

Equitable Distribution

Dividing Up Your Marital Stuff and Things

by Marci R. Carroll, Esq.

Equitable distribution is one of the main tasks in every divorce action. It is a three step process of identifying, valuing, and dividing the assets and debts of the marriage. Sound simple? Not really.

Equitable distribution is one of the reasons why completing your financial statement fully and accurately is so vital. The assets and debts section of the financial statement forms the basis for this process. And don't think that just because you and your spouse agree on property division that you won't need to complete and file financial statements; case law requires that verified financial statements be filed even in cases where the parties have a property settlement agreement. And let's face it, how can you evaluate whether you have made a reasonable property settlement if you don't know what is subject to division and the value of that property?

Identifying what property is marital and what property is separate is the first step. Marital property is subject to equitable distribution; a party's separate property is not. Marital property is defined by time frame rather than by title. A rule of thumb in identifying marital property is whether it is an asset acquired or a debt incurred since the date of marriage which still existed as of the date of the parties' separation. Of course, determining the date of separation is not necessarily clear cut, and a variety of exceptions to this rule of thumb may apply to make the asset or debt separate property. Moreover, an asset or debt may be part marital and part separate property. An asset which would have otherwise been classified as a spouse's separate property (*i.e.*, not subject to equitable distribution) may be transmuted into marital property. Distinguishing between active and passive depreciation can make the difference between characterizing property as marital or separate.

Further, the identification step requires that the list of assets and debts is complete. Many parties carelessly or unwittingly neglect or simply fail to include any number of assets and debts on their financial statements. Negligently or deliberately failing to disclose information as required on the financial statement can potentially have unpleasant and financially adverse consequences.

Valuing marital property is the second step in the equitable distribution process. Ordinarily, the courts will look to the value as of the date of the parties' separation. Assessing the fair market value of marital property can be tricky and often requires the assistance of outside experts such as appraisers and internet research. An experienced domestic relations attorney can assist you in securing this information as well as supporting, objective documentation regarding the value of other assets and debts.

After marital assets and debts are identified and valued, the final step is the divide the marital assets and debts between the parties.

- If the parties can agree how this division should be accomplished, a written property settlement agreement should be drafted and properly acknowledged by the parties; however, the property settlement agreement is still subject to scrutiny and approval by the family court. Family courts should approve the parties' property settlement agreement so long as it is found to be expressed in enforceable terms, fair and equitable, and not obtained by fraud, duress, or unconscionable conduct by either party. Signing a property settlement agreement is generally viewed as being contractual in nature and is extremely difficult to have set aside once it is signed by the parties. Therefore, you should consult a knowledgeable domestic relations attorney before entering into or signing any property settlement agreement. Further, drafting a property settlement agreement is a task that is best undertaken by an experienced attorney.
- If the parties cannot agree how this division should be accomplished (or cannot agree as to the identification or value of the marital estate), the family court must resolve the equitable distribution issue. Absent agreement between the parties, the law presumes that the assets and debts of the marital estate should be divided equally between the parties. However, this presumption is a rebuttable one and there do exist several bases upon which the family court may alter this equal distribution of assets and debts. Contrary to popular belief, the fault and the grounds for the divorce have absolutely no impact upon equitable distribution.

Equitable distribution is a complex and extremely important component of all divorces. Moreover, it is most definitely an area in which an experienced and dedicated domestic attorney with a commitment to assisting you in gathering information and analyzing supporting documentation can make a difference.

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