
# In Case You Were Wondering: When the Unforeseen Happens

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The entry of a final judgment of divorce is intended to bring finality to all issues between divorcing spouses including child support, spousal support, and division of marital property. Whether based on a court decision following a trial or pursuant to a settlement agreement negotiated between the parties, the judgment sets forth the rights and responsibilities of the parties going forward.

But what happens when things go wrong? The economic recession of the past few years has significantly impacted many small business owners, home owners, and wage earners at all levels of industry. Many settlement agreements and court decisions which seemed equitable at the time of divorce turned out to be inequitable as a result of the recession.

The following cases are a few examples of a judgment gone wrong and the relief, if any, available to the "wronged" party.

***Rose v Rose*** (Michigan Court of Appeals, No. 28658, June 22, 2010)

Rebecca and Wesley Rose reached a settlement on all issues and entered a consent judgment of divorce in 2006. As part of the agreement, Mr. Rose was granted sole ownership of Die Tron, Inc., valued at approximately $6,000,000. In exchange, he agreed to pay Ms. Rose nonmodifiable spousal support of $230,000 a year until the death of either party. Following the divorce, Mr. Rose turned the day to day operations of Die Tron over to his son. The company suffered a significant decline due to the son's financial malfeasance and after unsuccessful attempts to salvage the company, Die Tron ceased operations in March 2008. Ms. Cook filed a motion to enforce the spousal support provision of the judgment and Mr. Cook entered a counter motion requesting a reduction in his monthly support obligation.

The circuit court held an evidentiary hearing and granted Mr. Rose's motion, reducing monthly support to $900. Ms. Rose appealed.

The Court of Appeals reversed the trial court holding as follows:

> *"The events giving rise to Die Tron's failure qualify as tragic, but hardly extraordinary. As a seasoned business owner, defendant undoubtedly knew that an economic downturn, or financial mismanagement, could endanger the solvency of the company. He nevertheless agreed that plaintiff could receive nonmodifiable spousal support. We feel hard pressed to conclude that a business failure amounts to a circumstance so unexpected and unusual that it may constitute a ground for setting aside a final, binding and nonmodifiable spousal support opinion."*

***Mistretta v Mistretta*** (31 So. 3d 206 – Fla: Dist Court of Appeal, 1st District, 2010)

Barbara and Roberta Mistretta were divorced on August 25, 2008. Mr. Mistretta was awarded sole ownership of Jerry's Cajun Café and Market, Inc. with a value of $845,000 as of October 31, 2007 and with an equalization payment to be made to Ms. Mistretta. In March 2009, Mr. Mistretta filed a motion for rehearing on the basis that the economic downturn was "newly discovered evidence" warranting a new trial and revaluation of the business. The trial court granted Mr. Mistretta's motion finding that the severe economic downturn was unforeseen and could not have been anticipated at the time the judgment was entered. Further, the trial court held that it should order a rehearing because to do otherwise could be inequitable.

Ms. Mistretta appealed the decision. The Court of Appeals reversed, finding as follows:

> *"Allegedly newly discovered evidence cannot simply show some change in circumstances since the trial."*
>
> *Further, "projections of future revenues and cash flows are, of course, pertinent, in assessing the value of a business. But projections of future revenues, expenses and income necessarily depend not only on known or knowable facts already in existence, but also on assumptions about the future that will not always, if ever, be entirely accurate…Economic recessions, like other vagaries in the business cycle, are contingencies appraisers must take into account in valuing a business...That the future in fact unfolds differently than business appraisers assume cannot be a basis for a new trial on the value of a business if trials on such issues are ever to yield reliably final adjudications."*

There was a dissenting opinion in this case. In his dissent, Judge Kahn wrote that the "downturn could have been determined only after the fact…and the recession is of historic proportions." In addition, he noted that the appeal revolved around a small family-owned business and that he agreed with the trial court that the original judgment was rendered inequitable.

***Trimble v Trimble*** (VA: Court of Appeals No, 2394-09-4, April 27, 2010)

As part of their July 2006 property settlement agreement, Paula and Stephen Trimble agreed that Paula would retain the marital residence and assume the obligation for any outstanding debt on the home. Ms. Trimble agreed to buy out Mr. Trimble's equity in the home for $148,495 based on the appraised value of $645,000. Further, if the payment was not made by June 1, 2009, the house was to be immediately listed for sale and the proceeds divided under the following terms of the agreement:

> *"Upon sale, the net proceeds, which shall be defined as the sale price, minus the outstanding balance on the existing mortgage, and minus the costs of sale, shall be divided as follows: [Husband] shall receive $148,495 minus one-half the costs of the refinancing or of closing costs related to the sale of the house if the house is sold…"*

In February 2009, Ms. Trimble filed a petition with the trial court to issue a declaratory judgment that the property settlement agreement did not require her to pay Mr. Trimble more than the net proceeds of the sale because the value of the house had declined and an eventual sale would possibly yield less than Stephen's agreed upon equity. The trial court held that Ms. Trimble would not be responsible for any shortfall if the proceeds were insufficient to pay her obligation to pay Mr. Trimble in full.

Mr. Trimble appealed and the Court of Appeals reversed the trial court decision. The Court of Appeals reasoned that Mr. Trimble had an unambiguous right to receive $148,495 as a sum certain and that Ms. Trimble bore the risk of a decline in value just as she would have solely benefited from any increase in value due to market forces.

***Pumper v Pumper*** (2010 Ohio 4131 – Ohio: Court of Appeals, 8th Appellate Dist. 2010)

Steven and Darlene Pumper resolved all issues relating to property, support, and fees and entered a Judgment incorporating their Separation Agreement in July 2008. The following year, Mr. Pumper was named in a corruption probe and was forced to resign from D-A-S, the parties' main asset. Mr. Pumper filed for relief from the judgment on the basis that it would be inequitable to hold him responsible for the property payments and support pursuant to the separation agreement and judgment. He argued that the economic downturn in late 2008 combined with his potential prison sentence rendered it impossible for him to earn an income and negatively impacted the value of D-A-S such that its value was significantly less than at the time the settlement was negotiated.

The trial court denied Mr. Pumper's appeal because "a change in a person's financial situation is always taken into account when negotiating the terms of the property settlement agreement.

Mr. Pumper appealed and the Court of Appeals affirmed the trial court decision ruling, in part, that "in negotiating his settlement, [Mr. Pumper] should have taken into consideration the financial ramifications his criminal conduct would bring in the immediate future." Further, the Court found that "as a businessman in the construction business, [Mr. Pumper] either had contemplated or should have contemplated the day-to-day volatility in the world financial markets and the possibility that such fluctuations could hinder future business ventures while he was negotiating support and property division."

***Cook v Cook*** (Michigan Court of Appeals, No. 289805, July 6, 2010)

Pursuant to a negotiated property settlement agreement dated March 9, 2006, Ronald Cook agreed to pay Paula Cook a total of $2,300,000, with $1,750,000 to be paid in ten annual installments beginning one year following the date of divorce. Ms. Cook's interest was secured by a $1,750,000 life insurance policy and a 40 acre tract of property with an estimated value of $1,500,000. Mr. Cook paid $175,000 in 2007 and $44,000 in early 2008. In September 2008, following the significant decline in value of his real estate development and home building business, Mr. Cook filed a motion requesting relief from the property settlement agreement. Ms. Cook also filed a motion requesting the court to appoint a receiver to effectuate the terms of the settlement agreement.

The trial court declined to appoint a receiver but instead, ordered that the 40 acre parcel of property be transferred to Ms. Cook, leaving a balance due of $29,000 based on the estimated value of $1,500,000. Mr. Cook appealed arguing that the trial court erred by transferring the property in lieu of the cash payments. Ms. Cook also appealed on the grounds that the court did not determine the fair market value of the property at the time it was transferred in satisfaction of Mr. Cook's obligation.

The Court of Appeals denied Mr. Cook's appeal by enforcing the security provision under the unambiguous language of the judgment. The Court granted Ms. Cook's appeal, remanding the case for determination of the current fair market value of the property.

***McNeil v McNeil*** (Superior Court of New Jersey, Appellate Division, November 10, 2010)

As part of Andrew and Janet McNeil's March 2008 property settlement agreement, Mr. McNeil agreed to purchase Ms. McNeil's interest in the marital home based on an assumed value of $400,000 and to refinance the home within 90 days. When Mr. McNeil failed to refinance the home and pay Ms. McNeil by December 2008, the trial court entered an order which required Mr. McNeil to make the $150,000 payment within 45 days or the house would be put up for sale and Ms. McNeil would receive her $150,000 from the proceeds.

Mr. McNeil appealed on the basis that the value of the property had declined to under $300,000 and that the decline in value subsequent to the divorce should be shared equally by the parties. The Court of Appeals denied Mr. McNeil's appeal ruling that "by agreeing to pay plaintiff a fixed sum of $150,000, defendant would reap the benefit of any increase in the value of the real estate from the date of the judgment to the date of sale. But, as here, the converse is true as well; defendant alone bore the risk that the property would decrease in value."

## Conclusion – Food for Thought

Certainly the parties in the above cases did not foresee the impending recession and the impact it would have on their property settlements. While it is impossible to accurately predict all future events and to provide for all contingencies, perhaps consideration should be given to the possibility that the intent of the parties will be undermined by unforeseen occurrences.

For example, if a property is to be sold at some time in the future, do the parties intend that they should share in any post-divorce increase or decrease in value? Or, is one party willing to risk a potential decrease in value in exchange for the opportunity to retain any increase in value?

If the owner of a small business is obligated to make equalization payments over an extended period of years, how confident is he or she that the business can sustain a level of earnings sufficient to allow him or her to make the payments? Or, should there be a contingency clause providing for an adjustment, either up or down, based on subsequent events?

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