
LAW AND THE FAMILY

'Hartog' and 'Price': The 'Price' Is Right

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IT IS TIME WE LAWYERS took a good, hard look at the 1985 Court of Appeals decision in *Price v. Price*.^{*1} This infinitely manipulable case has brought many clients to the crossroads of settlement only to find themselves with high-pitched emotion leading to less than rational decisions. One need not be a defender of pointless laws to understand the wisdom behind *Price*.

First, a bit of background. Domestic Relations Law Sec.236(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."

The first controversy over the meaning of this language came about in *Jolis v. Jolis*^{*2} where the husband's stock in the family diamond business, most of which had been given to him during marriage by his father, and its appreciation, were held to be the husband's separate property. The stock greatly increased in value as the business prospered, being worth some \$3.5 million at the time of the trial. Supreme Court held that the wife's contributions and services since 1939, 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 resulted from inflation and market conditions.

The trial court insisted that if the appreciation were regarded as marital property the wife must establish a direct correlation between her efforts and the appreciation. Said another way, the wife's 40 years of contribution and services as a mother of four children, homemaker, companion and entertainer of the husband's friends and business associates were insufficient to serve as a basis for her sharing the appreciation in the value of the stock during the marriage. The First Department affirmed the trial court's decision and agreed with the distinction between direct and indirect spousal contributions to appreciated value of separate property.

An Economic Partnership

In 1985, in *Price v. Price*, the Court of Appeals established a far more just standard, setting the groundwork for all that would follow. The court rejected the distinction made in *Jolis* between direct and indirect contributions by a spouse to the appreciation in value of a spouse's separately owned property during the marriage and also 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. It construed the definition of marital property liberally, to achieve equity in the distribution of assets produced by the marital partnership.³

The Court of Appeals noted that equitable distribution was based on the premise that a marriage is an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker and that the EDL reflected an awareness that the success of the partnership depended, in part, on a wide range of nonremunerated services to the joint enterprise. The Court held that under the Equitable Distribution Law (EDL) an increase in the value of the separate property of one spouse, occurring during the marriage and prior to the 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. It did caution, however, that:

Whether assistance of a nontitled 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 spouse. If such efforts . . . were aided and the time devoted to the enterprise made possible, at least in part, by the indirect contributions of the nontitled 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. * * * 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 nontitled spouse has no claim to a share of the appreciation.

The Price Court held that the nontitled spouse must demonstrate that (1) the property appreciated in value during the marriage, in part, because of 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. Where an asset appreciates passively during the marriage solely as a result of the efforts of others or market forces, the nontitled spouse is not entitled to share in the appreciation, since it was not the efforts of the titled spouse that contributed to the increase in value of the asset.

Price, however, left unresolved nearly as many issues as it solved. Most notably, whether in determining if the nontitled spouse contributed to the appreciation of separate property, he or she is required to establish a substantial, almost quantifiable, connection between the titled spouses' efforts and the appreciated value of the property. In its most recent follow up to Price, the Court of Appeals in *Hartog v. Hartog*⁴ ruled "no" to this question.

Involvement in 'Separate Property'

In *Hartog v. Hartog*, the key issue was whether the husband's limited involvement during the marriage in "separate property"

businesses that appreciated in value, qualified as active participation, within the meaning of Price, so as to transmute the appreciation into marital property subject to equitable distribution. The parties weremarried in 1968. The wife was a homemaker from 1969 until May 1980. From 1980 through 1985, she worked full time at an advertising firm. In 1990, she started a song writing business, from which she earned nothing. During the marriage, she was a traditional homemaker, serving in roles of spouse, parent, housekeeper and hostess. When the parties divorced, she was 51 years old and he was 61. Two children were born of the marriage, both emancipated at the time of divorce.

When they married, the husband was 38 and worked in a family jewelry business, F. Staal. He was also a shareholder and director of another family business, Hartog Trading Co. (Trading). He owned 50 percent of the stock in F. Staal and Trading, and 25 percent of the stock of Hartog Foods International Inc. (Foods), a spin-off company of Trading. He was director of Trading throughout the marriage and was its secretary/treasurer from 1969. He was a director and secretary of Foods from the time of its incorporation in 1969.

The husband's brother or others, however, had primary responsibility for the day-to-day management and operation of Trading and Foods. F. Staal, Trading and Foods, each deducted a salary for the husband as a business expense, and he participated in their respective profit-sharing plans. The corporate tax returns of Trading and Foods listed him as a part-time employee, and the corporate minutes note his presence at meetings and his power to sign checks. Testimony at trial indicated that the husband and his brother conferred at times regarding business matters concerning Trading and Foods. The husband was recently diagnosed with prostate cancer.

Marital Property

Supreme Court granted the wife a divorce and distributed the marital property. She ultimately opted to sell both residences, resulting in a distributive award of \$1.7 million. The trial court found the following to be marital property: (1) 100 percent of the increased value of the husband's 50 percent share in F. Staal (\$412,000); (2) 25 percent of the appreciation of the husband's 50 percent share of Trading (\$575,000); and (3) 25 percent of the appreciation of the husband's 25 percent share of Foods (\$686,875).

The court also declared the husband's annual bonus to be marital property. It awarded the wife maintenance in the amount of \$2,816.66 per month until her death. It also ordered the husband to maintain a \$1 million life insurance policy for his wife's benefit and provided that in the event the policy was not in effect on his death, the amount of the insurance would constitute a pro rata lien against his estate.

The Appellate Division modified and affirmed the judgment. It deleted that portion of the distributive award to the wife that represented her portion of the appreciated value of Trading and Foods, \$630,937.50, which is half of 25 percent (the increased value of the husband's interest in Trading and Foods, the separate asset). It also deleted the share awarded the wife in the husband's bonus (\$59,998); a portion of the tax liability attributed to the husband

resulting from the sale of marital assets; and an award of \$197,585, representing half of the husband's brokerage account [not in issue]. It limited the award of spousal maintenance of \$650 per week to five years, and deleted the provisions directing the husband to maintain life insurance and establishing a conditional lien.

In the Court of Appeals the wife argued that because the husband had some active involvement in Trading and in Foods, the appreciation in value of those businesses, at least to some degree, was marital property subject to equitable distribution. She claimed that the Appellate Division imposed a substantial nexus requirement of a significant connection between the titled spouse's activity and the appreciation of the operating business assets and that this (1) is contrary to legislative intent, to construe the term "marital property" broadly; and, (2) is contrary to the Court's holding and rationale in *Price v. Price* that a titled spouse's "active" contribution to the separate asset during the marriage transforms at least some portion of the appreciated value into marital property.

The husband countered by arguing that his activities amounted to "paper participation" only, and that this type of pro forma involvement had no actual impact on the appreciation in the value of the businesses. He asserted that absent some concrete showing by the wife of how his involvement actually benefited the businesses' value, the appreciation in those businesses remained separate property in its entirety.

Letter and Spirit

The Court of Appeals held that requiring a non-titled spouse to show a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be contrary to the letter and spirit of DRL Sec.236(B)(1)(c), (B)(1)(d)(3), (B)(5)(c) and (B)(5)(d)(6). DRL Sec.236(B)(1)(d)(3) expressly provides that appreciation in separate property remains separate property, "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse."

It reasoned that DRL Sec.236(B)(5)(d)(6) explicitly recognizes that indirect contributions of the non-titled spouse (e.g., services as spouse, parent and homemaker and contributions to the other party's career or career potential) are equally relevant to direct contributions in equitable disposition calculations. Thus, to the extent that the appreciated value of separate property is at all aided or facilitated" by the non-titled spouse's direct or indirect efforts, that part of the appreciation is marital property subject to equitable distribution.

Consequently, while some connection between the titled spouse's effort and the appreciation must be discernible from the evidence, neither the statutory language nor its legislative history justifies the Appellate Division's and the husband's exacting causation prerequisite. The Court of Appeals also held that requiring such a connection was inconsistent with the legislative intent in enacting the EDL, to treat marriage in one respect as an economic partnership and, in so doing, to recognize the direct and indirect contributions of each spouse, including homemakers, and that such a result was at odds with *Price*.

The Court of Appeals in *Hartog* recognized that it was time for it to realistically handle the problem faced when the titled spouse

has only limited, yet active, involvement in a separate asset of a non-passive character where it may be difficult, if not impossible, to link limited, specific efforts to quantifiable, tangible results and to prove a direct causal link between the activity and the resulting appreciation.

The Court rejected the causation requirement urged by the husband. Instead it gave effect to the Legislature's intent that a non-titled spouse be permitted to share in the "indirect" fruits of his or her labor, even if the connection between the titled spouse's activity and the appreciation is not established with mathematical, causative or analytical precision. It noted that its holding in Price supported the analysis it adopted and "... inevitable implication of Price was a rejection of the "all or nothing" approach that would be interposed by adopting a particularized causative nexus requirement." It concluded: "... that where an asset, like an ongoing business, is, by its very nature, non-passive and sufficient facts exist from which the factfinder may conclude that the titled spouse engaged in active efforts with respect to that asset, even to a small degree, then the appreciation in that asset is, to a proportionate degree, marital property. By considering the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors, the factfinder must then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution ...

Limited, but Active

Applying these principles the Court concluded that the Appellate Division should not have deemed the total amount of the appreciation in Trading and Foods to be the husband's separate property. The trial court's findings demonstrated that the husband engaged in limited, active involvement in the two companies. His activities consisted of attendance at board meetings; holding officers' positions within the close corporations; being listed as a salaried employee; discussing and conferring on business matters; signing checks on occasion; and participating in the companies' profitsharing plans. These efforts constituted an "active" involvement and management role.

The Court held that through the husband's attendance at board meetings and business discussions with family members, particularly during times of crisis, a reasonable finder of fact could determine that this active involvement contributed to the appreciated value of the businesses. The Court reinstated the Supreme Court's determination that 25 percent of the appreciated value of the husband's interests in Trading and in Foods was marital property.

The Court of Appeals also held that the Legislature intended that the predivorce standard of living be a mandatory factor for the courts consideration in determining the amount and duration of the maintenance award and that the Appellate Division erred in failing to consider the wife's pre-divorce standard of living. It pointed out that DRL Sec.236, as amended in 1986, directs that when the court is considering an award of maintenance, it must "hav[e] regard for the standard of living of the parties established during the marriage."

The purpose of the amendment was to "require[] the court to

consider the marital standard of living" in making maintenance awards. Generally the lower courts' failure to analyze each of the statutory maintenance factors in DRL Sec.236 (B)(6)(a)(1)-(11) will not alone warrant appellate alteration of the award, because it suffices for a court to set forth the factors it did consider and the reasons for its decision. However, the pre-divorce standard of living has been placed by the Legislature in a markedly distinct category, rendering the general rule inapplicable.

The Court held that the Appellate Division's assertion of the wife's ability to become self-supporting with respect to some standard of living in no way obviated the need for the court to consider the pre-divorce standard of living; and did not create a per se bar to lifetime maintenance. Correspondingly, a pre-divorce "high life" standard of living guarantees no per se entitlement to an award of lifetime maintenance. "The lower courts must consider the payee spouse's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors, and then, in their discretion, fashion a fair and equitable maintenance award accordingly"

Because this is what Supreme Court did, and the Appellate Division's alteration of that award for the reason it advanced was not warranted, the Court modified and reinstated the trial court's determination awarding lifetime maintenance in the amount of \$2,816 per month.*5

It would seem that 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.

notes

(1) 1985, 2d Dept., 113 AD2d 299, 496 NYS2d 455, later proceeding 2d Dept.) 115 AD2d 530, 496 NYS2d 464, later proceeding (2d Dept.) 115 AD2d 531, 496 NYS2d 689 and ctfd uges ans, affd 69 NY2d 8, 511 NYS2d 219, 503 NE2d 684.

(2) 111 Misc2d 965, 446 NYS2d 138, affd (1st Dept.) 98 AD2d 692, 470 NYS2d 584.

(3) 1986, 69 NY2d 8, 511 NYS2d 219, 503 NE2d 684.

(4) 85 NY2d 36, NYS2d (1995).

(5) The Court of Appeals also held: (1) that the husband's bonus, earned during the course of the marriage but paid after commencement of marital dissolution proceedings was marital property subject to equitable distribution, noting that the Appellate Divisions rationale failed to heed its precedents and the generous reading that the Legislature intended to be accorded the term marital property in this respect; (2) that, while under DRL Sec.236(B)(8)(a), the courts have the general authority to "order a party to purchase, maintain or assign a policy of insurance on the life of either spouse" as a means to secure maintenance and child support payments, so that dependent spouses and children will be adequately protected, the trial court erred by ordering the husband to obtain a life insurance policy. Because of his serious illness, the husband was uncontestedly uninsurable, and the proof at trial

established the lack of any extant life insurance available when the relief was directed in the judgment; (3) that the courts have no inherent authority to order a lien on a spouse's estate in lieu of insurance. There is no statutory authority or suggestion in the legislative history that the courts were meant to exercise such broad-reaching power to create a lien on an estate for a payor spouse's failure to maintain life insurance; and (4) that the Appellate Division acted properly in considering the tax consequences to the husband and reducing plaintiff-wife's distributive award by her equitable share of the tax liability. Given the non-liquid nature of the assets, the Appellate Division did not abuse its discretion in making the wife responsible for an equitable share of the tax consequences.

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