

Indirect Appreciation of Separate Property
By Joel R Brandes

Under the Equitable Distribution provisions of the Domestic Relations Law marital property” is construed broadly to give effect to the ‘economic partnership’ concept of the marriage relationship. By contrast, “separate property”, an exception to marital property, is construed “narrowly. All property acquired by either or both spouses during the marriage, unless clearly separate, is presumed to be marital property, regardless of whose name title is taken. (Fields v. Fields, 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)). Domestic Relations Law §236 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. (Fields v. Fields, *supra*). Self-serving testimony, without more, is insufficient to rebut that presumption. (Parkoff v Parkoff, 195 A.D.3d 936, 151 N.Y.S.3d 105 (2d Dept.,2021)).

The burden of establishing that property is “separate” rests on the spouse who claims that it is separate. (Conner v Conner, 97 AD2d 88, 468 NYS2d 482 (2d Dept 1983); Sclafani v Sclafani, 178 AD2d 830, 577 NYS2d 711 (3d Dept 1991); Heine v Heine, 176 AD2d 77, 580 NYS2d 231 (1st Dept 1992)).

Domestic Relations Law § 236 Part B (1) (d) defines “separate property” as, among other things, (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.* (emphasis supplied)

A spouse who claims that the separate property of the other spouse has appreciated in value during the marriage and that the appreciation is marital property to which he or she is entitled to a share has the burden of proof of establishing the amount of the appreciation of the separate property. If that spouse fails to meet the burden of proof in establishing the amount of the appreciation she is not entitled to a distributive award in lieu of a share of it. (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); Rodgers v Rodgers 98 AD2d 386, 470 NYS2d 401 (2d Dept., 1983)).

A spouse seeking a share of the appreciation of a spouse's separate property business during the marriage, owing to his contributions to it, has the burden of proof of establishing “the baseline value of the business and the extent of its appreciation.”(Morrow v Morrow, 19 AD3d 253, 800 NYS2d 378 [1st Dept 2005]). If he fails to meet that burden of proof he is not entitled to a distributive award in lieu of a share of it. (Hirschfeld v Hirschfeld, *supra*; Rodgers v Rodgers, *supra*).

In Price v Price (69 NY2d 8, 511 NYS2d 219 (1986)), the Court of Appeals held that where separate property of one spouse has appreciated during the marriage and before execution of a separation agreement or commencement of a matrimonial proceeding, and where the appreciation was “due in part” to the contributions or efforts

of the nontitled spouse as parent and homemaker, the amount of that appreciation should be added to the marital property for equitable distribution. Whether the 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 those 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 efforts of the titled spouse, be considered a product of the marital partnership and hence, marital property.

The Price Court went on to hold that as a general rule, 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 question under Domestic Relations Law § 236 (B) (1) (d) (3) as to indirect contributions of the nontitled spouse as parent and homemaker is whether there was an appreciation of separate property due to the efforts of the *titled spouse* during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of appreciation during that period is considered a product of the marital partnership over which the trial court "retains the flexibility and discretion to structure [a] distributive award equitably". The nature and measure of the services performed by the nontitled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property, are matters to be weighed and decided by the trial court--not in making this initial determination under section 236 (B) (1) (d) (3)--but in making its distribution of the appreciation as marital property under section 236 (B) (5).

Price held that "active participation" by a spouse can transmute some portion of the appreciated value of separate property into marital property.

In *Hartog v Hartog* (85 NY2d 36, 623 NYS2d 537 (1995)) the key issue was whether the husband's limited involvement during the marriage in a "separate property" business that appreciated in value, qualified as active participation, within the meaning of Price, so as to transmute the appreciation into marital property subject to equitable distribution. The parties were married in 1968. The wife was a homemaker from 1969 until May 1980. From 1980 through 1985, she worked full-time at an advertising firm. In 1990, she started a songwriting business, from which she earned nothing. During the marriage, she was a traditional homemaker, serving in the roles of spouse, parent, housekeeper, and hostess. When the parties divorced, he was 51 years old and he was 61. Two children were born of the marriage, both emancipated at the time of divorce.

When they married, the husband was 38 and worked in a family jewelry business, F. Staal. He was also a shareholder and director of another family business, Hartog Trading Co. (Trading). He owned 50 percent of the stock in F. Staal and Trading, and 25 percent of the stock of Hartog Foods International Inc. (Foods), a spin-off

company of Trading. He was director of Trading throughout the marriage and was its secretary/treasurer from 1969. He was a director and secretary of Foods from the time of its incorporation in 1969. The husband's brother or others, however, had primary responsibility for the day-to-day management and operation of Trading and Foods. F. Staal, Trading and Foods, each deducted a salary for the husband as a business expense, and he participated in their respective profit-sharing plans. The corporate tax returns of Trading and Foods listed him as a part-time employee, and the corporate minutes note his presence at meetings and his power to sign checks. Testimony at trial indicated that the husband and his brother conferred at times regarding business matters concerning Trading and Foods.

The Supreme Court found the following to be marital property: (1) 100 percent of the increased value of the husband's 50 percent share in F. Staal (\$412,000); (2) 25 percent of the appreciation of the husband's 50 percent share of Trading (\$575,000); and (3) 25 percent of the appreciation of the husband's 25 percent share of Foods (\$686,875). The Appellate Division modified and affirmed the judgment. It deleted that portion of the distributive award to the wife that represented her portion of the appreciated value of Trading and Foods, \$630,937.50, which is half of 25 percent (the increased value of the husband's interest in Trading and Foods, the separate asset).

The Court of Appeals held that requiring a non-titled spouse to show a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be contrary to the letter and spirit of the Domestic Relations Law. It reasoned that 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 equally relevant to direct contributions in equitable disposition calculations. Thus, to the extent that the appreciated value of separate property is at all aided or facilitated" by the non-titled spouse's direct or indirect efforts, that part of the appreciation is marital property subject to equitable distribution. Consequently, while some connection between the titled spouse's effort and the appreciation must be discernible from the evidence, neither the statutory language nor its legislative history justifies the Appellate Division's and the husband's exacting causation prerequisite. The Court rejected the causation requirement urged by the husband. Instead, it gave effect to the Legislature's intent that a non-titled spouse be permitted to share in the "indirect" fruits of his or her labor, even if the connection between the titled spouse's activity and the appreciation is not established with mathematical, causative, or analytical precision. It concluded:" . . . that where an asset, like an ongoing business, is, by its very nature, non-passive and sufficient facts exist from which the factfinder may conclude that the titled spouse engaged in active efforts with respect to that asset, even to a small degree, then the appreciation in that asset is, to a proportionate degree, marital property. By considering the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors, the factfinder must then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution . . ."

Applying these principles, the Court concluded that the Appellate Division should not have deemed the total amount of the appreciation in Trading and Foods to be the husband's separate property and reinstated the Supreme Court's determination that 25 percent of the appreciated value of the husband's interests in Trading and in Foods was marital property. The husband engaged in limited, active involvement in the two companies. His activities consisted of attendance at board meetings; holding officers' positions within the close corporations; being listed as a salaried employee; discussing and conferring on business matters; signing checks on occasion, and participating in the companies' profit-sharing plans. These efforts constituted an "active" involvement and management role. The Court held that through the husband's attendance at board meetings and business discussions with family members, particularly during times of crisis, a reasonable finder of fact could determine that this active involvement contributed to the appreciated value of the businesses.

There is no requirement that the nontitled spouse prove precisely how the active efforts of either party quantitatively contributed to the property's appreciation. All he need show is that the appreciation was due in part to his or her marital efforts or contributions. Contributions that consist of time and effort, rather than the investment of funds, are no less worthy of recognition. (*Zelnik v. Zelnik*, 169 A.D.2d 317, 573 N.Y.S.2d 261 (1st Dep't 1991)).

Where the appreciation of separate property occurs during the marriage, it is presumptively marital property, and the spouse claiming it is separate property, rather than marital property, has to overcome the presumption that it is marital property by establishing that the other spouse's direct or indirect efforts did not contribute, in some degree, to the appreciation of the value of that interest. (*Parise v. Parise*, 13 A.D.3d 504, 787 N.Y.S.2d 360 (2d Dep't 2004); *Ponzi v. Ponzi*, 45 A.D.3d 1327, 845 N.Y.S.2d 605 (4th Dep't 2007)).

In *Pilato v. Pilato*, (206 A.D.2d 928, 615 N.Y.S.2d 182 (4th Dep't 1994)), the Appellate Division held that the wife was entitled to share in the appreciation of the 30 shares of the corporation that were determined to be the husband's separate property based upon her contributions as a homemaker and through outside employment.

In *Bailey v. Bailey*, (48 A.D.3d 1123, 853 N.Y.S.2d 238 (4th Dep't 2008)), the Appellate Division held that the court properly determined that the appreciation to the defendant's vanguard Money Market Reserves Account was marital property because plaintiff indirectly contributed to the appreciation of this asset by handling the household matters, thereby permitting defendant the freedom to devote energy to his financial endeavors.

In *Scher v. Scher*, (91 A.D.3d 842, 938 N.Y.S.2d 317 (2d Dep't 2012)), the Appellate Division held that contrary to the determination of the Supreme Court, the plaintiff was entitled to share in the appreciated value of Home Companion Services of New York, Inc., which the defendant incorporated approximately three years before the

marriage. The evidence established that the plaintiff made direct contributions to the business by serving as the company bookkeeper for approximately seven years. The evidence further established that the defendant's active participation in expanding the business was aided and facilitated by the plaintiff's indirect contributions as a homemaker and occasional caretaker of one of his children from a prior marriage.

Conclusion

Where the appreciation of separate property is due in part to the direct contributions or efforts of the other spouse the appreciation is marital property subject to equitable distribution.

Where a non-passive asset which is separate property appreciates due in some part to the active efforts of the titled spouse, then, to a proportionate degree the appreciation is marital property to the extent that it was "aided or facilitated" by the non-titled spouse's indirect efforts and contributions as a homemaker, spouse, and caretaker of the children, which permitted the titled spouse the freedom to devote energy to his financial endeavors.

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