IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD W. MCNULTY,[1]	§	
	§	No. 711, 2011
Petitioner Below-	§	
Appellant,	§	Court Below: Family Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
HELEN L. MCNULTY,	§	File No. CS09-03471
	§	Petition No. 09-39032
Respondent Below-	§	
Appellee.	§	
	§	

Submitted: April 16, 2012
Decided: May 24, 2012

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 24th day of May 2012, it appears to the Court that:

(1) Petitioner-Below/Appellant, Richard McNulty ("Husband"), appeals from a Family Court order dividing the marital assets of Husband and Respondent-Below/Appellee, Helen McNulty ("Wife"). Husband contends that the division of the marital residence and his 401(k) is not supported by the law and is not the product of a logical and deductive reasoning process. We find no merit to Husband's appeal and affirm.

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[1] This Court *sua sponte* assigned pseudonyms to the parties by order dated February 9, 2012. Supr. Ct. R. 7(d).

(2) Husband and Wife were married for approximately ten and one-half years. They now share custody of their minor daughter. Husband has a son from a previous relationship, but the son did not reside in the marital residence. Wife also has a son from a previous marriage. Her son was diagnosed with autism as a child and lived in the marital residence during the entire marriage.

(3) The marital residence was purchased by Husband, in his name, on June 2, 1999. Husband's parents provided the down payment, but the record is unclear as to whether the payment was a gift to Husband or to both parties. The parties could not recall if they were engaged at the time they acquired the home. It is undisputed, however, that the parties moved into the home shortly after its purchase. They were married five months later, on November 5, 1999. The Family Court found that Wife was involved in picking out the home, because it was important to find a location suitable for her son's educational needs. Wife also attended the closing. Husband and Wife lived in the home until Wife moved out in January 2010.

(4) Husband's 401(k) plan is also a matter of dispute. Husband liquidated his 401(k) plan during the pendency of the divorce proceedings without notifying Wife. He paid income taxes on the amount received, but was able to avoid early cash-in penalties as a result of a hardship application. He suffers from multiple

sclerosis. Husband testified that he liquidated the account to pay for the mortgage and other bills. He also testified that the account was his only source of cash.

(5) The Family Court determined that the marital residence was purchased in contemplation of marriage and was therefore subject to distribution. The Family Court also assigned the gross amount of the 401(k) plan at the time of liquidation to Husband for failing to notify Wife of the liquidation. The Family Court split the marital estate 55/45 in favor of Husband, giving weight to Husband's lower present and future anticipated income. This appeal followed.

(6) When reviewing a Family Court's order, our standard and scope of review involves a review of the facts and law, as well as the inferences and deductions that the Family Court has made.[2] We review conclusions of law *de novo*.[3] We will not disturb the Family Court's factual findings unless they are clearly wrong and justice requires their overturn.[4]

(7) Husband first contends that the Family Court erred in considering the home marital property, rather than pre-marital property, for purposes of the equitable division. Under Delaware law, property acquired before marriage may be subject to equitable division if it is acquired "in contemplation of marriage."[5]

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[2] *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979)
[3] *Olsen v. Olsen*, 971 A.2d 170, 174 (Del. 2009).
[4] *Id.*
[5] *Battaglia v. Battaglia,* 2005 WL 2149337, at *1 (Del. Aug. 24, 2005) (citing *Wilson v. Lynn*, 1993 WL 331899, at *2 (Del. Fam. 1993)).

In *Wilson v. Lynn*, the Family Court held that four factors must be present to find that property was acquired in contemplation of the marriage: "1) the property must have been acquired within three months of the marriage; 2) a wedding date must have been previously set; 3) there must be a compelling legal or financial reason for not placing title in both parties' names; and 4) both parties must have taken active involvement in the purchase."[6] This Court applied the *Lynn* test in *Battaglia* to hold that property was not purchased in contemplation of marriage.[7] We also held that the claim failed under a case-by-case analysis.[8] The Family Court has declined to apply the *Lynn* test as a bright-line rule in a number of recent decisions, instead embracing the latter, more fact-specific analysis.[9]

(8) Here, the Family Court properly applied a case-by-case analysis to determine that the property was acquired in contemplation of marriage, and thus was marital property. The Family Court considered the following facts: (1) the parties were residing together before Husband purchased the home; (2) the parties

[6] *Lynn*, 1993 WL 331899, at *2.
[7] *Battaglia,* 2005 WL 2149337, at *2.
[8] *Id*.
[9] *See*, *e.g.*, *Daugherty v. Sterns*, 2008 WL 4698563, at *3-4 (Del. Fam. Sept. 29, 2008) (declining to base decision solely on *Lynn* test and instead considering parties' intentions in acquiring property); *O.T.A. v. M.L.,* 2008 WL 4698492, at *7 (Del. Fam. July 10, 2008) (using *Lynn* factors as guide rather than as bright-line test); *A.J.A. v. R.L.R.T.A.F*, 2005 WL 4674277, *4 (Del. Fam. Nov. 15, 2005) (concluding that property was acquired in contemplation of marital even though first two *Wilson* factors were not met); *In the Interest of Bennett*, 1995 WL 775118, *2 (Del. Fam. Jan. 3, 1995) ("This Court is not prepared, in this particular case, to adopt the *Wilson* test as dispositive of all contemplation of marriage cases presented to this Court. Cases of this nature are never as clear cut as the test advanced in Wilson may suggest. Each case must be decided on its facts.").

moved into the home at the same time and married within five months of moving in; (3) Wife was involved in selecting the house; (4) the house was selected in part for its close proximity to a school for Wife's son from a former marriage; (5) Wife attended the closing; (6) Wife's name was not included on the deed or mortgage because of her recent bankruptcy filing; and (7) the parties resided in the home for the entirety of the marriage and through separation. The Family Court did not apply the *Lynn* four-prong test. Nor do the facts satisfy that test because the property was acquired five months, not three months, before marriage, and it is not clear that the wedding date was set previously. But, the Family Court found a compelling financial reason for not placing title in Wife's name, and that both parties had been actively involved in the purchase.

(9) The Family Court's factual findings strongly supported that the property was purchased in contemplation of marriage. Those findings were consistent with the record and the product of a logical reasoning process. This Court has not required exacting compliance with the *Lynn* factors, and here the Family Court properly assessed the case based on the unique facts before it. The Family Court did not err in treating the property as marital property for purposes of the equitable division.

(10) Husband also contends that the Family Court erred in awarding Wife an interest in the value of Husband's 401(k) account based on its value before

Husband liquidated the account. With respect to the liquidation, the Family Court stated:

> By not giving Wife advance notice of his intent to liquidate the account, Husband prohibited her from any possibility of proposing some type of alternative which might have avoided a tax loss for both of the parties. Also, Husband failed to notify Wife that he had liquidated his 401K Plan, and how he used the money. Thus, although Husband was in a hardship situation, and was able to save the parties any early liquidation penalty fees, his unilateral action in liquidating the account without informing Wife of his intent failed to give Wife any opportunity to offer some alternative, which might have saved both parties the income tax reduction.[10]

Thus, the Family Court assigned Husband the gross amount of his 401(k) at the time he liquidated it: $16,997.

(11) Title 13, section 1509(a)(1) of the Delaware Code provides that, upon the filing of a petition for divorce, a preliminary injunction shall issue against the parties enjoining them from: "[t]ransferring, encumbering, concealing or in any way disposing of any property except in the usual course of business or for the necessities of life, and requiring the parties to notify the other of any proposed extraordinary expenditures and to account to the Court for all extraordinary expenditures after the preliminary injunction becomes effective[.]"[11] Here, it is undisputed that Husband did not notify Wife of the liquidation, as required by the statute. The Family Court followed a logical reasoning process in considering that

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[10] *Husband (R.W.M.) v. Wife (H.L.M.),* No. CS09-03471, at 5 (Del. Fam. Nov. 29, 2011).
[11] 13 *Del. C.* § 1509(a)(1).

Wife was denied the opportunity to propose more tax-favorable alternatives. In light of Husband's violation of the statute, the Family Court did not err in awarding Wife based on the gross amount of Husband's 401(k).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice