

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

D.B.,	:	IN DIVORCE
Plaintiff	:	
	:	
v.	:	No. 05-21,155
	:	
A.B. III,	:	
Defendant	:	

**OPINION**

The issue before the court is how to characterize various documents for the purpose of equitable distribution. The facts are fully set forth in the “Stipulation of Facts Pertaining to the Morgan Stanley Promissory Notes,” attached to the plaintiff’s brief, which both parties agree accurately sets forth the facts.

To summarize these facts, on July 25, 2003, Wife left her position with Merrill Lynch and began working for Morgan Stanley as a Financial Advisor. She remains employed with Morgan Stanley. Upon accepting employment with Morgan Stanley, Wife executed two documents on July 25, 2003. The first was a Promissory Note relating to a loan in the amount of \$546,531.00<sup>1</sup>. The Note requires Wife to repay the loan on a five year plan, with one-fifth the loan principal and accompanying interest due on July 25<sup>th</sup> in the years 2004 thorough 2008. The second document was a Bonus Agreement stating that Wife will receive bonuses on August 8<sup>th</sup> of every year from 2004 through 2008, in the amount equal to the amount owed on the promissory note.

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<sup>1</sup> This amount was derived from the gross income production generated by Wife during the last twelve months of her employment with Merrill Lynch.

At the time Wife accepted employment with Morgan Stanley, it was also agreed that the following year she would be entitled to a second similar loan, equal to 50% of the gross production generated by her in the best 12 out of 14 months of her employment at Morgan Stanley, along with an accompanying off-setting bonus. Pursuant to this agreement, on October 11, 2004, Wife executed two more companion documents. The first was another Promissory Note relating to a loan in the amount of \$398,724.50. Again, the note requires Wife to repay the loan on a five year plan, with one-fifth the loan principal and accompanying interest due on October 8<sup>th</sup> in the years 2005 through 2009. The second document was a Bonus Agreement stating that Wife will receive bonuses on October 22<sup>nd</sup> of every year from 2005 through 2009, in the amount equal to the amount owed on the promissory note.

Each promissory note provides that the balance shall be immediately due and payable if Wife dies while employed by Morgan Stanley, if her employment terminates, if she has not retained all licenses and registrations from the regulatory bodies, or if she becomes financially impaired.

Similarly, the bonuses are contingent upon Wife remaining in the employ of Morgan Stanley and retaining all licenses and registrations from the regulatory bodies. In the event of Wife's death, all bonuses will be accelerated and become due as of the date of her death.

The parties separated on August 24, 2005. The total loan amount of \$945,255.50 was received by the parties during the marriage, and utilized by the parties. Both parties agree that money is marital property. Wife, however, contends the debt remaining on the loan as of the date of separation (\$647,745.71) is a marital debt, and

that she should receive credit for the amount she has paid on the debt. Husband contends this debt is illusory, and that all of the documents, taken together, establish that the “loans” were actually sign-on bonuses, disguised as loans in order to spread out the tax liability over five years.

Despite the clear language of the documents to the contrary, and despite the two Promissory Note Acknowledgement Forms which declare, “This loan does not constitute a bonus,” the court concludes that Husband is correct. Morgan Stanley has found a clever way to attract high-performing individuals by providing large bonuses with tax liability spread out over five years. Apparently, the Internal Revenue Service tolerates such arrangements. That does not mean, however, that courts in divorce proceedings must accept them. One of the purposes of the Divorce Code is to effectuate economic justice between the parties, 23 Pa.C.S.A. §3102(a)6), and this court does not believe economic justice would be served by accepting Wife’s arguments.

If Wife had merely executed the Bonus Agreements, there would be no doubt the post-separation bonuses would be non-marital. Conversely, if Wife had merely executed the Promissory Notes, there would be no doubt the loans would be marital debt. However, in this case we have two documents executed simultaneously: a note and a bonus agreement, and the two are not coincidental. They are inextricably connected, resulting in an illusory loan because all loan payments are offset by the bonuses. The court cannot turn a blind eye to the obvious connection between the documents, and reading them together, it is very clear the purpose of the loan/bonus scheme was to give Wife a “sign-on bonus” with spread-out tax liability.

Any marital debt created by the instruments is thus illusory, because with the “loans” came the right to receive bonuses in the amount of the loan payments each year.<sup>2</sup> The intentions of Morgan Stanley and Wife could not be any clearer, as the amount due each year corresponds exactly to the amount Wife is to receive as a bonus. Viewed another way, along with the “debt” comes automatic “debt forgiveness” of the amount due each year. In fact, prior to separation, there was no exchange of yearly checks when the loan and bonus came due. After separation this practice suddenly changed, presumably to bolster Wife’s argument that she was actually paying back a loan. However, in reality Wife is not making any loan payments at all, because the payments are offset by the bonuses. To credit Wife with such illusory loan payments would be unfair to Husband. The effect would be to drastically reduce Husband’s share of the sign-on bonus which was received by the parties during the marriage, and should remain marital property in its entirety.

Wife argues it is improper for Husband to benefit from Wife’s post-separation employment efforts. However, the offsetting bonuses each year are not actually compensation for Wife’s post-separation employment. The promise of receiving them arose during the marriage, hand-in-hand with the loan liability, and the “bonuses” are contingent only upon her continuing to be employed and the other two provisions as stated above. Moreover, Wife receives other compensation for her employment. At most, the purpose of the loan/bonus plan is to induce Wife to remain with Morgan Stanley.

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<sup>2</sup> We also note that in the event Wife dies during her employment, she owes nothing. This is very unlike traditional loans.

Wife argues each Bonus Agreement is analogous to an employment contract entitling one spouse to earn a certain sum for the upcoming year. Certainly such a sum could not be marital, as the sum was yet to be earned and received. However, in the case before this court, the entire sum was received simultaneously with the execution of the documents. Moreover, Wife's continued employment is not compensation for the work she will be doing, but is merely a condition of her continuing to receive the yearly offsetting bonuses.

Wife further argues that the right of Wife to receive the bonuses is not absolute, but is contingent primarily upon her remaining employed with Morgan Stanley. While the court finds this concept somewhat troubling, the Pennsylvania Supreme Court has already decided a similar issue. In Fisher v. Fisher, 769 A.2d 1165 (Pa. 2001), the court held that unvested stock options are marital property, despite the fact they are mere expectancies, with no guarantee they will ever be received. Neither was the court troubled by the fact that stock options are dependent upon the employee remaining in his or her present employment. The court determined that stock options are a form of deferred compensation, and like unvested pensions, they are marital property.

In this case, however, in fairness to Wife, the court will order that should Wife lose her employment with Morgan Stanley through no fault of her own, and should she fail to receive an offsetting bonus, the court will reserve jurisdiction to entertain a motion requesting that Husband contribute to the amount Wife owes.

In further fairness to Wife, the court will order that the tax liability on the post-separation bonuses are marital debt, and Wife should receive credit for any such taxes she has paid. Since the purpose of the sign-on bonus/loan arrangement was to allow the

parties to spread out the tax liability for the lump sums they received, and since Husband shared the sign-on bonus, he must also share the spread-out tax liability.

In conclusion, the court acknowledges Wife's argument that we are ignoring the separation date and the verbiage of the documents. However, the court believes our conclusion is fair to both spouses. Neither spouse is harmed by this holding, which recognizes the reality of this tax saving arrangement. This court is mindful that our Superior Court in its review considers all the circumstances of the case and the conclusions of the trial court in light of the legislative policy of effectuating economic justice between the parties. Hicks v. Kubit, 758 A.2d 202, 204 (Pa. Super. 2000).

**ORDER**

AND NOW, this \_\_\_\_\_ day of February, 2008, after argument, for the reasons stated in the foregoing opinion it is ordered as follows:

- (1) The balances of the two promissory notes at separation (\$647,745.71) shall not be considered marital debt.
- (2) Any and all taxes paid on the yearly bonuses Wife receives as a result of the bonus agreement of July 25, 2003 and/or the bonus agreement of October 8, 2004 shall be considered marital debt, and Wife shall receive credit for any such taxes she has paid.
- (3) Should Wife lose employment with Morgan Stanley prior to October 22, 2009, through no fault of her own, the court reserves jurisdiction to entertain a motion for Husband to contribute to any money owed to Morgan Stanley under one of the promissory notes which has not been offset by money received from one of the Bonus Agreements discussed in this opinion.

BY THE COURT,

Richard A. Gray, J.

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