

## **EQUITABLE DISTRIBUTION OF PROPERTY**

You need to know your rights regarding the equitable distribution of property in Florida; decided what is yours, mine or ours and how it can be divided up. Florida statistics shows that property division requests the most Court hearing time. If however you and your spouse can agree on a split of property ahead of time which is called a matrimonial settlement agreement or a stipulated settlement or sometimes just a settlement agreement and your agreement is reasonable, the court can approve your agreement as written and incorporate it into the Final Dissolution of Marriage. This can be a real financial and emotional cost favor to you. Otherwise the Court will set the matter for hearing, hold a trial and impose its own decision on how to divide your property.

*So what are the general principals of property division that the court's in Florida follow?*

### **ASSETS AND LIABILITIES**

Property includes everything that you have that could be considered an asset such as your home, cars, timeshares, investment property, investment accounts, retirements assets, stocks, pets, bank accounts, equipment, your business, life insurance cash value, pension plans, accounts receivable, furniture, jewelry, etc.

The other item that must be considered are your liabilities.

*Home and what do you owe?*

This must come into the mix. Often the parties fail to insure that the person to whom the debt was assigned in the marital settlement agreement or the divorce decree properly pays the debt.

Remember: a creditor is not bound by the agreement between you and your ex. or by the court order.

If it is a joint liability, it will look to you that the debt is not paid regardless of any agreement or Court order. After you have listed all your assets and liabilities, the Courts will look at whether the property is marital or non-marital property. Marital property is subject to be divided by the Court or by the parties in the marital settlement agreement. Non-marital property is not divided at all.

**Non-Marital Assets and Liabilities include:**

- Those acquired or incurred by either spouse prior to the marriage
- As it is acquired by either spouse by non interspousal gifts or inheritance
- Income derived from non-marital assets during the marriage; unless the income was used or relied upon by the parties as a marital asset, for example if they deposited it into a marital account.

- Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties such as a pre-nuptial agreement

#### Marital Assets and Liabilities include:

- Those acquired or incurred either or both of the spouses during the marriage
- Enhancement of or act of appreciation in, value of a non-marital asset as a result of the efforts of either spouse during the marriage or from the contribution to an expenditure of marital funds or other marital assets
- Inter-spousal gifts during the marriage
- All vested and non-vested benefits or funds occurred during the marriage in retirement, pension, profit sharing, annuity, deferred compensation, and or insurance plans or programs
- Property held by the parties in tenancy by the entirety, or otherwise commingled, or acquired during or prior to the marriage, is presumed a marital asset, although one spouse may claim contrary and prove special equity. (however, if a prenuptial contract holds otherwise this is not the case)

### **PROPERTY DIVISION**

Property division example:

Adam and Eve have been married for ten (10) years. (Ten years is a grey area when it comes to alimony). Adam is employed as a bagger for Publix. They have a joint banking account with a ten thousand dollar (\$10,000.00) balance and a credit union account that John started four (4) years prior to the marriage which is now held in their joint names. Every month Adam places \$50.00 in the credit union savings account from his wages. Eve has never deposited any funds into that account. Eve's mother died five (5) years ago and left her twenty-five thousand dollars (\$25,000.00); she used five thousand dollars (\$5,000.00) to start a new business which has been successful. Before starting her business she had been a homemaker. Now she is a nail tech. A nail chain has offered to purchase her nail business for \$100,000.00. With the remainder of the o her money from her mother's inheritance Eve bought Adam a new car to replace the old one that he had before they got married. Adam has a pension from Publix where he has worked for the past fifteen (15) years. Adam plans to retire when he reaches thirty-five years (35) with the company. Adam and Eve have a joint credit card which has a balance of three hundred dollars (\$300.00). Eve also has a credit card in her name which she used for household purposes which has a balance of five hundred dollars (\$500.00).

In figuring out what property is marital and what property is non-marital it helps to determine when and where the assets arose.

The joint checking account arose during the marriage. It is presumed to be marital even if consists of commingled funds from non-marital property where the funds have been used for joint expenses. However, non-commingled funds even if jointly titled may be traced to establish that they are non-marital. The party trying to

establish that they are non-marital funds would need to prove that a gift of the funds was not intended by the act of jointly-titling the account.

The savings account started out as a non-marital asset, it was held before the marriage began. However, wages during the marriage are marital property. Adam has commingled marital funds, his wages with non-marital fund with the account held before he married Eve, in addition to jointly-titling the account in both names. So these funds are presumed to be marital.

Eve's inheritance is non-marital property. It arose from a source outside of the marriage and was not a gift to both spouses or from one spouse to the other. Her business is marital property, less the original non-marital investment. Her business is now worth one hundred thousand dollars (\$100,000.00) of which the balance minus the initial investment is marital property. This appreciation to the value of a non-marital property due to the results of one of the spouses during the marriage is marital property.

The car which Eve purchased from her remaining inheritance would have been non-marital if she had segregated it and not used it for the marriage. Instead it became an inner spousal gift during the marriage. It is marital property to the extent of its current appraised value.

Adam's pension from Publix is part marital and part non-marital:

He earned part of pension before the marriage and some of it during the marriage and he expects to continue to add to it after his divorce. For retirement pension plans which will be divided sometime in the future Eve would be entitled to fifty percent (50% which is her half of the marital portion. The marital portion is determined by usually a financial planner who will determine how much of the pension was contributed during the marriage to equal the marital portion and then Eve would receive half of that. For example if Adam had worked for ten years before the marriage for Publix and ten years during the marriage out of a total of thirty (30) years of service with Publix, under Florida law the portion would be one third of the total frozen as of the date of division. Thus Eve is entitled to fifty percent (50%) of one third of the benefits from the pension plan without appreciation for future gains after division. This is usually mapped out through a Quadro which is prepared in individual retirement plan accounts.

For retirement asset accounts that can be divided which can be divided and distributed now such as 401k and IRA's Eve would be entitled to 50% of the value on the date evaluation which is usually the date of separation unless the parties agree to some other fixed date. If the value of the 401Ks or IRAs can be fixed as of the date of the marriage. That amount is often considered non-marital and subtracted from the total to determine the marital portion which is subject to division.

The liabilities of the marriage are also subject to division. Liabilities incurred during the marriage regardless of the lack of knowledge of one of the spouses. The Court

may however consider each spouses contribution to incurring the liability. If one spouse incurs the debt and primarily benefits from it the Court can make that person solely responsible with that liability.

Adam and Eve's joint credit card debt incurred during the marriage is presumed as marital debt and that is subject to division. Eve's card in her sole name was used to purchase items for the marriage so it is also consider a marital debt. However, if Adam and Eve agree to divide this debt and Adam later fails to pay on it Eve would be left solely liable on the debt with the credit card company. The recourse would be to try and recoup funds from Adam that she sent to the credit card collection action.

Real property purchased during the marriage and titled in both names is presumed to be marital property in Florida even if funded by only one spouse with pre-marital or non-marital funds. The burden is on that spouse to prove that no gift to the other spouse was intended by the joint-titling.

If real property is titled only in one spouses name but was acquired during the marriage or the real property was a non-marital but one spouse contributed labor or separate funds to enhance its value what then?

Special equity arises. Special equity is a judicial recognition that a spouse may have vested interest in property either brought into the marriage or acquired during the marriage, but who's value was enhance due to a contribution of services or funds over and above marital duties. That spouse may have a vested right in property titled in the name of the other spouse or owned by the other spouse. Or that spouse may have more than a one half interest in jointly held property in addition to and separate from any amount awarded in equitable distribution.

#### What about proceeds from the sale of a marital home?

Whether a spouse is entitled to a credit or a set-off against the proceeds is based on a set of factors such as: (1) whether the exclusive use of possession of the marital home is awarded, and the basis such award; (2) whether alimony or child support is awarded to the spouse who is in possession of the home, and whether such alimony or child support is awarded to cover the mortgage, taxes or other home related expenses; (3) the value of the use and occupancy of the home to the spouse in possession and to the spouse not in possession. The Court will look to which party will be able to claim any home related tax deductions, including any capital gains, events and any other relevant factors that making its calculations to the right to a credit or set off against the marital portion.

You must remember that everyone's situation is unique and that every property distribution of assets and liabilities in a divorce is not the same, however, they all have all have some degree of consistency by using the rules above.

Who gets what? What property division is the in the best interest for both of the parties? We have predicted how the Court will value your marital estate now what should you do about it?

Should your spouse take the car and the retirement funds while you keep the house? or should you spilt it all down the middle to achieve an equitable distribution?

Unfortunately most marital property owned cannot be split straight down the middle due to the nature of the assets? Assets even those that may have the same value do not have the same emotional value or the same tax ramification and/of appreciated rates. They can be inherently unequal, although the same monetary value. If left to a Court, the marital estate may be divided in ways that are not best for the parties, either financial or emotionally. If your marital assets are not significant you may have a difficult time dividing and divvying up your marital estate with your ex-spouse to be. However, if you have a pension plan, a retirement account or a home you could be talking about a larger financial numbers than you may realize. Most individuals do not have the financial expertise or the time or the inclination to obtain such expertise. A certified divorce financial analyst (CDFA) may be worth the investment. Most attorneys do not do the tax ramifications involved in the equitable distributions plans and they leave that to an expert. An expert is needed for a calm rational approach to best structure an adequate division of the marital estate in a way that will entitle or benefit you the most financial in the long run to utilize the assets you receive to work for their best advantage to you.