Jacklynn N. Price, Respondent, v. Harold Price, Appellant
[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

69 N.Y.2d 8; 503 N.E.2d 684; 1986 N.Y. LEXIS 21174; 511N.Y.S.2d 219

November 11, 1986, Argued December 19, 1986, Decided

PRIOR HISTORY: [***1]

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of said court, entered December 9, 1985, which (1) modified, on the law and the facts, and, as modified, affirmed so much of a judgment of the Supreme Court (Robert J. Stolarik, J.), entered in Rockland County, as, inter alia, adjudged that defendant's wholly owned businesses were not marital property subject to equitable distribution, and (2) remitted the matter to the Supreme Court for a hearing to determine (a) if the value of defendant's wholly owned corporations increased during the term of the marriage, and if so, what percentage of that appreciation should be awarded to plaintiff for the services that she performed as wife, homemaker and mother during that period, in addition to the value of any direct contribution that she may have made, and (b) plaintiff's application for counsel fees. The modification consisted of (1) providing that any appreciation in the value of stocks owned by defendant from the date of the marriage until the date hereof is marital property subject to equitable distribution, (2) deleting the provision that defendant pay all the children's[***2] uninsured medical and dental expenses, and substituting a provision that defendant maintain insurance coverage for the children, (3) deleting the provision that defendant have the option of maintaining his present life insurance or paying to plaintiff the cash surrender value, and substituting a provision that the cash surrender value be equally divided between the parties, and that defendant also obtain and maintain a life insurance policy for the benefit of the children, and (4) deleting the the award of counsel fees on the basis of the attorneys' affirmations only. The following question was certified by the Appellate Division: "Whether a nontitled spouse's 'contributions or efforts' (Domestic Relations Law § 236 [B] [1] [d] [3]), as homemaker and parent are entitled to recognition by the court in awarding said spouse a share of the appreciated value of the titled spouse's separate property, which occurred during the parties' marriage".

Price v Price, 113 AD2d 299.

DISPOSITION: Order affirmed, etc.

CORE TERMS: spouse, appreciation, marital property, separate property, homemaker, Domestic Relations Law, marriage, nontitled, equitable, indirect, partnership, titled, Equitable Distribution Law, commencement, property acquired, obvious meaning, gift, separation agreement, certified question, contributed, matrimonial, occurring, duration, marital, weighed, initial determination, statutory language, services performed, increase in value, memorandum

COUNSEL: James H. Goodfriend for appellant. I. A nontitled spouse is not entitled to share in the appreciation of separate assets based solely upon indirect contributions as a spouse, parent and homemaker. (Jolis v Jolis, 111 Misc 2d 965; Matter of Albano v Kirby, 36 NY2d 526; Matter of Bliss v Bliss, 66 NY2d 382; Matter of Devoy v Craig, 231 NY 186; Matter of City of New York [Ely Ave.], 217 NY 45; Nolan v Nolan, 107 AD2d 190; Brennan v Brennan, 103 AD2d 48; Cappiello v Cappiello, 110 AD2d 608; Wegman v Wegman, 129 Misc 2d 968.) [***5]II. Ancillary issues raised by the decision of the court below require review by this court. (Brennan v Brennan, 103 AD2d 48; Jolis v Jolis, 111 Misc 2d 965; Parsons v Parsons, 101 AD2d 1017; Duffy v Duffy, 94 AD2d 711; Conner v Conner, 97 AD2d 88; Blickstein v Blickstein, 99 AD2d 287; McMahan v McMahan, 100 AD2d 826; Wilson v Wilson, 101 AD2d 536, 63 NY2d 768; Kobylack v Kobylack, 110 Misc 2d 402.)

Isabelle C. Flaherty, Barry Leibowicz and Paul Morgenstern for respondent. I. Domestic Relations Law § 236 (B) (1) (d) (3) and § 236 (B) (5) (d) (6) authorize an award of separate property appreciation to the nontitled spouse based upon his or her efforts as spouse, homemaker and/or parent. (Majauskas v Majauskas, 61 NY2d 481; Wood v Wood, 119 Misc 2d 1076; Cappiello v Cappiello, 110 AD2d 608, 66 NY2d 107.) II.

Consistent with the clear import of the statute and the legislative mandate that marriage be considered an economic partnership, the court below properly held that indirect contributions of the nontitled spouse warrant an award of appreciated separate property to that spouse. (O'Brien v O'Brien, 66 NY2d 576; Majauskas [***6] v Majauskas, 61 NY2d 481; Brennan v Brennan, 103 AD2d 48; Conner v Conner, 97 AD2d 88; Nolan v Nolan, 107 AD2d 190; Cappiello v Cappiello, 110 AD2d 608, 66 NY2d 107; Sementilli v Sementilli, 102 AD2d 78; Parsons v Parsons, 101 AD2d 1017; Arvantides v Arvantides, 64 NY2d 1033; Blickstein v Blickstein, 99 AD2d 287.) III. Based upon the facts of this case where the closely held corporation owned by defendant was the sole financial basis for the marriage, where defendant utilized corporate funds in excess of his declared income at will for his personal needs, and where plaintiff contributed both directly and indirectly to the enhancement of this family business, not only should plaintiff receive a portion of the appreciation of that asset, but her share should be presumed to be at least 50%. (Roffman v Roffman, 124 Misc 2d 636; Brennan v Brennan, 103 AD2d 48; Schussler v Schussler, 109 AD2d 875; Bisca v Bisca, 108 AD2d 773; Griffin v Griffin, 115 AD2d 587; Cohen v Cohen, 104 AD2d 841; Perri v Perri, 97 AD2d 399; Sementilli v Sementilli , 102 AD2d 78; Harness v Harness, 99 AD2d 658; Ward v Ward, 101 AD2d 1006.)

JUDGES: [***7]

Hancock, Jr., J. Chief Judge Wachtler and Judges Meyer, Simons, Alexander and Titone, concur; Judge Kaye taking no part.

OPINIONBY: HANCOCK, JR.

OPINION: [*11] [**685] OPINION OF THE COURT

We hold that under the Equitable Distribution Law an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property (Domestic Relations Law § 236 [B] [1] [d] [3]). Under the statute there are two categories of property: marital property which is subject to equitable distribution and separate property which is not (Domestic Relations Law § 236 [B] [1] [c], [d]). Marital property is broadly defined as "all property acquired by either or both spouses during the marriage" (Domestic Relations Law § 236 [B] [1] [c]). Separate property, which is specifically described as an exception to marital property, includes property "acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than[***8] the spouse" (Domestic Relations Law § 236 [B] [1] [d] [1]). Separate property also includes "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" (Domestic Relations Law § 236 [B] [1] [d] [3]; emphasis supplied).

The narrow question of statutory construction before us is whether the terms "contributions or efforts", contained in the italicized phrase quoted above, are intended to incorporate contributions or efforts of the other spouse as homemaker and parent. Because we hold that increases in value due in part to such efforts or contributions are to be considered under section 236 (B) (1) (d) (3), such increases are excepted from separate property and treated as marital property available [*12] for equitable distribution by the court pursuant to Domestic Relations Law § 236 (B) (5).

I

The instant action, commenced in 1981, culminated in a judgment of divorce in April 1984. At issue is the treatment to be given under section 236 (B) (1) (d) (3) to defendant's ownership interest in the Unity Stove Company (Unity), [***9]a family business engaged in the wholesale supply of kitchen parts and appliances. Defendant commenced his association with Unity several years before the parties were married in 1969. He acquired 25% of the outstanding stock of Unity by gift from his father in 1957 and another 25% by gift in 1972. After [**686]commencement of the divorce action but prior to the divorce judgment, defendant became sole owner of Unity when the outstanding shares of the corporation were redeemed. He also became the owner of a corporation which holds title to the real estate holdings of Unity.

Before the marriage plaintiff was employed as a registered nurse at Mount Sinai Hospital. After the marriage, for a period of six months, she worked full time at Unity and, for the next six months, part time as a private duty nurse. When the first of the parties' two children was born in 1972, plaintiff gave up her outside employment in order to devote her efforts to being a homemaker and parent. There is evidence that during the marriage she attended conventions with her husband and assisted him as hostess at various business-related social events.

Following trial of the divorce action, [***10] Supreme Court found that defendant's interests in Unity and the related company constituted "separate property" since plaintiff had acquired these stock interests as gifts

(see, Domestic Relations Law § 236 [B] [1] [d]). The court rejected plaintiff's contention that the appreciation in value of defendant's separate property should be treated as marital property to the extent that any such increase was due, in part, to her contributions and efforts (Domestic Relations Law § 236 [B] [1] [d] [3]). It found that whatever direct contributions she may have made to Unity were "minimal and inconsequential" and that her indirect contributions were "likewise insignificant".

In a comprehensive opinion, the Appellate Division unanimously modified on the law and the facts (113 AD2d 299), concluding that plaintiff's indirect contributions as a homemaker [*13] and mother, as well as her direct contributions to the business, "however minimal", could warrant an award of a percentage of the appreciation of defendant's separate holdings in Unity and the related company (Domestic Relations Law § 236 [B] [1] [d] [3]; § 236 [B] [5]). Accordingly, the Appellate[***11] Division remitted the matter to Supreme Court to determine the extent of the appreciation, if any, in defendant's separate property and the amount "of such appreciation to which plaintiff is entitled by virtue of her direct and indirect contributions."

Following its determination, the Appellate Division denied the parties' reciprocal motions for reargument and granted defendant's motion for leave to appeal to this court pursuant to CPLR 5602 (b). It has certified the following question to us: "Whether a nontitled spouse's 'contributions or efforts' (Domestic Relations Law § 236 [B] [1] [d] [3]) as homemaker and parent are entitled to recognition by the court in awarding said spouse a share of the appreciated value of the titled spouses separate property which occurred during the parties' marriage". n1

n1 We address only the specific question of law because the scope of our review does not extend beyond the certified question as it reads or is reasonably interpretable (Cohen and Karger, Powers of the New York Court of Appeals § 86, at 363 [rev ed]; see, Mohrmann v Kob, 291 NY 181, 190). We interpret the certified question here as referring to an appreciation which occurred "during the parties' marriage and before the execution of a separation agreement or the commencement of a matrimonial action."

[***12]

For reasons which will appear, the question should be answered in the affirmative and the order of the Appellate Division affirmed.

II

In construing Domestic Relations Law § 236 (B) (1) (d) (3) and determining whether the Legislature intended that efforts of the nontitled spouse as homemaker and parent should be included, we must, of course, look to the particular words for their meaning, both as they are used in the section and in their context as part of the entire statute. But we must also look beyond the statutory language and consider the history leading to the adoption of the Equitable Distribution Law and the legislative purpose and policy considerations underlying this radical change in the Domestic Relations [**687] Law (L 1980, ch 281, § 9) (see, Ferres v City of New Rochelle, 68 NY2d 446, 451; [*14]New York State Bankers Assn. v Albright, 38 NY2d 430, 434, 436, 437; McKinney's Cons Laws of NY, Book 1, Statutes §§ 91, 92, 96, 124). For it is fundamental that in "the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle" [***13] (People v Ryan, 274 NY 149, 152; see, Matter of Petterson v Daystrom Corp., 17 NY2d 32, 38).

As background for an analysis of the statute, it is helpful to review the policy considerations leading to the enactment of the Equitable Distribution Law and to restate the main purpose of the legislation. The major reform accomplished by the law was a radical alteration of the traditional method of distributing property on dissolution of marriage. As we explained in O'Brien v O'Brien (66 NY2d 576, 585), the Legislature replaced the existing system of distribution, which depended on the common-law rules of property and had led to unfair results, "with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage (Assembly Memorandum, 1980 NY Legis Ann, at 129-130). Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker" (id., at p 585 [emphasis added]; see, Governor's Memorandum of Approval, 1980 McKinney's Session Laws of NY, at 1863; [***14] Assembly Memorandum, 1980 NY Legis Ann, at 129-130). The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends "not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home (see, Governor's Memorandum, McKinney's Session Laws of NY, 1980, p 1863; see,

also, Litman v Litman, 93 AD2d 695, 696, app dsmd 60 NY2d 586; Forcucci v Forcucci, 83 AD2d 169, 171; Wood v Wood, 119 Misc 2d 1076, 1079)" (Brennan v Brennan, 103 AD2d 48, 52; see, Capasso v Capasso , 119 AD2d 268; Wegman v Wegman, 123 AD2d 220). This "economic partnership" concept of marriage and the recognition of the value of "non-remunerated services" such as homemaking are exhibited in two important provisions in the statute: (1) that in making an equitable distribution the court shall [*15] consider any "contributions and services as a spouse, parent * * * and homemaker" (§ 236 [B] [5] [d] [***15] [6]); and (2) that in determining the amount and duration of maintenance the court shall consider "contributions and services of the party seeking maintenance as a spouse, parent * * * and homemaker" (§ 236 [B] [6] [a] [8]).

For any court making an equitable distribution under the statute, the necessary starting point is the critical determination of what constitutes "marital property" -- the designation of the particular assets which the court is to distribute equitably pursuant to section 236 (B) (5). 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 (see, Majauskas v Majauskas, 61 NY2d 481, 489, 490). 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 (Majauskas v Majauskas, supra, at p 489). These observations are of particular relevance [**688]here because the question of whether Domestic Relations Law § 236 (B) (1) (d) (3) includes[***16] increases in value due to contributions or efforts of a spouse as parent and homemaker involves a determination of what should be excluded from separate property and, thereby, included in marital property. Thus, to effect the broad construction of the term "marital property" mandated by our holding in Majauskas v Majauskas (supra), it follows that the exclusion from separate property for increases in value due, in part, to contributions or efforts of the nontitled spouse (§ 236 [B] [1] [d] [3]) should be broadly construed. (See, Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:4, 1986 Supp Pamphlet, p 205.)

With this background we turn to an analysis of the words of the statute, being guided by the accepted rules of construction that: (1) statutory language is generally given its natural and most obvious meaning (McKinney's Cons Laws of NY, Book 1, Statutes § 94; see, Association of Contr. Plumbers v Contracting Plumbers Assn., 302 NY 495, 500); and (2) if there is nothing to indicate a contrary intent, terms of general import will ordinarily be given their full significance without limitation[***17] (McKinney's Cons Laws of NY, Book 1, Statutes § 114; Matter of Board of St. Opening, 133 NY 329, 333-334). Here, the words "contributions or efforts" are used in the inclusive, [*16] general sense and, if given their natural and obvious meaning, would comprise contributions and efforts of any nature, including those of a spouse as homemaker and parent. Section 236 (B) (1) (d) (3) contains no words of limitation, and there is nothing to suggest that the general terms "contributions or efforts" should not be given their full significance (see, McKinney's Cons Laws of NY, Book 1, Statutes § 114).

Giving the words "contributions or efforts" their natural and obvious meaning as general and comprehensive terms is consistent with a third established rule of construction: that a particular construction of a statute should be preferred which furthers the statute's object, spirit and purpose (see, Matter of Petterson v Daystrom Corp., 17 NY2d 32, 38, 39, supra; Matter of New York Post Corp. v Leibowitz, 2 NY2d 677, 685, 686; McKinney's Cons Laws of NY, Book 1, Statutes § 96). Here, a broad construction of the terms "contributions or efforts" in section 236 (B) (1) [***18] (d) (3), as we have noted, results in enlarging the sum of marital property available for distribution and, thus, promotes the basic "economic partnership" concept of the statute. n2

> n2 The New York State Assembly Memorandum in Support of Legislation confirms an interpretation of "contributions or efforts" in section 236 (B) (1) (d) (3) as including services of a spouse as parent and homemaker. The memorandum states in pertinent part: "[the] exception with regard to the increment of value recognizes that a homemaker aids in making the spouse involved in business successful by permitting him/her the freedom and assistance to devote energy to financial endeavors". (Bill Jacket to L 1980, ch 281, at 2, reprinted in 11C Zett-Kaufman-Kraut, NY Civ Prac, Appendix B, at App B-3; emphasis added.)

Defendant argues, however, that two other provisions in section 236 (B) support a limited interpretation of the terms "contributions or efforts" in section 236 (B) (1) (d) (3). He contends that because the Legislature [***19]has specified that a court should consider contributions and services as a spouse, parent and homemaker in making an equitable distribution of marital property (§ 236 [B] [5] [d] [6]) and in fixing the amount and duration of

maintenance (§ 236 [B] [6] [a] [8]), it follows that the Legislature did not intend that a court should consider such contributions in determining whether an appreciation in separate property should be treated as marital property (§ 236 [B] [1] [d] [3]) n3 (see, Jolis v Jolis, 98 AD2d 692). [**689] We find this argument unpersuasive.

n3 Defendant's argument is essentially an application of the maxim "expressio unius est exclusio alterius" (McKinney's Cons Laws of NY, Book 1, Statutes § 240) -- that by mentioning certain things in a statute (i.e., contributions or efforts) and omitting other things (i.e., specific contributions or efforts as parent and homemaker) the Legislature intended that the omitted items should be excluded. The maxim "is merely an aid to be utilized in ascertaining the meaning of a statute when its language is ambiguous, and should be applied to accomplish the legislative intention, not to defeat it." (McKinney's Cons Laws of NY, Book 1, Statutes § 240, at 414.)

[***20]

[*17] The purpose and function of section 236 (B) (1) (d) (3) are distinct from and not comparable to those of the two sections to which defendant refers (§ 236 [B] [5] [d] [6]; § 236 [B] [6][a][8]). In those sections, the Legislature has set forth precisely the several equitable considerations which must be weighed in making a distribution of marital property and in setting the amount and duration of maintenance. The specific mention of contributions and services of a spouse as parent and homemaker is consistent with the detailed enumeration of the equitable considerations contained in those sections. Section 236 (B) (1) (d) (3), on the other hand, is part of the definition of separate property. As we have noted, separate property, as an exception to the broader term of marital property, is to be narrowly construed. Giving the words "contributions or efforts" their natural and obvious meaning as general and inclusive terms results in expanding the extent of marital property and diminishing that of separate property. That result is entirely compatible with the legislative scheme of defining "marital property" broadly and "separate property" narrowly [***21] (see, Majauskas v Majauskas, supra, at pp 489-490). An enumeration of specific types of "contributions or efforts" in section 236 (B) (1) (d) (3) would be contrary to this statutory scheme. Thus, the fact that the Legislature did not mention services as a parent and homemaker is consistent with our reading of the section and does not support the limited construction urged by defendant.

III

We hold, therefore, that where separate property of one spouse has appreciated during the marriage and before execution of a separation agreement or commencement of a matrimonial proceeding and where such appreciation was "due in part" to the contributions or efforts of the nontitled spouse as parent and homemaker, the amount of that appreciation should be added to the sum of marital property for equitable distribution (§ 236 [B] [5]). Whether assistance of a nontitled [*18] 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. If such efforts, as allegedly is true of defendant's interest in Unity, [***22] were aided and the time devoted to the enterprise made possible, at least in part, by the indirect contributions of the nontitled spouse, the appreciation should, to the extent it was produced by efforts of the titled spouse, be considered a product of the marital partnership and hence, marital property n4 (see, Nolan v Nolan, 107 AD2d 190, 193, where the court properly concluded that the indirect contributions of the wife as parent and homemaker entitled her to a share in the appreciation of securities which resulted, at least in part, from the time and effort that the titled spouse devoted to their management; see generally, Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:4, 1986 Supp Pamphlet, p 205; Foster and Freed, Price v Price: The Price is Right?, NYLJ, Dec. 30, 1985, p 3, col 1; see also, Majauskas v Majauskas, supra, at p 492, holding that an incremental increase in the value of the titled spouse's pension rights occurring during the marriage was the product of his continued employment [**690] and, should, therefore, be treated as marital property pursuant to the provisions pertaining[***23] to pension rights [Domestic Relations Law § 236 (B) (5) (d) (4)]). As a general rule, however, where the appreciation is not due, in any part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the nontitled spouse has no claim to a share of the appreciation.

n4 As to the merits of plaintiff's claim to a share in the appreciation of Unity and whether she can assert a similar claim to any appreciation in the value of the corporation which holds title to Unity's real estate, we express no view. These are matters of proof for the trial court on remand from the Appellate Division.

The question under section 236 (B) (1) (d) (3) as to indirect contributions of the nontitled spouse as parent and homemaker is whether there was an appreciation of separate property due to the efforts of the titled [***24] spouse during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of appreciation during that period is considered a [*19] product of the marital partnership over which the trial court "retains the flexibility and discretion to structure [a] distributive award equitably" (O'Brien v O'Brien, 66 NY2d 576, 588, supra). The nature and measure of the services performed by the nontitled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property, are matters to be weighed and decided by the trial court -- not in making this initial determination under section 236 (B) (1) (d) (3) -- but in making its distribution of the appreciation as marital property under section 236 (B) (5). n5

n5 Here we must disagree with the Appellate Division in its holding that this initial determination whether to treat the appreciation in separate property as marital property "will depend on a variety of factors including the length of the marriage, the relationship between the parties, [and] the type of services actually performed by the nontitled spouse" (113 AD2d 299, 306-307). In making this determination, the court is not concerned with evaluating the contributions or efforts of the nontitled spouse or with determining the extent, if any, of the appreciation due to those efforts. These and the other factors mentioned by the Appellate Division are appropriate considerations in making the equitable distribution of the appreciation as marital property (see, Domestic Relations Law § 236 [B] [5] [d] [2], [6], [10]).

[***25]

The certified question should be answered in the affirmative and the order of the Appellate Division should be affirmed, with costs.

Jacklynn N. Price, Respondent-Appellant, v. Harold Price,Appellant-Respondent
[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, SecondDepartment

113 A.D.2d 299; 496 N.Y.S.2d 455; 1985 N.Y. App. Div. LEXIS52367

December 9, 1985

PRIOR HISTORY: [***1]

Cross appeals from so much of a judgment of the Supreme Court (Robert J. Stolarik, J.), entered April 19, 1984 in Rockland County, as (1) directed defendant to pay the carrying charges on the marital premises until it was sold, (2) set child support in the amount of $600 per week, (3) awarded counsel fees, (4) determined that defendant's wholly owned businesses were not marital property subject to equitable distribution, and (5) failed to require defendant to maintain life insurance on his life for the benefit of the children of the parties.

DISPOSITION: Judgment modified, on the law and the facts, by (1) amending subdivision (a) of paragraph "seventh" of the findings of fact by adding thereto, after the word "defendant", the following: ", however, any appreciation in the value of the said stocks owned by defendant from the date of the marriage until the date hereof is marital property subject to equitable distribution.", (2) deleting therefrom the eleventh decretal paragraph which directed that defendant pay all of the children's uninsured medical and dental expenses, and substituting therefor a provision that defendant maintain medical and dental insurance coverage for the children; (3) [***2] deleting therefrom the thirteenth decretal paragraph which directed that defendant have the option of maintaining his present life insurance or paying to plaintiff the cash surrender value of $10,000, and substituting therefor a provision that the cash surrender value of the present policy be equally divided between the parties, and that defendant also obtain and maintain in effect an insurance policy on his life for the benefit of the children, and (4) deleting therefrom the eighteenth decretal paragraph which awarded counsel fees on the basis of the attorneys' affirmations only. As so modified, judgment affirmed insofar as appealed from, with costs to the plaintiff, and matter remitted to the Supreme Court, Rockland County, for a hearing to determine: (1) if the value of defendant's wholly owned corporations increased during the term of the marriage, and if so, what percentage of that appreciation should be awarded to plaintiff for the services that she performed as wife, homemaker and mother during that period, in addition to the value of any direct contribution that she may have made and (2) plaintiff's application for counsel fees, and for the entry of an amended judgment thereupon.

CORE TERMS: spouse, appreciation, separate property, marriage, nontitled, homemaker, indirect, Domestic Relations Law, equitable, marital, marital property, dental, marital relationship, divorce proceeding, awarding, divorce, carrying charges, entitled to share, active-passive, commencement, appreciated, partnership, conventions, diamond, cash surrender value, affirmations, separate property interest, insurance coverage, enhancement, open-ended

COUNSEL: Tenzer, Greenblatt, Fallon & Kaplan (James H. Goodfriend of counsel), for appellant-respondent.

Barry Leibowicz for respondent-appellant.

JUDGES: Mollen, P. J. Mangano, O'Connor and Weinstein, JJ., concur.

OPINIONBY: MOLLEN

OPINION: [*301] OPINION OF THE COURT

[**457] The instant appeals present an issue which has been the subject of considerable debate, to wit, under what circumstances and to what extent will a nontitled spouse be entitled to share[***6] in the appreciation in value of separate property which appreciation occurred from the inception of the marriage to the date of the commencement of the divorce action (see, Domestic Relations Law § 236 [B] [1] [d] [3]). More specifically, the appeals raise the question of whether a nontitled spouse's contributions as a homemaker and parent are entitled to recognition by the court in awarding said spouse a share of the appreciated value of the other spouse's separate property.

The parties were married on November 15, 1969 in the State of New York. For [**458] several years prior to the marriage defendant had been involved in a family-

owned corporation entitled Unity Stove Company (Unity), which was engaged in the wholesale supply of kitchen parts and appliances. Defendant had received 25% of the outstanding stock of Unity in 1957 as a gift from his father and another 25% in 1972, during the parties' marriage, also as a gift. In 1982, after the initiation of the instant divorce proceeding, defendant became Unity's sole shareholder by reason of the corporation's redemption of the outstanding shares held by defendant's brother. Defendant also possesses an interest [***7]in H & SP Realty, Inc. which holds title to the real estate holdings of Unity.

Prior to the parties' marriage, plaintiff had been working as a registered nurse at Mount Sinai Hospital for approximately one year but terminated her employment upon her marriage to defendant. For the first six months of their marriage, plaintiff worked full time in defendant's business. For six months thereafter, plaintiff worked part time as a private duty nurse at Doctor's Hospital. Upon the birth of the parties' first of two children in 1972, plaintiff ceased working outside the home and concentrated her efforts on being a homemaker and parent. In addition to her contributions as a homemaker and parent, however, plaintiff conferred with Unity's customers on several occasions, entertained her husband's business associates, attended business conventions with her husband and assisted in other business-related social events.

Plaintiff commenced the instant divorce proceeding in 1981. [*302] As part of her equitable distribution award, plaintiff sought a percentage of defendant's interest in Unity and related companies. Special Term denied plaintiff's request, finding that defendant's business[***8] interests constituted "separate property" since defendant had acquired his shares in Unity and its related companies as gifts (see, Domestic Relations Law § 236 [B] [1] [d] [1]). Special Term also concluded that plaintiff was not entitled, under Domestic Relations Law § 236 (B) (1) (d) (3), to share in the appreciation in value of defendant's separate property business interests which occurred during the parties' marriage since the services she rendered to Unity were "minimal and inconsequential". The court noted further, "[plaintiff's] indirect contributions were likewise insignificant. The business was firmly established by the time she came on the scene and if, indeed, the value of the company did appreciate during the years of the marriage herein, there is little or nothing in the record to support her claim that she was in any way responsible for that success. Any claim that an occasional dinner with business associates, attendance at conventions and trade shows, and occasional entertainment of business acquaintances in the marital home resulted in increased profits for the corporation is purely speculative".

While we agree with Special Term insofar as it[***9] determined that defendant's interests in Unity and related companies constituted "separate property" (see, Wegman v Wegman, 129 Misc 2d 968; cf. Roffman v Roffman, 124 Misc 2d 636), we disagree with the court's conclusion that plaintiff is not entitled to share to some extent in the appreciation of defendant's business interests which occurred during the parties' marriage.

At the outset, it is significant to note that the provisions of the equitable distribution statute permit a nontitled spouse, in certain instances, to share in the value appreciation of separate property which occurred during the marriage. This principle is reflected in one of the statute's definitions of separate property contained in Domestic Relations Law § 236 (B) (1) (d) (3), which provides: "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" (emphasis added).

[**459] The italicized statutory language has presented the courts with the task of ascertaining the legislative intent behind the phrase "contributions or efforts". As a general rule, the courts[***10] have uniformly agreed that where the nontitled spouse makes [*303] "direct" contributions such as actively managing the separate property and/or making financial contributions towards the enhancement of such property, that spouse is entitled to share in the appreciation of that asset to the extent attributable to his or her efforts (see, Nolan v Nolan, 107 AD2d 190; Brennan v Brennan, 103 AD2d 48, 53; Jolis v Jolis, 111 Misc 2d 965, affd 98 AD2d 692; Wood v Wood, 119 Misc 2d 1076). Divergent views, however, have been expressed by the courts on the question of whether the nontitled spouse's "indirect" contributions as a homemaker, parent and spouse are entitled to similar recognition under Domestic Relations Law § 236 (B) (1) (d) (3). For example, in Jolis v Jolis (supra) the First Department concluded that the homemaking and parenting efforts of the plaintiff wife did not entitle her to a percentage of the appreciation of her husband's separate property interest in a family-owned diamond business. The parties in Jolis had been married for approximately 38 years. Upon the parties' marriage in 1939, plaintiff wife gave up a promising acting and singing[***11] career to become a full-time wife, homemaker and mother of four sons. At the time of the marriage, the defendant husband had been involved in the family business, which had been formed one year prior. During the marriage, the defendant concentrated his efforts on the diamond business which had achieved extraordinary success. The trial court in Jolis determined that while plaintiff's services as a homemaker and parent

were substantial, the effect such contributions had on the success of the defendant's business was primarily "indirect and speculative" (Jolis v Jolis, supra, at p 979) and that these indirect contributions did not entitle the plaintiff to share in the appreciation in value of her husband's business. In construing Domestic Relations Law § 236 (B) (1) (d) (3), the trial court in Jolis found it significant that the clause did not contain the specific language of Domestic Relations Law § 236 (B) (5) (d) (6) requiring the court in calculating a distributive award of marital property to consider a spouse's "contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other [spouse]". Thus, the court [***12]reasoned that the Legislature apparently intended a construction of the phrase "contributions or efforts" toward the appreciation in value of separate property to exclude these types of indirect contributions (Jolis v Jolis, supra, at p 979).

On appeal, the First Department in Jolis (supra), with a lone Justice dissenting, agreed that the omission of the quoted [*304] language from Domestic Relations Law § 236 (B) (1) (d) (3) was relevant to the construction of the phrase "contributions or efforts" found in that section. Interestingly, however, the court limited the scope of its holding in Jolis by stating: "[We] decline to foreclose the possibility that other cases may disclose circumstances in which services as a spouse, parent, wage earner, or homemaker in fact contributed to the appreciation of the other spouse's separate property, circumstances not presented in the instant case" (Jolis v Jolis, supra, at p 692).

In recent cases, trial and appellate courts have expressed a more liberal interpretation of Domestic Relations Law § 236 (B) (1) (d) (3). In Wood v Wood (119 Misc 2d 1076, supra), for example, Justice Geiler, disagreeing with the holding[***13] in Jolis, expressed the view that a spouse's indirect contributions as a homemaker and/or parent may be considered by the court in awarding a percentage of the appreciation of the other spouse's separate property. Justice Geiler, relying on the [**460] legislative intent inherent in the equitable distribution statute, reasoned that the institution of marriage is a joint enterprise whose success is dependent on a variety of factors, financial and otherwise. "The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition" (Wood v Wood, supra, at p 1079). With this premise, Justice Geiler construed Domestic Relations Law § 236 (B) (1) (d) (3) to permit the recognition of a nontitled spouse's efforts as a homemaker and parent by the court by awarding him or her a share of the appreciation in value of a separate property asset.

The rationale of Wood v Wood (supra) has[***14] been adopted and applied in a number of subsequent cases (see, Nolan v Nolan, 107 AD2d 190, supra; Brennan v Brennan, 103 AD2d 48, supra; Sementilli v Sementilli, 102 AD2d 78; Van Ess v Van Ess, 100 AD2d 848; Roffman v Roffman, 124 Misc 2d 636, supra; Wegman v Wegman, 129 Misc 2d 968, supra; see also, Cappiello v Cappiello, 110 AD2d 608, affd 66 NY2d 107).

It is clear that this latter interpretation of Domestic Relations Law § 236 (B) (1) (d) (3) is more in keeping with the legislative intent behind the equitable distribution statute. When equitable distribution was enacted into law, then Governor [*305] Carey, in his executive memorandum, explained that the statute was premised upon the principle that the marriage relationship is an economic partnership and that property acquired during the marriage should be distributed in accordance with this view (see, Governor's Memorandum of Approval, 1980 McKinney's Session Laws of NY, at 1863). The concept of equitable distribution is a corollary to the concept that marriage is comprised of multiple components of both an economic and noneconomic nature, and that each of these components is entitled[***15] to substantial recognition with regard to its effect on the success and vitality of the marriage (see, Wood v Wood, supra). Thus, the function of equitable distribution is to insure that when a marriage comes to an end, each of the spouses, based on his or her relative contributions, will be entitled to a share of the family assets accumulated while the marital relationship endured (see, Conner v Conner, 97 AD2d 88, 99; Forcucci v Forcucci, 83 AD2d 169, 171). To this end, the equitable distribution statute gives recognition to the essential supportive role played by the wife in the home (see, Domestic Relations Law § 236 [B] [5] [d] [6]).

Viewed from this perspective, it would be untenable to conclude that the Legislature intended a construction of the meaning of a nontitled spouse's "contributions or efforts" which would exclude his or her services as a homemaker and parent and thereby limit the statutory exception to direct contributions in the form of money and/or active management of a separate property asset. Certainly, nonremunerated services of a nontitled spouse to the joint marital enterprise in the form of homemaking, raising children and providing[***16] the moral, psychic and emotional support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home, thus enabling the other spouse to concentrate his or her efforts successfully in the

furtherance of the economic interests of the marital partnership, are no less important or valuable than direct contributions made by the nontitled spouse to enhance the value of separate property (see, Brennan v Brennan, 103 AD2d 48, 52, supra). We can perceive of no reason why a nontitled spouse who remains at home, fulfills the responsibilities of a homemaker and cares for the [**461] couple's children while the titled spouse is actively engaged in the business world, should be treated any differently than a nontitled spouse who chooses to work outside the home and makes direct contributions to the marital enterprise. The partnership concept of equitable distribution in the full and [*306] true sense leads to the inexorable conclusion that while the homemaking and parenting efforts of the nontitled spouse may not be directly related to the appreciation of separate property assets, these indirect contributions enable the titled spouse to engage [***17]in efforts so related (see, Conner v Conner, 97 AD2d 88, 99, supra). This reasoning is reflected by the Assembly memorandum in support of the equitable distribution bill which specifically states that the statutory provisions excepting from the definition of separate property any appreciation in value of the separate property asset which is attributable to the nontitled spouse's "contributions or efforts" reflects an understanding "that a homemaker aids in making the spouse involved in business successful by permitting him/her the freedom and assistance to devote energy to financial endeavors" (see, New York State Assembly Memorandum in Support of Equitable Distribution Bill, reprinted in 11C Zett-Kaufman-Kraut, NY Civ Prac, Appendix B, at App B-3; see also, Samuelson, The Appreciation of Separate Assets; To Be or Not To Be Marital Property, 17 [No. 3] Fam L Rev 1).

A cautionary word is warranted at this point to emphasize that a nontitled spouse must establish that his or her direct or indirect contributions to the marital relationship were causally related to the enhancement of the separate property asset so as to warrant an award of a percentage of the appreciation [***18]in value of the separate property asset. Thus, in Rubin v Rubin (105 AD2d 736, 739), this court concluded that the plaintiff wife was not entitled to share in the appreciation in value of her husband's separate property business interest in a closely held corporation since her spousal contributions during the relatively short childless marriage of seven years was limited to playing "bridge and tennis". Similarly, in Borg v Borg (107 AD2d 777, 778) the defendant wife's claim for a share in the appreciation of the plaintiff's separately owned printing business which occurred during the parties' six-month marriage was denied "[since] defendant failed to establish that the business appreciated in value due to her contribution". Finally, in Billington v Billington (111 AD2d 203) the defendant wife's claim for the separate asset appreciation was also denied since she failed to allege that said assets appreciated in value due to her contributions or efforts. A review of the aforesaid cases indicates that a finding of a causal connection between appreciation in a separate property asset and the nontitled spouse's indirect contributions as a homemaker and parent will depend[***19] on a variety of factors including the length [*307] of the marriage, the relationship between the parties, the type of services actually performed by the nontitled spouse and the nature of the separate property.

As a corollary to the above analysis, it is significant to note that certain "passive" separate property assets appreciate in value as a result of factors which are not in any way attributable to the efforts of either spouse. For example, bank accounts, portfolio investments, unmanaged real estate holdings, works of art and the like, as a general rule, appreciate in value because of random market fluctuations rather than as a result of active management or financial contributions by either spouse. This active-passive distinction with regard to separate property assets was discussed by Justice O'Connor in Conner v Conner (97 AD2d 88, 99, n 4, supra), in which he explained that appreciation in passive investments, such as bank accounts or securities, remains separate property whereas appreciation in an actively managed separate property asset will be deemed, in certain circumstances, to constitute marital property. Justice O'Connor explained further: [**462] [***20] "Without this active-passive management distinction, it would not be possible to characterize as marital property the appreciation of a business, owned and operated solely by the one spouse before and during marriage, which happened to be the sole object of the owner-manager's remunerative labors during marriage and the sole pecuniary support of their household" (Conner v Conner, supra, at p 99, n 4).

Interestingly, this active-passive distinction was recognized by the First Department in Jolis v Jolis (98 AD2d 692, supra) wherein the majority took the position that the appreciation of the defendant husband's diamond business was attributable, most significantly, to the "diamond fever" which had engulfed the marketplace during the period in question rather than to the efforts of the defendant husband.

In a more recent case, the Third Department, in Nolan v Nolan (107 AD2d 190, supra) also utilized the active-passive approach in awarding the plaintiff wife a percentage of the appreciation in her husband's business. Therein the court stated: "In general, appreciation in value of separate property which 'cannot fairly be considered as the product of the marital partnership' [***21] is excluded from equitable distribution (Brennan v Brennan, 103 AD2d 48, 53; see, Domestic Relations

Law § 236 [B] [1] [d] [3]). In this case, however, defendant left a salaried position with Ashland in 1979 to devote his energies to full-time management of his securities. The record indicates [*308] that the appreciation in value of defendant's separate property was not entirely due to random market fluctuations (see, Jolis v Jolis, 98 AD2d 692, 693), but as a result of active management of his holdings (see, Conner v Conner, 97 AD2d 88, 99, n 4; Roffman v Roffman, 124 Misc 2d 636)" (Nolan v Nolan, supra, at p 193; emphasis added).

Thus, under this analysis, passive appreciation of a separate property asset during the marital relationship would not be subject to a claim by the nontitled spouse whereas an increase in value in such asset due to the direct or indirect contributions or efforts of the nontitled spouse would be considered marital property and subject to such a claim (see also, Roffman v Roffman, 124 Misc 2d 636, supra; 2 Foster, Freed and Brandes, Law and the Family § 33:4-B [1], at 963 [1985 Cum Supp]).

Turning to[***22] the facts of the instant case, we conclude that plaintiff's indirect contributions as a homemaker and mother to the parties' two children over the 12-year period of the marriage warrant an award of a percentage of the appreciation, if any, of defendant's separate property interest in Unity and related companies which occurred from the inception of the parties' marriage to the date of the commencement of the instant divorce proceeding. In addition to these indirect contributions, plaintiff is entitled to be credited for the direct contributions during the marriage, however minimal, which she made to the business in the form of conferring with customers, entertaining clients and attending conventions and trade shows (see, Wegman v Wegman, 129 Misc 2d 968, supra). Thus, remittal is necessary to determine (1) if there was any appreciation in the value of defendant's business interest in Unity and related companies between the date of the parties' marriage and the commencement of the instant divorce proceeding and (2) the extent of such appreciation to which plaintiff is entitled by virtue of her direct and indirect contributions.

With respect to the remaining issues presented[***23] by the instant appeal and cross appeal, we find that the direction in the judgment that defendant continue to pay the carrying charges on the marital premises until its sale is not an openended obligation such as would be improper under [**463] 22 NYCRR 699.9 (f) (6), as the judgment explicitly refers to and incorporates the earlier pendente lite order of Judge Wood, dated February 26, 1981, where those specific amounts determined to constitute the carrying charges are set out. As the monetary [*309] limits of defendant's obligations are thus fixed, the award was a proper exercise of discretion (cf. Belcastro v Belcastro, 104 AD2d 625).

However, the award of medical and dental expenses for the children is in the nature of an open-ended obligation and was improper under 22 NYCRR 699.9 (f) (6) (see, Armando v Armando, 114 AD2d 875; Troiano v Troiano, 87 AD2d 588; Di Mascio v Di Mascio, 88 AD2d 966, 967). Rather, under the circumstances of this case, we find that Special Term should have directed defendant to provide medical and dental insurance coverage for the children. It should be noted that plaintiff is not precluded from applying to either the Supreme[***24] Court or Family Court for the payment of future extraordinary expenses for the children (see, DiMascio v DiMascio, supra, at p 967).

Further, we find that under the facts of this case, particularly given defendant's age and the age of his children, Special Term erred in failing to direct defendant to obtain and keep in effect a life insurance policy for the benefit of the children. Therefore, we find it equitable that the cash surrender value of the old policy, which apparently has been allowed to lapse, be divided between the parties.

Finally, it was error to have awarded attorney's fees solely on the basis of the affirmations of counsel without first conducting a hearing. Where attorney's fees are challenged, the opposing spouse is entitled to a hearing, not only to examine into the financial conditions of the parties, an issue which, in this case was thoroughly examined at trial, but also as a "meaningful way of testing the [attorney's] claims relative to time and value" (see, Sadofsky v Sadofsky, 78 AD2d 520, 521; Weinberg v Weinberg, 95 AD2d 828, 829). An award of attorney's fees solely on the basis of affirmations is improper in the absence of a stipulation[***25] regarding the same (see, e.g., Sadofsky v Sadofsky, supra, at p 521; Entwistle v Entwistle, 92 AD2d 879, 880). Therefore, at the hearing to be had herein, the issue of the amount of attorney's fees to be awarded shall also be determined (see also, Price v Price, 115 AD2d -- [decided herewith] [appeal from stated portions of an order and judgment dated September 15, 1983]).

Judgment modified, on the law and the facts, by (1) amending subdivision (a) of paragraph "seventh" of the findings of fact by adding thereto, after the word "defendant", the following: [*310] ", however, any appreciation in the value of the said stocks owned by defendant from the date of the marriage until the date hereof is marital property subject to equitable distribution.", (2) deleting therefrom the eleventh decretal paragraph which directed that defendant pay all of the children's uninsured medical and dental expenses,

and substituting therefor a provision that defendant maintain medical and dental insurance coverage for the children; (3) deleting therefrom the thirteenth decretal paragraph which directed [**464] that defendant have the option of maintaining his present life insurance[***26] or paying to plaintiff the cash surrender value of $10,000, and substituting therefor a provision that the cash surrender value of the present policy be equally divided between the parties, and that defendant also obtain and maintain in effect an insurance policy on his life for the benefit of the children, and (4) deleting therefrom the eighteenth decretal paragraph which awarded counsel fees on the basis of the attorneys' affirmations only. As so modified, judgment affirmed insofar as appealed from, with costs to the plaintiff, and matter remitted to the Supreme Court, Rockland County, for a hearing to determine: (1) if the value of defendant's wholly owned corporations increased during the term of the marriage, and if so, what percentage of that appreciation should be awarded to plaintiff for the services that she performed as wife, homemaker and mother during that period, in addition to the value of any direct contribution that she may have made and (2) plaintiff's application for counsel fees, and for the entry of an amended judgment thereupon.