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LAW AND THE FAMILY

## **"What is Separate Property?"**

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### **SO WHAT'S MINE?**

**That, or something close to it, is what a lot of clients are asking these days, ever since the Equitable Distribution Law (EDL) was enacted, with case law evolving geometrically. While the Domestic Relations Law (DRL) actually delineates, with specificity, certain "marital property," the growing concern is that various court interpretations and indiscretions in determining that which is separate will mean a greater share of the pie for some, leaving little more than crumbs for others. And, as nice as that is for departing parties, its an unsettling prospect for others who have grown accustomed to living a luxurious, worry-free lifestyle on "borrowed" assets.**

**In last month's column, it was noted that the statutory definition of "marital property" in DRL s 236(B) Subdivision (1)(c) was exceedingly broad and comprehensive and that the spirit of the EDL, if not its letter, required a liberal judicial interpretation as to what constitutes marital property for equitable distribution purposes. [FN1] It would be fair to say that, in effect, the law creates a rebuttable presumption that family assets acquired 'during the marriage' are "marital" and that the burden of proving otherwise rests upon the proponent claiming that a particular asset is "separate."**

**The respective definitions given to marital and separate property in DRL s 236(B)(1)(c) and (1)(d) warrant the recent decisions [FN2] reached by the Second and Third Departments that property is "marital" unless otherwise proven. [FN3]**

## **'Product of Marriage' Theme**

**The statutory definition of "separate property" for distribution purposes in DRL s 236(B)(1)(d) is narrow and circumscribed and is limited to the instances cited therein. Viewed in context, the public policy expressed in the Equitable Distribution Law should affect the judicial construction and application of the "separate property" exceptions that remove such assets from the "marital pot." This is because the theoretical goal of the EDL is to achieve equity in the distribution of assets produced by the marital partnership during the marriage. This is consistent with the "product of the marriage theme." [FN4]**

**Bearing in mind the objectives and purposes of the EDL, we turn to the statutory classification of "separate property." DRL s 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.**

**The first exemption from distribution is contained in DRL s 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.**

**The above provision ordinarily covers the vast majority of assets classified as separate property and thus exempted from equitable distribution. The common thread running through Subdivision (1) is that the items described were not produced by a functioning marital partnership. Property that was separate was not produced by a functioning marital partnership. Property that was separate property**

before marriage was not produced during the marital partnership, [FN5] likewise, inheritances and gifts from a party 'other than a spouse. [FN6] Notably, interspousal gifts are not included in Subdivision (1) and, therefore, are deemed to be "marital property. [FN7]

### Literal Application?

An interesting problem in statutory construction is whether or not Subdivision (1)(d)(1) must be literally applied. [FN8] The following examples pose the problem.

Suppose, that the parties lived together before marriage and during that time a home was purchased and title was taken in the man's name. The woman at the time of acquisition supplied some of the purchase money and made contributions similar to those listed in DRL s 236(B) Subdivision (5)(d)(6). After they married, payments for the home were made from funds in a joint bank account. The parties later separated, and a divorce action was commenced. Under our law, the home is separate property of the husband, subject, however, to the vagaries of the wife's claim to an equitable interest in the house, and a possible constructive trust.

A further illustration. Suppose a husband has an elderly aunt whom he can barely tolerate, no less like. Given the enormous wealth of his aunt, the husband sends his wife on a mission to shower the aunt with love and affection. The wife talks to her regularly, visits her and calls her daily on the telephone. As a result of all this attention, the aunt changes her will and names the husband as sole heir to her estate. Upon the death of the aunt, the parties have such a bitter dispute over the husband's claim that all of the inheritance is his, that it precipitates a divorce. The inheritance is "separate property" under s 236(B)(1)(d)(1).

A strict application of the literal language in the statute would lead to inequity. It is submitted that the conscience of the court should lead it to conclude that the policies, context and flexible provisions of Subdivision (5)(d) permit it to make under the circumstances of each of the above hypothetical allocation of a disproportionate share of the marital property to the respective wives. [FN9]

Cappiello v. Cappiello [FN10] was a divorce action in which the court awarded the wife \$38,780 as her distributive share of the marital property. An appeal was taken, and the First Department [FN11] decreased the wife's distributive award from to 25 percent from 50 percent, because equitable distribution is "not designed either to

result in a penalty or a windfall," and considerations of fairness and equity under the circumstances here presented did not justify a 50-50 division of the marital property.

The Appellate Division also held that the wife was not entitled to a distributive share of the value of defendant-husband's new company, "which was a spin-off from defendant's 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," said the First Department, "under the facts of the case, were separate property interests, not subject to distribution." In this brief marriage, which did not work, the Appellate Division concluded that the trial term's award of "an equal distribution was improper." The First Department further held that the wife was not entitled to the \$25,000 awarded to her by the trial court "representing the amount the wife could have earned during the time the parties were living together."

Affirming the Appellate Division's findings in Cappiello, the Court of Appeals held that although property acquired during the marriage and before commencement of a matrimonial action is marital property, [FN12] separate property acquired in exchange for, or the increase in, value of separate property remained "separate."

Also affirming the Appellate Division's rejection of the lump-sum award of \$25,000 to the wife, representing what she allegedly could have earned while the parties lived together, the Court of Appeals held that this item was not authorized as an "award of maintenance" or as a "dislocation award."

With the exceptions of the unlikely situations posed in our hypotheticals, the exemption from "marital property" of premarital property and individual gifts and inheritances is consistent with the product concept [FN13] of the EDL. The illustrations also demonstrate the appropriate approach to construing and interpreting the statute, which, since remedial, should be liberally construed. [FN14]

Of course, the exemption from equitable distribution of gifts and inheritances from other parties applies when they are individual but not when the gift or inheritance is to both spouses. [FN15]

Exemption (2) in DRL s 236[IS] Subdivision (1)(d) was added belatedly at the request of legislative counsel, shortly before the enactment of the EDL. It exempts from equitable distribution and designates as separate property "compensation for personal injuries." It may be proper to view damages reflecting individual pain

and suffering as personal to the victim, but those damages compensating for loss of income, medical and hospital expenses, and the like, are family losses and deplete family assets. This dichotomy is preferable and is supported by the overall policies of the EDL and the evolving case law.

In *West v. West*, [FN16] the case was remitted to the trial court for a determination of the "extent to which the plaintiff husband's disability pension was marital property" because the portion attributable to compensation for the husband's personal injuries is separate property. The Appellate Division quoted from its opinion in *Damiano v. Damiano*, [FN17] to the effect that the difference between a disability pension and a retirement pension lies in the extent to which the former is compensation for personal injuries and thus is separate property and not subject to equitable distribution. "However," said the court, "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." [FN18]

In *Biddlecom v. Biddlecom*, [FN19] the issue was whether certain benefits "as a consequence of early retirement following a divorce are subject to equitable distribution." The Appellate Division held that absent a specific agreement to the contrary, such benefits are not marital property but are separate property of the retired spouse. The Appellate Division held that since any marital property is subject to equitable distribution, in the absence of a specific agreement between the parties to the contrary, severance benefits received under early retirement following divorce, as well as an additional monthly payment as a supplemental benefit, designed to compensate employees for the lack of eligibility for Social Security benefits and to serve as inducement for early retirement, are not marital property subject to equitable distribution, but are separate property of the retired husband.

The exclusion from "marital property" of "property acquired in exchange for or the increase in value of separate property" in DRL s 236[B] Subdivision (1)(d)(3) is another controversial provision. Obviously, it might be more simple, and the rule might be easier to apply, if property received in exchange for or an increase in the value of separate property were regarded as marital property. It would simplify accounting and bookkeeping "problems" and short circuit any uncertainties of "tracing." The easier path was rejected, however, because of the "product" premise of the EDL. Where the property in question was not produced by partnership efforts or

expenditures, it is consistent with the "product" premise to exclude it from equitable distribution.

The provision in DRL s 236[B] Subdivision (1)(d)(3), which designates as marital property, an "appreciation" in value of separate property "due in part to the contributions or efforts of the other spouse," was a bone of contention in *Price v. Price* [FN20] and will be the subject of discussion in next month's column.

The final specific example of "separate property" is found in DRL s 236[B] Subdivision (1)(d)(4), which refers to "property described as separate property by written agreement of the parties" pursuant to Subdivision 3 of Part B. Although on its face this exemption seems clear and furthers the policy of permitting the parties to "opt out" of an equitable distribution by the court, there is a problem as to whether the "opting out" must be in literal compliance with Subdivision 3 and must meet the formalities of being written and "subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." Will an in-court stipulation on the record suffice? The preferable view is that an on-the-record stipulation in open court meets the purposes of the formalities prescribed by Subdivision 3. Decisions to date, however, disagree as to whether or not the formalities are mandatory. [FN21] In certain instances informal distributions have served as an "opting out" device recognized by some courts, [FN22] and obviate the necessity of a formal written agreement.

In addition to the classification of separate property for equitable distribution purposes in DRL s 236[IS] Subdivision (1)(d) of the EDL, there are other relevant provisions. For examples DRL s 236[B] Subdivision (5)(d) sets forth the factors for the court to consider in making an equitable distribution and makes it clear that separate estates are relevant to a determination of what is equitable in the distribution of the marital property. [FN23]

Thus, Subdivision 5-d(1) provides that the court shall consider "the income and property of each party at the time of the marriage and at the time of the commencement of the action." Factor (6) requires consideration of spousal contributions and efforts. Factor (7) refers to the "liquid or non-liquid character of all marital property," and factor (8) refers to "the probable future financial circumstances of each party." Catch-all factor (11) authorizes the court to consider "any other factor which the court shall expressly find to be just and proper." In sum, the exclusion of separate property (as defined in Subdivision 1-d) from equitable distribution does not mean that such separate property is not relevant for an equitable distribution of

marital property. For example, in the case of a longterm marriage, where a spouse is disabled or cannot qualify for the job market, a disproportionate award of marital property to that spouse may be fully justified, especially where the other party has substantial separate property. [FN24]

A grant of a distributive award pursuant to DRL s 236[B] Subdivision (5)(e) is another example of a situation where the extent of separate property is highly relevant. Instead of allocating a share of a business or professional practice, the court is authorized to make a distributive award "payable in a lump sum or over a period of time in fixed amounts." [FN25] The source for such payments is likely to be the separate property of the obligor.

Finally, the extent of separate property also is relevant where modification of a prior award or agreement is sought under DRL s 236[B] Subdivision (9)(b). A substantial increase or decrease in the separate estate of a spouse has a direct bearing where an upward or downward modification of maintenance or child support is requested. Moreover, separate property has a direct relation upon the allocation of the mutual duty to support children.

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**FN1** In *Price v. Price*, 69 NYS2d 81, 511 NYS2d 221, the Court of Appeals (citing its holding in *Majauskas v. Majauskas*, 61 NY2d 481, 474 NYS2d 699), stated that in defining the term "marital property," the Legislature intended to construe the term broadly to give effect to the "economic partnership" concept of marriage relationships recognized in the statute. In contrast, the term "separate property," an exception to marital property, is to be construed narrowly.

**FN2** *Mechanick v. Mechanick*, NYLJ, June 7, 1984, p. 12, col. 6 (Nassau Co.).

**FN3** *Sarafian v. Sarafian*, 140 AD2d 801, 528 NYS2d 192 (3d Dept., 1990), *Helen A.S. v. Werner R.S.*, --- AD2d ---, 560 NYS2d 797 (2d Dept., 1990).

**FN4 Under DRL s 236(B) Subdivision 1-d, interspousal gifts are made marital property, but individual gifts from third parties are separate property. In 22 states the rule is that individual gifts or inheritances from third parties are excluded from equitable distribution, but in 13 states, such gifts or inheritances are included for equitable distribution purposes. See Freed and Walker, "Family Law in the Fifty States: An Overview," 19 Fam.L.Q. 331, 354- 355, Table IV (1986). The law in other states is unclear or undecided.**

**FN5 In Lipson v. Lipson, 134 Misc2d 1076, 514 NYS2d 158, the court held that an engagement ring, given prior to marriage is separate property.**

**FN6 In Novak v. Novak, 135 Misc2d 909, 516 NYS2d 878, the court held that where the husband conveyed title to the marital residence to himself and wife to be, "as husband and wife," 10 days before they were married, the conveyance created a joint tenancy under EPTL 6-2.2(c) which remained such upon marriage. The husband had purchased his interest in the property two and a half months before the marriage.**

**FN7 In Romano v. Romano (1987 2d Dept.), 133 AD2d 680, 519 NYS2d 850, the Appellate Division held that the trial court correctly found that the marital home was the wife's separate property because it was a gift to her before the marriage, and its appreciation was due to market forces.**

**FN8 In Spector v. Spector (1988, 4th Dept.), 136 AD2d 939, 524 NYS2d 896, app dismd without op, 72 NYS2d 952, the Appellate Division modified the divorce judgment on the law and held that certain personalty, including a manure spreader, tractor chains, plow frame, pony cart and various animals were not marital property. These items were purchased with plaintiff's separate property acquired by her as a result of gifts or inheritance.**

**FN9 See Coffey v. Coffey, 119 AD2d 620, 501 NYS2d 74, where the husband's property, which was inherited from his mother, was initially his separate property, but his conveyance to his wife and himself made it marital.**

**FN10 In Weinroth v. Weinroth, 549 NYS2d 576 (Sup.Ct., NY Co., 1989) the Supreme Court held that it did not have discretion to define as separate, property obtained by either party prior to commencement of the action or execution of a separation agreement, unless it qualifies as separate property under DRL s 236B(1)(d).**



**FN9 Disproportionate awards were given, for example, in *Wenzel v. Wenzel*, 122 Misc2d 1001, 472 NYS2d 830, where the husband tried to kill but merely seriously wounded the wife; *Farenga v. Farenga*, NYLJ, March 14, 1983 (Nassau Co.), husband severely beat wife; *Spector v. Spector*, NYLJ, Feb. 12, 1984 (NY Co.), where the wife was awarded all income-producing property since she was dying from cancer; *Whalen v. Whalen*, NYLJ, Sept. 24, 1981 (Nassau Co.), where husband dissipated family assets by gambling; *Brancoveneau v. Brancoveneau*, 145 AD2d 395, 535 NYS2d 86, where the husband attempted to hire someone to kill the wife.**

**FN10 66 NYS2d 107, 495 NYS2d 318, 485 NE2d 983.**

**FN11 110 AD2d 608, 488 NYS2d 399.**

**FN12 DRL s 236, Part B(1)(c).**

**FN13 In *Applebaum v. Applebaum*, 142 AD2d 300, 535 NYS2d 717, the court held that a co-op purchased by the wife after the husband left her was her separate property.**

**FN14 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.**

**FN15 In *Ackley v. Ackley*, 110 AD2d 453, 472 NYS2d 804, the court held that a wedding gift to both spouses by the wife's parents was marital property but that the wife should receive a greater share of it.**

**FN16 (2d Dept.) 101 AD2d 834, 475 NYS2d 493.**

**FN17 (2d Dept.) 94 AD2d 132, 463 NYS2d 477 (disapproved *Majauskas v. Majauskas*, 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15).**

**FN18 Citing *Newell v. Newell*, 121 Misc2d 586, 468 NYS2d 814.**

**FN19 (4th Dept.) 113 AD2d 66, 495 NYS2d 301.**

**FN20 69 NY2d 8, 571 NYS2d 219.**

**FN21 *Harrington v. Harrington* (2d Dept.), 103 AD2d 356, 479 NYS2d 1000 (formalities not mandatory; compliance with CPLR 2104 is sufficient).**

**FNSanders v. Copley (1st Dept.), 151 AD2d 350, 543 NYS2d 67; Josephson v. Josephson, 121 Misc2d 572, 469 NYS2d 285 [Sup.Ct., NY Co.] (formalities not mandatory; CPLR 2104 is sufficient).**

**FNLischynsky v. Lischynsky (3d Dept.), 95 AD2d 111, 466 NYS2d 815 (formalities required).**

**FNHanford v. Hanford (4th Dept.), 91 AD2d 829, 458 NYS2d 418; Giambattista v. Giambattista (4th Dept.), 89 AD2d 1057, 454 NYS2d 762 (formalities required).**

**FN22 In Hutchings v. Hutchings, --- AD2d ---, 547 NYS2d 970 (4th Dept., 1989), after the action was commenced, the husband gave his car to his son. The Appellate Division held the trial court erred in distributing the car and assessing its entire value to him. It held that the parties, in effect, made a distribution of this item to their own satisfaction and it should have been excluded from the property subject to distribution. See also, Hebron v. Hebron, 116 Misc2d 803, 456 NYS2d 957.**

**FNIn Reeves v. Reeves, 137 AD2d 586, 524 NYS2d 478 (2d Dept., 1988), a second marriage for both parties, of relatively short duration, the Appellate Division affirmed that part of the divorce judgment that provided that the proceeds from the sale of the marital residence were equitably divided by the parties in 1983, and reversed that part that awarded the wife a share of defendant's IRA and Keogh accounts. The marital home was sold in 1983 and the parties then divided the net proceeds in a ratio corresponding to their initial contributions, with defendant retaining 70 percent. It held that the trial court properly declined to disturb this division. Although unequal, it was rationally premised in the finding that the parties had fashioned an equitable distribution by reference to their original contributions and the court merely ratified this fully executed division. However, it was error to award the wife a share in the husband's IRA and Keoghs because the rationale therefor had no application to this case. The record established that the parties separately maintained their substantial separate incomes, assets and liabilities that they brought into the marriage. Since the Supreme Court simply concluded that the parties "were not to have access to the other funds and/or income," the Appellate Division concluded that awarding the wife a portion thereof was improper, especially since the husband made no claim to the appreciation in value of the wife's E.F. Hutton portfolio which he managed.**

**FNIn Lisetza v. Lisetza, 135 AD2d 20,523 NYS2d 632 (3d Dept., 1988), a six-year childless marriage, the plaintiff owned two parcels of real**

estate and \$35,000 at the time of marriage. Six months later, she received a piece of property as a gift that she sold, investing the \$72,000 profit in interest-bearing securities. At the time of marriage, the defendant owned a residence in the Bronx, a Mobil gas station leasehold, unimproved land in New Jersey and land in Colorado. In 1978, the parties bought the marital residence for \$55,000. The \$20,000 down payment came from defendant's pre-marital funds. The Appellate Division affirmed the award to plaintiff of one of the two parcels of land in Colorado and the first \$15,000 from the sale of the marital residence with the net balance to be divided equally. The husband retained the proceeds of the sale of the Mobil station and the entire interest in his pension plan. As to the marital home, it was held to be fair and equitable to effect a disproportionate allocation of spousal shares in the proceeds of the sale because this was in accordance with their own understanding.

FN23 The early decision of the trial court in *Nehorayoff v. Nehorayoff*, 108 Misc2d 311, 437 NYS2d 584, and that in *Kobylack v. Kobylack*, 110 Misc2d 402, 442 NYS2d 392, mod (2d Dept.), 96 AD2d 831, 465 NYS2d 581, revd 62 NY2d 399, 477 NYS2d 109, 465 NE2d 829, on remand (2d Dept.), 111 AD2d 221, 489 NYS2d 257 (disapproved *Blickstein v. Blickstein* (2d Dept.), 99 AD2d 287, 472 NYS2d 110), were among the first to consider the respective estates and contributions of the parties. In *Jolis v. Jolis*, 111 Misc2d 965, 446 NYS2d 138, affd (1st Dept.), 98 AD2d 692, 470 NYS2d 584, however, insufficient consideration was given to the husband's separate property.

FN24 See opinions cited supra, N. 8.

FN25 See DRL s 236(B) Subdivision (5)(e).

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