What Lawyers Need to Know About the Billion-Dollar Divorce

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Headlines across the country proclaim "Harold Hamm to Pay One of the Biggest Divorce Settlements in History" and "Sue Ann Hamm: One Billion Dollar Divorce Settlement Is Not Enough." The Oklahoma City divorce case of Sue Ann Hamm vs. Harold Hamm (a 68% owner of publicly traded oil company Continental Resources, Inc.) has garnered widespread attention due to the approximately $16 billion dollars of assets at issue. Sue Ann Hamm's award of only approximately $1 billion of the $16 billion dollars of potential assets has been the focal point of stories and discussions about the Hamm case; however, the details of the decision as well as the manner in which the case was handled serve as important reminders of how large asset divorce cases are litigated across the country and in Pennsylvania in particular.

Both Sue Ann Hamm and Harold Hamm have appealed the Oklahoma City trial court's decision, each arguing that she or he received too little of the marital estate (and the other party too much). Although at first blush Sue Ann's award of only $1 billion dollars might seem to some observers like good cause for an appeal by Sue Ann, the actual distribution of what the Oklahoma City court determined were the "marital" assets was equal. As noted on page 71 of the Judge Haralson's opinion, Harold was ordered to pay Sue Ann $995,481,842 to effectuate an equal division of the marital assets. Harold's receipt of the majority of the $16 billion of assets at issue was based on the fact that Harold held his interest in the majority of his assets before he married Sue Ann. Under Oklahoma law, only the increase in value of pre-marital assets that are attributed to "active" or "non-passive" forces is marital property. The Oklahoma City court, therefore, reviewed the manner by which Harold's pre-marital property increased in value, including the appreciation in corporate stock and changes to the nature of Harold's business interests, and determined that the vast majority of the increase in value was attributed to "passive" forces, or forces independent of Harold's involvement. Therefore, the trial court held that those assets were Harold's non-marital property that could not be awarded to Sue Ann.

As evidence of how states differ substantially in their handling of divorce cases, Pennsylvania law does not distinguish between active and passive increases in value. Section 3501 of the Pennsylvania Divorce Code includes all of "the increase in value of any nonmarital property" in its definition of marital property. Nevertheless, Pennsylvania courts can still decline to award a significant portion, or any, of the increase in the value of nonmarital assets to the other party based on its consideration of the parties' respective efforts in increasing the value of nonmarital property. Specifically, factor 7 of the enumerated factors that Pennsylvania courts must consider in all equitable distribution decisions is the "contribution" that each party made to the "acquisition" and "appreciation" of marital property, including the contribution of a party as a homemaker.

Therefore, a Pennsylvania court can conclude that only one of the parties, or neither of the parties, contributed to the increase in value of a nonmarital asset, and divide the increase in value of one spouse's nonmarital assets accordingly. Attorneys advocating for divorcing parties, therefore, make the competing arguments that: 1) the spouse who worked tirelessly to create the couple's wealth, or to increase the value of an asset, should be awarded a greater share of the assets; or 2) the opposing spouse's argument that his or her efforts as a homemaker enabled the other spouse to focus on his or her work efforts and create the wealth on behalf of both parties as the marriage was a "partnership", each partner fulfilling his or her respective role. For further discussion of the applicability of the equitable distribution factors, see the authors' article on "Equitable Distribution Involving Large Marital Estates" in the Journal of the American Academy of Matrimonial Lawyers, Volume 26, Number 2 (2014).

Unlike arguments traditionally made in Pennsylvania courts regarding the spouses' respective contributions to creating the wealth, Harold Hamm's case was centered on proving that he in fact made minimal or no contributions during the marriage to creating the couple's wealth. In fact, Harold went so far as to rewrite portions of his company's website and amend the company's SEC filings to re-characterize Continental Resource, Inc.'s history to suggest that any efforts made by Harold to grow the company took place prior to the marriage and that increases in value during the marriage were due to market forces. Although Harold's goal was the opposite of a Pennsylvania divorce litigant's goal, Harold's efforts remind Pennsylvania litigants, in particular litigants in large estate divorces involving parties with public personas or public companies, that representations to the public can have an impact on a private divorce matter. Therefore, when engaging in "divorce planning", it is important to keep in mind the possible impact that actions being taken in public (including making statements as innocuous as introducing your spouse as "loving and supportive") or with regard to privately held business interests (such as making the decision to launch an IPO for the company) might become relevant and even determinative in a divorce matter.

Due to Harold Hamm's concern that disclosure of sensitive corporate information could harm the company, the majority of the Hamms' courtroom proceedings were closed to the public, excluding reporters and any interested or curious parties. Closing courtrooms to the public is not done as a matter of right, even in divorce proceedings, and it is in fact contrary to the general concept that court trials must be open to the public. As noted in the 1986 Pennsylvania Superior Court case of Katz v. Katz, 356 Pa.Super. 461, 514 A.2d 1374 (1986) in which Harold Katz, owner of the Philadelphia 76ers and Nutri/Systems, Inc., sought closure of his divorce case, divorce proceedings will be closed to the public only upon showing "good cause" and, specifically, proof that "disclosure will work a clearly defined and serious injury to the party seeking closure." Like Harold Hamm, Harold Katz was concerned that public access to information disclosed in the divorce proceedings related to Nutri/Systems, Inc. could impact investors' perception of the company. The Pennsylvania Superior Court affirmed the ability of parties to seek closure of the courtroom to the press and public and remanded the case to the trial court.

Although it might feel intrusive to divorce litigants that the public has a right to know the details of their private lives, absent "good cause", the decision to ask a Court to decide a personal matter will make a private matter public. For that reason, as well as the uncertainty in relying upon a Judge to make critical decisions about one's private, personal matters, many divorcing parties, in particular litigants with public personas and large estates, often settle their case out of Court or submit their case to other, less public, dispute resolution forums, such as arbitration.