

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Cathy's positions must be rejected for a couple reasons. First, there is no such "automatic forfeiture rule" in Michigan. See *Sands v Sands*, 442 Mich 30, 36-37 (1993). While in the dispositional phase of a divorce action a court may award concealed property to the innocent spouse, that determination is to be made employing a variety of factors in reaching an equitable distribution. Second, because a judge's role is to achieve equity in a property distribution, a desire to "punish" a wrongdoer is not a valid consideration. Appropriate property distribution awards are not achieved by rigid, concrete rules of distribution (see *Sparks v Sparks*, 440 Mich 141, 158-159 [1992]), like an automatic forfeiture rule or a metric of punishment. In that regard, Cathy's argument has no merit.

However, that is not to say that employing proper principles of Michigan property distribution, Karl's wrongdoing would be either unaccounted for or ignored. Under Michigan law, property distribution must be equitable, but need not be equal. *Sparks* at 159. Under *Sparks*, the trial court is called on to consider a number of factors, and some may not even be relevant to a given case, while others may be far more salient. To fashion an equitable property distribution, the trial court must have the flexibility to achieve an equitable distribution on the given circumstances.

Under *Sparks*, the factors to consider are "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Sparks* at 159-160. As stated, a proper distribution of the marital estate should consider some or all of these factors.

Given the factual scenario presented, a few of the factors warrant prominent consideration and weight. First, this is a 35-year marriage; a long marital relationship by any standard. Second, the age of the parties, especially as those ages impact

the earning abilities of the parties. Mid-sixties means one thing for Cathy and yet another for Karl. Karl runs his own business and may continue to do so regardless of his age. Cathy has been out of the work force for decades and in her mid-sixties is not likely to embark on out-of-the-home employment. And significantly, the past relations and conduct of the parties, i.e. Karl's effort to hide assets, is certainly a primary consideration. While the facts are relatively silent on the remaining factors, even considering them contributes little in arriving at an equitable distribution.

As previously stated, an equitable distribution need not mean an equal distribution. However, nothing prevents a court from awarding an unequal distribution that is still equitable. The facts presented here supply the type of scenario where unequal is nevertheless equitable.

Cathy may prevail in getting a greater share of the marital estate but not all of it, because the former would be equitable where the latter would not. Cathy might prevail in getting the concealed property or its value--off the top--because that too may be equitable. But at bottom, her award will not be based on the nonexistent automatic forfeiture rule nor a desire to punish, but rather an appropriate consideration of the factors under *Sparks*.