Chapter 25

Property Distribution

25-1. "Property" Redefined - "Marital Property" Defined – Tracing Property to its Source as Marital Property

Domestic Relations Law §236 [B] is commonly referred to as the Equitable Distribution Law. New York is an "Equitable Distribution State" and upon the dissolution of a marriage, the Court must "equitably" (but not necessarily equally) distribute 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 the 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 statue 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.[1]

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,[2] the Court of Appeals noted that "marital property" is a term of art and that the equitable distribution law 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

1 See 3, Freed, Brandes and Weidman, Law and the Family New York § 2:1 et seq. (Marital Property) [2d Ed. Rev.1993]) for a comprehensive discussion of marital property and separate property.

2 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717 (1985).

board certification in internal 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 payout 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.[3]

In Fields v Fields[4] the Court of Appeals, in an opinion by Judge Graffeo, explained that the contribution of separate property towards the purchase of marital property during the marriage does not automatically establish the character of that property as "separate" where it covers only a portion of the purchase price.

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, 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.[5]

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 observed 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

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

4 15 N.Y.3d 158, 905 N.Y.S.2d 783 (2010)

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

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 with the intent that it would be used as the marital residence where the parties would live and raise their son. 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.[6]

Once the statutory presumption was triggered, the burden shifted to the husband to rebut that presumption. The Husband relied on the fact that he used monies derived from separate property, a $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 were also placed into the account, such as the husband's earnings from his tax preparation and video businesses and the wife's paychecks. The fact that the husband would later transfer funds or give cash to the Wife did 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 husband, 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.[7]

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.[8]

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

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

townhouse was 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 an income-generating business did 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 was marital property. These were factors properly considered by the trial court in determining the extent of wife's distributive award.[9]

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. [10] However, 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. [11]

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.[12] For example, assets that are acquired with funds received from the liquidation of an interest in a partnership, which partnership was acquired during the marriage and prior to the commencement of the action constituted marital property as they were acquired through the sale or exchange of marital property.[13]

---

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

10 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).

11 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.")

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

13 See Marcus v. Marcus, 135 A.D.2d 216, 221, 525 N.Y.S.2d 238, 241 (1988)

25-2 Equitable Distribution - Professional Degrees and Licenses

In O'Brien v O'Brien, [14] 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 court's 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[15] 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 courts 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 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 are to be regarded only as helpful guideposts. [16]

25-3. Domestic Relations Law §236[B] [5] [d] [7] - Actions Commenced on or after January 23, 2016 - The Demise of O'Brien

In O'Brien v O'Brien[17] 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 1-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.

---

14 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717 (1985).

15 87 NY2d 275, 639 NYS2d 265 (1995).

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

17 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.

The Court of Appeals expanded the O'Brien rule when it decided McSparron v McSparron. [18] In a 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.[19] 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.

In 2015 Domestic Relations Law §236[B] [5] [d] [7] was amended to eliminate enhanced earning capacity as a marital asset.[20] The 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.[21] However, vestiges of O'Brien [22] remain. In arriving at an equitable division of marital property, the court may consider the direct or indirect contributions of a spouse during the marriage to the development of the enhanced earning capacity of the other spouse. [23] 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 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.

---

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

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

20 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 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.

21 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

22 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.

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

25-4. Equitable Distribution - Appreciation of Separate Property Is Marital Property

In Price v Price [24] the Court of Appeals attempted to construe Domestic Relations Law § 236(B)(1)(d)(3) which excludes from the definition of marital 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 and (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 contributed to the increase in value of the asset. [25]

In Hartog v Hartog [26] 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, nonpassive 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 . . ." [27]

24 69 NY2d 8, 511 NYS2d 219, 503 NE2d 684 (1986).

25 69 NY2d 8, 511 NYS2d 219, 503 NE2d 684 (1986).

26 85 NY2d 36, 623 NYS2d 537 (1995).

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

25-5. 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."

25-6. 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 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.

25-7. Separate Property - Compensation for Personal Injury

Domestic Relations Law § 236 [B] (1) (d) exempts from equitable distribution and designates as separate property "compensation for personal injuries".

In West v West, [28] 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. [29]

---

28 101 AD2d 834, 475 NYS2d 493 (2 Dept. 1984).

29 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

25-8. 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". [30]

In Capiello v Capiello [31] the trial judge awarded Lorraine Cappiello $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 the 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."

25-9. 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. [32]

25-10. 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. [33]

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

---

'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).

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

31 66 NYS2d 107, 495 NYS2d 318, 485 NE2d 983 (1985).

32 See Sanders v. Copley, 151 A.D.2d 350, 543 N.Y.S.2d 67 (1st Dept. 1989); Rubenfeld v. Rubenfeld , 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 3, Freed, Brandes and Weidman, Law and the Family New York § 2:4 et seq. [2d ed rev 1993]).

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

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. [34]

Separate property remains separate. [35]

The Court must distribute marital property "equitably between the parties, considering the circumstances of the case and of the respective parties". [36]

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. [37]

In its discretion, the court may also make a distributive award to supplement, facilitate or effectuate a distribution of marital property.[38]

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. [39]

25-11. Presumptions - 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. [40] Marital property should be construed broadly in order to give effect to the 'economic partnership' concept of the marriage relationship. By contrast, separate property—denoted as an exception to marital property—should be construed "narrowly. The structure of section 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.[41]

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." [42]

---

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

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

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

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

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

39 Domestic Relations Law § 236 [B]

40 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")

41 Fields v. Fields, 15 N.Y.3d 158, 165, 931 N.E.2d 1039, 1043 (2010); 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).

42 Lauzonis v. Lauzonis 105 AD3d 1351, 964 N.Y.S.2d 796 (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 martial 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.

25-12. Burden of Proof - 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. [43]

In D'Amato v D'Amato [44] where the major assets constituting marital property were the marital residence and defendant's pension the Appellate Division said: "A determination must be made at 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."

In Capasso v Capasso [45] 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.[46] 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. [47]

Although marital property is distributed regardless of the form in which title is held [48] 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.[49] Where the marital residence

---

43 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)

44 (1983, 2d Dept.) 96 App Div. 2d 849, 466 NYS2d 23; Rudish v. Rudish, __AD3d___, 2017 WL 2346529 (2d Dept., 2017)

45 (1986, 1st Dep't) 119 App Div. 2d 268, 506 NYS2d 686

46 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)

47 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).

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

49 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. 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 as the plaintiff, 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,

is titled in the name of one spouse alone the court may not order its sale and distribution of the proceeds absent a valuation. [50] Where the marital residence or other marital property is titled in the name 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.[51]

---

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.

50 In London v. London, 21 A.D.3d 602, 799 N.Y.S.2d 646 (3d Dep't 2005), the Appellate Division observed 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 concerning the separate and marital portions of these assets. The Court held that such proof is however, necessary 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.

51 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 cases[52] where there is an equitable distribution in accordance with the rule enunciated in Majauskas v Majauskas,[53] 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 court's 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,[54] 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.[55]

In Van Housen v. Van Housen,[56] the Appellate Division held that although no 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[57] the wife was awarded exclusive occupancy of the marital residence, and the stock was distributed in kind.

In Spathis v. Spathis, [58] 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

---

52 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)." See also London v. London, 21 A.D.3d 602, 799 N.Y.S.2d 646 (3d Dep't 2005).

53 61 NY2d 481

54 206 A.D.2d 715, 716, 614 N.Y.S.2d 779, 780 (3d Dept.,1994)

55 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.

56 114 A.D.2d 411, 411-12, 494 N.Y.S.2d 135 (2d Dept., 1985)

57 61 NY2d 481

58 103 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),

an absence of proof regarding the value of property or reasons for treating property as marital property, the Court may refuse to consider any equitable distribution of those assets.[59]

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.[60] Valuation is not required where a spouse does not seek a present lump 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 Majauskas formula.[61] In Majauskas, [62] 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

---

59 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.

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."

60 In Damiano v Damian, 94 AD2d 132 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 non-employee 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 non-employed 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 non-employed 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 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.

61 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).

62 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).

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.

25-13. Property Distribution – Allocation of Marital Assets and Marital Debts – In Kind Distribution

Equitable distribution does not necessarily mean equal distribution.[63] The court may allocate marital assets to achieve an equitable distribution. The equitable distribution of marital assets must be based on the circumstances of the particular case and the consideration of a number of statutory factors.[64] There is no requirement that the distribution of each item of marital property be on an equal or 50–50 basis. [65] The court may allocate liability for debts incurred for marital benefit in the same manner as to achieve an equitable distribution comparable to that of assets.[66]

While outstanding financial obligations incurred during the marriage which are not solely the liability of either spouse may be deemed marital obligations, a financial obligation incurred by one party in pursuit of his or her separate interests[67] or not incurred for the benefit of the marriage [68] should remain that party's separate liability.

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. [69]

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. [70]

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 discussed in this section.

There does not appear to be any statutory or case authority for the court to order that assets be sold and 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

63 See Michaelessi v. Michaelessi, 59 A.D.3d 688, 689, 874 N.Y.S.2d 207; Evans v. Evans, 57 A.D.3d 718, 719, 870 N.Y.S.2d 394; Greene v. Greene, 250 A.D.2d 572, 672 N.Y.S.2d 746.

64 See Domestic Relations Law § 236[B] [5] [d]; Holterman v. Holterman, 3 N.Y.3d 1, 7, 781 N.Y.S.2d 458, 814 N.E.2d 765.

65 Arvantides v. Arvantides, 478 N.E.2d 199, 200, 489 N.Y.S.2d 58, 59, 64 N.Y.2d 1033, 1034 (1985)

66 Savage v. Savage, 155 A.D.2d 336, 337, 547 N.Y.S.2d 306, 307 (1 Dept.,1989)

67 Corless v. Corless, 18 A.D.3d 493, 494, 795 N.Y.S.2d 273, 274–75, (2d Dept.,2005); Marin v Marin, 148 AD3d 1132, 51 N.Y.S.3d 111 (2d Dept., 2017)

68 Kosovsky v. Zahl, 257 A.D.2d 522, 523, 684 N.Y.S.2d 524, 526 (1 Dept.,1999)

69 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.

70 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.

valuation, all involve liquid assets such as stocks and bonds, or unusual circumstances making valuation unnecessary or unfeasible.[71]

In Hinden v Hinden, [72] 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,[73] the wife was directed to transfer to the husband one-half of her 26 shares of stock in the family insurance business. The Appellate Davison found that any attempted valuation of the 26 shares owned by the wife would have involved undue speculation and conjuncture. 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 [74] the Appellate Division held that 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.

In Repka v. Repka, [75] 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 neither 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.

In Hinden v Hinden,[76] the court valued the husband's stock before making the equitable distribution. In Iacobucci v Iacobucci,[77] the court found that the stock had no value to an outside party, before making the equitable

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

72 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

73 (1988, 2d Dept) 140 App Div 2d 412, 528 NYS2d 114

74 (1992, 2d Dept) 184 App Div 2d 544, 584 NYS2d 857

75 186 A.D.2d 119, 120-22, 588 N.Y.S.2d 39 (2d Dept,1992)

76 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

77 (1988, 2d Dept) 140 App Div 2d 412, 528 NYS2d 114

distribution. In Elmaleh v Elmaleh,[78] the court did not cite any authority for awarding half of the husband's partnership interests to the wife. The decision in Repka v. Repka [79] does not indicate whether the businesses were titled in the husband's name or in the joint names of the parties, and it is significant that the wife did not oppose the husband's request. In each of these cases, there were unusual circumstances making valuation unnecessary or unfeasible.[80]

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 [81]

25-14. 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. [82] If that spouse fails to meet the burden of proof in establishing the value of the property he or she is not entitled to a distributive award in lieu of a share of it.[83]

A spouse who claims that the post-commencement increase in value of separate property was active and, therefore, separate property, must show that the increase was due solely to his or her efforts. [84]

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.[85]

---

78 (1992, 2d Dept) 184 App Div 2d 544, 584 NYS2d 857

79 186 A.D.2d 119, 120-22, 588 N.Y.S.2d 39 (2d Dept,1992)

80 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.

81 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.

82 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. Antoian 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).

83 See Hirschfeld v. Hirschfeld 96 AD2d 473,464 NYS2d 789 (1st Dept, 1983); Antoian v. Antoian 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)

84 Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 421–22, 909 N.E.2d 62, 65–66 (2009); 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).

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

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 spouse's 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 to equitable distribution. [86] 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.[87]

25-15. Property Distribution – Value of Homemaker Services.

The Second Department has held that testimony as to the value of homemaker services and work performed by a spouse is admissible. Beckerman v. Beckerman, 126 AD2d 591, 511 NYS2d 33 (2d Dept., 1987). The Third and Fourth Departments have held that the value of homemaker services is not a subject which requires expert testimony in a matrimonial action.[88]

It was stated by Justice O'Conner, in his opinion in Conner v Conner, [89] 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. 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.

---

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

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

88 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)

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

25-16. Property Distribution - Separate Property - Burden of Proof Property Is Separate

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 exceptions, [90] can dispose of it as he or she desires.

Between a husband and wife, "separate property" usually remains separate [91] 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.[92]

Property which was separate property before marriage,[93] or received by inheritance or gift from others during marriage,[94] compensation for personal injury,[95] and property "acquired in exchange for" what is separate property [96] ordinarily retains that identity. However, the burden of establishing that property is "separate" rests on the spouse who claims that it is. [97]

The separate property exception to marital property is to be construed narrowly.[98]

The structure of section 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.[99] When an asset is acquired during the marriage, the party's own testimony that the source of the funds used to acquire it are pre-marital or separate property, without more, is insufficient to overcome the presumption that the property is marital property.[100]

---

90 See, e.g., EPTL 5-1.1, 5-3.1

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

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

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

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

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

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

97 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]).

98 see Domestic Relations Law § 236[B][1][d]; Price v. Price, 69 N.Y.2d 8, 15, 511 N.Y.S.2d 219, 503 N.E.2d 684; Majauskas v. Majauskas, 61 N.Y.2d 481, 489, 474 N.Y.S.2d 699, 463 N.E.2d 15; Farag v. Farag, 4 A.D.3d 502, 503, 772 N.Y.S.2d 368; Saasto v. Saasto, 211 A.D.2d 708, 621 N.Y.S.2d 660)

99 Fields v. Fields, 15 N.Y.3d 158, 165, 931 N.E.2d 1039, 1043 (2010); 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).

100 Rosenberg v. Rosenberg145 A.D.3d 1052 (2d Dept., 2016) ("Contrary to the defendant's contention, the Supreme Court properly determined that a boat acquired during the marriage was marital property. "Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property" (Bernard v. Bernard, 126 A.D.3d 658, 659, 5 N.Y.S.3d 233 [internal quotation marks omitted]). Here, the defendant's testimony that the funds used to acquire the boat were his separate property, unsupported by documentary evidence, was insufficient to overcome the marital presumption (see Marshall v. Marshall, 91 A.D.3d 610, 611, 937 N.Y.S.2d 253; Steinberg v. Steinberg, 59 A.D.3d 702, 704, 874 N.Y.S.2d 2)."

Marshall v. Marshall, 91 A.D.3d 610, 937 N.Y.S.2d 253, 2012 N.Y. Slip Op. 00191(2d Dept., 2012) ("Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property" (Embury v. Embury, 49 A.D.3d 802, 804, 854 N.Y.S.2d 502 [internal quotation marks omitted]; see D'Angelo v. D'Angelo, 14 A.D.3d 476, 477, 788 N.Y.S.2d 154). A court is not bound by a party's own account of his or her finances (see Steinberg v. Steinberg, 59 A.D.3d at 704, 874 N.Y.S.2d 230, citing Saasto v. Saasto, 211 A.D.2d 708, 709, 621 N.Y.S.2d 660). When an asset is acquired

25-17. Property Distribution - 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.[101]

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. [102]

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.[103]

Transferring separate property into the joint names of the parties, or commingling separate property with marital property will transmute it into marital property unless proven otherwise. [104] The presumption that separate funds are transmuted into 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.[105]

---

during the marriage, the party's own testimony that the source of the funds used to acquire it are premarital or separate property, without more, is insufficient to overcome the presumption that the property is marital property (see Steinberg v. Steinberg, 59 A.D.3d at 704, 874 N.Y.S.2d 230; D'Angelo v. D'Angelo, 14 A.D.3d at 477, 788 N.Y.S.2d 154; Farag v. Farag, 4 A.D.3d 502, 503, 772 N.Y.S.2d 368).30; D'Angelo v. D'Angelo, 14 A.D.3d 476, 477, 788 N.Y.S.2d 154) ")

D'Angelo v. D'Angelo, 14 A.D.3d 476, 788 N.Y.S.2d 154, 2005 N.Y. Slip Op. 00122 (2d Dept., 2005)("The Supreme Court also erred in awarding the defendant a separate property interest with respect to the Mercedes–Benz automobile. The separate property exception to marital property is to be construed narrowly (see Domestic Relations Law § 236[B][1][d]; Price v. Price, 69 N.Y.2d 8, 15, 511 N.Y.S.2d 219, 503 N.E.2d 684; Majauskas v. Majauskas, 61 N.Y.2d 481, 489, 474 N.Y.S.2d 699, 463 N.E.2d 15; Farag v. Farag, 4 A.D.3d 502, 503, 772 N.Y.S.2d 368; Saasto v. Saasto, 211 A.D.2d 708, 621 N.Y.S.2d 660) and the party seeking to overcome the presumption that property is marital bears the burden of proving that the property in dispute is separate property (see Farag v. Farag, supra; Barone v. Barone, 292 A.D.2d 481, 483, 740 N.Y.S.2d 350). Here, the automobile in question was purchased nine years after the date of the marriage. In these circumstances, the defendant's testimony that the automobile was purchased, in major part, with pre-marital assets, unsupported by documentary evidence, was insufficient to overcome the marital presumption (see Farag v. Farag, supra; Barone v. Barone, supra; Seidman v. Seidman, 226 A.D.2d 1011, 641 N.Y.S.2d 431; Saasto v. Saasto, supra)."

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

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

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

104 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)

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

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. [106] 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. [107] In this instance, a commingling of separate with marital property may be said to convert separate property into marital property.[108] The presumption is rebuttable. [109]

A spouse's 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.[110] 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.[111]

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

---

106 Banking Law § 675

107 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.

108 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)

109 In Feldman v Feldman (1993, 2d Dept) 194 AD2d 207, 605 NYS2d 777, the 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 supported Supreme Court's conclusion that the plaintiff failed to rebut the presumption that the subject funds were marital property.

110 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).

111 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 711, 713, 754 N.Y.S.2d 766 (2003).

back to the source of the funds or asset he or she is claiming is separate property.[112] 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. [113]

Separate property can be transmuted into marital property where the actions of the titled spouse demonstrate his intent to transform the character of the property from separate to marital.[114] The general rule is that a spouse is entitled to a credit for the value his or her separate property contribution to marital property.[115] 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.[116] The granting of such a credit is a matter of discretion and not strictly mandated since the property is no longer separate, but is part of the total marital property.[117] The court may not transmute that contribution into a percentage and apply the percentage to the appreciated asset. [118]

The use of marital property or funds to improve separate property does not transmute the separate property into marital property.[119]

In Ceravolo v. DeSantis, [120] the Appellate Division held that Supreme Court erred in classifying the marital residence as marital property. The husband purchased the marital residence, 2 years prior to the parties' marriage paying $130,000 of his own funds and borrowing an additional $100,000 from his father, secured by a note and mortgage. Although the wife contributed $30,000 of her separate funds to the initial purchase of the residence, she did not attend the closing and the husband took title to the property in his name alone. The wife paid the mortgage for more than two years prior to the marriage, as well as after the parties were married through 2003, when a satisfaction of mortgage was issued, notwithstanding a principal balance remaining of approximately $52,000. Supreme Court determined that the wife's contributions transformed the residence from the husband's separate property into marital property, which was subject to equitable distribution. The Appellate Division disagreed. It observed that the Equitable Distribution Law does not purport to address financial transactions between persons

112 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)

113 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)

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

115 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.

116 In Murray v. Murray, 101 A.D.3d 1320, 956 N.Y.S.2d 252 (3d Dep't 2012), 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, 119 A.D.3d 1114, 989 N.Y.S.2d 537 (3d Dept., 2014).

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

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

119 Ceravolo v. DeSantis 125 A.D.3d 113, 1 N.Y.S.3d 468 (3d Dep't 2015)

120 125 A.D.3d 113, 1 N.Y.S.3d 468 (3d Dep't 2015)

prior to their marriage, which cannot be considered to have been the product of the marital enterprise. While Supreme Court's finding that the wife made certain substantial contributions of money and effort toward the acquisition and maintenance of the marital residence was amply supported by the record, the effect of such contributions by the wife, particularly those she made before the marriage, was not to transform the husband's premarital, separate property into marital property. For this same reason, equitable distribution did not afford the wife any remedy with respect to the $30,000 that she contributed towards the down payment of the house or the pre-marriage mortgage payments that she made. The Court held that to the extent that Matwijczuk v. Matwijczuk, [121] and Ciaffone v. Ciaffone, [122] held that separate property contributions made by a nontitled spouse toward the acquisition or improvement of premarital property can serve to transform such property into a marital asset, they should no longer be followed. [123]The Appellate Division noted, however, that separate property contributions by a nontitled spouse could result in an appreciation of the value of the titled spouse's separate property during the marriage, which appreciation would be subject to equitable distribution. Here, the wife conceded that she was not seeking equitable distribution of the property's value based upon its appreciation. The majority pointed out that title is a critical consideration in identifying the nature of real property acquired before the marriage. Therefore, in its view, the circumstances surrounding the purchase of the residence and the parties' intent relative thereto are irrelevant to the legal classification of the residence as separate or marital property. The Appellate Division agreed with the wife's alternative argument that she was entitled to recoup her equitable share of marital funds paid toward the mortgage. It is well settled that, in determining the equitable distribution of marital property, a court has the authority to effectively recoup marital funds applied to the reduction of one party's separate indebtedness. The wife testified that she paid the mortgage on the marital residence from the date of the marriage until a satisfaction of mortgage was issued. Although it was not evident from the record what funds were used to make these payments, it could be presumed that marital funds were used. Thus, the wife was entitled to an equitable share of the marital funds that were used to pay the husband's separate indebtedness on the mortgage during the marriage, and the matter was remitted to Supreme Court to determine the wife's share thereof and reconsideration of the equitable distribution and maintenance awards.

Real property that is separate property cannot be transformed or transmuted into marital property by the efforts and contributions of the nontitled spouse.[124]

---

121 261 A.D.2d 784, 690 N.Y.S.2d 343 (3d Dep't 1999)

122 228 A.D.2d 949, 645 N.Y.S.2d 549 (3d Dep't 1996)

123 In Matwijczuk it held, citing Ciaffone v. Ciaffone, 228 A.D.2d 949, 645 N.Y.S.2d 549 (3d Dep't 1996)), that the use of marital funds, together with the nontitled spouse's efforts and contributions of separate funds toward the construction of the marital residence (which began before the marriage on land purchased by the titled spouse a few months earlier) "in furtherance of the marital partnership" were sufficient to transform the residence, including the land, into marital property. In Ciaffone, it determined that the parties' investment of marital funds to construct a two family house on land purchased by the husband with his premarital funds rendered the property a marital asset subject to equitable distribution, with a credit given to the husband for the premarital funds that he used to purchase the land.

124 In Macaluso v. Macaluso, 124 A.D.3d 959, 1 N.Y.S.3d 464 (3d Dep't 2015) the Appellate Division held that Supreme Court erred in finding that the marital residence was marital property and awarding the wife 50% of the home's appraised value minus a $10,000 separate property credit to the husband for the purchase price of the land. Supreme Court credited the wife's testimony that, although the husband purchased the land and constructed a "shell" of a house prior to the marriage, the construction of the residence was not complete until approximately four years after the marriage. The record demonstrated that the vast majority of the improvements occurred during the marriage due, in part, to the wife's contributions of money, time and labor. Nevertheless, for the reasons set forth in Ceravolo v. DeSantis (AD3d),

By parity of reasoning it appears that separate property contributions of funds or efforts by a nontitled spouse toward the improvement of the titled spouses separate property cannot serve to transform such property into marital property as it is not in furtherance of the marital partnership.

In Mahoney-Buntzman v Buntzman,[125] the Court of Appeals stated that as a general rule, where payments are made with marital property during the marriage for separate debts of a spouse before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the nontitled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end. The Court of Appeals acknowledged that there may be circumstances where equity requires a credit to one spouse where marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property. It noted that to the extent that expenditures are truly excessive, the ability of one party to claim that the other has accomplished a "wasteful dissipation of assets" by his or her expenditures provides protection. The payment of maintenance to a former spouse, however, does not fall under either of these categories. Nor was the wife entitled to a credit for payments made during the marriage towards husband's student loan. He incurred the student loan during the parties' marriage, and had his degree conferred an economic benefit, the wife would have been entitled to a share in its value.

25-18. Property Distribution - Reducing Enhanced Earnings by Amount of Distributive Award – Actions Commenced on or after January 23, 2016

In McSparron v McSparron,[126] the Court of Appeals held that a professional degree or license which has been used by the licensee to establish and maintain a career does not "merge" with the career or ever lose its character as a separate, distributable asset. The Court of Appeals 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 and that courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.

The Appellate Division, Fourth Department attempted to avoid duplicative awards in Wadsworth v Wadsworth, [127] where, rather than limit the maintenance award, it "McSparronized" the property distribution by holding that to avoid a double count, the income used in determining the present value of the law practice had to be deducted from the calculation of the future enhanced earning capacity, and that where there is a maintenance award, "the court [is] obliged to reduce the value of the enhanced earnings by the amount awarded in maintenance. Not to do so would involve a double counting of the same income."

---

a parcel of real property that is separate property cannot be transformed or transmuted into marital property by the efforts and contributions of the nontitled spouse. Accordingly, the parcel was separate property which was not subject to equitable distribution.

125 Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 373, (2009)

126 87 NY2d 275, 639 NYS2d 265 (1995).

127 219 AD2 410, 641 NYS2d 779 (4 Dept., 1996).

In Grunfeld v Grunfeld,[128] the trial judge ordered Harold Grunfeld to pay his wife Rochelle maintenance of $15,000 per month until the sale of the marital home one year after their younger child was to enter college, in 2000. Then, maintenance was to be reduced to $8,500 per month. The court determined the value of Harold's license to practice law for equitable distribution purposes. Because the parties did not marry until Harold was halfway through law school, only one-half of the license was a marital asset. The sum of the license's bare value and enhanced earnings potential was found to be $1,547,000. The Supreme Court stated that it had considered all of Harold's future income in fixing the maintenance award. It noted that the method of determining the value of Harold's license was based on the earnings differential between reasonable compensation and the income of a non-licensed college graduate. It then explained that it would violate the McSparron rule against double counting to actually award one-half the value of the license, since the earnings differential upon which it was based had already been considered in fixing the award of maintenance. To avoid giving Rochelle two separate awards derived from the same stream of future income, the trial court excluded the license from the marital assets in determining the distributive award.

The Appellate Division modified the trial courts' award, directing that the one-half of the value of Harold's professional license, $773,500, should also have been distributed to Rochelle. It held that the reduction of maintenance from $15,000 to $8,500 per month should begin following full payment of the distributive award.[129]

The Court of Appeals modified the order of the Appellate Division because it double counted Harold's income in ordering that Rochelle should receive both unreduced maintenance and the full distributive award of one-half the value of Harold's law license. The Court of Appeals pointed out that Supreme Court included as part of Harold's earning capacity the projected earnings derived from his professional license. It also used the same earnings attributable to the law license to determine the present value of the license as a marital asset. 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. "The necessity of this reduction was recognized in Wadsworth v Wadsworth (219 AD2d 410). Not to do so would involve a double counting of the same income." The court noted that "One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce." It added: "'This method is also consistent with our observation that in particular cases the value of the license 'may be nominal.'" It also noted that "there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (***). Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance."[130]

128 94 NY2d 696 (2000).

129 Grunfeld v Grunfeld, 94 NY2d 696 (2000).

130 Grunfeld v Grunfeld, 94 NY2d 696 (2000).

The Court of Appeals found that the Appellate Division based its ruling, in part, on the fact that "defendant's future earnings" – which only could be expected to come from his own professional endeavors – were likely "to exceed $1 million yearly". Additionally, that court apparently recognized that income from other resources could only be expected to support "a portion of the maintenance". It held that by ordering full distribution of Rochelle's share of Harold's license without any adjustment of maintenance, the Appellate Division engaged in double counting of income, which was inconsistent with McSparron. Therefore, it sent the case back to the Supreme Court to recalculate the required reduction in the license distributive award, in accordance with McSparron and its opinion.[131]

Domestic Relations Law §236[B] [5] [d] [7] was amended in 2016 to eliminate enhanced earning capacity as a marital asset.[132] The 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.[133]

25-19. Property Distribution - Reducing Enhanced Earnings by Amount of Distributive Award – Exception to Rule for tangible income-producing asset

In Keane v Keane,[134] the Court of Appeals, in an opinion by Judge Rosenblatt, held that the principal enunciated in Grunfeld v. Grunfeld [135] and McSparron v. McSparron, [136] that in divorce actions a court should not twice count the income associated with a professional license, an intangible asset, when making distributive and maintenance awards, does not extend to the distribution of a tangible, income-producing asset and the subsequent award of maintenance from income deriving from that asset.

25-20. Property Distribution - Valuation Date

The valuation date for marital assets must be between the date of commencement and the date of trial. [137]

---

131 Grunfeld v Grunfeld, 94 NY2d 696 (2000).

132 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 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.

133 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

134 8 N.Y.3d 115, 828 N.Y.S.2d 283, 861 N.E.2d 98 (2006).

135 94 NY2d 696 (2000).

136 87 NY2d 275 (1995).

137 See Domestic Relations Law §236[B] [4] [b]. See also Chapter 30, Section 30-3. Valuation Date - Active Assets and Passive Assets.

A party arguing that an asset is active, and should be valued as of the commencement of the action, rather than the date of trial, must prove that any change in the value of that asset was due solely to his efforts, to the exclusion of all other factors.[138]

The Second Department has noted that one date mentioned as a date to be utilized for valuation is that of the date of the commencement of the matrimonial action. The valuation date would, in most cases, then coincide both with the date at which marital property is identified. [139] It observed that this rule could lead to injustice if the asset has significantly increased or decreased in value between the date of commencement and the date of trial of the action. If an asset increases in value due to market forces or inflation, valuation as of the date of commencement of the action would result in a windfall to the titled spouse and injustice to the other. If the asset greatly decreased in value, as would be the case, for example, if a closely held corporation lost a major customer, a court which values assets at the date of commencement of the action might make a distributive award that is beyond the owner spouse's ability to pay. A rule requiring valuation at the time of trial could be equally unworkable. In some cases, practical problems could arise if proof of value at the date of trial is unavailable. Injustice could result if the value of an asset significantly decreased after the commencement of the action due to wasteful dissipation or other fault of the owner spouse. In this type of circumstance, it might be unfair to, in effect, force the blameless spouse to share a portion of the loss. An asset such as, for example, a business, might suddenly appreciate in value due solely to the efforts of the owner spouse. If a considerable period of time has elapsed since the date of commencement or the date of separation, the court might be justified in establishing a valuation date earlier than the date of trial. In many cases, valuation of marital assets as of a date as close to the time of trial as practicable will result in an award which is fair to both parties. During a long delay between the date of commencement and the date of the trial many assets, particularly businesses may experience fluctuations that might dramatically change the logic of the distribution. Under such circumstances, the valuation of assets close to the time of trial may result in the formulation of an award consistent with the purpose of equitable distribution and insure that each spouse receives a fair share of the family assets accumulated while the marital relationship endured. However, in other cases, circumstances may exist which would justify the use of a valuation date closer to the time of commencement of the action. A sharp increase in the value of a marital asset due solely to the efforts of the owner spouse might be such a circumstance. Similarly, a dramatic reduction in value due to dissipation or wasteful conduct of the owner spouse might justify the use of a date earlier than the date of trial.[140]

The First Department subsequently observed that courts have consistently recognized that assets such as undeveloped real estate or mutual funds, which appreciate in value strictly as a result of random market fluctuations or the efforts of others, constitute passive assets, while assets that appreciate due to the efforts of the titled

138 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).

139 Citing Domestic Relations Law §236 [B] [1] [c]).

140 Wegman v. Wegman, 123 A.D.2d 220, 234, 509 N.Y.S.2d 342 (1986) amended, 512 N.Y.S.2d 410 (2d Dept., App. Div. 1987)

spouse are active. [141] It held that passive assets should generally be valued as of the trial date so as to prevent a windfall to the titled spouse if the asset has increased in value; active assets should generally be valued as of the commencement date of the action in order to benefit the titled spouse, since any appreciation in value is the product of that spouse's labors. [142]

In McSparron v. McSparron,[143] the Court of Appeals observed that in attempting to select a suitable valuation date, some courts have drawn a distinction between "active" assets (i.e., those whose value depends on the labor of a spouse) and "passive assets" (i.e., those whose value depends only on market conditions). These courts have concluded that "active" assets should be valued only as of the date of the commencement of the action, while the valuation date for "passive" assets may be determined more flexibly.[144] It held that such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law.[145]

25-21. Property Distribution - Retirement Benefits, Severance Payments, Stock Plans, Bonuses and Deferred Compensation

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. [146] A spouse's right to an equitable share in the other spouse's pension or retirement benefits depends on the nature of the benefits, when they are obtained and whether they are considered to be "property." [147]

In Majauskas v Majauskas, [148] the Court of Appeals held that vested rights[149] in a noncontributory pension plan are marital property to the extent they were acquired between the date of the marriage and the commencement of the matrimonial action, even though the rights are unmatured at the beginning of the action. The matrimonial court in the exercise of the discretion vested in it by part B of section 236 of the Domestic Relations Law

141 Citing Price v Price, 113 AD2d 299, 307-308, affd 69 NY2d 8, 18; Jolis v Jolis, 98 AD2d 692; Nolan v Nolan, 107 AD2d 190.

142 Greenwald v. Greenwald, 164 A.D.2d 706, 716, 565 N.Y.S.2d 494 (1st Dept.1991) (citing Wegman v Wegman, 123 AD2d 220, 234, 236.)

143 87 N.Y.2d 275, 287-88, 662 N.E.2d 745 (1995)

144 Citing Smerling v Smerling, 177 AD2d 429; Heine v Heine, 176 AD2d 77; Zelnik v Zelnik, 169 AD2d 317; Kallins v Kallins, 170 AD2d 436; Greenwald v Greenwald, 164 AD2d 706.

145 See also Mesholam v Mesholam, 11 N.Y.3d 24, 892 N.E.2d 846, 862 N.Y.S.2d 453 (2008).

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

147 See Volume 3B, Chapter 17, Law and the Family New York, 2d Edition Revised, for a comprehensive discussion of equitable distribution of retirement benefits, including Military Retirement Benefits.

148 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913.

149 The Court of Appeals did not reach or consider the status of unvested pension rights. However, in Burns v Burns, 84 NY2d 369, 618 NYS2d 761 (1994) the Court of Appeals held that non-vested pensions are also subject to equitable distribution, because they often represent deferred compensation for services performed over a number of years that encompasses the marriage.

may 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 may provide that upon maturity of the pension rights the recipient pay a portion of each payment received to his or her former spouse or may, if it determines that valuation or other problems make equitable distribution impractical or burdensome, order a distributive award in lieu of equitable distribution. [150]

Majauskas governs the equitable distribution of all pension-related benefits, both retirement and survivorship earned during the marriage. [151]

According to the clear language of Majauskas the Court may: (a) 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 (a lump sum award discounted for present value); [152] or (b) provide that upon maturity of the pension rights upon

---

150 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913.

In Glasberg v. Glasberg, 104 A.D.2d 788, 480 N.Y.S.2d 131 (2d Dep't 1984), the Second Department held that Special Term had erred in not awarding the wife her equitable share of the husband's pension and profit sharing plans, and that Special Term must make detailed findings of fact as to the "characteristics" of the plans in order to determine the proper method of valuation on remand.

151 McCoy v. Feinman, 99 N.Y.2d 295, 785 N.E.2d 714 (2002)

152 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913.

In Delgado v. Delgado, 160 A.D.2d 383, 553 N.Y.S.2d 748 (1st Dep't 1990), the Appellate Division vacated that part of the judgment which awarded the wife one half of the police pension benefits the husband would receive at age 65. It held that defendant's 50% interest in the pension had to be limited, as a matter of law, to the corpus of the plaintiff's police pension fund which accumulated between the date of the marriage and the commencement of the action, even though the rights are unmatured at the time the action is begun. The court held that since the wife did not adduce evidence of the present value of the husband's pension, only the second method discussed in D'Amato v. D'Amato, 96 A.D.2d 849, 466 N.Y.S.2d 23 (2d Dep't 1983), could be utilized and the husband was directed to pay the wife one-third of "each pension" payment payable to him, less taxes.

In Zacharek v. Zacharek, 116 A.D.2d 1004, 498 N.Y.S.2d 625 (4th Dep't 1986), the Appellate Division found no fault with the court's computation of plaintiff's interest in defendant's pension. Defendant testified that he was entitled to a lump-sum award of $21,000 based on 15 years of work. The parties had been married six years before the commencement of the divorce action. Thus, six-fifteenths, or $8,400, of the value of the pension was earned during the marriage, and the trial court determined that plaintiff was equitably entitled to one-half of that amount. It held that although the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15 and Szulgit v. Szulgit, 94 A.D.2d 979, 461 N.Y.S.2d 609 is appropriate where the pension is payable in installments and where the pensioner lacks sufficient assets to pay a distributive award, the court retains discretion to use other methods, as it did here, to evaluate and distribute the marital interest in pension rights, where appropriate.

In DeMarco v. DeMarco, 143 A.D.2d 328, 532 N.Y.S.2d 293 (2d Dep't 1988), the Appellate Division affirmed the award to the wife of 40% of the value of the husband's retirement pension payable in a lump sum, but reduced the value to $98,475. The husband was unable to work since 1971 when he was in an auto accident, became disabled and received a policeman's disability pension. The action was commenced in October 1984 after 21 years of marriage. The pension was converted into a retirement pension in April 1985, on the 20th anniversary of the husband's employment. The value which accrued during 19 years, six months was marital property.

In Armando v. Armando, 114 A.D.2d 875, 495 N.Y.S.2d 192 (2d Dep't 1985), the Appellate Division held it was error to deny the wife a share of the husband's pension and it awarded her 50% ($2524.46) of his pension benefits. It held that an immediate distribution 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".

In Mele v. Mele, 152 A.D.2d 685, 544 N.Y.S.2d 25 (2d Dep't 1989), the Appellate Division modified the judgment of divorce to apply the Majauskas formula to the distribution of 50% of the husband's pension benefits to the wife. It rejected the husband's claim that it was error to

retirement the recipient pay a portion of each payment received to his or her former spouse (a deferred distributive award) or (c) if it determines that valuation or other problems make equitable distribution impractical or burdensome, order a distributive award in lieu of equitable distribution. [153]

Under the first approach established by Majauskas, the Court may order a lump sum award of a portion of the present value of the pension. [154] This type of distribution requires the party seeking the award to prove the present value of the pension. [155]

---

distribute his pension rights without evidence of their value or the tax implications of the distribution. It 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.

In Glasberg v. Glasberg, 162 A.D.2d 586, 556 N.Y.S.2d 772 (2d Dep't 1990), the Appellate Division held that the trial Court did not err in awarding the wife a lump sum payment equal to 50% of the funds maintained in the husband's pension and profit sharing plans as of the date the action was commenced. It held that the trial court did not err in awarding the wife 50% of the interest earned on these funds, which constituted marital property. The calculation excluded interest on any contributions to these funds after the action was commenced and thus was based only on the marital portion the fund.

In Brooks v. Brooks, 55 A.D.3d 520, 867 N.Y.S.2d 451 (2d Dep't 2008), the Appellate Division held that in light of the plaintiff's poor health and life expectancy, it was appropriate to award the plaintiff her portion thereof as a lump sum. A lump sum payment of a party's share of a pension is preferred when there is sufficient marital property to enable the payment to be made.

153 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913. See also Puzzi v Puzzi (1984, 2d Dept) 101 App Div 2d 884, 476 NYS2d 355; Brundage v Brundage (1984, 2d Dept) 100 App Div 2d 887, 474 NYS2d 546; McDermott v McDermott (1984) 123 Misc 2d 355, 474 NYS2d 221, affd in part and revd on other grounds in part, mod on other grounds in part (2d Dept) 119 App Div 2d 370, 507 NYS2d 390, app dismd 69 NY2d 1028, 517 NYS2d 938, 511 NE2d 81; Wenzel v Wenzel (1984) 122 Misc 2d 1001, 472 NYS2d 830; Newell v Newell (1983) 121 Misc 2d 586, 468 NYS2d 814.

In Francis v Francis, 133 AD2d 335 (2d Dept, 1987), the Appellate Division vacated the award of $6,000 representing wife's share of the husband's vested but unmatured interest in a pension plan and directed that the husband pay one-half of a percentage of the amount of each pension benefit when received by him, less taxes. The percentage was to be derived by dividing the number of months married before commencement of action and during which husband earned pension credit by the number of months of pension credits he will have earned towards pension as of date of his retirement. The court concluded that the payment schedule had to be changed because of the husband's lack of available assets to meet his obligations under the divorce judgment. The schedule of payments imposed by the trial court did not leave him with sufficient funds to maintain himself and meet his own reasonable expenses in a separate household.

In Delgado v. Delgado, 160 A.D.2d 383, 553 N.Y.S.2d 748 (1st Dep't 1990), the Appellate Division vacated that part of the judgment which awarded the wife one half of the police pension benefits the husband would receive at age 65. It held that defendant's 50% interest in the pension had to be limited, as a matter of law, to the corpus of the plaintiff's police pension fund which accumulated between the date of the marriage and the commencement of the action, even though the rights are unmatured at the time the action is begun. The court held that since the wife did not adduce evidence of the present value of the husband's pension, only the second method discussed in D'Amato v. D'Amato, 96 A.D.2d 849, 466 N.Y.S.2d 23 (2d Dep't 1983), can be utilized and the husband was directed to pay the wife one-third of "each pension" payment payable to him, less taxes.

154 Ibid. at 486, 463 NE2d at 18, 474 NYS2d at 701. See also Puzzi v Puzzi (1984, 2d Dept) 101 App Div 2d 884, 476 NYS2d 355; Brundage v Brundage (1984, 2d Dept) 100 App Div 2d 887, 474 NYS2d 546; McDermott v McDermott (1984) 123 Misc 2d 355, 474 NYS2d 221, affd in part and revd on other grounds in part, mod on other grounds in part (2d Dept) 119 App Div 2d 370, 507 NYS2d 390, app dismd 69 NY2d 1028, 517 NYS2d 938, 511 NE2d 81.

155 Weilert v. Weilert, 115 A.D.2d 473, 495 N.Y.S.2d 707 (2d Dep't 1985); Tabriztchi v. Tabriztchi, 130 A.D.2d 652, 515 N.Y.S.2d 582 (2d Dep't 1987); Culnan v. Culnan, 142 A.D.2d 805, 530 N.Y.S.2d 688 (3d Dep't 1988); Michalek v. Michalek, 114 A.D.2d 655, 494 N.Y.S.2d 487, 6 Employee Benefits Cas. (BNA) 2319 (3d Dep't 1985);Del Gado v. Del Gado, 129 A.D.2d 426, 513 N.Y.S.2d 689 (1st Dep't 1987); Cleary v. Cleary, 171 A.D.2d 1076, 569 N.Y.S.2d 250 (4th Dep't 1991); LeVigne v. LeVigne, 220 A.D.2d 561, 632 N.Y.S.2d 610 (2d Dep't 1995); Shapiro v. Shapiro, 151 A.D.2d 559, 542 N.Y.S.2d 339; See also Seckler-Roode v. Roode, 36 A.D.3d 889, 830 N.Y.S.2d 211 (2d Dep't 2007)

The second approach awards the non-employee spouse a deferred specific share of the present value of the pension benefits which the employee spouse will receive in the future.[156]

Under the second approach the non-employee spouse will receive a percentage of the amount of each pension benefit payable to the employed spouse, 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 (the "Majauskas fraction").[157]

The "Majauskas fraction" is arrived at by using the following formula: The number of months of the marriage during which benefits were accumulated, including the months prior to commencement of the matrimonial action, is the numerator, and the total number of months during which benefits accrued to the employee party, from the date of employment to the date of retirement, is the denominator of the fraction.[158]

The failure to value the other spouse's pension or retirement plan does not prevent the equitable distribution to that spouse of a share of the plan where that spouse seeks an equitable share of the future periodic benefits from the plan, rather than a present lump-sum payment or distribution. [159]

---

156 In Buzzeo v. Buzzeo, 141 A.D.2d 490, 491-92, 529 N.Y.S.2d 120 (2d Dept., 1988) the court, as an alternative to a lump-sum payment, directed the husband to begin making present payments to the wife of a portion of the periodic pension benefits which he would receive only upon retirement. In effect, the court treated the wife's award of a portion of the pension as an additional source of maintenance, rather than as a division of marital property, an approach the court had previously rejected (see, Rodgers v Rodgers, 98 AD2d 386, 393, appeal dismissed 62 NY2d 646; Perri v Perri, 97 AD2d 399, 400; D'Amato v D'Amato, 96 AD2d 849, 850). Therefore, the matter was remitted to the Supreme Court for determination of the appropriate method of distribution within the parameters discussed in its decision. The Appellate Division indicated that it had repeatedly expressed a preference for a lump-sum award, in lieu of a deferred distributive award, where the amount the nonemployee spouse will receive is small and there is sufficient marital property from which a lump-sum distribution can be made. However, where sufficient assets for a lump sum payment do not exist, the court may direct the recipient of the pension benefits to make the required payments as they are received upon retirement. It directed that on remittitur, the court was to select one method of distribution and not a hybrid form of the two.

In Hromek v. Hromek, 119 A.D.2d 946, 501 N.Y.S.2d 217 (3d Dep't 1986), the Appellate Division held that the possibility that defendant might die before reaching the age of retirement does not preclude the court from ordering distribution of the present value of a vested pension earned during the marriage.

157 Majauskas v. Majauskas, 94 A.D.2d 494, 464 N.Y.S.2d 913 [4th Dept], aff'd, 61 N.Y.2d 481 [1984].

In Zacharek v. Zacharek, 116 A.D.2d 1004, 498 N.Y.S.2d 625 (4th Dep't 1986), the Appellate Division found no fault with the court's computation of plaintiff's interest in defendant's pension. Defendant testified that he was entitled to a lump-sum award of $21,000 based on 15 years of work. The parties had been married six years before the commencement of the divorce action. Thus, six-fifteenths, or $8,400, of the value of the pension was earned during the marriage, and the trial court determined that plaintiff was equitably entitled to one-half of that amount. It held that although the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15 and Szulgit v. Szulgit, 94 A.D.2d 979, 461 N.Y.S.2d 609 is appropriate where the pension is payable in installments and where the pensioner lacks sufficient assets to pay a distributive award, the court retains discretion to use other methods, as it did here, to evaluate and distribute the marital interest in pension rights, where appropriate.

158 See Francis v Francis, 133 AD2d 335 (2d Dept, 1987), where the percentage was to be derived by dividing the number of months married before commencement of action and during which husband earned pension credit by the number of months of pension credits he will have earned towards pension as of date of his retirement.

159 Majauskas v. Majauskas, 61 N.Y.2d 481, 486, 463 N.E.2d 15 (1984); See also Graepel v Graepel (1986, 2d Dept) 125 App Div 2d 447, 509 NYS2d 377; Dawson v Dawson (1989, 2d Dept) 152 App Div 2d 717, 544 NYS2d 172; Mele v Mele (1989, 2d Dept) 152 App Div 2d 685, 544 NYS2d 25; Church v Church (1991, 3d Dept) 169 App Div 2d 851, 564 NYS2d 572.

A third option referred to in Majauskas appears to be that the court may make a distributive award on maturity of an equitable share of the other spouses pension rights earned during marriage if it determines that valuation or other problems make equitable distribution impractical or burdensome. [160]

However, the Appellate Division, Second Department has held that one of the two methods in Majauskas must be utilized.[161] In Buzzeo v. Buzzeo, [162] the Appellate Division, citing Majauskas, observed that Supreme Court, "apparently as an alternative to a lump-sum payment, directed the husband to begin making present payments to the wife of a portion of the periodic pension benefits which he would receive only upon retirement." In effect, the court treated the wife's award of a portion of the pension as an additional source of maintenance, rather than as a division of marital property, an approach the court had previously rejected. It remitted for a redetermination specifying that there "are two recognized methods for distribution of pension benefits. The court can either direct that the nonemployee spouse be given a lump-sum payment discounted for present value or, in the alternative, a deferred distributive award consisting of a specific share of the periodic pension benefits which the husband will receive in the future …." It directed that on remittitur, the court was to select one method of distribution and not a hybrid form of the two.[163]

The possibility that defendant might die before reaching the age of retirement does not preclude the court from ordering distribution of the present value of a vested pension earned during the marriage.[164]

In distributing a pension the court may not treat an award of a portion of the pension as maintenance, rather than as a division of marital property.[165]

---

160 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913.

In Glasberg v. Glasberg, 104 A.D.2d 788, 480 N.Y.S.2d 131 (2d Dep't 1984), the Second Department held that Special Term had erred in not awarding the wife her equitable share of the husband's pension and profit sharing plans, and that Special Term must make detailed findings of fact as to the "characteristics" of the plans in order to determine the proper method of valuation on remand.

161 In Buzzeo v. Buzzeo, 141 A.D.2d 490, 529 N.Y.S.2d 120 (2d Dep't 1988) the Appellate Division held that the court can either direct that the nonemployee spouse be given a lump sum payment discounted for present value or, in the alternative, a deferred distributive award consisting of a specific share of the periodic pension benefits which the husband will receive in the future."

In Kyle v. Kyle, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dep't 1989), the Appellate Division held that a decision that plaintiff pay the defendant a distributive award of his unmatured pension in monthly installment payments for eight years was unreasonable as plaintiff did not have the means to do so. Further, the installment payment arrangement conflicted with the holding in Buzzeo v. Buzzeo, 141 A.D.2d 490, 529 N.Y.S.2d 120 (2d Dep't 1988). "The court can either direct that the nonemployee spouse be given a lump sum payment discounted for present value or, in the alternative, a deferred distributive award consisting of a specific share of the periodic pension benefits which the husband will receive in the future."

162 141 A.D.2d 490, 529 N.Y.S.2d 120 (2d Dep't 1988)

163 Majauskas v Majauskas (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15, 6 EBC 1053, affg (4th Dept) 94 App Div 2d 494, 464 NYS2d 913.

164 Hromek v. Hromek, 119 A.D.2d 946, 501 N.Y.S.2d 217 (3d Dep't 1986).

165 Perri v. Perri, 97 A.D.2d 399, 467 N.Y.S.2d 226 (2d Dep't 1983).

In Buzzeo v. Buzzeo, 141 A.D.2d 490, 491-92, 529 N.Y.S.2d 120 (1988) there was no dispute as to the value of the husbands pension nor the equitable share awarded to the wife. However, the court, as an alternative to a lump-sum payment, directed the husband to begin making present payments to the wife of a portion of the periodic pension benefits which he would receive only upon retirement. In effect, the court treated the wife's award of a portion of the pension as an additional source of maintenance, rather than as a division of marital property, an approach the court had previously rejected (see, Rodgers v Rodgers, 98 AD2d 386, 393, appeal dismissed 62 NY2d 646; Perri v Perri, 97

Valuation is necessary only where the pension holder is directed to immediately pay a share of the pension's value to the other spouse in a lump sum. Where the pension holder is not directed to immediately pay the other spouse a share of his pension in a lump sum, valuation of the pension is not required. [166]

A party is not obligated to present evidence regarding the value of a pension in payout status since the value of the benefit is already known and defined.[167]

The Appellate Divisions have expressed a preference for a lump sum payment in lieu of a deferred distributive award, where the amount the nonemployee spouse will receive is small and there is sufficient marital property from which a lump-sum distribution can be made. [168] It is an abuse of discretion to award a lump sum payment distributive award where the employee spouse does not have the financial means to make such payment.[169] Moreover, an installment payment arrangement is improper.[170]

Where a spouse is already receiving fixed monthly pension payments from a pension which is marital property, it is appropriate to equitably distribute the pension payments. [171] Where the divorce judgment fails to provide

---

AD2d 399, 400; D'Amato v D'Amato, 96 AD2d 849, 850). Therefore, the matter was remitted to the Supreme Court for determination of the appropriate method of distribution within the parameters discussed in its decision.

166 In Graepel v. Graepel, 125 A.D.2d 447, 509 N.Y.S.2d 377 (2d Dep't 1986), the Appellate Division affirmed a judgment awarding the wife one-third of the husband's net retirement benefits accrued during marriage. There was no testimony as to the value of the pension. It was proper to award a percentage of payments at retirement.

See also Church v. Church, 169 A.D.2d 851, 564 N.Y.S.2d 572 (3d Dep't 1991); Koeth v. Koeth, 309 A.D.2d 786, 765 N.Y.S.2d 640 (2d Dep't 2003) (Since the defendant was not directed to immediately pay the plaintiff's share of his pension to her in a lump sum, the judgment was not required to contain such a valuation); Dawson v. Dawson, 152 A.D.2d 717, 544 N.Y.S.2d 172 (2d Dep't 1989)).

167 In Ferrugiari v. Ferrugiari, 226 A.D.2d 498, 641 N.Y.S.2d 116 (2d Dep't 1996), the Appellate Division held that the Supreme Court correctly awarded the wife a share of the husband's pension benefit. The wife was not obligated to present evidence regarding the value of the benefit since the husband was receiving pension payments at the time of the trial and the value of the benefit was already known and defined.

168 In Armando v. Armando, 114 A.D.2d 875, 495 N.Y.S.2d 192 (2d Dep't 1985), the Appellate Division held it was error to deny the wife a share of the husband's pension and it awarded her 50% ($2524.46) of his pension benefits. It held that an immediate distribution 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".

In Buzzeo v. Buzzeo, 141 A.D.2d 490, 491-92, 529 N.Y.S.2d 120 (1988) the Appellate Division indicated that it had repeatedly expressed a preference for a lump-sum award, in lieu of a deferred distributive award, where the amount the nonemployee spouse will receive is small and there is sufficient marital property from which a lump-sum distribution can be made . However, where sufficient assets for a lump sum payment do not exist, the court may direct the recipient of the pension benefits to make the required payments as they are received upon retirement. It directed that on remittitur, the court was to select one method of distribution and not a hybrid form of the two.

In Clark v. Clark, 171 A.D.2d 986, 568 N.Y.S.2d 170 (3d Dep't 1991), the Appellate Division rejected the husband's argument that the wife's share of the husband's pension should be paid in a lump sum of $77,504, $20,000 of which would consist of the husband's one-half share of the net equity of the marital residence, because there were insufficient marital assets to enable that payment to be made. That option is preferred when there is sufficient marital property to enable the payment to be made.

169 In Kyle v. Kyle, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dep't 1989), the Appellate Division held that a decision that plaintiff pay the defendant a distributive award of his unmatured pension in monthly installment payments for eight years was unreasonable as plaintiff did not have the means to do so. Further, the installment payment arrangement conflicted with the holding in Buzzeo v. Buzzeo, 141 A.D.2d 490, 529 N.Y.S.2d 120 (2d Dep't 1988). "The court can either direct that the nonemployee spouse be given a lump sum payment discounted for present value or, in the alternative, a deferred distributive award consisting of a specific share of the periodic pension benefits which the husband will receive in the future."

170 Kyle v. Kyle, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dep't 1989)

171 Miller v. Miller, 150 A.D.2d 652, 541 N.Y.S.2d 524 (2d Dep't 1989)

for the payment of taxes in its distribution of the pension payments, the nonemployee's share should consist of the predetermined percentage, less taxes.[172]

A spouse who claims that the disability portion of his pension is separate property has the burden of proof that the disability portion is separate property.[173]

A "disability" pension is usually considered to be a spouse's separate property because it is considered to be compensation for personal injuries.[174] However, in Dolan v Dolan, [175] the Court of Appeals held that the portion of the husbands' disability pension that represented "deferred compensation" related to the length of employment occurring during the marriage constituted marital property subject to equitable distribution. The Supreme Court concluded that 47.62% of the husband's ordinary disability pension was marital property subject to equitable distribution. The remaining 52.38% was a disability payment and was separate property not subject to equitable distribution. The Court of Appeals affirmed on the basis that part of the pension benefits were a form of deferred compensation from his employment. The husband was retired, under the retirement for ordinary disability provision of the law which entitled a member of the City Civil Service to receive an ordinary disability pension if he or she "is physically or mentally incapacitated for the performance of duty and ought to be retired," provided he or she had "ten or more years of city service and was a member or otherwise in city service in each of the 10 years preceding his or her retirement." The Court of Appeals concluded that "an employee may receive an ordinary disability pension, even if the disability was not the result of a job-related accident, provided the employee satisfies the length of service requirement." The Court distinguished the "regular pension" and the "ordinary disability pension" from the "accident disability" pension, which does not have a length of service requirement, and is "separate property." The Court of Appeals reasoned that the husband was being compensated for his length of service in the Department of Sanitation, in addition to being compensated for the injuries he sustained. It held that to the extent the husband's ordinary disability pension represented deferred compensation, it was no different than a retirement pension and, to that extent, was subject to equitable distribution.

Thus, the manner in which disability pensions are treated for equitable distribution purposes is well established. Pension benefits or vested rights to those benefits, except to the extent that they are earned or acquired before marriage or after the commencement of a matrimonial action, constitute marital property.[176] Thus, to the extent that the disability pension represents deferred compensation, it is subject to equitable distribution.[177] However, to the extent that a disability pension constitutes compensation for personal injuries, that compensation is separate property which is not subject to equitable distribution.[178]

---

172 Nolan v. Nolan, 195 A.D.2d 503, 600 N.Y.S.2d 266 (2d Dep't 1993

173 Palazzolo v. Palazzolo, 242 A.D.2d 688, 689, 663 N.Y.S.2d 58 (2d Dept. 1987).

174 Palazzolo v. Palazzolo, 242 AD2d 688, 689 (2 Dept. 1997)

175 78 NY2d 463, 577 NYS S2d 195, 583 NE2d 908 (1991).

176 Dolan v. Dolan, 78 NY2d 463, 466, citing Majauskas v. Majauskas, 61 NY2d 481, 490.

177 Mylett v. Mylett, 163 AD2d 463, 465 (2 Dept.1990); see Link v. Link, 304 AD2d 800, 801 (2 Dept. 2003); Beshara v. Beshara, 281 AD2d 577, 578 (2 Dept. 2001).

178 Mylett v. Mylett, 163 AD2d at 464-465; see Link v. Link, 304 AD2d at 801; Beshara v. Beshara, 281 AD2d at 578; Domestic Relations Law §236 [B] [5] [b]).

The burden of distinguishing the marital property portion of a disability pension from the separate property portion has been placed on the recipient of the pension who is resisting equitable distribution. In other words, until the contrary is demonstrated, the presumption is that the entire disability pension is marital property. [179]

Severance payments and other payments that represent deferred compensation for services performed over a number of years that encompass the marriage are considered marital property, to the extent they are earned or acquired during the marriage and are compensation for services.[180] Where the right to receive the payments did not exist during the marriage,[181] or do not represent deferred compensation,[182] but are designed to compensate employees for the lack of eligibility for Social Security benefits or to serve as an inducement for early retirement, they are not marital property.[183]

Employee stock plans which constitute deferred compensation for the period of employment during the marriage up to the commencement of the action are marital property. Stock plans which are received after the commencement of the action, which are purely an incentive for the employees future services are separate property. [184]

The Court of Appeals has held that where the stock plans are granted as compensation for the employee's past services and as incentive for the employee's future services the Court must first determine, based on competent evidence, whether and to what extent the stock plans were granted as compensation for the employee's past services or as incentive for the employee's future services. Relevant factors would include whether the stock plans are offered

---

179 Palazzolo v. Palazzolo, 242 AD2d 688, 689 (2 Dept. 1997); See Pulaski v. Pulaski, 22 AD3d 820, 821; Ferrugiari v. Ferrugiari, 226 AD2d 498 (2 Dept. 1996). (See 3B, Freed, Brandes and Weidman, Law and the Family New York, Ch 17 (Pensions and Retirement Benefits) [2d ed rev 1993]).

180 In Nielsen v. Nielsen, 256 A.D.2d 1173, 682 N.Y.S.2d 502 (4th Dep't 1998) the Appellate Division held that the Supreme Court erred in determining that the severance payment of $52,500.00 received by defendant after the commencement of the divorce action constituted separate property. Upon review of the record, the court concluded that the severance payment constituted compensation for past services rather than an incentive for future services. The record established that 95%% of the severance payment, $49,875.00, was earned during the marriage and constituted marital property.

In Dunnan v. Dunnan, 261 A.D.2d 195, 690 N.Y.S.2d 46 (1st Dep't 1999), the Appellate Division held that the trial Court properly found the husband's severance package to be marital property. It also held that severance invested pension payments are a form of compensation which are generally considered assets.

In Pena v. Alves, 50 A.D.3d 336, 855 N.Y.S.2d 444 (1st Dep't 2008), the Appellate Division held that the trial court correctly found the severance pay plaintiff received after commencement of the action to be a form of deferred compensation earned during the marriage, not, as plaintiff argued, compensation for future lost earnings, and thus a distributable marital asset.

181 In Harold v. Harold, 133 A.D.3d 1376, 21 N.Y.S.3d 508 (4th Dep't 2015) approximately one year after the entry of the judgment of divorce, defendant lost his job and received a severance payment from his employer. The Appellate Division concluded that the severance payments were defendant's separate property inasmuch as his right to receive those payments did not exist either during the marriage or prior to the commencement of this action, nor did the severance payments constitute compensation for past services.

182 In Bink v. Bink, 55 A.D.3d 1244, 865 N.Y.S.2d 417 (4th Dep't 2008), the Appellate Division held that Supreme Court erred in determining that defendants severance payments were marital property. Inasmuch as defendant's right to receive those payments did not exist either during the marriage or prior to the commencement of this action, nor did the severance payments constitute compensation for past services, the severance payments were defendant's separate property.

183 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 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.

184 DeJesus v DeJesus, 90 N.Y.2d 643, 651–53 (1997).

as a bonus or as an alternative to fixed salary, whether the value or quantity of the employee's shares is tied to future performance and whether the plan is being used to attract key personnel from other companies. A time rule should be applied to portions of the stock plans found to be compensation for past services to factor out any value which may be traceable to the period before the marriage, where the numerator is the time from the later of the beginning of the titled spouse's employment with the issuing company, or the beginning of the marriage, until the date of the grant, and the denominator is the time from the beginning of the titled spouse's employment until the date of the grant. A second time rule should be applied to portions found to be granted as incentive to determine the marital share, that is, accretions from the time of the grant until the matrimonial action was commenced, and any further accumulations attributable to the contributions of the nontitled spouse. What is determined to be marital property may then be equitably distributed, generally according to the Judge's discretion. [185]

As a general rule, the net value of a bonus which is awarded as compensation for past services, not tied to future performance, is marital property and subject to equitable distribution. Where the bonus is received after the commencement of the action the marital portion of the bonus is that portion attributable to the period of employment from the date of the parties' marriage to the date of the commencement of the action.[186]

A bonus which is awarded after the commencement of the action and is provided as an incentive for future services is separate property.[187]

25-22. Property Distribution - Burden of Proof -The Fourteen Factors - Domestic Relations Law § 236 (B) (5) (d)

The process of making an equitable distribution contemplates the separation of marital property and separate property as defined in Domestic Relations Law §236(B)(1), (commonly known as the Equitable Distribution Law), the evaluation of the marital property, and then its allocation pursuant to the factors enumerated in subdivision (5)(d). The trial court must set forth the factors it considered and the reasons for its decisions.

The 1980 enactment of the Equitable Distribution Law [188] set forth 10 factors for the court to consider in determining an equitable disposition of property. In 1986 three new factors were added to the original 10 factors that the court was required to consider in determining an equitable disposition of property.[189] As of August 2, 1986,

185 DeJesus v DeJesus, 90 N.Y.2d 643, 651–53 (1997)

186 Kriftcher v Kriftcher, 59 A.D.3d 392, 393, 2009 N.Y. Slip Op. 00650, 2 (2d Dept.,2009)("The Supreme Court also erred in failing to distribute the husband's bonus for the calendar year 2005, which he received in March 2006 and was in the gross sum of $360,000. Based upon the unrebutted testimony of the forensic expert, the husband's effective income tax rate was 38.25%, and, therefore, the net amount of the husband's bonus was the sum of $222,300. Since the divorce action was commenced on June 28, 2005, the marital portion of that asset is 50% of its net value, or $111,150)

187 Ropiecki v Ropiecki, 94 A.D.3d 734, 736, 2012 N.Y. Slip Op. 02475, 2 (2d Dept, 2012) ("The defendant correctly contends that the Supreme Court improperly awarded the plaintiff a portion of his bonus in the sum of $200,000 as part of the equitable distribution of marital assets. The defendant's bonus, awarded in 2006, after the commencement of the instant action, was provided as an incentive for future services. Based on the defendant's testimony at trial, as well as the Executive Incentive Bonus Plan that sets forth the terms of the bonus, the bonus plan was adopted by the defendant's employer in October 2006 as an incentive for certain employees, including the defendant, to meet certain goals and to ensure the successful sale of the company in the future. Accordingly, the bonus was compensation for future services that were not performed prior to the commencement of the instant action and, thus, was separate property not subject to equitable distribution.")

188 Laws of 1980, Ch 281, effective July 19, 1980.

189 Laws of 1986, Ch 884, §3, effective August 2, 1986. Laws of 1986, Ch. 884 shifted former factor (10) to factor (13) and added: (10) the tax consequences to each party; (11) the wasteful dissipation of assets by either spouse; (12) any transfer or encumbrance made in

the statute required to court to consider 13 factors in determining an equitable disposition of property. In 2009 Domestic Relations Law §236 [B] [5] [d], subparagraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 were renumbered and a new subparagraph 5 was added.[190] In any action commenced after September 15, 2009, the court is required to consider 14 factors in determining an equitable disposition of property. Domestic Relations Law § 236 (B)] (5) (d) provides:

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

---

contemplation of a matrimonial action without fair consideration.

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

25-23. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (1)

In determining an equitable disposition of property under paragraph c, the court shall consider: (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action.[191]

This information usually is provided by the respective statements of net worth, which must be filed in matrimonial and support proceedings, and from evidence submitted during the trial. It enables the court to obtain an economic history of the particular marriage and the present financial circumstances of the respective parties. It also entails information as to the respective estates of the parties and their holdings of separate assets. Although the court cannot divide separate property, as distinguished from marital property, as defined in the statute, it may consider individual holdings as an item in determining an equitable division of marital property. This is especially important where one party is disabled or unemployable and where the other party has substantial separate property so that a disproportionate allocation is called for. Factor (1) is also closely related to factor 9 (former factor (8)), which deals with the probable future financial circumstances of each party.

25-24. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (2)

In determining an equitable disposition of property under paragraph c, the court shall consider: (2) the duration of the marriage and the age and health of both parties.[192]

This factor, in particular, justifies a different approach to long and short term marriages and permits a distinction to be made between cases where each party is employed or employable and cases where one spouse is dependent or incapacitated. It may be assumed that the objective in short-term marriages of employed persons is to settle accounts fairly and to release them for a fresh start. [193]

Most will still be working and will remarry within one or two years. In the case of long-term marriages, where there is a dependent spouse and where suitable employment is unlikely, factors (2) and (9) come into play, and the objective, so far as possible, is to secure the financial future for both parties.

---

191 Domestic Relations Law §236 [B] [5] [d] [1].

192 Domestic Relations Law §236 [B] [5] [d] [2].

193 In Cappiello v Cappiello (1985, 1st Dept) 110 App Div 2d 608, 488 NYS2d 399, affd 66 NY2d 107, 495 NYS2d 318, 485 NE2d 983, the Appellate Division held that Supreme Court had committed error in awarding the wife $25,000, "representing the amount she could have earned during the short period of time that the parties were living together." It had been an 8 month marriage and had as a practical matter ended after 2 months. The Appellate Division found that the portion of the award representing compensation for possible lost earnings "is not authorized under the equitable distribution law and is inconsistent with the denial of any maintenance to the plaintiff. Nor did the record disclose any basis to conclude that she was in any way precluded from working or requested not to work during that period of time. As a matter of fact, she stopped working shortly after the marriage and devoted herself to skiing." The Appellate Division stated that on the record an equitable division of marital assets would result in an award to the plaintiff of 25 percent, not 50 percent. It found that the critical consideration of fairness and equity incorporated as part of the "catch-all" factor in Domestic Relations Laws §236(B)(5)(d)(10), as well as the other factors it had discussed, impelled its conclusion that the trial court's award of an equal distribution had been improper. "Equitable distribution, as a remedy in marital actions, is not designed either to result in a penalty or a windfall." Considering the plaintiff's income producing capabilities as well as her comparatively minimal contribution to the household with no responsibilities for child care, it was held that the amount of the maintenance award was unjustified. Insofar as standard of living was concerned, the court noted that the plaintiff's standard of living improved as a result of the marriage, but that where the marriage is of such short duration there is no issue, and where the plaintiff is relatively young and capable of self-support, "this factor is of limited weight". More significantly, however, the court considered the fact that the plaintiff was worse off economically as a result of the marriage, and it held that the plaintiff was entitled to be restored, to the extent possible, to the economic situation predating the marriage.

25-25. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (3)

In determining an equitable disposition of property under paragraph c, the court shall consider: (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects.[194]

This factor ties in with Domestic Relations Laws §236(B)(5)(f), which authorizes the court to "make such order regarding the use and occupancy of the marital home and its household effects ... without regard to the form of ownership of such property." These provisions enable the court to in effect take the marital home out of the "kitty" of marital property it is allocating immediately and to either make a set-off or order a subsequent sale and division of net proceeds. [195]

Formerly, where the husband had sole ownership of the marital home, courts were reluctant to grant a custodial wife exclusive occupancy and possession. Under factor (3), such title ownership is no bar to an award of exclusive occupancy to a custodial wife.

25-26. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (4)

In determining an equitable disposition of property under paragraph c, the court shall consider: (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution.[196]

This factor, which has been used sparingly, makes the loss of inheritance and pension "rights" upon termination of the marriage a factor to be considered in the allocation of marital property. Thus, the loss of the expectancy of at least a statutory share, where the party in question survives the other party, is one factor among others to be considered in making equitable distribution. This is true even though the spousal interest is a mere expectancy as distinguished from a legal right or entitlement. The loss of pension rights may occur under plans where there is an option to choose or reject a plan that provides for income to a surviving spouse.

25-27. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (5)

In determining an equitable disposition of property under paragraph c, the court shall consider: (5) the loss of health insurance benefits upon dissolution of the marriage.[197]

This factor is self-explanatory.

---

194 Domestic Relations Law §236 [B] [5] [d] [3].

195 For an example, see Ward v Ward (1983, 3d Dept) 94 App Div 2d 908, 463 NYS2d 634. A number of cases have involved an issue as to possession and occupancy of the marital home, including: Vitkun v Vitkun (1981) 108 Misc 2d 814, 438 NYS2d 981 (ignored subdivision (5) (f) and factor (3) to hold that where husband had owned the marital home long before the marriage, "the court will not deprive a person of his title to or possession of property he or she acquired prior to the marriage sought to be dissolved.").

In Baylek v Baylek (1981, 1st Dept) 83 App Div 2d 816, 442 NYS2d 60, it was held error to award the marital apartment to the wife as the apartment was acquired by the husband prior to the marriage and as he maintained his medical practice there. He was 72 and in declining health and had need of the apartment.

196 Domestic Relations Law §236 [B] [5] [d] [4].

197 Domestic Relations Law §236 [B] [5] [d] [5], See Laws of 2009, Ch 229. The amendments apply to any action or proceeding commenced on or after the effective date of September 14, 2009.

25-28. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (6)

In determining an equitable disposition of property under paragraph c, the court shall consider: (6) any award of maintenance under subdivision six of this part.[198]

This factor, formerly factor (5) directs the court's attention to the "total package" approach under the Equitable Distribution Law. See also, Domestic Relations Laws §236(B) (6) (a) (1). To the parties, the overall package is most important. Although the allocation of marital property and an award of maintenance serve different purposes, it is fair and realistic to consider the total economic picture.

25-29. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (7)

In determining an equitable disposition of property under paragraph c, the court shall consider: (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. [199]

This was former Factor (6). It was designed to serve as the "great equalizer" for the homemaker spouse and to make it clear that the homemaker was a partner with the breadwinner. This factor does not necessitate an equal distribution of marital property but instead requires that the allocation of property be equitable. Nonmonetary contributions to the partnership are recognized.

In Perri v Perri [200] the Appellate Division held that presumably, the value to the marital partnership of homemaking is equal in value to that of a breadwinner—at least absent evidence to the contrary. Whether or not a presumption is created, the important thing is this factor is an anecdote to the common, chauvinistic "put down" of the significance of running a home and raising a family. Factor (7) recognizes that nonmonetary contributions may be more than equal or may be minimal and that what is equitable in a given case depends upon the totality of circumstances and the weight given other factors set forth in the guidelines.

This factor sought to accomplish several objectives. First, it preserves the traditional concept of equitable ownership or interest in property titled in the other party, in order to make it clear that the Equitable Distribution Law does not eliminate equitable ownerships or interests or the law pertaining to constructive trusts. It also makes it clear that "contributions" may be direct or indirect in the acquisition of family assets, and it then points to contributions and services as a spouse, parent, wage earner and homemaker, thus linking together if not establishing parity for the value of the different roles, which is being blurred in contemporary divisions of labor within the family. This aspect of the factor may be the most significant of all the factors in determining what is equitable, and it forecloses a downgrading of the value of homemaker services unless the services have been minimal in the particular case.

198 Domestic Relations Law §236 [B] [5] [d] [6].

199 Domestic Relations Law §236 [B] [5] [d] [7].

200 Perri v Perri (1983, 2d Dept) 97 App Div 2d 399, 467 NYS2d 226. See also Conner v Conner (1983, 2d Dept) 97 App Div 2d 88, 468 NYS2d 482. One of the leading cases stressing the value of homemaker services is Lynn v Lynn, (Sup Ct NJ Ch Div, Bergen Co, decided Dec 1980, Krafte, J., Docket No M-9842-77 (unreported). See also Gibbons v Gibbons (1980) 174 NJ Super 107, 415 A2d 1174, revd on other grounds 86 NJ 515, 432 A2d 80.

By the same token, exceptional services or a combination of monetary contributions and household services should enhance the equities of the homemaker who contributes funds for the family or obtains outside employment.

In many cases, this factor is the focal point for proof and advocacy in matrimonial litigation. The argument may center on the issue of whether contributions and services were routine, minimal, or exceptional. Homemakers are not treated as fungible, nor are breadwinners. There is an impression that courts are most sympathetic when the homemaker is a mother who nurtured and raised children.

The last clause in this factor also was designed with the objective in mind of specifically directing attention to spousal contributions and services in connection with the partner's career and career potential. It specifically has in mind the student-spouse/working-spouse situation and authorizes special recognition of the value of such contributions and services, and in addition, a similar factor for maintenance permits that special recognition be given to such contributions and services in setting the amount and duration of maintenance. The value of such contributions and services also may be the subject of a distributive award. Under its flexible provisions, any or all of the remedies may be utilized. It is now well established that there is a spousal interest in the other party's business or professional practice.

25-30. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (8)

In determining an equitable disposition of property under paragraph c, the court shall consider: (8) the liquid or non-liquid character of all marital property.[201]

This is former Factor (7). It will frequently appear in tandem with former factor (9) and the distributive award provision in Domestic Relations Law §236 [B] (5) (e). The objective is flexibility, that is, to permit marital property to be distributed in such a way, or distributive awards to be granted, so that it serves the best interests of the parties, does not waste assets, and does not impair future productivity. Understandably, courts do not wish to "kill the goose that lays golden eggs".

Where there is substantial liquidity, the judicial task of dividing marital assets is greatly simplified. Where, however, marital assets are not liquid, difficulties are encountered, especially as to valuation. The parties and the experts often are far apart on valuations, and the disparity often is gross. That problem does not exist or is minimized if the marital assets are liquid.

In the case of substantial, nonliquid assets, there is the possibility of set-offs. For example, she gets the marital home, and he gets to keep his business interests intact. But here again the valuation problem intrudes itself, for the set-off should be a fair swap, and valuation is essential to determine fairness. The same problem is inherent in the valuation of pension and retirement benefits in terms of present value and the determination of the spousal share or percentage in such assets produced during the marriage. It must be a relief to judges when the only substantial assets produced during the marriage are held in joint bank accounts or in an IRA account.

25-31. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (9)

In determining an equitable disposition of property under paragraph c, the court shall consider (9) the probable future financial circumstances of each party. [202]

201 Domestic Relations Law §236 [B][5][d][8]

202 Domestic Relations Law §236 [B] [5] [d] [9].

This was original factor (5). It was renumbered as factor (6), then factor (8), and then factor (9). This factor (9) directs the court to consider a party's lost life-time earning capacity as a result of foregoing or delaying education, training, employment or career opportunities during the marriage. This factor, which may be important under the facts of a particular case, sometimes is overlooked or neglected. It does not demand an equalization of resources in order to secure the financial future of the parties, but it definitely permits movement in that direction. Factor (9) also is another demonstration of why equitable distribution is to be preferred over equal distribution. For example, keeping in mind the other factors, the facts may warrant an award to the wife of all or most of the marital property.

The husband may be an established, big income producer who will acquire substantial additional assets in the future, while the wife may be unemployable and may have to live off the income from the marital property allocated to her. Since she no longer will have a spousal share in the husband's future income, a disproportionate share of marital property and permanent maintenance may be in order. Again, the flexibility of the Equitable Distribution Law and its statutory guidelines permit or welcome a disproportionate allocation under such circumstances.

25-32. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (10)

In determining an equitable disposition of property under paragraph c, the court shall consider: (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.[203]

This was former factor 9. The drafting committee and the legislative sponsors of equitable distribution were committed to classifying an interest in a business, corporation, or profession as "marital property". At the same time, there was no desire to "kill the goose that lays golden eggs" or to make an illegal or foolish intrusion into the other party's business or professional practice. The solution arrived at is set forth in factor (10) and in the distributive award provision in Domestic Relations Law §236 [B](5) (e) of the Equitable Distribution Law, which provides that: "In any action in which the court shall determine 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 shall make a distributive award in order to achieve equity between the parties. The court in its discretion also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property."

25-33. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (11)

In determining an equitable disposition of property under paragraph c, the court shall consider: (11) the tax consequences to each party.[204]

This was formerly factor 10, added in 1986. Factor (11) requires the court to consider the tax consequences to the parties because of equitable distribution. Since New York courts already were reading this factor into the former catchall factor its express stipulation merely nailed down the guideline.

---

203 Domestic Relations Law §236 [B] [5] [d] [10].

204 Domestic Relations Law §236 [B] [5] [d] [11].

25-34. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (12)

In determining an equitable disposition of property under paragraph c, the court shall consider: (12) the wasteful dissipation of assets by either spouse.[205]

The original factor (9), for maintenance in the Equitable Distribution Law, provided that "the wasteful dissipation of family assets by either spouse" must be considered. The 1986 amendment of the maintenance and property distribution provision changed factor (9), now factor (12) for property distribution, to read: "(9) the wasteful dissipation of assets by either spouse." The change is confusing. Presumably, it was intended that factor (12) be expanded to cover not only family assets, as such, but also to include individually owned separate property in the title holder's name, which in the event of divorce, may be denominated as "marital property." If such is the case, new limitations may be imposed on freedom of disposition of what at the time in question was "separate property". No apparent distinction is made in this factor between dispositions made before or after the matrimonial litigation was commenced or was imminent.

Dissipation of family assets and marital property as well, where egregious, already has been categorized as relevant marital fault by Blickstein v Blickstein. [206] So factor (12) is superfluous unless it relates back to the time before a divorce was in the offing. [207]

Factor (12) requires the court in making an equitable distribution to consider "the wasteful dissipation of assets by either spouse". Note that this language differs from that set forth in new factor (17) for maintenance. The difference may complicate problems of interpretation, and we are unaware of the facts that may account for the difference in language. The maintenance factor covers "marital property", and the equitable distribution factor covers "assets". This may mean assets that are not marital property under the Equitable Distribution Law and may include assets that are separate property under that law.

As a general rule, Courts do not second-guess the economic decisions made during the course of a marriage. During any marriage, many payments are made, whether of debts old or new, or current expenses. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage. Where payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts do not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets.

In Mahoney-Buntzman v. Buntzman, [208] the Court of Appeals observed that "… during the life of any marriage, many payments are made, whether of debts old or new, or simply current expenses. If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred. It held that as a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted

205 Domestic Relations Law §236 [B] [5] [d] [12].

206 Blickstein v Blickstein (1984, 2d Dept) 99 App Div 2d 287, 472 NYS2d 110.

207 Examples of transfers in an attempt to defeat interests of a spouse include Conner v Conner (1983, 2d Dept) 97 App Div 2d 88, 468 NYS2d 482 (husband transferred property to his sister); Kasinski v Questel (1984, 4th Dept) 99 App Div 2d 396, 472 NYS2d 807.

208 12 N.Y.3d 415, 421–22, 909 N.E.2d 62, 65–66 (2009)

in the reduction of marital assets. Nor should courts attempt to adjust for the fact that payments out of separate property may have benefitted both parties, or even the nontitled spouse exclusively. The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end.

In Mahoney-Buntzman v. Buntzman,[209] the wife sought to recoup money that was expended during the marriage to pay the husband's obligation to his former spouse for maintenance. The Court of Appeals held that that wife was not entitled to such recoupment. It stated: "Expenditures made during the life of the marriage towards maintenance to a former spouse, as well as payments made pursuant to a child support order, are obligations that do not enure solely to the benefit of one spouse. Payments made to a former spouse and/or children of an earlier marriage, even if made pursuant to court order, are not the type of liabilities entitled to recoupment. This is not to say that every expenditure of marital funds during the course of the marriage may not be considered in an equitable distribution calculation. Domestic Relations Law § 236(B) (5) (d) (13) expressly and broadly authorizes the trial court to take into account "any other factor which the court shall expressly find to be just and proper" in determining an equitable distribution of marital property. There may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property …. Further, to the extent that expenditures are truly excessive, the ability of one party to claim that the other has accomplished a "wasteful dissipation of assets" (Domestic Relations Law § 236[B] [5] [d] [11]) by his or her expenditures provides protection. The payment of maintenance to a former spouse, however, does not fall under either of these categories.

In Johnson v Chapin,[210] the Court of Appeals held that the wife was not entitled to a 50% credit representing the money paid during the marriage towards husband's premarital obligations to pay his first wife maintenance and child support.[211]

25-35. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (13)

In determining an equitable disposition of property under paragraph c, the court shall consider: (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.[212]

This factor (13) is a reiteration of prior case law and authority and was recognized by New York courts in setting alimony before the advent of the Equitable Distribution Law. [213]

25-36. Domestic Relations Law § 236 (B) (5) (d) - The Fourteen Factors - Factor (14)

In determining an equitable disposition of property under paragraph c, the court shall consider: (14) any other factor which the court shall expressly find to be just and proper.[214]

---

209 12 N.Y.3d 415, 420–21, 909 N.E.2d 62, 65 (2009)

210 12 N.Y.3d 461 (2009)

211 citing Mahoney–Buntzman v. Buntzman, 12 N.Y.3d 415 [2009]

212 Domestic Relations Law §236 [B] [5] [d] [6].

213 See Ferraro v. Ferraro, 257 A.D.2d 596, 684 N.Y.S.2d 274 (2d Dep't 1999) (transfer of husbands interest in corporation to trust two months before commencement of action was made in contemplation of a matrimonial action and half was awarded to wife).

214 Domestic Relations Law §236 [B] [5] [d] [14].

This was formerly factor (13). This is the "catch-all" or "wild card" factor for making an equitable distribution of marital property in divorce or annulment actions where the marriage is terminated. It was originally enacted in 1980 as factor (10). In drafting the other factors, for both the allocation of property in subdivision (5) and setting the duration and amount of maintenance under subdivision (6), it was appreciated that something might have been overlooked in the statutory enumeration and that unusual cases might arise. Factor (14), therefore, was designed to give flexibility so that an equitable result may be achieved.

Factor (14) also was designed to serve as the key factor in determining the role of marital fault in making an equitable distribution and in setting maintenance. The compromise was that marital fault would be neither expressly excluded nor expressly included in the enumerated factors, but instead, the problem would be left for the courts to resolve under the umbrella of factor (14).

It is well established that, as a general rule, marital fault of a party is not to be considered in determining equitable distribution of property following the dissolution of a marriage. [215] The drafters correctly presumed that New York courts would probably regard ordinary marital fault as irrelevant but that egregious marital fault or dissipation of family assets might affect property division and maintenance. Blickstein v Blickstein, fulfilled that expectation, although dispute continues as to the role of marital fault in setting maintenance. [216]

Nevertheless, where the fault is "egregious fault" it may be considered.[217] In Howard S. v. Lillian S.,[218] the Court of Appeals noted that it has rejected the notion that marital fault is a just and proper factor for consideration in determining equitable distribution, except in egregious cases which shock the conscience of the court.

25-37. 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.[219]

---

215 See O'Brien v O'Brien, 66 NY2d 576; Blickstein v Blickstein, 99 AD2d 287.

216 See the decisions from the Third Department in Stevens v Stevens (1985, 3d Dept) 107 App Div 2d 987, 484 NYS2d 708, appeal after remand (3d Dept) 112 App Div 2d 1091, 492 NYS2d 519, and Nolan v Nolan (1985, 3d Dept) 107 App Div 2d 190, 486 NYS2d 415.

217 Brancoveanu v Brancoveanu (1988, 2d Dept) 145 App Div 2d 395, 535 NYS2d 86, app dismd without op 73 NY2d 994, 540 NYS2d 1006, 538 NE2d 358 (husband's attempt to hire someone to kill wife is so egregious as to deny him a share of wife's dental practice; no immediate need for sale of marital home); Thompson v Thompson, NYLJ, 1-5-90, P. 28, Col. 3, Sup. Ct., Nassau Co. (McCaffrey, J.) (defendant's conviction of raping his 17 year old step-daughter constituted egregious conduct because it effected wife's economic status) ; Safah v Safah, NYLJ, 1-8-92, P. 26, Col. 5 (Sup. Ct. Suffolk Co.) (Wife awarded 100% of marital property based on husband's egregious conduct); Gordon v Gordon, NYLJ, 3-10-92, P. 22, Col. 5 (Sup. Ct., NY Co.) (Wife's attempt to arrange an assault upon the husband was sufficiently egregious to be factored in where determining equitable distribution); Pollack v. Pollack, NYLJ, 10-25-99, P.40, col.3, Sup Ct, Nassau Co (Jonas J.) (husband, who attempted to murder wife (an attorney) by stabbing her many times denied share of her law practice/license for egregious misconduct; Havell v. Islam, 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dep't 2002) (All marital assets ($13 million) except $377,500, awarded to wife where husbands attempted murder of wife was so egregious as to shock the conscience; while fault should not be considered in determining equitable distribution it may be considered where it is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship) ; Levi v. Levi, 46 A.D.3d 520, 848 N.Y.S.2d 225 (2d Dep't 2007) (Attempt to bribe former trial justice constituted egregious marital fault to be factored into the equitable distribution.)

218 14 N.Y.3d 431, 437, 902 N.Y.S.2d 17, 20 (2010)

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

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 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). [220]

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."[221] It appears that taking all steps to remove a "barrier to 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.

---

220 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.

221 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 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."

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,[222] an action for a divorce, the defendant husband appealed from a 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 a few cases which have applied this provision to property distribution.[223]

222 235 A.D.2d 468, 652 N.Y.S.2d 616 (2d Dep't 1997)

223 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).