
LAW AND THE FAMILY

"What is Marital Property"

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[New York Law Journal](#)

December 5, 1990

WITH THE FINANCIAL BOOM of the "roaring '80's" coming to a screeching halt, anxious parties to divorce actions are trying harder than ever to take all they can get, a process hastened by harder times. Crumbling asset values, severe slowdowns in real estate and huge national debt have spurred economists to predict a long, steep recession. Reflecting on the deteriorating economic outlook as business failures continue to rise, spouses are scrambling to grab whatever they can find to claim as "theirs." Despite the unpredictability of spousal behavior in the coming years, particularly upon entering a recession, the law defining marital property is quite clear.

The restatement of the Law of Property [FN1] defines "property" as the relation between persons with regard to a thing. Property may be tangible or intangible; it need not have exchange value, nor need it be salable, assignable or transferable. This definition is responsive to contemporary expectations and needs.

When the Equitable Distribution Law (EDL) was enacted in 1980, Domestic Relations Law s 236, Part B(1)(c), gave a radically new statutory definition to "marital property." Under former law, or where DRL s 236 Part A applies, if the term "marital property" is used it refers solely to jointly owned property, such as a residence owned as tenants by the entirety, or joint bank or savings accounts. Under DRL s 236 Part B, "marital property" includes what was previously jointly owned property and much more as well. DRL s 236, Part B, Subdiv. 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 applies for purposes of equitable distribution of family assets upon divorce. It does not apply where the marriage is dissolved by death. The Estates, Powers and Trusts Law [FN2] controls that situation.

Achieving Equity

The statutory definition of marital property is broad and comprehensive. [FN3] It does not specify that in order to be "marital property" an item must have exchange value or have characteristics such as salability, assignability or transferability. The words "all property" were chosen by the draftsmen to supply a broad and comprehensive definition so that the products of the marital partnership could be equitably distributed upon dissolution of the marriage by divorce or annulment. It was not intended to omit from distribution items or products that were intangibles or that presented difficulties for valuation. The "distributive award" was fashioned to meet the latter difficulty, and the key words in Part B subdiv. 5-e are that the distributive award device is "in order to achieve equity."

In O'Brien v. O'Brien, [FN4] it was noted that "marital property" as the term is used in the Equitable Distribution Law is a term of art and 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 "(here a physician's license) is marital property subject to equitable distribution."

The fact that the license was not assignable, could not be transferred and could not be sold and had no market value did not preclude the license from being a "valuable property right" that enhanced the husband's earning capacity, which the EDL had recognized by providing for distributive awards.

In determining whether property is separate or marital, it has been held that the court should construe the term "marital property" broadly and the term "separate property" narrowly. [FN5]

An example of this is DRL s 236, Part B, subdiv. (5)(d), which lists as a factor to be considered "the loss of inheritance and pension rights upon the dissolution of the marriage as of the date of dissolution." Inheritance rights, are commonly regarded as mere "expectancies" as distinguished from "property rights." [FN6] Nonetheless, "inheritance rights," as well as other things of value that may not be "property" under a strict definition of that term and included under the statutory definition of "marital property."

Another feature of the statutory definition of marital property is the specified time frame. The expressed public policy is that the "product" of the marital partnership is subject to equitable distribution. Ordinarily, assets produced before marriage are not the product of the marital partnership. Also, it may be fair to assume that assets produced after the execution of a separation agreement or the commencement of a matrimonial action are not the products of an on-going partnership.

Status of Marriage

Although the time frame is specified in DRL s 236(B)(1)(c) with particularity and includes acquisitions during marriage and before the execution of an agreement pursuant to subdivision 3, or commencement of an action, the status of the marriage at the time a particular asset was acquired may have a bearing on the equities of the case. For example, if the marriage had terminated de facto and was dead at the time of acquisition and no services or contributions were being made by the other spouse, or if the parties had been separated for some years before a divorce was sought, factor (6) of subdiv. (5)(d) might come into play. The item in question would be "marital property," but its allocation might be disproportionate. [FN7]

Similar reasoning led to the statutory exclusion from "marital property" of gifts from non-spouses, since they too are not the product of the individual or joint efforts of the spouses. [FN8]

With reference to the cut-off time of "before commencement of a matrimonial action," such actions are commenced upon service of the summons. [FN9] The other termination point of "before the execution of a separation agreement" furthers the policy of encouraging parties to "opt out" of statutory equitable distribution by writing their own ticket.

The phrase "regardless of the form in which title is held" constitutes one of the major reforms of the EDL. While who has legal title to a family asset produced during the marriage no longer controls the

distribution of marital property upon divorce, it may have indirect significance in the allocation of marital assets.

In general, the characterization of property as "marital property" occurs when a dissolution action is commenced, or when property is designated as such in a valid agreement that conforms to the requirements DRL s 236[B](3). But what is the status of family assets before either event? Presumably, if the particular family asset is separately owned, the holder of legal title has considerable but not absolute freedom of disposition. He or she ordinarily may sell, transfer or give away his or her separate asset and has exclusive management and control.

In Hertzler v. Herzler, [FN10] the court stated the general rule as to the freedom to dispose of separate property and held that the husband's inherited property was separate property that he could dispose of as he wished. Unlike the Uniform Marital Property Act, New York's EDL does not create an immediate and present half interest in what otherwise would be separate property. At most there is what may be called a contingent or inchoate spousal interest in such an item.

It has been held that notwithstanding the EDL before the commencement of the matrimonial action, the legal title holder has freedom of disposition of what then is his or her separate property. [FN11] What if, in anticipation of commencing a matrimonial action, the titleholder divests himself or herself of the property in question without fair consideration for the other? If such can be shown, the transaction may constitute the wasteful dissipation of assets, as well as a transfer in contemplation of a matrimonial action, both statutory to be considered in the allocation of property and for the setting of maintenance upon divorce. [FN12] Whatever it is called, there appears to be some kind of a spousal interest extant before and after commencement of a matrimonial action in all property acquired during the marriage, regardless of how title is held. Several courts have struggled to define it, but none have been successful.

Justice Stecher in Kriger v. Kriger [FN13] was the first to explore this uncertain area of conflict between the prerogatives of the legal title holder and the policies of the EDL. The wife in conjunction with her divorce action sought to enjoin the husband from purchasing a delicatessen-restaurant for \$430,000. She claimed that the purchase would take most of his liquid assets and, since he knew nothing about the deli business, he was merely trying to deplete the marital property, leaving her to hold the bagels.

Justice Stecher noting that neither the courts nor the Legislature had addressed the true nature of "marital property" suggested that "there can be little doubt that the Legislature has created a heretofore unknown species of property right which comes into being, not with the service of the divorce summons, but with the marriage and acquisition of the first earned asset." He then said he could detect no intent upon the part of the Legislature to have reimposed the inalienability of property, yet an "inchoate interest in the asset is acquired by the spouse without title immediately on acquisition and during 'coverture,' it becomes 'consummate' on service of the divorce summons awaiting only 'admeasurement' in the decree of divorce."

He then concluded that "to suggest, as the defendant does, that even after the service of summons he is free to convert sound assets into questionable assets, destroying a spouse's rights in the second assets, all without interference from the courts is to deny the very existence of marital property. To sustain such a view would require the courts to ignore the plain language of the statute which creates rights in property and not merely in the value of property."

In *McDermott v. McDermott* [FN14] the issue before the Appellate Division was the authority of the court to limit the husband's choice of pension options. In its decision, the court stated that equitable distribution created new property concepts under which the Supreme Court was authorized to limit the husband's choice of pension options:

The 1980 Equitable Distribution Law created the concept of marital property, a property interest previously unknown in this State. "Marital Property" is the most crucial term in the statute for the power it gives the court is the centerpiece of the equitable distribution revolution the reformers sought. No longer is the matrimonial court circumscribed in its adjustment of the economic incidents of the dissolution of a marriage by the technical trappings of ownership. Instead, it may disregard the form in which legal title has been held and distribute the marital property on the basis of listed equitable factors, something that could not have been done directly under prior law and could not be done effectively by the employment of other traditional legal concepts such as constructive trusts.

* * * *

While the centerpiece of the equitable distribution revolution is indeed the concept of marital property and the judicial power to

distribute it, what underlies everything doctrinally is the economic partnership that marriage constitutes in which the contribution of each spouse, in whatever form, is recognized as furthering the partnership interest. The economic partnership principle far exceeds in significance the merely rhetorical role it sometimes seems to assume. If marital property "arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action," it does so because the economic partnership has nurtured it until the fateful moment of process service has permitted its revelation. While the legal affects of the partnership principle may not be visible to the naked eye until an action has begun, there can be little doubt that the principle affects much more than the psychology of the marital parties.

The McDermott pension grew and appreciated for the benefit of the economic partnership by virtue of the equitable distribution statute, a constitutional law that created property interests wholly unknown at common law. While the fund quite obviously views such a doctrine with abhorrence as it affects pensions, under the doctrine Mrs. McDermott began acquiring an interest in the pension from the moment her husband joined the plan. That interest, unenforceable and unallocated as it may have been prior to the divorce action, constituted the seed from which an inchoate interest in the pension emerged as a marital asset when the divorce action began and matured into a true ownership interest when the equitable distribution judgment terminated the action.

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During the marital property phase, when a spouse's interest is still inchoate, there can be no doubt that it is protectable against unwarranted dissipation, for the "power of restraint is vital to meaningful enforcement of the equitable distribution statute." When inchoate rights become actual ownership interests by virtue of equitable distribution judgments, they are susceptible to even greater protection because their enhancement status eliminates some of the inhibitions inherent in the exercise of injunctive power prior to distribution. The court that awarded to the wife one-half ownership in the pension contract originally entered into between the husband and the fund possessed the power to take appropriate measures to prevent the award from becoming an illusion. (Citations omitted.)

Does the title holder have complete freedom of disposition during marriage due to the policies reflected in McDermott and imposed by the EDL?

Donative Intent

The commingling of separate property with marital property may convert the separate property into marital property if a donative intent is found or it is impossible to trace the assets to their source. Under the Banking Law, [FN15] a rebuttable presumption of co-ownership arises when separate funds are deposited in a joint account with rights of survivorship.

Under the Equitable Distribution Law interspousal gifts are deemed to be marital property, whereas individual gifts from the outside are classified as "separate property." [FN16]

Where the claimed "marital property" was acquired during the marriage and before the commencement of the divorce action but when the parties were separated and when no spousal contributions were being made, the property is still "marital property." In Forcucci v. Forcucci, [FN17] the parties had separated and reconciled a number of times during a lengthy and stormy marriage. A major issue was the status of a "Nut Shoppe" acquired by the wife during the marriage that had increased in value in that time. To support her claim that the "Nut Shoppe" was her separate property, and not marital property, the wife pointed to her 1971 legal separation decree, saying that it sub silentio resolved the issue and made the "Nut Shoppe" her separate property. The Appellate Division rejected her argument, holding that the prior separation judgment was not altered or resolved by the intermittent reconciliation and cohabitation of the parties.

What is the status of family assets if an action for dissolution is commenced and it is dismissed or discontinued? Are the family assets "marital property" or do they revert back to what they were characterized at before the action was converted? It would seem that they would revert back to their pre- commencement status since there can only be "equitable distribution" of "marital property" in an action where all or part of the relief granted is a divorce or dissolution. [FN18]

The final sentence of the definition given to "marital property" in subdivision (1)(c) [FN19] provides that "Marital property shall not include separate property as herein defined" (in subdiv. 1-d).

DRL s 236 Part B, subdiv. d, defines "separate property" and states in part that it is:

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.

Thus, under certain circumstances, the appreciation in value of "separate property" may become marital property. [FN20]

In Price v. Price, [FN21] the Court of Appeals held that under the EDL an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the direct or indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property. The Court stated that the amount of that appreciation should be added to the sum of marital property for equitable distribution.

Whether assistance of a non-titled 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 in or facilitated by the time devoted to the enterprise that was made possible, at least in part, by the indirect contributions of the non-titled 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.

The Court also held that 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 a work of art, the appreciation remains separate property, and the non-titled spouse has no claim to a share of the appreciation.

'All Property'

Unfortunately, the statute does not expressly provide that all property acquired during the marriage shall be presumed to be marital property. Such a presumption, however, may be justified by the legislative policies and objectives expressed in the EDL and the words "all property" in the definition of "marital property" may justify such a conclusion.

Our courts have liberally construed the term "marital property" to include vested but unmatured pension rights; [FN22] a law practice; [FN23] a physician's license; [FN24] a Ph.D.; [FN25] a degree and

certification as a school administrator; [FN26] a law license, [FN27] a board certification in internal medicine; [FN28] a teaching license; [FN29] a physician's assistant's State license and certification; [FN30] breeders awards received before trial and future breeder's awards received after the date of the commencement of the action resulting from horse breeding during the marriage; [FN31] lottery winnings from tickets bought from earnings; [FN32] the portion of a pension that represents deferred compensation; [FN33] a master's degree and teaching certificate; [FN34] a fellowship in the society of actuaries; [FN35] a degree and license as a health care administrator; [FN36] 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; [FN37] oil paintings created by the husband, an artist, during the marriage; [FN38] 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; [FN39] wedding gifts; [FN40] an abortion practice; [FN41] a police pension in pay-out status; [FN42] an unvested and unmatured fireman's pension [FN43] a non-vested pension; [FN44] that portion of a matured and paying disability pension representing retirement benefits; [FN45] a farm started by the husband before marriage to which the wife contributed her efforts as a lender, homemaker and mother; [FN46] a medical-psychiatrist license; [FN47] a debt owed by the parties'; [FN48] a profit-sharing plan; [FN49] a cooperative apartment that closed after the marriage; [FN50] a podiatry practice; [FN51] an increase in a spouse's career as an actress and model; [FN52] the appreciation of personal injury settlement proceeds, [FN53] and stock given to a husband's nominee where he has controlled it. [FN54]

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FN1 See Introduction, ALI Restatement of the Law of Property I.

FN2 EPTL 5-1.2(a)(1).

FN3 See Justice Thompson's dissent in O'Brien v. O'Brien (2d Dept.) 106 AD2d 223, 485 NYS2d 548, and the majority opinion in O'Brien v. O'Brien, 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712.

FN4 66 NY2d 576, 498 NYS2d 743, 489 NE2d 717.

FN5 Sarafian v. Sarafian, 140 AD2d 801, 528 NYS2d 192 (3rd Dept., 1989); Helen A.S. v. Werner R.S. --- AD2d ----, --- NYS2d ----, New York Law Journal, Oct. 17, 1990. P. 25, Col. 3. (2nd Dept., 1990).

FN6 See Gleason v. Gleason, 26 NY2d 28, 308 NYS2d 347, 256 NE2d 513 (superseded by statute as stated in Coffman v. Coffman (2d Dept.) 60 AD2d 181, 400 NYS2d 833).

FN7 See Moran v. Moran, NYLJ March 12, 1982 (Nassau Co.) where the parties had been separated for 16 years before the divorce, apparently due to the husband's fault. The Court ordered that the marital home occupied by the husband be sold and the net proceeds be evenly divided. The wife had a larger income than that of the husband, so no maintenance was awarded.

FN8 This principle follows from the necessary implication of Dom.Rel.L. 236(B) subdiv. 1(d)(1) which defines separate property to include property acquired by "gift from a party other than the spouse."

FN9 See CPLR 304.

FN10 109 Misc2d 16, 439 NYS2d 590.

FN11 Kriger v. Kriger, 115 Misc2d 595, 454 NYS2d 500.

FN12 See Whalen v. Whalen, NYLJ, Sept. 24 1981 (Nassau Co.) Jacoby v. Jacoby, NYLJ, May 10, 1982 (Queens Co.) and Blickstein v. Blickstein (2d Dept.) 99 AD2d 287, 472 NYS2d 110, See DRL s 236[B](5)[d](11) and (12) and DRL s 236[B](6)[a] (9) and (10).

FN13 Kriger v. Kriger, supra N. 12.

FN14 (1986, 2d Dept.) 119 App Div 2d 370, 507 NYS2d 390, 507 NYS2d 390, app dismd 69 NY2d 1028, 517 NYD2d 938, NE2d 81.

FN15 Banking Law 675.

FN16 By necessary implication from DRL ss 236(B) subdiv. (1)(d)(1).

FN17 (4th Dept.) 83 AD2d 169, 443 NYS2d 1013.

FN18 See DRL s 236[B][5] and Lee v. Lee, 93 AD2d 221, 462 NYS2d 34.

FN19 DRL s 236[B][1][c].

FN20 This will be the subject of next month's article.

FN21 Price v. Price, 69 NY2d 8, 511 NYS2d 219.

FN22 Majauskas v. Majauskas 61 NY2d 481, 474 NYS2d 699.

FN23 Litman v. Litman, 61 NY2d 918, 474 NYS2d 718.

FN24 O'Brien v. O'Brien, 66 NY2d 576, 498 NYS2d 743.

FN25 Freyer v. Freyer, 138 Misc2d 158, 524 NYS2d 147.

FN26 DiCaprio v. DiCaprio, --- AD2d ----, 556 NYS2d 1011 (4th Dept. 1990).

FN27 Holihan v. Holihan, --- AD2d ----, 553 NYS2d 434 (2d Dept. 1990).

FN28 Savasta v. Savasta, --- Misc2d ----, 549 NYS2d 544 (Sup.Ct.1989).

FN29 Parlow v. Parlow, --- Misc2d ----, 548 NYS2d 373 (Sup.Ct.1989).

FN30 Morimando v. Morimando, 145 AD2d 679, 536 NYS2d 701 (2d Dept. 1988).

FN31 Berge v. Berge, --- AD2d ----, 552 NYS2d 799 (4th Dept. 1990).

**FN32 Ullah v. Ullah, --- AD2d ----, 555 NYS2d 834 (2d Dept. 1990);
Smith v. Smith, --- AD2d ----, 557 NYS2d 22, (1st Dept. 1990).**

FN33 Mylette v. Mylette, --- AD2d ----, 558 NYS2d 160 (1st Dept. 1990).

FN34 McGowan v. McGowan, 142 AD2d 355, 535 NYS2d 490.

FN35 McAlpine v. McAlpine, 143 Misc2d 30, 539 NYS2d 680.

FN36 Anderson v. Anderson, --- AD2d ----, 545 NYS2d 335 (2d Dept. 1989).

FN37 Lipan v. Lipan, --- AD2d ----, 554 NYS2d 7 (1st Dept. 1990).

FN38 Kustura v. Kustura, NYLJ, Sept. 22, 1990, P. 25, Col. 2 Sup.Ct., Kings County (Schneier, J.).

FN39 Jeruchimowitz v. Jeruchimowitz, 128 Misc2d 888, 491 NYS2d 576.

FN40 Ackley v. Ackley, 100 AD2d 153, 472 NYS2d 804.

FN41 Nehorayoff v. Nehorayoff 106 Misc2d 311, 436 NYS2d 584.

FN42 Perri v. Perri, 97 AD2d 399, 467 NYS2d 226.

FN43 Hebron v. Hebron, 116 Misc2d 803, 456 NYS2d 957.

FN44 Lentz v. Lentz, 103 AD2d (a)(22) 478 NYS2d 56, Damiano v. Damiano, 94 AD2d 132, 463 NYS2d 477.

FN45 Newell v. Newell, 121 Misc2d 586, 468 NYS2d 814.

FN46 Brennan v. Brennan, 103 AD2d 48, 479 NYS2d 877 (3d Dept. 1984).

FN47 DeStafano v. DeStafano, 119 AD2d 793, 501 NYS2d 419.

FN48 Clarkson v. Clarkson, 116 AD2d 824, 496 NYS2d 854.

FN49 Neumark v. Neumark, 120 AppDiv2d 502, 501 NYS2d 704.

FN50 Zuch v. Zuch, 117 AD2d 397, 503 NYS2d 343, (1st Dept. 1986).

FN51 Morton v. Morton, 130 AD2d 558, 515 NYS2d 499.

FN52 Golub v. Golub, 139 Misc2d 440, 527 NYS2d 946.

FN53 DeMarco v. DeMarco, 143 AD2d 328, 532 NYS2d 293.

FN54 Hackett v. Hackett, 147 AD2d 611, 538 NYS2d 20.

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