

What Happens to a Rental Apartment in a Divorce in New York?

For many New Yorkers, one of the issues they first consider when contemplating a divorce is what will happen to my rental apartment when we divorce? The issue is particularly acute when the apartment is a rare New York City rent controlled or rent stabilized apartment.

That very issue recently confronted one New York couple living in a rent controlled apartment. In *Cudar v. Cudar*, the husband leased a rent-controlled apartment in 1960. In 1969, the parties wed and the wife moved into the apartment. The parties resided together in the apartment for thirty five (35) years, until 2004, when the husband was forced to leave after the wife obtained an order of protection. Since 2004, the wife solely paid rent and resided in the apartment.

The husband claimed that the apartment was his pre-marital separate property and that he was entitled to retain possession of it.

As part of a divorce, property is broadly defined as either marital or separate property.

As detailed in the courts decision:

Domestic Relations Law § 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial action, *regardless of the form in which title is held*

. . . Separate property, on the other hand, is defined, in part, as "property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse" (Domestic Relations Law § 236[B][1][d][1]). Separate property is required to remain separate for the purposes of equitable distribution.

At issue in *Cudar* was how the lease should be qualified- was it separate or marital property? The Court through a curve and declared that the lease was neither. The Appellate Division stated that:

A leasehold interest in a rental apartment, even one subject to the rent control law, which is not expected to be converted into a form of ownership such as a cooperative, is neither marital nor separate property as defined by the Domestic Relations Law.

This is a logical conclusion, The lease to rental property does not give the tenant an ownership interest, but instead confers the right to occupy the premises and to pay rent, albeit in the case of a rent controlled apartment at a rate substantially below market level.

Though the apartment cannot be distributed as part of the divorce, the court is empowered as part of the divorce to determine who may occupy and possess the apartment. While the Appellate Court remanded the matter to the trial court of consideration, if I was the husband in this case, I would not be making plans to move into the apartment anytime soon. The Court cited a single case where, like the case at bar the husband was excluded from the apartment because of his violent acts, the divorce was granted based upon those acts, the wife was the sole occupant of the apartment for eight years, and had paid the rent during that time. The Court specifically noted the trial court's conclusion that "it would be inappropriate to "uproot" the wife" to give occupancy to the husband.