

Gone Without a Trace

By Jeffrey L. Catterson

New York's equitable distribution law defines two categories of property: marital property, which is subject to equitable distribution; and separate property, which is not subject to equitable distribution. *See*, D.R.L. §236(B)(1). Marital property is defined 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, excluding separate property. Separate property is defined as: property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; compensation for personal injuries; 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; and property described as separate property by written agreement of the parties. It is hornbook law that marital property is to be defined broadly and separate property is to be narrowly construed. *See*, *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 (1986). Significantly, “[p]roperty 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.” *Judson v. Judson*, 255 A.D.2d 656, 657, 679 N.Y.S.2d 465 (2nd Dept. 1998); *Farag v. Farag*, 4 A.D.3d 502, 503, 772 N.Y.S.2d 368 (2nd Dept. 2004). To do so, the party seeking the separate property credit must trace the asset claimed to be separate from date of marriage, or acquisition if later, to the date of commencement of the divorce action making certain the asset has not been commingled with marital property. *See*, *Hymowitz v. Hymowitz*, 119 A.D.3d 736, 991 N.Y.S.2d 57 (2nd Dept. 2014); *Steinberg v. Steinberg*, 59 A.D.3d 702, 874 N.Y.S.2d 230 (2nd Dept. 2009).

While the principal separate property may be exempt from equitable distribution, the appreciation or growth on that separate property could be subject to equitable distribution. To determine if the appreciation or growth is subject to equitable distribution, the court must determine if the appreciation or growth is “passive” or “active” in nature. Passive growth occurs due to market forces,



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not the efforts of the titled spouse (i.e. the appreciation of real property), and the nontitled spouse is not entitled to any percentage of the appreciation. *See Price v. Price*, 113 A.D.2d 299, 496 N.Y.S.2d 455 (2nd Dept. 1985) (where the court held that “passive appreciation of a separate property asset during the marital relationship would not be subject to a claim by the nontitled spouse . . .”), *aff’d* by 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986). Specifically, “passive” separate property assets “appreciate in value as a result of factors which are not in any way attributable to the efforts of either spouse,” but rather increase in value due to random market fluctuations. *Id.* at 307, 496 N.Y.S.2d at 461. In contrast, an active growth occurs, at least in part, due to the efforts of the titled spouse (i.e. an ongoing business). *See*, *Hymowitz*, *supra*. (where the Second Department increased the non-titled spouse’s entitlement to the appreciation of the titled spouses gifted business interest from 15 to 25 percent).

Even if a court determines a separate property asset is an “active” asset, that does not automatically subject the asset to distribution. An increase in the value of the separate property of one spouse,

occurring during the marriage, may only be considered marital property subject to equitable distribution when the increase in value is due, at least in part, to the “contributions or efforts of the other spouse.” D.R.L. §236(B)(1)(d)(3). Further, it is well-settled that, “the non-titled spouse must demonstrate the manner in which his [or her] contributions resulted in the increase in value and the amount of the increase which was attributable to his [or her] efforts.” *Embury v. Embury*, 49 A.D.3d 802, 804, 854 N.Y.S.2d 502, 504-05 (2nd Dept. 2008) (internal citations omitted), *quoting Elmaleh v. Elmaleh*, 184 A.D.2d 544, 545, 584 N.Y.S.2d 857, 858 (2nd Dept. 1992). *See also Morales v. Inzerra*, 98 A.D.3d 484, 949 N.Y.S.2d 433 (2nd Dept. 2012) (where the court held that because the plaintiff failed to demonstrate the manner in which his contributions resulted in any alleged appreciation, the alleged appreciation would not be deemed marital property subject to equitable distribution); *Hartog v. Hartog*, 85 N.Y.2d 36, 46, 623 N.Y.S.2d 537, 647 N.E.2d 749 (1995) (where the Court of Appeals held “[w]hen a nontitled spouse’s claim to appreciation in the other spouse’s separate property is predicated solely on the nontitled spouse’s indirect contributions, some nexus between the title spouse’s

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active efforts and the appreciation in the separate asset is required”).

Courts have also made it clear that conclusory allegations of a non-titled spouse’s contribution will not satisfy this burden. *See Rubin v. Rubin*, 309 A.D.2d 846, 766 N.Y.S.2d 68 (2nd Dept. 2003) (where the court held that because the defendant relied only on conclusory assertions, he failed to meet this burden and was therefore not entitled to equitable distribution of the appreciation of the plaintiff’s interest in her separate property); *Jeshiva v. Gross*, 23 Misc.3d 1122(A), 886 N.Y.S.2d 71 (Sup. Ct. Nassau Cnty. 2009) (where the court held that “conclusory allegations are absolutely insufficient” to satisfy this burden).

What is abundantly clear, whether you are the titled spouse seeking to exclude separate property from equitable distribution or the non-titled spouse seeking to obtain equitable distribution of separate property appreciation / growth, the party must trace the genesis of the assets and the contributions, whether direct or indirect, made to the assets appreciation / growth.

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