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DIVISION OF MARITAL PROPERTY IN OHIO

A PRIMER

By

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THE ORIGIN OF MARITAL PROPERTY LAW

The division of marital property in Ohio is based upon the concept of equitable distribution. The current Ohio statute resulted from an evolution of the views of the church, the courts, and the legislature as to the type of legal entity which a marriage is considered and as to the rights of the participants in that entity. In England, divorces were granted through the Ecclesiastical Courts. Two types of divorces existed there. In one, the husband and the wife lived apart but remained married until death. In the second, there was an annulment finding that no marriage ever existed. In the separation divorce, a husband could be ordered to provide alimony if he was guilty of gross misconduct. Alimony was granted because of a husband's common law duty to support his wife. In an annulled marriage, the wife received nothing.

A third type of divorce became available in England through a private Act of Parliament. There, even if the wife was the guilty party, she was entitled to alimony to provide for her sustenance because "a guilty wife may starve as quickly as an innocent one". Chester G. Vernier & John B. Hurlbut, The Historical Background of Alimony Law And Its Present Statutory Structure , 6 Law & Contemp. Probs. 197, 199 (1939). Women had no property rights and virtually all of a woman's personalty vested in her husband upon marriage and remained with him upon divorce. Thus, a wife had no assets with which to support herself upon divorce.

Like the English Parliament, in the 1800's, the Ohio General Assembly granted divorces through special acts. Finally, in 1953, the legislature enacted a statute providing for alimony. Under this statute and its revisions, the courts began to recognize that support awards granted wives at divorce represented a mixture of "alimony" and a "division of property".

Although alimony had two distinct dimensions under this statute, there was no guidance as to how the eleven factors listed in the statute were to be applied to determine property alimony verses sustenance alimony. This led to the Ohio State Bar Association's Family Law Committee seeking to create the current, more sophisticated statute. Spousal support is now clearly separate from property division and is not to even be considered until the property division is made. This report will deal only with property division. You will find a spousal support report on the reports section of our website.

THE CURRENT LAW ON PROPERTY DIVISION IN OHIO

The current property division statute treats the termination of a marriage much as the dissolution of a partnership. However, although the starting point for a division of property should be an equal division, the court must consider all of the statutory factors and all other relevant factors resulting in an "equitable" division.

Generally, all property and debts accumulated during the marriage are marital, regardless of which party actually acquired the asset or debt. There are seven types of property that are not marital property. These are:

1. Premarital property;
2. Inheritances;
3. Passive income and appreciation on non-marital assets;
4. Property acquired after a Legal Separation;
5. Property excluded by a prenuptial agreement;
6. Money received for pain and suffering due to a personal injury;
7. Gifts to one spouse.
 - Property is often the subject of dispute in the context of gifts made during marriage. The property division statute specifically provides that gifts of real or personal property made during marriage may be separate property if the court finds proof by clear and convincing evidence that the gift was made to only one spouse. Gifts between spouses are difficult to prove as separate property by clear and convincing evidence. Even when those gifts are clearly for the personal use of one spouse, such as a fur coat or jewelry, it is difficult to show that the spouse giving them intended to waive all rights and interest in those items as marital property. This is particularly true when the gift has a value far exceeding other marital assets.

Everything else is marital property.

HOW THE COURT DIVIDES MARITAL PROPERTY

In dividing marital property equitably, the Court must consider the following factors:

1. The length of the marriage;
2. The assets and liabilities of the spouses;
3. The desirability of awarding the family home, or the right to reside in the family home for a reasonable period, to the spouse with custody of the children;
4. The liquidity of the property to be distributed;
5. Whether it is feasible to divide an asset or retain it intact;
6. The tax consequences of the property division;
7. The cost of selling an asset.

TYPES OF ASSETS WHICH MUST BE DIVIDED

Personal property: This is defined in Ohio to include both tangible and intangible personal property.

Household goods and tangible objects without exceptional value: If the parties cannot agree upon division, the court may divide the property by coin flip selection.

Automobiles, trucks, motorcycles, boats, trailers: If there is no equity, there is no marital property to divide, but rather only debt. The debt on the vehicle generally follows the vehicle, whether a lease or mortgage. Leased vehicles are not marital property as there is no ownership interest. A problem in dividing these items is where there is a debt and the title is in both parties' names or only the name of the party not retaining the vehicle. In those cases, if sale or refinance is not an option, the title holder not retaining the vehicle needs protection from delinquent payments and failure to maintain insurance. Potential lawsuits from claims of negligent entrustment may also be an issue. Insurance coverage for vehicles titled to a person not in possession and no longer married to the driver is another issue.

Artwork, antiques, and expensive jewelry: These are generally the subject of "gift" arguments. To prove these items were given as gifts, the proponent must show that the other party intended to waive all of his or her rights and interests in the item.

Benefits from employment: These can include the following:

- a. **Life Insurance:** Generally, these are term policies with no cash value to the employee, and used more to secure support or property division obligations rather than divided as an asset;
- b. **Vacation and Sick Leave:** Where accumulated during marriage but unused, the value of these is marital and the cash value included in the property division
- c. **Disability Pay:** This is paid in lieu of wages and is not treated as property but income. However, when disability pay continues after normal retirement age in lieu of retirement it should be divided as marital property.
- d. **Stock Options:** These are contractual rights to purchase stock of the employer corporation during a designated period at a predetermined price. The incentive to purchase is to obtain the stock at a below market price and gain substantial profits on a subsequent sale. These are granted for past, present, or future services. Continued employment is generally required to exercise the option. To be marital, the option must be granted for services performed during the marriage. Unexercised options should be considered property upon divorce, as it is an enforceable contract, provided the employee remains employed. This contingency affects the value not the nature of the property. The marital share is determined by whether the grant was awarded for service rendered totally during

- the marriage or for a mixed period.
- e. **Worker's Compensation:** These are marital when for lost earnings during marriage, but separate when for loss of a body part or reduction of future earning capacity.
 - f. **Benefits from Military Service:** Pursuant to the Uniformed Services Former Spouse's Protection Act, spouses of military personnel are entitled to up to fifty per cent of net retirement pay. Receipt of retirement benefits also gives the spouse privileges for military medical and dental care, commissary and exchange store use, and other benefits of retired members. Voluntary Separation Incentive (VSI) pay is also a marital asset.
 - g. **Professional Licenses and Degrees:** While other states recognize these as marital property subject to valuation and distribution by offset, Ohio does not. Rather, this is a consideration for spousal support.
 - h. **Covenant Not to Compete:** Money paid for such agreements is not marital property, as it is payment for loss of future income.
 - i. **Intellectual Property:** These can include patents, copyrights, trademarks, trade secrets, and right of publicity. Patents grant the holder the exclusive rights to an idea, which lasts for about seventeen years. Patents developed through employment are generally owned by the employer, not the inventor. Copyright law governs original literary, dramatic, musical, and artistic works. When created by an employee, these too are generally owned by the company. Copyrights last the life of the author plus seventy years. For a company, copyrights last ninety-five years from publication. Trademarks are words, short phrases, symbols, pictures designs or other features used in trade in conjunction with specific goods to indicate the source of the goods and distinguish them from the commercial offerings of competitors. They can be owned by individuals, partnerships, corporations, or other organizations.
 - j. **Rights of Publicity:** This protects individuals from misappropriation of their names and likenesses. Some courts have found this to be divisible property, such as business goodwill.
 - k. **Trade Secrets:** Information used in commerce that gives the owner an opportunity to obtain an advantage over competitors. It is deemed a business asset. A patent potential may exist with this type of asset.
 - l. **Frequent Flyer Miles and Other Reward Programs:** These are often earned through employment or just with use of credit cards, and can be a valuable asset. Many airlines will transfer miles and points, or the owner can be required to redeem them for the spouse.

Pension and Retirement Plans: Pension and retirement plans acquired during marriage are marital assets. Where a pension benefit has not yet vested in the employee, the pension may still

be valued as a marital asset. The types of retirement plans that spouses may have are:

- a. Defined contribution plans – these are plans such as 401k's;
- b. Defined benefit plans - these are plans that pay a certain amount per month upon retirement;
- c. Public Employee Retirement System;
- d. State Teachers Retirement System;
- e. School Employees Retirement System;
- f. Police & Fire Pension Fund;
- g. Civil Service Retirement System;
- h. Federal Employees' Retirement System;
- i. Thrift Savings Plan;
- j. Railroad Retirement benefits;
- k. Military Retirement pay.

Social Security: A divorced spouse is entitled to one-half of the spouse's benefits (but this does not reduce the spouse's benefit) when:

- a. parties were married for at least ten years;
- b. worker is entitled to benefits, but, if eligible and not yet receiving, divorced spouse may receive benefits if divorced for at least two years;
- c. claimant is at least 62 years old;
- d. claimant is not married, unless person married to also receiving benefits through another.

Marital Residence: The marital residence is recognized as a special item. Courts often award the family home, or the right to reside therein for a period of time, to one spouse in order to preserve the home for the children. In this case, payment of the other's spouse's marital interest may be delayed. The court may also order the sale of the marital residence and divide the proceeds. The marital residence is often the asset most likely to be a mixture of marital and separate property. This occurs due to multiple marriages and due to marrying at a later age. Where both parties contribute separate property to the purchase of the marital residence, upon divorce, those separate investment monies may be returned to them before dividing the remaining equity as marital property.

Debts: These must be divided also. Because the court must consider both assets and liabilities of the parties in dividing their property, it must, necessarily, determine an equitable division of the debt.

As mentioned above, where assets are encumbered by debt, such as mortgages or secured loans,

the debt generally follows the asset.

Student loans: This debt may properly be allocated to the party who incurs the debt and receives the benefit. Where the monies were used solely for schooling, they should be allocated to the party obtaining the degree. Where the monies were used to support the family, they should be considered marital debt.

Allocating debt does not remove either party from the contractual obligation to the lending institution. Therefore, it is important to try to remove the spouse who will not be paying the debt from the loan.

HOW CAN I RECEIVE MORE INFORMATION?

We hope you have found this report useful. As you can see, there are a number of issues to examine when determining the division of property in a case. We strive to obtain full information from you to examine all factors that may affect what you receive, and thus provide you the best advice. If you would like to discuss your situation, please call the office at **513-241-4029** or email us at **cathy.cook@cathycooklaw.com**. We offer a free phone consultation. For a more in-depth analysis of your situation, we offer an in office case audit.

LEGAL NOTICE

The above is an overview of property division in the state of Ohio. It is not legal advice, and does not create an attorney-client relationship with Cathy R. Cook, Attorneys at Law. Your own situation should be reviewed and analyzed by an attorney.