

A Snapshot of the Financial Considerations in a Divorce

BY JAMIE L. WRIGHT

The sheer thought of going through a divorce may cause feelings of anxiety, fear, and confusion. Swirling questions concerning how the process will impact your children, yourself, and your future can become all consuming. If you have children, your priority will most certainly be to protect them and their best interests as best you can during the divorce process. However, second only to protecting your children is protecting your assets, your financial stability, and your financial future.

Financial issues in divorce are a common source of discord and, consequently, litigation between partners. Even prior to the filing of the divorce, it can be important to have some understanding of the financial issues that may come up, what to expect, what you may be required to disclose, and what/how property may be divided during the course of and following the divorce.

Marital versus separate

A good starting point in thinking about the division of property is understanding how the law distinguishes between marital and separate property and why such a distinction is critical. (Remember, debts are essentially “negative” property and allocated by law the same way property is allocated.) Though you may have preconceived notions of what is yours, your partner’s, and shared property, the divorce law in your state may not be in line with your views.

Generally, the court will only have jurisdiction to divide marital property between the parties, with the division being equitable, or equal, depending on the state. However, in most states, the court also will have jurisdiction to set aside separate property to the rightful owner. In many states, marital property is property acquired during the marriage, without regard to whether the property is titled in one party’s individual name. If acquired during the marriage, it also may be important to consider how the property was acquired. If the property was acquired through a gift, bequest, inheritance, or the like, the asset may be your separate property and not subject to division by the court, even though it was acquired during the marriage.

Additionally, be aware that even property acquired before you were married may have increased in value during your marriage. In some states, the court may find that increase in value to be marital property and subject to division. For example, if you owned a retirement asset prior to your marriage, you may need to provide documentary proof of the value of the account immediately preceding the date of your marriage to demonstrate your separate property claim.

Although you may claim that your partner “knows” some of your retirement assets are separate or premarital, in the absence of documentary proof of value, in a contested case, the court may classify the entire amount as marital. In this vein, it is important to understand the differences between public and private retirement assets. For example, the division of public retirement benefits often calls into question the length of the marriage, years of service, and vesting schedule, along with very



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specific rules surrounding division of the account incident to divorce, while private plan rules are not necessarily so stringent.

In many states, the waters become further muddied in the event that you have mixed, or commingled, separate property with marital property. This is called “transmutation of property,” meaning that nonmarital property may be transformed into marital property. In some states, this situation arises if the money or other premarital assets have been commingled and cannot be traced, they have been placed in joint ownership, or the parties have used the funds in support of their marriage. In some instances, it may be important to explain why you contributed your separate property to joint property. What was your intent? Was there an understanding that you would get your contribution back, *i.e.*, be paid back, or did you intend to give your separate property to your marriage? Your intent is an important consideration when you contribute separate property to, or for, the purchase of joint assets, *i.e.*, assets titled in both parties’ names, during your marriage.

Bear in mind that you remain married after the divorce case is legally filed, and before the decree or final orders are issued. It will be important to understand when the accumulation of marital assets is cut off. A common expectation is that property or debt accumulated after physical separation is separate property. Although that is true in some states, in others it is the formal filing of the divorce action that establishes the cut-off date. In a third category of states, the accumulation of marital assets and liabilities is not cut off until the divorce is granted. Transfers made on a mistaken belief that no more marital property is being created may result in the court’s construing your action as a gift to the marriage, thereby causing the property to be classified as marital property.

In determining whether money or other assets might be categorized as separate property in the event of a divorce, the paper trail can be important. For example, if money was inherited, account statements showing where it went can be crucial. If assets owned prior to the marriage are used to acquire different assets during the marriage, a portion of the asset acquired may still be considered marital property. For example, one spouse uses an inheritance acquired during the marriage to purchase a family cottage, although the cottage may be separate property, there may be a marital component if it increased in value during the marriage, or if marital funds were used to pay down any mortgage, make improvements, etc.

In many cases, it may be necessary to hire a forensic accounting expert to trace and report as to the value of the separate assets mixed with marital assets. Forensic accounting experts generally have special education, training, and experience in tracing assets, analyzing their findings, and testifying before the court within the legal definition and valuation framework. Understand that the tracing process, with the assistance of a forensic accounting expert, can be very time consuming and an added expense.

Even before you think about dividing marital property and setting aside separate property, the following question must be answered: for purposes of a divorce, what is property? Property is not just furniture, cars, homes, or money in the bank. Property can be intangible as well. Consider certain trust interests, businesses, and stock options, to name a few examples. You will likely be required to disclose, or provide to your partner, documentary evidence of the existence of not only tangible assets and their values, but intangible assets, as well.

Often the value of assets becomes a disputed issue. For example, the value of commingled separate assets is a common source of litigation, as is the valuation method employed to determine the value of intangible assets, such as trust and business interests. Ask your lawyer about the different valuation methods applied in your state at the start of your case, especially if you own intangible assets. The

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valuation method employed and the experts chosen to value particular assets are usually part of an overall strategy to protect your interests as best you can through the divorce proceedings.

Once your divorce case is filed, your actions concerning spending and/or transferring/moving funds, may be scrutinized. In some situations, your actions may even be viewed as a violation of a court order. For example, a spouse who deliberately dissipates or wastes property to deprive the other spouse of any portion of a particular asset could be subject to penalties, such as fines, having to pay the other party's attorney's fees, or having the court value the asset dissipated as if it still existed and was held by the spouse who disposed of it.

Some states have statutory orders to prevent the dissipation of assets, which automatically go into effect upon the filing of a divorce case and service of the summons. In Colorado, for example, unless spouses consent to another arrangement or exception, an automatic temporary injunction prohibits either spouse from transferring, encumbering, concealing, or in any way disposing of marital property, except for the necessities of life and in the usual course of business. Statutory restraining orders offer legal protection against dissipation or wasting of assets. Another layer of "protection" against dissipation of assets in some no-fault divorce states is the court's consideration of "economic fault" or deliberate wasting of marital assets during, or in contemplation of, divorce. The bottom line is that you need to be very careful about how you conduct your financial affairs once the divorce case is filed. If you begin spending or hiding money in a dramatically different way than you did before the divorce was filed, there may be serious financial consequences.

Where the court has jurisdiction to allocate marital property equitably, both financial and nonfinancial contributions may be considered in the court's allocation of marital property. An example of a nonfinancial contribution would include a spouse's contribution as a homemaker. In equitable division states, the court may allocate property in percentages different than 50/50 if there is good cause to do so. Understand, however, that simply because you were the one who earned, or paid for an asset from your earnings, does not necessarily mean that you will get a greater portion of that asset or the marital estate. Contribution is but one factor to be considered.

Another financial consideration is your economic circumstances at the time the divorce is filed. Do you have a high earnings potential? What are your projected future Social Security benefits? Do you have substantial separate assets? All of these economic circumstances are additional factors to be considered in an equitable, or uneven, division of marital property.

What is "income"?

Another financial piece of the puzzle is the issue of support. To have a meaningful understanding of what you may expect to receive, or pay, for child or spousal support, you must fully understand what your income is. Certain funds constitute income for purposes of determining child support, and other amounts do not.

In many states, for purposes of determining child support and spousal support, income is defined by statute. Income is not necessarily limited to employment earnings. Rather, income can include and come from a variety of sources such as commissions, regular bonuses, rents received, interest received, capital gains, unemployment/disability benefits, including Social Security, spousal maintenance/alimony, monetary gifts and prizes, and the list goes on. Often military benefits such as BAH (Basic Allowance for Housing)/BAS (Basic Allowance for Subsistence) are includable as income. What income is depends on how your state has defined it. Examples of monies specifically excluded from income include child support payments

received and public assistance benefits.

If you are not working full time, or up to your capacity, the court may impute appropriate income to you for purposes of determining support, unless an exception applies. That means the threat of quitting a job to avoid paying support is often meaningless and can backfire. Parties are sometimes treated as earning a certain amount of income each month or year, even if not earning that amount because of unemployment or underemployment (working part time when able to work full time or working in a job not commensurate with qualifications and capacity). Exceptions to imputation of income may sometimes include enrollment in an educational program, the care of a young or disabled child; and/or employment limitations, *i.e.*, incapacity or disability.

This is another area where experts are relied on. Vocational experts are often hired to determine an unemployed party's employability and earnings capacity. Word of advice: it is a bad idea, once the divorce is filed or in anticipation of filing for divorce, to quit your job, deliberately decrease your work load, or take a lower paying job as you will likely be imputed income anyway.

Many other factors, in addition to income, go into a determination of child support and spousal support. Addressing those other factors in detail is best saved for another discussion. However, given that, having an expectation of what your financial support may be, or what you may expect to receive during and at the conclusion of the divorce, is of extreme importance in future planning. The other factors may include, very briefly, with respect to child support: the number of children; the parenting-time overnight schedule; the cost of insurance (health, dental, vision) for the children; the cost of childcare; and any other extraordinary expenses for the children (*i.e.*, monthly medical needs, private education, extracurricular activities, etc.). With respect to spousal maintenance, other factors may include: length of the marriage; the ability of the lower-wage-earning spouse to be self-supporting; the presence of marital income-producing assets; the ability of the higher-wage-earning spouse to pay support; and the age and health of the spouses involved.

Be prepared to seek professional tax advice concerning the amount of spousal support. Generally, spousal support is deductible to the payor spouse for income tax purposes and taxable to the receiving spouse. There also are recapture issues to consider.

Attorney's fees

One last preliminary financial consideration is the issue of attorney's fees and costs, including expert fees. You may agree, or be ordered, to contribute to or pay for all your spouse's attorney's and/or experts' fees. Generally, this depends on the parties' financial resources and the disparity in earnings. Regardless of which side you are on, the public policy is such that the court does not want one party to be disadvantaged during the divorce proceedings and, optimally, both parties should be on an equal financial footing throughout the legal process. This means that both should have equal access to representation and experts. The amount of fees that one party may have to pay, or that one party may expect to receive, depends on the facts and circumstances of each case and the reasonableness and necessity of the amounts requested.

Certainly, a range of financial considerations may surface in your divorce case. Each issue should be addressed in detail at the beginning and throughout your case. Begin organizing your financial paperwork, whether in hard copy or online. Understand your household budget and how much you will need to sustain a separate household, in comparison to how much you earn. Keep in mind that the budget needs to be realistic—not a "wish list."

If the marriage is stressed because of overspending, the reality is probably that everyone will need to cut back. Compile a list of property and think about whether the property is separate, marital, or potentially both. What is the value of the property? Will you need an appraisal? Organization is key to being prepared to make full disclosure of documents and have a reasonable expectation of how the divorce will affect you financially. Prioritize your wants, versus your needs, and understand that your postdivorce life will, in all likelihood, look much different than your married life, but possibly in a way that you are satisfied with and feel is fair. **FA**

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