

# Inchoate Rights to Marital Property

When inchoate rights become actual ownership interests by virtue of equitable distribution judgments, they are susceptible to even greater protection because their enhancement status eliminates some of the inhibitions inherent in the exercise of injunctive power prior to distribution.

By Joel R. Brandes | July 26, 2019 at 02:40 PM

- f
- in
- 🐦
- ✉
- 📄 (http)



When the Equitable Distribution Law (EDL) was enacted (Laws of 1980, Ch. 281, effective July 19, 1980), Domestic Relations Law §236, Part B(1)(c), gave a radically new statutory definition to “marital property.” Before the EDL, if the term “marital property” was used it referred solely to jointly owned property, such as a residence owned as tenants by the entirety, or joint bank accounts. Under Domestic Relations Law §236 Part B, “marital property” includes what was previously jointly owned property and more.

Domestic Relations Law §236, Part B, (1)(c) provides that “marital property” means: “All property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in an agreement pursuant to subdivision three of this part. Marital property shall not

## Trending Stories

- 1 **[Lawyers in Paper Ballot Case Accuse Georgia Officials of Destroying Evidence](https://www.law.com/daily-in-paper-ballot-case-accuse-georgia-officials-of-destroy-evidence/)**  
[\(https://www.law.com/daily-in-paper-ballot-case-accuse-georgia-officials-of-destroy-evidence/\)](https://www.law.com/daily-in-paper-ballot-case-accuse-georgia-officials-of-destroy-evidence/)  
[DAILY REPORT ONLINE](https://www.law.com/daily-in-paper-ballot-case-accuse-georgia-officials-of-destroy-evidence/)  
[\(/DAILYREPORTONLINE/\)](https://www.law.com/daily-in-paper-ballot-case-accuse-georgia-officials-of-destroy-evidence/)
- 2 **[As LeClair Exits, Shrinking LeClairRyan 'Considering Options'](https://www.law.com/american-lawyer/leclairryan-considering-options-as-departures-mou/)**  
[\(https://www.law.com/american-lawyer/leclairryan-considering-options-as-departures-mou/\)](https://www.law.com/american-lawyer/leclairryan-considering-options-as-departures-mou/)  
[THE AMERICAN LAWYER](https://www.law.com/american-lawyer/leclairryan-considering-options-as-departures-mou/)  
[\(/AMERICANLAWYER/\)](https://www.law.com/american-lawyer/leclairryan-considering-options-as-departures-mou/)
- 3 **[David Boies Is Not Finished With Jeffrey Epstein](https://www.law.com/american-lawyer/boies-is-not-finished-with-jeffrey-epstein/)**  
[\(https://www.law.com/american-lawyer/boies-is-not-finished-with-jeffrey-epstein/\)](https://www.law.com/american-lawyer/boies-is-not-finished-with-jeffrey-epstein/)  
[THE AMERICAN LAWYER](https://www.law.com/american-lawyer/boies-is-not-finished-with-jeffrey-epstein/)  
[\(/AMERICANLAWYER/\)](https://www.law.com/american-lawyer/boies-is-not-finished-with-jeffrey-epstein/)
- 4 **[White-Collar Slowdown Forces Law Firms, Ex-Prosecutors to Adapt](https://www.law.com/new-york-law-journal/white-collar-slowdown-forces-law-firms-ex-prosecutors-to-adapt/)**  
[\(https://www.law.com/new-york-law-journal/white-collar-slowdown-forces-law-firms-ex-prosecutors-to-adapt/\)](https://www.law.com/new-york-law-journal/white-collar-slowdown-forces-law-firms-ex-prosecutors-to-adapt/)  
[NEW YORK LAW JOURNAL](https://www.law.com/new-york-law-journal/white-collar-slowdown-forces-law-firms-ex-prosecutors-to-adapt/)  
[\(/NEWYORKLAWJOURNAL/\)](https://www.law.com/new-york-law-journal/white-collar-slowdown-forces-law-firms-ex-prosecutors-to-adapt/)
- 5 **[California Bar 'Inadvertently' Reveals Essay Topics Days Before Exam](#)**

include separate property as hereinafter defined.” This definition applies for purposes of equitable distribution of family assets upon divorce. It does not apply where the marriage is dissolved by death. See EPTL 5-1.2(a)(1).

The statutory definition of marital property is broad and comprehensive. See *O’Brien v. O’Brien*, 66 N.Y.2d 576, 583 (1985). The phrase “regardless of the form in which title is held” indicates that the distribution of marital property upon dissolution is not controlled by who has legal title to a family asset produced during the marriage.

In *O’Brien*, it was noted that “marital property” as the term is used in the Equitable Distribution Law is a term of art and a new species of “property” that was not anchored in common law property concepts or affected by decisions in other states having a different statutory definition. The Court of Appeals held that an interest in a profession or a professional career potential, there a physician’s license, “was marital property subject to equitable distribution.” (*O’Brien* and its progeny were legislatively overruled by Laws of 2016, Ch.269.) The fact that the license was not assignable, could not be transferred and could not be sold and had no market value did not preclude the license from being a “valuable property right” that enhanced the husband’s earning capacity, which the EDL had recognized by providing for distributive awards.

The public policy expressed by the definition of marital property is that the “product” of the marital partnership is subject to equitable distribution. Ordinarily, assets produced before marriage or after the execution of a separation agreement or the commencement of a matrimonial action are not the products of an on-going marital partnership. In general, the characterization of property as “marital property” occurs when a dissolution action is commenced, or when property is designated as marital in a valid agreement that conforms to the requirements of Domestic Relations Law §236(B)(3).

In *McDermott v. McDermott*, 119 A.D.2d 370 (2d Dep’t 1986), the issue was the authority of the court to limit the husband’s choice of pension options. In its decision, the Second Department stated that equitable distribution created new property concepts under which the Supreme Court was authorized to limit the husband’s choice of pension options. It pointed out that the centerpiece of the equitable distribution revolution was the concept of marital property and the judicial power to distribute it. The court held that under the economic partnership doctrine Mrs. McDermott began acquiring an interest in her husbands’ pension from the moment he joined the plan. That interest, unenforceable and unallocated as it may have been prior to the divorce action, constituted the seed from which an inchoate interest in the pension emerged as a marital asset when the divorce action began, and matured into a true ownership interest when the equitable distribution judgment terminated the action. During the marital property phase, when a spouse’s interest is still inchoate, it is protectable against unwarranted dissipation. When inchoate rights become actual ownership interests by virtue of equitable distribution judgments, they are susceptible to even greater protection because their enhancement status eliminates some of the inhibitions inherent in the exercise of injunctive power prior to distribution.

It would appear that in *Hallsville Capital, S.A. v. Dobrish*, 87 A.D.3d 933 (1st Dep't 2011), the First Department rejected the conclusion that an inchoate interest in property acquired during the marriage is created upon the marriage of the parties. It observed that Domestic Relations Law §236(B)(5)(a) provides that the court "shall provide for the disposition [of the parties' property] in a final judgment"; the statute does not "create any contingent or present vested interests, legal or equitable at any point before judgment." However, the authority it cited for its conclusion was Justice O'Connor's concurring opinion in *Leibowits v. Leibowits*, 93 A.D.2d 535, 549 (1983), which has no precedential value. See *White v. Mazella-White*, 60 A.D.3d 1047, 1048 (2009); *Musso v. Ostashko*, 468 F.3d 99, 107 (2006) ("A mere judicial declaration of equitable distribution, without entry, cannot give a spouse an interest in property superior to that of a creditor ... holding a valid judgment lien.").

In *Pangea Capital Management v. Lakian*, --- N.E.3d ---, 2019 WL 2583109 (2019), the U.S. Court of Appeals for the Second Circuit certified the following question to the Court of Appeals: If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law §236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property? The Court of Appeals answered the question in the negative.

John and Andrea Lakian were married in 1977. In 2002, they purchased a home on Shelter Island, Suffolk County, for \$4.5 million. Title to the property was recorded in John's name and immediately transferred to a trust, for which John was the sole trustee and each spouse was a 50% beneficiary as tenant in common. In 2013, Andrea commenced an action for divorce. A judgment entered on June 11, 2015 incorporated by reference an agreement that settled all issues, including providing for the sale of the Shelter Island property. Under the settlement, Andrea would receive 62.5% of the proceeds plus another \$75,000 and John would receive the balance.

In 2012, Pangea Capital Management brought an action against John. Pangea voluntarily discontinued that action in favor of arbitration. The arbitrator ruled in Pangea's favor on Jan. 6, 2016, and Pangea subsequently brought an action in federal court to enforce the \$14 million arbitral award against John. Pangea sought and obtained an order of attachment on the Shelter Island property. Several months later, John asked the federal district court to modify the order of attachment to permit the sale of the home. The court allowed Andrea to intervene and the parties agreed to the sale and further agreed that the proceeds, totaling over \$5 million, would be deposited with the Clerk of the court while the dispute over Pangea's claim to the proceeds was litigated. The parties also agreed that their rights to the proceeds would constitute the "cash equivalent" of their rights in the Shelter Island property. During this time, the federal district court confirmed the \$14 million arbitral award against John and entered a judgment in Pangea's favor in November 2016, which Pangea promptly docketed.

Andrea contended that, pursuant to the terms of the divorce settlement, she was entitled to 62.5% of the sale proceeds, plus \$75,000. Pangea argued that, because it docketed its judgment before Andrea docketed her judgment of divorce in Suffolk

County, CPLR 5203 gave Pangea priority over Andrea with respect to the Shelter Island property.

The Court of Appeals noted that CPLR 5203(a) concerns “Priority and lien on docketing judgment,” and provides, in relevant part: “No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned.”

The Court of Appeals explained that under Domestic Relations Law §236(B)(1)(c), marital property is “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held.” Andrea had an interest in that marital property. Citing *McDermott*, it held that “[L]egal rights to specific marital property vest upon the judgment of divorce, with ‘inchoate rights’ becoming ‘actual ownership interests by virtue of [an] equitable distribution judgment.’”

The court held that Pangea’s conception of Andrea as judgment creditor was utterly incompatible with the legislature’s dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of “marital property” into Domestic Relations Law §236, “the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law.” Under that statute, both “spouses have an equitable claim to things of value arising out of the marital relationship.” Marital property “hardly fall[s] within the traditional property concepts because there is no common-law property interest remotely resembling marital property.” Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-spouse the creditor of another. Andrea therefore could not properly be considered a judgment creditor of John. Thus, CPLR 5203(a), by its plain terms, had no application here, and Pangea had no priority. Subsection (a) applies to transfers of the interest of a judgment debtor in real property; the equitable distribution of Andrea’s share was not the transfer of the interest of a judgment debtor to a judgment creditor. Subsection (c) concerns only the priority given to a judgment creditor as against a lien created by a petition in bankruptcy, which was irrelevant here.

The court held that the Second Circuit’s decision in *Musso v. Ostashko*, had no application. In *Musso*, Tanya Ostashko obtained a decision in her matrimonial action, awarding her certain assets. Her husband’s creditors immediately filed an involuntary bankruptcy petition against her husband before the judgment was entered, and the Second Circuit held that because the divorce judgment had not been entered, the bankruptcy petition took priority, and all the marital assets were within the bankruptcy estate. *Musso* addressed a question that was not present here: When an award distributing marital assets has been made, but a bankruptcy petition is filed against a spouse before the divorce judgment is entered, do all the marital assets become part of the bankruptcy estate?

Pangea also relied on *Mussd's* statement that "under New York law an equitable distribution award is a remedy, and the enforcement of that remedy is no different than the enforcement of any other judgment." That statement was dicta, and did not accurately convey New York law because an entered judgment of divorce that distributes marital property is not like a money judgment of a judgment creditor.

The judgment of divorce was "a final settling of accounts" between marital partners with an equitable interest in all marital property. Because the judgment did not render Andrea a judgment creditor of John (and it did not render John a judgment creditor of Andrea), Andrea was not subject to the docketing requirements of CPLR 5203.

## Conclusion

*Pangea* is not the last word on the subject. In a footnote, the court pointed out that in some situations one spouse or ex-spouse might be a judgment creditor as to the other. For example, one spouse may obtain a money judgment against the other spouse pursuant to Domestic Relations Law §244. This was not the case here and the court had no reason to decide whether a spouse seeking to enforce a judgment pursuant to Domestic Relations Law §244 is a judgment creditor of the other spouse.

**Joel R. Brandes**, an attorney in New York, is the author of the nine volume treatise *Law and the Family New York, 2d*, and *Law and the Family New York Forms (five volumes)*, both published by Thomson Reuters, and the *New York Matrimonial Trial Handbook*.

f SHARE    t SHARE

## Dig Deeper

[Family Law \(/topics/family-law/\)](#)

## Recommended Stories

### **[Prenups and High Net Worth Divorces: Do They Solve Everything?](https://www.law.com/newyorklawjournal/2019/07/26/prenups-and-high-net-worth-divorces-do-they-solve-everything/)** **(https://www.law.com/newyorklawjournal/2019/07/26/prenups-and-high-net-worth-divorces-do-they-solve-everything/)**

STEVEN J. MANDEL | JULY 26, 2019

"Prenups" are not able to solve every problem that arises in a divorce, even when the terms are clearly spelled out and agreed upon beforehand.

### **[Adventures in Matrimonial Mediation: A Journey](#)**

---

LEAN ADVISER LEGAL (/LEAN-ADVISER/STATIC/LEAN-ADVISER/?CMP=LARMLDC)

## Think Lean Daily Message

" Surprisingly, the trick to not missing anything is not, as you might imagine, to read everything, but rather to establish what matters by CO... "

**Learn More (/lean-adviser/static/lean-adviser/?cmp=LARMLDC)**

## Featured Firms

### **Law Offices of Mark E. Salomone**

2 OLIVER ST #608  
BOSTON, MA 02109  
857-444-6468 [www.marksalomone.com](http://www.marksalomone.com)

### **Gary Martin Hays & Associates**

235 PEACHTREE ST NE #400  
ATLANTA, GA 30303  
800-898-4297 [www.garymartinhays.com](http://www.garymartinhays.com)

### **Smith & Hassler**

225 N LOOP W #525  
HOUSTON, TX 77008  
(877) 777-1529 [www.smithandhassler.com](http://www.smithandhassler.com)

Presented by Big

## [\(https://www.law.com/newyorklawjournal/2019/07/26/adventures-in-matrimonial-mediation-a-journey/\)](https://www.law.com/newyorklawjournal/2019/07/26/adventures-in-matrimonial-mediation-a-journey/)

LESLIE J. WILSHER | JULY 26, 2019

Not only is matrimonial mediation more efficient and less painful than battling over these issues in court, but sometimes something remarkable happens.

## **Divorce vs. Death: Pecuniary Rights and How They Differ**

## **(https://www.law.com/newyorklawjournal/2019/07/26/divorce-vs-death-pecuniary-rights-and-how-they-differ/)**

HARRIET NEWMAN COHEN AND TIM JAMES | JULY 26, 2019

Sometimes, the older client's question is posed in the starkest form: Am I better off getting a divorce or just waiting for my spouse to die? The smart lawyer's answer is "It depends on a lot of variables."

# More from ALM

CLE Center

Legal Compass

Events

Webcasts

Lawjobs

Professional Announcements

## Premium Subscription

With this subscription you will receive unlimited access to high quality, online, on-demand premium content from well-respected faculty in the legal industry. This is perfect for attorneys licensed in multiple jurisdictions or for attorneys that have fulfilled their CLE requirement but need to access resourceful information for their practice areas.

View Now  
(<http://clecenter.com/Program/Premium.aspx>)

## Team Accounts

Our Team Account subscription service is for legal teams of four or more attorneys. Each attorney is granted unlimited access to high quality, on-demand premium content from well-respected faculty in the legal industry along with administrative access to easily manage CLE for the entire team.

View Now  
(<http://clecenter.com/CleForFirm/Default.aspx>)

## Bundle Subscriptions

Gain access to some of the most knowledgeable and experienced attorneys with our 2 bundle options! Our Compliance bundles are curated CLE Counselors and include current legal topic and challenges within the industry. Our second option allows you to build your bundle and strategically select the content that pertains to your needs. Both options are priced the same.

View Now (<http://clecenter.com/Default.aspx>)

[CLE Center → \(http://clecenter.com\)](http://clecenter.com)

## ALM Legal Publication Newsletters

# Sign Up Today and Never Miss Another Story.

As part of your digital membership, you can sign up for an unlimited number of a wide range of complimentary newsletters. Visit your [My Account \(https://store.law.com/Registration/myAccount.aspx?promoCode=NY#/EmailPref\)](https://store.law.com/Registration/myAccount.aspx?promoCode=NY#/EmailPref) page to make your selections. Get the timely legal news and critical analysis you cannot afford to miss. Tailored just for you. In your inbox. Every day.

## Subscribe Now

(<https://store.law.com/Registration/promoCode=NY#/EmailPref>)  
[Privacy Policy \(https://www.alm.com/privacy-policy-new/\)](https://www.alm.com/privacy-policy-new/)

**FOLLOW US**

[.https://www.facebook.com/LawdotcomALM/](https://www.facebook.com/LawdotcomALM/)

[.https://twitter.com/lawdotcom](https://twitter.com/lawdotcom)

[.https://www.linkedin.com/company/law-com/](https://www.linkedin.com/company/law-com/)

[\(http://feeds.feedblitz.com/law/legal-news/\)](http://feeds.feedblitz.com/law/legal-news/)

**Publications**

- [The American Lawyer \(/americanlawyer/\)](/americanlawyer/)
- [Corporate Counsel \(/corpcounsel/\)](/corpcounsel/)
- [National Law Journal \(/nationallawjournal/\)](/nationallawjournal/)
- [New York Law Journal \(/newyorklawjournal/\)](/newyorklawjournal/)
- [New Jersey Law Journal \(/njlawjournal/\)](/njlawjournal/)
- [The Recorder \(/therecorder/\)](/therecorder/)
- [More Publications > \(/publications/\)](/publications/)

**Law Topics**

- [Litigation \(/topics/litigation/\)](/topics/litigation/)
- [Deals and Transactions \(/topics/deals-and-transactions/\)](/topics/deals-and-transactions/)
- [Law Firm Management \(/topics/law-firm-management/\)](/topics/law-firm-management/)
- [Legal Practice Management \(/topics/legal-practice-management/\)](/topics/legal-practice-management/)
- [Cybersecurity \(/topics/cybersecurity/\)](/topics/cybersecurity/)
- [Intellectual Property \(/topics/intellectual-property/\)](/topics/intellectual-property/)
- [More Law Topics > \(/topics/\)](/topics/)

**Rankings**

- [Am Law 100 \(/americanlawyer/rankings/the-2019-am-law-100/\)](/americanlawyer/rankings/the-2019-am-law-100/)
- [Am Law 200 \(/americanlawyer/rankings/the-2018-am-law-200-the-american-lawyer/\)](/americanlawyer/rankings/the-2018-am-law-200-the-american-lawyer/)
- [Global 100 \(/americanlawyer/rankings/global-100/\)](/americanlawyer/rankings/global-100/)
- [National Law Journal 500 \(/nationallawjournal/rankings/the-nj-500/\)](/nationallawjournal/rankings/the-nj-500/)
- [Pro Bono Scorecard \(/americanlawyer/rankings/pro-bono/\)](/americanlawyer/rankings/pro-bono/)
- [The A-List \(/americanlawyer/rankings/a-list/\)](/americanlawyer/rankings/a-list/)
- [More Rankings > \(/rankings/\)](/rankings/)

**More**

- [Events \(/events/\)](/events/)
- [Legal Compass \(https://www.alm.com/intelligence/solutions-we-provide/business-of-law-solutions/legal-compass/\)](https://www.alm.com/intelligence/solutions-we-provide/business-of-law-solutions/legal-compass/)
- [Editorial Calendar \(/editorial-calendar/\)](/editorial-calendar/)
- [Briefings \(/static/briefings/\)](/static/briefings/)
- [Legal Dictionary \(https://dictionary.law.com/\)](https://dictionary.law.com/)
- [Lawjobs.com \(http://lawjobs.com/\)](http://lawjobs.com/)
- [Law Firms \(/law-firms/\)](/law-firms/)
- [Law Schools \(/topics/legal-education/\)](/topics/legal-education/)

**Law.com**

- [About Us \(/static/about/\)](/static/about/)
- [Contact Us \(/static/contact-us/\)](/static/contact-us/)
- [Site Map \(/sitemap/\)](/sitemap/)
- [Advertise With Us \(/static/advertise-with-us/\)](/static/advertise-with-us/)
- [Customer Support \(https://www.alm.com/customer-support/\)](https://www.alm.com/customer-support/)
- [Terms of Service \(https://www.alm.com/terms-of-service/\)](https://www.alm.com/terms-of-service/)
- [FAQ \(/sites/almstaff/2017/10/20/faq-asked-questions/\)](/sites/almstaff/2017/10/20/faq-asked-questions/)
- [Privacy Policy \(https://www.alm.com/privacy-policy/new/\)](https://www.alm.com/privacy-policy/)