non-financial factors. Rothman v. Rothman, 65 N.J. 219, 232 (1974) (wherein Court stated that equitable distribution “gives recognition to the essential supportive role played by the [spouse] in the home, acknowledging that as homemaker, [spouse and parent] should clearly be entitled to a share of family assets accumulated during the marriage.).

In Rothman, in specifically rejecting a party’s demand that equitable distribution mandates an equal distribution of the marital property, the Supreme Court of New Jersey has stated:

The suggestion has been offered that in undertaking to effect equitable distribution of marital assets, the trial courts should, to establish a starting point, presumptively assign some proportion generally mentioned as 50%, of all eligible assets to each. We disapprove of this proposal. No basis for it is to be found in the statute itself, [sic] it would import concepts into our law now held chiefly, if not solely, in these states where community property law principles have gained acceptance, and we foresee that it might readily lead to unjust results. Rejecting any simple formula, we rather believe that each case should be examined as an individual and particular entity. Id. at 233.

In determining how to equitably distribute assets, equity can only be achieved through the recognition of marriage as “a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the [equitable distribution] statute.” Rothman, 65 N.J. at 229.
In Rothman v. Rothman, the Supreme Court of New Jersey provided further support for the concept that equitable distribution should be equitable where it expressly stated its long-held dissatisfaction with the presumption that equitable distribution of marital assets is 50/50 because it is apparent to the Court how that “might readily lead to unjust results.” Rothman v. Rothman, 65 N.J. 219, 232 (1974) Fairness, not equality, is considered the prevailing guideline when determining the equitable distribution of marital assets. Accordingly, the statute and case law of this state direct the courts to examine the particular factual circumstances of the marital relationship to determine what constitutes an equitable distribution of that asset.

In Painter v. Painter, the New Jersey Supreme Court established that equitable distribution does not mean equal distribution. In Painter, 65 N.J. 196 (1974), in upholding the constitutionality of the equitable distribution statute, the New Jersey Supreme Court stated that equitable distribution “requires that the matrimonial judges apportion marital assets in such a manner as will be just to the parties concerned, under all of the circumstances of the particular case.” Id. at 209.

In determining what is equitable, the Court must consider the sixteen (16) factors enumerated in N.J.S.A. § 2A:34-23.1 as follows:

(1) The duration of the marriage or civil union;

(2) The age and physical and emotional health of the parties;

(3) The income or property brought to the marriage or civil union by each party;

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

(5) Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;
(6) The economic circumstances of each party at the time the division of property becomes effective;

(7) 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;

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

(9) 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;

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

(11) The present value of the property;

(12) 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;

(13) The debts and liabilities of the parties;

(14) 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;

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

(16) Any other factors which the court may deem relevant.
Separate Property of One Spouse Can Be Grounds For An Unequal Distribution of Marital Assets

One of the statutory factors to be considered in dividing the marital estate is the economic circumstances of each party after the division of the assets. If one party will keep significant separate property while the other party has substantially less, then it would not be equitable to equally divide the marital estate.

In *Rucker v. Rucker*, 2002 N.J. Super Unpub. Lexis 4 (App. Div. April 17, 2002) (unpublished decision), the Appellate Division reversed the equitable distribution award which equally distributed the parties’ marital assets where one party had inherited significant separate property. The Appellate Division held that the trial court failed to “accord property weight to the large inheritance the Plaintiff had received (or would be receiving), in balancing the equities in the case.” *Id.* at p. 3. The Appellate Division further stated that “while defendant’s inheritance was properly excluded from the marital estate subject to equitable distribution, it is clear that his overall financial picture, including his inheritance, must be taken into account in determining child support and in fairly distributing all of the marital assets.” *Id.* at p 6.

The Appellate Division also examined the extent of separate property in unequally dividing the marital estate in the case of *Van Horn v. Van Horn*, 2008 N.J. Super. Unpub. Lexis 797 (App. Div. July 14, 2008) where it upheld the trial court’s decision to award one party 100% of the marital estate where the other party inherited significant separate property. In *Van Horn*, one-half of marital
estate would have been .011% of the total amount that the Wife had inherited.

The Court concluded that

the equitable distribution statute permits the court to consider the economic circumstances of each party at the time the division of the assets becomes effective. The court finds that, given the facts of this particular case, equity compels that all the marital assets be awarded to ... husband. By making this award the court is not saying that the wife did not make a substantial contribution to the marital partnership. Her contributions to the marital partnership is equivalent to that which the husband contributed. The equitable distribution award is being made strictly in light of the fact that the marital assets are so small in value in comparison to those assets which the wife now possess due to her inheritance. The wife's new-found wealth vastly exceeds that which she is seeking by way of distributions. Given the magnitude of her inheritance, she does not need to get a share of the marital assets. As for the husband, getting the marital assets, especially the marital home (the most valuable marital asset), will contribute toward his ability to maintain the marital standard of living. Therefore, all of the marital assets shall be awarded to the husband. Id. at 5.

Accordingly, there are circumstances where the separate property of one party will justify an unequal division of the marital assets in order to provide for an equitable division of the parties' assets.

**Parties’ Long Term Separation Can Be Grounds For Unequal Distribution of Marital Assets.**

Although the Court in Painter, 65 N.J. 196 (1974), adopted a general rule that the date of complaint defines the termination date for purposes of determining which assets are subject to equitable distribution, the Court recognized that in certain cases, that might not be the case. The Court stated: “[w]e have sought only to implement the legislative intent, as we discern it by setting forth what we believe should be the general governing rules. Individual problems must be solved, as they arise, within the context of particular cases.”
The Supreme Court has acknowledged that there are deviations from this bright line rule established in Painter. In Smith v. Smith, 72 N.J. 350 (1977), the parties had entered into a written separation agreement, accompanied by a separation in fact. For purposes of determining and valuing assets eligible for equitable distribution, the Court utilized the date of the agreement in lieu of the date the Complaint for Divorce had been filed. In reaching this conclusion, the Court in Smith recited the rationale for the Painter bright line rule – “an attempt to avoid promulgating an unworkable rule.” Smith, at 361. The Court found that: “[t]he execution and delivery of such an agreement, or its inclusion in a judgment, would appear to be incontrovertible evidence that the marital enterprise is no longer viable.” (emphasis added) Id. In other words, despite the bright line rule promulgated by the Painter court, the Supreme Court found that, where incontrovertible evidence that a marital enterprise is no longer viable can be presented, deviation is permissible.

The holding in Smith was later extended by the Supreme Court in DiGiacomo v. DiGiacomo, 80 N.J. 155 (1979), in which the Court held that property acquired subsequent to an oral agreement between the parties for support and distribution of property, accompanied by a physical separation, was not eligible for equitable distribution. In footnote 1, the Court noted that the exception in Smith to the bright line rule “has been described as a 'logical modification of the Painter holding.'”

In Brandenburg v. Brandenburg, 83 N.J. 198 (1980), the Brandenburgs had separated in 1966; Mr. Brandenburg was paying support to Mrs. Brandenburg on a voluntary basis. In February 1976, some ten years after separation, Mr. Brandenburg
filed for divorce. Mr. Brandenburg argued that the terminal date for equitable
distribution should be the separation date in 1966, and that all property acquired after
that date was not subject to distribution. In its analysis, the Supreme Court considered
the facts of and its holdings in Painter, Smith, and DiGiacomo. After such
consideration, the Court stated that, “these cases following Painter recognize that there
can be reliable indicia of an end of the marital partnership other than the filing of a
complaint for divorce.” Although the Court denied Mr. Brandenburg’s request for
deviation from the bright line rule on the facts before it, the Court had acknowledged,
again, that if there is “reliable indicia of an end to the marital partnership,” deviation may
be appropriate. The Court in Brandenburg considered the parties lengthy separation in
awarding the Wife less than fifty percent of the marital estate.

Court affirmed the bright line rule, but it acknowledged that

assets acquired after that enterprise or partnership no longer
exists should not be so included [in the marital estate for purposes
of equitable distribution].

Accordingly, in certain situations following Painter, we relied on dates
other than the filing of the complaint, in which the irretrievable breakdown
could be readily pinpointed. (emphasis added) Id.

In applying the various Supreme Court decisions on the issue of the terminal
date, supra, the Appellate Division has held that,

[T]he central bright line rule is that the marriage is deemed ended
upon the filing of a valid divorce complaint that culminates in
divorce. Deviation from that rule has been permitted where there
is “incontrovertible evidence’ establishing some other date.”
Although the filing of a valid divorce complaint has been determined to be the terminal date for inclusion or exclusion of assets subject to equitable distribution, the analysis does not end there. As set forth above, the Supreme Court in Brandenburg v. Brandenburg, 83 N.J. 198 (1980), denied Mr. Brandenburg’s request to utilize the date of separation as the terminal date for determining which assets were eligible for distribution. However, the Court noted that this determination only related to the first prong of the Rothman “three-step proceeding.” The Court continued:

Our rejection of the parties’ separation as the termination date on eligibility does not mean the trial court must ignore the separation once it reaches the third step. The purpose of equitable distribution – the recognition of the ‘contribution of each spouse to the acquisition of the marital property, including contribution of a spouse as homemaker’, Painter, 65 N.J. at 212 – requires an assessment of the spouses’ contributions in each individual case. Rothman, 65 N.J., at 232, n. 6. In undertaking the third step, the trial court should consider the effect of separation on the respective contributions of the parties to the further acquisition of marital property. Brandenburg, at 210.

In other words, even if a trial court was to reject the request for deviation from the Painter bright-line rule regarding inclusion/exclusion of assets for purposes of equitable distribution, the Court could nevertheless make a disparate distribution of an asset based upon equitable considerations.

Conclusion

While the general norm continues to be that marital assets will be equally divided between the parties, there are many circumstances which may justify that marital assets should not be equally divided between the parties. Each case needs to be reviewed in light of the statutory factors in order to achieve an equitable distribution of the parties’ marital estate.