

## SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

### **Mark Tannen v. Wendy Tannen (A-53-10) (066951)**

**(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, which is published at 416 N.J. Super. 248 (App. Div. 2010).)**

**Argued September 13, 2011 -- Decided December 8, 2011**

### **PER CURIAM**

The issues in this matrimonial action include 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 eighteen 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. This case went to trial only on the issues of equitable distribution, alimony, and child support. In rendering its judgment following trial, 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. Tannen v. Tannen, 416 N.J. Super. 248 (App. Div. 2010).

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 N.J.S.A. 2A:34-23(b)(11) 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 addressed other arguments of the parties concerning calculation of alimony, child support, equitable distribution, and attorneys' fees, and it remanded the matter to the trial court for further proceedings.

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.**

MARK TANNEN,

Plaintiff-Appellant,

v.

WENDY TANNEN,

Defendant-Respondent,

v.

WENDY TANNEN TRUST, WENDY G.  
TANNEN, LEONARD J. PHILLIPS  
and GLORIA PHILLIPS, as  
trustees, PHILLIPS FAMILY  
DYNASTY TRUST, WENDY G.  
TANNEN and ROBERT A. BERTHA,  
CPA, as trustees, BLAKE  
GORDON TANNEN TRUST, WENDY G.  
TANNEN, as trustee, and  
ELIZABETH ROSE TANNEN TRUST,  
WENDY G. TANNEN, as trustee,

Third-Party Defendants-  
Respondents.

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MARK TANNEN,

Plaintiff-Respondent and  
Cross-Appellant,

v.

WENDY TANNEN,

Defendant,

v.

WENDY TANNEN TRUST, WENDY G. TANNEN, LEONARD J. PHILLIPS and GLORIA PHILLIPS, as trustees, PHILLIPS FAMILY DYNASTY TRUST, WENDY G. TANNEN and ROBERT A. BERTHA, CPA, as trustees, BLAKE GORDON TANNEN TRUST, WENDY G. TANNEN, as trustee, and ELIZABETH ROSE TANNEN TRUST, WENDY G. TANNEN, as trustee,

Third-Party Defendants-Appellants.

Argued September 13, 2011 - Decided December 8, 2011

On certification to the Superior Court, Appellate Division, whose opinion is reported at 416 N.J. Super. 248 (2010).

Edward S. Snyder argued the cause for appellant (Snyder & Sarno, attorneys; Mr. Snyder and Tracey Alfano on the brief).

Jay J. Rice argued the cause for respondents Wendy Tannen Trust, et al. (Nagel Rice, attorneys; Mr. Rice and Randee M. Matloff on the briefs).

Shelley D. Albert argued the cause for respondent Wendy Tannen (Dario Yacker Suarez & Albert, attorneys).

Glenn A. Henkel argued the cause for amicus curiae New Jersey State Bar Association (Richard H. Steen, President, attorney; Mr. Steen, of counsel; Mr. Henkel, Martin L. Bearg, Lawrence A. Friedman, Richard H. Greenberg, Stephanie F. Hagan, Richard Kahn, Jeralyn L. Lawrence, Daniel M. Serviss, and Thomas J. Snyder on the brief).

PER CURIAM

The judgment of the Appellate Division is affirmed, substantially for the reasons expressed in Judge Messano's opinion of the Appellate Division reported at 416 N.J. Super. 248 (2010).

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, HOENS, and PATTERSON join in the Court's opinion. JUDGE WEFING (temporarily assigned) did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-53

SEPTEMBER TERM 2010

ON CERTIFICATION TO Appellate Division, Superior Court

MARK TANNEN,

Plaintiff-Appellant,

v.

WENDY TANNEN,

Defendant-Respondent,

v.

WENDY TANNEN TRUST, WENDY G. TANNEN, LEONARD J. PHILLIPS and GLORIA PHILLIPS, as Trustees, PHILLIPS FAMILY DYNASTY TRUST, WENDY G. TANNEN and ROBERT A. BERTHA, CPA, as trustees, BLAKE GORDON TANNEN TRUST, WENDY G. TANNEN, as trustee, and ELIZABETH ROSE TANNEN TRUST, WENDY G. TANNEN, as trustee,

Third-Party Defendants- Respondents.

DECIDED December 8, 2011

Chief Justice Rabner PRESIDING

OPINION BY Per Curiam

CONCURRING/DISSENTING OPINIONS BY \_\_\_\_\_

DISSENTING OPINION BY \_\_\_\_\_

CHECKLIST	AFFIRM	
CHIEF JUSTICE RABNER	X	
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE HOENS	X	
JUSTICE PATTERSON	X	
JUDGE WEFING (t/a)	-----	-----
TOTALS	6	

