Tim Braughler Quoted in Massachusetts Lawyers Weekly, Ex-wife's Hatchet Attack Excuses Husband's Performance under Separation Agreement

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After his ex-wife attacked him with a hatchet, a man was excused from making further payments under a separation agreement, the Appeals Court has decided, affirming the result of a bench trial in Superior Court.

On Aug. 11, 2015, Julie Rabinowitz dressed in camouflage and a ski mask and hid in the minivan belonging to her ex-husband, Dr. Mark Schenkman, waiting for him to exit his North Attleboro dental office.

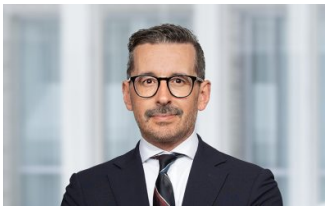
In the attack that ensued, Schenkman was able to disarm her after a brief struggle, suffering only cuts to his arms and chest, according to contemporaneous press reports.

"In the pandemonium of the attack, the wife accused the husband of ruining her 'reunification plans'" with the couple's four children, of whom Schenkman had been granted full custody, the Appeals Court panel's Nov. 16 decision notes.

Before the attack, Schenkman had lived up to his end of the separation agreement that was part of their 2013 divorce, making 17 of 60 monthly payments of $3,533.33 to Rabinowitz, gradually providing her a share of the marital estate attributable to the value of Schenkman's ownership of his dental practice. Schenkman was also required to carry a life insurance policy.

On Dec. 16, 2015, Rabinowitz pleaded guilty to armed assault with intent to murder and other charges and received a sentence of two and a half years in the house of correction, one year to serve and 10 years' probation.

On Oct. 16, 2019, she filed suit in Bristol Superior Court, arguing that Schenkman should have kept making those monthly payments, hatchet



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attack notwithstanding.

In challenging Judge Jackie A. Cowin's ruling in her husband's favor, Rabinowitz contended that Cowin had erroneously applied the implied covenant of good faith and fair dealing to excuse Schenkman's performance. An equitable division of property under G.L.c. 208, §34, is not modifiable, and the separation agreement was not conditioned on post-agreement conduct, she argued.

But the panel found that courts have sometimes revisited property division in similar — if not identical — circumstances, such as the 2000 Supreme Judicial Court case Nile v. Nile, in which a husband elected to receive disability pay in lieu of his pension to deprive his ex-wife of her share of that pension.

"We see nothing in §34 that prohibits a court from entertaining the contract defense raised here — particularly where the parties understood that their separation agreement would survive the divorce judgment as an independent contract," Judge Christopher P. Hodgens wrote on behalf of the panel.

Hodgens noted that whether Rabinowitz committed a breach of the implied covenant of good faith and fair dealing was a question for Cowin, which would not be disturbed unless clearly erroneous.

"Based on the 'totality of the circumstances'… a fact finder could conclude from this evidence that the wife tried to thwart the consequences of the separation agreement by killing the husband, accelerating the property division through the life insurance policy, and obtaining custody of the children," Hodgens wrote. "A fact finder could also conclude that the wife tried to seriously injure the husband and impair his ability to fund the carefully structured monthly payments with income derived from the ongoing dental practice."

The panel also rejected Rabinowitz's argument that because her ex had survived the attack, Schenkman had not suffered any "real harm."

"The wife's extreme conduct, manifestly aimed at destroying or injuring the husband's rights that had been fixed by the separation agreement, may be viewed as precisely the type of behavior prohibited by the covenant of good faith and fair dealing because the wife tried to 'recapture opportunities forgone,'" Hodgens wrote, citing the SJC's 1991 decision Anthony's Pier Four, Inc. v. HBC Assocs.

Rabinowitz also tried to argue that upholding Cowin's decision would create a "flood of litigation concerning allegations of post-divorce misconduct aimed at invalidating property settlements."

But no such flood of litigation had ensued after the Nile decision, the panel noted, adding that its decision was limited to the unique facts before it.

Charles G. Devine Jr.Aside from those unique facts, it is not uncommon for a party to a separation agreement to seek enforcement either in District or Superior Court, says Schenkman's attorney, Charles G. Devine Jr. of Wellesley.

As he assessed the "ordinary contract defenses" available to his client, a breach of the covenant of good faith and fair dealing seemed to fit, he says.

"If [Rabinowitz's] plan succeeded as conceived, and she got away with it, she would have received the life insurance policy proceeds and been the custodian of the children," Devine says. "She had a lot to gain from it."

While Rabinowitz's counsel tried to argue that the fact that the plot failed should matter, Cowin and the Appeals Court correctly found that's not the law, Devine says.

Other decisions dealing with the covenant of good faith and fair dealing have tended to deal with far more subtle conduct, Devine says. For example, in Anthony's Pier Four, the defendant had exercised a discretionary right under a contract that had the consequence of hurting a buyer, which was nonetheless found to be a breach of the covenant.

"Very rarely is [a breach] as blatantly obvious as attempted murder," he says.

Timothy D. BraughlerBoston family law attorney Timothy D. Braughler says the Rabinowitz decision is "a reminder to me and other practitioners that a separation agreement in a divorce is a contract, subject to normal contract principles."

Not only that, but as the panel noted, parties to a separation agreement stand as fiduciaries to one another and are held to higher standards than are tolerated in arm's-length transactions, Braughler adds.

Devine says that fiduciary status allowed him to make a "belt-and-

suspenders sort of argument," that even if the covenant of good faith and fair dealing had not been violated, the hatchet attack could still constitute a fiduciary duty breach.

In the rare cases in which courts undo property divisions, Braughler notes, it is typically due to an error, like an overlooked parcel of marital property, or fraud, such as an asset that had been hidden at the time of the divorce.

Wellesley Hills family law attorney Jonathan E. Fields agrees.

"It's always interesting for practitioners to understand what the guardrails and boundaries are" to reopening a settlement agreement, he says.

While Fields believes that the panel reached the right result, he was surprised that neither the parties nor the court cited a seminal case regarding exceptions to the finality of surviving provisions of a separation agreement, the SJC's 1976 decision in Knox v. Remick. In Knox, the SJC ruled that an agreement concerning interspousal support should be specifically enforced, "absent countervailing equities."

A murder attempt by one ex-spouse against the other would have fit neatly into the box of "countervailing equities," Fields suggests.

Even though the court made clear that it views Rabinowitz as a rare case with extreme facts, Haverhill family law attorney Marc A. Moccia says he would not be surprised if the notoriety generated by those extreme facts prompts other family law attorneys to try to argue that the circumstances of their case, too, amount to a breach of the covenant of good faith and fair dealing.

Rabinowitz's attorney, Mark Booker of Fall River, had not responded to requests for comment as of Lawyers Weekly's press time.