

**Course Name:**      **Preparing a Real Property Appraisal for Divorce Litigation, Made Easy**

**Purpose:**            **Introductory Course on Appraisals in Divorce Litigation**

**Total Time:**      **3 Hours**

### TOPIC OUTLINE

I.      **Domestic Relations Law on evaluation of residential and commercial real property for a divorce in New York State:**

A.      Marital Property

- Property acquired with marital or joint funds or the proceeds of marital property
  - regardless of whether sole title has been taken in one spouse's name.
- Includes property acquired after commencement of the matrimonial action.

B.      Property Acquired During Marriage with Contribution of Separate Property

- Where property acquired is partially paid for by funds constituted by separate property, the portion of the property not paid by separate property constitutes marital property
  - The entire property is then considered marital property
  - spouse who contributed separate property gets a credit
  - No credit will be allowed where the claiming spouse fails to prove there was no other possible source for the separate property money.
    - ◆      i.e. You must rebut the presumption that property purchased during the marriage was marital.
- Where a spouse has contributed separate property toward marital property, they are entitled to receive, in addition to the return of the separate property, appreciation generated by such contribution.

C. Separate Property Commingled with Marital Property or Transferred to Joint Ownership

- The act of commingling assets gives rise to a presumption that the assets have become marital, i.e.
  - ▶ separate funds are deposited in a bank account held jointly by the parties;
  - ▶ in a brokerage account constituting marital property; or
  - ▶ assets maintained in a jointly held safe deposit box along with other marital assets.
- Transferring separate assets to joint ownership converts them to marital property, even if the transfer was made for a limited purpose
  - ▶ the same is true where separate assets are used to acquire jointly held property.
- Even though assets fungible in nature were separate property when brought to the marriage, assets of like nature held by the parties after commencement of the marriage are marital property.
- The presumption that separate property becomes marital when placed in joint name is rebuttable where,
  - ▶ the spouse making the contribution shows the account was managed solely by the contributing spouse, and
  - ▶ that the other spouse had no involvement with the account.

D. Appreciation of Separate Property

- Equitable Distribution defines separate property to include 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.

- An appreciation in the value of separate property due to the contributions or efforts of the non-titled spouse will be considered marital.
- A spouse is entitled to an equitable share of the appreciated value of the other spouse's separate property absent a showing that his or her indirect efforts did not contribute, in some degree to the appreciation in value of that interest, i.e.
  - ▶ direct contributions to the appreciation, as when the non-titled spouse makes financial contributions toward expenses associated with the property in question,
  - ▶ contributing toward payment of the carrying costs of, or improvements to, a marital residence,
    - ◆ as well as when the non-titled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence.
- Appreciation in the value of separate property of one spouse occurring during the marriage and prior to execution of a separation agreement, or commencement of the matrimonial action, which is aided or facilitated, in part, to the direct or indirect contributions or efforts of the other spouse, as a homemaker and/or parent, is considered marital property.
- No requirement the non-titled spouse prove precisely how the active efforts of either party quantitatively contributed to the property's appreciation.
- When a non-titled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the non-titled spouse's indirect contributions, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required.
- Non-titled spouse is not required to produce a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset

- ▶ Where the contributions or efforts of the non-titled spouse are non-existent, or only minimal, the appreciation in value of the titled spouse's separate property remains separate property.
- Where the appreciation in value of separate property is not due, in any part, to the efforts of the titled spouse, but rather is due to the efforts of others or to unrelated factors (like inflation or other market forces), as in the case of a mutual fund or an investment in unimproved land or in a work of art, the appreciation remains separate property,
  - ▶ and the non-titled spouse has no claim to a share of the appreciation, notwithstanding his or her indirect efforts as a homemaker or parent.
- Non-titled spouse who claims a share in the appreciation in value of the separate property must present expert testimony establishing the amount of such appreciation due to the efforts of the titled spouse,
  - ▶ rather than to random market forces independent of the efforts of either spouse.

**Time: 50 minutes**

**10 minute break**

## **II. Preparing an appraisal:**

- A. Questions an appraiser should ask the attorney before starting an appraisal for an individual or neutral court appraiser.
  - (1) The Date of the purchase
  - (2) The date of the marriage
  - (3) Date of commencement
  - (4) Are there separate property issues?
  - (5) Is there an issue of contribution of the non-titled spouse?

- (6) Who is going to be present during the course of the physical examination;
  - ▶ Are there any problems between the parties such as Orders of Protection?
- (7) Conversations with either party. TIP: Being cordial but not too friendly is appropriate;
  - ▶ if one party persists, as a last resort, simply state that the comments and discussions have nothing to do with the appraisal and are impeding the progress of the appraisal.
- (8) Who is the intended user; the Court or one of the parties.
- (9) Form of the report: form or narrative.
  - ▶ Usually form but on special, more expensive, unusual property, a narrative report is customary.
- (10) Approach: Analysis, Sales, or cost;
  - ▶ Residential properties almost always the Sales approach, in some unusual circumstances the Cost approach; Commercial buildings have their own set of rules.
- (11) Miscellaneous considerations
  - ▶ Is the property owned by a trust?
  - ▶ Is there multiple ownership?
  - ▶ Is this a one-family dwelling, mother/daughter, two-family dwelling, multiple dwelling;
    - are there legitimate C/O's for multiple units
  - ▶ Are there rental units in the house

- B. Documents requested for a commercial property or a residential property
  - a. Certification of Occupancy

- b. Deed
- c. Survey
- d. Tax Bill

**Time: 50 minutes**

**10 minute break**

### **III. Mock Trial Testimony**

#### **A. Court appointed neutral appraiser**

(1) Direct examination: placing the expert's report into evidence

- ▶ Direct testimony for all experts follow the same pattern according to the Rules of Evidence
- ▶ The expert witness must be qualified as to education, licensing credentials and experience

Q. Please state your name and address for the record.

A.

Q. Are you employed?

A.

Q. Do you provide services under a business name?

A.

Q. Did you attend a college or university and did you obtain a degree?

A.

Q. When did you receive your degree; was it in any specialty?

A.

Q. Did you obtain an education or take courses in appraising real property, and if so, where and when?

A.

Q. Did you obtain a license as an appraiser from the State of New York, and if so, when?

A.

Q. Did you serve as an employee or work for any other appraisers before receiving your licensure?

A.

Q. As a result of your employment as an appraiser did you prepare any appraisal reports for residences or commercial properties, and if so, approximately how many?

A.

Q. Have you ever prepared appraisals for banks or financial institutions, and if so, how many?

A.

Q. Have you ever prepared a report for an attorney or for a Court, either in a local, state or federal jurisdiction?

A.

Q. Have you ever testified in Court in connection with appraisals you have prepared or appraisals that were before the Court?

A.

Q. Did there come a time where you prepared an appraisal for the subject property in Baldwin, NY, and if so, when did you do so?

A.

Q. Did you prepare this report as a neutral evaluator or for one of the parties?

A.

Q. I'm going to show you this report and ask you if it's your signature on this page? (report marked for ID)

A.

Q. Did you prepare this report for the purposes of use in this litigation? (move into evidence)

A.

(2) Cross examination:

- ▶ usually directed either towards appraisers credentials, not very often, and certainly towards the appraisers conclusion about the value

B. Using report prepared by parties' expert to cross exam and impeach the neutral expert's report.

- ▶ Matrimonial Courts have favored using neutral experts in the past few years, in that it resolves the dilemma of competing experts' evaluations, which is usually "high-ball" and "low-ball"
- ▶ Case law shows that after both experts have testified, the Court simply averaged the two prices and used that as the evaluation for the purposes of the litigation.
- ▶ However both parties, by Court rule, have the opportunity to challenge the appraisal by the Court appointed appraiser. An appraiser's job then must be to systematically analyze the Court appointed appraisal report, and provide the Court authority as to why his appraisal is valid, i.e. more accurate.

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**EDUCATION:**

B.A., SUNY at Stony Brook, 1968

St. John's University School of Law, J.D., June, 1973

Admitted: State of New York, Second Department, Oct. 1974  
United States District Court, Southern District, 1975  
United States District Court Eastern District, 1975  
United States Court of Appeals, 2<sup>nd</sup> Circuit, 1980  
United States Supreme Court, 1980

**Associations:**

Edelstein & Coleman, 1974-1987, associate  
Law Offices of Lewis C. Edelstein, 1988-Present  
Nassau County Assigned Counsel, Family Court Panel, 1975-Present  
Law Guardian Panel, 2<sup>nd</sup> Dept., 1975-Present  
Volunteer for the Nassau/Suffolk Law Services, 1975-Present

**PROFESSIONAL ASSOCIATIONS:**

New York State Bar Association  
Family Law Section  
Legislative Sub-Committee  
Elder Law Committee  
Nassau County Bar Association,  
Matrimonial Committee  
Family Court Sub-Committee  
Child Custody Sub-Committee

Suffolk County Bar Association  
Matrimonial and Family Law Section  
Elder Law Committee

## AWARDS:

Pro Bono Attorney: Nassau County Bar Association, for June 2003  
Nassau County Bar Association, for June 2007  
Suffolk County Bar Association, for April 2007  
Nassau County Bar Association, Pro Bono Attorney of the Year, 2007

New York State Bar Association, Pro Bono Attorney of the Year for 2007,  
for the 10<sup>th</sup> Judicial District

## LECTURES

### Topics

<i>End of Life Issues</i>	Friends of the Smithtown Public Library Smithtown, NY	9/26/06
<i>Elder Law</i>	Federation of Organizations Patchogue, NY	9/12/06
<i>Medicare &amp; Medicaid Update</i>	Northrop Grumman Retirees - Eastern Long Island Commack, NY	11/16/05
<i>Medicaid &amp; Long Term Care</i>	Association of American Transcriptionists Good Samaritan Hospital W. Islip, NY	11/12/05
<i>End of Life Issues</i>	Friends of the Smithtown Library - Kings Park Branch Kings Park, NY	4/11/05
<i>Medicare &amp; Medicaid Update</i>	Northrop Grumman Retirees - Eastern Long Island Commack, NY	3/16/05

## PRINT MEDIA:

"Nassau Matrimonial Attorney is Honored" (New York Law Journal, May 15, 2007)

"The Children of New York Have a Hero in Garden City" (Long Island Business News)