Community Property in the Equitable Distribution Law, Remarriage Penalty[1]

In *Johnson v. Chapin*,[2] the Appellate Division handed down a very lengthy and acutely divided opinion along a philosophical schism of public policy. That oral argument had been heard on November 29, 2006, and the decision was not rendered until about 16 months later, March 13, 2008, suggests an intense rift and the difficulties in assembling a majority. Although *Johnson* wrestled with several important issues, its epicenter lies along the majority's 50% credit to the wife of marital funds used to satisfy the husband's equitable distribution and support obligation to his first wife and children, an award the dissent dubbed "a remarriage penalty." I express my gratitude to Leonard Florescue, Esq., and Allan Mayefsky, Esq., who represented the husband and the wife, respectively, for helping to shed light on the case.

Community Property

In his April 23, 2008 column, L. Florecscue, Esq., probed a possible unintended consequence percolating at the heart of *Johnson*: had the Appellate Division unwittingly created a community property state?[3] Mr. Florescue, a scholar and academician, always teases the intellect to pursue independent avenues of inquiry and discourse. I respectfully submit that the First Department did not create a community property state. Rather the Legislature, wittingly or not, integrated the notion of community property into the Equitable Distribution matrix at its very inception, whereas *Johnson* and precedent authority[4] only illuminate its existence and application.

The traditional thesis posits that equitable distribution is an inchoate right. Black's Law Dictionary (8th ed. 2004) defines "inchoate right" as "a right that has not fully developed, matured, or vested." Merriam-Webster defines inchoate as "being only partly in existence or operation : incipient." Inchoate thus means that the right has already come into being albeit an amorphous, unvested, and uncrystalized entity that first begins to assume form upon the commencement of the action.

Johnson quotes *O'Brien v. O'Brien* 66 N.Y.2d 576 (1985), wherein the Court of Appeals adopted Mr. Florescue's metaphor of marital property:

> *Our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of*

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[1] N.Y.L.J., July 2, 2008.

[2] Johnson v. Chapin 49 A.D.3d 348 (1st Dept., 2008).

[3] L. Florescue, 'Chapin' Unwittingly Creates Community Property State? 4/23/2008 N.Y.L.J. 3, (col. 1).

[4] See citations in Johnson: Micha v. Micha, 213 A.D.2d 956 (1995), et al.

> *acquisition*. Those things acquired during marriage and subject to distribution have been classified as "marital property" although, as one commentator has observed, they hardly fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property. "It is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action. [Thus] [i]t is hardly surprising, and not at all relevant, that traditional common law property concepts do not fit in parsing the meaning of 'marital property' " (Florescue, "Market Value", Professional Licenses and Marital Property: A Dilemma in Search of a Horn, 1982 N.Y.St.Bar Assn.Fam.L.Rev.13 [Dec.]). Having classified the "property" subject to distribution, the Legislature did not attempt to go further and define it but left it to the courts to determine what interests come within the terms of section 236(B)(1)(c) (emphasis provided).

Nevertheless, the modality of DRL § 236B makes it immediately apparent that the statutory infrastructure and decisional authority contemplate a system wherein the inchoate right becomes instantly activated upon the nuptials rather than at the tail end of the marriage: it is precisely the marital status that births marital property (*O'Brien*). "Marital relationship" and "marital status" can only be synonymous, as reflected in DRL § 236B(1)(c) wherein the Legislature stated: "The term 'marital property' shall mean *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 agreement pursuant to subdivision three of this part" (emphasis provided). The Court of Appeals and other appellate courts have repeatedly echoed:

> The Legislature, in defining this basic term 'marital property', we have held, intended that the term should be construed broadly in order to give effect to the "economic partnership" concept of the marriage relationship recognized in the statute. The term 'separate property', on the other hand, which is described in the statute as an exception to marital property, we have stated, should be construed narrowly.[5]

> Mr. Florescue synthesizes the effect of the Equitable Distribution Law on prior law: ... there was no concept in New York resembling marital property and the titled spouse could do anything and everything to the property in his name without having to account to the other or to the court in any way ... The 1980 equitable distribution statute changed none of that: it did not create an interest in either

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[5] Majauskas v. Majauskas, 61 N.Y.2d 481 (1984); Price v. Price 69 N.Y.2d 8 (1986); Leeds v. Leeds 281 A.D.2d 601 (2nd Dept., 2001), appeal dismissed, 96 N.Y.2d 858 (2001), lv. to appeal denied, 97 N.Y.2d 602 (2001); Judson v. Judson 255 AD2d 656 (3rd Dept., 1998); Galachiuk v. Galachiuk 262 AD2d 1026 (4th Dept., 1999); Leroy v. Leroy 274 AD2d 362 (1st Dept., 2000).

spouse's favor in the other's titled property.

Had the Legislature not created mutual interests, however shapelessly inchoate, in favor of each spouse in the interests of property acquired by the other during the marriage, title owners would be genuinely unbridled to spend or divest their earnings and assets with impunity, irrespective of motive, mode, or purpose. However, statutory accountability for dissipating marital assets (even those solely titled) is compelling in that it evidences the not so subtle inherence of community property within the governance of the Equitable Distribution Law – plainly, "unmarital-like" fiscal activities inconsistent with the principle of economic partnership are not without repercussion. Herein lies the conundrum: if following the equitable distribution statute titled spouses may continue to do anything and everything with property titled in their names, which source authority enables the imposition of accountability and possible sanctions upon a spouse for having done that which he may do, unless the Legislature had indeed created an unquantified inchoate interest in either spouse's favor that germinates from the time of the marriage and does not mature to distribution until dissolution of the marriage?

Johnson did not thus create community property but rather only identified its intrinsic function in the statutory structure: "Our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition." Unlike a true community property regime, marital property, under New York law, is a hybrid-diluted concept which accrues and shifts throughout its dormancy with a nunc pro tunc impact – the Equitable Distribution Law is just a little pregnant.

Remarriage Penalty

Johnson affirmed a credit to the wife for 50% of the husband's support obligations and property distribution payments to his first wife and children based on "ample authority" that "marital funds should not be used to pay off separate liabilities' ... the inequity may be remedied by permitting the injured spouse to recoup his or her equitable share of the marital funds so used." The majority delivered a grim message: "such is the lot of any individual who enters into a marriage with outstanding debt"– the obligation to a prior family is no different from "educational debt, credit card debt, or any other separate financial obligation."[6] The second spouse, without more, automatically receives a judicially crafted deferred savings plan immediately upon marriage to a spouse who has outstanding financial responsibilities and liabilities to a prior spouse. Although it is uncertain to what extent it may have been influenced by *Johnson*, the Second Department tersely and unanimously reached the same conclusion,[7] two months to the day after *Johnson*.

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[6] The dissent rejected the analogy.

[7] Mahoney-Buntzman v. Buntzman 2008 WL 2066586, 2008 N.Y. Slip Op. 04476 (2nd Dept., 2008).

Justice James McGuire's cogent dissent, joined by Justice David Friedman, raises powerfully inescapable issues grounded in "bad public policy":

> Such an award raises the spectre of a remarriage penalty that will loom over many second marriages. Remarriage will be discouraged in the first instance whenever the previously divorced spouse is under an obligation to make maintenance, child support or equitable distribution payments to his or her first spouse. The longer the second marriage lasts, the greater the potential financial penalty if it also ends in divorce ... this remarriage penalty will encourage the remarried spouse to file for divorce sooner rather than later if the second marriage encounters difficulties ... the penalty inflicted on the spouse who must pay once again a substantial portion of all maintenance, child support and equitable distribution payments that he or she previously paid to a first spouse also represents a windfall to the recipient spouse.

Applying *a fortiori* reasoning, the dissent could not reconcile precedent authority from its own Court: *Kohl v. Kohl*[8] held that "money given by the husband to his former wife and children [as a nonenforceable debt such as spousal maintenance, etc.] [was not] a wasteful dissipation of marital assets. Such gifts were not unreasonable in relation to the husband's income and were consistent with the type of gift giving he had engaged in throughout his marriage to the wife ..."

> The conflict is palpable. If a spouse is not on the hook upon the dissolution of a second marriage for 50% (or any portion) of the amount of payments made during the second marriage to a former spouse and the children of the earlier marriage that are gratuitously made but are not unreasonable in relation to the donor spouse's income, it makes no sense to conclude that a spouse is on the hook upon the dissolution of a second marriage for 50% of the amount of such payments when they are required by law to be made and also are not unreasonable in relation to the income of the spouse obligated to make the payments. No rational public policy could support a rule of law that thus favors the making of the gratuitous payment even as it discourages the making of the legally required payment.

Moreover, the dissent advanced an "assumption of the risk-like" theory, that the wife was aware, before marrying the husband, of the terms of his prior judgment of divorce and must have perceived compensating benefits as a result of the marriage:

> With the 'good' of the husband's divorce judgment (i.e., the ability to marry the husband and the benefits, tangible and intangible, she realized over the course of their marriage), the wife took the 'bad' (i.e., the husband's financial obligations to his former spouse and their children).

The dissent further queried "the lot of an individual" who enters into a marriage with a moral obligation to a charitable organization? If that individual consistently earns significantly

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[8] Kohl v. Kohl 24 A.D.3d 219 (1st Dept., 2005).

more income than his or her spouse and contributes significant amounts annually, is the other spouse entitled to 50% of all the contributions?

Unaddressed in *Johnson* is why the wife was entitled to a full 50% credit of all spousal maintenance payments without any recognition for allowable deductions realized therefrom from which she, too, benefitted – double dipping. The "penalty" is paid out as a nontaxable property distribution with the payor realizing absolutely no relief. This translates into an impermissible windfall to the wife.

Burden to Value

Before the marriage, the husband owned a small home and a tenant house on approximately 160 acres of land, which underwent an ongoing $2 million lavish remodelling throughout the marriage. All improvements were deemed 100% marital, including the wife's work and the marital funds used for the improvements. The husband was credited with a separate property value. Citing *Ritz v. Ritz*,[9] the Appellate Division reduced the wife's share of the property's appreciation from 50% to 25% because "[m]arket forces over the approximately 11 years of marriage accounted for *some* [unquantified amount] of the property's increased value" thereby giving the husband a *sua sponte* "market force" credit notwithstanding the absence of any such formal evidence.

Despite the many variances from settled law in *Ritz,*[10] *Johnson* misapplied that decision in that *Ritz* had penalized the husband for not having proffered evidence apportioning the appreciation of his premarital apartment as between his efforts and those attributable to market forces:

> The enhanced value was to be determined from the date of acquisition [prior to the marriage], not the date of commencement, because the court was only provided with a dollar figure for the former, not the latter ... since defendant produced no evidence as to the amount of increase due to passive market forces as opposed to his direct efforts, we will not disturb the classification that the entire increase was marital property.[11]

Recoupment of Support Overpayment

Restitution or recoupment of support overpayments has always been rejected on strong

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

[10] E. Scheinberg, ·Burden of Proof and Rights to Appreciated Separate Property, NYLJ 4/28/06.

[11] Ritz, id.

public policy grounds.[12] A broadening trend in the First,[13] Second,[14] and Third[15] Departments is reversing this policy by means of nomenclature which permits property award adjustments to compensate for excessive *pendente lite* awards.

Without explanation, the majority held (the dissent agreed) that "[e]quity requires that the husband be awarded a distributive credit for [] the amount that his pendente lite support payments exceeded what he would have been required to pay consistent with the final maintenance award." This is troublesome because property distribution and spousal maintenance are inextricably intertwined.[16] The statutory sequence prioritizes property distribution (DRL § 236B(5)) over spousal maintenance (DRL § 236B(6)) in that property awards and their income generating potential must be determined ahead of maintenance allocations.[17] During the pendency of the *Johnson* case, the wife had not yet been in possession of any income generating assets. This can be remedied with retroactive interest on the distributive award.

Rehabilitative Maintenance

The wife, 51 years of age, at the time of the commencement of the action, had been out of the work force as an attorney for nine years. *Johnson* affirmed a six-year $6,000 monthly rehabilitative maintenance award because she required at least six years to achieve her vocational goals for a career in photography. Puzzling: why is vocational training appropriate for an attorney with an annual history of $220,000 as a corporate vice-president at Walt Disney?

Joint Risk

The First Department underscored that when parties jointly enter into a venture involving risk they jointly share the risk of loss, "there is no basis in law or equity to now shield the wife from the economic consequences of a shared decision." No cherry picking.

Conclusion

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[12] Annette M.R. v. John W.R. 45 A.D.3d 1306 (4th Dept.,2007); Rodgers v. Rodgers 98 A.D.2d 386 (2nd Dept., 1983), appeal dismissed, 62 N.Y.2d 646 (1984); Rosenberg v. Sack 46 A.D.3d 1273 (3rd Dept.,2007).

[13] Pickard v. Pickard 33 A.D.3d 202 (1st Dept., 2006), appeal dismissed 7 N.Y.3d 897 (2006); Gad v. Gad 283 A.D.2d 200 (1st Dept., 2001).

[14] Galvano v. Galvano 303 A.D.2d 206 (2nd Dept., 2003).

[15] Fox v. Fox 306 A.D.2d 583 (3rd Dept., 2003), appeal dismissed 1 N.Y.3d 622 (2004).

[16] Kaplan v. Kaplan 82 N.Y.2d 300 (1993).

[17] Grumet v. Grumet 37 A.D.3d 534 (2nd Dept., 2007), lv. to appeal denied, 9 N.Y.3d 818 (2008); Griggs v. Griggs 44 A.D.3d 710 (2nd Dept., 2007).

Spouses with financial obligations to prior families are well advised to enter into prenuptial agreements to insulate against the automatic (up to) 50% remarriage penalty. This provision must be specified individually because courts may not infer provisions into agreements.[18]

[18] Nichols v. Nichols 306 N.Y. 490 (1954).