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FAMILY LAW

Sorting Out Premarital Assets

Single professionals are acquiring more assets prior to marriage, which means more to equitably divide during a divorce

By Nicole T. Donoian

Times are changing. As more working professionals continue to postpone marriage until later in life, the way in which family law practitioners must resolve equitable distribution issues grows more fact sensitive.

Today many professional men and women elect to “tie the knot” only after their respective careers are firmly established, and only after they have amassed a considerable amount of wealth or assets, including real estate, retirement accounts and investment portfolios. Years ago, many women went from their parents’ homes to their marital homes. These days, however, increasing numbers of single men and women already own their own home and then, as husband and wife, move into a premarital asset after marriage. Today, as many professionals have their own savings or investment accounts, they may add their

Donoian is a member of the Family Law Practice Group at Flaster/Greenberg of Cherry Hill and served as the Young Lawyer Trustee of the Camden County Bar Association.

new spouse’s name to the account after marriage. Does that make such an account subject to an equitable distribution?

During an initial interview with a prospective client, it is vital that the practitioner establish from the outset exactly which assets and liabilities existed prior to the marriage. Of course, the inquiry does not stop there. It is just the beginning of what is likely to become a maze of who paid for or contributed to what, who gifted what to whom, and what contributions were made to premarital assets during the marriage. By the time the inquisition is complete, your client may feel like there is no information about his personal finances that you have not uncovered. Yet, to properly address equitable distribution, practitioners must engage in an exhausting line of questioning to determine which assets, if any, are on the chopping block.

As practitioners we must: 1) identify all property subject to equitable distribution; 2) value the property subject to equitable distribution; and 3) divide the property. *Rothman v. Rothman*, 65 N.J. 219, 232 (1974). A number of factors, including the age and health of the parties, the length of the marriage, the parties’ respective earning capacities and education, child care responsibilities, the income and property each party brought into the marriage, the parties’ financial contributions to the marriage, debts, liabilities and other relevant fac-

tors come into play when distributing an asset. N.J.S.A. 2A:34-23.1 Identifying those assets subject to distribution can be most challenging in today’s era of established professionals bringing premarital assets into a marriage. While your client may tell you that he or she owned an asset prior to marriage, there are many ways in which that once exempt asset became subject to distribution and it is this inquiry that is crucial to effective representation.

Long ago, the basic rule was that assets owned by one spouse before marriage will not be subject to equitable distribution. *Painter v. Painter*, 65 N.J. 196 (1974). Unless the nonowner spouse can show that he contributed in some way to the asset’s increase in value, the immunity will extend to an increase in the value of the asset during the marriage. *Id.*

Once premarital assets are identified, the practitioner must then determine if the asset(s) are active or passive. A passive immune asset increases solely as a result of market conditions and is not subject to equitable distribution. *Scavone v. Scavone*, 230 N.J. Super. 482 (Ch. Div. 1988), *aff’d*, 243 N.J. Super. 134 (App. Div. 1990). On the other hand, active immune assets involve contributions and efforts by one or both spouses toward the asset’s growth and development, which directly increase its value. *Id.* “When the increase in value [in an active immune asset] is brought about solely through the efforts of the owner, that value is undistributable. Conversely, when such value is derived, in part or in whole, from the efforts of the non-owner, the appreciation is sub-

ject to distribution.” *Valentino v. Valentino*, 309 N.J. Super. 334, 338 (App. Div. 1998) citing *Scavone*, 230 N.J. Super. at 488. The increased value of the active immune asset is subject to distribution to the extent that the increase is attributable to the expenditures or effort of the nonowner spouse. *Valentino*, 309 N.J. Super. at 338. Accordingly, one must determine the extent to which the original investment was enhanced by contributions of either spouse. *Id.*

The spouse claiming asset immunity bears the initial burden of demonstrating that the asset is not subject to distribution. *Sculler v. Sculler*, 348 N.J. Super. 374, 380 (Ch. Div. 2001). This raises a rebuttable presumption that any subsequent increases in value will also be immune. The nonowner spouse must then show that 1) the value of the asset increased during the marriage; 2) the asset was one that could increase in value as a result of the parties’ efforts; and 3) the increase in value can somehow be linked to the nonowner spouse’s efforts. *Id.* at 381.

Contributions do not have to be actual, physical on-site work. Our courts have long recognized that a homemaker’s contributions and entitlement to an asset can stem from the fact that their work at home and efforts caring for the family’s children enabled the other spouse to devote time and effort to a pre-marital asset such as a business or property. *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401 (App. Div. 1975), cert. denied 69 N.J. 391 (1976); *Weiss v. Weiss*, 226 N.J. Super. 281, 290 (App. Div. 1988), cert. denied 114 N.J. 287 (1988). So while your 30-something client may plead to you that her spouse never worked in the business that she alone created and runs, this may not be a point of contention strong enough to exempt it from distribution.

For example, your client may advise you that he owned a commercial property prior to marriage and that his wife had nothing to do with this property. Nonetheless, the property’s appreciation may be subject to equitable distribution. While the wife did not make improvements to the property or work there, her expenditures of time and

effort at home and to the parties’ child allowed the husband to devote his time to this property and work to pay down the mortgage on the property, thereby subjecting a portion of its value to distribution. *Valentino*, 309 N.J. Super. at 339-340.

Similarly, your client may come to you and advise that during marriage her spouse received a gift of stock in the family business that existed long before marriage. While the value of the interest in the business when the gift was made is not subject to distribution, any enhancement in the value of the interest resulting from husband and wife’s contributions to the business during the marriage is subject to distribution. *Weiss*, 226 N.J. Super. at 290; *Scherzer*, 136 N.J. Super. at 401. Even if the nonowner spouse does not work in the business, a valid argument can be made that the nonowner spouse’s work at home and caring for the children allowed the owner spouse to devote time to the business, thereby subjecting any increase in the owner spouse’s interest to distribution. *Id.*

While the pattern in these cases is obvious, we have yet to see them applied to a more modern case where both spouses work fulltime and their children are in day care or cared for during work hours by a nanny. Query how the nonowner spouse argues for an interest in a premarital business when she cannot show that her efforts at home made it possible for her spouse to devote time and effort to the business.

Things can be complicated even further. For example, your client may advise you that prior to marriage she used her savings to purchase a home that was placed in her name alone. After some questioning, it is determined that this home was purchased in contemplation of marriage and that both parties decided upon the home to be purchased. Additional questioning leads you to discover that your client’s husband had been actively involved in making improvements to this home both prior to and subsequent to the marriage. These efforts can range from hanging curtains, finishing floors and cleaning to more substantive work, such as actual construction. While your

client used premarital funds to purchase the home, if the other party can demonstrate that both parties participated in the decision to buy the home, it was intended to be the marital home when purchased and that he was actively involved in making improvements to the home, its premarital status may well be lost. *Weiss*, 226 N.J. Super. at 287-288.

On the other hand, suppose your client owned her own home prior to marriage. After marriage the parties resided in that home and neither the deed nor the mortgage were changed to include the husband’s name and the husband did not contribute at all towards the mortgage or upkeep. But, a few years into the marriage the husband inherited \$50,000 and these funds are used to pay for an addition on the home. The once premarital asset is now subject to distribution and involves a process of establishing values to be utilized for distribution.

While many of the pitfalls associated with premarital assets can be avoided with a well-written premarital agreement, as practitioners, the majority of our cases have no premarital agreement and some commingling of premarital assets. New Jersey case law addresses more traditional marital circumstances wherein one spouse is the primary or only wage earner and the other spouse is the homemaker, primarily responsible for child rearing. However, today’s professional men and women have modified the traditional notions of marriage, particularly the roles played by the parties. Marriage has been altered, for better or for worse, to include unions where both parties work fulltime and where a third party frequently cares for the children.

The entitlement you once found for your client based upon her homemaker status often no longer applies. In addition, the more straightforward distribution cases involving assets acquired during marriage are increasingly becoming outnumbered by those cases involving substantial premarital assets. Query whether the case law will eventually tackle the societal changes that now complicate equitable distribution. ■

