

New York Law - Equitable Distribution¹

Property and “Marital Property” Defined

Domestic Relations Law §236 [B] is commonly referred to as the Equitable Distribution Law (“EDL”). New York is an "Equitable Distribution State" and upon the dissolution of a marriage, the Court must distribute "Equitably" (but not necessarily equally) all marital property, and determine each spouse's right to his or her separate property. In equitably distributing marital property, the Court is required by the provisions of Domestic Relations Law § 236 [B][6] to consider fourteen factors. There must be a determination as to the equitable distribution of marital property and a determination as to the ownership of the separate property of each party.

Domestic Relations Law § 236, Part B(1)(c), gave a new statutory definition to "marital property." Under former law "marital property" referred solely to jointly owned property, such as a residence owned as tenants by the entirety, or joint bank or savings accounts. Under the statute 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 include separate property as hereinafter defined.” The definition of marital property applies for purposes of equitable distribution of family assets upon divorce.²

The definition of marital property is broad and comprehensive. It does not specify that in order to be "marital property" an item must have exchange value or be salable, assignable or transferable. In *O'Brien v O'Brien*,³ the Court of Appeals noted that "marital property" is a term of art and that the EDL created 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 (a physician's license) is marital property subject to equitable distribution.

Courts have liberally interpreted the term "marital property" to include vested but unmatured pension rights; a law practice; a physician's license; a Ph.D.; a degree and certification as a school administrator; a law license, a board certification in internal

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² See 3, Freed, Brandes and Weidman, *Law and the Family New York* § 2:1 et seq. (Marital Property) [2d ed rev 1993]).

³ 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717 (1985).

medicine; a teaching license; a physician's assistant's State license and certification; breeders' awards received before trial and future breeders' awards received after the date of the commencement of the action resulting from horse breeding during the marriage; lottery winnings from tickets bought from earnings; the portion of a pension that represents deferred compensation; a master's degree and teaching certificate; a fellowship in the society of actuaries; a degree and license as a health care administrator; a taxi medallion purchased by the husband prior to the marriage that was paid off during the marriage out of a joint account to which the wife contributed; oil paintings created by the husband, an artist, during the marriage; tax refunds used by the husband to purchase an IRA account in his name and a cooperative apartment occupied by the wife before marriage but converted during the marriage; wedding gifts; an abortion practice; a police pension in pay out status; an unvested and unmatured fireman's pension a non-vested pension; that portion of a matured and paying disability pension representing retirement benefits; a farm started by the husband before marriage to which the wife contributed her efforts as a lender, homemaker and mother; a medical-psychiatrist license; a debt owed by the parties'; a profit-sharing plan; a cooperative apartment that closed after the marriage; a podiatry practice; an increase in a spouse's career as an actress and model; the appreciation of personal injury settlement proceeds, and stock given to a husband's nominee where he has controlled it.⁴

In *Fields v Fields*⁵ the Court of Appeals, in an opinion by Judge Graffeo, concluded that the value of the husband's one-half interest in the parties' residence, a Manhattan townhouse that the husband purchased during the marriage and where the parties had lived for nearly thirty years, was marital property and affirmed the order of the Appellate Division. The decision is in keeping with the fundamental purpose of the Equitable Distribution Law, the recognition of marriage as an economic partnership, in which 'both parties contribute as spouse, parent, wage earner or homemaker.

At the outset Judge Graffeo set forth the applicable principals of law that applied to this case. She pointed out that Domestic Relations Law §236 defines 'marital property' as '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, and the definition of marital property includes a 'wide range' of tangible and intangible interests. She indicated that "it is telling that the Legislature chose to initially categorize all property, of whatever nature, acquired after parties marry as marital property." Hence, the Court has stressed that marital property should be 'construed broadly in order to give effect to the 'economic partnership' concept of the marriage relationship'. By contrast, separate property,

⁴ See 3B, Freed, Brandes and Weidman, Law and the Family New York § 16:13 [2d ed rev 1993]).

⁵ 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)

denoted as an exception to marital property, should be construed 'narrowly'. The structure of section 236 therefore creates a statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden rests with the titled spouse to rebut that presumption.⁶

The husband argued in the Court of Appeals that his one-half interest in the townhouse was separate property because he owned and managed the building with his mother and because the Wife did not contribute to its purchase or its appreciation in value. The Court of Appeals disagreed and concluded that the value of the husband's one-half interest in the townhouse was marital property subject to equitable distribution.

Judge Graffeo wrote that here, the husband purchased the townhouse in 1978, approximately eight years into the marriage, and therefore, on the date of acquisition, the presumption of marital property arose. Even where one spouse contributed monies derived from separate property toward the acquisition of the marital residence, this has not precluded its classification as marital property where the other spouse made economic or other contributions to the residence and the marriage; the contributing spouse generally has received a credit for that contribution. Here, the property was purchased eight years into the parties' marriage with the intent that it would be used as the marital residence where the parties would live and raise their son. In fact, that is precisely what occurred, the parties resided in the home with their son and other family members for nearly 30 years. Thus, the statutory presumption that a residence acquired during the marriage is marital property clearly applied in this case.⁷

Once the statutory presumption was triggered, the burden shifted to the husband to rebut that presumption.⁸ The Husband relied on the fact that he used monies derived from separate property, the \$30,000 down payment, to acquire the townhouse. But the townhouse was not 'acquired in exchange for' the \$30,000 down payment (Domestic Relations Law § 236 [B] [1] [d] [3]). The husband's \$30,000 separate property contribution covered only a fraction of the purchase price. While the down payment facilitated the acquisition, the use of a 'separate property' down payment does not, in and of itself, establish the property's character as separate property. The remaining \$100,000 of the purchase price was paid through two mortgages and, despite the husband's claim that he made mortgage payments solely from rental proceeds, he failed to substantiate that allegation. The husband testified that he commingled marital assets in the partnership bank account from which mortgage payments were made. Specifically, he acknowledged that he would sometimes deposit his paychecks, which were marital property, into the account. Funds from other sources of marital income

⁶ Fields v Fields, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010).

⁷ Fields v Fields, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010).

⁸ Citing DeJesus v DeJesus, 90 NY2d at 652.

were also placed into the account, such as the husband 's earnings from his tax preparation and video businesses and wife's paychecks. The fact that the husband would later transfer funds or give cash to the Wife does not alter the commingled nature of the funds. Finally, both the husband and the Wife paid rent to the partnership using income from their outside endeavors, which was a partial source of the mortgage payments. The Court found that the therefore failed to establish that the mortgages, which were used to pay the majority of the townhouse's purchase price, were paid using monies derived exclusively from separate property, much less that all of the expenses associated with the property were covered by segregated funds.⁹

Judge Graffeo noted that there is no single template that directs how courts are to distribute a marital asset that was acquired, in part or in whole, with separate property funds. In these situations, courts have usually given the spouse who made the separate property contribution a credit for such payment before determining how to equitably distribute the remaining value of the asset. In distributing any appreciation in value, courts may consider any of the factors listed in Domestic Relations Law §236 (B) (5) (d) or any other relevant considerations, including the respective contributions of each spouse and the effect of market forces.¹⁰

In this case, the courts below properly considered the spectrum and quantity of contributions made by each spouse to the management and maintenance of the townhouse and the extent to which market factors enhanced the value of the property. Under these circumstances, the Court declined to disturb the determination below that the husband failed to rebut the statutory presumption that his interest in the townhouse is marital property subject to equitable distribution and that the Wife was entitled to 35 percent of the husband 's interest in that asset. In reaching this conclusion, the Court emphasized that the husband purchased the townhouse eight years into the 35-year marriage and that the family maintained their living arrangement since 1978. It is not for the courts to dictate what type of lifestyle a 'normal' marriage should reflect or how married couples should structure their marital relationships. That the husband and the wife in this case maintained separate apartments in the building did not change the character of the property from marital to separate, especially since they both made economic and noneconomic contributions to their marriage and the upbringing of their son. Many married couples sleep in different bedrooms for a variety of reasons and such arrangements do not affect the 'marital property' status of their homes if they divorce. The fact that the husband took title to his one-half interest in the townhouse in his name alone is irrelevant under the statute's express language, nor does the fact that the husband acquired title with his mother interfere with the marital character of his interest in the property. That portions of the townhouse were used as

⁹ Fields v Fields, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010).

¹⁰ Fields v Fields, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)

an income-generating business does not transform the building into separate property. The Wife's lack of an initial monetary investment and involvement in the management activities pertaining to the townhouse do not preclude a holding that the husband 's interest in the building is marital property. These were factors properly considered by the trial court in determining the extent of wife's distributive award.¹¹

Equitable Distribution: Professional Degrees and Licenses

In *O'Brien v O'Brien*,¹² the Court of Appeals mandated that the Equitable Distribution Law be given a liberal interpretation, and held that a professional degree or license was "marital property" subject to equitable distribution. It affirmed the trial courts holding that Dr. Michael O'Brien's medical degree and license, earned during the course of the marriage, had a present value of \$472,000, and awarded his wife Loretta 20% of that amount. That figure was computed by comparing the average income of a college graduate and a general surgeon (Dr. O'Brien's then residency training) between 1985, when Dr. O'Brien anticipated the completion of his residency, until his 65th birthday. After considering Federal income taxes, an inflation rate of 10 percent and a real interest rate of 3 percent, the court capitalized the difference in average earnings and reduced the amount to present value.

The Court of Appeals expanded the *O'Brien* rule in *McSparron v McSparron*¹³ where the court concluded that even after a license has been exploited by the licensee to establish and maintain a career, it does not "merge" with the career or ever lose its character as a separate, distributable asset. The Court cautioned that care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license. Most notable among these is the licensed spouse's professional practice. Courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses. Recognizing that the question of valuation would probably have to be tried over, the Court of Appeals held that in selecting the appropriate valuation date the trial court may consider the events which may have affected the value of Jim's license, including his job loss, which was caused in part by what the Appellate Division characterized as Hedy's 'acrimonious and vindictive conduct'. The Court of Appeals reported that in selecting a valuation date some make a distinction between "active" assets, whose value depends on the labor of a spouse, and "passive assets," whose value depends only on market conditions. These courts concluded that "active" assets should be valued only as of the date of the

¹¹ *Fields v Fields*, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)

¹² 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717 (1985).

¹³ 87 NY2d 275, 639 NYS2d 265 (1995).

commencement of the action, while the valuation date for "passive" assets may be determined more flexibly. The Court of Appeals rejected the "active-passive" distinction as a rule of law, holding that they be regarded only as helpful guideposts.¹⁴

Equitable Distribution: Appreciation of Separate Property Is Marital Property

In *Price v Price*¹⁵ the Court of Appeals attempted to construe Domestic Relations Law § 236(B)(1)(d)(3) which 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 Court of Appeals held that under the Equitable Distribution Law an increase in the value of the separate property of one spouse, occurring during the marriage and before 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 cautioned, 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 Court of Appeals held that the nontitled 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. (2) he or she contributed, in part, to the 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 due solely to 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 which

¹⁴ See 3B, Freed, Brandes and Weidman, Law and the Family New York, Chapter 16, (Professional Practices, Licenses and Degrees) [2d ed rev 1993]).

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

contributed to the increase in value of the asset.¹⁶

In *Hartog v Hartog*¹⁷ the Court of Appeals held that requiring a nontitled 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 Domestic Relations Law § 236[B][1][c], [B][1][d][3], [B][5][c], [B][5][d][6]. The Court concluded that where an asset, like an ongoing business, is, by its very nature, non-passive and sufficient facts exist from which the fact finder 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 fact finder must then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution . . . "¹⁸

Separate Property: Defined - Domestic Relations Law § 236 [B](1)(d)

Domestic Relations Law § 236 Part B(1)(d) contains the statutory definition of "separate property." It provides: "d. The term separate property shall mean:

- (1) property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;
- (3) 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;
- (4) property described as separate property by written agreement of the parties pursuant to Subdivision Three of this part."

Separate Property: Property Acquired Before Marriage or By Inheritance or Gift

The first type of separate property is listed in Domestic Relations Law § 236 [B](1)(d)(1), which reads: "(1) Property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse."

This provision ordinarily covers the majority of assets classified as separate

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

¹⁷ 85 NY2d 36, NYS2d (1995).

¹⁸ See 3, Freed, Brandes and Weidman, *Law and the Family New York* § 2:9 et seq. [2d ed rev 1993].

property and exempted from equitable distribution. The common thread running through this subdivision (1) is that the items described were not produced by a functioning marital partnership. Property which was separate property before marriage was not produced during the marital partnership. The same holds true as to inheritances and gifts from a party other than a spouse. Gifts between spouses are not included in subdivision (1) and are "marital property. This exemption from equitable distribution of gifts and inheritances from other parties applies when they are individual gifts but not when the gift or inheritance is to both spouses.

In *Capiello v Capiello*¹⁹ the trial judge awarded Lorraine Capiello \$38,780 as her distributive share of the marital property. The Appellate Division reduced the award because equitable distribution is "not designed either to result in a penalty or a windfall," and considerations of fairness and equity did not justify a fifty-fifty division of the marital property. It also held that the wife was not entitled to a distributive share of the value of Anthony's new company which was a spin-off from his equity interest in his old firm, or to a distributive share of the cooperative apartment which he bought with his own funds after leaving the marital home. These were separate property interests, not subject to distribution. The Court of Appeals affirmed and held that although property acquired during the marriage and before commencement of a matrimonial action is marital property, and that separate property acquired in exchange for, or the increase in value of separate property remained "separate."

Separate Property: Compensation for Personal Injuries

Domestic Relations Law § 236 [B] Subdivision (1)(d) exempts from equitable distribution and designates as separate property "compensation for personal injuries." In *West v West*,²⁰ the matter was sent back to the trial Court for a determination of the extent to which the husband's disability pension was marital property because the portion attributable to compensation for his personal injuries is separate property. The Appellate Division explained that the difference between a disability pension and a retirement pension is in the extent to which the disability pension is compensation for personal injuries and is separate property and not subject to equitable distribution. "However," "where a disability pension may in part, represent deferred compensation, it is indistinguishable from a retirement pension and is, to some extent, subject to equitable distribution."²¹

¹⁹ 66 NYS2d 107, 495 NYS2d 318, 485 NE2d 983 (1985).

²⁰ 101 AD2d 834, 475 NYS2d 493 (2 Dept. 1984).

²¹ In *Biddlecom v. Biddlecom*, 113 AD2d 66, 495 NYS2d 301 (4 Dept. 1985), the court held that severance benefits received by the former husband as part of his early retirement following the divorce, as well as an additional monthly payment he received

Separate Property: Property Acquired in Exchange for Separate Property

There is an exclusion from "marital property" of "property acquired in exchange for or the increase in value of separate property".²²

Separate Property: Property Described in Agreement As Separate Property

The last specific example of "separate property" is found in Domestic Relations Law § 236[B] (1)(d)(4), which refers to "property described as separate property by written agreement of the parties." In the First and Second Departments a "written agreement" includes stipulations made on the record in open court pursuant to CPLR 2104.²³

as a supplemental benefit, were designed to compensate employees for the lack of eligibility for Social Security benefits and to serve as inducement for early retirement, and are not marital property subject to Equitable Distribution, but are the separate property of the retired husband.

In *Howe v Howe*, 68 A.D.3d 38, 886 N.Y.S.2d 722 (2 Dept 2009) the plaintiff became a New York City firefighter soon after the parties were married, and remained in that employment until approximately 16 months prior to the commencement of this action. The wife cross appealed from that part of the judgement that awarded the plaintiff 100 percent of the remaining funds from his September 11th Victim Compensation Fund award. The plaintiff received an award from the September 11th Victim Compensation Fund as a result of injuries he suffered in the aftermath of that tragedy. The administrator of that fund specifically designated a portion of that award, in the amount of \$127,571, as compensation for economic loss. The Supreme Court held that the economic component of the award constituted 'compensation for personal injuries' within the meaning of Domestic Relations Law 236(B) (1)(d)(2) and, on that basis, treated the award as the separate property of the plaintiff. The Appellate Division agreed with that determination, because, inter alia, the legislative history of the Equitable Distribution Law compelled it. The Second Department rejected the rule in the other departments that the economic component of a personal injury award is separate property, which is derived from the holding of the Appellate Division, Third Department, in *Fleitz v. Fleitz* (200 AD2d 874) and the decisions of the Appellate Division, First Department and the Appellate Division, Fourth Department, that have followed it (see *Gann v. Gann*, 233 AD2d 188; *Solomon v. Solomon*, 206 AD2d 971).

²² Domestic Relations Law §236 [B](1)(d)(3).

²³ See *Sanders v. Copley*, 151 A.D.2d 350, 543 N.Y.S.2d 67 (1st Dept 1989); *Rubinfeld v. Rubinfeld*, 279 A.D.2d 153, 720 N.Y.S.2d 29 (1st Dep't 2001); *Harrington v. Harrington*, 103 A.D.2d 356, 479 N.Y.S.2d 1000 (2d Dep't 1984). See

Distributive Award: Defined - Domestic Relations Law § 236 [B][5][e]

The term “distributive award” means payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts. Distributive awards may not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.²⁴

Except where the parties have provided in an agreement for the disposition of their property pursuant to Domestic Relations Law 236 [B][3], the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, must (1) determine the respective rights of the parties in their separate or marital property, and (2) provide for the disposition thereof in the final judgment.²⁵

Separate property remains separate.²⁶

The Court must distribute marital property "equitably between the parties, considering the circumstances of the case and of the respective parties."²⁷

3, Freed, Brandes and Weidman, Law and the Family New York § 2:4 et seq. [2d ed rev 1993]).

²⁴ Domestic Relations Law §236 [B][1][b]

²⁵ Domestic Relations Law §236 [B][5][a]

²⁶ Domestic Relations Law §236 [B][5][b]

²⁷ Domestic Relations Law §236 [B][5][c]

In any action in which the court determines that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution is required to make a distributive award in order to achieve equity between the parties.²⁸

In its discretion, the court may also make a distributive award to supplement, facilitate or effectuate a distribution of marital property.²⁹

Thus, "equitable distribution" refers to a physical division or distribution of an equitable share of particular marital property, including liquid assets such as cash or stocks and nonliquid assets such as a house or pension plan. A "distributive award" refers to a "payment" to effectuate or facilitate a division or distribution of marital property. Although an "equitable distribution" of cash or other liquid assets is the physical equivalent of a distributive award, by definition, it would still be an equitable distribution.³⁰

Presumptions as to Marital and Separate Property

All property acquired by either or both spouses during the marriage, unless clearly separate, is presumed to be marital property, regardless of in whose name title is taken.³¹ The term "marital property" is to be broadly interpreted. The term "separate property" is to be narrowly interpreted. The reason for this is to give effect to the

²⁸ Domestic Relations Law §236 [B][5][e]

²⁹ Domestic Relations Law §236 [B][5][e]

³⁰ Domestic Relations Law § 236 [B]

³¹ Fields v. Fields, 15 N.Y.3d 158, 165, 931 N.E.2d 1039, 1043 (2010) (“ This case involves the application of the well-settled statutory presumption that all property acquired by either spouse during the marriage, unless clearly separate, is deemed marital property”)

economic-partnership concept of the marriage relationship.³²

Where, “ the property at issue is held jointly, an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement”. It found that the husband did not overcome the presumption that the jointly titled property, i.e., an Investacorp account, should be divided equally between the parties.³³

Equitable Distribution and Distributive Award - Burden of Proof of Value - Effect of Failure to Value

The party seeking an interest by way of an equitable distribution, or a distributive award, in marital property titled in the name of the other spouse, has the burden of proving its value at the appropriate valuation date.³⁴

In *D'Amato v D'Amato*³⁵ where the major assets constituting marital property were the marital residence and defendant's pension the Appellate Division said: “ A determination must be made as to the net value of each asset before determining the distribution thereof. In this regard, Special Term must make explicit findings of fact as to the reasons for the distribution of each asset constituting marital property.”

³² *Helen A. S. v Werner R. S.*, 166 AD2d 515, 560 NYS2d 797 (2d Dept. 1990); *Sarafian v Sarafian*, 140 AD2d 801, 528 NYS2d 192 (1988).

³³ *Lauzonis v. Lauzonis* 105 AD3d 1351, --- N.Y.S.2d ---- (4 Dept. 2013). The foundation for the holding that where the property at issue is held jointly, “an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement is questionable since the funds deposited into the joint account were marital property to begin with and *Diner v Diner* , 281 A.D.2d 385, 386, 721 N.Y.S.2d 667 (2d Dept 2001) and the cases cited by the court in support of its holding, and the cases cited in *Diner*, refer to situations where separate property is deposited into a joint account.

³⁴*Antoian v. Antoian*, 215 A.D.2d 421, 422, 626 N.Y.S.2d 535 (2nd Dept.1995); *LaBarre v. LaBarre*, 251 A.D.2d 1008, 674 N.Y.S.2d 235 (4th Dept.1998); *Gredel v. Gredel*, 128 A.D.2d 834, 513 N.Y.S.2d 754, 755 (2d Dept., 1987)

³⁵ (1983, 2d Dept) 96 App Div 2d 849, 466 NYS2d 23

In *Capasso v Capasso*³⁶ the Appellate Division pointed out that the trial court has an obligation to determine the net value of each asset before making a distributive award. Absent unusual circumstances, making valuation unnecessary or unfeasible "consideration of the total value of the marital property is essential to the fashioning of a plan of distribution, for it is this total, after all, which has to be apportioned." The court must state the facts and figures deemed essential in valuation..

Thus, the court may not make a distribution of marital property without first determining the value of each marital asset.³⁷ The rationale behind this rule is that the court must know the value of the property it is distributing before making an equitable distribution or distributive award, in order to determine the amount being awarded each spouse. Moreover, the amount of the property distribution is a factor to be considered before making a maintenance and counsel fee award.³⁸

Although marital property is distributed regardless of the form in which title is held³⁹ this rule has significant consequences in cases where an asset is titled in the name of one spouse. For example, the failure of a spouse to prove the value of an asset or a business titled in the name of the other spouse constitutes a waiver of the right to equitable distribution or a distributive award of the value of that asset or business.⁴⁰ Where the marital residence is titled in the name of one spouse

³⁶ (1986, 1st Dep't) 119 App Div 2d 268, 506 NYS2d 686

³⁷ *Capasso v Capasso* (1986, 1st Dep't) 119 App Div 2d 268, 506 NYS2d 686. See also *Hartog v Hartog*, 194 AD2d 286, 605 N.Y.S.2d 749 (1st Dept, 1993) (stocks, bonds and brokerage account)

³⁸ *Capasso v. Capasso*, 129 A.D.2d 267, 517 N.Y.S.2d 952 (1 Dept., 1987); *Hirschfeld v. Hirschfeld* 96 AD2d 473,464 NYS2d 789 (1st Dept, 1983) (husbands law practice); *Antoian v Antoian*, 215 AD2d 421, (2d Dept., 1995) (husbands business); *Post v Post*, 68 AD3d 741 (2d Dept., 2009) (husbands business); *Sutera v Sutera*, 123 AD3d 909 (2d Dept.,2014) (husbands business).

³⁹ Domestic Relations Law 236[B][1][c]

⁴⁰ In *Antoian v. Antoian*, 215 A.D.2d 421, 422, 626 N.Y.S.2d 535 (1995) the defendant contended that the court erred in failing to value the plaintiff's business, G&W Dairy Distributors, Inc. The Appellate Division held that defendant, as the party seeking an interest in this asset, had the burden of establishing its value. The defendant failed to present sufficient proof to rebut the plaintiff's assertion that the business had no value at the time of trial and to enable the court to assess its value .

alone the court may not order its sale and distribution of the proceeds absent a valuation.⁴¹ Where the marital residence or other marital property is titled in the name

Thus, the court properly declined to include the value of the business in the marital estate.

In *Goudreau v. Goudreau*, 283 A.D.2d 684, 685 86, 724 N.Y.S.2d 123 (3d Dept 2001) the Appellate Division held that the plaintiff, as the party seeking an interest in the defendants contracting business, submitted no proof of its value or any articulation of what constituted business assets Supreme Court properly excluded it from the distribution of marital property. Considering the lack of any proof of business value and deferring to Supreme Court's credibility determinations, it concluded that the distribution of the marital property was equitable.

In *Post v. Post*, 68 A.D.3d 741, 743, 890 N.Y.S.2d 581 (2d Dept., 2009) the Second Department held that the court erred in awarding the plaintiff a portion of the defendant's business. The plaintiff, as the party seeking an interest in the business, submitted no proof of its value, and failed to identify the business assets. The Supreme Court did not determine any assets of the business, but awarded the plaintiff \$43,000 based upon the defendant's income. The Appellate Division found that the court's award was not supported by the record as there was no proof of business value or assets.

In *Sutera v Sutera*, 123 AD3d 909 (2d Dept.,2014) the Appellate Division held that the supreme Court properly declined to make a distributive award of the plaintiffs alleged money-lending business due to the insufficient evidence of the existence and value of such business.

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In *London v. London*, 21 A.D.3d 602, 799 N.Y.S.2d 646 (3d Dep't 2005), the Appellate Division observed that the findings recited that no evidence was received with respect to market value of the two residences either at the time of trial or the time of commencement of the action, nor was evidence received with respect to the value of much of the personalty, rendering the record insufficient for independent review. The Appellate Division held that as the nontitled spouse, plaintiff had the burden of establishing the value, if any, that was added to the marital residence by her direct or indirect contributions during the marriage. As she did not, Supreme Court should not have awarded her any interest in this asset. Moreover, it was error for Supreme Court to order this separate property sold. Supreme Court also found that defendant's Wachovia securities account and defendant's pension and profit-sharing trust plans were marital assets despite uncontroverted evidence that these plans were established prior to the marriage. There was a marital component to these assets, however, as contributions were made after the marriage. Defendant argued that plaintiff was entitled to no share in these assets by reason of her failure to offer proof of valuation

of both spouses it appears the court may direct its sale and an equal distribution of the proceeds as a distributive award, even though it has not been valued, because if it declines to make an equitable distribution or a distributive award of the property, the parties will hold it as tenants in common after the dissolution of their marriage, and, as a general rule, each party would be entitled to fifty percent of its value upon a subsequent sale or partition. In such case the amount of the distribution to each party will be equal.⁴²

concerning the separate and marital portions of these assets. The Court held that such proof is however, only if the asset will be the subject of a distributive award. Rather than make a distributive award, Supreme Court erroneously equally divided these accounts and directed that a Qualified Domestic Relations Order be employed, if necessary, to transfer half of these funds to an individual retirement account in plaintiff's name. Such a distribution gave defendant no credit for his separate property interest in these accounts. There appeared to be no reason why the Majauskas formula (see "Majauskas v. Majauskas, 61 N.Y.2d 481, 488-493, 474 N.Y.S.2d 699, 463 N.E.2d 15, 6 Employee Benefits Cas. (BNA) 1053 (1984)) should not be applied to properly distribute these accounts. Neither party submitted competent evidence of value of any other asset. Both made irreconcilable claims of the value of household furnishings, and both attempted to submit evidence concerning the value of automobiles, jewelry and an all terrain vehicle. Despite a lack of evidence, Supreme Court directed defendant to sell his Rolex watch and the all terrain vehicle and divide the proceeds equally with plaintiff, while ignoring plaintiff's own Rolex watch, thousands of dollars worth of jewelry given to her during the marriage by defendant and all of the household furnishings, leaving all with plaintiff. The Court held that upon remittal, the marital residence and the Wachovia securities account were to be awarded to defendant as his separate property and the house could not be ordered sold. Defendant's pension and profit-sharing plans that he originated prior to marriage were to be divided in accordance with the Majauskas formula and Supreme Court was directed to require plaintiff's counsel to submit a Qualified Domestic Relations Order to accomplish this division.

⁴² In *Thom v Thom*, 162 A.D.2d 811, 558 N.Y.S.2d 219 (3d Dept, 1990) the Appellate Division affirmed that part of the judgment which ordered the sale of the marital residence and equal distribution of the proceeds. The record indicated that the parties jointly purchased the residence in 1985 with a down payment from the proceeds of the sale of another house they jointly owned. The parties had no other assets apart from the house and its contents. Since no expert witnesses gave any appraisal value of the home and defendant raised no objections, Supreme Court's order that the property not be sold for less than \$145,000 was reasonable as is its ordered division of the proceeds.

Valuation may be unnecessary only in the rare cases where cash or liquid assets are equitably distributed "in kind", and in pension cases⁴³ where there is an equitable distribution in accordance with the rule enunciated in *Majauskas v Majauskas*,⁴⁴ rather than a lump sum distribution.

We have found only a few reported cases where valuation was not established before the court distributed the marital property in kind or without valuing it. None of these cases indicate the courts reasoning for distributing the asset without a valuation, whether the issue of the manner of distribution was even raised, or whether anyone objected to the manner of distribution.

In *Blaise v. Blaise*,⁴⁵ the Appellate Division said: " The essentially equal distribution of marital property by in-kind distribution rather than by liquidation was well within Supreme Court's discretion and supported by the record." However, it did not discuss the facts of the case or what was distributed in kind.⁴⁶

In *Van Housen v. Van Housen*,⁴⁷ the Appellate Division held that although no

⁴³ In *Mele v. Mele*, 152 A.D.2d 685, 686, 544 N.Y.S.2d 25, 26 (2d Dept., 1989), where the distribution of an unvalued pension was involved the court stated: " As to the issue of valuation, where, as here, the court has properly considered the parties' monetary and nonmonetary contributions to the marriage and the feasibility of a lump-sum award and the proper formula has been applied, valuation of the parties' respective interests may not be required (see, *Van Housen v. Van Housen*, 114 A.D.2d 411, 494 N.Y.S.2d 135)."

⁴⁴ 61 NY2d 481

⁴⁵ 206 A.D.2d 715, 716, 614 N.Y.S.2d 779, 780 (3d Dept., 1994)

⁴⁶ In *Spector v Spector*, NYLJ, Feb. 16, 1984, p. 12, col. 1 (Sup Ct, NY Co.) the Supreme Court simply distributed marital property in kind, without arriving at fixed percentages. The wife received all income producing properties. The husband was directed to hold the vacation home until wife's death or the child's majority and the wife was awarded exclusive occupancy 3 1/2 months of year. The wife received properties worth \$319,000 subject to \$51,000 mortgages. The decision was not appealed.

⁴⁷ 114 A.D.2d 411, 411-12, 494 N.Y.S.2d 135 (2d Dept., 1985)

expert testimony was presented as to the value of the parties' marital assets, which consisted of the marital residence, New York Telephone Company stock and defendant's vested pension), Special Term's award of one half of the value of each asset to each party effectuated the purpose and intent of equitable distribution. The pension was distributed in accordance with the formula used in *Majauskas v. Majauskas*, 61 NY2d 481,⁴⁸ the wife was awarded exclusive occupancy of the marital residence, and the stock was distributed in kind.

In *Spathis v. Spathis*,⁴⁹ the Appellate Division found that Plaintiff failed to provide the court-appointed forensic expert with sufficient information to value his stock options at the time of the marriage or the present value of the shares he purchased, and thus plaintiff could not be credited in the amount of the value as of the date of the marriage of his right to acquire the shares of stock. Nor could the value of the shares be distributed since the same was unknown. It held that in such circumstances, it was necessary and appropriate to resolve the issue by ordering an in-kind distribution of the stock shares, and it modified the judgment to direct the husband to transfer half of the shares of stock to the wife.

Despite, the rare cases set forth above there is a requirement that marital assets, other than a pension, must be valued, and the failure to value those assets will constitute a waiver of the right to an equitable distribution and a distributive award of those assets. The Appellate Division has held that in a matrimonial action, where there is an absence of proof regarding the value of property or the reasons for treating property as marital property, the Court may refuse to consider any equitable distribution of those assets.⁵⁰

⁴⁸ 61 NY2d 481

⁴⁹ 103 A.D.3d 599, 960 N.Y.S.2d 384 (1st Dep't 2013), leave to appeal dismissed in part, denied in part, 22 N.Y.3d 913, 975 N.Y.S.2d 733, 998 N.E.2d 397 (2013),

⁵⁰ See *Gredel v. Gredel*, 128 A.D.2d 834, 513 N.Y.S.2d 754 [2d Dept.1987], leave dismissed 70 N.Y.2d 693, 518 N.Y.S.2d 1028 [1987]; *Moller v. Moller*, 188 A.D.2d 807, 591 N.Y.S.2d 244 [3d Dept.1992]).

In *Gredel v. Gredel*, 128 A.D.2d 834, 513 N.Y.S.2d 754, 755 (2d Dept., 1987) the plaintiff sought to modify the divorce judgment to provide that she was entitled to sole ownership of the parties' Connecticut real property and a distributive award of the defendant's pension. The plaintiff, as the one seeking an interest in these assets, had the burden of establishing their value and her interest therein. The Appellate Division found that the plaintiff failed to present sufficient proof to the referee at the inquest, to enable the court to make distributive awards with respect to these assets.

There are separate rules for the equitable distribution, or a distributive award of a vested or nonvested pension, which is valued as of the date of the commencement of the action.⁵¹ Valuation is not required where a spouse does not seek a present lump

In *Moller v. Moller*, 188 A.D.2d 807, 808, 591 N.Y.S.2d 244, 246 (3d Dept, 1992) neither party supplied any evidence of the value of any particular personal assets claimed to be marital property. The Appellate Division held that in the absence of any claimed value or reasons for treating the personalty as marital property, Supreme Court properly refused to consider any equitable distribution of those assets.

In *N.H. v. S.H.*, 28 Misc. 3d 1217(A), 958 N.Y.S.2d 62 (Sup. Ct. 2010) the court stated:" In light of the parties' complete failure to satisfy their respective burdens of proof regarding the parties' separate or marital assets, this Court is unable to direct any specific distribution of assets.

⁵¹ In *Damiano v Damiano* (94 AD2d 132, *supra*), the Appellate Division held that, despite its contingent nature, a pension benefits belonging to either spouse attributable to employment during the marriage, whether those benefits are vested or nonvested, and whether the plan is contributory or noncontributory, constitute marital property subject to equitable distribution upon divorce. The marital property, however, shall include only that portion of the pension benefits which have accrued during the marriage and prior to the commencement of the divorce action (see Domestic Relations Law, § 236, part B, subd 1, par c). The nonemployed spouse's right to pension benefits may be enforced primarily by two methods. One is to award the nonemployee spouse a lump sum, calculated by determining the present value of the pension benefits at the time of the divorce, the percentage of that value attributable to the period between the date of the marriage and the commencement of the divorce action, and the appropriate equitable share to which the nonemployed spouse is entitled. The payment of a lump sum can often be accomplished by the redistribution of other marital assets as, for example, the proceeds of the sale of the marital residence. A second method, often preferable where contingencies make the determination of present value difficult or where there are insufficient marital assets from which to derive large lump-sum payments, is to award the nonemployee spouse a specific share of the periodic pension benefits the employed spouse will receive in the future. To do so, a court must determine the percentage of future pension payments attributable to the period of the marriage prior to the commencement of the divorce action and the appropriate equitable share to which the nonemployed spouse is entitled. The case was remitted for further proceedings.

In *Rodgers v Rodgers* (1983, 2d Dept) 98 App Div 2d 386, 470 NYS2d 401. the

sum payment in lieu of an equitable distribution. If a spouse proves its value as of the date of the commencement of the action the court can make an immediate lump sum distributive award in lieu of equitable distribution. If a spouse cannot prove its value the matrimonial court may: (1) order distribution to one spouse of an equitable portion of that part of the present value of the other spouse's pension rights earned during marriage; or (2) may provide that upon maturity of the pension rights the recipient pay a portion of each payment received to his or her former spouse, determined by use of the

Appellate Division observed that a lump-sum award is preferable when the amount the nonemployee spouse will receive is small and there is sufficient marital property to be awarded in lieu of a deferred interest, for enforcement problems may be avoided and finality achieved before the actual receipt of retirement benefits which may be years in the future. Also, care must be taken not to consider the pension interest twice, once as an asset for property division and again as an income item utilized in ascertaining maintenance. In *Damiano v Damiano* (94 AD2d 132, supra), the Appellate Division held that, despite its contingent nature, a pension benefits belonging to either spouse attributable to employment during the marriage, whether those benefits are vested or nonvested, and whether the plan is contributory or noncontributory, constitute marital property subject to equitable distribution upon divorce. The marital property, however, shall include only that portion of the pension benefits which have accrued during the marriage and prior to the commencement of the divorce action (see Domestic Relations Law, § 236, part B, subd 1, par c). The nonemployed spouse's right to pension benefits may be enforced primarily by two methods. One is to award the nonemployee spouse a lump sum, calculated by determining the present value of the pension benefits at the time of the divorce, the percentage of that value attributable to the period between the date of the marriage and the commencement of the divorce action, and the appropriate equitable share to which the nonemployed spouse is entitled. The payment of a lump sum can often be accomplished by the redistribution of other marital assets as, for example, the proceeds of the sale of the marital residence. A second method, often preferable where contingencies make the determination of present value difficult or where there are insufficient marital assets from which to derive large lump-sum payments, is to award the nonemployee spouse a specific share of the periodic pension benefits the employed spouse will receive in the future. To do so, a court must determine the percentage of future pension payments attributable to the period of the marriage prior to the commencement of the divorce action and the appropriate equitable share to which the nonemployed spouse is entitled. The case was remitted for further proceedings.

Majauskas formula.⁵² In *Majauskas*,⁵³ the Appellate Division formula, which was affirmed by the Court of Appeals, directed the husband, upon his retirement, to pay to the wife one-half of a percentage of the amount of each pension benefit payable to him, less taxes, that percentage to be derived by dividing the number of months the parties had been married before the commencement of this action by the total number of months of credits the husband will have earned toward his pension as of the date of retirement.

How Marital Property is distributed by the Court

The choice as to whether marital property shall be distributed or a distributive award shall be made in lieu of or to supplement, facilitate or effectuate a distribution of marital property are matters committed by Domestic Relations Law §236(B)(5) to the discretion of the trial court in the first instance.⁵⁴

It has been held that in the proper exercise of discretion courts should avoid a method of marital property distribution that permits one spouse immediate realization of the equity in assets awarded and relegates the other spouse to a relatively long and uncertain wait for the same enjoyment.⁵⁵

Although "equitable distribution" means that the court will award a spouse an equitable share of specific marital property, both liquid and nonliquid (i.e., physically distribute the marital property), very few cases have actually distributed a business equally or distributed minority ownership interests in a business. Those cases are

⁵² *Majauskas v. Majauskas*, 61 N.Y.2d 481, 486, 463 N.E.2d 15 (1984) affirming *Majauskas v. Majauskas*, 94 A.D.2d 494, 497-98, 464 N.Y.S.2d 913, 916 (1983).

⁵³ *Majauskas v. Majauskas*, 61 N.Y.2d 481, 486, 463 N.E.2d 15 (1984) affirming *Majauskas v. Majauskas*, 94 A.D.2d 494, 497-98, 464 N.Y.S.2d 913, 916 (1983).

⁵⁴ *Majauskas v. Majauskas* (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053; *Filax v. Filax* (1991, 4th Dept) 176 App Div 2d 1194, 576 NYS2d 692;

⁵⁵ *Filax v. Filax* (1991, 4th Dept) 176 App Div 2d 1194, 576 NYS2d 692; *Tanner v. Tanner* (1985, 3d Dept) 107 App Div 2d 980, 484 NYS2d 700; *Petrie v. Petrie* (1988, 2d Dept) 143 App Div 2d 258, 532 NYS2d 283, later proceeding (2d Dept) 144 App Div 2d 549, 535 NYS2d 958 and app den 73 NY2d 702, 537 NYS2d 490, 534 NE2d 328.

discussed in this section.

There does not appear to be any statutory or case authority for the court to order that assets be sold as the proceeds distributed as a distributive award, or that marital property titled in one spouse's name only, be distributed as an equitable distribution. They only cases which have ordered an in kind equitable distribution without valuation, all involve liquid assets such as stocks and bonds, or an unusual circumstances making valuation unnecessary or unfeasible.⁵⁶

In *Hinden v Hinden*,⁵⁷ the husband was the owner of 1900 shares of preferred voting 8 percent noncumulative stock (85 percent of the total) in the business having a liquidation value of \$1,039,000, and no common stock. The court found that this stock was not "marketable" and it declined to place a value on it in excess of its redemption value. The wife was awarded, as part of her equitable distribution, 50 percent of the husband's stock. However, it directed that control of the corporation was to remain with the husband.

In *Iacobucci v Iacobucci*,⁵⁸ the wife was directed to transfer to the husband one-half of her 26 shares of stock in the family insurance business. The Appellate Division found that any attempted valuation of the 26 shares owned by the wife would have involved undue speculation and conjecture. The parties' son was the major shareholder of the business, and the stock had no value to an outside party. No evidence of its worth was produced. In such circumstances the Appellate Division held that the equal division was proper.

In *Elmaleh v Elmaleh*⁵⁹ the Appellate Division held that the Supreme Court properly determined that the wife was entitled to 50 percent of certain partnership interests acquired by the husband during the marriage. Since the values of the partnership interests could not be established at the trial, it held that the trial court properly exercised its discretion in directing the husband to transfer a one-half share thereof to the wife.

⁵⁶ See *Capasso v Capasso*, (1986, 1st Dep't) 119 App Div 2d 268, 506 NYS2d 686

⁵⁷ NYLJ, Feb. 16, 1988, p. 42, col. 2 (Sup Ct, Nassau Co.) (Wager, J.), aff'd (2d Dept) 155 App Div 2d 517, 547 NYS2d 580

⁵⁸ (1988, 2d Dept) 140 App Div 2d 412, 528 NYS2d 114

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(1992, 2d Dept) 184 App Div 2d 544, 584 NYS2d 857

In *Repka v. Repka*,⁶⁰ the major marital assets of the parties for purposes of equitable distribution included “the parties' businesses.” The husband requested a direction for the sale of the businesses and an equal division of the net proceeds thereof, with due consideration of the tax consequences. The judgment appealed from directed, inter alia, that “the businesses of the parties shall be sold and the proceeds of sale shall be divided equally between the parties after payment of all liabilities, including taxes”. The Appellate Division affirmed the judgment. It observed that the wife did not oppose the sale of the businesses, but contended that any tax consequences of such a sale should be borne solely by the husband. The Appellate Division held that awarding the family businesses to the husband, against his wishes, and awarding the wife a distributive award in lieu of her interest in the businesses, without consideration of the tax consequences, would be inequitable. Moreover, a sale of the businesses, as directed by the court, would resolve any issue of their value, including the tax consequences, with certainty. Although there was much testimony by the parties' experts as to the tax consequences, the court noted that “(n)either party adequately informed the court as to the basis of the property”. Thus, the court's direction that the businesses “be sold and that the proceeds of the sale shall be divided equally between the parties after the payment of all liabilities”, was justified.

These unusual decisions do not create any exception to the rule that the court may not make an equitable (physical) distribution of marital property, or direct a payment as a distributive award, in lieu thereof, without first determining the value of each marital asset.⁶¹

In *Hinden v Hinden*,⁶² the court valued the husbands stock before making the

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186 A.D.2d 119, 120-22, 588 N.Y.S.2d 39 (2d Dept,1992)

⁶¹ See *Capasso v Capasso* (1986, 1st Dep't) 119 App Div 2d 268, 506 NYS2d 686, appeal after remand (1st Dep't) 129 App Div 2d 267, 517 NYS2d 952, app den, app dismd 70 NY2d 988, 526 NYS2d 429, 521 NE2d 436, later proceeding (1st Dep't) 179 App Div 2d 570, 578 NYS2d 206; *D'Amato v D'Amato* (1983, 2d Dep't) 96 App Div 2d 849, 466 NYS2d 23.

⁶² NYLJ, Feb. 16, 1988, p. 42, col. 2 (Sup Ct, Nassau Co.) (Wager, J.), affd (2d Dept) 155 App Div 2d 517, 547 NYS2d 580

equitable distribution. In *Iacobucci v Iacobucci*,⁶³ the court found that the stock had no value to an outside party, before making the equitable distribution. In *Elmaleh v Elmaleh*,⁶⁴ the court did not cite any authority for awarding half of the husbands partnership interests to the wife. The decision in *Repka v. Repka*,⁶⁵ does not indicate whether the businesses were titled in the husbands name or in the joint names of the parties, and it is significant that the wife did not oppose the husbands request.

In each of these cases there were unusual circumstances making valuation unnecessary or unfeasible.⁶⁶

Thus, It appears that under current case law unless the non-titled spouse establishes the value of a business owned by the other spouse, the court cannot direct its equitable distribution, absent unusual circumstances making valuation unnecessary.

Property Distribution- Appreciation of Separate Property -Burden of Proof-Direct and Indirect Contributions

A Spouse who claims that separate property of the other spouse has appreciated during the marriage and is entitled to a share of the appreciation has the burden of proof of establishing the amount of the appreciation of the separate property.⁶⁷ If that spouse fails to meet the burden of proof in establishing the value of the

⁶³ (1988, 2d Dept) 140 App Div 2d 412, 528 NYS2d 114

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(1992, 2d Dept) 184 App Div 2d 544, 584 NYS2d 857

⁶⁵ 186 A.D.2d 119, 120-22, 588 N.Y.S.2d 39 (2d Dept,1992)

⁶⁶ See *Capasso v Capasso* (1986, 1st Dep't) 119 App Div 2d 268, 506 NYS2d 686, appeal after remand (1st Dep't) 129 App Div 2d 267, 517 NYS2d 952, app den, app dismd 70 NY2d 988, 526 NYS2d 429, 521 NE2d 436, later proceeding (1st Dep't) 179 App Div 2d 570, 578 NYS2d 206.

⁶⁷ *Capasso v. Capasso*, 129 A.D.2d 267, 517 N.Y.S.2d 952 (1 Dept., 1987)
See *Hirschfeld v. Hirschfeld* 96 AD2d 473,464 NYS2d 789 (1st Dept, 1983); *Antoian v. Antioan* 215, AD2d 421, 626 NYS2d 535 (2nd Dept, 1995); *Chew v. Chew* 157 Misc2d 322, 596 NYS2d 950 (Sup Ct, NY Co, Silberman, J.); *Iwahara v. Iwahara* 226 AD2d 346, 640 NYS2d 217 (2nd Dept, 1996); *DelGado v. DelGado*, supra; *Tabriztchi v.*

property he or she is not entitled to a distributive award in lieu of a share of it.⁶⁸

The spouse who claims that the post-commencement increase in value of the separate property was 'active' and, therefore, separate property, must show that the increase was 'due solely' to his or her efforts.⁶⁹

When a non-titled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the non-titled spouse's indirect contributions, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required.⁷⁰

In determining if a non-titled spouse contributed to the appreciation of separate property, he or she is not required to establish a substantial, almost quantifiable connection between the titled spouses efforts and the appreciated value of the property. Domestic Relations Law §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 relevant in the equitable disposition calculations just as direct contributions are. 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

Tabriztchi, supra; D'Amato v D'Amato supra, Rodgers v Rodgers 98 AD2d 386, 470 NYS2d 401 (1983, 2d Dept).

⁶⁸ See Hirschfeld v. Hirschfeld 96 AD2d 473,464 NYS2d 789 (1st Dept, 1983); Antioian v. Antioan 215, AD2d 421, 626 NYS2d 535 (2nd Dept, 1995); Chew v. Chew 157 Misc2d 322, 596 NYS2d 950 (Sup Ct, NY Co, Silberman, J.); Iwahara v. Iwahara 226 AD2d 346, 640 NYS2d 217 (2nd Dept, 1996); DelGado v. DelGado, supra; Tabriztchi v. Tabriztchi, supra; D'Amato v D'Amato supra, Rodgers v Rodgers 98 AD2d 386, 470 NYS2d 401 (1983, 2d Dept).

⁶⁹ Mahoney-Buntzman v. Buntzman, 13 Misc.3d 1216(A), 824 N.Y.S.2d 755 (Sup. Ct., Westchester Co., Giacomo, J., 2006); see also, Breese v. Breese, 256 A.D.2d 433, 681 N.Y.S.2d 606 (2d Dept. 1998); Barbuto v. Barbuto, 286 A.D.2d 741, 730 N.Y.S.2d 532 (2d Dept. 2001); Scharfman v. Scharfman, 19 A.D.3d 474, 800 N.Y.S.2d 175 (2d Dept 2005).

⁷⁰ Price v Price 69 NY2d 8, 511 NYS2d 221 (1986).

to equitable distribution.⁷¹ 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.⁷²

Value of Homemaker Services and Equality of Spousal Contributions.

The value of homemaker services is not a subject which requires expert testimony in a matrimonial action.⁷³

⁷¹ Hartog v Hartog, 85 NY2d 36, 623 NYS2d 537, 647 NE2d 749 (1995).

⁷² Hartog v Hartog, 85 NY2d 36, 623 NYS2d 537, 647 NE2d 749 (1995).

⁷³ In Bidwell v. Bidwell 122 A.D.2d 364, 365-66, 504 N.Y.S.2d 327, 329 (3d Dept., 1986) plaintiff argued on appeal that Trial Term erred in not permitting plaintiff's labor expert to testify concerning the value of plaintiff's services as a homemaker and that this ruling adversely affected plaintiff's rights to a more equal distribution of marital property. She argued too that the disallowance of her expert's testimony as to her future earning capacity was to her detriment on the question of maintenance. The Appellate Division found no merit in plaintiff's argument. Since Trial Term concluded that plaintiff was entitled to distribution of marital property, the value of her services as a homemaker was irrelevant. Moreover, the value of such services is not a subject which necessitates elucidation by expert testimony.

See Ashdown v. Kluckhohn, 62 A.D.2d 1137, 404 N.Y.S.2d 461, 463 (4th Dept., 1978) ("Nor do we find that on the record presented the trial court erred in following Zaninovich v. American Airlines, 26 A.D.2d 155, 271 N.Y.S.2d 866, and excluding the proffered expert testimony concerning the cost of providing an employee to perform household services. The jury could use its own knowledge in assessing how much, if any, pecuniary loss the husband sustained by virtue of the loss of his wife's services in performing the household duties."); Zaninovich v. American Airlines, 26 A.D.2d 155, 271 N.Y.S.2d 866 (1st Dept., 1966)

It was stated by Justice O'Conner, in his opinion in *Conner v Conner*, that that equitable distribution encompasses a partnership, no matter what the proportionate share of capital advances and personal services, and that the wife's marital contributions as a homemaker are presumed equal in value to the husband's contribution as an income earner.⁷⁴ The other four judges on the Appellate Division panel concurred in the result only, and to our knowledge the case has never been cited for that proposition by any appellate court.

Separate Property Remains Separate - Burden of Proof

Under our Equitable Distribution Law, during the marriage, and absent any divorce action, each spouse retains sole interest in the property to which he or she has title and, with few exceptions⁷⁵, can dispose of it as he or she desires.

Between a husband and wife, "separate property" usually remains separate⁷⁶ with its rights of management, control and freedom of disposition. The Domestic Relations law provides that "separate property shall remain such," and only "marital property" is subject to equitable distribution.⁷⁷

Property which was separate property before marriage,⁷⁸ or received by inheritance or gift from others during marriage,⁷⁹ compensation for personal injury,⁸⁰ and property "acquired in exchange for" what is separate property⁸¹ ordinarily retains that identity. However, the burden of establishing that property is "separate" rests on the spouse who claims that it is⁸²

⁷⁴ *Conner v Conner*, 97 App Div 2d 88, 468 NYS2d 482 (2 Dept 1983).

⁷⁵ see, e.g., EPTL 5-1.1, 5-3.1

⁷⁶ Domestic Relations Law § 236[B][5][b]

⁷⁷ Domestic Relations Law § 236 (B)(5)(b).

⁷⁸ Domestic Relations Law §236 (B) (1)(c) and (1)(d).

⁷⁹ Domestic Relations Law § 236[B][1][d][1]

⁸⁰ Domestic Relations Law § 236[B][1][d][2]

⁸¹ Domestic Relations Law § 236[B][1][d][3]

⁸² See *Connor v. Connor*, 97 AD2d 88, 468 NYS2d 482 (2d Dept. 1983).

Almost every New York case has applied the "source of the funds approach." See *Duffy v. Duffy*, 94 AD2d 711, 462 NYS2d 240 (2d Dept. 1983). See 3, Freed, Brandes and Weidman, *Law and the Family New York* § 2:10 et seq. [2d ed rev 1993].

Separate Property Becomes Marital Property - Commingling - Source of the Funds

“Separate property” becomes “marital property” for equitable distribution purposes if it falls within the statutory definition of marital property.⁸³

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 include separate property as hereinafter defined.”

The definition of marital property is broad and comprehensive. It does not specify that in order to be "marital property" an item must have exchange value or be salable, assignable or transferable.⁸⁴

The Domestic Relations Law also provides, inter alia, that "property acquired in exchange for or the increase in value of separate property is separate property, except to the extent the appreciation is attributable to the contributions or efforts of the other spouse."⁸⁵

The transferring of separate property into the joint names of the parties, or comingling separate property with marital property will transmute it into marital property, unless proven otherwise.⁸⁶ The presumption that separate funds are transmuted into

⁸³ Domestic Relations Law § 236[B][1][c]

⁸⁴ O'Brien v O'Brien, 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717 (1985).

⁸⁵ Domestic Relations Law § 236[B][1][d][3]

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See McCormack v McCormack, NYLJ, Oct. 29, 1982, p. 7 cols. 4-6 (NY Co.); and Conner v Conner (1983, 2d Dept) 97 App Div 2d 88, 468 NYS2d 482. Carney v Carney (1994, 3d Dept) 202 AD2d 907, 609 NYS2d 425; Chambers v. Chambers, 259 A.D.2d 807, 686 N.Y.S.2d 199 (3d Dep't 1999); George v. George, 237 A.D.2d 894, 656 N.Y.S.2d 1016 (4th Dep't 1997); Clark v. Clark, 257 A.D.2d 459, 683 N.Y.S.2d 255 (1st Dep't 1999); Boardman v. Boardman, 300 A.D.2d 1110, 752 N.Y.S.2d 777 (4th Dep't 2002)

marital property when commingled may be rebutted by establishing that the account in which the funds were deposited was created only as a matter of convenience.⁸⁷

The closest thing to the doctrine of transmutation that we have in New York is the rebuttable presumption that arises under section 675 of the Banking Law.⁸⁸ Under Banking Law §675 (a) a deposit of cash, securities or other property in a joint account with rights of survivorship (payable to either or the survivor) creates a moiety for the co-depositor and becomes the property of such persons as joint tenants. Unless it is clearly shown that there was no donative intent, as for example where the deposit was a mere matter of convenience, the joint account is marital property for distribution purposes in the event of a legal dissolution of the marriage.⁸⁹ In this instance a comingling of separate with marital property may be said to convert separate property into marital property.⁹⁰ The presumption is rebuttable.⁹¹

⁸⁷ *Crescimanno v Crescimanno*, 33 A.D.3d 649, 822 N.Y.S.2d 310 (2 Dept. 2006).

⁸⁸

Banking Law § 675

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Banking Law §678 allows depositors to establish accounts “for the convenience” of the depositor. The making of a deposit of cash, securities or other property into such an account does not affect the title to the deposit, and the depositor is not considered to have made a gift of one half of the deposit or any additions or accruals thereon to the other person, and on the death of the depositor the other person does not have a right of survivorship in the account. See Banking Law § 678, as added by Laws of 1990, Ch. 436.

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In *Di Nardo v Di Nardo* (1988, 4th Dept) 144 App Div 2d 906, 534 NYS2d 25, in modifying the divorce judgment, the Appellate Division held that a \$32,214.00 check received by the husband from his mother's estate, plus accrued interest, was converted to marital property by comingling it with other assets in a joint account where it remained for a period of seven years. By placing this check in a joint account, a presumption arises that the parties are entitled to equal shares of the account. Defendant's proof failed to overcome this presumption.

See also *Midy v. Midy*, 45 A.D.3d 543, 846 N.Y.S.2d 220 (2d Dep't 2007)

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In *Feldman v Feldman* (1993, 2d Dept) 194 AD2d 207, 605 NYS2d 777, the

A spouses conveyance of inherited property, which is separate property, to herself and her husband as tenants by the entirety creates a presumption that the property is marital property.⁹² In order to rebut this presumption, a party is required to come forward with clear and convincing proof that he did not intend his spouse to have an ownership interest in the property, but merely placed her name on the deed for the sole purpose of convenience.⁹³

Appellate Division held that both the husband's 30 percent interest in his father's corporation and the 30 percent interest in its real property which the husband acquired upon the sale of this business in 1981 were separate property upon their receipt. The record did not demonstrate that the funds received by the husband through gift and inheritance were transmuted into marital property by the actions of the parties. While the record revealed that the two payments which the husband received from his parents' estates were deposited in a joint bank account, these funds were ultimately used to purchase the \$275,000 worth of treasury bills which the parties agreed to equally divide. The husband placed the remaining funds from his parents' estates as well as the proceeds derived from the sale of other properties in his individual bank accounts. The fact that a portion of the husband's inherited funds were deposited in a joint account did not support the inference that the husband intended to treat all subsequently received funds which were placed in his individual bank accounts as marital property.

In *Harris v. Harris*, 97 A.D.3d 534, 948 N.Y.S.2d 343 (2d Dep't 2012) the Appellate Division found that at the time the plaintiff received her award for personal injuries, that award constituted separate property. However, the plaintiff deposited that separate property into a jointly held investment account, creating a presumption that those funds constituted marital property. Although that presumption is rebuttable, and a depositor may create a joint account with the right of survivorship without necessarily transferring a present beneficial interest in the funds in the account the plaintiff used money in the account to pay marital expenses. Thus, those funds did not retain their character as separate property. The evidence Supreme Court's conclusion that the plaintiff failed to rebut the presumption that the subject funds were marital property.

⁹² *Chiotti v. Chiotti*, 12 A.D.3d 995, 996, 785 N.Y.S.2d 157 (2004); *Arnold v. Arnold*, 309 A.D.2d 1043, 1044, 765 N.Y.S.2d 686 (2003); *Rosenkranse v. Rosenkranse*, 290 A.D.2d 685, 686, 736 N.Y.S.2d 453 (2002).

⁹³ *Currie v. McTague*, 83 A.D.3d 1184, 1185, 921 N.Y.S.2d 364 (2011); *Burtchaell v. Burtchaell*, 42 A.D.3d 783, 787, 840 N.Y.S.2d 449 (2007); *Kay v. Kay*, 302 A.D.2d

There is a presumption that assets which are combined or mix in with property that was acquired during the marriage are marital property. The spouse seeking to rebut or disprove that presumption must adequately trace back to the source of the funds or asset he or she is claiming is separate property.⁹⁴ A court is not bound by one's own account of his finances, and where a party fails to trace the source of deposits claimed to be separate property, the court is justified in treating them as marital property.⁹⁵

Separate property can be transmuted into marital property where the actions of the titled spouse demonstrates his intent to transform the character of the property from separate to marital.⁹⁶ The general rule is that a spouse is entitled to a credit for the value his or her separate property contribution to marital property.⁹⁷ However, the granting of such a credit has been held by the Third Department to be a matter of discretion, and a party is not always entitled to a credit for the amount of property contributed.⁹⁸ The granting of such a credit is a matter of discretion and not strictly

711, 713, 754 N.Y.S.2d 766 (2003).

⁹⁴

O'Brien v O'Brien (1985) 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, on remand (2d Dept) 120 App Div 2d 656, 502 NYS2d 250, later proceeding (2d Dept) 124 App Div 2d 575, 507 NYS2d 719; Sarafian v Sarafian, 140 AD2d 801 [3 Dept. 1983]; Heine v. Heine, 176 A.D.2d 77, 580 N.Y.S.2d 231 [1 Dept., 1992]); Helen A.S. v Werner R.S., 166 App Div 2d 515, 560 NYS2d 797 (2d dept.,1990)

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Pullman v Pullman, 176 AD2d 113 (1st Dept., 1991); DiNardo v DiNardo, 144 AD2d 906; Lischynsky v Lischynsky, 120 AD2d 824; Sarafian v. Sarafian, 140 A.D.2d 801, 803-04, 528 N.Y.S.2d 192 (1988)

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Spera v Spera, 71 AD3d 661 (2d Dept.,2010)

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Fields v Fields, 15 NY2d 158 (2d Dept, 2010); Patete v Rodriguez, 109 Ad3d 595 (2d Dept.,2013); Duffy v Duffy, (1983, 2d Dept) 94 App Div 2d 711, 462 NYS2d 240; Parsons v Parsons, (1985, 4th Dept) 115 App Div 2d 289, 496 NYS2d 138; Coffey v Coffey, (1986, 2d Dept) 119 App Div 2d 620, 501 NYS2d 74.

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In Murray v. Murray, 101 A.D.3d 1320, 956 N.Y.S.2d 252 (3d Dep't 2012), leave

mandated since the property is no longer separate, but is part of the total marital property.⁹⁹ The court may not transmute that contribution into a percentage and apply the percentage to the appreciated asset.¹⁰⁰

Equitable Distribution -The 2009 Amendments - The Fourteen Factors - Domestic Relations Law § 236 (B)(5)(d)

In 2009 Domestic Relations Law §236 [B][5][d], subparagraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 were renumbered subparagraphs 6, 7, 8, 9, 10, 11, 12, 13 and 14, and a new subparagraph 5 was added to read as follows: (5) the loss of health insurance benefits upon dissolution of the marriage.¹⁰¹

In any action commenced after September 15, 2009, the court is required to consider 14 factors in determining an equitable disposition of property. The statute provides:

In determining an equitable disposition of property under paragraph c, the court shall

to appeal dismissed, 20 N.Y.3d 1085, 2013 WL 1197133 (2013), the Appellate Division found that denying the husband a credit for the premarital value of the Queens County property was within Supreme Court's discretion. While a credit is often given for the value of the former separate property, such credit is not strictly mandated since the property is no longer separate, but is part of the total marital property." There is no single template that directs how courts are to distribute a marital asset that was acquired, in part or in whole, with separate property funds" (Fields v. Fields, 15 N.Y.3d 158, 167, 905 N.Y.S.2d 783, 931 N.E.2d 1039 (2010)).

See also Alecca v. Alecca, 111 A.D.3d 1127, 1128, 975 N.Y.S.2d 801 [2013]; Myers v Myers, --- N.Y.S.2d ----, 2014 WL 3360378 (N.Y.A.D. 3 Dept.)

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See, e.g., Lolli-Ghetti v Lolli-Ghetti, 165 AD2d 426, 432; Coffey v Coffey, 119 AD2d 620, 622.

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Heine v. Heine, 176 A.D.2d 77, 83-86, 580 N.Y.S.2d 231 (1st Dept.,1992)

¹⁰¹ Laws of 2009, Ch 229, effective September 15, 2009 and applicable to any action or proceeding commenced on or after such effective date.

consider:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) the loss of health insurance benefits upon dissolution of the marriage;
- (6) any award of maintenance under subdivision six of this part;
- (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (8) the liquid or non-liquid character of all marital property;
- (9) the probable future financial circumstances of each party;
- (10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (11) the tax consequences to each party;
- (12) the wasteful dissipation of assets by either spouse;
- (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
- (14) any other factor which the court shall expressly find to be just and proper.

Property Distribution - Effect of Barrier to Remarriage -Domestic Relations Law §236(B)(5)(h)

The property distribution provisions of the New York Equitable Distribution Law require that where appropriate the court must "consider the effect of a barrier to remarriage" on the enumerated factors, which the court is required to consider in making an equitable distribution of marital property.¹⁰²

Domestic Relations Law §236(B)(5)(h) provides as follows: In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision."

Domestic Relations Law § 253 requires a party to a proceeding to annul a

¹⁰² Domestic Relations Law §236(B)(5) (h).

marriage, or for a divorce, to allege under oath that he or she has taken, or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce.

The section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in Domestic Relations Law §11(1).¹⁰³

Regarding the "sworn statements" prescribed by Domestic Relations Law §253, "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act. Nothing in the section defining "barrier to remarriage". . . "shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition." It is not deemed to be a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses.

"All steps solely within his or her power" may not be construed to include application to a marriage tribunal or other similar organization or agency of a religious denomination which has authority to annul or dissolve a marriage under the rules of such denomination."¹⁰⁴ It appears that taking all steps to remove a "barrier to

¹⁰³ Domestic Relations Law §253(1);

Domestic Relations Law §11(1) lists the following persons: A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the City of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the City of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union.

¹⁰⁴ Domestic Relations Law §253(6) also provides as follows:

"As used in sworn statements prescribed by this section "barrier to remarriage" includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary

remarriage" does not require an application to the religious tribunal to dissolve the marriage, only an appearance to accept the religious dissolution. Nothing in §253 "should be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue." The truth of any statement submitted pursuant to §253 "shall not be the subject of any judicial inquiry," except that any person who knowingly submits a false sworn statement under Domestic Relations Law §253 is guilty of knowingly filing a false sworn statement, punishable in accordance with §210.40 of the Penal Law.

The thrust of the Equitable Distribution Law is that contemporary marriage involves an "economic partnership" and that all family assets acquired during the marriage by individual or joint efforts should be considered as "marital property" and subject to equitable distribution upon dissolution in accordance with the factors set forth in the statute.

Domestic Relations Law §236(B)(5)(h) fits into the "economic partnership" theory of the Equitable Distribution Law in those situations where a spouse refuses to remove "barriers to remarriage" solely to extract economic concessions from the other spouse. For example, in *Schwartz v. Schwartz*,¹⁰⁵ an action for a divorce, the defendant husband appealed from judgment which, after a nonjury trial, inter alia, determined that his interest in the Jewish Press, Inc., was forfeited by him because he withheld delivery of a Get. The Appellate Division affirmed holding that the Supreme Court's determination that the defendant forfeited the right to any distributive award by his conduct involving the granting of a Get (a Jewish religious divorce) did not constitute an impermissible interference with religion and that the court made no determination regarding religious doctrine. Rather, the court found that the defendant initially withheld the delivery of the Get, which he ultimately gave in Israel, solely to extract economic concessions from the plaintiff.

There are only few cases which have applied this provision to property distribution. Cases which have applied or discussed this provision are in the

act. Nothing in this section shall be construed to require any party to consult with any clergyman or minister to determine whether there exists any such religious or conscientious restraint or inhibition. It shall not be deemed a "barrier to remarriage" within the meaning of this section if the restraint or inhibition cannot be removed by the party's voluntary act. Nor shall it be deemed a "barrier to remarriage" if the party must incur expenses in connection with removal of the restraint or inhibition and the other party refuses to provide reasonable reimbursement for such expenses."

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235 A.D.2d 468, 652 N.Y.S.2d 616 (2d Dep't 1997)

footnote.¹⁰⁶

Property acquired by a spouse after the commencement of the action – Tracing Property to its source

Domestic Relations Law § 236 Part B(1)(c) defines marital property as property acquired by either or both spouses during the marriage and before the commencement of a matrimonial action. The definition of marital property excludes property acquired by a spouse after the commencement of the action.¹⁰⁷

Automatic accretions to marital property stemming solely from the incidents of ownership retain the character of their source as marital property, even when realized after the action has begun.¹⁰⁸

Property acquired by a spouse after the commencement of the action becomes become marital property where the source of the funds to acquire it is traceable to marital property, or where it is acquired from the increase in value of marital property or where it is the product of a sale or exchange of marital property.¹⁰⁹

¹⁰⁶ In *Pinto v. Pinto*, 260 A.D.2d 622, 622, 688 N.Y.S.2d 701, 701-02 (2d Dept, 1999) the Appellate Division held that Supreme Court did not improvidently exercise its discretion in granting the plaintiff title to all of the assets listed on both of the parties statements of net worth if he did not deliver a religious divorce known as a Get to the plaintiff within a specified time period (citing, *Schwartz v. Schwartz*, 235 A.D.2d 468)

¹⁰⁷ NY Dom Rel Law § 236(B)(1)(c)); *Vora v. Vora*, 268 A.D.2d 470, 471, 702 N.Y.S.2d 343, 344 (2d Dept., 2000); *Questel v. Questel*, 39 Misc. 3d 667, 960 N.Y.S.2d 860 (Sup 2013); *DeLapp v. DeLapp*, 37 A.D.3d 1161, 829 N.Y.S.2d 381 (4th Dep't 2007); *Ropiecki v. Ropiecki*, 94 A.D.3d 734, 941 N.Y.S.2d 650 (2d Dep't 2012).

¹⁰⁸ In *Brennan v. Brennan*, 103 A.D.2d 48, 54, 479 N.Y.S.2d 877 (1984) the Appellate Division held that error was also committed in Trial Term's total exclusion from equitable distribution of the interest which accrued after the commencement of the action on the certificates of deposit and the bond fund in the husband's name. "In our opinion, automatic accretions to marital property stemming solely from the incidents of ownership retain the character of their source, even when realized after the action has begun. Therefore, the accrued interest on these marital funds should have been subject to equitable distribution.")

¹⁰⁹ *Woodson v Woodson* (1991, 2d Dept) 178 App Div 2d 642, 578 NYS2d 217; *Ducharme v. Ducharme*, 145 A.D.2d 737, 738, 535 N.Y.S.2d 474 (2d Dept.,1988); *Siegel v. Siegel*, 132 A.D.2d 247, 254-55, 523 N.Y.S.2d 517 (2d Dept.,1987); *Glazer v. Glazer*, 190 A.D.2d 951, 953, 593 N.Y.S.2d 905, 907 (3d Dept.,1993); *Gurbacki v. Gurbacki*, 270 A.D.2d 807, 708 N.Y.S.2d 761 (4th Dep't 2000); *Wei Jiang Sun v. Yong*

Domestic Relations Law §236[B][5][d][7] - In Actions Commenced on or after January 23, 2016 - The Demise of O'Brien

In *O'Brien v O'Brien*¹¹⁰ the Court of Appeals charted the future course of the Equitable Distribution Law. In doing so it mandated that the statute be given a liberal interpretation in order to achieve its objective of an equitable division of family assets upon divorce. In *O'Brien* the husband's medical degree or license was classified as "marital property" because at the time of divorce he was still in residency and had no medical practice. The timing of the commencement of the divorce action in *O'Brien* precluded any distributive award based upon a medical practice, which had not yet been established. Dr. O'Brien had acquired a medical degree and license during his 9-year marriage, but he had no medical practice. The court did not award Mrs. O'Brien any interest in the husband's future medical practice nor did it mortgage his professional future.

The Court of Appeals expanded the *O'Brien* rule when it decided *McSparron v McSparron*.¹¹¹ In a resounding reaffirmation of *O'Brien* the court concluded that even after a license has been exploited by the licensee to establish and maintain a career, it does not "merge" with the career or ever lose its character as a separate, distributable asset.

The Court of Appeals revisited, reaffirmed and refined its *McSparron* holding in *Grunfeld v. Grunfeld*.¹¹² The Court of Appeals held that, to comply with *McSparron*, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout. It stated that where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income.

Domestic Relations Law §236[B] [5] [d] [7] was amended, thirty years after the *O'Brien* decision to eliminate enhanced earning capacity as a marital asset.¹¹³ The

Jian Li, 43 Misc. 3d 1205(A), 990 N.Y.S.2d 440 (Sup. Ct. 2014)

¹¹⁰ *O'Brien v O'Brien* (1985) 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, on remand (2d Dept) 120 App Div 2d 656, 502 NYS2d 250.

¹¹¹ *McSparron v McSparron* (1995) 87 NY2d 275, 639 NYS2d 265, 662 NE2d 745.

¹¹² *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 709 N.Y.S.2d 486, 731 N.E.2d 142 (2000).

¹¹³ Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][b] [1], and Family

amendment added the following paragraph to factor 7 for property distribution: The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.

The amendment was intended to eliminate enhanced earning capacity as a marital asset, thus, legislatively overruling McSparron and Grunfeld too.¹¹⁴ However, vestiges of O'Brien¹¹⁵ remain. In arriving at an equitable division of marital property, the court may consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.¹¹⁶ This requires the spouse requesting the court to consider his or her contributions to the development of the enhanced earning capacity of the other spouse to establish: (1) that the other spouse has an enhanced earning capacity attributable to a license, degree, celebrity

Court Act § 412, effective January 23 , 2016.

Laws of 2015, Ch 269 amended Domestic Relations Law § 236 [B][5-a], effective October 25, 2015.

See Laws of 2015, Ch 269, Section 8, which reads as follows:

8. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to matrimonial actions and family court actions for spousal support commenced on or after such effective date; provided however that section three of this act shall take effect on the thirtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date. Nothing in this act shall be deemed to affect the validity of any agreement made pursuant to subdivision 3 of part B of section 236 of the domestic relations law or section 425 of the family court act prior to the effective date of this act.

¹¹⁴ See Volume 3B, Law and the Family New York, 2d Edition Revised § 16:11 Merger of Professional Licenses and Academic Degrees; § 16:11.1 McSparron: The Demise of the “Merger” Fiction; § 16:11.2 Effect of Grunfeld upon distributive award; § 16:12 Valuation of Professional Degrees, Licenses, and Academic Degrees; and § 16:13 Aftermath of O'Brien: Careers and Enhanced Earning Capacity

¹¹⁵ O'Brien v O'Brien (1985) 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, on remand (2d Dept) 120 App Div 2d 656, 502 NYS2d 250.

¹¹⁶ See Domestic Relations Law §236[B][5][d][7], as amended by Laws of 2015, Ch 269, §2, effective January 23 , 2016.

goodwill, or career enhancement and (2) the value of such enhanced earning capacity, before the court can consider his or her contributions to the development of such enhanced earning capacity.