

Lengthy Separation Of Married Partners Can Impact Alimony And Division Of Assets In Divorce

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What rights and obligations do spouses have to one another upon divorce after the parties have lived separate and apart, though still married, for a significant period of time before seeking a divorce? The New Jersey Appellate Division grappled with these questions in a recent unpublished opinion.

In *Karen M. Milcarsky v. Mark V. Milcarsky* (A-2998-16T2), the Appellate Division held that a spouse is entitled to alimony and equitable distribution under circumstances where the parties were living separate and apart from one another for 11 years (of a 20-year marriage) prior to the filing of the Complaint for Divorce. The court found the lengthy separation of the parties did not eliminate claims for alimony and equitable distribution of assets; however, ultimately the separation impacted the amount of alimony and equitable distribution awarded.

The parties in this matter were married in 1995. The defendant husband was the primary wage earner during the marriage, and the plaintiff wife was a stay-at-home homemaker who cared for her children from a prior marriage (the parties did not have children born of the marriage at issue). The parties lived together in a jointly owned marital home as a family. In 2002 plaintiff was diagnosed with serious and chronic medical conditions.

The parties separated in 2004, nine years following the date of their marriage. However, the plaintiff wife did not file a Complaint for Divorce until November 2015, approximately 11 years following the parties' separation.

The two issues at trial were (a) the equitable distribution of defendant's 401(k) account, and (b) the plaintiff's claim for alimony. At trial, defendant argued that the marriage was, for all intents and purposes, "dead" when the parties separated in June 2004, and therefore property acquired after the

legal separation should not be subject to equitable distribution.

The trial court, relying on *Brandenburg V. Brandenburg*, 83 N.J. 198 (1980), determined that the mere separation of the parties does not equal a clear termination of the marriage. Absent a written separation agreement, or the complete division of marital assets pursuant to an oral agreement, the fact that the parties live separate and apart does not terminate the marital relationship. In affirming the trial court's decision, the Appellate Division found that the correct termination date of the marriage was the date of the filing of the Complaint for Divorce in 2015.

The court then performed its analysis regarding equitable distribution of the defendant husband's 401(k) account. The court found that it would be inequitable to divide the account equally between the parties because of the lengthy separation. During the time the parties lived separate and apart, the court found that plaintiff wife had not contributed to the accumulation of the value of the account by either economic or non-economic means. The plaintiff only contributed to the acquisition of the marital portion of the account for the period of time that the parties lived together and participated jointly in the marital enterprise, which the court determined was 43% of the value of the 401(k) account. Accordingly, the trial court found that plaintiff wife was only entitled to one-half the relevant 43% of the 401(k) assets. The Appellate Division affirmed the trial court's analysis.

As to alimony, the court determined that the plaintiff was entitled to receive open durational alimony pursuant to the New Jersey alimony statute because it had been 20 years from the date of the marriage (1995) to the date of the filing of the Complaint for Divorce (2015). In applying the statutory factors of N.J.S.A. 2A:34-23(b), including the income disparity of the parties and plaintiff's disability, the trial court ordered alimony to be paid to the plaintiff in the amount of \$250 per week.

In her cross-appeal, plaintiff wife argued that the alimony amount awarded by the trial court was insufficient to permit her to maintain the marital lifestyle. The trial court found (and the Appellate Division affirmed) that based upon the lengthy separation of the parties, the defendant husband was not obligated to maintain the marital standard of living because it had not been the status quo for either party for a significant length of time.

This Appellate Division decision demonstrates that the mere separation of married partners will not invalidate the rights and obligations of those partners clearly defined by statute. However, the Family Court is a court of equity, and such a lengthy separation (in this case, more than half the length of the marriage itself) can impact an award of alimony and the division of assets on an equitable basis.