

## **FLESCH v. FLESCH**

**Supreme Court of Georgia, S17F1231, 2017 WL 3468517**, August 14, 2017

by: Margaret Gettle Washburn, Sr. Cont. Ed., [margaret@washburnlawoffices.com](mailto:margaret@washburnlawoffices.com)

This very recent case deals with the issues of equitable division of property, finding same to be an allocation to the parties of the assets acquired during the marriage, based on the parties' respective equitable interests; the trial court must classify the disputed property as either marital or non-marital, as only marital property is subject to division. Also, a good lesson learned: Do not purchase property for your paramour, unbeknownst to your spouse, and then testify to the Court that you are "merely a broker."

The Superior Court of DeKalb County, granted a divorce to James Flesch and Debbie Flesch after a bench trial. Thereafter, Husband's application for discretionary appeal was granted. Because the Husband filed his application for discretionary appeal prior to the January 1, 2017 effective date of the Appellate Jurisdiction Reform Act, this Court has jurisdiction over this appeal. See Ga. L. 2016, p. 883, §§ 3–1, 6–1 (c) (shifting subject matter jurisdiction over "[a]ll divorce and alimony cases" from this Court to the Court of Appeals).

Justice Hunstein, for the Court, held that the Wife's Vanguard retirement account was a marital asset subject to equitable division; that the evidence was sufficient to conclude that townhouse purchased by the Husband, unbeknownst to the Wife, was marital property subject to division; and that the award of attorney fees to the Wife was not an abuse of discretion. The trial court was affirmed in part, reversed in part, and the case was remanded.

In his two enumerations, the Husband contended that the trial court erred in classifying Wife's Vanguard account as non-marital property and in classifying a townhome as marital property subject to equitable division. The Supreme Court noted that marital property includes real property, personal property, and assets acquired as a direct result of the labor and investment of the parties during the marriage. There are numerous cases on this issue, notably Payson v Payson and the grandfather of these cases, Thomas v. Thomas: "The equitable division of property is an allocation to the parties of the assets acquired during the marriage, based on the parties' respective equitable interests." Payson v. Payson, 274 Ga. 231, 231–232 (1), 552 S.E.2d 839 (2001). Further, the trial court must classify the disputed property as either marital or non-marital, as only marital property is subject to division. See Thomas v. Thomas, 259 Ga. 73, 75, 377 S.E.2d 666 (1989). Crowder v. Crowder, 281 Ga. 656, 657, 642 S.E.2d 97 (2007).

In the amended final judgment and decree of divorce, the trial court concluded that the Wife's Vanguard retirement account was a non-marital asset, finding that Wife "owned" the account prior to marriage. However, the Wife conceded at trial that she had placed marital assets into the retirement account. If "no marital funds were placed into the account and its value ... rose or fell with the market rather than being the result of any labor or investment made by [Wife] or the parties together during the marriage," then Wife would have maintained the Vanguard account as separate property. See Highsmith v. Highsmith, 289 Ga. 841, 842–843, 716 S.E.2d 146 (2011); see also Hipps v. Hipps, 278 Ga. 49 (1), 597 S.E.2d 359 (2004).

The record showed that the Wife's account predated the marriage, however, the Wife testified that retirement monies that she saved or earned during the marriage had been transferred into her

Vanguard retirement account and that she had placed marital assets into her premarital account, comingling funds. Therefore, the Supreme Court found that the evidence did not support the trial court's finding that the Vanguard account was entirely Wife's separate, pre-marital property. That portion of the ruling was reversible error and, thus, the case is remanded for the trial court to determine what portion of the Vanguard retirement account was marital property, and, following the Thomas rule, to equitably divide that portion of the account.

The Husband's other enumeration of error was that the trial court erred in finding that a townhouse in Doraville, Georgia, was marital property. The Husband's argument was the townhouse was purchased for the benefit of, and held in trust for, an individual named "Vu", who is not a party in the divorce, and tried to claim that there was "an implied purchase money resulting trust". See **OCGA § 53-12-131** (a) ("A purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property."). The Supreme Court disagreed.

The Supreme Court found that the Husband failed to advance the "implied purchase money resulting trust" theory and that he had presented a completely different theory at trial, arguing "Vu" should retain the property as a matter of "equity." As such, the Court agreed with the Wife that Husband presented this new legal argument for the first time on appeal and, accordingly, that the Supreme Court did not need to consider it. See, e.g., Gotel v. Thomas, 277 Ga. 532, 533, 592 S.E.2d 78 (2004). Further, even if the argument had been preserved, Husband was still not entitled to relief as he did not request a finding of fact.

It came to light during trial, that the Husband purchased the townhouse, during the marriage, without the knowledge of Wife, the mortgage was secured in the Husband's name, and the townhouse was originally titled to two people: the Husband and Pheera Phan Pai (Vu's now ex-Wife and Husband's former paramour). Further, Husband and Pai had a "lease to own" agreement. Thereafter, Pai later left the country permanently, and conveyed her interest in the real estate back to the Husband. The Husband tried to persuade the trial court that "he was merely a broker, and the funds to pay for the townhouse and all associated expenses..., were borne exclusively by Vu and Pai". The trial court, however, concluded that the townhouse was marital property and awarded 60% of the equity in the townhouse to Wife.

The Supreme Court held that the trial court was not required to make a finding that the (philandering) Husband held the townhouse in trust for Vu. "In a bench trial, the court sits as the finder of fact and, as such, is charged with the responsibility of determining whether and to what extent a particular item is a marital or non-marital asset and then exercising its discretion and dividing the marital property equitably." Crowder, 281 Ga. at 658, 642 S.E.2d 97. Because resolution of this argument depends upon the factual determinations made by the trial court as fact-finder and neither party asked the trial court to make factual findings, the Supreme Court could not find the trial court's finding that the townhouse was marital property was improper as a matter of law or as a matter of fact. Dasher v. Dasher, 283 Ga. 436, 437 (1), 658 S.E.2d 571 .

The Supreme Court did not find that the trial court committed error in awarding attorney fees to Wife pursuant to **OCGA § 19-6-2**. An award of attorney fees as part of the expenses of divorce litigation is left to "the sound discretion of the [trial] court, except that the court shall consider the financial circumstances of both parties as a part of its determination of the amount of attorney's fees, if any, to be allowed against either party". The Supreme Court found that the trial court was "intimately familiar with

the parties' finances. Further, order awarding attorney fees showed that the trial court considered the financial circumstances of both parties, including the parties' disparate incomes. See **Rieffel v. Rieffel**, 281 Ga. 891 (1), 644 S.E.2d 140 (2007). That the Wife was not awarded periodic alimony did not preclude the fee award. **Scott v. Scott**, 251 Ga. 619, 308 S.E.2d 177 (1983).