

CHAPTER NINE

IN THE EVENT OF DIVORCE, the husband and wife generally are free to divide their property as they see fit. They may enter into what is called a **marital settlement agreement**. A marital settlement agreement is a contract between the husband and wife that divides property and debts and resolves other issues of the divorce. Although many divorces begin with a high level of acrimony, a substantial majority of divorces (95 percent or more) are settled by the husband and wife--often with help from attorneys--without need for a judge deciding property issues or other issues.

When the husband and wife have reached a marital settlement agreement, they can take the agreement to court, where a judge usually will approve the agreement after a short hearing. Some states with simplified divorce procedures might not even require a hearing if everything has been agreed to by the husband and wife.

Settlement agreements operate in what is sometimes called “**the shadow of the law**”--meaning that parties and their attorneys are aware of what a judge might do if a judge had to decide the case. It may not be possible to predict with complete precision what a judge would do, but an experienced attorney can give a range of possible results. With that knowledge, parties often prefer to reach their own agreements rather than go through the monetary and emotional expense of a trial.

Deciding Whether to Go to Trial

The decision of whether or not to go to trial and to have a judge decide contested issues often involves a cost-benefit analysis. If the financial benefit that may be received from going to trial is high compared to the cost of going to trial, it may make sense to go to trial. For example, if wife and husband dispute the value of a business started by the husband during the marriage and the difference in their valuations is substantial, then it may make sense to let a judge decide the issue rather than give in to an unreasonable valuation by the other side.

The parties will need to look at the facts objectively. How much attorney-time will it take to develop facts about the business? How much will it cost to hire an expert to evaluate the business and testify at trial? If, after gathering preliminary information and trying negotiations, the husband still says the business is worth \$50,000 and the wife still believes the business is worth \$1 million, the only way to solve the problem may be to go to court. (Chapter 15 of this book will discuss “Mediation and Other Alternative Means of Resolving Disputes”.)

On the other hand, if the business is a very small one, with the husband saying it is worth \$10,000 and the wife saying it is worth \$15,000, it does not much sense for one or both sides to spend \$10,000 in attorneys’ fees and experts’ fees to try to ascertain a precise value of the business.

Separate or Nonmarital Property

The laws of dividing property vary from state to state. As a starting point, however, most states allow parties to keep their own **separate or nonmarital property**. Nonmarital property includes property that a spouse brought into the marriage and kept separate during the marriage. It also includes inheritances received during the marriage and kept separate during the marriage. In addition, nonmarital or separate property may include gifts received by just one spouse during the marriage. A few states permit division of separate as well as marital property when parties divorce, but the origin of the property is considered when deciding who receives the property.

The right of a spouse to keep his or her separate or nonmarital property may depend on the degree to which the property was, in fact, kept separate. For example, if a wife came into a marriage with a \$20,000 money market account and wanted to keep it as nonmarital property, she should keep the account in her own name and not deposit any funds earned during the marriage into the account. She should not, for instance, deposit her paychecks into the money market account, because the paychecks are marital funds and could turn the whole account into marital property. (Marital property will be explained in the next section.) The process of changing nonmarital property into marital property and vice versa sometimes is called **transmutation** (from Latin words meaning “cross” and “change”).

Another example: If a husband inherits some stock from his mother during the marriage and he wants to keep it as nonmarital property, he should open his own investment account and should not use the account for any

investments that he and his wife own together. If a husband or wife decides to use some nonmarital funds for a common purpose, such as purchasing a home in joint tenancy, that money normally will become marital property. The nonmarital property will be viewed by the courts of most states as a gift to the marriage.

Similarly, if a wife or husband takes nonmarital funds and places them in a joint checking account, the funds generally will become marital property. In some states, the presumption that funds placed in a joint account are marital property can be overcome by specific proof that the spouse depositing the funds did not intend to have the funds used for a marital purpose. Nonetheless, if a husband or wife does not want nonmarital property converted into marital property, it is best to keep the nonmarital property separate. Always.

Property distribution laws have many intricacies and variations between states; understanding them usually requires a lawyer's help. For example, in many states, the increase in value of nonmarital property (such as an investment account or a house that is held in the name of only one party) also would be nonmarital property. In some states, however, the increase in value would be marital property.

Marital or Community Property

Marital or community property is defined somewhat differently by different states, but it generally includes property and income acquired during the marriage. Wages earned during the marriage are marital property. A home,

furniture, and cars purchased during the marriage usually are considered marital property.

When property is considered to be marital or community property, the court has the power to divide the property between the parties. Unlike separate or nonmarital property, one party does not have an automatic right to keep the property in the event of a divorce.

If title to property is held in the name of only one spouse, that does not necessarily mean that the property is not marital or community property. Assume, for example, that wife and husband both work and use their wages to purchase a car. If title to the car is only in the wife's name or only in the husband's name, the car still is marital property because payments for the car came from marital funds (their wages). Even if one spouse bought the car with his or her wages, was the only driver, and held title to the car, the car still is marital property because payments came from marital funds.

As a practical matter, if husband and wife owned two cars and a judge had to decide who receives which car, the husband and wife probably would each receive the vehicle that he or she primarily drove. Nonetheless, if the property in question is marital property, the judge has the power to give it to either party.

A pension also is usually marital property, even though it may have been earned by the labor of only one spouse during the marriage. To the extent that rights to a pension were earned partially during the marriage and partially during a period when the parties were not married, the part earned during the marriage

may be marital property and the part earned when the parties were not married may be nonmarital property. (A later section in this chapter will discuss pensions in more detail.)

Dividing Marital or Community Property

A few states, such as California, take a rather simple approach. Lawmakers in those states believe property should be divided equally because they view marriage as a joint undertaking in which both spouses are presumed to contribute equally to the acquisition and preservation of property. The contributions may be different in nature, but they are treated equally. The wage earner does not receive more property than the homemaker, and vice versa. All marital property will be divided fifty-fifty, unless the husband and wife had a premarital agreement stating otherwise. (Premarital agreements were discussed in [chapter 2](#).)

The California community property approach saves resources. Husbands and wives do not have to spend time and money arguing about who should get more property since the law of that state already has determined that community property will be divided fifty-fifty. (In California, there still may be issues to dispute, such as: What is and what is not community property? What is the value of a particular piece of community property? For example, if an actress divorces mid-way in production of a film, how does one value her interest in the film?)

Although California may save resources by declaring an automatic fifty-fifty split, it deprives courts of the opportunity to fine-tune property divisions to

meet the needs of individual cases. In several other community property states and in all **equitable distribution** states, courts are allowed to fine-tune property divisions. (That may or may not be an advantage, depending on the cost of fighting over what is “equitable” and one’s faith in judges to make fair decisions regarding property.)

“Equitable distribution” means a court divides marital property as it thinks is fair. Like community property states, states applying principles of equitable distribution view marriage as a shared enterprise in which both spouses usually contribute significantly to the acquisition and preservation of property. Unlike the community property approach of California, however, equitable distribution states are not locked into a fifty-fifty split. The division of property could be fifty-fifty, sixty-forty, seventy-thirty, or even all for one spouse and nothing for the other (although that would be very unusual). Under equitable distribution, courts consider a variety of factors and need not weigh the factors equally. That permits more flexibility and more attention to the financial situation of both spouses after the divorce. However, it also makes the resolution of property issues less predictable.

Here are some examples of factors that are considered by states applying principles of equitable distribution:

(1) **Nonmarital Property.** If one spouse has significantly more nonmarital property than the other, that could be a basis for giving more marital property to the less wealthy spouse. As noted, courts are not obliged to give

equal amounts of property to each spouse, but if the parties have sufficient assets to leave each party in a comfortable situation after the divorce, courts usually will try to do so.

(2) **Earning Power.** If one spouse has more earning power than the other, that could be a basis for giving more marital property to the spouse with less earning power. Courts reason that the party with greater earning power can regain money lost in a divorce more easily than the party with less earning power.

(3) **Who Earned the Property.** That can be a factor in favor of the party who worked hard to acquire or maintain the property. When courts apply this factor to a family business, it is common for a court to award all the interest, or a majority of the interest, in the family business to the spouse who operates the business. In that circumstance, the court not only is considering who earned the property, but also is seeking to disentangle the husband and wife from each other's future financial affairs. If the value of the business is approximately the same as the value of the family home, it is common for the court to give the business to the spouse who primarily operates the business and give the home to the other spouse.

(4) **Services as a Homemaker.** Courts recognize that keeping a home and raising children are work. In addition, those services often enable the spouse

who is working outside the home to earn more money. Thus, services as a homemaker are a factor in favor of the homemaker. Some courts also apply a related concept of considering whether one spouse had impaired her or his earning capacity because of working as a homemaker. If a party can show his or her work as a homemaker resulted in missing the opportunity for training or job experience that could have resulted in higher income, that factor can favor giving more property to the homemaker-spouse.

(5) **Waste and Dissipation.** If a spouse wasted money during the marriage, that could count against him or her when it comes time to divide property. This factor is sometimes labeled “**economic fault**,” and may be considered even by courts that do not consider other kinds of fault. Waste or dissipation could include gambling losses, significant sums of money given to family members (particularly over the protest of the other spouse), and money spent on pursuing romantic relationships outside the marriage. Business losses occasionally are considered waste or dissipation, but more often, they are considered an ordinary risk of doing business for which neither spouse should be penalized (particularly if the business deal would have benefited both parties had it gone better). In some states, before waste or dissipation can be a factor, it must be shown that the waste or dissipation occurred when the marriage was breaking down (a relatively short time before or after one spouse filed for divorce). In other states, waste or dissipation at any time during the marriage could be relevant.

(6) **Fault.** Non-economic fault, such as spousal abuse or marital infidelity, is considered in some states, but most states do not consider it relevant to property division. In years past (particularly prior to 1965), divorces were based on fault. One needed to show fault by the other party in order to obtain a divorce, and fault was an important consideration in dividing property and setting support. The more modern view is that courts should focus primarily on the economic factors when dividing property and pay less attention to who-did-what-to-whom. Most courts and legislatures concluded that it was too difficult and not worth the time to try to sort out all the transgressions that may have gone on in a marriage, many of which are of a subjective nature.

(7) **Duration of Marriage.** A long marriage may be a factor in favor of a larger property award to the spouse with less wealth or earning power. The longer the marriage, the more likely a court is to view the husband and wife as equal partners.

(8) **Age and Health of Parties.** If one spouse has ill health or is significantly older than the other, that factor could favor a larger award to the sicker or older spouse. When the factor is mentioned by a court, it most often is in connection with an older wife whose ability to earn money is diminished by her age and health. The factor can apply to men too, particularly if the man is of an age at which it is not reasonable to assume that he can go out and re-earn a

substantial amount of assets if his wife were given a majority of the marital assets. In such a case, an equal division of assets would be more likely.

(9) **Tax Consequences.** The tax consequences of property division can be considered when dividing property. If, for example, the sale of a house or the sale of stock in a company as part of a divorce will result in payment of capital gains tax, the court can consider that when dividing the property. Perhaps the person who will have to pay the tax may receive some extra property to compensate for the added tax that person will have to pay. Conversely, if a property settlement results in a tax benefit, the person receiving the benefit may receive less property because of that benefit. In order for a court to consider tax consequences, the consequences usually must be immediate and specific. The court generally does not want to speculate about possible tax consequences that may occur several years in the future.

(10) **Premarital Agreements.** A written premarital agreement, assuming it is valid, can be a trump card in dividing marital property. By entering into a premarital agreement, the wife and husband have agreed to waive their rights to have a court consider the usual cluster of factors in dividing property. Instead, the parties through their agreement have determined in advance how their property should be divided in the event of a divorce. For more information about premarital agreements, [see chapter 2](#).

The Family Home

What happens to the family home will depend on the facts of each case. If the wife and husband can agree between themselves on what should happen to the home, the court virtually always will accept their decision. If the wife and husband cannot agree, the court will decide.

If the parties own a house, condominium, or cooperative apartment and they have children who are still living at home, the law favors giving the house to the spouse who will have primary custody of the children, if it is affordable to do so. This promotes continuity in the lives of the children as well as in the life of the spouse who will live in the house.

If the parties cannot afford to keep the house, it may be sold and the proceeds divided (or perhaps given to one party). Division of money from sale of the house generally is made after paying off the mortgage and the costs of the sale such as commissions to the real estate brokers, transfer tax, and attorneys fees.

In some cases, there is a middle-ground approach: The spouse who has primary custody of the children will have a right to live in the house for a certain number of years, such as until the youngest child graduates high school. At the end of that time, that spouse will buy out the other spouse's interest or sell the house and divide the proceeds.

A variation on these arrangements is to give one spouse a right to buy out the other spouse for a fixed period of time, such as thirty days. If the first spouse cannot buy out the other spouse (perhaps because he or she was not able

to obtain financing), then the second spouse has an equal period of time to buy out the first spouse. If neither spouse is able to buy out the other, then the house will be sold and the proceeds divided.

When only one spouse is going to occupy the house after a divorce, arrangements need to be made for payment of expenses related to the house. A common arrangement is for the party living in the house to pay the mortgage, property taxes, utilities, and routine repairs. If the spouse who is not living in the house retains an interest in the house (such a right to share in the proceeds when the house is sold at a later date), both parties might share in the costs of major repairs. Major repairs might be defined by the nature of the expense (repair of roof, replacement of appliance) or by dollar amount--for example, any repair costing more than \$200.

In some cases, the monetary interest of the spouse who is not living in the house may be set at a fixed dollar amount. That amount could be adjusted for inflation based on the Consumer Price Index (issued by the U.S. Department of Commerce, Bureau of Labor Statistics) or by the percent increase in the value of the house from the date of the divorce to the date of sale of the house.

Here is an example of the second situation. Assume that a house is determined to be worth \$150,000 at the time of divorce in the year 2000 and that the spouse who moved out was given a \$30,000 interest in the house at the time of divorce. If the house is sold ten years later for \$300,000, the spouse who originally was given a \$30,000 interest in the house would then receive \$60,000

since the value of the house doubled between the time of divorce and the time of sale.

When a court or a marital settlement agreement gives the entire interest in the house to one spouse and makes that spouse responsible for paying future mortgage payments, that does not mean the spouse who moves out is no longer potentially liable for the mortgage. Banks and other lending institutions are very reluctant to give up the security of having more than one person responsible for the loan. The spouse who moved out still is responsible for the loan in the event the other spouse does not pay the mortgage.

The legal remedy for the spouse who moved out is a **hold harmless provision**. That means that if the spouse who moved out is obliged to pay a loan that the other spouse was supposed to pay, then the spouse who moved out can collect the loss from the spouse who has the house. The spouse who moved out can sue his or her former partner for any lost funds. Assuming the house has a positive net worth, the court could order the house sold in order to pay back the spouse who moved out.

Family-Owned Business

As noted in the section on dividing marital and community property, courts usually favor giving a family-owned business to the spouse who runs the business. The other spouse may be given other assets in exchange, such as the family home or bank accounts.

The situation is more complicated if both wife and husband have been actively involved in the business. The court may set up an arrangement by which one spouse has the right to buy out the other spouse over time. Alternatively, the right to buy out the other could be sequential--first given to one spouse for a certain period of time, and then to the other spouse for the same period of time. As with handling division of the family home, a forced sale might be an option if neither party can buy out the other party (although most courts would favor giving the business to just one spouse rather than dissolving an on-going business).

If the court thinks the parties can continue to work together despite the divorce, the court may continue the *status quo* with the husband and wife remaining as business partners, even though they are no longer marital partners.

Valuation of family businesses can be difficult. A **closely held business**, by nature, does not have a value that can be readily ascertained on a stock exchange. If the business is of sufficient size, it could be worth the parties' efforts to hire experts such as accountants or business consultants to evaluate the business, assuming the value of the business is disputed or uncertain. On the other hand, if the business is very small or clearly does not have a significant positive value, it may not be worth the time and money to thoroughly evaluate the business.

When trying to ascertain the value of a business, it is helpful to look at financial statements of the business, reflecting the business's assets, liabilities, income, and expenses. Tax returns and checking account records also can

provide valuable information--sometimes more accurate than the company's internal financial statements.

Loan applications of the business (or of the owner of the business) may provide highly valuable information. Businesses and individuals may make "generous" statements about income and assets when seeking a loan. That can be useful for obtaining a loan. It also is very useful to the spouse of the business owner when the spouse wants to show that the business is worth more than the business owner claims when divorce is at issue.

If there has been a recent good faith offer to buy the business, that, of course, is valuable evidence about the value of the business. In addition, if there is information available about the purchase price of similar businesses, that too is useful.

Cash businesses can be particularly hard to value, especially if the owner tries to hide income. If the stated income of the business owner does not match the amount of money the parties have been spending over the past few years, proof of the parties' expenses compared with declared income can create an inference to the court that the business is worth more than the owner says it is.

Another source of information about a closely held business may be a disgruntled former (or current) employee of the business. An employee unhappy with the boss may be willing to pass on information about how much money really is made and what the expenses are.

If the spouse who is not the business owner presents proof about hidden income or inflated expenses, that can be the basis for a greater award of other

property, as well as perhaps higher alimony and child support. When seeking to claim that income is greater than what the other party says it is, one needs to be alert for other explanations for the added funds. If the business owner has been meeting family expenses with loans that have to be repaid, the funds from those loans would not be a basis for a larger award of property, alimony, or child support to the other spouse. Instead, the other spouse may receive a lesser amount of property, alimony and child support since the business owner is likely to be saddled with the debt that needs to be repaid.

Sidebar

Looking for Hidden Assets

In addition to the financial records discussed in this section, consider checking the following items in cases where the other party is suspected of hiding income and assets:

- **Original tax returns** -- If you have reason to believe that the tax returns given to you or your attorney are not the actual returns filed with the Internal Revenue Service (or state tax department), fill out a form requesting the Internal Revenue Service to send you a copy of the original. Your spouse's signature may be required if you did not sign the tax return. A court can require that your spouse provide his or her signature.

- **Children's bank accounts** -- A child's bank account might be a hiding place for money. A trace on the source of those assets could yield to discovery of more income and assets. Similarly, joint bank accounts held by a spouse and another relative also could be a hiding place for income and assets.
- **Safety deposit boxes** -- find out (perhaps through court-ordered discovery) where your spouse has safety deposit boxes. Check the bank records for access to the box and see if the times of access coincide with other significant events.
- **Manipulation of expenses, perks, and income** -- The owner of a closely held business often can manipulate expenses, perks, and income to make it appear he or she has less income or assets at the time of a divorce. If these items have shifted significantly near the time of divorce, further comparisons and inquiries are warranted.

Pensions

When a couple divorces, they probably focus first on dividing the property that's easy to see--the home, furniture, cars, etc. The property they can't see--their **intangible property**--is also affected by divorce.

For many families, a pension is the largest asset, after the family home. Even if the pension is earned solely by the efforts of one spouse, the portion of it

that was earned during the marriage is still marital property subject to division by the court. (For discussion of how a pension can be considered nonmarital and marital, see the earlier section on “Marital and Community Property,” pages 4 - 6.)

Many courts prefer to give full rights to a pension to the party who earned it as long as the other party will have a sufficient amount of income and property from other sources.

If, however, the pension is the primary source of income that a spouse would have and there are no other significant sources of income, the court is likely to divide rights to the pension. The court can divide the pension between the spouses by percentages (i.e., spouse A will receive 60 percent, spouse B 40 percent) or by a fixed cash amount to one spouse with the remainder to the other spouse (i.e., spouse A will get \$600 per month, spouse B \$400).

Congress has passed a law facilitating division of pensions. The law allows entry of orders by a court called **Qualified Domestic Relations Orders (QDROs)**. These orders, when properly entered by a court, require the administrator of a pension plan to send pension checks not only to the worker, but also to the worker’s former spouse. The court cannot order a pension check to be written before the worker is entitled to the pension, nor can the court change the total amount of the pension that is due. But the court can direct that when a worker is eligible for a pension (even if he or she has not yet retired and is not drawing a pension), checks must be sent to the worker’s former spouse.

For example, if a couple is divorcing after a worker has retired, the court may order that pension payments be divided fifty-fifty (or by some other percentage). If the couple divorces while the worker is still employed and accumulating retirement benefits, the court may ascertain the value of the pension as of the date of the divorce and order division of that sum. When the worker later becomes eligible for payment of retirement benefits, the spouse could receive pension payments for a portion of the pension earned during the marriage. The worker would receive the remainder of the pension, including all of the pension that accumulated after the divorce.

Qualified Domestic Relations Orders can be applied to pensions of most private employers. If a spouse has a military pension or certain types of government pensions, different types of orders with different types of forms may be required, but in most cases, the result can be the same: with a properly entered order by a court, the pension can be divided between the spouses.

Sidebar:

SOCIAL SECURITY BENEFITS

Divorced spouses may also be eligible to collect Social Security retirement benefits based on their ex-spouse's work record. As long as the divorced spouse:

- is sixty-two or older
- is unmarried
- was married to the worker for at least ten years and

- is not entitled to benefits on own or other account, that exceed one-half the wage earner's primary benefit amount

he or she is generally eligible to collect benefits. The wage-earning spouse doesn't have to be retired and actually drawing benefits; he or she just has to be eligible for retirement benefits.

The impact of divorce on Social Security retirement benefits is very different from its impact on pension benefits. A worker with a pension is eligible for a certain amount of money in benefits. If a court orders these benefits split between the parties, the worker's share will go down.

With Social Security retirement benefits, the eligibility of a divorced spouse has no effect on the amount the worker is entitled to. He or she will collect that amount whether he has no eligible spouse or ex-spouse or whether he has four ex-spouses all eligible to collect based on his work record.

That's one reason establishing eligibility for a divorced spouse is normally not difficult. It doesn't require a court appearance or even notification to the worker. It simply requires presenting the appropriate documentation to the Social Security Administration. Documentation would normally include proof of

- identity
- each party's age
- marriage and

- divorce (the divorce must be final; the legal action cannot be a separation or an annulment)

Generally, original documents are best, but certified copies will be acceptable.

A divorced spouse may also be eligible for benefits on the account of a deceased wage earner if the wage earner was eligible for benefits. Requirements are similar to those outlined above, except that the surviving divorced spouse must be at least sixty (*or* at least fifty and disabled *or* be caring for a child who is also eligible to receive benefits on the deceased wage earner's account) and the surviving divorced spouse can remarry after age sixty (age fifty if disabled). The amount of the benefit is approximately equal to the wage earner's primary benefit amount. As with retirement benefits, more than one person can collect. Applicants will need the documents outlined above, along with proof of the wage-earner's death and, if applicable, of disability.

[end sidebar]

Dividing Personal Property

Even in contested cases that have to be decided by a judge, most parties manage to decide between themselves how to divide the relatively small items of personal property. Nonetheless, the phrase “they battled down to who got the last teaspoon” reflects the intensity of emotion that can come with divorce.

Even couples who are relatively amicable when splitting up usually manage to find a few pieces of property to fight over. The individual piece of

property often is not truly important by itself, but it comes to represent the frustrations of a relationship that has failed. Perhaps it is easier to obtain an emotional release from fighting over some object than focussing on the underlying personal issues that caused the marriage to end.

If the parties truly cannot resolve a dispute over personal property, a judge can do it for them, but that normally is not a cost-effective way to resolve the issue. If the judge does have to resolve the dispute, the judge will consider the same factors discussed earlier in the section on dividing marital or community property ([pages 6 - 11](#)). In addition, the judge may consider who acquired the property, who uses the property, and whether the property has a special connection to the original family of one spouse.

If the wife and husband are having a difficult time dividing personal property, they might try some techniques that have been used by other couples.

The spouses together can prepare a list of all the property in dispute. One spouse can take that list and divide it into two separate lists. Then the other spouse can choose which of the two lists to take as his or her property. Presumably, the spouse who drew up the two lists will have an incentive to prepare an equal division of property. This arrangement is a variation on the way parents often encourage children to divide a disputed candy bar: have one child divide the candy bar and let the other child choose which piece to take.

Another option is to use a single list of disputed property. By flip of a coin or other method, one spouse chooses the first piece of property; then the other chooses; and back and forth it goes until all the property is divided. A

variation on this approach would be to have a series of lists from which the spouses take turns, one list at a time. The lists might be categorized by the economic value or sentimental value of the items on each list.

Another somewhat elaborate approach could be used if the parties decide on an unequal division of property, but have not decided how to allocate the property. This approach also can be used for equal divisions of property. Again, the parties draw up a list of disputed property. Then they must agree on the value of each item of property, and post the value next to the item. The parties take turns selecting items of property. When either the husband or the wife has reached his or her designated quota (for example, 65 percent of the property as determined by the agreed values), then the other party receives the rest of the property.

If the husband and wife have enough fun working together on this distribution scheme, they might consider getting back together.

Personal Injury Awards

One of the types of property the couple sometimes needs to divide is a personal injury damage award. If, for example, the husband or wife were involved in an auto accident for which someone else was a fault, the party who was injured might receive (or be entitled to receive in the future) a sum of money for the damages. When the couple divorces, the question arises, who is entitled to the damage award?

States take different approaches to the issue. Some states view the award as separate or nonmarital property. Thus, all of the damage award belongs to the injured party. Courts in those states reason that the injury was suffered by only one spouse, and the damage award was designed to make the injured spouse whole. Therefore, all of the damage award belongs to the injured spouse.

In some personal injury lawsuits, there are two damage awards: one for the spouse who received the physical injury and another damage award for the spouse of the injured party to compensate that spouse for loss of companionship or **consortium** that resulted from the injury. (Loss of consortium refers to loss of sexual relations and, under some definitions, the term also refers to loss of general companionship.) If a state treated damage awards as separate or nonmarital property, each spouse would be entitled to his or her own damage award, but they would not be entitled to any portion of their partner's award.

Other states treat damage awards as marital or community property, which means the court can divide the award between the husband and wife. Courts in these states reason that the damage award arose from something that occurred during the marriage and was going to benefit the entire family; therefore, the award should be treated as marital property. In practice, courts in these states are likely to give more of the damage award to the injured party, but the court has the power to allocate some of the award to the other spouse.

In other states, there is mid-ground approach that focuses on the type of damage award. Many personal injury damage awards (particularly those set by a judge or jury) are divided into parts. Depending on what type of damage award

is given, the payment may go to the injured party or to the parties jointly.

Payments for medical expenses are likely to go to whichever party will pay the medical bills; payments for pain and suffering are likely to go to the injured party who experienced the pain and suffering; and payments for lost wages may go to both parties since the wages would have benefited them both.

Lottery Winnings

As a majority of states have acquired “lottery fever,” there are a growing number of news stories and court opinions about how lottery winnings are to be divided in the event of a divorce. Sometimes the issue arises when one spouse won a big lottery after the couple has separated, but before a divorce is final. The spouse who bought the lottery ticket wants to keep all the winnings for himself or herself, while the other spouse wants a piece of the action.

The rule in most states is that if the winnings came from a lottery ticket purchased during the marriage--even if the parties were separated--the winnings are marital or community property, which means the winnings can be divided between the husband and wife. In some states, however, the winner may keep all if the parties had already separated.

Allocation of Debts

In addition to dividing property, most couples also have debts to divide.

Sometimes the debts will exceed the assets. The court, or the parties by agreement, will divide whatever property the couple has and then allocate the

responsibility of each party to pay off particular debts. (The wife pays off MasterCard; husband pays off Visa . . .).

If the debts were jointly incurred, both parties remain ultimately responsible for them. If the spouse who was supposed to pay a particular bill does not, the creditor still can look to the other spouse to collect the amount due. For example, if during the marriage the husband and wife applied together for a MasterCard, both signing the application and both promising to make payments, both are liable to MasterCard, even if only one spouse made the charges.

If a court or a settlement agreement requires a wife to pay the MasterCard bill, but she does not and MasterCard collects from the husband, the husband can sue the wife for the loss, or he may be able to deduct his loss from future payments he may owe his wife (such as alimony, if there is any).

Given the potential for continued joint debts, even after a divorce, it is important to limit one's liability for the other spouse's debts. Thus, it is best to close joint credit card accounts or other joint accounts as soon as a divorce is pending (unless one has a great deal of faith in the soon-to-be former spouse). If it is not possible to close an account because there is an outstanding debt that cannot be paid off immediately, it is prudent for a spouse to notify the creditor that he or she will not be responsible for any additional debts beyond current outstanding balances.

For example, if there is an outstanding home equity loan of \$10,000, but an available line of credit of \$40,000, it probably is best to notify the creditor (orally and in writing) that the line of credit should not be extended beyond

\$10,000. Similarly, if one spouse co-signed on a business loan for the benefit of the other spouse's business, it would be prudent for the spouse who does not own the business to notify the creditor that he or she will not be responsible for any business debts beyond those already incurred.

One spouse normally will not be responsible for the debts of another spouse if debts were incurred only in the name of the spouse who made the purchase. In many states, however, an exception will be made for debts that are considered family expenses. Examples of family expenses include groceries for the family, the children's necessary medical expenses, and children's clothes. If a debt is considered to be a family expense, both spouses probably are liable for the debt, even if only one of them incurred the debt. Community property states also generally make spouses liable for each other's debts incurred during the marriage.

Educational loans are a common debt. Generally, a court will direct each party to repay his or her own loans for educational expenses. If, however, the debts were incurred during the marriage, it is possible for the court to direct one spouse to repay the other spouse's educational debts.

Modifying or Undoing a Property Division

A property division that has been agreed to by the parties or ordered by the court is very hard to get out of. Courts favor "done deals" and do not want to encourage the parties to run back to court to litigate their dispute all over again.

In most states, there is a period of time after a court enters its order in which one of the parties can ask the court to reconsider its decision. Such a request may be called a **motion to reconsider** or a **motion to vacate the judgment**. The time period for making such a request varies between states, but it is often thirty days after entry of the court's order that is at issue.

The party seeking reconsideration may argue that the court made a mistake in understanding the facts of the case or in applying the law. The party also may claim that some new facts have arisen that make the original order unfair. (Generally, the party claiming new facts must have a good reason for not having discovered the facts earlier.) In most cases, courts turn down a party's request for reconsideration, but if the court accepts the party's arguments, the court may modify the order or conduct additional hearings.

Fraud or **duress** are two other bases for seeking modification of a court order or settlement agreement. Fraud means that one party has deliberately deceived the other party on a significant matter. If, for example, one party to a settlement agreement lied about the amount of his or her assets and the other party later found out that a substantial amount of assets were hidden, that could be a basis for asking the court to vacate the property settlement and order a new distribution of property.

Duress occurs when one party is forced into an agreement by extreme, unfair pressure from the other party. In this circumstance, a court also might vacate an agreement and order a different distribution of property. Duress is difficult to prove. Most judges assume that parties to a divorce agreement are

under some degree of stress. The amount of stress and pressure that a party must have been under before a court will allow the party to back out of a deal is very high.

The time period for seeking to modify an agreement or order on the basis of fraud or duress usually is longer than the time period for asking for reconsideration because of the court's mistake of facts or law. The time period varies from state to state, but a period of one year from the time of the order or agreement is common.

If a party does not like a trial court's decision, another way to seek relief is to appeal to a higher court. The first appeal usually is to the state's appellate court, although if the case has been decided in a small state or if the case involves an issue of substantial public importance, a direct appeal to the state's supreme court may be possible.

Appeals are expensive--often costing as much as the cost of the trial. The decision to appeal must be made promptly, often within thirty days of the trial court's decision. If the party wanting to appeal waits beyond the period provided by statute or court rule for filing a **notice of appeal**, the right to appeal may be lost. The notice of appeal is a document that lets the trial court, the appellate court, and the opposing party know that an appeal will be taken.

More appeals are unsuccessful than successful. The likelihood of success depends on the facts of the case. Before taking an appeal, a party may wish to seek an outside opinion from an attorney who has not been connected with the case regarding the likelihood of success of the appeal. Sometimes the attorney

who handled the trial has been so close to the case that he or she cannot be fully objective about the merits of an appeal.

Effect of bankruptcy

A property settlement might be dischargeable in bankruptcy or it might not be dischargeable, depending on the facts of the case. A **discharge in bankruptcy** means that all of a debt or a portion of a debt no longer has to be paid because a federal court has declared the debtor to be bankrupt.

Prior to 1994, many former spouses of persons who declared bankruptcy after the divorce found themselves out of luck when seeking to collect what was due. A wife, for example, may have agreed to a divorce based on a promise from her husband that three years after the divorce, he would pay her a certain amount of money as part of the property settlement. If after the divorce was finalized, the husband declared bankruptcy, the wife might never collect the amount that was due.

Congress saw the potential unfairness of this, particularly in cases in which the debtor is technically bankrupt (owing more money than the debtor has assets), but debtor nonetheless still has the capacity to pay many debts. The new law, which took effect in 1994, allows the bankruptcy court to weigh the hardships between the parties. If it appears that the bankrupt debtor has enough property and income to pay the debt to the ex-spouse, the debtor will have to do so. If the debtor truly does not have enough money for the basic support of the

debtor and his or her dependents, then all or a portion of the debt may be discharged in bankruptcy.

Although in appropriate circumstances, a bankruptcy court has the power to discharge a debt owed in a property settlement, the court cannot discharge past-due payments for alimony or child support. A debtor's bankruptcy may be a basis for reducing *future* alimony and child support, but not for reducing or eliminating *past-due* alimony and child support.

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