Is a 'Restrained Lifestyle' a Valid Basis for an Equitable Distribution Award?

By Elliot Wiener

In *Cotton v. Roedlebronn*,[1] the trial court accepted findings of the Special Referee that valued two sets of the husband's business interests. The wife was awarded 10% of the marital portion of the first set of business assets because "the value of these businesses was primarily derived from efforts made by the [husband] and his partner prior to the marriage, and [the wife] made little, if any, contribution to the growth of these businesses. To the contrary," she at times "acted as a hinderance to the growth of these businesses."

The wife was awarded 40% of the marital portion of the second set of businesses which presented a totally different set of facts. These businesses were "formed during the marriage using mostly marital funds." She awarded 40% of these assets because, by virtue of this couple's "restrained lifestyle," they were not required to use the value of these businesses to pay their bills. The referee found that the wife "shared in the parties' restrained lifestyle that allowed these particular investments to grow. Under the circumstances, this was a provident exercise of discretion (*see Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 420 [2009]; *Arvantides [v. Arvantides,* 64 N.Y.2d 1033] at 1034 [1985]."

The cases the court cites say that an equitable distribution award must be "fair and equitable under the circumstances," they do not refer to the parties' "lifestyle," restrained or otherwise. The *Cotton* court's failure to cite any other "restrained lifestyle" cases implies that this factor is unrecognized in the cases. But the "wasteful dissipation of assets"—a statutory factor at Domestic Relations Law § 236(B)(5)(d)(12)—is entirely focused on the manner in which parties use their assets. If we think of wasteful dissipation as a unilaterally unrestrained lifestyle, a remedy based on the parties' "restrained lifestyle" is justifiable, at least by analogy.

What remedies do courts employ that are responsive to the manner in which parties use their assets? The typical remedy for wasteful dissipation is a credit to the marital estate of the dollar amount that was wasted which is then divided "equitably." But that's because the waste is often restricted to one asset, e.g., cash, is quantifiable, and readily and directly remediable. In *Cotton*, the wife was able to show that the "restrained lifestyle" "allowed these particular investments to grow." As with wasteful dissipation, it makes sense to apply the remedy to the particular asset affected by the parties' conduct. But if a "restrained lifestyle" results in a larger pool of marital assets, not merely a larger value to a particular asset, it may be impractical or arbitrary to fashion a remedy that affects only one asset or a set of assets.

Regardless of the extent of the assets affected by a "restrained lifestyle," its presence or absence is manifest in the value of the asset(s) to be distributed. The more "restrained" the lifestyle, the larger the pool of marital funds. The parties are rewarded for their thrift by having a bigger pie to divide. Adjusting the distribution ratio on the basis of the parties' restraint accounts twice for the same conduct.

Beyond this, the negative implications for this factor are ominous because adjusting the distributive ratio is a zero sum; the greater the award to one spouse, the lesser the award to the other. If the parties' lifestyle was not "restrained," *Cotton* suggests that the non-market-active spouse would be entitled to a lesser, and the market-active spouse a greater, percentage of the marital assets. This would be true irrespective of whether the lack of restraint was compelled (e.g., private special education for a child) or chosen (e.g., the acquisition of non-durable luxury goods and services), mutual or unilateral. By *Cotton's* logic, if a family did not live a "restrained lifestyle," the ratio associated with "restrained" spending would not apply. In effect, the non-market-active spouse is punished for circumstances that were uncontrollable or were the result of choices the parties made together.[2] Importantly, the *Cotton* court did not examine the reason for the "restrained lifestyle," only the fact that the estate was larger due to restrained spending.

This mode of analysis invites us to go down the road that *Mahoney-Buntzman*[3] tells us we should not travel. "[D]uring the life of any marriage, many payments are made, whether of debts old or new, or simply current expenses. If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred. As a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets."[4] The same logic should apply where restrained spending

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resulted in the enlargement of marital assets. *Cotton*'s negative implication provides a legal basis for parties to argue, and therefore to develop a record, of the extent of each party's marital spending and its purpose. Moreover, the review of spending is not limited to wastefulness; under *Cotton,* it goes to the entirety of the level of "restraint" of marital spending.

The idea of adjusting the ratio of marital assets based on a "restrained lifestyle" applies as readily to personal assets as it does to the business assets involved in *Cotton*. Imagine two couples, both of whom used the funds from a HELOC to fund their lifestyle. Assume all other relevant facts about the couples are the same. In each family, there was a market-active spouse who earned the money that funded the lifestyle and there was a non-market-active spouse who cared for the home and family. Assume further that upon divorce the value of their homes, net of the HELOCs, was equal. Suppose one couple consumed their HELOC funds to pay for necessary services for their family, e.g., special education for a child. Suppose the other couple consumed their HELOC funds by purchasing non-durable luxury goods and services. Should the non-market-active spouses in these families walk away from the marriage with different percentage of the assets? The only distinction between them is the discretionary nature of their spending. Do we want to apply these kinds of moral judgments to equitable distribution awards? Does the answer change if the bulk of the spending in the second family was attributable to the market-active spouse? What if the market-active spouse claimed that the keep-up-with-the-Joneses level of spending was less a choice than a necessity to maintain a lifestyle that attracted clients or customers for a business? If the second couple's spending level was agreed upon, expressly or tacitly, is it fair to punish the non-market-active spouse with a lesser percentage of the marital estate? All of these questions arise when we introduce "restrained lifestyle" as a factor to be considered in the calculus of equitable distribution. If we look in our rearview mirror, we can see the *Mahoney-Buntzman* stop sign fading into the distance.

Endnotes

1. 170 A.D.3d 595 (1st Dep't 2019).
2. The husband in *Mahoney-Buntzman,* 12 N.Y.3d 415 (2009), did not have control over his obligation to pay maintenance to his first wife; that was the consequence of their divorce. The Court sidestepped the virtually bottomless, nasty rabbit-hole that would have ensued had it explored the issue of which spouse wanted the husband to get divorce.
3. *Mahoney-Buntzman v. Buntzman*, *id.*
4. *Id.* at 420.