

FAMILY LAW

Need to Disturb the Status Quo? When It's OK to Sell Marital Property Pendente Lite

By Valerie Jules McCarthy

Divorce litigants often hear judges and their attorneys recite the importance of “maintaining the status quo” during the pendency of the litigation. N.J.S.A. 2A:34–23 imparts the court with the statutory authority to provide pendente lite relief in the form of support in matrimonial actions, which is well established in practice and precedent. *Crowe v. De Gioia*, 90 N.J. 126, 130 (1982); *Schiff v. Schiff*, 116 N.J. Super. 546, 562 (App.Div.1971), *certif. den.* 60 N.J. 139 (1972). The general purpose of pendente lite support is to maintain the parties in the same or similar situation they were in prior to the inception of the litigation “to preserve the status quo through the device of awarding temporary financial support pending a full investigation of the case.” *Mallamo v. Mallamo*, 280 N.J. Super. 8, 11-12 (App.Div.1995).

However, with an increasing number of middle-class families struggling to make ends meet financially, it is often untenable to maintain the status

quo during the pendency of a divorce. Many married couples in two-income households are barely getting by, particularly during a divorce when it is common for the parties’ expenses to increase. In certain situations, parties may be living in two households and find themselves unable to meet two sets of shelter expenses while trying to maintain their other transportation and personal expenses. These financial strains may cause couples to fall in arrears on their mortgage and other bills and even face foreclosure. Those in this predicament may want or need to disturb the status quo by selling an asset in order to reduce their expenses or free up funds to pay their ongoing expenses.

In the past, it had been argued that N.J.S.A. 2A:34-23 authorizes the equitable distribution of marital assets *only* upon the divorce of the parties and not before. N.J.S.A. 2A:34-23(h) provides:

Except as provided in this subsection, in all actions where a judgment of divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union couple is entered the court may make



Valerie Jules McCarthy

such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts or gifts between partners in a civil union couple shall be subject to equitable distribution.

Valerie Jules McCarthy is an associate in the Family Law Group of Pashman Stein Walder Hayden in Hackensack.

Over the past 40 years, the law surrounding whether a court may order the sale of a marital asset, such as real property, pending a divorce has evolved substantially.

A court's authority to order the sale of a marital home before the divorce, and against the wishes of one of the parties, was initially addressed in the 1978 case, *Grange v. Grange*, 160 N.J. Super. 153 (App.Div. 1978). In *Grange*, the couple's former marital residence, a condo in New Jersey, was not occupied as both parties had relocated outside of New Jersey. The plaintiff claimed that he could not afford to maintain three residences, pay support, and pay the defendant's counsel fees pendente lite. He sought, without success, to have the defendant cooperate in the sale of their former marital residence. He then filed a motion to compel the sale of the property, and the trial court authorized the sale without prejudice, subject to the defendant's right to challenge the price for the property and to seek equitable distribution based upon the fair market value of the condominium. The defendant appealed.

The Appellate Division framed the issue as "whether in a matrimonial matter the court may make a pendente lite order relating to the equitable distribution of the marital assets and, more specifically, order the sale of the marital dwelling absent the consent of the parties." *Grange* at 157. The panel reviewed N.J.S.A. 2A:34-23 and found "no statutory authority for pendente lite action of this kind in connection with equitable distribution." *Id.* at 158. The panel concluded that the trial court lacked authority to order a pre-judgment distribution of the marital property absent consent of the parties, and reversed the judgment of the trial court.



Several years after the *Grange* decision, the Supreme Court Committee on Matrimonial Litigation addressed the issue of the pendente lite sale of marital assets. The committee found that the "Grange rule is unduly restrictive, contrary to the broad discretionary powers of a court of equity and generally unfair." Supreme Court Committee on Matrimonial Litigation, Phase Two, Final Report, 81 N.J.L.J. Supp. at 1 (July 16, 1981). Among other things, the committee recommended that trial courts have "the discretionary power to permit a party to utilize a portion of the proceeds when ... basic living expenses cannot be paid in any other way" and "for other good and emergent cause." *Id.*

Similarly, several trial courts have distinguished *Grange* on the facts and authorized the pendente lite sale of marital assets in order to provide support to a dependent spouse or child. In *Witt v. Witt*, 165 N.J. Super. 463 (Ch.Div.1979), the court found that the pendente lite sale of the marital home could be ordered against an absent party when it concluded he had previously consented to the sale by executing a listing agreement.

In *Samuelson v. Samuelson*, 198 N.J. Super. 390 (Ch.Div.1984), the court tackled the issue of whether a pendente lite distribution of interest monies, which were accruing on the proceeds from the sale of the marital residence could be used for support purposes. The court ordered pendente lite support to be paid from the interest accumulations from the sale proceeds of the marital residence. The court found that:

[I]t would be palpably inequitable to permit this interest to accumulate, and simultaneously compel the plaintiff to live at virtually a pauperized level, based upon the limited amount of alimony which could be ordered, considering the defendant's state of income. Therefore, this Court finds that the limitations and restrictions set forth in *Grange v. Grange*, supra, are inapplicable to the factual posture of this case, and further finds that it has jurisdiction and authority to order *pendente lite* support payable from interest

accumulations of otherwise equitably distributable assets when no other source of support is available.

In addition, in *Pelow v. Pelow*, 300 N.J. Super. 634 (App.Div. 1996), the plaintiff sought to have the defendant pay the mortgage, taxes, and other expenses of the home, and the defendant sought to sell the marital home. Due to the dire financial circumstances of the parties, the trial court ordered the listing of the home for sale. In reaching that decision, the trial court limited the reach of *Grange* to a “sale of convenience.” *Pelow* at 643. The court held that *Grange* should not control where the sale was necessary “to avoid irreparable harm to a spouse and/or the children.” *Pelow*, 300 N.J. Super. at 642-643.

Again, the issue of a court’s authority to order the sale of marital property was raised in the 2005 case of *Randazzo v. Randazzo*, 184 N.J. 101 (App. Div. 2005). The Supreme Court in *Randazzo* finally clarified this seemingly unsettled issue by holding that “a trial court has the equitable power to order the sale of marital real property and, if the circumstances warrant, to order the proceeds be distributed to serve the best interests of the parties.” *Id.* at 102.

In *Randazzo*, a husband and wife faced significant financial issues after losing a towing contract with the city of Clifton New Jersey. During the divorce, the parties agreed to sell

a property in Florida. However, the husband later refused to cooperate with the sale of the property. The trial court entered an order stating that the wife’s request to sell the Florida property was moot because the Husband already agreed to the sale. The husband continued to oppose the sale of the property and the New Jersey Supreme Court agreed to hear the husband’s petition and addressed the issue of whether the trial court erred in ordering the sale of the property before the entry of the Final Judgment of Divorce.

The court in *Randazzo* authorized the pendente lite sale of the parties’ Florida property, and in doing so expressly disagreed with *Grange*, and held as follows:

The Family Part is a court of equity. We read the statutory requirement that directs equitable distribution at the time of the divorce judgment to be limited by the portion of N.J.S.A. 2A:34-23 that authorizes the court in its discretion to “make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children.” We conclude that, consistent with N.J.S.A. 2A:34-23 and Rule 5:3-5, *the trial court may exercise its discretion to order the sale of marital assets and the utilization of the proceeds in a*

manner as “the case shall render fit, reasonable and just.” We acknowledge that in many cases the proceeds from the sale of marital assets should be placed in escrow pending final distribution. But in other cases, the proceeds may properly be used to pay marital obligations. We leave to the discretion of the trial court the varying circumstances that may justify the sale of the marital assets and the utilization of the proceeds prior to the divorce judgment.”

Id. at 113 (emphasis added).

Whether or not a court will order the pendente lite sale of marital assets remains fact-sensitive. A party must prove financial hardship in maintaining the status quo and the necessity for the pendente lite sale. However, the substantial evolution in the case law surrounding the ability for a court to order the sale of marital assets pending a divorce should provide families some comfort and encourage attorneys to make more applications seeking the sale of assets pendente lite when doing so will benefit their clients. There is clear authority for disturbing the status quo and liquidating property when the financial circumstances warrant such action, and parties should avail themselves of this option instead of struggling to maintain a status quo which is unachievable. ■