

133 A.D.3d 550
 Supreme Court, Appellate Division,
 First Department, New York.

Elinor R. TATUM, Plaintiff–Respondent,

v.

Curtis R. SIMMONS,
 Defendant–Appellant.
 Grimes & Zimet, et al.,
 NonParty Appellants.

Nov. 24, 2015.

Synopsis

Background: In action for divorce, the Supreme Court, New York County, [Matthew F. Cooper, J.](#), awarded husband equitable distribution of property, awarded parties joint legal custody of their child, and denied husband's request for counsel fees. Husband appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] husband was not entitled to portion of the appreciation in the value of wife's real estate properties, which were her separate property;

[2] court's determination that it was in child's best interest for parents not to have a 50/50 access schedule was supported by the record;

[3] court was not bound to follow recommendation of court-appointed forensic evaluator when determining custody and parenting time schedule; and

[4] court providently exercised its discretion in denying husband's requests for interim awards of counsel's fees and his request for fees made after trial.

Affirmed.

West Headnotes (5)

[1] **Divorce** 🔑 Enhancements and proceeds of separate property

In action for divorce, husband was not entitled to portion of the appreciation in the value of wife's real estate properties, which were her separate property, where husband failed to demonstrate that the property in question increased in value or that he contributed to any alleged appreciation. [McKinney's DRL § 236\(B\)\(1\)\(d\)\(1\)](#).

2 Cases that cite this headnote

[2] **Child Custody** 🔑 Physical custody arrangements

Trial court's determination, in action for divorce, that it was in child's best interest for parents not to have a 50/50 access schedule was supported by the record; temporary 50/50 schedule in place during pendency of action had too many transitions and too much opportunity for conflict.

[3] **Child Custody** 🔑 Reports and recommendations

In action for divorce, trial court was not bound to follow recommendation of court-appointed forensic evaluator when determining custody and parenting time schedule; although court found evaluator's clinical observation about parents to be accurate and convincing, it also found that she was overly optimistic about parents' ability to work together in the future.

3 Cases that cite this headnote

[4] **Divorce** 🔑 Initiating and prevailing party; partial success

Divorce 🔑 Financial condition and resources in general

In action for divorce, trial court providently exercised its discretion in denying husband's requests for interim awards of counsel's fees and his request for fees made after trial, where

difference in parties' incomes was not that great, both parties had significant separate property they could utilize to pay counsel, and husband's positions in litigation were not meritorious. [McKinney's DRL § 237](#).

3 Cases that cite this headnote

[5] Divorce  Evidence in general

Even if wife was monied spouse in action for divorce, presumption that husband should be awarded counsel fees was overcome by husband's significant real estate holdings and lack of merit in his positions at trial. [McKinney's DRL § 237](#).

Attorneys and Law Firms

****209** Catafago Fini LLP, New York ([Jacques Catafago](#) of counsel), for Curtis R. Simmons, appellant.

Grimes & Zimet, Chappaqua ([John J. Grimes](#) of counsel), for Grimes & Zimet and [John J. Grimes](#), appellants.

Aronson Mayefsky & Sloan, LLP, New York ([Alyssa Rower](#) of counsel), for respondent.

[ACOSTA, J.P.](#), [SAXE, RICHTER, GISCHE, KAPNICK, JJ.](#)

Opinion

***550** Judgment of divorce, New York County (Matthew F. Cooper, J.), entered June 12, 2014, which, inter alia, awarded defendant husband \$30,006 in equitable distribution, awarded the parties joint legal custody of their child with separate decision-making zones and a near 50/50 parental access schedule, and denied the husband's request for an award of counsel fees, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered February 7, 2013, May 29, 2013, December 18, 2013, and March 24, 2014, and entered on or about December 13, 2012, which, inter alia, denied the husband's motions for interim awards of counsel fees, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

[1] Supreme Court's distribution of marital property was amply supported by the record and was not an abuse of discretion (see [Domestic Relations Law § 236 \[B\]\[5\]\[d\]](#);

[Holterman v. Holterman](#), 3 N.Y.3d 1, 781 N.Y.S.2d 458, 814 N.E.2d 765 [2004]). The court properly found that the husband was not entitled to a portion of the appreciation in the value of the wife's real estate properties, which were her separate property, because the husband failed to demonstrate that the property in question increased in value or that he contributed to any alleged appreciation (see [Embury v. Embury](#), 49 A.D.3d 802, 804, 854 N.Y.S.2d 502 [2nd Dept.2008]). The husband also never sought to have the wife's pension distributed at trial and never provided any evidence as to its increase in value.

The wife also established that she obtained ownership of the Amsterdam News as part inheritance from her father and part gift from her mother, which makes it her separate property (see [DRL § 236\[B\]\[1\]\[d\]\[1\]](#); see [Feldman v. Feldman](#), 194 A.D.2d 207, 215, 605 N.Y.S.2d 777 [2nd Dept.1993]). In any event, the husband failed to meet his burden to prove its value or to show that he contributed directly or indirectly to the Amsterdam News so as to entitle him to the appreciation in its value (see [Morrow v. Morrow](#), 19 A.D.3d 253, 800 N.Y.S.2d 378 [1st Dept.2005]).

Nor did the husband put forth any proof at trial to support his claims that the wife dissipated marital assets to pay her counsel fees, to maintain her upstate properties, or to make ***551** loans to the Amsterdam News (see [Epstein v. Messner](#), 73 A.D.3d 843, 846, 900 N.Y.S.2d 454 [2nd Dept.2010]).

[2] The court properly awarded the parties' shared legal custody of the child with each party having final authority over separate decision-making zones (see [Eschbach v. Eschbach](#), 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 [1982]). ****210** The court's determination that it was in the child's best interest for the parties not to have a 50/50 access schedule had a sound and substantial basis in the record ([Matter of James Joseph M. v. Rosana R.](#), 32 A.D.3d 725, 726, 821 N.Y.S.2d 168 [1st Dept.2006], *lv. denied* 7 N.Y.3d 717, 827 N.Y.S.2d 688, 860 N.E.2d 990 [2006]). The temporary 50/50 schedule in place during the pendency of the action had too many transitions and too much opportunity for conflict.

[3] Nor was the court bound to follow the recommendation of the court-appointed forensic evaluator (see [Matter of John A. v. Bridget M.](#), 16 A.D.3d 324, 332, 791 N.Y.S.2d 421 [1st Dept.2005], *lv. denied* 5 N.Y.3d 710, 804 N.Y.S.2d 34, 837 N.E.2d 733 [2005]). While the court found the forensic evaluator's clinical observation about the parties to be accurate and convincing, the court also concluded that

she was overly optimistic about the parties' ability to work together in the future. The court's conclusion was based upon consideration of the evidence of hostility and strife between the parties, which the court did not believe would subside after the divorce.

[4] [5] The court providently exercised its discretion in denying the husband's requests for interim awards of counsel's fees, as well as his request for fees made after trial, after considering the financial positions of the parties and the circumstances of the case (see [Domestic Relations Law § 237](#); *Johnson v. Chapin*, 12 N.Y.3d 461, 467, 881 N.Y.S.2d 373, 909 N.E.2d 66 [2009]; see *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881, 518 N.E.2d 1168 [1987]). Specifically, the court found that the difference in the parties' incomes was not that great, that both parties had significant separate property they could utilize to pay counsel, and that

the husband's positions in the litigation were not meritorious. Even if the court had accepted the contention that the wife was the monied spouse and, thus, that there was a rebuttable presumption that the husband should be awarded counsel fees (see *Saunders v. Guberman*, 130 A.D.3d 510, 511 [1st Dept.2015]), the court did not abuse its discretion in finding that such presumption would be overcome by various factors, including the husband's significant real estate holdings and the lack of merit to his positions.

We have considered the husband's and nonparty appellants' remaining claims and find them unavailing.

All Citations

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