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Verdict

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Joanna L. Grossman

The High Price of Badmouthing One's Spouse During Divorce



Without question, Ira and Janice Schacter have had a bitter and costly divorce. Seven years passed between the initial petition for divorce and the decree of dissolution, and over a million dollars have been paid to lawyers. They fought over everything—custody, child support, alimony, property distribution, and attorneys' fees. This was perhaps not surprising, since the divorce court observed that during nineteen years of marriage, “they were never happy.” But this does not make them unique among divorcing couples. Although the trial judge observed that this “acrimonious divorce action presented one of the most contentious litigations this court has ever presided over,” many couples fight over the same things—or would, if they could afford the financial and emotional costs of protracted litigation.

This divorce, however, was in the news. (Thanks to Hofstra Law student Hersh Parekh for bringing it to my attention when we were studying property distribution in family law.) And the publicity itself became the subject of a new legal battle: If the wife pilloried her husband in the press, reducing his ability to attract clients, should her share of the marital property be reduced? In a recent ruling, in *Ira S. v. Janice S.* (<http://newyorklawjournal.com/id=1202650165483?slreturn=20140320174538>), a judge said yes, granting her just seventeen percent of the value of his law firm partnership.

The War of the Schacters

The Schacters were married for nineteen years and had two children, one of whom has profound hearing loss. The divorce began with a bang after a physical altercation between the spouses in 2007 that required police intervention and led to their both being arrested. She got a temporary restraining order barring him from their shared Manhattan townhouse; he filed for divorce. Her allegations of abuse were their first foray into the public eye.

Occasional articles in newspapers and postings on the Internet chronicled other low points of the divorce—for example, she complained that he had spent \$200,000 on an engagement ring for a Playboy bunny (it didn't last) while refusing to pay \$12,000 for his daughter's new hearing aids. The hearing aid story took on a life of its own, leading to Ira's being named a contestant in the sarcastic “Lawyer of the Month” contest on the snarky scandal-watching website, *Above the Law*.

Ira Schacter, a partner at a top New York law firm, argued in court that his wife's very public complaints about

his behavior had reduced his ability to attract and retain clients, which, in turn, reduced his share of the partnership's profits. A key factual issue at trial was whether the publicity harmed his earnings, or whether, given the 2008-2012 time period, the recession was the more important variable. The legal question is whether it should matter if her appeals to the media affected his earnings.

The Cost of Fault

When couples divorce, courts are often saddled with the task of dividing their property. In most states, this process is guided by the principle of "equitable distribution," under which the property a couple has accumulated during marriage (and even the property they brought to the marriage, in some states) will be fairly apportioned between them. Courts are rarely given unfettered discretion in this process, but, instead, are guided by legislatively mandated factors to consider.

New York's equitable distribution law, Domestic Relations Law § 236(b)(5)(d), provides thirteen factors that courts must consider before dividing marital property. Most of the factors relate directly to economic information such as past earnings, the amount of property the parties brought to the marriage, their expected future income and property acquisition, the tax consequences of property distribution, and whether either party wasted assets during the marriage or transferred them to avoid distribution. In addition, courts are directed to consider non-economic factors such as the duration of the marriage, the age and health of the parties, and the need for a custodial parent to keep the marital residence.

How and when does fault or misconduct come into play? In most cases, it doesn't. Under New York case law, non-economic fault can be considered only if it "shocks the conscience." Courts have allowed consideration of egregious fault under the last of the statutory factors: "any other factor which the court shall expressly find to be just and proper." (Some states allow greater consideration of fault than New York does, but most do not allow it to factor in at all.) This has proven a high standard, met in cases involving **attempted murder** (<http://writ.lp.findlaw.com/grossman/20010814.html>), rape of a stepdaughter, and sometimes **domestic violence** (<http://writ.lp.findlaw.com/grossman/20060905.html>), but not in cases of adultery, bearing another man's child (and lying about it), or general cruelty. This refusal to consider marital fault in most cases is in keeping with one of the key principles of no-fault divorce: marriages break down for complex reasons, rarely attributable to a single, identifiable act of misconduct. There's thus no reason to fight over who did what, either for finding grounds for divorce or for allocating a couple's property.

But the type of "fault" at issue in the Schacter divorce is different. Ira claimed that his wife's behavior—characterized by the judge as "incessant postings and discussion about her husband . . . beyond any reasonable discussion"—directly affected the amount of marital property available for distribution. This type of "economic" fault is allowed to play a role in property distribution decisions. It often comes up when one party, in anticipation of divorce, wastes or otherwise dissipates assets. It can also come up when one party has fed an expensive habit throughout the marriage like gambling, to the detriment of the couple's economic security. Ira Schacter's claim is more unusual—that his wife's public criticism of him during the divorce proceeding directly affected his earning capacity and thus the value of the law firm partnership.

Splitting the Property

In a high-money divorce, neither party ends up in bad shape. The Schacters owned three multi-million dollar houses, as well as countless other valuable assets. For almost everything, the judge ordered that the assets be split down the middle: the houses, the jewelry, the mutual fund accounts, and so on. The wife will also get many thousands in alimony over the next several years.

But what about the law firm partnership? This was deemed a marital asset because it was acquired during the marriage through the joint efforts of the spouses: he was able to devote himself to a demanding practice because of her work caring for the children, one of whom had special needs, and tending to the home. (She also became an advocate for people with hearing disabilities and worked, mostly without compensation, in that field.) The court could also have deemed the wife's law degree a marital asset—a peculiarity of New York law when either spouse acquires a professional degree during marriage—but found insufficient proof of its value (by how much

did her earning capacity increase because of the degree?) at trial. The wife practiced law only briefly after being admitted to the bar and had held only one paid job since then for three months.

The judge could have split this asset 50/50 as was done with the other assets. Instead, the partnership, valued at the commencement of the case at \$5 million, was split 83/17 in the husband's favor. In the judge's disparaging account, "in essence, the wife chose to bite the hand that fed her." Although the wife was, in the judge's view, "well within her rights to publicly raise her concerns about domestic violence," her repeated attacks against him have played a part in diminishing his income." Moreover, the judge noted, the leak to the media about the hearing aid dispute was both misleading and unnecessary. It suggested that the daughter was deprived of the hearing aids because of the dispute, but in fact it was only a fight about paying the bill after the fact, which was being considered in court. As the court concluded:

From the evidence presented, the court concludes that the Wife contributed to the decline in value of the Husband's law practice. The court has considered the multitude of newspaper articles and website postings arising from this divorce litigation. The article and a significant number of the postings presented the Husband in a negative light. Although the Wife was not necessarily the source of each of these postings, she was the initial source of the articles, and, throughout these proceedings, regularly posted negative information about the Husband to various web sites. The Wife claims she never intended to harm the Husband's career and that she, herself, never mentioned his law firm by name. The court finds her claim completely lacking in credibility. The Wife is intelligent and very savvy with respect to public relations. She would surely have understood that the reason why her stories had legs was precisely because her Husband was a partner at a major law firm. Even if by some stretch of the imagination she thought otherwise, the very first article printed in the Daily News, in which the Husband's law firm was mentioned by name, should have disabused her of the belief that the Husband's career might not be affected.

It is hard to judge factual findings from a cold record—for this reason, findings of fact are reviewed on appeal under a deferential "abuse of discretion" standard. But two questions jump off the page of this opinion.

First, was there adequate evidence that there was a direct causal relationship between the wife's blogging and media activities and the husband's earnings? The key evidence seemed to be the testimony of a close personal friend of the husband's that he went to a new firm because his company did not like what they had read about Ira Schacter. But this witness was not a neutral party and, in the high stakes game of law firm rainmaking, one client makes little difference. (It's also not clear to me that being accused of dating a Playboy bunny would obviously be a cause of disrepute in the hypermasculine world of Wall Street and its lawyers.)

Second, given the obvious impact of the great recession, which coincided almost perfectly with the key years of the Schacter divorce, how could the judge make any reasonable determination as to the relative impact of badmouthing versus the economy (or versus other factors, such as his wife's claim that he just didn't work as hard as he used to)? A reduction from 50 to 17 percent is dramatic and not clearly justified by the facts. (Some of the harm may be offset by the judge's decision to use the law firm partnership's value at the commencement of the proceedings—pre-recession—than closer to the end. Seventeen percent of a high number may work out to be more than fifty percent of a much lower number.)

Conclusion

At the end of a seven-year divorce, everyone's tired and exasperated, including the judge. (The children have also suffered. The son has little relationship with his mother, while the daughter has little relationship with her father.) The judge chastised the parties for problems with "personality" and noted that each "party demonstrated troubling and uncooperative behavior during the proceedings;" "[e]ach party at times displayed offensive behavior in court. They each shouted and interrupted court proceedings. They made inappropriate comments and gestures to each other immediately outside the courtroom. They each periodically ran out of the courtroom in the middle of the proceedings."

But the wife has perhaps learned the hardest lesson—that bitterness, whether justified or not, can be costly.



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