Pendente Lite Sale of the Marital Residence: When Is It Possible?

By Frances A. DeThomas, Esq. and Julia Uriarte

In a matrimonial action, it is rare for the court to order the *pendente lite* sale of the jointly owned marital residence absent consent of the parties. The 1977 New York Court of Appeals ruling in *Kahn v. Kahn* held, *inter alia*, that courts cannot order the sale of the marital residence until the tenancy by the entirety is severed upon entry of the judgment of divorce.[1] This rule frustrates pending matrimonial actions where the spouse occupying the marital residence uses the inability of the non-occupant spouse to force a sale of the marital residence *pendente lite* as leverage to obtain additional settlement concessions from said spouse to bring about a prompt sale. However, courts increasingly recognize that a *pendente lite* sale of the marital residence is warranted in certain limited circumstances where marital assets are in danger of dissipation, and most recently, where equities dictate such result in a no-fault divorce under Domestic Relations Law ("DRL") Section 170(7).[2]

The *Kahn* Approach

The *Kahn* court determined that it had no authority to order the sale of the marital residence *pendente lite* until the tenancy by the entirety relationship was severed and that DRL Section 234, which permits courts to determine both the right of possession and "any question as to the title to property arising between the parties," was not intended to "alter existing property law principles" so as to allow a *pendente lite* sale of the marital residence if tenancy by the entirety remained intact.[3] The court held that unless a court alters the legal relationship of husband and wife by granting a divorce, annulment, separation, or by declaring a void marriage a nullity, it has no authority to order

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the sale of the marital residence owned by parties as tenants by the entirety.[4] The holding in *Kahn* has been routinely upheld.[5]

The Departure from *Kahn*

In 1980, DRL Section 236(B), or the Equitable Distribution Law, gave courts the "judicial flexibility and discretion needed to issue orders necessary to preserve marital assets in danger of being dissipated during the pendency of the divorce proceeding."[6] Thereafter, in the 1985 case of *St. Angelo v. St. Angelo* and the 2013 case of *Stratton v. Stratton,* both courts relied on DRL Section 236(B) in granting motions to sell jointly titled marital residences *pendente lite*.[7] In both cases, the marital residences were facing foreclosure due to one party's refusal to make mortgage payments or comply with the other party's attempts to sell to ready and willing buyers.[8]

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The *D.R.D.* court revisited the Kahn holding. Like in *Harlan*, the *D.R.D.* court notes that the implementation of no-fault divorce "has the practical consequence of guaranteeing the termination of the tenancy-by-the-entirety because the divorce will occur and neither a judge nor a jury can vitiate the spouse's declaration as grounds for divorce." Thus, the *D.R.D.* court states that "because the divorce is certain, both spouses, upon the filing of the complaint, acquire or confirm their equitable share in the residence. As a matter of law to all third parties, the tenancy may be preserved but, as a matter of equity between the spouses, the tenancy by the entirety is severed."

In the 2021 New York Supreme Court decision in *D.R.D. v. J.D.D.*, Justice Dollinger determined that an interim sale of the marital residence was justified.[12] In *D.R.D.*, the defendant continued to live in the marital residence while the plaintiff paid for usual household expenses, but the defendant refused to sign a contract for sale of the residence, despite its considerable mortgage.[13] The plaintiff argued that "the financial facts of continued ownership of the property merited a court order to require the sale" given that "the outstanding balance of the mortgage… would erase any equity and neither [party] would be paid any proceeds at the time of the sale."[14] In granting the plaintiff's motion, the *D.R.D.* court reasoned that "equity—the governing principle embedded in the legislature's concept of equitable distribution—should weigh in favor of requiring an immediate—or at least prompt—sale of the residence during the pendency of the divorce."[15]

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dente lite sale of the marital residence in a no-fault divorce, despite the restrictions imposed by *Kahn*, because the no-fault divorce complaint effectively severs the tenancy by the entirety of any jointly owned marital residence and eliminates the DRL Section 234 impediment of preventing a court from dividing questions of title on an interim basis.[19]

It is important to also note that a plaintiff in a matrimonial action may voluntarily discontinue the divorce action under Section 3217(a)(1) of the New York Civil Practice Law and Rules ("CPLR"), and for those plaintiffs filing under DRL Section 170(7) no-fault grounds, the possibility of a voluntary discontinuance of said action may call into question when exactly a tenancy by the entirety is severed.[20] Under CPLR Section 3217(a)(1), any party asserting a claim may serve notice of discontinuance "at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim."[21] Therefore, it would seem that once a responsive pleading is served in a no-fault divorce action and there is no possibility of a voluntary discontinuance, the tenancy by the entirety relationship would be severed, following the reasoning in *D.R.D.*[22]

Finally, the *D.R.D.* court exposes an anomaly in New York matrimonial law that needs to be addressed, i.e., "a trial court cannot balance the equities of all the family—children included—in deciding whether to sell the marital residence while a no-fault divorce is pending, but the same court can balance the same equities in deciding exclusive use and possession of the property during the pendency and can apply the same equitable factors in the judgment of divorce or any post judgment decision."[23] As *D.R.D.* suggests, this anomaly can be resolved by allowing equity to intervene in a pending no-fault divorce so that courts may order the sale of the jointly owned marital residence *pendente lite* where appropriate.[24]

Endnotes

1 *Kahn v. Kahn*, 43 N.Y.2d 203, 206, 371 N.E.2d 809 (1977).

2 *See, e.g., D.R.D. v. J.D.D.*, 74 Misc.3d 237, 160 N.Y.S.3d 767 (Sup. Ct. Monroe Co. 2021); *Stratton v. Stratton*, 39 Misc.3d 1230(A), 972 N.Y.S.2d 147 (Sup. Ct. Sullivan Co. 2013); *St. Angelo v. St. Angelo*, 130 Misc.2d 583, 496 N.Y.S.2d 633 (Sup. Ct. Suffolk Co. 1985); N.Y. Domestic Relations Law §170(7).

3 *Kahn*, 43 N.Y.2d at 206; N.Y. Domestic Relations Law §234.

4 *Kahn*, 43 N.Y.2d at 206.

5 *Kahn,* 43 N.Y.2d 203; *See also Jancu v. Jancu,* 174 A.D.2d 428, 571 N.Y.S.2d 456 (1st Dep't App. Div. 1991); *Delvito v. Delvito*, 6 A.D.3d 487, 775 N.Y.S.2d 71 (2d Dep't App. Div. 2004); *Adamo v. Adamo*, 18 A.D.3d 407, 794 N.Y.S.2d 413 (2d Dep't App. Div. 2005); *Taglioni v. Garcia*, 200 A.D.3d 44, 157 N.Y.S.3d 7 (1st Dep't App. Div. 2021).

6 *Stratton,* 39 Misc.3d 1230(A); N.Y. Domestic Relations Law §236(B).

7 *St. Angelo,* 130 Misc.2d 583; *Stratton,* 39 Misc.3d 1230(A).

8 *St. Angelo,* 130 Misc.2d 583*; Stratton,* 39 Misc.3d 1230(A).

9 *Harlan v. Harlan*, 46 Misc.3d 1003, 998 N.Y.S.2d 769, 772 (Sup. Ct. Monroe Co. 2014); *Kahn,* 43 N.Y.2d 203.

10 *Harlan*, 46 Misc.3d at 1007; *Kahn,* 43 N.Y.2d 203.

11 *Harlan*, 46 Misc.3d at 1009.

12 *D.R.D.*, 74 Misc.3d 237.

13 *Id.*

14 *Id.* at 239.

15 *Id.* at 240.

16 *Id.* at 245; *see also Kahn*, 43 N.Y.2d 203.

17 *Harlan*, 46 Misc.3d 1003; *D.R.D.*, 74 Misc.3d at 245.

18 *D.R.D.*, 74 Misc.3d at 244.

19 *Id.*; *see also Kahn*, 43 N.Y.2d 203; N.Y. Domestic Relations Law §234.

20 N.Y. Civil Practice Law and Rules §3217(a)(1); N.Y. Domestic Relations Law §170(7).

21 N.Y. Civil Practice Law and Rules §3217(a)(1).

22 *D.R.D.*, 74 Misc.3d 237.

23 *Id.* at 253.

24 *Id.*

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