
LAW AND THE FAMILY

"Appreciation of Separate Property"

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"IF YOU WOULD speak with me, first define your terms." If only the scribes of the definitions section of the Equitable Distribution Law had heeded Voltaire's admonition. [FN1] As we have seen with regard to the definitions of "marital property," and "separate property," it is difficult to achieve precision. When there is ambiguity in the construction of a statute, it is helpful to read the entire text in terms of legislative policy and purpose and to review the history leading to the adoption of the EDL. [FN2]

Domestic Relations Law s236 (B)(1)(d)(3) excludes from the definition of "marital property" ... "property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse."

Spousal Contribution

The first controversy over the meaning of this language arose in Jolis v. Jolis. [FN3] One of many significant issues in that case involved DRL s236 Subdivision (B)(1)(d)(3).

The issue as to spousal contributions that "in part" were responsible for "the appreciated value of separate property" centered around the word "contributions" in the statute. In Jolis, [FN4] the husband's stock in the family diamond business, most of which had been given to him by his father, was held to be his separate property. The husband received most of the stock during the marriage, and it had greatly increased in value as the business prospered, being worth some \$3.5 million at the time of the trial. The question was, had his

wife of some 40 years "contributed" to the substantial appreciation in value of the stock since 1939.

Special Term held that the wife's contributions and services, which would be an important factor in allocating material property and setting maintenance, were not "contributions" under the statute, and that in any event, the appreciation was due to inflation and market conditions - what the court called "diamond fever." In short, the court insisted that in order to acquire a spousal interest and to have the appreciation regarded as marital property, the wife had to show a direct input into the appreciation. This was justified, in the eyes of the court, because the word "contribution" in the statute was not embellished in the same terms as those in Subdivision 5-d(6) and Subdivision 6- a (8) of the Statute. The trial court did not consider that the underlying purposes of the EDL was to distribute the "product" of the economic partnership upon divorce and to achieve equity.

Thus, the wife's 40 years of contribution and services as a mother of four children, as a homemaker, companion, and entertainer of the husband's friends and business associates, were insufficient to give her any share of the appreciated value of the stock that had appreciated during the marriage. The implication was that to qualify under the provision, the wife must help tend the shop or bring in customers.

The First Department affirmed the trial court's decision [FN5] and agreed with the distinction between direct and indirect spousal contributions to appreciated value of separate property, but it expressed a caveat. The First Department cautioned: "We decline to foreclose the possibility that other cases may disclose circumstances in which services of 'a spouse, parent, wage earner, or homemaker' in fact contributed to the appreciation of the other spouse's separate property, circumstances not present in the instant case." [FN6]

Direct and Indirect Contributions

In *Price v. Price*, [FN7] the Court of Appeals rejected the distinction made between direct and indirect contributions by a spouse to the appreciation in value of a spouse's separately owned property during the marriage, and liberally construed the statute to require only that a relationship must be established between the "product of the marital partnership" and the appreciation in value of the separate property. In so doing it construed the definition of marital property

liberally, to achieve equity in the distribution of assets which are produced by the marital partnership during the marriage.

In *Price v. Price*, [FN8] the parties were married on Nov. 16, 1969. For several years before the marriage, the defendant-husband had been involved in a family-owned corporation that was engaged in the wholesale supply of kitchen parts and appliances. He had received 25 percent of the stock outstanding of this corporation (Unity) in 1957 as a gift an additional 25 percent in 1972, during the parties' marriage, likewise as a gift.

In 1982, after the commencement of the divorce action, the husband became sole shareholder by reason of the corporation's redemption of the outstanding shares held by his brother. Prior to the parties' marriage, the wife had been working as a registered nurse for about one year but terminated her employment upon her marriage to the defendant. During the next six months, the wife worked in a part-time position as a private duty nurse. When the first of the parties' two children was born in 1972, Plaintiff ceased working outside the home and devoted her efforts entirely to being a homemaker and parent. Plaintiff was known to confer with Unity's customers from time to time, entertain the husband's business associates, attend business conventions with her husband and assist in other business social events.

The action for divorce was commenced in 1981. As part of her Equitable Distribution award, plaintiff sought a percentage of defendant's interest in Unity and related companies. Special Term denied plaintiff's request finding that defendant's business interests constituted "separate property." Since defendant had acquired his share in Unity and its related companies as gifts, Special Term also concluded that plaintiff was not entitled under DRL s236 (B)(1)(d)(3) to share in the appreciation and value of defendant's separate property business interest that occurred during the parties' marriage, since the services she rendered to Unity were "minimal and inconsequential." The court noted further that plaintiff's indirect contributions were likewise insignificant. It held that the business was firmly established by the time she came on the scene and if the value of the company did appreciate during the years of the marriage, there was little or nothing in the record to support a claim that she was in any way responsible for that success.

The Appellate Division, Second Department, [FN9] agreed with Special Term insofar as it determined that defendant's interests in the business constituted "separate property." However, it disagreed with the court's conclusion that plaintiff was not entitled to share to

some extent in the appreciation of defendant's business interests that occurred during the parties' marriage. It held that the non-titled spouse's "indirect" contributions as a homemaker, parent and spouse are entitled to recognition under DRL s236(B)(1)(3) as "contributions or efforts." However, the court held that a non-titled spouse must establish that his or her indirect or direct contributions to the marital relationship are "casually related" to the enhancement of the separate property assets so as to warrant an award of a percentage of the appreciation in value of the separate property asset.

Under its analysis, passive appreciation of a separate property asset during the marital relationship would not be subject to a claim by the non-titled spouse, whereas an increase in such asset because of the direct or indirect contributions or efforts of the non-titled spouse would be considered marital property and subject to such a claim.

Credit Warranted

The court concluded that plaintiff's indirect contributions as a homemaker and mother to the parties' two children over the 12-year period of the marriage warranted an award of a percentage of the appreciation, if any, of defendant's separate property business interests to the date of the commencement of the divorce proceedings. In addition to these indirect contributions, plaintiff was entitled to be credited for the direct contributions during the marriage, however minimal, which she made to the business in the form of conferring with customers, entertaining clients, and attending conventions and trade shows.

The Appellate Division remitted to determine: (1) if there was any appreciation in the value of defendant's interest in Unity and related companies from the date of the parties' marriage to the commencement of the divorce proceedings, and (2) the extent of such appreciation to which plaintiff is entitled by virtue of her direct and indirect contributions.

Following its determination, the Appellate Division denied the parties reciprocal motions for reargument and granted defendant's motion for leave to appeal to the Court of Appeals, pursuant to CPLR 5602(b). It certified the following question to the Court of Appeals:

Whether a non-titled spouse's contributions or efforts (DRL s236 (B)(1)(b)(3), as homemaker and parent are entitled to recognition by the Court in awarding said spouse a share of the appreciated value

of the titled spouse's separate property, which occurred during the parties' marriage.

The Court of Appeals analyzed the Statute after reviewing the policy considerations that led to the enactment of the EDL. It noted that equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker and that the statute reflected an awareness that the success of the partnership depended, in part, on a wide range of nonremunerated services to the joint enterprise such as homemaking and raising children.

The Court of Appeals held that under the EDL an increase in the value of the separate property of one spouse, occurring during the marriage and before commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property.

The Court of Appeals addressed only this specific question of law because the scope of its review did not extend beyond the certified question as it reads or is reasonably interpretable. It interpreted the certified question as referring to an appreciation that occurred during the parties' marriage and before the execution of a separation agreement or the commencement of a matrimonial action. It answered the certified question in the affirmative and affirmed the order of the Appellate Division.

In so holding the court stated that the amount of that appreciation should be added to the sum of marital property for equitable distribution. Whether assistance of a non-titled spouse, when indirect, can be said to have contributed "in part" to the appreciation of an asset depends primarily upon the nature of the asset and whether its appreciation was due in some measure to the time and efforts of the titled spousal. If such efforts were aided in the time devoted to the enterprise, at least in part, by the indirect contributions of the non-titled spouse, the appreciation should, to the extent it was produced by the efforts of the titled spouse, be considered a product of the marital partnership and hence marital property. [FN10]

Unrelated Efforts

As a general rule, however, where the appreciation is not due in any part to the efforts of the titled spouse but to the efforts of others or to

unrelated factors including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the non-titled spouse has no claim to a share of the appreciation.

The question under s236(B)(1)(b)(3) as to indirect contributions of the non-titled spouse as parent and homemaker is whether there was an appreciation of separate property from the efforts of the titled spouse during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of appreciation during that period is considered a product of the marital partnership over which the trial court retains the flexibility and discretion to structure a distributive award equitably. The nature and measure of the services performed by the non-titled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property are matters to be weighed and decided by the trial court. This is in contrast to the initial determination as to whether or not the appreciation is marital property. In this regard the Court of Appeals rejected the Appellate Division formula for determining whether to treat the appreciation in separate property as marital property.

The Court of Appeals in Price established a two-prong test, in accordance with the "product of the marital partnership" theme to determine whether a non-titled spouse should share in the appreciation in value during the marriage of the titled spouse's separate property. Under this test, the non-titled spouse must demonstrate that (1) the property appreciated in value during the marriage due, in part, to efforts or contributions of the titled spouse in time, money or energy; and (2) he or she contributed, in part, to such appreciation as a homemaker or parent by giving the titled spouse the time to devote to the enterprise. Under this analysis, where an asset appreciates passively during the marriage solely as a result of the efforts of others or market conditions, the non-titled spouse can not share in the appreciation because the titled spouse did nothing to contribute to its increase in value and, thus, it can not be established that the non-titled spouse gave the titled spouse the time to devote to the enterprise.

As could be expected, what seemed to be an endless number of lower court cases followed Price. The cases that followed all hold that the titled spouse must demonstrate the amount of the appreciation during the marriage and that the appreciation was due, in part, to the efforts of the titled spouse which were aided or facilitated by the non-titled spouses' indirect contributions as a

parent or homemaker in making the time available for the titled spouse to devote to the enterprise. Each of the cases is won or lost on the basis of the proof presented and the equities of the individual case.

Direct Contribution

In *Peterson v. Peterson*, [FN11] the Appellate Division affirmed that part of a divorce judgment that granted the wife a divorce and awarded her title to the marital residence. It held that the court had properly awarded the wife title to the marital residence since she owned it before the marriage and did not transfer any interest in the property to her husband. However, it modified the judgment to remit for a hearing to determine if any part of the appreciation of the value of the property, during the 11-year marriage, was because of the husband's efforts or contributions, thus subjecting it to equitable distribution and for an award. As he paid taxes and for the utilities on the property and did some repairs, it held that the trial court erred in failing to give appropriate consideration to the husband's direct and indirect contributions to the maintenance of the residence.

Peterson demonstrates that a payment by the non-titled spouse of some of the expenses of the property constitutes a direct contribution to its appreciation, not an indirect one.

In *DeCabrera v. DeCabrera*, [FN12] the Court of Appeals affirmed a judgment that declined to award the husband any equitable share of the shares and lease to a cooperative apartment that was bought in 1979 with \$182,000 of the wife's separate property. In June 1982 the husband moved out and refused to provide support for the wife. Based upon the affirmed findings that the husband's contributions were minimal or nonexistent, the Court concluded it was not an abuse of discretion to deny the husband a share in the appreciated value of the shares and lease to the cooperative unit.

In *Rider v. Rider*, [FN13] the parties were married in July 1982, separated in October 1984 and the action was commenced in March 1985. In September 1984, the couple built a home on a plot of land, deeded to the husband before marriage by his parents. The construction began in June 1984, financed by loans totaling \$13,300 obtained by the parents. The wife contributed an additional \$3,000 that she accumulated from her wages and income for the four-month period ending with their separation. Both individuals contributed their physical labor. The Appellate Division affirmed in part but reversed the award of \$3,000 to the wife on this issue. It remitted for a redetermination of the wife's share of the appreciation. While it was

proper for the Supreme Court to determine that the appreciation to the land, by way of improvements, was marital property, it improperly valued the asset. The contributions were also direct contributions by the wife.

In *Mahlab v. Mahlab*, [FN14] the Appellate Division affirmed that part of the judgment of divorce that awarded the wife exclusive occupancy, sole title and possession of the marital home. The money for the down payment, closing and mortgage was provided by the wife's father for her benefit while the husband was irresponsible with money and contributed little, if any, financial support to the marriage. Thus, the award of title to the wife, based upon the husband's minimal contribution to the purchase and maintenance of the house was held, not to be an abuse of discretion. The record was sufficient for the Appellate Division to determine that the husband did not contribute directly or indirectly to the appreciation. The husband failed to present nor allege that he contributed to the property's appreciation. The appreciation appeared to be "passive," that is, predicated solely on an improving real estate market.

Lack of Evidence

In *McCann v. McCann*, [FN15] the Supreme Court held that the wife, of a four- year marriage, who was seeking a share of the appreciation of the husband's home, the enhanced value occurring during the marriage, was not entitled to share. Her failure to present evidence resulted in her loss. By failing to produce expert testimony to establish that a portion of the appreciation was directly attributable to her direct or indirect contributions, the wife was entitled to zero. The only testimony adduced at trial was that the house was worth \$50,000 at marriage in 1982 and \$152,000 at trial, and that \$18,000 of the parties' joint earnings was spent on the improvements to defendant's home. The court, resistant to guessing as to how much to apportion the appreciation for passive or market forces, versus that increase resulting from plaintiff's direct or indirect contributions, denied any award. Given there were no other marital assets in this short marriage, the court awarded the wife 50 percent of the joint funds (i.e., \$9,000) invested in the house. The parties were married in October 1982, and the action was started in April 1986.

In *Smith v. Smith*, [FN16] the Appellate Division deleted a direction that the wife pay the husband half the appreciation of her separate property. It stated that the defendant offered no evidence demonstrating that the appreciation of plaintiff's separate property was due in part to his direct or indirect efforts of contributions and

absent such evidence, it appeared that the increase in value of the property was the result of market forces or other factors.

In *Guarnier v. Guarnier* [FN17] the Appellate Division held that where the record established that the parties' marriage was not a true economic partnership, the proceeds from the sale of certain realty should be distributed in accordance with the parties' relative economic contributions. It also found no support in the record that the wife's efforts as a wife, parent, wage earner and homemaker indirectly enhanced the value of the marital residence that was separate property of the husband. In both instances it found no significant contribution of "money, time and labor" by the wife.

In *Fitzgibbon v. Fitzgibbon*, [FN18] the Appellate Division affirmed an order of the Supreme Court that held that the increase in value of the marital residence, which was the wife's separate property, was attributable to market forces and denied the husband a share thereof. It held that the husband failed to maintain his burden of proof in demonstrating the manner in which his contributions resulted in the increase in value and the amount of the increase which was attributable to his efforts. The defendant, a real estate professional, testified that the increase was attributable to a general upturn in the real estate market.

Mahlab, McCann, Smith, Guarnier and Fitzgibbon all were lost for lack of proof.

In *Robinson v. Robinson*, [FN19] the Second Department affirmed an \$18,500 distributive award to the wife representing her equitable share of the appreciated value of the husband's condominium, which the husband purchased 3 1/2 years before the marriage for \$31,500. The appraisal figure quoted in the husband's 1988 application for mortgage financing was \$96,500, an appreciation of \$65,000. The court held that the wife's monetary and non-monetary contributions to the mortgage and household justified the award "since the fruits of her labor, love and effort may be said to have contributed to the appreciation of the value" The record indicated that prior to her becoming disabled, the wife was employed full-time and made financial contributions to the household expenses, often turning over her entire paycheck to the defendant. In addition, the testimony revealed that she made significant contribution as a homemaker, spouse and primary caretaker for the parties' infant children during the 4 1/2 -year marriage.

In *Zelnick v. Zelnick*, [FN20] the Appellate Division awarded the wife 50 percent of the increase in value of a house the husband had

purchased, at the wife's suggestion, 2 1/2 months before their marriage. With the assistance of architects, the wife developed a plan to create a triplex. She hired a designer and supervised the construction, which cost \$300,000 to \$350,000. At trial, the wife's appraiser valued the house at about \$1.8 million as of Aug. 15, 1988, and concluded that the renovation had increased its value. The Appellate Division noted that as Price makes clear, the question of whether the non-titled spouse's role contributed to the appreciation "depends primarily upon the nature of the asset and whether its appreciation was due in some measure to the time and efforts of the titled spouse. The court held that the wife was entitled to an award based upon the appreciation unless it was completely unrelated to any effort expended by her and due solely to the fluctuations of the real estate market. The wife's contributions consisted of time and effort, not the investment of funds, which is no less worthy of recognition. The court noted that the improvements to the property were paid for after the marriage, and the sums spent were well within the husband's reported gross earnings. There was nothing to indicate that the payments for the renovation came from any source other than post-marriage earnings. "It was incumbent on him to show that the improvements were funded out of separate property."

In reversing the trial court's decision to deny the wife any share of the appreciation, the Appellate Division noted that the funds contributed to the improvements were from wages or income earned during the marriage and that this was marital property ignored by the trial court. It concluded that "there is no requirement that the non-titled spouse prove precisely how the active efforts of either party quantitatively contributed to the property's appreciation. All he need show is that the appreciation was due in part to his or her marital efforts or contributions."

Perhaps what best serves the objectives and purposes of the EDL, as well as the underlying public policy, is to give broad and liberal interpretation to the statutory definition of "marital property" and narrowly construe the exemptions from equitable distribution which are designated as "separate property." When in doubt, one should side in favor of the marital property category. With the elimination of permanent alimony and its replacement by maintenance (often temporary), as a matter of justice and fair play, the "pot" for equitable distribution must include the "product" of the marital partnership. No doubt, the intended quid pro quo in the EDL was the exchange of what formerly was alimony for a new, expansive definition of marital property. As such, the reduction in support obligation, justifies the filling of the "pot."

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FN1 236(B) Subdivision (1).

FN2 Price v. Price, 69 NYS2d 81, 511 NYS2d 221, 222.

FN3 Jolis v. Jolis, 111 Misc 2d 965, 446 NYS2d 138, affd (1st Dept.) 98 AD2d 692, 470 NYS2d 584.

FN4 Ibid.

FN5 Jolis v. Jolis, Ibid.

FN6 Compare Perri v. Perri, (2d Dept.) 97 AD2d 399, 467 NYS2d 226, where Justice O'Connor said that under the EDL it is presumed that the value to the marital partnership of homemaking is equal in value to that to the breadwinner - at least absent evidence to the contrary.

FN7 (2d Dept) 113 AD2d 299, 496 NYS2d 455, (later proceeding 496 NYS2d 464, later proceeding --- AD2d --- , 496 NYS2d 689, 69 NY2d 81, 511 NYS2d 521.

FN8 Ibid.

FN9 113 AD2d 299, 496 NYS2d 455.

FN10 Citing Nolan v. Nolan, 107 AD2d 190, 486 NYS2d 415.

FN11 133 AD2d 448, 519 NYS2d 566 (2d Dept., 1987).

FN12 70 NY2d 879, 524 NYS2d 176.

FN13 141 AD2d 1004, 531 NYS2d 44 (3d Dept., 1988).

FN14 143 AD2d 116, 531 NYS2d 580 (2d Dept., 1988).

FN15 142 Misc2d 1083, 539 NYS2d 281 (Sup.Ct. Suffolk Co., 1989); In Josan v. Josan (1987, 2d Dept), 134 AD2d 486, 521 NYS2d 270, the

Appellate Division held that trial court properly determined that appreciation during marriage of apartment building bought before marriage, which was due in part to contribution of wife, was marital property. However, it was error to calculate the appreciation of the building from the time the parties began cohabitation in 1976 rather than from time of marriage in September 1978. Moreover, the expert who testified as to the amount of the appreciation failed to clarify how much was due to the wife's direct or indirect efforts rather than "random market fluctuation." The distributive award to the wife was vacated and the matter remitted for a hearing to determine wife's distributive award based upon the appreciation in value from September 1978 until Jan. 7, 1980, when the parties' separated, to the extent to which the appreciation was due to the direct or indirect efforts of the wife.

FN16 154 AD2d 365, 545 NYS2d 842 (2d Dept. 1989).

FN17 155 AD2d 744, 547 NYS2d 455 (3d Dept. 1989).

FN18 161 AD2d 619, 555 NYS2d 399 (2d Dept. 1989).

FN19 --- AD2d --- , 560 NYS2d 665 (2d Dept. 1990).

FN20 --- AD2d --- , --- NYS2d --- , NYLJ, Aug. 7, 1991, p.21, col.3 (1st Dept. 1991).

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