

FAMILY LAW — Trusts — Spousal Support

Tannen v. Tannen, A-53 September Term 2010; Supreme Court; *per curiam* opinion; decided December 8, 2011. On certification to the Appellate Division, 416 N.J. Super. 248 (App. Div. 2010). [Sat below: Judges Wefing, Messano and LeWinn in the Appellate Division.] DDS No. 20-1-4515 [6 pp.]

For purposes of determining alimony, income may not be imputed to a party based on a beneficial interest in a discretionary support trust.

(Note: The Supreme Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in Judge Messano's opinion.)

At issue in this matrimonial action is whether, for purposes of determining alimony, it was appropriate to impute income to a party based on her beneficial interest in a discretionary support trust.

Plaintiff Mark Tannen and defendant Wendy Tannen were married for nearly 18 years. During the marriage, Wendy's parents settled an irrevocable, discretionary support trust with Wendy as sole beneficiary and Wendy and her parents as co-trustees (Wendy Tannen Trust). Before trial, the judge ordered Mark to name the Wendy Tannen Trust and other family trusts as third-party defendants. The case went to trial only on the issues of equitable distribution, alimony and child support.

In rendering its judgment, the court applied the *Restatement (Third) of Trusts* to determine that the terms "support" and "maintenance" in the Wendy Tannen Trust required the trustees to distribute "such sums as are necessary to maintain" Wendy's lifestyle. The court determined it must consider trust benefits before computing alimony and imputed income to Wendy from the Wendy Tannen Trust. In the final judgment of divorce, the trial court ordered the trustees to make a \$4,000 monthly payment to Wendy and to continue making payments for shelter-related expenses that it historically had made. Based on that imputed income, the court calculated Mark's permanent monthly alimony obligation at \$4,500.

Mark, Wendy and the trusts cross-appealed various aspects of the judgment and prior orders of the trial court. The Appellate Division reversed in part, affirmed in part, and remanded the matter to the trial court for further proceedings consistent with its published opinion.

The Appellate Division noted that the *Restatement (Third) of Trusts* had not been adopted by any reported decision in New Jersey and, if adopted, would operate to change the law in this state. The panel recognized that pursuant to the *Restatement (Third) of Trusts*, Wendy would have an enforceable interest in the income of the Wendy Tannen Trust. The panel determined, however, that as a court of intermediate appellate jurisdiction it would not presume to adopt that restatement and suggested that such a decision would be more appropriately made by the Supreme Court.

The Appellate Division held that by applying existing law, which has incorporated various provisions of the *Restatement (Second) of Trusts*, Wendy's beneficial interest in the Wendy Tannen Trust was not an "asset held by" her for purposes of the alimony statute. Thus, the panel determined that no income from the Wendy Tannen Trust should have been imputed to Wendy in determining Mark's alimony obligation. The panel also reversed and remanded other provisions of the judgment of divorce regarding computation of the alimony award, the child-support award and equitable distribution.

The Supreme Court granted defendant's petition for certification.

Held: The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Messano's opinion.

Chief Justice Rabner and Justices Long, LaVecchia, Albin, Hoens and Patterson join in the Court's opinion. Judge Wefing (temporarily assigned) did not participate.

— By Debra McLoughlin