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Family Law Review

A publication of the Family Law Section of the New York State Bar Association

In Memory of Stanley A. Rosen

By Brian J. Barney, Chair, Family Law Section

On November 27, 2002, the Family Law Section lost a tireless worker after a battle with cancer. Stan served our Section in many ways, including over twenty-five years as the Editorial Assistant of the *Family Law Review* and member of our Executive Committee. For all of us fortunate to have had the opportunity to have our lives touched by Stan, the spark his being added to our moments together will be truly missed.

A sentence from his obituary in the Albany *Times Union* of Thursday, November 28, 2002, provided me with the succinct statement to describe Stan to those of you who may not have been fortunate to know him: "He was a loyal friend and generous mentor to many, a consummate professional and loving family man."

Stan's surviving family includes his wife, Rosemarie Vairo Rosen; his mother, Rose G. Rosen; and his daughter, Victoria.

Stan was a principal in the law firm of McNamee, Lochner, Titus & Williams for over thirty years. Beginning in 1974, he limited his practice exclusively to Matrimonial and Family Law.

Stan volunteered many hours of service to enhancing the practice of Matrimonial and Family Law and served on the Unified Court System's Committee to Examine Lawyer Conduct in Matrimonial Matters (the "Milonas Committee") which implemented numerous changes to the practice of Matrimonial Law in 1993. In 1997, on recommendation of Appellate Division Presiding Justice Anthony V. Cardona, he was appointed by Governor Pataki to the Judicial Screening Committee for the Third Judicial Department. Stan also served as a member of the Unified Court System's Family Violence Task Force.

Stan was a frequent lecturer and author for continuing legal education programs sponsored by our Section and a quote which will live with his memory is the advice he gave lawyers on the topic of dealing with difficult adversaries: "Just bombard them with kindness, they won't know what to do."

Our Section is honored to be able to inspire future members of our profession to write on Family Law topics in memory of Stan. The Stanley A. Rosen Award is being established to be given annually for submission of an article on a Family Law topic by a law student. The award for said article, which is to be competitively chosen, is a $1,000 scholarship and publication in the *Family Law Review*.

Stan will be missed by us all, those who were fortunate to know him, those of us who were inspired and taught by his scholarly endeavors and all who practice our profession whose lives were made easier through his efforts. We will miss you, Stan.

Notes and Comments

Elliot D. Samuelson, Editor

Is It Time to Reverse *O'Brien*?

Soon after the blockbuster decision by the Court of Appeals in *O'Brien v. O'Brien*,[1] some 17 years ago, both bench and bar speculated whether the high Court would limit its holding to the fact pattern presented (the wife supported the husband during medical school and enabled him to obtain his medical license) or expand it to other persons enjoying enhanced earnings made possible by an advanced degree. At that time, few believed that the decision would become far-reaching and applied to exceptional wage earners without degrees or licenses who enjoyed enhanced earnings.[2]

The Court of Appeals had several chances to curtail the reach of *O'Brien*, but chose not to do so. Most recently, in *Grunfeld v. Grunfeld*,[3] the Court had the opportunity to revisit the merger doctrine (the professional license merged into a professional practice and, therefore, had no value), but once again failed to do so. Rather, the Court set limits on the award of maintenance when a valuation of a professional license was made, holding that the earning stream enjoyed by the professional could not be counted twice (a double dip, so to speak) and used as a basis to award maintenance when the projected income stream was used to compute the enhanced earnings that the license or degree would afford.

The *Grunfeld* case was remanded to the trial court for further computation. Justice Gish, in a well-reasoned decision, concluded that Mr. Grunfeld's law license had no residual value, since his business income stream was exhausted when maintenance was fixed for the wife. (Query: Would the same result be obtained if child support, and not maintenance, was at issue?)

Interestingly, at the time of oral argument of *Grunfeld* before the court, it was not suggested that the *O'Brien* decision had created a legal fiction that had caused severe economic hardship to a license holder, and should be reversed or modified. Rather the argument was limited to multi-tasking the income stream. Such argument, which actually rests in the constitutional rights to equal protection under the law (only a license holder is treated this way), will have to await another appeal to the high Court. Nonetheless, it is quite clear that many in the legal community believe that it is grossly unfair to value a license and a professional practice, as well as award maintenance and child support from the same income stream. No non-licensed businessman has the same economic burden placed upon him by the court. Why should a professional? It is just this unequal and unique treatment by the courts that might support a constitutional attack upon such application of the equitable distribution statute solely to professionals, and no other group of litigants.

In order to understand the grave injustice placed upon licensed professionals, consider the following hypothetical examples:

A college graduate begins a wholesale food distribution business during the parties' 30-year marriage. At the time of divorce, the business is valued at $300,000. The wife gave up her career to raise the children. Both parties are in their fifties. Here, only the business will be valued, and the wife is likely to obtain non-durational maintenance.

Another college graduate obtains a law license and starts a small general practice during the parties' 30-year marriage. At the time of divorce, the lawyer earns $300,000 a year. The parties are also age 55. The wife never worked, and raised the children. Here, both the license and practice will be valued, and the wife is also likely to receive non-durational maintenance.

The businessman, in our example, will be exposed to paying the wife in equitable distribution, one-half (or $150,000) of the appraised value of his business. Or he might elect to sell the business and pay the wife one-half of the net proceeds received. The lawyer has no such option. He will have a value placed on his license based upon his remaining work life of ten years, producing enhanced annual earnings of approximately $2,000,000 ($200,000 more than the average college graduate x 10 = $2,000,000), discounted to present value, yields a present value of about $900,000.) The license

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Entitlements to Refunds of Transmuted Separate Property

By Elliott Scheinberg

Divorce law, to wit, the grounds therefor and all related incidental relief, is a creature of the legislature and may neither be abridged nor expanded in any manner other than via legislative fiat.[1] In Domestic Relations Law (DRL) section 236B the legislature created two categories of property: separate and marital. DRL § 236B(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial action, regardless of the form in which title is held." It is settled law that marital property is to be broadly construed to include property acquired during the marriage and that separate property is to be narrowly construed; the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property[2] by adequately tracing the source of the funds.[3] Any property not specifically excepted by statute as separate is presumed marital.[4]

When a party possessed of separate property alters its status by adding the other's name to the asset or otherwise commingles the asset with marital property, that newly created property is, generally, although not absolutely, converted into marital property.[5] The issue, therefore, becomes to what extent, if any, is the newly endowed spouse entitled to share in that portion of the newly created marital asset which had formerly been separate property? The answer is that with some slim exceptions the answer is almost never. In *Sorrell v. Sorrell*[6] and *Angst v. Angst*,[7] the Second Department emphasized that the transfer of title to property during the marriage "is not determinative on the issue of whether the property is separate or marital in nature." Furthermore, since equitable distribution does not mean equal[8] a court is, thus, free to fashion a fair result which contemplates the origin of the asset.

The Doctrine of Separate Property Origination —Traceability of Assets— and the Principle of Dollar-for-Dollar Credit

Since the early 1980s, in a rare instance of statewide judicial unanimity, appellate courts began to carve out exceptions from the formerly perceived inviolable notion that transmutations of separate property into joint names irretrievably converted the transferred/commingled property into marital property subject to equitable distribution, thereby, having, thus, imbued the formerly non-titled spouse with an interest in the asset including that portion which was formerly held as separate property. It has since been uniform and consistent judicial policy in all the Appellate Departments to credit the spouse who transmuted his/her separate property with a dollar-for-dollar credit, without any interest, as and for the original value of the separate asset.[9] Courts have generally rejected a theory of compensation to the original owner which would have converted the value of the initial contribution into a percentage of the entire asset (as of the date of its creation) and would have subsequently distributed the asset along those percentage lines.

As discussed below, a spouse is entitled to recoup the initial contribution of separate property into the marital fisc provided that: (1) the origin of the asset can be traced, *even if by presumption*, and (2) the asset was not commingled with other existing marital assets sufficient to mask its separate identity.[10] Furthermore, not only have courts refunded the original value of the separate property, credit is given for any separate property used to repay marital loans or debts.[11]

Coffey v. Coffey and *Duffy v. Duffy*

Duffy,[12] and *Coffey, supra (fn. 5)*, were among the landmark decisions which awarded the recoupment of the full value of the separate property which had been transmuted into the marital asset. In *Coffey* the husband had inherited a home which he conveyed to himself and to his wife as tenants by the entirety. Six years later the home was destroyed by fire. From funds realized from an insurance settlement and the sale of the land, six $10,000 certificates of deposit were purchased in the names of both parties. The Appellate Division held that the wife was not entitled to any distribution of the assets realized from the formerly held separate property and awarded the husband a credit for the contribution of his separate property toward the creation of the marital asset:

> With respect to the six certificates of deposit, while they were purchased with funds derived from marital property (the former residence of the husband's mother which the husband conveyed to himself and his wife as tenants by the entirety), the husband must be credited with creation of the marital asset (cites omitted) and must also, therefore, receive a 100% credit for the acquisition of the certificates of deposit. Thus, the wife is entitled to none of the principal from the certificates.

Coffey further underscored that it affirmed the lower court's award to the wife of 50 percent of the interest realized from the aforementioned certificates because the parties had "customarily" used those proceeds for household and other expenses. The Appellate Division emphasized three guiding principles in the distribution of property:

> that the distribution of each item of marital property need not be on an equal basis;
>
> that property acquired during a marriage should be distributed "in a manner which reflects the individual needs and circumstances of the parties," and
>
> that courts possess the flexibility to tailor decrees appropriate to a given situation, **with fairness being the ultimate goal.**

Monks v. Monks

In *Monks*,[13] the parties owned two homes that had been purchased by the husband prior to the marriage. After two months of marriage the husband transferred the homes to himself and his wife as tenants by the entirety. The husband testified that the transfer was not intended as a gift but rather to facilitate the transfer of property to the wife in the event of his death. Citing *Coffey*, the Appellate Division reversed an award of a nearly equal division of the properties for failure to credit the husband for "the contribution of his separate property toward the creation of the marital assets."

Dunn v. Dunn

In *Dunn*,[14] the wife had brought $63,000 of separate property into the marriage which was used to fund an intricate and complex chain of purchases and sales of various properties. The Third Department held that the money eventually lost its separate identity and became a marital asset.

> The $63,000 was first used by the parties in the purchase of a home in the State of Washington for $105,000, which the parties held jointly. When the Washington home was sold, the parties invested the proceeds in a house and acreage in Georgia, which was also held jointly. Sale of the Georgia property resulted in a substantial profit, which included a net cash payment of $250,000, whereby the parties recouped their initial investment, including the $63,000 of plaintiff's separate property.
>
> The $250,000 was deposited in a joint bank account and cash from the account apparently was subsequently used in the purchase of two separate jointly held parcels of real property in New York.

Dunn further found that the parties "jointly expended a substantial sum of money in the purchase of antiques and other personal property," concluding that it was the intent of the parties to treat their assets indistinguishably as assets of the economic partnership created by their marriage. The Third Department did not, however, offer any further facts behind its decision, such as: (a) the husband's contributions, if any, to assist the wife in the purchase, development, or management of the properties in Washington and Georgia, (b) the source of funds used to buy the various antiques and personal property, (c) were the moneys derived from the joint account that was initially created by the wife's $63,000 or from some other account, (d) how long did the money stay in the joint account before being shifted, i.e., was the money in that account for convenience purposes, was it an active marital account, etc.

It had been argued that *Dunn* augured a possible departure from the progressive judicial trend of refunding separate property in the Third Department. It is, nevertheless, clear from subsequent Third Department holdings, to wit, *Maczek (see, fn. 13)* and *Myers*[15] that such was never the Third Department's intention.

Significantly, *Myers* stressed that *Dunn* was not to be applied broadly but rather was to be limited to its facts.

> We further conclude that Supreme Court properly credited defendant for her separate property in the amount of $10,000 representing the money she invested in the parties' cash purchase of their first marital dwelling . . . In our view, defendant's investment did not lose its character as separate and traceable funds when the marital residence was subsequently mortgaged and the proceeds of the mortgage invested in the parties' purchase of the Jackson Avenue investment property in 1974 . . . Plaintiff's reliance on our holding in *Dunn v. Dunn*, 224 AD2d 888, 638 N.Y.S.2d 238, is unavailing; there, unlike here, the proceeds of the sale of the second marital residence were deposited in a joint bank account, thereby losing their separate identity.

Traceability of the Separate Property Even if by Presumption

To secure the originator of an asset with a proper credit for his/her contribution, courts presently conduct

fine-tuned analyses and reviews in order to carefully track the origin of formerly held separate property, including the application of a lesser evidentiary threshold which allows the acceptance of a mere showing that *there may be a greater likelihood than not* that an asset's existence is attributable to a party's separate property—notwithstanding any subsequent multiple transmutations or rollovers since the original transfer of the asset into joint names.[16] This is so notwithstanding the caselaw which stands for the proposition that a failure to submit proof of one's claim to "separate property" constitutes a waiver of the claim.[17]

Carney v. Carney

In *Carney*[18] the Appellate Division awarded the husband 100 percent of a building and its appreciation where he was able to specifically prove that the building had been his separate property. The court, however, denied the husband any further origination of asset credits regarding the remaining assets because:

(i) "because the husband could not **specifically** trace the source of the funds" used to make the purchase of another property; and

(ii) because the husband had "commingled" his separate property "with assets in a joint account."

The requirement in *Carney* of a specific tracing of funds is a greater degree of proof than "the greater likelihood than not" test, *supra*.

Sarafian v. Sarafian[19]

If ever there was a case where the non-titled spouse (the wife) was tortured and victimized by the husband, ever-deserving of pity and of every available form of equitable relief that a court could bestow, including an award of some percentage of the husband's separate property, *Sarafian* was it. *The court, nevertheless, did not grant her any portion of any assets which were clearly traceable to the husband's separate property.*

The parties began dating when the husband was 64 and the wife 16. The husband used to take her to his abandoned chicken farm where he would have sexual relations with her. The wife's parents were induced into giving their blessings to the marriage due to the husband's purchase of a home for them. Thereafter, four children were born of the marriage.

At the time of the marriage the defendant husband owned: (1) his family's 67-acre chicken farm, (2) two apartment buildings, and (3) a two-family dwelling. Subsequent to the marriage, the husband sold both apartment buildings along with his jewelry business and purchased $400,000 in Treasury bonds. Thereafter, he sold his two-family house and bought an additional $100,000 Treasury bond.

The husband had renovated a "chicken coop" building that he had on his family-owned farm into the marital residence. The husband continued to receive $40,000 a year from his Treasury bonds plus monthly social security payments of $548 for himself and $516 for his children. He also obtained additional cash by selling jewelry that he retained from the sale of his liquidated jewelry business. In 1983 he purchased J.D.'s Dairy Bar for $175,000—$75,000 in cash and the balance in the form of a purchase money mortgage.

During the wife's pregnancy with their last child the husband began to drink heavily because the wife would not abort the child. He called her his slave, threatened to kill her, and forced her to withdraw from two college classes. After the plaintiff injured himself, thus precluding him from operating the business, the wife operated the business and cared for the new baby.

The wife eventually moved out with the children.

The *Sarafian* Ruling

The court characterized the husband as a "depraved," "dishonest," and "deceitful" older man who committed "heinous" acts of statutory rape against his wife, "thus violating all our standards of morality and tolerable conduct" and who, after having dated and "rented" the plaintiff, "bought" and married her. The court also described the wife as a "victim of her parents and the defendant" and found her to be "a loving caring, devoted and competent mother."

It is critical that during the trial "in any relevant conflict in testimony, the court credited plaintiff's [wife] account." The court further stated "that these characterizations of the parties affected equitable distribution to a 'tangential degree.'" Notwithstanding the vile and repulsive nature of this case, the appellate court began its analysis by reciting some of the underlying fundamentals of equitable distribution:

(1) that "'marital property" is to be construed broadly in order to give effect to the 'economic partnership' concept of the marriage relationship";

(2) that "'separate property' should be construed narrowly"; and

(3) that "the distribution, based on the factors enumerated in the statute (Domestic Relations Law § 236 [B] [5] [d]), must be equitable, not merely a 50/50 split of assets."

Mr. Sarafian's Traceability of Assets

Accordingly, the Appellate Division reversed *nisi prius'* award of a portion of the Treasury bonds to the wife, underscoring that the conclusion was inescapable that the purchase of the bonds could not have come

from any other source but from the sale of the husband's various assets, thereby rebutting the presumption that they were marital property merely because of their acquisition after the marriage. The husband was also given a credit for the value of the marital residence at the time of the marriage, granting the wife a portion of the appreciation due to her efforts in the reconstruction of the "chicken coop" into the marital residence.

In *Galachiuk*,[20] the Third Department repeated its reasoning behind *Serafian:*

> In Sarafian, although defendant failed to trace specifically the source of funds for the purchase of Treasury bonds, he proved that, prior to purchasing the bonds, he had sold specific assets that were his separate property. The court held that the conclusion was inescapable that the current assets were purchased with funds obtained from the sales of separate property.

Heine v. Heine

In *Heine*,[21] a marriage of 20-plus years, the parties purchased a townhouse six months after their marriage which was financed by two mortgages totaling $213,000 and a down payment of $54,500 originating from the husband's separate property. The court applied a *Serafian*-like analysis to reimburse Mr. Heine's original $54,500 down payment, notwithstanding the fact that his testimony was uncorroborated. The court observed that although the husband could not remember nor prove, via brokerage records, how many shares of stock he had sold twenty years prior to fund the aforementioned down payment, Mr. Heine had been possessed of substantial assets while the wife had none, leading to the inference that "this circumstance fairly compels the conclusion that the down payment came from his pre-marital assets."[22]

Feldman v. Feldman

At issue in *Feldman*,[23] a marriage of over 40 years duration, was whether the lower court had properly determined that certain property acquired by the husband through gifts and bequests remained his separate property, even though some separate funds were commingled with marital funds or used for the support of both parties. Complex and multiple commingling of separate property notwithstanding, *Feldman* specifically looked to the source of funds as the predicate for its characterization as either separate or marital. Nor did Mr. Feldman's poor record-keeping divest him of his original separate assets. The Appellate Division noted that since the funds could not have been attributable to a source other than the husband, the money was, thus, awarded him as his separate property. Again, a *Serafian*-like evidentiary standard.

Separate property credits are disallowed only after commingling which results in the loss of its separate identity.[24] The holdings in *Heine* and *Feldman* are further noteworthy because of the pervasive rule that although courts are not bound by a party's own representation of one's own assets[25] they accepted uncorroborated testimony.

Lolli-Ghetti v. Lolli-Ghetti

In *Lolli-Ghetti v. Lolli-Ghetti*,[26] the husband made a $67,840 contribution of separate property toward the purchase of the first marital residence. The court held that the wife, through her active efforts, had contributed toward the appreciation of the husband's separate property and had *thereby acquired an interest in the separate property which interest was rolled over and continued to grow as the parties continued to buy and sell subsequent residences.* Notwithstanding the rollover of the sale proceeds into subsequent residences, the Appellate Division also held that the original $67,840 had never lost its characteristics or identity of separate property and refunded the entire amount to the husband.

The conundrum in this decision is that the Appellate Division held that the wife's acquired interest in the separate property "was rolled over and continued to grow as the parties continued to buy and sell subsequent residences." Thus, what had happened was that while the contributor of the separate property was limited to an exact dollar-for-dollar credit for its original value, irrespective of the number of times the houses were rolled over, the wife's newly acquired interest in the separate property was awarded to her in a manner where it continued to appreciate, not dollar-for-dollar, thus, effectively penalizing the husband.

Verrilli v. Verrilli

In *Verrilli*,[27] the Appellate Division denied the husband any credit for alleged contributions of separate property because:

a. it appeared that the source of funds used to acquire the various properties was from the pooling of separate funds into a joint account and that such commingling of assets justified characterizing the property as marital with no credit to either party for individual contributions of separate property; and

b. in addition to delivering vague and inconsistent answers during the trial, the husband was unable to provide any documentary evidence in support of his assertions regarding the funding sources.

Verrilli did, however, note that had the husband substantiated his allegations regarding the origins of separate property he would have received a credit for his contributions.

In *Karounos*[28] the Appellate Division reduced from 50 percent to 15 percent the distributive award to the wife of the marital residence which had been the husband's separate property. The analysis behind the decision is a bit troubling:

> The husband purchased this house for $26,000 in 1963, six years before the marriage. Upon their marriage, the wife moved into this house. In the house, the husband had a beauty shop, where the wife worked as a hairdresser for the first year of the marriage, contributing her earnings to the household. The parties lived in the house for at least three years before they moved to the most recent marital residence. In 1983, the husband sold the house for $120,000, and gave an $81,000 purchase money mortgage to the buyer. The husband used $18,000 from these proceeds to satisfy the outstanding balance on the mortgage he had on the marital residence. The husband testified that he used part of the proceeds to renovate the bathroom in the most recent marital residence and placed the remaining proceeds in his [bank account] [sic].

Karounos noted that after their marriage the wife worked for three years in a beauty business operated out of the marital residence. Citing *Price*, the Appellate Division held that the wife was entitled to some award from the appreciated value of the husband's separate property resulting from her contributions to the husband's separate property across a three-year period. (This writer is not entirely certain if and how the Appellate Division considered the wife's three years of employment in the husband's business as a hairdresser, albeit that it was out of the home, as a basis for having acquired an ownership interest in the separate property because she would have been entitled to receive a portion of the EEC in the business as her enhanced compensation.)

> At bar, the record sufficiently demonstrates that the wife's monetary and nonmonetary contributions to the marriage and household justified awarding her a portion of the appreciation value (see, Robinson v. Robinson, 166 AD2d 428, 429-430, 560 N.Y.S.2d 665). However, since the wife only demonstrated that she contributed to the value of the house during the first three years of her marriage, her share in the appreciation of the value of the house should be limited to 15%, i.e., 3 years out of the 20 years that the husband owned the house. Additionally, the husband should be credited for $15,300 ($18,000 that he used from the proceeds of this sale to satisfy the mortgage on the marital residence less 15% [i.e. $2,700] representing the wife's share of the $18,000) (see, Lobotsky v. Lobotsky, 122 AD2d 253, 254, 505 N.Y.S.2d 444; Monks v. Monks, 134 AD2d 334, 336, 520 N.Y.S.2d 810).
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> The husband also contends that the court erred in finding that his Manufacturers Hanover Trust account was marital property because he claimed that the balance in that account represented the proceeds from the sale of the house. This contention is without merit, because the husband clearly commingled the proceeds from the sale of the house with the marital funds that he put into this account (see, Di Nardo v. Di Nardo, 144 AD2d 906, 907, 534 N.Y.S.2d 25; Feldman v. Feldman, 194 AD2d 207, 215-216, *supra*, 605 N.Y.S.2d 777). This is demonstrated by the fact that the balance in this account fluctuated from approximately $20,000 in March 1987 to approximately $49,000 in July 1987, to approximately $70,000 in June 1991.

Gifts from a Spouse's Parents—a Judicially Created Presumption

Courts apply the doctrine of reimbursement of separate property to include any category of separate property including gifts originating from the parents of one spouse. The "presumption" is that the gift had been intended for the benefit of their child because, absent the filial relationship, the donor-parent would not have independently given a gift to the son- or daughter-in-law for which reason the child is credited if that property is transmuted into marital property.

Vogel v. Vogel

In *Vogel*,[29] the Second Department reprimanded the trial court for having refused to receive testimony regarding the intent of the donor-parent who gave $42,800 to be applied towards the purchase of a house. Referring to this gift as "arguably separate property," the case was remanded for further testimony specifically on this issue. The message was clear as to what the Appellate Division expected the trial court to do on remand.

In *McSparron*,[30] the wife challenged the trial court's distribution of assets because many of them originated from the wife's mother. Fatal to her claim was her having commingled the money in their joint account:

> . . . although there was ample testimony that plaintiff's mother did contribute large sums of money to purchase various marital assets, almost all of this money was either commingled in the parties' joint account or used to purchase jointly held property. This use of the moneys evidences plaintiff's mother's "clear intention to share it equally with [defendant]" (Brown v. Brown, 148 AD2d 377, 381, 538 N.Y.S.2d 945), which warrants treating the money and assets bought with it as marital property.

Banking Law § 675(b) and the Doctrine of Convenience

Banking Law § 675(b) gives rise to the rebuttable presumption that parties to a joint bank account are entitled to equal shares of the account. The burden of refuting the presumption rests with the party challenging it—who must, then, establish that the joint account was opened for convenience purposes only.[31] "The presumption of joint tenancy [of Banking Law § 675 (b)] may only be refuted by direct proof or substantial circumstantial proof, clear and convincing, and sufficient to support an inference that the joint account had been opened in that form as a matter of convenience."[32]

Lagnena v. Lagnena

In *Lagnena*,[33] the Second Department began its analysis by highlighting the rebuttable presumption in the Banking Law §675(a), to wit, that each named account holder holds an undivided half interest in moneys deposited into joint accounts. Citing *Krinski* and *Brezinski, infra*, the Appellate Division stated: "That presumption may be refuted by direct proof or substantial circumstantial proof, which is clear and convincing and sufficient to support an inference that the joint account had been opened in that form as a matter of convenience."

Lagnena found that the wife had successfully rebutted the presumption of joint tenancy by establishing that: (1) all of the moneys in the joint savings accounts originated with the wife, (2) the wife maintained sole control over the accounts, and (3) that the accounts were created for her exclusive convenience. Accordingly, since the moneys in the joint accounts were deemed her separate property, the marital home, which had been acquired from the wife's separate property was, therefore, not subject to equitable distribution.

Brugge v. Brugge

In *Brugge*,[34] the Fourth Department, citing *McGarrity* and *Feldman*, affirmed the lower court's finding that the money deposited by the defendant in the parties' joint checking account was her separate property. *Brugge* held that the defendant had successfully rebutted the presumption that deposits into joint accounts were transmuted into marital property by proving that the joint account "was used only as a conduit for the transfer of her capital interest from one business owned by her family to another."

The presumption of gift may also be defeated where convenience can be inferred.[35]

Gundlach v. Gundlach

In *Gundlach*,[36] the husband had received a $208,198 personal injury award which he deposited into a newly opened joint account. *Gundlach* emphasized that the failure to credit the husband for his initial contribution was attributable to his failure to prove that the joint account had been opened for convenience purposes only: "The evidence of various transfers from the joint account into and out of other accounts confirmed the plaintiff's testimony that all of the parties' money was handled jointly, regardless of the source."

Giuffre v. Giuffre

In *Giuffre, supra (fn. 32)*, the husband deposited his separate property funds into joint accounts to maximize the FDIC insurance deposit coverage. The court held that the husband had rebutted the presumption of transmutation from separate to marital.

McGarrity v. McGarrity

In *McGarrity, supra (fn. 5)*, the husband deposited inherited monies into a joint account after the physical separation of the parties primarily because the bank was conveniently located just across the street from his office. The court held: (1) that there was no donative intent despite the wife's continued access, and (2) the separate property retained its characteristic as such and was not transmuted into marital property as a result of a mere deposit.

Wiercinsky v. Wiercinsky

Similarly, in *Wiercinsky, supra (fn. 31)*, a case involving a 30-plus year marriage, the Appellate Division disallowed the claim for separate property only after the husband admitted that the account was intended for the whole family and had allowed the wife to withdraw money from the account. Critically, *Wiercinsky* held that the husband had failed "the convenience test" (unlike *McGarrity* where the wife's continued access to the account was not a dispositive factor of the issue):

> Defendant further maintains that his Social Security disability payments were the equivalent of "compensation for personal injuries" and thus properly classified as separate property not subject to equitable distribution (Domestic Relations Law § 236[B][1][d][2]). We recognize that to the extent disability payments constitute compensation for personal injuries, as opposed to deferred compensation, such payments are treatable as separate property (see, West v. West, 101 AD2d 834, 475 N.Y.S.2d 493). Assuming, without deciding, that defendant is correct in his characterization of these funds, we find that the funds became marital property when placed in the joint "pacemaker account". Banking Law § 675(b) gives rise to a presumption that the parties to a joint bank account are entitled to equal shares of that account (see, Matter of Phelps v. Kramer, 102 AD2d 908, 477 N.Y.S.2d 743; Alwell v. Alwell, 98 AD2d 549, 552, 471 N.Y.S.2d 899; McGill v. Booth, 94 AD2d 928, 463 N.Y.S.2d 333). The burden of refuting this presumption rests on the one challenging it (McGill v. Booth, supra, p. 929, 463 N.Y.S.2d 333). Here, no evidence was presented to establish that the "pacemaker account" was simply one of convenience (cf. Matter of Phelps v. Kramer, supra, 102 AD2d p. 909, 477 N.Y.S.2d 743). To the contrary, defendant testified that the funds were "meant for the whole family" and were occasionally used to cover certain household expenses. Moreover, plaintiff was allowed to make at least one withdrawal. In our view, defendant failed to rebut the presumption that a gift of these funds was made (cf. Alwell v. Alwell, supra, 98 AD2d p. 552, 471 N.Y.S.2d 899). Accordingly, the funds became marital property subject to equitable distribution.

Geisel v. Geisel

In *Geisel*,[37] the husband deposited money from his separate account into a joint account with rights of survivorship. The court held that such deposits defeated any arguments with respect to convenience because the nature of the transfer evidenced his intent to transform the property into joint property.

In *Lynch v. King*, *supra* (*fn. 37*), the court concluded that the husband's conveyance of the property to himself and his wife as tenants by the entireties evinced an intent that the wife acquire an ownership interest in the property: "By placing the home in both parties' names, the defendant changed the character of the property to marital property (see, Diaco v. Diaco, 278 AD2d 358, 717 N.Y.S.2d 635; Schmidlapp v. Schmidlapp, 220 AD2d 571, 632 N.Y.S.2d 593; Monks v. Monks, 134 AD2d 334, 520 N.Y.S.2d 810)."

The husband was nevertheless credited with his $350,000 contribution of separate property.

Conclusion

The conclusions to be drawn from the existing body of decisional authority is that the appellate courts, statewide, have universally adopted the following policies:

a. transmutation of separate assets into jointly held property is dangerous but not fatal to the recovery of the full value of the original property where the asset can be traced to separate property even if by likelihood, presumption, or circumstantial proof, and, as such, it does not irretrievably convert the initial contribution into marital property;

b. a spouse is credited on a dollar-for-dollar basis for the initial contribution of separate property which led to the creation of the marital asset unless the funds were so commingled so as to lose their separate characteristics and identity; and

c. that Banking Law § 675(b)'s presumption of donative intent is not insurmountable and can be rebutted via logical rational explanations.

This appears to be part of a trend, having evolved along parallel lines, which circumvents the potential injustices of the statute regarding property distribution which, if strictly applied, would offend our notion of equity and fair play.[38]

Endnotes

1. *Pajak v. Pajak*, 56 N.Y.2d 394, 396, 452 N.Y.S.2d 381 (1982); *Brady v. Brady*, 64 N.Y.2d 339, 346, 486 N.Y.S.2d 891 (1985).
2. *Judson v. Judson* 255 AD2d 656, 679 N.Y.S.2d 465 (3d Dep't 1998); *Seidman v. Seidman*, 226 AD2d 1011, 641 N.Y.S.2d 431 (3d Dep't 1996); *Walasek v. Walasek*, 243 AD2d 851, 664 N.Y.S.2d 626 (3d Dep't 1997); *Gotsky v. Gotsky*, 208 AD2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994); *Sarafian v. Sarafian*, 140 AD2d 801, 528 N.Y.S.2d 192 (3d Dep't 1988); *Galachiuk v. Galachiuk*, 262 AD2d 1026, 691 N.Y.S.2d 828 (4th Dep't 1999); *Leroy v. Leroy*, 274 AD2d 362, 712 N.Y.S.2d 33 (1st Dep't 2000).
3. *Heine v. Heine*, 176 AD2d 77, 580 N.Y.S.2d 231 (1st Dep't 1992), *lv. denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632.

4. *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986); *McSparron*, 190 AD2d 74, 597 N.Y.S.2d 743 (3d Dep't 1993).

5. DRL § 236B(1)[c]; *Coffey v. Coffey*, 119 AD2d 620, 501 N.Y.S.2d 74 (2d Dep't 1986); *Cunningham v. Cunningham*, 105 AD2d 997, 482 N.Y.S.2d 148 (3d Dep't 1984); *Liselza v. Liselza*, 135 AD2d 20, 523 N.Y.S.2d 632 (3d Dep't 1988); *Judson, supra*, fn. 2; *McGarrity v. McGarrity*, 211 AD2d 669, 622 N.Y.S.2d 521 (2d Dep't 1995); *Lauricella v. Lauricella*, 143 AD2d 642, 532 N.Y.S.2d 907 (2d Dep't 1988); *Askew v. Askew*, 268 AD2d 635, 700 N.Y.S.2d 594 (3d Dep't 2000).

6. 233 AD2d 387, 650 N.Y.S.2d 237 (2d Dep't 1996).

7. 273 AD2d 423, 710 N.Y.S.2d 105 (2d Dep't 2000).

8. *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58; *Coffey, supra*, fn. 5; *Butler v. Butler*, 171 AD2d 89, 574 N.Y.S.2d 387 (2d Dep't 1991).

9. *McAlpine v. McAlpine*, 176 AD2d 285, 574 N.Y.S.2d 385 (2d Dep't 1991); *Lauricella v. Lauricella*, 143 AD2d 642, 532 N.Y.S.2d 907 (2d Dep't 1988); *Coffey, supra*, fn. 5; *Parsons v. Parsons*, 101 AD2d 1017, 476 N.Y.S.2d 708 (4th Dep't 1984); the only exception that this writer was able to find was in a recent Second Department decision, *Klein v. Klein*, __ AD2d __, 745 N.Y.S.2d 569 (2d Dep't 2002), where the Appellate Division inexplicably held that the appreciation of shares of stock gifted prior to the marriage were marital property.

10. *Corasanti v. Corasanti*, 744 N.Y.S.2d 614 (4th Dep't 2002); *Jones v. Jones*, 289 AD2d 983, 734 N.Y.S.2d 796 (4th Dep't 2001).

11. *MacDonald v. MacDonald*, 226 AD2d 596, 641 N.Y.S.2d 349 (2d Dep't 1996); *Burns v. Burns*, 193 AD2d 1104, 598 N.Y.S.2d 888, *mod.* 84 N.Y.2d 369, 618 N.Y.S.2d 761; *Robertson v. Robertson*, 186 AD2d 124, 125, 588 N.Y.S.2d 43; *Litman v. Litman*, 280 AD2d 520, 721 N.Y.S.2d 84 (2d Dep't 2001); *Beece v. Beece*, 734 N.Y.S.2d 606, 289 AD2d 352 (2d Dep't 2001).

12. 94 AD2d 711, 462 N.Y.S.2d 240 (2d Dep't 1983).

13. 134 AD2d 334, 520 N.Y.S.2d 810 (2d Dep't 1987); *Maczek v. Maczek*, 248 AD2d 835, 669 N.Y.S.2d 749 (3d Dep't 1998).

14. 224 AD2d 888, 638 N.Y.S.2d 238 (3d Dep't 1996).

15. 255 AD2d 711, 680 N.Y.S.2d 690 (3d Dep't 1998).

16. *Heine, supra*, fn. 3; *Sarafian v. Sarafian*, 140 AD2d 801, 528 N.Y.S.2d 192 (3d Dep't 1988); *Feldman v. Feldman*, 194 AD2d 207, 605 N.Y.S.2d 777 (2d Dep't 1993).

17. *Greenley v. Greenley*, 175 AD2d 824, 573 N.Y.S.2d 300 (2d Dep't 1991); *Fabricius v. Fabricius*, 199 AD2d 695, 605 N.Y.S.2d 415 (3d Dep't 1993); *Kosovsky v. Zahl*, 257 AD2d 522, 684 N.Y.S.2d 524 (1st Dep't 1999).

18. *Carney v. Carney*, 202 AD2d 907, 609 N.Y.S.2d 425 (3d Dep't 1994).

19. *Sarafian, supra*, fn. 2.

20. *Galachiuk v. Galachiuk*, 262 AD2d 1026, 691 N.Y.S.2d 828 (4th Dep't 1999).

21. *Heine v. Heine*, 176 AD2d 77, 580 N.Y.S.2d 231 (1st Dep't 1992), *lv. denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632.

22. *Id.* at 84.

23. *Feldman v. Feldman*, 194 AD2d 207, 605 N.Y.S.2d 777 (2d Dep't 1993).

24. *DiNardo v. DiNardo*, 144 AD2d 906, 534 N.Y.S.2d 25 (4th Dep't 1988); *Glazer v. Glazer*, 190 AD2d 951, 593 N.Y.S.2d 905 (3d Dep't 1993).

25. *Saasto v. Saasto*, 211 AD2d 708, 621 N.Y.S.2d 660 (2d Dep't 1995).

26. 165 AD2d 426, 568 N.Y.S.2d 29 (1st Dep't 1991).

27. 172 AD2d 990, 568 N.Y.S.2d 495 (3d Dep't 1991), *lv. denied* 78 N.Y.2d 863, 578 N.Y.S.2d 878, 586 N.E.2d 61.

28. *Karounos v. Karounos*, 206 AD2d 407, 614 N.Y.S.2d 535 (2d Dep't 1994).

29. 156 AD2d 671, 549 N.Y.S.2d 438 (2d Dep't 1989).

30. *McSparron v. McSparron*, 190 AD2d 74, 597 N.Y.S.2d 743 (3d Dep't 1993).

31. *Wiercinski v. Wiercinski*, 116 AD2d 789, 497 N.Y.S.2d 179 (3d Dep't 1986); *DiNardo, supra*, fn. 24; *Pauk v. Pauk*, 232 AD2d 386, 648 N.Y.S.2d 621 (2d Dep't 1996); *Brezinski v. Brezinski*, 94 AD2d 969, 463 N.Y.S.2d 975 (4th Dep't 1983); *Haas v. Haas*, 265 AD2d 887, 695 N.Y.S.2d 644 (4th Dep't 1999); *Jones v. Jones*, 289 AD2d 983, 734 N.Y.S.2d 796 (4th Dep't 2001).

32. *Rosenkranse v. Rosenkranse*, 290 AD2d 685, 736 N.Y.S.2d 453 (3d Dep't 2002); *Brezinski v. Brezinski*, 94 AD2d 969, 463 N.Y.S.2d 975 (4th Dep't 1983); *Krinsky v. Krinsky*, 208 AD2d 599, 618 N.Y.S.2d 36 (2d Dep't 1994); *Gundlach v. Gundlach*, 223 AD2d 942, 636 N.Y.S.2d 914 (3d Dep't 1996); *McCanna v. McCanna*, 274 AD2d 949, 711 N.Y.S.2d 822 (4th Dep't 2000); *FDIC v. Koffman*, 849 F. Supp. 176; *see also, Giuffre v. Giuffre*, 204 AD2d 684, 612 N.Y.S.2d 439 (2d Dep't 1994); *Anderson v. Anderson*, 286 AD2d 967, 731 N.Y.S.2d 108 (4th Dep't 2001); *Koehler v. Koehler*, 182 Misc. 2d 436, 697 N.Y.S.2d 478 (N.Y. Sup., 1999); *Lagnena v. Lagnena*, 215 AD2d 445, 626 N.Y.S.2d 542 (2d Dep't 1995).

33. 215 AD2d 445, 626 N.Y.S.2d 542 (2d Dep't 1995).

34. 245 AD2d 1113, 667 N.Y.S.2d 180 (4th Dep't 1997); *Anderson v. Anderson*, 286 AD2d 967, 731 N.Y.S.2d 108 (4th Dep't 2001); *McCanna v. McCanna*, 274 AD2d 949, 711 N.Y.S.2d 822 (4th Dep't 2000).

35. *In re Bobeck*, 143 AD2d 90, 531 N.Y.S.2d 340 (2d Dep't 1988); *Brezinsky, supra*, fn. 32; *Chambers v. Chambers*, 259 AD2d 807, 686 N.Y.S.2d 199 (3d Dep't 1999); *Brugge, supra*, fn. 34; *Kosovsky, supra*, fn. 17.

36. *Gundlach v. Gundlach*, 223 AD2d 942, 636 N.Y.S.2d 914 (3d Dep't 1996) *lv. to appeal denied*, 88 N.Y.2d 802, 645 N.Y.S.2d 445 (1996).

37. 241 AD2d 442, 659 N.Y.S.2d 511 (2d Dep't 1997); *Schmidlapp v. Schmidlapp*, 220 AD2d 571, 632 N.Y.S.2d 593 (2d Dep't 1995) ("Although the unimproved lot was the wife's separate property prior to the marriage, she transferred title to the property to herself and the husband as tenants in the entirety after they were married. Thus, the character of the property was changed from separate to marital property."); *Dinco v. Dinco*, 278 AD2d 358, 717 N.Y.S.2d 635 (2d Dep't 2000); *Lynch v. King*, 284 AD2d 309, 725 N.Y.S.2d 391 (2d Dep't 2001).

38. *Musumeci v. Musumeci*, 133 Misc. 2d 139, 506 N.Y.S.2d 629 (N.Y. Sup., 1986); *Anglin v. Anglin*, 80 N.Y.2d 553, 592 N.Y.S.2d 630 (1992); *Lamba v. Lamba*, 266 AD2d 515, 698 N.Y.S.2d 715 (2d Dep't 1999); *Gonzalez v. Gonzalez*, 240 AD2d 630, 659 N.Y.S.2d 499 (2d Dep't 1997); *Thomas v. Thomas*, 221 AD2d 621, 634 N.Y.S.2d 496 (2d Dep't 1995); *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683 (1982); *Cappa v. Cappa*, 212 AD2d 1056, 624 N.Y.S.2d 1012 (4th Dep't 1995); *Kane v. Kane*, 163 AD2d 568, 558 N.Y.S.2d 627 (2d Dep't 1990); also, see the conclusion of the court in *McMahon v. McMahon*, 187 Misc. 2d 364, 722 N.Y.S.2d 723 (N.Y. Sup., 2001); *O'Connell v. O'Connell*, 290 AD2d 774, 736 N.Y.S.2d 728 (3d Dep't 2002).