

New York Divorce and Family Law Blog

New York Divorce Settlement May Be Set Aside- Mutual Mistake that Money "Invested" With Madoff

Posted by Daniel Clement on January 07, 2011

I previously wrote about a lawyer who was attempting to re-open his divorce settlement because, he claimed, there was a mutual mistake - he retained money invested with Madoff in lieu of other assets retained by his wife. Of course, the assets invested with Madoff proved to be worthless.

At that time, I opined (and the trial court agreed) that divorce settlement should not be opened. I wrote:

Had the wife participated with Madoff in the fraud or had knowledge of the wrongdoing, the husband might have a case. But, the husband simply made an unfortunate choice and, through no fault of the wife, lost his investment.

Had the account value gone up, it is doubtful that husband would have shared the profits with his ex-wife. Alternatively, had the wife poorly invested the cash she received from the husband, she would have no claim against the ex-husband for her loss. And

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what about all the people who bargained for the marital home, which is now worth substantially less than it was one year ago-should they look to have their former spouses share in the loss?

There is a practical reason why the husband cannot win this case-if the mere fact that some former marital asset lost value could subject a settlement agreement to attack, there would be no finality to divorce. Every agreement would be at risk for a post divorce attack. In order for there to be finality, in absence of fraud, duress or coercion etc, agreements must be enforced, without the benefit of hindsight.

Recently, the Appellate Division, in a 3-2 opinion reversed the trial court. As pointed out in David Lat's analysis in *Above the Law*, the point of contention seems to be not if there was a mistake, but defining what was the mistake.

If there was a mere mistake as to the valuation of the Madoff account, then [the Husband] would be out of luck — a point the majority and the dissenters appear to agree on. But according to the majority, there was a mutual mistake as to something more fundamental than mere valuation, namely, the *existence* of the account:

The majority of the Court felt that the mistake was the belief that the Madoff account existed. The majority opined that the husband “*never* had an account in his name with Madoff; on Madoff's own admission there were no accounts within which trades were made on behalf of investors.”

The sharply worded dissent, on the other hand, noted that:

Because Steven received significant value in exchange for the payment of \$6.25 million

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to Laura, his retention of the Madoff account and subsequent losses render this case no different than the legion of cases denying a spouse's request to open up a divorce settlement where the final value of an asset was not what the parties believed at the time of the divorce.

The dissent predicted that the majority's decision would lead to "chaos, not only for the court system, but for the litigants as well, who deserve finality and to move on."

The case is headed to the Court of Appeals.