



By Charles and Thomas Danziger

DEAR BROTHERS-IN-LAW: Last Valentine's Day my husband served me breakfast in bed. This year his attorney served me with divorce papers. What's up with that? —Sincerely, Mystified on Madison.
DEAR MISTY: Call us for an appointment, and bring a retainer check.

A week after her e-mail, Misty and her soon-to-be ex, Andre, came in to discuss how splitting up would affect their extensive art collection. We know just enough matrimonial law to be dangerous—divorce, the saying goes, is a lawsuit to determine who gets custody of the money—so we advised them to bring along separate divorce attorneys and we would help mediate.

In New York and most other U.S. states, the general rule is well settled: Items acquired during a marriage (“marital property”) are distributed equitably between spouses, whereas those acquired before marriage or through gift or inheritance (“separate property”) generally remain separate. When it comes to property like art,

however, the application of this rule isn't always so straightforward.

In our case, Andre began the meeting on a slightly antagonistic note, calling his wife a scheming witch and declaring that all appreciation on their collection was marital property. One painting in particular—a Roy Lichtenstein image of two lovers that Misty had bought years before their marriage—had increased in value by \$1 million, and Andre wanted half of that increase, in cash. Misty's attorney objected. The painting was clearly separate property, he said, and since the appreciation in value was “passive,” meaning it was achieved without any action by the spouses, it should go to the titled owner—here, the wife.

Andre's lawyer fired back with the seminal 1986 case *Price v. Price*, in which the New York Court of Appeals held that “where separate property of one spouse has appreciated during the marriage . . . ‘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.” The attorney argued that Andre had made important “contributions and efforts” in having advised his wife not to sell the painting too soon.

According to New York divorce attorney Allan D. Mantel, a judge weighing the Lichtenstein in question would likely consider factors such as “the expertise and training of the advising spouse; whether buying, selling or collecting art was a regular activity of the parties; and the manner by which the art was acquired”—for example, whether it was inherited or purchased with separate assets.

After much bickering, the two matrimonial attorneys left the issue of the Lichtenstein unresolved, and we then discussed an iconic Jim Dine heart painting purchased at Christie’s during the couple’s honeymoon in Europe. Misty wanted the heart (“since Andre has no brain”) and reminded her husband that she had bought it in her own name with funds from her own bank account. Andre’s lawyer balked, saying his client had accompanied Misty to the auction and that it was thanks to his “great eye” that she made the purchase at all. Misty reluctantly agreed to sell the picture and share the proceeds.

Next, the couple turned their attention to a Robert Indiana “love” sculpture. Andre claimed that it was his alone because he had just received it as a birthday present from his father-in-law. “Not so fast,” responded Misty’s lawyer. (“You can’t hurry love,” we hummed.) While conceding that items obtained by gift from someone other than the spouse

are separate property, he shrewdly requested proof that the sculpture was in fact a gift. New York law presumes that everything acquired during marriage is marital property, and anything separate must be proved as such. Luckily for Andre, he had compelling evidence—a birthday card—that the work was indeed a present. As for the Schiele nude that Misty had given him for their first anniversary, this would be considered marital property, even though it was purchased with her money.

The lesson here: In a divorce it’s important to have proper documentation that shows how and when art was acquired, and the party with the more complete paperwork usually wins. Usually, but not always. Misty’s attorney observed that the birthday card thanked Andre for his “invaluable advice on my art collection.” In the lawyer’s view, this meant that the sculpture wasn’t really a gift but simply payment in kind for art consulting services. Under the law, a gift loses its character as a gift—and therefore becomes a divisible marital asset—if it is given in return for services. The issue remained unresolved, but the parties at least agreed on one thing: love was now for sale.

The mood in the room heated up when the two focused on the portion of the collection that they managed to agree was marital property. The issue now was how to split up these works in an equitable manner, which in turn raised the question of how to value the collection. Because the major auction houses don’t like to be caught in the middle of marital battles, they will generally offer a divorce appraisal only if the parties agree not to contest the final estimate. Since Andre and Misty

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Brothers in Law

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could hardly agree on anything, we suggested using an art adviser to value the works instead.

Next they discovered that they each wanted exactly the same pieces. This wasn't surprising, since divvying up an integrated art collection can be challenging even among friendly parties—and friendly did not begin to describe our couple, who were now glaring at each other across the table.

Rather than have Andre and Misty recreate a scene from the movie *The War of the Roses*, we suggested a more Solomonic solution, borrowed from third-grade gym class: a system of alternating picks. This is what happened in the famous 1983 New York State Supreme Court case *Scull v. Scull*, involving taxi fleet tycoon Robert Scull and his wife, Ethyl. The judge ordered the couple to divide their Pop art collection equally, on the basis of a Sotheby's appraisal. Each party took turns selecting works from a vast central warehouse space, filling up "his" and "her" rooms. After much to-and-fro, Andre and Misty finally settled on this approach.

As we discussed dividing the couple's collection, a final complication arose. Andre, an accomplished amateur artist, did not want to part with any works that he himself had painted during the marriage. Misty not only insisted on a division of the "hideous little paintings" but demanded a half interest in their copyright, "on the remote chance they are ever worth more than a nickel."

In support, her attorney referred to a groundbreaking case in 2000, *Rodrigue v. Rodrigue*, between the artist

George Rodrigue and his wife of almost 30 years, Veronica. The Fifth Circuit Court of Appeals ordered George Rodrigue, who had created the wildly successful "Blue Dog" image used to sell products ranging from Xerox copiers to Absolut vodka, to give Veronica a half interest in the net economic benefit from copyrighted works that he produced during their marriage. Not surprisingly, Andre's attorney balked at the copyright request, which was tabled for further discussion.

By the end of the meeting, we understood why divorce is so expensive: because it's worth it. Fortunately, Misty and Andre eventually did manage to divide their collection, living happily ever after. Happily, but separately.

Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice. Charles and Thomas Danziger are the lead partners in the New York firm [Danziger, Danziger & Muro](#), specializing in art law.

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