

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



LOUDOUN, FAUQUIER AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, Judge
POST OFFICE BOX 727
LEESBURG, VIRGINIA 20178

JAMES H. CHAMBLIN, Judge
POST OFFICE BOX 123
LEESBURG, VIRGINIA 20178

BURKE F. MCCAILL, Judge
POST OFFICE BOX 9
LEESBURG, VIRGINIA 20178

JEFFREY W. PARKER, Judge
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED
W. SHORE ROBERTSON, JUDGE RETIRED
POST OFFICE BOX 727
LEESBURG, VIRGINIA 20178

July 14, 2003

Dana James Carlson, Esquire
Ryan M. Mattson, Esquire
10511 Judicial Drive
Fairfax, Virginia 22030

Richard R. Saunders, Jr., Esquire
P.O. Box 678
Leesburg, Virginia 20178

Re: Tadesse v. Negatu
Chancery No. 22025-01
Circuit Court of Loudoun County

Gentlemen:

In the instant divorce case, the Court is asked to equitably divide the marital estate of the parties. Va. Code Ann. § 20-107.3 (Michie 2003). By decree entered May 10, 2003, the complainant, Ms. Amelework Tadesse obtained a divorce, *a vinculo matrimonii* from her husband, Mr. Frew Negatu. Issues of equitable distribution, support, and attorney's fees were bifurcated based upon a finding of "clear necessity". By agreement of the parties, a sale of the marital home was authorized at a price and upon terms outlined in that decree.

Counsel have represented that the marital home is presently under contract and settlement is imminent.

The parties were married on November 26, 1982 in Boston, Massachusetts. They separated in November, 2001, and have thereafter continued to reside in the marital home. Two children were born of the marriage, Abail Frewhiwot, age 11, and Rachab Frewhiwot, age 5.

Mr. Negatu is 42 years of age and in good health. He has a bachelor of science degree and is employed as a pharmacist with the Jefferson Memorial Hospital. At all times during the marriage he was employed full time. In addition to his financial contributions to the family, he assisted with home maintenance, household chores, and care of the children.

Ms. Amelework Tadesse is 45 years of age and in good health. She has completed high school. At present she is employed full time with Rite-Aid Pharmacy. During most of the marriage, she also was employed full time. Ms. Tadesse was the principal homemaker during the marriage. Upon the evidence presented, it may be fairly concluded that Ms. Tadesse's monetary contributions to the marriage, and to the acquisition of marital property were overshadowed by those of her husband. However, her non-monetary contributions to the marriage exceeded those of her husband. Their contributions to the marital partnership stand in equipoise.

The testimony presented in the instant proceedings primarily centers on two issues. One such issue involves the recent payment of substantial marital funds into a prepaid college tuition program for the children. The other relates to the proper allocation of marital debt between the parties. A decision as to these matters, along with others, is governed by familiar principles.

An equitable division of the marital estate is determined upon the equities, rights, and interests of the parties in marital property and a consideration of certain statutory factors. Va. Code Ann. § 20-107.3 (E) (Michie 2003). Before the Court may fashion an award, it must first identify, classify, and value the marital estate. Brinkley v. Brinkley, 5 Va. App. 132 (1987). Counsel have graciously provided the Court demonstrative exhibits that assist in relating the evidence to the task at hand. The parties are barred from relitigating the title to property considered in these proceedings Va. Code Ann. § 20-107.3 (D) (Michie 2003).

It has been stipulated that the household effects have been divided to the satisfaction of the parties. As previously noted, the marital home has been sold and the parties are awaiting a determination as to equitable distribution.

An agreement has been reached that the marital home has a value of \$470,000.00. After deduction of the amount due on the mortgage, the equity of the parties is \$280,257.00.

Excepting only a determination of the weight to be given the defendant's post separation gift of marital property to the children and the allocation of marital debt, a consideration of the statutory facts would warrant an equal division of the marital estate. They have both made significant monetary and non-monetary contributions to a nineteen-year marriage. Although the contributions may differ in kind, they counterbalance each other in the final calculus. Both parties enjoy good health and are approximately the same age. This is a no fault marriage in which the parties have continued to reside in the home with the children even after their permanent separation.

The parties have divided the household effects by agreement. These items and the values assigned to them are set forth in defendant's exhibit #5. Those items received by the complainant have an aggregate value of \$3,060.00 and those received by the defendant an aggregate value

of \$1,085.00. Defendant received an income tax refund in May, 2003, for the year 2002. The amount of the refund is \$5,649.00 and it is marital. ✓

An American IRA is titled in the name of the defendant and is marital property. It has a value of \$4,524.00. There are three automobiles. A 1999 Honda Accord titled in defendant's name and has a value of \$8,000.00. Complainant has titled in her name a 1993 Honda Civic valued at \$3,000.00. In its determination of the value of these vehicles, the Court has taken into consideration the NADA values and made adjustments consistent with the evidence of mileage and condition. Va. Code Ann. § 8.01-419.1 (Michie 2003). ✓

A truck titled in the name of the defendant is marital property. It is parked in Ethiopia. There is insufficient evidence to determine its condition or value. ✓

Defendant cashed in his 401-K retirement plan with CVS and received, after withholding, \$80,006.18. From the proceeds he paid off a \$14,000.00 loan from his sister that is a marital debt. Of the \$66,006.00 remaining, the marital share is 81% or \$53,465.00. From the cash proceeds from the liquidation of the plan, defendant acquired prepaid education contracts for the children. There were cash proceeds left from the liquidation that are hybrid property, the marital share of which is included in the gross amount of \$53,465.00. The reason for including such sum is set forth below.

Of the amount recovered from defendant's sale of the CVS stock and after payment of the penalty for the liquidation of the 401-K plan, a balance will remain of \$9,158. Of this amount, 75% is marital or \$6,868.00. ✓

Central to a resolution of the equitable allocation of the marital estate are two issues. The first of these involves the use of marital funds derived from the liquidation of the defendant's 401-K plan to purchase a prepaid college tuition contract for the children that is protected by an irrevocable deed of trust. There was no discussion between the parties of such an investment prior to the separation. Without the knowledge or consent of his wife and only after these divorce proceedings had commenced, Mr. Negatu used marital funds to purchase contracts that may benefit his children when they reach college age.

Complainant suggests that either a different valuation date be set for the retirement plan or that the monies used to fund the tuition contracts and trusts be considered waste and recaptured for purposes of making an equitable division of the marital estate. In accordance with controlling principles of law governing the dissipation of marital assets, the Court is challenged to determine whether the gift to the children of such an investment is for a marital purpose. In doing so the Court must consider the nature of the gift and the circumstances under which it was made. Mr. Negatu liquidated his entire interest in his 401-K plan on March 27, 2003. As of that date the plan had a value of \$128,418.46.

From the proceeds of liquidation, the defendant paid \$62,049.55 for a 529 Virginia Prepaid Education Plan for the children. As the plan contracts have been transferred into irrevocable trusts, they are no longer available for consideration as part of the marital estate. Accordingly, the establishment of an alternative valuation date is inappropriate. Instead, the

Court must determine whether the defendant has dissipated the marital estate so that the Court should charge the defendant with such sum in fashioning a monetary award.

The terms waste and dissipation of marital assets have been used when considering the use of marital funds by a spouse for purposes that are unrelated to a marriage that is irrevocably broken. Thus, it has been held,

[w]aste occurs 'where one spouse uses marital property for his own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.' ... '[t]o allow one spouse to squander marital property is to make an equitable award impossible.' Thomas v. Thomas, 40 Va. App. 639, 644, 645 (2003).

There is no clear definition of what is a marital purpose. One legal commentator has observed,

[t]he parties are not required to live austere and spartan lifestyles during separation, and recreation within the general marital standard of living is therefore a marital purpose. Where the expenditures exceed the accustomed marital standard of living, however, they are not for a marital purpose. ... [a] majority of cases find dissipation under this rule (gifts to third parties) when gifts are made to the parties' own children. Dissipation results only when the amount of the gifts exceeds the children's reasonable support needs, for...the living expenses of the children are generally a valid purpose. A respectable minority treats gifts to the children as a marital purpose, at least where the gifts are motivated by traditional love and affection. Brett R. Turner, Equitable Distribution of Property 481, 483 (2d ed. 1994).

Thus, the Court of Appeals has determined the following do not constitute waste or a dissipation of marital assets:

1. Children's tuition [Clements v. Clements, 10 Va. App. 580 (1990); Amburn v. Amburn, 13 Va. App. 661 (1992)].
2. Voluntary support [Alphin v. Alphin, 15 Va. App. 395 (1992)]
3. Personal living expenses [Amburn, 13 Va. App. at 666].
4. Car loans [*Id.* at 666].
5. Attorney's fees [*Id.* at 666].
6. Medical bills of spouse [Alphin v. Alphin, 15 Va. App. 395 (1992)].
7. Mortgages and credit cards [Anderson v. Anderson, 29 Va. App. 673 (1999)].
8. *Pendente lite* support [Thomas, 40 Va. App. at 644].

In each of these cases the Court has found that the expenditure of such funds was for a marital purpose. These expenditures represent those payments that the parties might reasonably have expected to incur during the marriage or in the process of a winding up of the marital partnership. They do not represent a, "...deliberate attempt to affect the monetary award." *Id.* at 644.

Marital funds were transferred to educational contracts for the children protected by irrevocable trusts. Were the contracts to terminate and the funds paid over, the parties would

share equally in the distribution. There has been no showing that the parents discussed such a plan to fund their children's college education. Only after suit had been filed did the defendant, without his wife's knowledge and approval, deliberately put these funds beyond the reach of the parties and so diminish the marital wealth available to equitably divide.

The election to make a long-term investment with marital funds at a time when the marriage was over is not related to the marriage or the winding up of the marital partnership. To the extent that the parties remain equal beneficiaries under the contract does not make the expenditure something more than it already is--the purposeful dissipation of a marital asset. Accordingly, the educational contracts protected by the trusts constitute marital waste chargeable to the defendant.

Additionally, the parties have identified the allocation of post separation credit card debt incurred by the defendant as another issue in controversy. Defendant seeks an equitable division of the debt based upon a consideration of the relevant statutory factors. Va. Code Ann. §§ 20-107.3 (C) (D) (Michie 2003). Having incurred the debt post separation, it is incumbent upon Mr. Negatu to demonstrate by a preponderance of the evidence that the debt was incurred for living expenses or some other purpose. Luczkovich v. Luczkovich, 26 Va. App. 702 (1998). In addition, Ms. Tadesse argues that Mr. Negatu has sought to increase, without historical precedent, his separate estate at the expense of the marital wealth available for equitable division. It is suggested that he has done so through the incursion of post separation credit card debt, albeit for marital purposes, while investing his separate income in such a way as to remove it from the marital estate. Howell v. Howell, 31 Va. App. 332 (2000).

Mr. Negatu has satisfied his burden of showing that, with the exception of those items marked with an "X" and the "First Colony Life Premium" on defendant's exhibits 6A, B, C, and D, the amounts were for a proper purpose or living expenses. The Bank of America VISA, AT&T Universal, and Chase MasterCard were utilized by the parties during the marriage and had outstanding balances at the time of separation. The Discover Card account was opened after the date of separation by the defendant but was used in part to make a payment on the AT&T marital debt. The Court concludes that the outstanding balances on the cards, less the items noted above, should be divided equally among the parties. Although it may not have been the practice of the parties to charge the mortgage and utility payments with the credit card, a review of the exhibits does not demonstrate that the defendant has shifted the responsibility for the payment of marital expenses to the credit card debt in furtherance of a scheme to feather his own nest at the expense of the marital estate. To the contrary, the defendant has demonstrated these to be legitimate post separation expenditure for a proper purpose. ✓

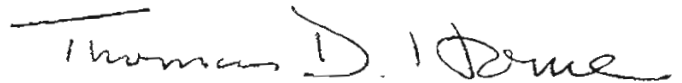
It should be noted that the defendant has made no claim for a credit for the principal payments made on the mortgage after the parties separated within the marital home. Thus, there is no need to consider the application of the "Brandenburg" formula in this case. Hart v. Hart, 27 Va. App. 46 (1998).

The Court has previously observed that this is a case in which the marital estate and marital debt should be equally divided based upon the right title and equities of the parties in the marital estate and a consideration of the statutory factors. Accordingly the Court finds that the

outstanding credit card debt, less those items that the court has found should be deducted, be paid from the proceeds of settlement. Ms. Tadesse shall retain the 1993 Honda and the items of household effects allocated to her. Mr. Negatu shall retain what remains of the cash proceeds of the 401-K, CVS Stock Proceeds, 1999 Honda, truck in Ethiopia, and household items assigned to him. The America Century IRA shall be equally divided between the parties. The Court will award a monetary award to the complainant in the amount of \$34,500.00 payable at the time of settlement on the marital home.

Mr. Carlson shall prepare a Decree consistent with this opinion to which the parties may note their exception. The case will be continued as to the remaining issues consistent with the court's earlier directive.

Very truly yours,

A handwritten signature in black ink that reads "Thomas D. Horne". The signature is written in a cursive style with a horizontal line above the first name.

Thomas D. Horne, Chief Judge