

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

TIMOTHY W. HARPER,)
)
)
Plaintiff)
)
v.)
)
SHERYL E. HARPER,)
)
Defendant)

Docket No. BCD-FM-14-02

**ORDER ON MARITAL/NON-MARITAL STATUS
OF H.M. PAYSON ACCOUNT ENDING IN 3108**

This divorce case involves multiple properties and accounts. By agreement of the parties, certain issues that could be addressed through a discrete presentation of evidence were heard in what was designated as Phase I of the case. The Phase I trial began January 28, 2015 but was not completed due to a weather-related cancellation of court. The Phase I trial resumed in February 2015, but was suspended as to issues regarding the parties' commercial real estate to enable the commercial real estate to be sold instead of awarded to one or the other of the parties.

Accordingly, the rulings in this order focus primarily on the status of one of the various accounts maintained in the names of one or both parties with the H.M. Payson—namely an account in Defendant's name to which H.M. Payson has assigned an account number ending in 3108 [“the account ending in 3108”]. The issue is the extent to which the funds in the account are nonmarital funds of Defendant. In July 2015, the parties filed proposed findings and conclusions, with Plaintiff filing initially and also filing a reply to Defendant's filing.

Based on the entire record, the court adopts the following findings and conclusions. These findings and conclusions likely will be incorporated by reference in the court's final

judgment in this case, which must await trial in April 2016, when trial on all remaining issues is scheduled to occur.

Findings Of Fact and Conclusions of Law

A. The Parties' Businesses and Accounts

1. Plaintiff Timothy Harper and Defendant Sheryl Harper were married on July 3, 1978. They have four grown children.
2. Shortly after the parties married, they moved to Maine. The parties purchased a fishing boat, with financial assistance from Sheryl Harper's parents, and Timothy Harper began taking the boat to sea to harvest scallops. The parties began operating Fish Unlimited, an unincorporated wholesale seafood business, about 30 years ago. It began when Mr. Harper decided to sell the scallops directly to local buyers, rather than through an agent. Sheryl Harper's role was to sell the scallops, operating out of the parties' residence.
3. Over time, the Fish Unlimited business expanded by purchasing seafood from other fishermen as well, for resale. As the business grew, Mr. Harper built a structure next to the parties' home to serve as a warehouse for Fish Unlimited. The parties expanded the Fish Unlimited operations over the years, mainly through Sheryl Harper's efforts: traveling to various docks throughout New England, buying seafood directly from the boats on the docks, and then transporting the seafood for sale to restaurants and wholesalers. During these years, Timothy Harper captained various fishing vessels owned by the parties and, along with other fishermen, supplied seafood to Fish Unlimited for resale.
4. After the parties purchased a wharf at 126 Clark Road in Southwest Harbor, Fish Unlimited continued its wholesale seafood operations, expanding to purchasing and selling retail and wholesale lobsters. At one point Fish Unlimited ran a restaurant on the dock.

5. At some point, the parties formed a corporation, Northeastern Seafood, Inc. (NES), and the operations of Fish Unlimited continued under the auspices of NES although NES sold bait, gas, lobster and other items beyond what Fish Unlimited had sold. Mr. Harper was actively managing NES, although Sheryl Harper continued to manage what had been the operations of Fish Unlimited.

6. Partly as a result of a downturn in the scallop market, what had been the Fish Unlimited business effectively ceased operating around 2006-2007, when the parties purchased McKinley Market and the surrounding properties in Tremont and purchased the Dictator offshore scallop fishing vessel. At that time, Timothy Harper stopped fishing and began managing the fishing operations of the Dictator, including hiring a captain to run the vessel during fishing trips. At the same time, Sheryl Harper began managing McKinley Market and Timothy Harper took responsibility for operating Northeastern Seafood, with a primary focus on the purchase and sale of lobsters from the 126 Clark Road dock owned by the parties.

7. While Sheryl Harper was primarily managing the operation of the Fish Unlimited business, income from the business paid the parties' mortgages, real estate taxes, insurance, housing expenses, household expenses, clothing, food, transportation and expenses for the parties' four children. What Timothy Harper earned from fishing mainly went to expenses associated with the fishing boat and to vehicles associated with the boat and Fish Unlimited.

8. Although both parties have played a substantial role in the significant growth in their marital assets over the past 30 years, Sheryl Harper has historically been more involved than Timothy Harper in administering the parties' funds and accounts. She appears to have been the spouse who arranged for accounts to be opened, closed and transferred, and the spouse who dealt with the managers of the various bank and investment accounts the parties have had over the decades.

9. In the 1990s, she arranged for accounts to be opened in the parties' names at the former national investment firm known as A.G. Edwards. The A. G. Edwards accounts included separate IRA accounts for both parties, a joint brokerage account, and an account in Sheryl Harper's name only. By November 1997, the joint account totaled \$90,787.42. By November, 1999, Timothy Harper's IRA had a balance of \$14,320.55 and Sheryl Harper's two IRAs totaled \$16,073.47.

10. The parties also entered into a series of personal and commercial banking relationships with a local financial institution, the First National Bank of Bar Harbor. The trust officer at First National who was assigned to the Harpers' various accounts was Daniel Lay. At some point, First National Bank formed a wealth management department called First Advisors, and the parties' accounts were moved to First Advisors, where Mr. Lay continued to manage them.

11. The account primarily at issue in this Order is an account in Sheryl Harper's name alone assigned an account number ending in 3463. It was originally opened at The First and later moved to First Advisors.

12. Also among the accounts opened at The First and moved to First Advisors was an account in the name of Northeastern Seafood, into which Sheryl Harper deposited funds earned from Fish Unlimited and then NES. The two IRA accounts at A. G. Edwards were also transferred to First Advisors to be managed by Mr. Lay.

13. Funds saved from the operation of Fish Unlimited in a deposit account ending 6651 in Sheryl Harper's sole name at First National Bank of Bar Harbor. In January, 2005, this account had a balance of \$623,041.60. On April 1, 2005, \$600,000 from this account was transferred to her First National Bank of Bar Harbor investment account, where it briefly remained until after the merger forming The First. After the merger, Sheryl Harper opened a

new First Advisors investment account ending 6020 in September, 2005 in the name of NES d/b/a/ Fish Unlimited. (Def. Exh. 16). On September 23, 2005, Sheryl deposited \$414,681.25 from her individual First Advisor account ending 3463 into the NES d/b/a Fish Unlimited First Advisor account ending 6020. On October 5, 2005, Sheryl deposited \$185,132.11 from her individual account into the NES d/b/a Fish Unlimited account. The NES d/b/a Fish Unlimited account had a balance of \$615,992.94 on September 8, 2006.

14. In 2006, Mr. Lay left the employ of First Advisors and joined the H. M. Payson investment firm. In order to maintain his involvement in managing the accounts, the parties transferred all of their accounts at First Advisors to the H. M. Payson firm, and also transferred the joint brokerage account at A.G. Edwards.

15. H. M. Payson assigned the IRA accounts for Timothy and Sheryl Harper account numbers ending in 3156 and 3129 and the parties' H.M. Payson joint account an account number ending in 3162. H. M. Payson assigned the Northeastern Seafood account an account number ending in 4103, and assigned the former First Advisors account in Sheryl Harper's name only an account number ending in 3108. Another H. M. Payson account is the so-called Dictator capital construction account, with an account number ending in 3171. This account was funded with deposits from the operations of the Dictator vessel, which are managed by Timothy Harper.

16. In December 2008, funds in the Northeastern Seafood account ending in 4103 were transferred to the H.M. Payson joint brokerage account ending in 3162. Aside from reinvested income and dividends, this deposit of funds from the Northeastern Seafood account has been the only addition since 2006 to the funds in the parties' joint H.M. Payson account ending in 3162.

17. At all times, Mr. Lay's management of the parties' investment accounts involved the purchase and sale of securities within the account and reinvestment of interest and dividends to

purchase new securities. All purchases were made from either the sale of securities within the account or from the routine reinvestment of interest and dividends.

Sheryl Harper's Account Ending in 3108

18. With regard to the 3108 account specifically, although Mr. Lay would occasionally see or talk to Sheryl Harper, Sheryl Harper gave him full discretionary authority to manage the account. Sheryl Harper did not direct the management of the account. Her actions were nominal, inconsequential, or sporadic. She did not invest substantial marital time and energy in managing the assets in the account.

19. The origins of the H.M. Payson account in Sheryl Harper's name only ending in 3108 go back to a gift of stock she received from her parents in the 1990s. The stock was transferred to the A.G. Edwards account in Sheryl Harper's sole name. No stock certificates were given to Sheryl Harper. Although she does not recall the individual stocks gifted to her decades later, she specifically recalls providing her mother with contact information for her A.G. Edwards broker to facilitate an electronic transfer of the gifted stock to an investment account in her sole name at A.G. Edwards. No marital funds were deposited in the account while it was being administered by A.G. Edwards individual account in Sheryl Harper's name.

20. Sheryl Harper received a second gift of stock from her parents between 2001 and 2003. This gift was made by her parents because they had assisted her brother with the building of his house and decided to make a similar gift to her. The stock was directly transferred from her parents to the newly opened account in her sole name at the trust department of First National Bank of Bar Harbor. The stock gift was managed by the trust department of First National Bank of Bar Harbor. All income from the account was reinvested in the account to purchase additional securities. No marital funds were deposited into this account.

21. On December 31, 2004, the value of Sheryl's individual stock and securities account ending 3463 at the First National Bank of Bar Harbor was \$205,165. The same account had a balance of \$213,323 on December, 31, 2005.

22. In June 2006, Sheryl Harper liquidated her individual A.G. Edwards account and sold the stock her parents had given her as a gift in the 1990s. Thereafter, she transferred the proceeds of the stock sale to her individual First Advisors investment account ending 3463. On September 8, 2006, Sheryl Harper's individual First Advisors investment account ending 3463, had a balance of \$331,544.13. The sole source of these funds was the stock gifted to her by her parents in the 1990s and originally held in her individual A.G. Edwards account before its liquidation in June, 2006, and the stock gifted to her by her parents between 2001 and 2003 originally held in her individual First National Bank of Bar Harbor investment account ending 3463 02 8.

23. In September, 2006, when Daniel Lay left First Advisors and began working at H.M. Payson, all of the investment assets and cash in Sheryl Harper's individual First Advisor account ending in 3463 were transferred in September 2006, to the account ending 3108 at H.M. Payson, still in Sheryl Harper's sole name.

24. Sheryl Harper also saved the parties' earnings money from Fish Unlimited in an investment account with Royal Alliance. On April 11, 2007, the sum of \$69,374.68 was transferred from Royal Alliance into Sheryl Harper's individual H.M. Payson account ending 3108.

25. Funds in the amount of \$144,962.35 from the H.M. Payson NES d/b/a Fish Unlimited account ending 4103 were transferred into the parties' joint H.M. Payson account ending 3162. On February 9, 2009, one-half this amount (\$72,481.18) was transferred to Sheryl Harper's individual H.M. Payson account ending 3108

26. In 2010, Sheryl Harper withdrew funds from her individual H.M. Payson account ending 3108 for legal fees related to a dispute over her mother's estate. The balance of the account prior to withdrawal was \$506,786.17 on March 31, 2010, and the balance of the account on December 31, 2010, after the withdrawals was \$385,628.78.

27. In March and April, 2011, Sheryl Harper received stock from her mother's estate. The inherited stock from Sheryl's mother's estate was directly transferred into her individual H.M. Payson account ending 3108. (Def. Exh. 29). The value of the stock inherited by Sheryl and deposited into her individual account on March 24, 2011, was \$202,388.58. The value of the stock inherited by Sheryl and deposited into her individual account on April 5th and 6th, 2011 was \$60,726.80.

28. The balance of Sheryl Harper's individual H.M. Payson account ending 3108 on June 30, 2011 was \$684,287.58. All stock inherited by Sheryl Harper, with the exception of 100 shares of Apple stock,¹ was sold within the individual investment account by her investment manager, Daniel Lay. The proceeds of all of the sales of her inherited stock was exchanged for other stock purchased and sold in the course of Daniel Lay's management of the account. All interest and dividend income earned on the inherited stock was routinely reinvested in Sheryl's individual account.

29. A check in the amount of \$98,969.10 received by Sheryl Harper from her mother's estate was not deposited in her H.M. Payson individual account ending 3108. This nonmarital inheritance was used to make a \$25,000 gift from Sheryl to each of the parties' four children.

¹ The 100 shares of Apple stock inherited by Sheryl from her mother and deposited in the account on March 24, 2011 has since had a 7-1 stock split on and now consists of 700 shares of Apple.

The Legal Framework

30. The court is to follow a three-step analysis in distributing property in a divorce action. *Ayotte v. Ayotte*, 2009 ME 20, ¶6, 966 A.2d 883. The Court must “(1) determine what of the parties’ property is marital and non-marital, (2) set apart each spouse’s non-marital property, and (3) divide the marital property between them in such proportion as the court deems just.” *Id.* The divorce statute mandates the court “*shall* set apart to each spouse the spouse’s property and *shall* divide the marital property.” *Miliano v. Miliano*, 2012 ME 100 ¶14, *citing* 19-A M.R.S. § 953(1) (2011) (emphasis in original).

31. There is a statutory presumption that all property acquired subsequent to marriage is marital property regardless of how title is held. 19-A M.R.S. § 953(3). The presumption may be overcome, however, by a showing the property was acquired by one of the exceptions to the definition of marital property set forth in 19-A M.R.S. §953(2):

- A.** Property acquired by gift, bequest, devise or descent;
- B.** Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;
- C.** Property acquired by a spouse after a decree of judicial separation;
- D.** Property excluded by valid agreement of the parties; and
- E.** The increase in value of property acquired prior to the marriage and the increase in value of a spouse’s non-marital property as defined in paragraphs A to D.

(1) "Increase in value" includes:

- (a)** Appreciation resulting from market forces; and
- (b)** Appreciation resulting from reinvested income and capital gain unless either or both spouses had a substantial active role during the marriage in managing, preserving or improving the property.

(2) "Increase in value" does not include:

- (a) Appreciation resulting from the investment of marital funds or property in the nonmarital property;
- (b) Appreciation resulting from marital labor; and
- (c) Appreciation resulting from reinvested income and capital gain if either or both spouses had a substantial active role during the marriage in managing, preserving or improving the property.

19-A M.R.S §953(2); P.L. 1999 c.665, § 1. *See Warner v. Warner*, 2002 ME 156, 807 A.2d 607 (applying the statute to determine whether increase in value was marital).

32. In *Hedges v. Pitcher*, 2008 ME 55, 942 A.2d 1217, the Law Court set forth the allocation of the burden of proving whether appreciation of a non-marital asset is marital or non-marital. The burden initially falls on the party asserting the property is marital to prove that non-marital property appreciated in value during the marriage. *See Warren v. Warren*, 2005 ME 9, ¶26, 866 A.2d 97, 103. Proving an increase in value is an essential element of the burden of proof. *Miliano* at ¶25.

33. If appreciation in value during the marriage is established, the statute creates the rebuttable presumption that the increase in non-marital property's value is marital. *See* 19-A M.R.S. § 953(2),(3). To rebut the statutory presumption, the party asserting the appreciation in value is non-marital then bears the burden to show appreciation during the marriage remains non-marital because it resulted from either "market forces," 19-A M.R.S. § 953(2)(E)(1)(a), or from "reinvested income and capital gain," *id.* § 953(2)(E)(1)(b). *See Warren*, 2005 ME 9, ¶ 26, 866 A.2d at 103.

34. If the party asserting the property is non-marital meets the burden of proving market forces caused appreciation in the value of non-marital property during the marriage, the

amount of that appreciation remains non-marital, whether or not either spouse played a substantial active role in managing, preserving or improving the property. *Warner v. Warner*, 2002 ME 156, ¶ 31, 807 A.2d 607, 620.

35. If the Court finds an increase in the value of a non-marital asset resulted from reinvested income and capital gain, then, and only then, does the issue of whether a spouse played a substantial active role in managing, preserving or improving the property arise. *Id.* (citing 19-A M.R.S. § 953(2)(E)(1)(b),(2)(c)). If this issue is reached, the factors a court should consider in determining whether there has been a substantial active role in managing, preserving or improving the property include:

- (1) whether a spouse engaged in routine reinvestment, or instead, actively managed the asset;
- (2) whether the actions of a spouse were nominal, inconsequential, or sporadic;
- (3) whether a spouse invested substantial marital time and energy in managing the asset;
- (4) whether a spouse had an occupation separate from managing that property; and
- (5) whether a spouse's knowledge of and involvement with the property is casual or in-depth.

Hedges v. Pitcher, 2008 ME 55 ¶ 27, 942 A.2d 1217, 1225.

Application of Law to Fact

36. The core issue is to what extent the funds in the H.M. Payson account in Sheryl Harper's name ending in 3108 only are marital or nonmarital.

37. The evidence affirmatively establishes the following:

- The funds in the 3108 account derive from Sheryl Harper's nonmarital funds and the parties' marital funds.

- The nonmarital assets and cash transferred into the 3108 account and its predecessor accounts at First Advisors, The First, First National and A.G. Edwards total \$492,669.
- The marital funds transferred into the account consist of the Royal Alliance transfer and the transfer from the NES account, totaling \$150,110.
- The 3108 account had a balance of \$861,384.75 as of December 31, 2014.
- The only asset in the 3108 account that can definitively be designated as nonmarital is the Apple stock. This is because all of the other nonmarital stock gifted to Sheryl Harper and transferred into the 3108 account has been sold, and the proceeds of those sales, along with all of the nonmarital cash that was deposited into the 3108 account, have been inextricably commingled with marital cash and used to purchase stock or other types of investments.
- Because of the extensive commingling of marital and nonmarital funds in the 3108 account, it cannot be determined how much of the December 2014 balance of \$861,384.75 is attributable to nonmarital contributions. In other words, although the evidence establishes a nonmarital contribution totaling \$492,669, the fact that all of it except for the 700 shares of Apple stock has been commingled with marital funds and used to pursue a variety of different stocks and other investments means that how much of the account's current value stems from the nonmarital contribution is unknown.
- The fact that the 3108 account's December 2014 balance is more than \$219,000 greater than the combined marital and nonmarital contributions to the account clearly supports the inference that the difference reflects an increase in value, but the extensive commingling of marital and nonmarital funds makes it impossible

to determine how much of the increase stems from marital funds versus nonmarital funds, except for the increase in value of the Apple stock.

- Neither party had a substantial active role in managing the 3108 account or any of the predecessor accounts at various financial institutions. Although Sheryl Harper was more involved than Timothy Harper in all of the parties' various accounts throughout the time those accounts were at the various financial institutions or brokerage firms mentioned above, at no time did her involvement in any of them, including the 3108 account, amount to a substantive active role for purposes of section 953(2)(E)(2)(c). Instead, both parties left active management and oversight of all of the accounts to Daniel Lay and, before him, to other managers at the financial institutions or brokerage firms involved.

38. Applying the statutory burden analysis to the 3108 account, the initial issue applies to whether the assets themselves (independent of any increase) are marital or non-marital. Because all the assets were acquired during the marriage, Defendant Sheryl Harper has the initial burden to demonstrate that the assets are in fact non-marital because they were gifted to her. The only asset in the account that consists of a gifted asset is the Apple stock. Because of the extensive commingling of marital and non-marital assets and cash that has occurred over the years, none of the other assets in the 3108 account consists of a gifted asset, nor can any other asset in the account be specifically traced to a gifted asset. The court finds and concludes that the only current asset in the 3108 account that has been established to be non-marital is the Apple stock.

39. With respect to the non-marital Apple stock, Plaintiff Timothy Harper has met his burden to show an increase during the marriage in the value of the stock, thereby triggering the statutory presumption at 19-A M.R.S. § 953(3) that the increase is marital.

Because the increase in value of the Apple stock was entirely due to market forces or reinvested income and capital gains, and because she had no active role in managing the 3108 account, Sheryl Harper has also met her burden to overcome the presumption. Accordingly, the entire value of the Apple stock will be set aside to her.

40. Although the court has concluded that Defendant Sheryl Harper has not established that most of the value of the 3108 account consists of non-marital property, the fact that about three-quarters of the contributions into the account were of Sheryl Harper's nonmarital funds, coupled with the fact that the account has increased in value by nearly \$220,000, is by no means an irrelevant consideration. Nothing in this order should be deemed to foreclose any justifiable allocation of the marital component of 3108 account on the basis of an equitable allocation or economic misconduct. Because these issues will be raised at the trial scheduled for April 2016, and may be visited earlier at the upcoming interim hearing, the court will defer allocating the 3108 account other than the nonmarital Apple stock and any proceeds directly traceable to that stock.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to incorporate this Order by reference in the docket.

Dated October 20, 2015

/ S

A. M. Horton
Justice, Superior Court