

### **What is the standard for dividing property in Ohio?**

Each spouse shall be considered to have contributed equally to the production and acquisition of "marital property." The laws of the State of Ohio require that the division of "marital property" must be equal, unless such a division would be inequitable. In such a situation, the court must divide the property equitably instead of equally.

### **What is "marital property?"**

"Marital property" means, all of the following:

- a. All real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;
- b. All interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;
- c. Except as otherwise provided, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage;
- d. Participant accounts in state and municipal deferred compensation plans, to the extent set forth in the applicable statute.

"Marital property" does not include any "separate property."

### **What does the term "during the marriage" mean?**

"During the marriage" means whichever of the following is applicable:

- a. the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation; or,
- b. if the court determines that the use of either or both of the dates specified above would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, "during the marriage" means the period of time between those dates selected and specified by the court.

### **What is "separate property?"**

"Separate property" means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

- a. An inheritance by one spouse by bequest, devise, or descent during the course of the marriage;
- b. Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage;
- c. Passive income and appreciation acquired from separate property by one spouse during the marriage;
- d. Any real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation;
- e. Any real or personal property or interest in real or personal property that is excluded by a valid ante-nuptial agreement;
- f. Compensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets;
- g. Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.
- h. The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.

### **How does the court determine how to divide the marital property?**

In making a division of marital property and in determining whether to make and the amount of any distributive award, the court shall consider all of the following factors:

- a. The duration of the marriage;
- b. The assets and liabilities of the spouses;
- c. The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;
- d. The liquidity of the property to be distributed; The economic desirability of retaining intact an asset or an interest in an asset;
- e. The tax consequences of the property division upon the respective awards to be made to each spouse;
- f. The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;
- g. Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;
- h. Any other factor that the court expressly finds to be relevant and equitable.

### **How does the court determine the value of a marital asset?**

Obviously, some assets have a readily ascertainable value, such as a bank account, publicly traded stock, etc. If the parties can not agree on the value of other assets, there must be a determination of the value in order for the court to be able to make an informed determination. The value of assets such as homes, cars, jewelry, etc., can be determined by obtaining appraisals from qualified experts. The value of pensions and retirement accounts may also be determined from an evaluation. Assets such as the value of a business, is often more troublesome. In those situations it is usually necessary to retain the services of accountants and other experts to do financial evaluations. This process can often become relatively expensive and time consuming. Unless the parties agree to accept the value determined by one expert, the court will have to take evidence and testimony and make a determination based upon the evidence as to the value of the property.

### **Is a professional license or degree an asset subject to valuation and division?**

No. Although other states have ruled otherwise, Ohio has determined that the license or degree is not an asset subject to division. The future value of a professional degree or license earned during the marriage is, however, a factor to be considered by the court when making a determination with regard to spousal support.

### **What about retirement accounts, pensions and other deferred compensation?**

The retirement benefits of the spouses, including IRA's, 401-K plans, pensions, deferred compensation, etc. are considered marital property and subject to division by the court to the extent that it was acquired by either or both of the spouses during the marriage.

### **Divorce and Your Real Estate**

Disposition of the family home frequently causes problems in a divorce. Custodial parents may want to hang onto the home for the sake of the children. Perhaps one or both spouses can't afford to purchase a similar replacement home. Much depends upon the amount of equity in the home and the ability of each spouse to keep it.

For most couples the family home is the highest valued asset they will have to divide in their divorce. Its division is usually fraught with controversy for varying reasons. It may be difficult to value, is not readily converted to cash, costs a substantial amount of money to maintain and has implications of federal and state tax liability. As if all those things were not enough, your family's emotional attachment to your real estate, in particular a family or vacation home, can cause you to make an irrational or poor decision at the time of the divorce. Your family may be haunted by that decision for years after your divorce.

### Some questions that you need to answer are:

- a. Should you sell the family home?
- b. Do you keep it until the children are grown?
- c. Should you keep the home and buyout your soon to be ex-spouse, or vice versa?
- d. Can either of you afford to keep it after the divorce?

The answers to these questions and others can help you avoid or plan for problems associated with your real estate. Historically, the family home is the asset that most often causes controversy both before and after a divorce.

The principal reason for this problem is the timing of the sale of the home and the division of the net proceeds. Both events frequently occur some time after the divorce. In addition, couples seldom plan as they should for the payment of household maintenance and upkeep during the pendency of the divorce. At first glance the family home appears to be the easiest asset to identify and describe. For purposes of a divorce, the description of your ownership interest in your home and other real estate can be very complicated with pitfalls for the unwary. As with the division of personal property, the rules and laws regarding the division of real estate vary from state to state. Consult with your lawyer about your rights and responsibilities after you have read this section and put together your worksheets.

Before you see your lawyer, gather the necessary documents and records about each piece of real estate. Get the documents not only for the property titled in your name, but for all the property in which you or your spouse has an ownership interest. This includes property that you own in either of your names alone, jointly with another person or property owned by a trust or business in which either of you have an interest.

### Key Factors

There are six key factors about your real estate that affect the handling of the asset or the distribution of the net proceeds from the sale of the asset in a divorce. The factors are:

1. identification of the type of real estate and the type of ownership interest you have in the property
2. the ownership history of your real estate
3. real estate, income and capital gain taxes
4. debts, such as loans and tax liens, that are secured by the real estate the value of the real estate
5. the plans you must make to pay for and maintain the real estate during the pendency of the divorce and afterward
6. The following sections describe in detail these six factors.

### Identification

As previously mentioned, most couples own an interest in real estate in the form of a family home. Other types of real estate that you may own are vacation property, rental property, commercial or office buildings, buildings on land leases, vacant land, mineral rights and other types of special use real estate. Whatever type of real property you may own, each one has unique features that could affect how you can utilize it in your divorce, especially in the context of a settlement agreement. The following sections of this chapter contain examples of some of the methods you might use.

How you hold title to the real estate may determine, in large part, what interest you and your spouse have in the real estate. Most married couples own property as tenants by the entirety and each spouse has an undivided one-half interest in the property. A divorce ends the ownership in tenancy by the entirety. Joint tenancy is similar to tenants by the entirety except that the owners are usually not married to one another. In joint tenancy and tenants by the entirety, if one of the owners dies, the deceased person's interest passes to the other owner by operation of law. Another way of holding title is as tenants in common. The interest owned by each tenant in common is divisible and can be inherited by the owner's heirs. This is customarily the way that unrelated persons, including divorced people, own real estate together. It may be the way that you and your ex-spouse own your real estate after the divorce.

### History of Ownership

It is important to establish and document the history of your real estate ownership because each parcel's history affects the property's net worth. For example, real estate has tax implications that are usually assumed by the person receiving it in a divorce. Additionally, the history of your real estate helps you determine if the real estate that was owned before the marriage or inherited during the marriage is marital or separate property. Finally, the history of the land usage enables you to analyze the financial and environmental risk, if any, you could incur from owning the property.

Prepare a history of your home ownership for each property you have owned, including those which you have sold. Make notes about any miscellaneous information that is important about the real estate. Put together any source documents you used to back up your information. Organize your documents so that your history table is the first document in your real estate file. Then attach the supporting documents in descending or ascending order to the file folder. Some of the relevant information you need for each piece of real estate is:

- a. Address, purchase price and date purchased
- b. Down payment amount and source of funds for the down payment
- c. Original loan amount and current balance
- d. List of improvements you have made and their cost depreciation claimed on any prior year's tax return
- e. Insurance proceeds received from any claim
- f. Costs to repair any damages or restoration costs
- g. Date sold, sale price, costs of sale and net proceeds

As it applies to divorce, the secretion of assets is an attempt by one spouse to hide assets that might be subject to distribution as part of the marital property settlement.

Very often, when one party is contemplating a divorce, he (or she) hides assets that might otherwise be eligible for distribution as part of the property settlement. Very often women are at a disadvantage at the outset of a divorce because the husband very often manages his money and her money and their money, and the wife has a limited understanding of their assets and liabilities.

Sometimes these machinations become quite complicated and require a forensic accountant who can analyze financial records for evidence of dissipation and secretion. For example, a forensic accountant examines UCC filings for evidence of collusion with a business partner in hiding or misrepresenting marital assets.

A certified fraud examiner can be called to testify as an expert witness.

Assets can sometimes be hidden in a variety of ways. For example, assets can be hidden as false debts to friends or in a closely held business. Unusual expenses are another red flag. Judges look very unfavorably on both dissipation and hiding of assets.

Further, during the divorce process, there are references to three D-Days: the Date of Marriage, the Date of Separation, and the Date of Divorce. In reality, with respect to a marriage, the beginning of the end traditionally comes with the formal Date of Separation. Its impact can be far-reaching. The actual Date of Separation is quite critical and can have a dramatic effect on things such as credit, pension benefits, and other marital assets. From this date on, you and your ex-spouse to be are now in limbo both legally and financially, and will retain such status until the actual Date of Divorce. During this time period, there is quite literally a potentially large amount of money at stake, depending upon you and your spouse's particular situation. You may still be held responsible for any debts incurred by your spouse after the DOS; the value of a retirement plan or other marital asset such as residential property can go up or down, often by thousands of dollars, contingent upon the applicable laws of your home state.

In dealing with dissipation, courts balance the competing goals of preventing dishonest or

reckless expenditure of marital funds against reasonable use of marital funds for legitimate purposes. According to one source, "[t]he immense body of case law dealing with [dissipation] is a tribute to both the dogged persistence of spouses who are determined to steal marital property for themselves, and the ingenuity of courts faced with stopping them."

In divorce, the allegations that a jilted husband emptied a wall safe, or looted a safe deposit box, or cooked the books are the themes and refrains that judges hear like the sad refrains in Greek chorus. In divorce actions, courts even hear claims that spouses dissipated assets during the happier times of the marriage.

Courts disagree the expenditure of marital funds for living expenses during a separation, but a majority have said that the burden of proof is on the party doing the spending. That means he or she must prove that the funds were spent for a marital or proper purpose.

Courts look with disfavor on the dissipation of assets, and some consider it serious marital misconduct. Very often, when one party is contemplating a divorce, he (or she) hides assets that might otherwise be eligible for distribution as part of the property settlement. Very often women are at a disadvantage because the husband manages the money. Sometimes these machinations become quite complicated and require a forensic accountant who can analyze financial records for evidence of dissipation and secretion.

In the context of divorce, dissipation of assets includes concealment and conveyance of assets as well as their wasting through acts that are reckless and negligent and not necessarily intentional.

In divorce actions, sometimes courts issue pretrial injunctions to prevent dissipation before the fact, but this at the least requires that one party demonstrate that dissipation is likely to happen.

Very often dishonest spouses reduce the marital estate by conveying assets to friendly third parties. Sometimes, a court orders a rescission of a fraudulent conveyance of assets, which in effect restores the property or assets to the marital estate.

The Uniform Fraudulent Transfers Act (UFTA) and case law govern rescissions of fraudulently conveyed property. In divorce actions, courts have rescinded the conveyances of real estate and stock when it was demonstrated that the transfer happened without appropriate consideration and with fraudulent intent.

Very often when couples divorce courts must deal with dissipation after the fact via unequal distribution of the remaining marital assets in favor of the victim party, usually the woman.

In at least one case, a Michigan court added deterrence to the logic of the punitive distribution, holding that the amount of the unequal distribution can be greater than the amount dissipated (although an appeals decision reversed the lower but upheld the facts). A growing body of case law permits courts to award amounts greater than the amount of the damage in the interest of deterrence.

The most common way of dealing with dissipation is to treat the dissipated assets as a marital

property, then distribute what is already gone as that party's share of the marital pie. For instance, an alienated spouse who squandered marital assets in the casinos may find that amount negatively credited to his share of the marital estate. Intent is not a consideration in the dissipation of marital assets by a problem gambler, who is addicted to the thrill in the risk of financial ruination.

Generally, a dissipated asset may be considered marital property if 1) the asset is lost; 2) the loss happened upon and after the breakdown of the marriage; 3) the guilty spouse controlled the asset at the time of the loss; and 4) the loss was not incidental to a valid marital purpose. In the case of the first three elements, the burden of proof is on the spouse alleging dissipation; in the case of the last element, the burden is on the spouse to prove a valid marital purpose.

The expenditure of marital funds for a girlfriend or paramour can be classed as dissipation of the marital estate.

Gifts to children, particularly when they are larger than previous years, may be classed as dissipation, especially if they are made near the time of the marital breakup.

Loss can take many forms, including destruction (a California case where a spiteful husband threw his wife's jewelry into the ocean); deliberate reduction of an asset's fair market value; negligent reduction of fair market value; concealment; placement of an asset in a trust; allowing foreclosure of real estate.

Courts sometimes face cases where one spouse improperly appropriates marital funds early in the marriage. A Massachusetts court, for example, considered the wife's economic misconduct in dividing marital property because he had squirreled away some \$100,000 in marital property in accounts in her own name from the beginning of her marriage.

Expenditures or loss associated with a "valid marital purpose" are more problematic. No court has made a definite ruling of the meaning of this phrase, but valid marital purpose would be when one partner spends marital assets on routine living expenses, business expenses associated with a marital business, reasonable maintenance and payment of taxes on marital property. In general, the use of marital funds to attorney's fees is not dissipation.

The payment of temporary spousal and child support, particularly after the breakdown of the marriage but before the divorce, can be knotty. Payment of court-ordered spousal and/or child support is not a marital purpose since by its nature such support is paid by one spouse to the other for the benefit of children. However, courts in some jurisdictions look upon the payment of "reasonable living expenses" as valid marital purpose, not dissipation. The determination of whether such expenses are reasonable and permitted dissipation may lie in whether they are paid before or after the classification of assets.

Courts increasingly hold that dissipation may also include recklessness without intent to harm the spouse or the marital estate. Courts uniformly include "excessive gambling" in this category of dissipation. Marital funds spent entertaining a paramour, with or without a reckless intent, are also dissipation.



Reckless expenditures, such as the loss of \$56,000 in marital assets seized by the federal government upon the failure of the husband's illegal drug business, are dissipation.

Like so much of divorce maneuvering, dissipation becomes darkly comic. In one 2004 Indiana case, a man weakened a claim that his wife removed \$3,000 a home safe when he "suddenly remembered" some \$75,000 in bonuses he previously said he had not received from his employer. In presenting his case, he further blundered when he failed to allege dissipation in connection with the improper removal of some \$7,000 from the parties' checking account immediately after separation. Thus the court decided that the \$7,000 was not subject to a claim of improper division.

Marital property is property specifically accumulated by the couple during the marriage. States differ in their treatment of the different types of property. In some states, all property and earnings accumulated during the marriage are considered marital property. In other states, property acquired before the marriage, gifts, and inheritances are excluded from marital property. There are other exceptions, and each state is different. If you are doing your own separation or divorce it is very important you recognize and understand what is considered "marital" or "separate". If you have a lawyer or mediator, or intend on hiring one, he or she should ask you to list and itemize all the property. At which point, they will help you classify the property into two categories "Marital" and "Separate".

### **Contact the Law Office of Michael J. Davis**

To talk to Michael J. Davis about your legal concerns, please contact us by calling 513-604-8391 or emailing us at [davislaw01@gmail.com](mailto:davislaw01@gmail.com)

Michael J. Davis is located in Mason, Ohio, and serves clients throughout Ohio, including Lebanon, Maineville, Mason, Morrow, Springboro, South Lebanon, West Chester, Warren County, Butler County, Hamilton County, Clermont County and Clinton County, Ohio.