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## FAMILY LAW

# Failure to Disclose and Constructive Trust in Divorce

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*Special to the Legal*

For many family law practitioners, 23 Pa.C.S. Section 3505(d) is a safety blanket protecting their clients in situations where a party fails to disclose information regarding an asset or assets with a fair market value of \$1,000 or more which results in that asset or assets being omitted from the final distribution of property in a divorce matter. Under Section 3505(d): “If a party fails to disclose information required by general rule of the Supreme Court and in consequence thereof an asset or assets with a fair market value of \$1,000 or more is omitted from the final distribution of property, the party aggrieved by the nondisclosure may at any time petition the court granting the award to declare the creation of a constructive trust as to all undisclosed assets for the benefit of the parties and their minor or dependent children, if any.” However, application of Section 3505(d) is not as automatic as the practitioner may believe. The intersection of where difficulty may arise is the situation where the parties resolve the economic circumstances in their case by agreement and the agreement contains a statement or statements acknowledging that each party has made a full and



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complete disclosure to the other of his or her entire assets and liabilities. The recent case of *Bennett v. Bennett*, \_\_\_ A.3d \_\_\_, 2017 Pa. Super. 253 (Aug. 4), is one of those cases.

In the *Bennett* case, the trial court entered an order imposing a constructive trust over the husband’s pension benefit that accrued during his marriage to the wife. The husband appealed and the Superior Court reversed the trial court’s decision. The facts of the *Bennett* case are as follows: The husband and wife divorced approximately 23½ years after they married on Jan. 29, 1972. The parties entered into a property settlement agreement that settled their equitable distribution matter. In the parties’ agreement, it

included the distribution of marital assets and the “husband’s assent to paying the marital liabilities, alimony, child support and the children’s college expenses.” The agreement also included a provision pertaining to legal advice where each party acknowledged that “he and she has had the opportunity to consult with independent legal counsel regarding the terms and provisions of this agreement,” and that “each party has made a full and complete disclosure to the other of his and her entire assets and liabilities, and each is informed and familiar with the property, estate and assets, earnings and income of the other.” According to the opinion, a paragraph titled “distribution of property” contained language that stated: “The parties have previously divided to their mutual satisfaction all ... retirement accounts ... and all other assets.”

The parties divorced in July of 1995, and the agreement was incorporated but not merged into their divorce decree. In September 2014, 19 years after the parties’ divorce decree was entered, The wife filed a petition “to impose a constructive trust pursuant to 23 Pa.C.S. Section 3505(d). In the wife’s petition, she averred that the husband failed to make a full disclosure of the pension benefit that he earned during the marriage. In her petition, she requested “the creation

of a constructive trust as to the previously undisclosed marital asset, an accounting of the monthly benefits the husband received since the account entered pay status, and 50 percent of the marital value of past and future benefits.” The wife also requested counsel fees.

According to the opinion, the husband filed preliminary objections “based upon the position that the formation of the constructive trust pursuant Section 3505(d) required, as a prerequisite, the filing of an inventory during the equitable distribution process, and, in the absence of that form, the statutory provisions is inapplicable.” The opinion also highlights that the “husband leveled a preliminary objection to the petition based upon insufficient specificity insofar as the wife failed to assert that the husband secreted the pension’s existence when the agreement was formed.” The trial court overruled the husband’s preliminary objections and after a hearing on the wife’s petition entered an order granting the wife’s petition for a constructive trust.

The Superior Court highlighted that the wife did not assert that the husband misled her or lied about the existence of the pension benefit. The wife’s basis for her petition was that she was unaware of the pension, and believed that the home was the only asset to be divided.

One of the most important provisions in a property settlement agreement is the disclosure provision. If a property settlement agreement provides that a full and complete financial disclosure has been made by the parties, a presumption attaches that full and complete disclosures has occurred. The presumption can only be rebutted if it is proven by clear and convincing evidence that fraud or misrepresentation has occurred. Interestingly, an agreement is valid even if it does not contain financial disclosure itself and the agreement can be upheld if it merely recites that such disclosure has been made.

What is interesting is that Section 3505(d) states that: “If a party fails to disclose information required by general rule of the Supreme Court.” The Superior Court in the *Bennett* case states that Section 3505(d) is triggered by a breach of a parties’ affirmative obligation to disclose information in an inventory submitted pursuant to Rule 1920.33. However, when parties settle the economic aspect of a divorce amicably and enter into a property settlement agreement, in many instances, an inventory under Rule

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1920.33 is not submitted. Therefore, the safety net of Section 3505(d) may be hard to apply in such instances as a party will not have the opportunity of pointing to the other party’s inventory to trigger Section 3530(d), regarding an asset unknown to one party which was not brought to the attention of the other party. However, when a provision in a property settlement agreement states that full disclosure has been made, the presumption arises and the burden falls on the challenging party. As such, a party should be careful that full disclosure has been made prior to signing an agreement with such a provision.

In the Superior Court’s opinion, it stated: “the trial court concluded that the wife should not be bound by the disclosure recital because she was not actually familiar with all of the marital assets that she certified knowing about.” The Superior Court then states: “However, in light of [wife’s] evidentiary burden

to rebut the presumption of disclosure, evidence that a potentially inadvertent or negligent omission may have occurred is woefully inadequate to establish fraud or misrepresentation that would negate the wife’s certification that she received full disclosure.” According to the opinion the wife simply testified that she was unaware of the pension when she signed the “recital certifying her familiarity with the assets.”

Again, being that the wife had a heightened standard of clear and convincing evidence and the fact that she failed to assert fraudulent misrepresentation, the superior court reversed the trial court’s order imposing a constructive trust over the pension benefits.

This case is an important case for the family law practitioner in that it reiterates the importance and strength of a disclosure provision in a property settlement agreement. It also reminds the practitioner that a constructive trust is not an automatic remedy in the situation where a party fails to disclose an asset prior to the parties amicably entering into a property settlement agreement where no inventory has been provided prior thereto. •