The Asymmetric Pre-Classification Of The Appreciated Marital Residence[1]

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In *Fields v. Fields*,[2] the Court of Appeals infixed asymmetry into a complex arena dominated by statutory guidelines and a substantial body of decisional authority. The Court, counterintuitively: misapplied the plain statutory language in Domestic Relations Law (DRL) § 236B[1][d], which identifies separate property, by inexplicably confirming a *fait accompli* special status on marital residences acquired with separate property down payments, although the Legislature never did so; improperly linked DRL § 236B[1][d][1] with DRL § 236B[1][d][3]; and shifted the nontitled-spouse's burden of proof in an appreciated separate asset acquired with separate property to the titled-spouse because of no more than the nature of the asset. The Court further failed to apply its own precedent authority regarding the dichotomy between active-passive assets and the nexus of effort by the titled-spouse to his separate property. The cost of litigation has just risen precipitously.

In a surgically brilliant dissent, Judge Robert Smith called the decision "indefensible", "unjustified", "absurd", and "sympathy" driven that could have been remedied by a maintenance award–the First Department's opening statement similarly heralded a pity conclusion.[3] Although Judge Smith found it "easy to sympathize with the wife", a retired school teacher nine years her wealthier husband's junior, who was left for another woman after a 35-year marriage, he warned that "sympathy should be totally irrelevant to the outcome of cases":

> Court's should hold 'lower courts in check when they find highly inventive ways of reaching what seem desirable results-not to find even more inventive ways of affirming those results.' 'This record assures that sympathy rather than law will prevail. The result is a marked lack of predictability, and the sending of a message that the rules written in the statute books will not be followed. That is bad for litigants and bad for the law.'

The dissent in the First Department, penned by Justice James M. McGuire, joined by Justice James M. Catterson, is equally honed and a must read.

Background

The principal issue in *Fields* was whether the husband's one-half interest in a ten-apartment Manhattan townhouse that he purchased during the marriage with separate property, in which the parties lived for nearly thirty years, was marital property. The husband paid $130,000, with a $30,000 down payment derived from his grandparents – half in lieu of a bequest and half

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[1] N.Y.L.J., August 13, 2010.

[2] 2010 WL 2301107 (2010).

[3] 65 A.D.3d 297 (1st Dept., 2009).

on loan, which his mother agreed to repay. The balance was paid through two joint mortgages held by the husband and his mother. The husband took title in his name but later conveyed a one-half interest to his mother. The husband and his mother managed the townhouse as a formal partnership. They deposited rent proceeds into a partnership bank account from which they made mortgage payments. The parties paid rent from their incomes to the partnership. The parties shared child care expenses and parental responsibilities of their son. At the time of trial, the townhouse was valued at $2,625,000.

The Court of Appeals affirmed the First Department's conclusion that the appreciation constituted marital property subject to distribution (less a $30,000 separate property down payment credit) because the property was purchased during the marriage with the intent to use it as the family residence and was so used for nearly 30 years, albeit they lived in separate apartments for almo st 28 years. The other apartments were used as an income-generating business. The majority and the dissent declined to pass on "what type of lifestyle a 'normal' marriage should reflect or how married couples should structure their marital relationships"; "many married couples sleep in different bedrooms for a variety of reasons and such arrangements do not affect the marital property status of their homes." Both parties made economic and noneconomic contributions to their marriage and the upbringing of their son.

Distribution, **Template**

The Legislature created two categories of property, marital and separate, each circumscribed by discretely defined immutable parameters. Marital property is a strict function of status[4] attributable to time of acquisition: "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 ..." [§ 236B[1][c]]. In § 236B[1][d][1]-[4] the Legislature served up a menu of separate property classifications, excluding therefrom any appreciation in value which is attributable, in some measure, to the contributions or efforts of the nontitled spouse, whether those efforts are direct or indirect.[5] Separate property can either be a function of status [premarital assets] or of manner of acquisition during the marriage. Manner supercedes time. It is axiomatic that distribution is a function of classification: non-marital property may not be distributed.

While *Fields* noted that there is no single template that directs how courts are to distribute marital assets that were acquired, in part or in whole, with separate property funds, the fundamental premise was that the townhouse was marital property ab initio; the law "focus[es] on the marital status of the parties at the time of acquisition" which is consistent with "the fundamental purpose of the Equitable Distribution Law-the recognition of marriage as an economic partnership, in which both parties contribute as spouse, parent, wage earner or homemaker." This premise effectively vitiates § 236[B][1][d][1] ["property acquired before

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[4] DeJesus v. DeJesus, 90 N.Y.2d 643 (1997).

[5] Hartog v. Hartog 85 N.Y.2d 36 (1995).

marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse"]. In the world of litigation, *Fields* has, by inertia and the path of least resistance, just become the "template."

Marital Residences

Notwithstanding the absence of any evidence within the statute that the Legislature intended to distinguish marital residences acquired with separate property during the marriage from any other category of property similarly acquired, the majority opinion, without statutory elucidation or inquiry into legislative intent,[6] casually affirmed the unexplained judicially crafted automatic residential-pre-classification phenomenon – a possible subliminal synthesis from the word "marital" in "marital residence":

> New York courts have long treated a marital residence [] purchased after the marriage as marital property ... Even where one spouse contributed monies derived from separate property toward the acquisition of the marital residence, this has not precluded its classification as marital property where the other spouse made economic or other contributions to the residence and the marriage ...

The first and second sentences clash: the first refers to the erroneous ab initio pre-classification of marital residences, whereas the second echoes the statute [§ 236B[1][d][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"]. Moreover, these two sentences impact burdens of proof, below. In three cases, cited in *Fields*, there was no mention of any contributions by the nontitled spouses [cf., § 236B[1][d][3]].

Active-Passive Assets

Fields runs afoul of *Price v. Price*,[7] which introduced "the 'active/passive' test, which established the guidelines for determining whether the appreciation in a titled-spouse's separate property has been transmuted into marital property based on the indirect contributions of the nontitled spouse."[8] Although *Fields* cites *Price* and *Hartog*, it did not heed their admonition to mind the "nature" of the appreciated asset – real estate is typically a passive asset:

> Whether 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.[9]

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[6] Statutes § 92.

[7] 69 N.Y.2d 8 (1986).

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

[9] Price; Hartog.

The court-appointed expert, the only valuation expert to testify, testified without contradiction how "the greatest increase in value" came from market forces and renovations with which the wife had little, if anything, to do.

Separate Property Not An "Exception"

It is noteworthy that *Price* twice erred: "separate property [] is specifically described as an exception to marital property ..."[10] Nowhere in DRL § 236B did the Legislature characterize separate property as an "exception." An agreement is the only statutory "exception" to marital property [§ 236[B][1][c]] : "... *except* as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined." The entire category of separate property exists as a discrete and complete entity, not as a discretionary subclass or in the shadow of marital property. The directive in § 236[B][5][b] that "separate property shall remain such" underscores the Legislature's zealous intent to guard the integrity of separate property in the distributive ecosystem.

Fields' sweeping stroke compels a re-examination of the Court's mantra in *Price* that marital property is to be construed "broadly" while separate property is to be construed "narrowly." Each category, marital or separate, must be enforced to the broadest extent of its own statutory parameters and may not spill over into or trespass the other's domain. Although marriage is an economic partnership, the creation of separate property evidences the legislative intent that it is not the anti-matter of the partnership. Nowhere does the statutory scheme direct that separate property must yield to marital property.

Judge Smith thus aptly reframed the issue: "whether, and to what extent, the wife's 'contributions or efforts' justified treating the 100% 'increase in value of separate property' as marital property."

Exchanges

It is error to link § 236[B][1][d][1] and § 236[B][1][d][3], that an even exchange of assets is the absolute predicate towards preserving separate property classification. The plain language in § 236[B][1][d][3] confirms their independence. The majority, nevertheless, found: (1) the townhouse was not an equal "exchange for" the $30,000 separate-property down payment because it covered only a fraction of the purchase price; and (2) a "separate property" down payment does not, standing alone, classify property as separate. However, the townhouse was acquired by separate property [gift, § 236[B][1][d][1]] and an exchange of that gift [§ 236[B][1][d][3]] – neither marital status nor the march of time can alter that fact and its attendant statutory ramifications: at the time of acquisition only its appreciation remains undetermined per [§ 236[B][1][d][3]].

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[10] Price, at 11 and 15.

Nexus by Titled-Spouse

The majority found that the husband failed to prove that the mortgage payments derived solely from rental proceeds. *Hartog* and *Price* emphasized that eligibility to share in appreciated separate property based on indirect contribution requires "some nexus between the titled-spouse's active efforts and the appreciation." Once such nexus is established, the "active efforts with respect to that asset, even to a small degree, [render] [] the appreciation in that asset [], to a proportionate degree, marital property" – the active effort does not convert the entire asset into marital property. *Hartog* further underscored:

> The court must "consider[] the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors." [This statement should have been considered by the Court, in *Mahoney-Buntzman v. Buntzman*,[11] regarding the schism between the First and Second Departments as to the "substantial vs. sole cause" test necessary to lock in the commencement date of an action of an actively appreciated asset as [its] valuation date so as to preclude the distribution of its increased value beyond that point." [12]]

Fields entirely disregarded the testimony of the court-appointed expert regarding the driving market-force impact. No evidence was adduced that collecting rents caused any appreciation whatsoever. Ergo, no nexus-effort by the husband. The husband could not have possibly satisfied a higher burden of proof. Contrary to the canons of statutory construction, *Fields* gave § 236[B][1][d][3] a reading which is at variance with its plain language.

Judge Smith observed that: (1) even following discovery, the wife offered nothing to contradict that the mortgages had been paid from the tenants' rents and not marital property – "the opinions below accepted that position." "Nor was there any evidence, or any claim, that the mortgage payments exceeded the rent roll"; and (2) the entire ten-apartment townhouse was not the marital residence:

> To suggest that when parties live in an apartment the whole apartment building, if separately acquired by one of them, takes on some special "marital residence" status is to open the door to enormous uncertainty and potential abuse.

Fields found that the husband's paycheck, clearly marital property, with other [nominal] deposits into the mortgage-partnership account, towards his payment of rent constituted commingling of marital and separate property. Even if such deposits comprised a direct effort-nexus by the husband – per *Hartog*, only a minimally proportionate share of the forty-fold appreciation could, at best, have been marital, not 100%. An alternate solution, under the uncertainty of *Mahoney-Buntzman*, could allow the wife a credit for the deposited amounts.

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[11] 12 N.Y.3d 415 (2009).

[12] E. Scheinberg, 'Mahoney-Buntzman' and 'Johnson': Persisting Issues in Matrimonial Law, 6/29/2009 NYLJ 4, (col. 1).

Johnson v. Chapin

The First Department, in *Fields*, marked an inexplicable deviation from its ruling in *Johnson v. Chapin* 49 A.D.3d 348 (1st Dept., 2008), wherein, only one year earlier, it had created an implicit presumption that market forces impact the value of separate real property by "some" amount, and awarded a 25% sua sponte market-force appreciation credit sans expert testimony. Nevertheless, in *Fields*, the First Department declined to assign any market-force credit notwithstanding the lone testimony from the court's expert that the appreciation of the townhouse was primarily attributable to market forces. Has the First Department rethought *Johnson*?

Burdens of Proof

The burden to prove value rests upon the party seeking an equitable share.[13] The quantum of proof is coextensive with classification, marital or separate. A marital asset requires no more than present valuation, and a court may consider direct or indirect contributions in its distribution [§ 236[B][5][d][7]], whereas distribution of appreciated separate property depends either upon a nexus-effort to its title-holder [*Hartog*] or a direct contribution by the nontitled spouse, the latter of which requires: (1) a showing of how those contributions enhanced the value of the separate property, and (2) a quantification [via expert testimony] of the amount of the increase,[14] including baseline values, which Mrs. Fields did not do. Pre-classifying separately acquired marital residences as marital property creates a presumption in favor of the nontitled spouse by easing the quantum of proof.

In light of *Fields* and *Price* ["broad" construction], no similarly situated titled-spouse can ever meet the burden of classifying a marital residence as separate property unless there has been an equal or near equal exchange.

Indirect Contributions

Although the wife made no financial investment and did not engage in the management of the townhouse, she was awarded 35% of its value because of her direct and indirect contributions [§ 236[B][5][d][7]]:

> [She] purchased some furniture ... 'occasionally' swept and vacuumed the hall in front of the [marital] apartment entrance. She would clean up the lobby during renovations. She purchased a chandelier, $600 vacuum cleaner to clean the lobby three times a week, a $500-Formica counter top, flooring in the foyer for $700, a foyer mirror for $400, a carpet, installed a basement door and bathroom cabinets, cleaned the mailbox vestibule, swept the interior and exterior steps, used bleach to clean dog excrement from the sidewalk, and raked leaves in the backyard. During one summer, when the husband was visiting his mother in France, she took

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[13] Grenier v. Grenier 210 A.D.2d 557 (3rd Dept.,1994) [marital property]; Van Dyke v. Van Dyke 273 A.D.2d 589 (3rd Dept.,2000) [separate property].

[14] Embury v. Embury 49 A.D.3d 802 (2nd Dept.,2008).

> responsibility for disposing of the building's refuse. She washed lobby curtains, cleaned lobby windows, polished the lobby mirror, decorated the basement apartment, planted and maintained the backyard ...

Judge Smith aptly posited that while those services "can enhance the value of a building, [] they do not cause Manhattan real estate [] to increase forty-fold in value over 30 years. What does that, obviously, is the real estate market."

Heine

The majority opinion relied upon *Heine v. Heine*,[15] wherein the husband purchased a multi-apartment townhouse during the marriage with his separate property as a down payment. There were two mortgages for the balance of the purchase price. Title was placed solely in the husband's name. Justice McGuire distinguished *Heine*:[16]

> [U]nlike [] this case, the wife in Heine made substantial contributions to the building's appreciation-she supervised all of the extensive renovations thereto, and marital funds were used to pay for those renovations as well as the building's mortgage. In this case, by contrast, the wife did not supervise any (or play any role in) renovations to the building and marital funds were not used to pay for renovations to the building or the mortgages on the building.

Commingling Per Se

Surprisingly, the husband's cashing the wife's checks in the mortgage account was deemed commingling. *Fields* can be read to have abrogated the body of law which shields monies filtered through bank accounts for very brief periods resulting in an almost irrefutable presumption of commingling per se.

Conclusion

Fields is counterintuitive. Judge Smith cautioned: "the sending of a message that the rules written in the statute books will not be followed ... is bad for litigants and bad for the law." The Court used limiting language: "unique facts presented in this case", and "under these circumstances." Were that this decision might be so confined.

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[15] 176 A.D.2d 77 (1st Dept.,1992), leave to appeal denied, 80 N.Y.2d 753 (1992).

[16] 65 A.D.3d 297 (1st Dept.,2009).