

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Borzilleri v. Borzilleri

2026 NY Slip Op 02814 (N.Y. Ct. App. 2026) · No. 2020-09665 · Decided May 6, 2026

SUMMARY

The Appellate Division, Second Department, dismissed as academic portions of an appeal and cross-appeal concerning maintenance, prospective child support, and specified equitable-distribution issues because of a subsequent stipulation. It affirmed the judgment of divorce insofar as reviewed, including determinations regarding imputed income, classification and distribution of real property and commingled assets, and an award of attorneys' fees. The court also declined to increase the attorneys' fee award.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Barry E. Warhit, J.; Carl J. Landicino, J.; Phillip Hom, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	May 6, 2026
DOCKET	2020-09665
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiff appealed and the defendant cross-appealed from a judgment of divorce entered after a nonjury trial. While the appeals were pending, the parties entered into a so-ordered stipulation resolving or waiving several financial issues. The Appellate Division dismissed portions of the appeal and cross-appeal as academic and affirmed the judgment insofar as reviewed.
STANDARD OF REVIEW	Child-support income-imputation and attorneys'-fee determinations are reviewed for abuse of discretion, with deference given to credibility determinations. Equitable-distribution determinations are reviewed for whether the trial court improvidently exercised its discretion, and credibility findings after a nonjury trial receive great weight on appeal. Issues rendered academic by a subsequent stipulation are dismissed.

PRECEDENTIAL VALUE	Published intermediate appellate decision; currently uncorrected and subject to revision before publication in the Official Reports.
PARTIES	John Borzilleri v. Sarah Boyce Borzilleri

TOPICS

divorce dissolution of marriage equitable distribution child support appellate procedure

PRACTICE AREAS

family law matrimonial law appellate practice equitable distribution child support

QUESTIONS PRESENTED

1. Whether portions of the appeal and cross-appeal were rendered academic by the parties' August 16, 2021, so-ordered stipulation.
2. Whether the Supreme Court properly imputed income to the parties and determined the plaintiff's child-support obligation.
3. Whether the Cutchogue property and related appreciation retained a separate-property character or became marital property through transfer to a trust and the plaintiff's conduct.
4. Whether the plaintiff was entitled to a separate-property credit for proceeds from the Brighton property that were used to pay down a jointly owned marital mortgage and later commingled with marital funds.
5. Whether the Supreme Court providently exercised its discretion in awarding the defendant \$40,000 in attorneys' fees and declining to award her the additional amount requested.

HOLDINGS

1. The portions of the appeal concerning maintenance, prospective child support after August 16, 2021, educational expenses, the defendant's Charles Schwab account, and the parties' 2018 capital-gains tax liability, as well as the cross-appeal concerning the 2018 capital-gains tax liability, were rendered academic and were dismissed.
2. The Supreme Court providently exercised its discretion in imputing income to the plaintiff based on his past earnings, actual earning capacity, and educational background, imputing \$35,000 in annual income to the defendant based on her circumstances, and treating the plaintiff as the noncustodial parent for child-support purposes.
3. The plaintiff was entitled to a credit for the premarital down payment on the Cutchogue property, but he failed to establish that the property retained its separate character or that he was entitled to a credit for premarital appreciation.
4. The plaintiff was not entitled to a separate-property credit for the approximately \$268,000 in proceeds from the Brighton property.
5. The Supreme Court providently exercised its discretion in awarding the defendant \$40,000 in attorneys' fees, but the record did not support the defendant's request for \$100,000.

KEY QUOTATIONS

“In determining child support obligations, '[t]he court has considerable discretion in determining whether income should be imputed to a party and the court's credibility determinations are accorded deference on appeal.'” ([*1])

“Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property.” ([*2])

“Separate property that is commingled with marital property presumptively becomes marital property.” ([*2])

“By statute, there is 'a rebuttable presumption that counsel fees shall be awarded to the less monied spouse.'” ([*3])

FACTUAL BACKGROUND

The parties married in November 1999 and had two children, who were emancipated by the time of the appeal. The plaintiff claimed separate-property interests in real property and proceeds derived from property acquired before the marriage, while the evidence showed that the Cutchogue property was transferred to a trust benefiting both parties and that proceeds from the Brighton property were used to pay down a mortgage on jointly owned marital property and later placed in an investment fund containing marital funds. The Supreme Court imputed income to both parties for child-support purposes, equitably distributed marital assets, and awarded the defendant \$40,000 in attorneys' fees.

PROCEDURAL HISTORY

The plaintiff commenced a divorce action on September 29, 2017. Following a nonjury trial, the Supreme Court, Suffolk County, issued a decision on May 21, 2020, addressing maintenance, child support, equitable distribution, and attorneys' fees, and entered a judgment of divorce on December 2, 2020. The plaintiff appealed and the defendant cross-appealed; during the pendency of the appeals, the parties executed a so-ordered stipulation on August 16, 2021, which resolved or waived several issues and reserved others for appellate review.

DISPOSITION

affirmed

CASES CITED

- Aniq Halal Live Poultry Corp. v. Montague-Lee Ltd. Partnership, 110 AD3d 934, 934
- Smith v. AJ Contr. Co., 277 AD2d 305, 306
- Bailey v. Bailey, 232 AD3d 574, 576
- Tuchman v. Tuchman, 201 AD3d 986, 990
- Diliberto v. Diliberto, 230 AD3d 637, 639
- Matter of Monti v. DiBedendetto, 151 AD3d 864, 866

- Matter of Mireille J. v. Ernst F.J., 220 AD2d 503, 504
- Cicale v. Cicale, 231 AD3d 705, 707
- Matter of Smisek v. DeSantis, 209 AD3d 142, 143
- Volkerick v. Volkerick, 153 AD3d 885, 886
- Spera v. Spera, 71 AD3d 661, 664
- Massimi v. Massimi, 35 AD3d 400, 402
- Hymowitz v. Hymowitz, 119 AD3d 736, 740
- Imhof v. Imhof, 259 AD2d 666, 667
- Lieberman-Massoni v. Massoni, 215 AD3d 656, 658
- Kattan v. Kattan, 202 AD3d 771, 773
- Santamaria v. Santamaria, 177 AD3d 802, 804
- Glessing v. Glessing, 212 AD3d 783, 784
- Murphy v. Murphy, 4 AD3d 460, 461
- Sherman v. Sherman, 304 AD2d 744, 744
- Ospina-Cherner v. Cherner, 178 AD3d 1059, 1061
- Szypula v. Szypula, 42 NY3d 620, 625
- Mahoney-Buntzman v. Buntzman, 12 NY3d 415, 421
- Loria v. Loria, 46 AD3d 768, 770
- Marchese v. Marchese, 185 AD3d 571, 575-579
- Kaufman v. Kaufman, Kaufman v. Kaufman, 189 AD3d 31, 74
- Caracciolo v. Chodkowski, 90 AD3d 801, 803
- Ostrower v. Ostrower, 148 AD3d 819, 820
- Sutaria v. Sutaria, 123 AD3d 908, 909