

11-26-2014

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Recommended Citation

Joanna L. Grossman, *Who Gets the Black Gold? Harold Hamm Ordered to Pay \$1 Billion in Divorce Settlement Verdict* (2014)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/988

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Verdict

NOVEMBER 26, 2014

JOANNA L. GROSSMAN

Who Gets the Black Gold? Harold Hamm Ordered to Pay \$1 Billion in Divorce Settlement

Divorces can often be ugly, acrimonious, and hard-fought. The divorce between Sue Ann and Harold Hamm was not special in that regard. She accused him of having an affair—his first marriage ended when he was accused of having an affair with Sue Ann—and filed for divorce. What made this divorce special is that the parties were fighting over billions. And with an 80-page court order ruling that Harold must pay Sue Ann one billion dollars, they have joined the ranks of the biggest divorce settlements in history. The number may be shocking, but, as I will explain in this column, the result is the product of standard principles governing the economic consequences of divorce.



The Hamm Marriage

Sue Ann and Harold married in 1988. She was a decade younger than he and rumored to be the paramour that broke up Harold's previous marriage. Sue Ann and Harold had two children together, now adults. Already a rich and successful oil tycoon, Harold entered his second marriage without a prenuptial agreement, although such contracts are used in marriages such as this one: second or subsequent marriages where there is a great disparity in wealth or earning capacity between the parties.

Although Harold was a multimillionaire by 1988, when the marriage took place, his wealth grew substantially during the twenty-five years the marriage lasted. Both Hamms worked at Continental Resources, an oil company that was in the process of leasing huge swaths of land in North Dakota, Montana, and Canada. This land turned out to include something called the Bakken formation, a veritable pot of gold for an oil drilling company. As oil bubbled up at a rapid rate, Hamm's millions became billions. His net worth by the time of the divorce trial was estimated at \$18 billion; Forbes Magazine ranks

him the 18th richest American. At the same time, however, his marriage to Sue Ann crumbled through her accusations of infidelity, her leaving and moving to another city, and eventually a mutual desire to split.

The Hamm Divorce

There was no dispute about the grounds for divorce in this case. Sue Ann filed on grounds of “mutual irreconcilable incompatibility”—Oklahoma’s version of a no-fault divorce—and Harold heartily agreed with her assessment. What they could not agree on is how much of Harold’s money should be given to Sue Ann upon divorce. Although there was plenty to go around, the parties could not agree on a settlement and thus took their case to trial.

The central issue in the divorce trial was whether Harold’s company was so successful because of his skill, expertise, or hard work—or whether, as his lawyers suggested, he just stumbled into pools of oil and haplessly became a billionaire. Now one might ordinarily expect a lawyer to defend his client’s honor—to argue zealously that his client is personally responsible for his company’s tremendous success. But the divorce context changes all that, forcing spouses with successful business to argue, instead, that their companies have succeeded in spite of them rather than because of them. A brief discussion of marital property law will explain why.

Property Division Upon Divorce

In the age of no-fault divorce, most of the expense and controversy of divorce involves fights over custody or money. For the Hamms, whose children were grown, money was at the heart of their lengthy battle.

At divorce, courts must deal with two basic financial questions: who gets what right now (property division) and whether either spouse should share in the other’s future earnings (alimony or spousal support). The rules used to answer these questions are a function of state law and flow first and foremost from the type of property system in place.

In community property states, spouses are generally entitled to keep separate property—assets they brought to the marriage or acquired during it through gift, inheritance, or other non-earned mechanisms—but must split community property equally. Community property is whatever the couple has earned through work. Community property principles are in place from the moment a marriage begins—and from the moment each dollar is earned. A paycheck of one spouse is owned in equal part by the other spouse, whether or not the non-earning spouse played any role in its acquisition. Couples are presumed to labor on behalf of the marriage and to share its spoils (or losses). Upon

divorce, these principles drive the division of property.

Most states, including Oklahoma where the Hamms lived, are “separate property” states rather than community property states. In those states, marriage does not give rise to any automatic rights to the other’s property. While married, each spouse owns not only whatever he or she brought to the marriage, but also what he or she earns or otherwise acquires during the marriage. Many couples share money, of course, but the law does not impose any sharing principles on an intact married couple.

However, upon divorce, the separate-property system can mean that the parties, despite having made joint decisions about the allocation of time, labor and money, can end up in drastically different financial positions. A wage-earning spouse, for example, could potentially own almost everything the couple has; a stay-at-home parent could own virtually nothing. To avoid unjust results, separate-property states have adopted “equitable distribution” laws, which empower divorce courts to reallocate property between spouses. It can order that property owned by one be given to the other.

The equitable distribution system is different in every state, but the basic principles are similar. The court first categorizes property by its source and time of acquisition—the “separate property” category includes things owned prior to the marriage or acquired during the marriage without effort; the “marital property” category (like “community property”, in the states that use that system instead) includes property earned during the marriage by either spouse. In some states, only marital property can be divided; in others, both separate and marital property can be divided. Divisible property is then allocated to one spouse or the other based on equitable principles, typically captured in a list of factors.

A prenuptial agreement (or a postnuptial agreement, in some situations) can be used to opt out of these property-sharing principles, as well as those that create mandatory rights of inheritance upon the first spouse’s death. Harold Hamm, despite his millions, did not enter into either such agreement with Sue Ann. He did put most of his assets into a revocable trust primarily for his own benefit, but a trust like that does not shield assets from equitable distribution.

Sue Ann is exactly the type of wife for whom equitable distribution laws were enacted. Although the couple lived lavishly, with multiple homes and every luxury imaginable, the court found that she brought no assets to the marriage and acquired none in her own name during the marriage. If his assets were not redistributed to some extent, she would have left a twenty-five year marriage penniless, while he retained a net worth of several billion dollars.

Dividing Harold's Oil Money

Oklahoma law allows the division of marital property only; separate property remains with its original owner. However, as the court describes in the ruling, there are several doctrines that push in favor of categorizing property as marital, rather than separate. For example, property that was acquired after the date of marriage is *presumed* to be marital, which puts the burden on the party claiming ownership to prove that it was acquired in a way that makes it separate. In addition, property that was acquired as separate property is presumed to be marital when it has been placed into joint ownership. Thus, if a husband inherits money, but uses it to buy a jointly titled family home, his wife would be presumed a joint owner of the house.

An additional principle—central to this ruling—is that when separate property is brought to the marriage, any increase in value during the marriage can be wholly or partly marital, depending on why the value increased. In a prior case, *Thielenhaus v. Thielenhaus*, the Oklahoma Supreme Court set forth this principle as follows:

Where, as here, a spouse brings separate property to the marriage, its increased or enhanced value, produced by investment managed by neither spouse or by *appreciation, inflation, changing economic conditions, or circumstances beyond the parties' control*, cannot be treated as a divisible marital asset unless, of course, there be proof that the increase resulted from efforts, skills or funds of either spouse.

The question, then, in *Hamm v. Hamm*, was whether the increase in the value of Harold's 122 million shares of Continental stock (the company he headed) was due to some passive factor, or due to his skill or effort. The stock's increased value was set at almost \$1.4 billion, making this a very high stakes question. This is the rule that put Harold's lawyers in the odd position that his successful career was just the product of dumb luck. He just happened to lease land that happened to be filled with gushes of oil. The court did not buy it. Instead, it ruled that the enhanced value of the stock was marital property and should be apportioned in a just and equitable manner.

In its lengthy ruling, the court described every piece of property Harold owned and announced its new owner. The most valuable asset, by far, was the enhanced value of the Continental Resources stock. It was undisputed that he brought many shares of that stock to the marriage—and was entitled to retain their original value for himself. But because their enhanced was largely due to his skill and effort, Sue Ann was entitled to share in the increased value. All in all, the marital estate was worth a little over two billion dollars, and Sue Ann was entitled to half.

Conclusion

Sue Ann received about \$25 million in property, including the marital home. That left her \$975 million short of her equal share. Harold was thus ordered to give Sue Ann a down payment of \$322 million by the end of December 2014. He will then pay off the rest in monthly installments of \$7 million until the total payments total \$1 billion.

A billion dollar divorce award might strike some as excessive. After all, couldn't Sue Ann live on less? Of course she could, but that isn't the operative principle. Most state laws on marital property are designed are a partnership principle, or the idea that spouses work together in the hopes of generating a marital estate, and they should share the riches when the partnership dissolves. As with partnerships generally, equal division is the default. However, although equal division is supposed to govern most equitable distributions, courts are often reluctant to apply it when there is so much money to go around. They explicitly or implicitly compromise on a number that is more than enough to continue a life of luxury, but not necessarily half. The *Hamm* Court should be applauded for applying the rule as it was intended. And there is one benefit for Harold—since Sue Ann was given \$1 billion in marital property, she was deemed not in need of alimony.



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