Nice Guys Finish Last: New Yorkers Leave our Assets Exposed When We Plan for Forever

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NICE GUYS FINISH LAST: NEW YORKERS LEAVE OUR ASSETS EXPOSED WHEN WE PLAN FOR FOREVER

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Consider Adam and Barbara, two thirty-something professionals. Adam has finally convinced Barbara to marry him after a long courtship. Like many people entering marriages these days, they both have bank accounts, retirement accounts, and personal and real property. They are romantics who expect to be together forever. As such, they sign no prenuptial property agreements. Adam even goes a step further. He shows his everlasting commitment by adding Barbara's name to all of his bank accounts. He wants his wife to be able to use the property during their marriage. The couple also creates a joint bank account that they use throughout their marriage to deposit their paychecks and pay household expenses. Sadly, after several years, they realize that their dream will not last, and they separate. As part of the judicial settlement of assets, all property will be characterized in one of three ways: Barbara's separate property, Adam's separate property, or marital property. Under New York law, Barbara keeps all of her separate premarital property after the dissolution of the marriage. The joint account for household expenses is marital property to be split by equitable distribution with both parties getting a share based on their contributions to the marriage. Adam's pre-marital accounts are not separate like Barbara's, but are marital and split through equitable distribution. So Adam, the true romantic, ends up with less than Barbara, who hedged and prepared for the possibility of an eventual split.

New York Domestic Relations Law generally favors parties being prepared by allowing pre- and post-nuptial agreements to trump these presumptions.¹ But the State also favors promoting successful marriages.² These concepts can be

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¹ N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2008).
² Fearon v. Treanor, 5 N.E.2d 815, 816 (1936).
in conflict. Imagine the relationship strain if Adam wanted Barbara to put her property in to a joint account as he did, but she refused. In the case of a spouse's name being put on separate property, rather than relying on the Domestic Relations Law, courts have deferred to the Banking Law to determine the characterization of premarital property put into joint accounts. Any time that property is put in a joint account or a second name is added to an existing account, a presumption is created that the property holder intended to create a joint tenancy.\(^3\) In the case of married couples seeking divorce, this statutory joint tenancy creates a rebuttable presumption that one party's otherwise separate property is converted to marital property. The presumption can only be rebutted by evidence that the property owner only created the joint account for his own convenience.

In our example, Adam obviously did not create the joint account for his convenience, but for his and Barbara's as a couple. Thus, his premarital property became marital property, subject to equitable distribution. Because he expected their marriage to last, he lost property at the time of the dissolution of marriage. In this note, I argue that it is against public policy to allow Banking Law to continue to prevail in this manner. This presumption discourages sharing among partners who know its disadvantages, and it infers an often inaccurate intent on those who do not. It also uses title to determine property distribution, in opposition to the principals of equitable distribution.\(^4\) To encourage New Yorkers to try for forever without having to choose between hedging now or losing if it does not work, there should be a middle ground. Upon initiation of divorce proceedings, these joint accounts, funded entirely with separate property acquired before or during the marriage, should be looked at differently. The beneficial interest created should be looked at like a life estate—or a "life of the marriage" estate, with the remainder being

\(^3\) N.Y. BANKING LAW § 675(a), (b) (McKinney 2001).

\(^4\) This presumption exists in most states, but a few recognize that title alone does not prevail. See BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 5:43 (3d ed., 2009).
converted back to separate property subject to the domestic relations rules for any other separate property.

I. PROPERTY CHARACTERIZATIONS AND THE NEW YORK DOMESTIC RELATIONS LAW

Prior to the enactment of the equitable distribution doctrine in 1980, New York used a common law method of distribution of property based on title alone. There was no concept of marital property. As the idea of marriage as an economic partnership evolved, so did the need for a new system of dividing property that was a product of that partnership. As such, the current law requires any property acquired during the marriage to be considered marital property subject to equitable distribution. This consideration is regardless of title. As stated in a landmark Court of Appeals case on this issue, “[t]he function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured.”

Under equitable distribution, property is characterized. It can be either the wife’s separate property, the husband’s separate property, or marital property. Marital property is divided equitably between the parties, “consider[ing] the circumstances of the case and of the respective parties to the marriage.” To determine this equity, the courts consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

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6 Id. at 811.
8 N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 2009).
9 See N.Y. DOM. REL. LAW § 236(B)(5) (McKinney 2009).
11 Id. at 716.
(2) the duration of the marriage and the age and health of both parties;
(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
(5) the loss of health insurance benefits upon dissolution of the marriage;
(6) any award of maintenance . . . ;
(7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
(8) the liquid or non-liquid character of all marital property;
(9) the probable future financial circumstances of each party;
(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
(11) the tax consequences to each party;
(12) the wasteful dissipation of assets by either spouse;
(13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; [and]
(14) any other factor which the court shall expressly find to be just and proper.\textsuperscript{12}

\textsuperscript{12} N.Y. Dom. Rel. Law § 236(B)(5) (McKinney 2009).
Each spouse's separate property generally includes any property held prior to the marriage and certain types of property acquired during the marriage, including disability benefits, gifts, and property acquired in connection with a personal injury. Separate property acquired during the marriage is not considered to be a product of the economic partnership. It is thus excepted from marital property.

II. CONVERSION OF SEPARATE PROPERTY TO MARITAL PROPERTY

It is possible for the character of separate property to be changed to marital property. For example, if separate and marital funds are comingled such that there would be no way to determine the amount of the account balance that was provided by the separate property, all property is deemed to be marital. Another common way that property's characterization is changed is if a spouse contributes to the property in other ways. An example is a house that is separate property, but maintained by both parties. Any appreciation is marital property.

Any property put into a joint bank account presumptively changes from separate to marital. Likewise, property in a separate account where the spouse's name is added becomes marital property. This presumption is rebuttable. However, in the case of divorce proceedings, elements must be proven by clear and convincing evidence presented by the party seeking to overcome the presumption. First, the funds in the joint bank account must come solely from one spouse's separate property. There cannot be any comingling. Second, the deposit of the separate property must be done for convenience without the intention to create a

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14 N.Y. DOM. REL. LAW § 236(B)(1)(d)(1), (2) (McKinney2009).
15 N.Y. DOM. REL. LAW § 236(B)(5)(b) (McKinney 2009).
17 N.Y. BANK LAW § 675(b).
19 Id.
beneficial interest.\textsuperscript{20} Convenience has been found when a joint account was controlled by only one party,\textsuperscript{21} when there was no intention to comingle the funds,\textsuperscript{22} or when the account was not used for marital expenses.\textsuperscript{23}

In our example, Adam's accounts are funded entirely by separate property. However, he did not intend for them to be for convenience only. He wanted Barbara to have access to the accounts and pay marital expenses. But if he was asked at the time, he probably also did not expect to part with the property upon divorce.

\section*{III. A Workable Solution: The "Life of the Marriage" Interest}

In estates and trusts law, it is common for two people to hold full control of property during the life of a trust with a general power of appointment. Upon some event, the trust ceases, and the remaining funds can be appointed pursuant to the trust instrument. This appointment of a remainder is not necessarily to those holding the general power of appointment during the life of a trust.

New York Domestic Relations Law should use these trust principles to create the "life of the marriage" presumption for separate property. This presumption would use the analysis of the convenience doctrine where funds cannot be commingled, and they are presumed to be held in a joint tenancy, but only during the marriage. This combination can create an equitable, practical solution where funds held in a joint account are a joint tenancy as a matter of law for the life of the marriage. Upon divorce, the remainder is distributed back to the original title holder as separate property.

This structure would allow for Adam and Barbara to part with an equitable distribution of property created as a product of the marriage, while also protecting property not a

\textsuperscript{20} See id. \\
product of the economic partnership. The household expense account would be divided by equitable distribution, and the premarital property would revert back to each party. This solution would also more adequately reflect the actual, rather than presumed, intent of the parties. Not exactly happily ever after, but we are mere lawyers, not fairy godmothers.