Burden of Proof and Rights to Appreciated Separate Property[1]

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The statutory presumption is that all property acquired during the marriage, unless clearly separate, is deemed marital property; it is "the titled spouse's burden to rebut that presumption."[2] Two recent decision have upset the applecart regarding the issue of who bears the burden of proof of showing contribution towards appreciated separate property. In *Parise v. Parise,*[3] the Second Department, without explanation, shifted the burden of proof unto the titled spouse to show that the non-titled spouse's "indirect efforts did *not* contribute, in some degree, to the appreciation of the value" of certain residential real estate which had been the titled spouse's separate property. Of note, *Parise*'s citations in support of the ruling were inapposite.[4] In *Ritz v. Ritz*[5], a complex decision irreconcilable with governing law, the First Department inexplicably, also, shifted the burden of proof unto the titled spouse regarding the appreciated value of an apartment, an otherwise seemingly passive asset.

Non-titled Spouse's Burden of proof

In *Price v. Price*[6] the Court of Appeals held that "an increase in value of separate property occurring during the marriage ... which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent should be considered marital property"; that the terms "contributions or efforts"[7] contained in Domestic Relations Law (DRL) § 236(B)(1)(d)(3) "reflect an awareness that the economic success of the partnership depends not only upon the financial

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[1] N.Y.L.J., Apr. 28, 2006.

[2] DeJesus v. DeJesus 90 N.Y.2d 643, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997).

[3] 13 A.D.3d 504 (2nd Dept., 2004).

[4] Notwithstanding Parise's reference to Price and Hartog, in Pellino v. Pellino, 295 A.D.2d 330 (2nd Dept. 2002), wife established some nexus between her efforts and the appreciated value of husband's interests in two closely held corporations (separate property); in Koehler v. Koehler, 285 A.D.2d 582 (2nd Dept., 2001), the parties took joint ownership of the property before the marriage, which plaintiff paid for solely with her own funds – the appreciation "may be deemed" marital property; Lukacs v. Lukacs 238 A.D.2d 483 (2nd Dept. 1997), wife "contributed efforts" towards an apartment building that was husband's separate property.

[5] 21 A.D.3d 267 (1st Dept.,2005).

[6] 69 N.Y.2d 8 (1986).

[7] Price explored the history of the statute and the legislative intent: "Giving the words 'contributions or efforts' their natural and obvious meaning as general and inclusive terms results in expanding the extent of marital property and diminishing that of separate property."

contributions of the partners, but also on a wide range of non remunerated [contributions] to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."[8]

A decade later, *Hartog v. Hartog*[9], stated that "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 distribution." Nevertheless, *Hartog* underscored that "[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 titled spouse's active efforts and the appreciation in the separate asset is required"[10] whereupon the titled spouse's active efforts, "even to a small degree", render "the appreciation in that asset is, to a proportionate degree [not the entire asset], marital property."[11] However, "[w]hether 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."[12]

Clearly, a direct contribution by the non-titled spouse to the titled spouse's separate property, even if the titled spouse did not actively participate in the appreciation of the separate asset, renders that branch of the appreciation subject to distribution.[13]

The Court of Appeals observed that appreciated separate property retains its separate character where it was "not due, in any part, to the efforts of the titled spouse," but, rather, was due in its entirety "to the efforts of others or to unrelated factors,"such as inflation or market forces.[14]

Hartog interdicted imposing the burden of proof upon a non-titled spouse to "produce a

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[8] Price, supra.

[9] 85 N.Y.2d 36 (1995).

[10] Id.

[11] Id.

[12] Price, supra.

[13] Allen v. Allen, 263 A.D.2d 691 (3rd Dept.,1999); Hartog, supra.

[14] Price, at 18; Hartog, at 47; see, Feldman v. Feldman, 194 A.D.2d 207 (2nd Dept., 1993); Nearly a decade following *Price,* the Court of Appeals, in *McSparron v. McSparron*, 87 N.Y.2d 275 (1995), cautioned that the active-passive distinction "may prove too rigid to be useful in particular cases" and "should be regarded only as helpful guideposts and not as immutable rules of law."

substantial, almost quantifiable connection ['a definitive and direct nexus']", "with mathematical, causative or analytical precision", "between the titled spouse's efforts ['activity'] and the appreciated value of the [separate] asset" because it would eviscerate the legislative intent and judicial precedents, "result[ing] in an all or nothing contest ... defeat[ing] a central calibrating feature of *Price* and the DRL,", and "often procedurally exempt appreciation even when the titled spouse's active efforts substantively contributed to the appreciation to some degree, resulting in a windfall for the titled spouse, nullifying, contrary to statute, the indirect efforts of the non-titled spouse."

Following the aftermath of these landmark cases (*Price* and *Hartog*) decisional authority has imposed a rigorous two prong burden of proof, to be satisfied conjunctively, that permits a non-titled spouse to share in the appreciated portion of separate property once the non-titled spouse:

1. establishes causality, a direct nexus between the contributions of the *non-titled spouse* and the appreciated separate property; and
2. quantifies the appreciation of the sought to be divided asset.[15]

Subsequent Second Department Decisions

Several recent decisions, albeit leanly worded, merit review. In *Tzanopoulos v. Tzanopoulos*,[16] decided some four months after *Parise*, the Second Department did not follow *Parise* and denied the husband a share of the wife's separate residential property because: (1) he failed to establish that its appreciated value was caused by his direct or indirect contributions and efforts; (2) he did not prove that his financial support allowed the wife to devote time toward the development of the property; (3) the development of the property was carried out substantially by local agents hired by the defendant; and (4) he failed to establish the monetary value of the appreciation of the property. Under *Hartog*, shouldn't the wife's directions to the agents qualify as the "small degree" nexus to bring some portion of the appreciation into the marital pot?

In *Herzog v. Herzog*,[17] decided several weeks after *Tzanopoulos*, the Second Department not only refunded to the wife the separate property she used to purchase the jointly held marital residence, but also awarded her the entirety of its appreciated value because the husband, inter alia, "completely failed to substantiate any of his assertions regarding contributions to the [property] or the marriage" whereas the wife proved that she "paid all expenses ... after acquiring ownership."

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[15] See, Carniol v. Carniol, 306 A.D.2d 366 (2nd Dept., 2003); Burgio v. Burgio, 278 A.D.2d 767 (3rd Dept., 2000); Pauk v. Pauk, 232 A.D.2d 386 (2nd Dept., 1996), leave to appeal denied, 89 N.Y.2d 982 (1997); Pulice v. Pulice, 242 A.D.2d 527 (2nd Dept., 1997);Acosta v. Acosta, 301 A.D.2d 467 (1st Dept., 2003).

[16] 18 A.D.3d 464 (2nd Dept., 2005).

[17] 18 A.D.3d 707 (2nd Dept., 2005).

Scammacca v. Scammacca,[18] decided two months after *Parise*, awarded the wife a share of the appreciated portion of the husband's separate real property, based on her unspecified direct and indirect contributions to the increase in value of the property "by assisting the defendant in the business and as a homemaker." Significantly, *Scammacca* cites *Pulice v. Pulice*[19] wherein the Second Department imposed the burden of proof on the non-titled spouse "to show the manner in which her contributions resulted in the increase in value and the amount of the increase that was attributable to her efforts." Although it cannot clearly be gleaned from *Scammaca* whether the wife proved the nexus between her contributions and the appreciation, the reference to *Pulice* suggests that she most likely satisfied the two prong test.

First Department

In *Naimollah v. De Ugarte*,[20] the First Department, citing early pre-*Price* Third Department authority,[21] held that the non-titled spouse failed to sustain his burden of proof that "the appreciation in plaintiff's condominium was in any way due to his contribution or efforts" (including evidence of contributions to the mortgage).

However, in *Ritz v. Ritz,*[22] decided three months after *Naimollah,* the enhanced value of an apartment that was the husband's separate property was deemed marital because: (1) he deposited the rent money in a joint checking account[23] [title apparently remained separate property], and (2) of unspecified "evidence of the wife's *indirect* contributions as a parent and homemaker." The Court's reference to the wife's indirect contributions is most puzzling in view of the Court's pain at spelling out the absolute absence of any possible nexus between the wife and the appreciation:

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[18] 15 A.D.3d 382 (2nd Dept., 2005).

[19] 242 A.D.2d 527 (2nd Dept., 1997).

[20] 18 A.D.3d 268 (1st Dept., 2005).

[21] Guarnier v. Guarnier, 155 A.D.2d 744 (3rd Dept., 1989), burden of proof is on the non-titled spouse to establish how efforts as a spouse, "parent, wage earner and homemaker indirectly enhanced the appreciation" of the other spouse's separate property.; Alwell v. Alwell, 98 A.D.2d 549 (3rd Dept., 1984).

[22] 21 A.D.3d 267 (1st Dept., 2005).

[23] This is surprising in light of the First Department's prior ruling that extracted such funds from the marital pot, see, Spencer v. Spencer 230 A.D.2d 645 (1st Dept.,1996), "fact that the plaintiff may have made withdrawals from his separate account to pay marital expenses does not alter th[e] conclusion [that the asset remained separate] (Feldman, supra)." Feldman v. Feldman 194 A.D.2d 207 (2nd Dept., 1993), "that a portion of the husband's inherited funds were deposited in a joint account does not support the further inference that the husband intended to treat all subsequently-received funds, which were placed in his individual bank accounts, as marital property."

> She contributed no money to the operation of the apartment; the rent money, which was merely "parked" in the joint checking account, more than paid for its expenses. Nor did [she] directly contribute to the operation or management of the apartment ... the record shows [she] had no involvement with the apartment whatsoever.

Pursuant to *Hartog*, a claim to appreciated separate property predicated "solely"on indirect contributions, as in *Ritz*, requires a showing of active efforts on the part of the titled spouse towards the separate property, above. *Ritz* makes absolutely no reference to *any* active effort by the husband towards the appreciated value of the apartment, an otherwise passive asset, to wit, that the appreciation was the result of anything other than passive market forces. Nevertheless, the burden of proof was shifted unto Mr. Ritz for having failed to "produce[] evidence as to the amount of increase due to passive market forces as opposed to his direct efforts" – these last several words are the only obscure reference to any possible active effort by the husband.

Ritz's very limited factual recitation makes the ruling even more difficult to compartmentalize due to the three cases cited therein, *Derderian v. Derderian,*[24] *Zelnik v. Zelnik*,[25] and *Rider v. Rider*[26], all off which point to *direct* contributions by the *non*-titled spouses to appreciated separate property.

Ritz also serves as a painful reminder regarding the consequences from a failure to offer proper valuation date evidence. Significantly, the Appellate Division calculated the enhanced value of the separate property from the date of the property's premarital acquisition, not the date of commencement of the action, because "the court was only provided with a dollar figure for the former, not the latter (notwithstanding the generous result this gives the plaintiff.")[27]

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[24] 167 A.D.2d 158 (1st Dept., 1990), before and throughout the marriage plaintiff contributed substantial sums to defendant to maintain various parcels of real property. She was also found to have contributed to the appreciation of his real estate ventures as a homemaker, and by performing various services in maintaining and operating the real estate.

[25] 169 A.D.2d 317 (1st Dept., 1991), in addition to indirect contributions as a parent and homemaker, the wife planned and supervised significant renovations; her expert quantified the appreciated value.

[26] 141 A.D.2d 1004 (3rd Dept., 1988), wife contributed not only as a spouse, parent and homemaker; she donated all of her income from the time construction started to the time the parties separated, worked on the project, and assisted in obtaining funds on credit to finance the construction.

[27] The wife's distributive award was, therefore, reduced from 50% to 25%.; see, Spilman-Conklin v. Conklin, 11 A.D.3d 798, 783 N.Y.S.2d 114 (3rd Dept., 2004), "plaintiff offered no proof to determine the value of jewelry given to her by defendant during the marriage leaving Supreme Court free to credit defendant's testimony and apply that amount in distributing

Conclusion

Are *Parise* and *Ritz* anomalous? Hopefully, yes. Although neither case has been cited, they loom "on the books" like the bullet in a Russian roulette chamber. It is hoped that these decisions will either be reversed or otherwise restricted to their facts. Of further note, there is also much ongoing discussion as to the role of gender in the finding of contribution to and distribution of appreciated separate property.

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the property."