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# Are Expectancies Still Expectancies? How Ferri v. Powell-Ferri and Reville v. Reville Might Alter the Landscape in Property Distribution Cases

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The classic dichotomy in asset distribution pursuant to General Statutes § 46b-81 is whether an interest constitutes divisible property or an expectancy. This distinction has its origins in the cases of *Krause v. Krause*, 174 Conn. 361 (1978) and *Rubin v. Rubin*, 204 Conn. 224 (1987), which prohibit in bright line terms the consideration of an expected, inchoate interest in the fashioning of financial orders. While these bright lines have blurred somewhat over the past few decades, the question of whether an interest is divisible property or an expectancy still defines whether that interest is a marital asset subject to distribution. Nevertheless, in two recent cases – *Ferri v. Powell-Ferri*, 317 Conn. 223 (2015); *Reville v. Reville*, 312 Conn. 428 (2014) – the Supreme Court flirts with whether an expectancy can be considered by a trial court without applying this classification test. Given that these are new cases, however, how much of a development of the law they represent in the classic divisible property versus expectancy dichotomy remains to be seen.

The evolution of the distinction between divisible property and expectancies is instructive. General Statutes § 46b-81 provides the framework used by the courts in determining how to divide property in a marital dissolution. Although § 46b-81 includes "opportunity of each for future acquisitions" as a factor the court should consider in dividing property, the relevant decisional law, pre-*Reville* and *Ferri*, distinguishes interests that are distributable property from mere expectancies. Under the applicable cases, the former qualifies as property under § 46b-81, while the latter do not.

As set forth above, the Connecticut Supreme Court established a bright-line distinction between distributable property and expectancies in the seminal cases *Krause* and *Rubin*. Pursuant to those decisions, if a party had an existing claim to an interest, the interest was property. If a party's claim to an interest was dependent on future events, the interest was defined as an expectancy. In *Krause*, the Court determined that a party's potential inheritance did not qualify as property, reasoning that the inheritance was an "expectancy" because it was merely speculative. *See Krause*, 174 Conn. at 365. Nearly a decade later, the Court addressed the issue again in *Rubin*, holding that a contingent remainder interest in an inter vivos trust did not qualify as property because the interest was subject to complete divestment and had not yet been acquired. *See Rubin*, 204 Conn. at 232. The *Rubin* Court further found it was error for the trial court to award the wife a contingent percentage of the husband's interest in the trust if and when he ever received it. *Id*. at 232.

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The Court refined the definition of expectancies in *Krafick v. Krafick*, 234 Conn. 783 (1995), holding that the litmus test for the definition of property was whether a party has an "enforceable right" to the interest. The Court reasoned that this broader and more comprehensive definition was consistent with the premise that the "fruits of [the marriage] are equitable at divorce." *Id.* at 795.

The line between distributable property and expectancies blurred significantly with the 2001 Connecticut Supreme Court decision in *Bender v. Bender*, 258 Conn. 733 (2001), which involved the issue of an *unvested* pension interest. Under *Krafick*, it would have appeared that the interest was a mere expectancy, as the husband would not have an "enforceable right" to the interest until it vested. Rather than follow the "enforceable right" analysis, however, the Court built upon *Krafick* and established a new test that defined property to include any interest that was "sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes." *Id.*at 750.

The *Bender* test was later revisited in *Mickey v. Mickey*, 292 Conn. 597 (2009), where the Court explained that it interpreted *Bender* as having established a two-pronged test to define property: 1) an interest constitutes property if the holder has an enforceable legal right akin to a valid contract claim, and 2) an interest that does not satisfy prong one nevertheless qualifies as property if the condition precedent to receipt is not overly speculative. The *Mickey* Court further emphasized that an interest, even if it was sufficiently concrete to constitute distributable property, could not be classified as distributable where "it does not represent the 'fruits' of the marital partnership that § 46b–81 is designed to equitably parse." *Id.* at 631. The gravamen of this ancillary holding in *Mickey* is that only assets acquired or earned during the coverture of the marriage should be considered in fashioning the financial orders.

In apparent stark contrast to this established body of law, the Supreme Court in *Ferri* and *Reville* indicated that expectancies, although potentially not distributable themselves, should be considered in the overall mosaic as a possible future acquisition of the parties. *See Ferri*, 317 Conn. at 235; *Reville*, 312 Conn. at 453. This holding may seem antithetical to the fruits of the marriage discussion from *Krafick* and *Mickey*, yet the Supreme Court made clear that it was not intending to change the law. Rather, the Court stated, "[a]s early as 1981, [the Supreme Court] held that a dissolution court could consider a party's unvested pension benefits when crafting property and alimony orders." *Reville*, 312 Conn. at 455. In *Reville*, the Court held that "even when an item is determined to be nondistributable, its existence nevertheless is a relevant consideration for a court adjudicating a dissolution action when it assesses the fairness of a settlement, distributes property or fashions other financial orders." *Id.* at 453. Similarly, in *Ferri*, the Court stated unequivocally that "in fashioning the financial orders of the dissolution proceeding, the trial court can take into account the significant assets that will be available to [the husband] through the [family] trust." *See Ferri*, 317 Conn. at 235.

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The possible ramifications of this development are significant. Indeed, the Court's decisions in *Reville* and *Ferri* may effectively alter the landscape of property distribution. By allowing trial courts to consider nondistributable expectancy interests when "distribut[ing] property or fashion[ing] other financial orders," the court is given an incentive to potentially give the party who does not hold the interest more in other assets. As a result, although the expectancy interest itself is not distributed, it would effectively be included in the property distribution. Consider how this rule of law might have impacted the fact patterns in *Krause* and *Rubin*. Would it have been proper for the trial court in *Krause* to have considered the amount of the possible inheritance the husband might receive from his mother? Similarly, could the trial court in *Rubin* have considered the value of the possible trust distributions under the husband's mother's revocable trust? Could, or indeed, should, the courts in both cases have awarded the wives more of the divisible marital property to compensate for the husbands' respective interests in the expectancies? In the wake of *Reville* and *Ferri*, is that now the controlling law in Connecticut? As both decisions are still recent, we do not yet know how they will change the paradigm in how courts deal with expectancy interests. It appears, however, that the implications of these decisions has the potential to be substantial.

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