

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                     |   |                                  |
|---------------------|---|----------------------------------|
| ELLEN P. BRENNAN,   | § |                                  |
|                     | § | No. 32, 2006                     |
| Respondent Below,   | § |                                  |
| Appellant,          | § | Court Below: Family Court of the |
|                     | § | State of Delaware in and for     |
| v.                  | § | New Castle County                |
|                     | § |                                  |
| MICHAEL J. BRENNAN, | § | No. 05-05185                     |
|                     | § |                                  |
| Petitioner Below,   | § |                                  |
| Appellee.           | § |                                  |

Submitted : April 17, 2006  
Decided : May 19, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

**ORDER**

This 19<sup>th</sup> day of May 2006, upon consideration of the briefs of the parties it appears to the Court that:

(1) Respondent-Appellant, Ellen P. Brennan (“Wife”) appeals the order of the Family Court denying her motion to reopen matters ancillary to her divorce from Petitioner-Appellee Michael J. Brennan (“Husband”). Because the Family Court failed to analyze Wife’s motion using the factors in *Donahue v. Donahue*,<sup>1</sup> we remand this matter.

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<sup>1</sup>*Donahue v. Donahue*, 2005 Del. LEXIS 224, (Order).

(2) On May 5, 2005 the Family Court granted Husband’s divorce petition and retained jurisdiction to decide ancillary matters. The parties prepared a notarized Financial Report that recognized Wife was entitled to receive an interest in the appreciated value of the marital residence during the marriage, or “*Albanese* interest.”<sup>2</sup>

(3) The parties disagree in their briefs on the significance of this recognition. Wife characterizes it as an agreement to provide half the value of the appreciation. Husband characterizes the provision only as recognition that any interest would be determined pursuant to the factors established in *Albanese* due to the home’s pre-marital nature. In either case, Husband concedes in his brief that “Husband’s portion of the Financial Report did indicate that wife is entitled to receive an *Albanese* interest in his pre-marital home.”

(4) Husband’s counsel prepared the Financial Report and gave it to Wife’s counsel on June 1, 2005. Pursuant to Rule 16(c)(1) and the divorce decree, Wife was to submit the Financial Report to the Family Court.<sup>3</sup> After making several changes, Wife’s counsel asked for an updated signature page from

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<sup>2</sup> See *Albanese v. Albanese*, Del. Supr., No. 113, 1995 (Feb. 8, 1996).

<sup>3</sup> Del. Fam. Ct. Civ. R. 16(c)(1) states in part:

After the entry of a divorce decree, a petitioner requesting ancillary relief shall complete a written report in the form approved by the Court known as a Rule 16(c) Financial Report, attaching thereto such documents as may be required by the instructions accompanying the form and shall forward an original notarized copy to the respondent or attorney for respondent within 30 days of the granting of the final decree of divorce and advise the Court in writing that same has been accomplished... (emphasis added).

Husband before submitting it to the Court. Wife's counsel then relied on receiving the updated signature page from Husband as the reminder to submit the Financial Report to the Family Court.

(5) Husband's counsel mailed the updated signature page to Wife's counsel on or about August 4, 2005. Wife's counsel was on vacation. Wife's counsel's secretary filed husband's updated signature page, but not the entire Report with the Family Court. On November 1, 2005, the Family Court dismissed the ancillary matters *sue sponte* because the Report had not been filed. Wife filed motions to reopen the ancillary matters and to reargue. Wife also filed the Financial Report. The Family Court denied Wife's motion and this appeal followed.

(6) Wife's counsel contends the Family Court abused its discretion because his failure to file the Report on time was an inadvertent oversight. On appeal, he cites Family Court Rules 6(b) and 60(b). Rule 6(b) Enlargement of Time provides "the Court for cause shown may at any time in its discretion (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect..." This Court held in *Reynolds v. Reynolds* that under Rule 6(b) "the Family Court has the discretionary power to permit what would otherwise be an untimely filing of the

Report which is required by Rule 16.”<sup>4</sup> The claim on appeal by Wife and her counsel is that under our decision in *Reynolds*, the Family Court should not have dismissed the ancillary matters to a divorce when the delay in filing a 16(c) financial report was attributable solely to an attorney’s candidly admitted good faith mistake.<sup>5</sup>

(7) Rule 60(b) allows Family Court to provide relief to a party from an order due to mistakes, new evidence, fraud, and other reasons justifying relief.<sup>6</sup> This Court recently addressed the appropriate standard for relief under a Rule 60(b) motion. In *Donohue v. Donohue*, we said:

It is well settled in Delaware that a decision to vacate a dismissal and reopen a judgment is left to the discretion of the trial court. Although Delaware courts afford Family Court Civil Rule 60(b)(1) liberal construction, the movant must satisfy three elements before a motion under that Rule will be granted. These elements require the defaulting

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<sup>4</sup> *Reynolds v. Reynolds*, 595 A.2d 385, 388 (Del. 1991).

<sup>5</sup> See *Reynolds*, 595 A.2d at 388.

<sup>6</sup> Del. Fam. Ct. Civ. R. 60(b)(1) states in part:

Rule 60(b) provides that “the Court may relieve a party or legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the Court. The procedure for obtaining relief from judgments shall be by motion as prescribed in these Rules or by an independent action.

party to show (1) excusable neglect in the conduct that resulted in the default judgment (or order of dismissal) being taken, (2) the outcome of the action may be different, if relief is granted, from what it will be if the judgment is permitted to stand and (3) substantial prejudice will not be suffered by the nonmoving party if the motion is granted. To constitute excusable neglect, the conduct of the moving party must have been that of a reasonably prudent person.<sup>7</sup>

(8) The Family Court did not analyze Wife's motion under *Donahue*.

Instead, it said:

The Rule 16(c) Report was due on or about July 6, 2005. The court entered the Order of Dismissal almost five months later on November 1, 2005. Form 434 informed the parties' attorneys that all ancillary matters "shall" be dismissed if both parties fail to file the Report. The Form was issued on May 5, 2005.

(9) We take this opportunity to reiterate that *Donohue* provides the appropriate test for the Family Court to apply when considering a motion under Rule 60(b)(1). We conclude that the Family Court abused its discretion by not applying the *Donohue* test and we remand this matter to the Family Court to apply *Donohue*. On remand, the Family Court should determine (1) whether there was excusable neglect by Wife's counsel when Wife's counsel was not aware that the new signature page for the completed financial report had been returned due to office staff oversight; (2) whether the outcome in this case could have been different (*i.e.*, if Wife could receive a portion of the appreciated value of the

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<sup>7</sup> *Donohue v. Donohue*, 2005 Del. LEXIS 224, \*4-5 (Order) (footnotes and citations omitted).

house); and (3) whether Husband would suffer substantial prejudice (*i.e.*, be in the same position as had the Financial Statement been timely filed).

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED to the Family Court. Jurisdiction is not retained.

BY THE COURT

/s/Henry duPont Ridgely  
Justice