Who Gets What? Dividing Property During Divorce

Divorce is a time of emotional stress. It can be difficult to decide which property is "yours," "mine," "ours," or "theirs." Here are some pointers.

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When thinking about dividing property, draw four columns on a piece of paper; then follow these steps:

- **Step 1.** In the first column, list each property, whether separate or joint. Include everything you own.
- **Step 2.** In the second column, write what each property is worth next to each description.
- **Step 3.** In the third column, try to assign each property a fair-market value.
- **Step 4.** In the fourth column, write how each property might be divided.

What Do You List as Property?

Property includes your family home and ranch, rental property, cars, trucks, trailers, livestock, crops, and equipment. It also includes bank accounts, investment accounts (such as mutual funds, stocks, bonds, and annuities), life-insurance cash value, retirement accounts, profit-sharing accounts, and pension plans. You can probably think of more things to add to the list because there is practically no limit to what is considered property.

While laws differ among states, property in Texas can be divided into two basic categories: separate and marital (or community) property. Other states, such as New Jersey, are "equitable distribution" states, where settlements are meant to be fair, but not necessarily 50/50.

In Texas, separate property includes what each person:

- Inherits before and during the marriage
- Brings into the marriage
- Receives as a gift during the marriage
- Receives as personal-injury proceeds

Marital or community property is everything acquired during the marriage regardless of whether one spouse bought it with her salary or placed only one name on the title document. In Texas, the income earned on a separate property account is marital property. However, the increase in value of the separate property account can be separate property. It depends in part on whether or not the other spouse actively worked to increase the value of that property. Other states have the same or similar rules.

Depositing separate property money into a marital-property bank account creates a co-mingled account. Over the years, this can complicate the process of identifying how much is separate versus marital property. Add in a purchase of something like a vacation home with co-mingled funds, and you have an even more complex situation.

Is It Marital or Separate Property?

This simple question can have very complex answers.

In this example, John and MarySue live in Texas and are getting a divorce. When they married 17 years ago, MarySue had a CD (Certificate of Deposit) of $10,000. While they were married, her CD earned interest of $1,500. The CD balance is now $11,500. Her separate property is $10,000, while the interest of $1,500 earned during the marriage is marital property. If MarySue had moved all of this money to a joint account, she would have made a presumptive gift of the money to the marriage. The amount she co-mingled would have become marital property. If she had spent the money on a family vacation, she would also have made a presumptive gift. In some circumstances, if the separate-property portion has not been spent, it can be traced back to its origins and be treated as separate again.

Let's assume MarySue owned a house when she and John married 17 years ago. During the marriage, she kept the house in her name, not adding John's name to the deed. They made the mortgage payments out of their joint account. The house increased in value partially because of John's talent for home improvement. Now the situation is more complex. MarySue's separate property is at least the value of the house on their wedding date, less the mortgage balance on that date. (Did she get the house appraised at that time? Probably not.) The mortgage payments, in part, increase the equity in the house. Since those payments were made with marital money, that increase in equity is marital property. As in New Jersey, to the extent the house increased in value due to John's efforts, that portion of the value might be considered marital. The amount the house increased in value due to inflation or due to a general rise in real estate values would be considered separate property. John and MarySue end up with a house that is part separate and part marital property. As you can see, finding out what the house is worth can be a challenging task.

Now let's assume that MarySue and John refinanced the house during their marriage. At that time, if both their names went on the new mortgage and the deed to the house, MarySue made a presumptive gift of the house to the marriage. This makes the entire value of the house a marital asset subject to division.

If MarySue's grandmother either gifted or left as inheritance $20,000 to MarySue during the marriage, that amount started out as MarySue's separate property. The same rules apply here as they did to the CD MarySue brought into the marriage.

If MarySue saves $50 a month from her salary and deposits it into a savings account in only her name, the entire account is marital property. She may think of it as "her money," but it is marital because the money she deposited was earned during the marriage.

In most cases, the couple agrees on how to split up the household items. If the items need to be valued, they are done so at garage-sale prices.

Who Gets Which Assets?

The question is not which assets do you want to keep, but rather which assets are best for your long-term financial security. In the end, who gets what will most likely be the result of negotiating between spouses. Knowing what to negotiate for is crucial.

When trying to decide who gets which property, consider the issues related to the property and long-term financial security. To illustrate, we will return to John and MarySue.

Retirement Accounts

Let's assume John has a 401(k) and MarySue has a pension plan through her employer. John has always done the investing for the family. He takes risks and spends hours at the computer checking the stocks and mutual funds. MarySue is more comfortable with a steady income, predictable investment results, and little time monitoring the investments.

MarySue is a teacher and has a pension account with the Teacher Retirement System of Texas (TRS). John has a 401(k) account with his company. His 401(k) account is worth $180,000. Her pension is valued at $60,000. For simplification, both of these retirement accounts are wholly marital property. Theoretically, they could equally share both retirement accounts. But the easier division is to offset. Instead of John getting half of her pension and MarySue getting half of his 401(k), MarySue could have $60,000 of his 401(k) and keep her pension, leaving John with $120,000 in his 401(k). This would give each of them equal amounts of retirement funds. MarySue would be able to keep her steady and predictable pension, and John would be able to creatively invest his remaining share of the 401(k) funds.

The portion of a retirement account that existed before the marriage is not divisible. A complex analysis is used to determine how much of a retirement account is attributable to the marriage and available to be divided in divorce.

Non-Retirement Property

John and MarySue have owned a rental home near their children's school for 10 years. There is a mortgage on this house. They also have an investment account with stocks and mutual funds. The estimated value of the house is $100,000. The estimated value of the investment account is $100,000. John has always invested the money, and MarySue is not familiar with the investments. MarySue and John think that if John takes the account and MarySue takes the rental home, they will have an equal split. That is not necessarily true.

MarySue needs to consider the tax basis in the rental property as well as the balance of the mortgage before she can figure out the true financial value of the rental home. Additionally, she should consider the costs and income taxes she would incur when she eventually sells the property. Given all that, she might get only $44,000 out of the property after the income tax considerations and paying off the mortgage.

John also needs to consider the income tax aspects of the investment account. Depending upon the basis of the stocks, and the history of the stock market, there could be capital gains in those stocks that would reduce the net value of the cash he could get from a sale of those stocks to less than $100,000. The net value could be more or less than $44,000.

Both the rental house and the investment account should be carefully analyzed to determine their true worth. Only then can John and MarySue begin to see how to fairly divide these assets.

The Entire Picture

In real life, couples take all their property into consideration: assets, debts, retirement accounts, etc. The examples in this article show simple comparisons of property. When everything is included, assets are not compared one-on-one, but rather in a mixture.

During divorce negotiations, it's common for spouses to go back and forth about who will get what property. This is in an effort to reach a fair settlement. This is not necessarily an equal split: a settlement can be fair without being equal.

In addition to the long-term financial considerations of a settlement, the couple will think about how a property division will affect their minor children. It may be financially fair to the adults to sell the family home and divide the resulting cash, but it may not be emotionally fair to the children.

In the case of the divorce involving an older homemaker, the property division should include consideration for her decades of life as a homemaker instead of a career woman. Her employment skills at the time of her divorce can easily be substandard. She will most likely be facing a significant reduction in her standard of living. To help her keep an equal and fair economic position, the division of property might need to be unequal.

There are no guarantees in dividing property in divorce. Negotiations go back and forth. This article has barely touched on the issues. Couples need to understand the aspects of their property to determine how a property division will affect their individual long-term financial security. You may wish to seek help from a Certified Divorce Financial Analyst (CDFA). A CDFA is a financial professional who is trained in the specific financial and tax issues of divorce.

Maintenance/Alimony in Texas

For many years, Texas was the only state without post-divorce court-ordered alimony. In 1995, a law was passed partly in an effort to prevent the economically displaced spouse from going on welfare. This law is really more symbolic than practical; it's rare for a Texas divorce settlement to include alimony.

Most other states have more generous alimony laws. For example, in Colorado, alimony/maintenance can be permanent or temporary. It depends on the satisfaction of several criteria, such as ability to pay, reasonable need, length of marriage, etc.

The Texas court is limited to the amount and duration it can require one spouse to pay the other in alimony. Basically, the couple must have been married for 10 years, and the spouse asking to receive alimony must be unable to be self-supporting. The alimony can be no more than $2,500 or 20% of the payor's income, whichever is less. It is generally limited to three years. Of course, couples can negotiate alimony that is greater in amount and longer in duration, but the court-ordered alimony is limited to this. (If the former spouse is physically or mentally disabled, the court can order payments to be indefinite.)

Alimony in Texas is considered to be a temporary measure to allow the lesser-earning spouse to get training for a career that will support her. If she has substantial wealth upon divorce, she might not qualify for the alimony. Even if she isn't wealthy, her husband still might not have the income to give her alimony.

Temporary maintenance is more often ordered for the period during which the divorce is pending. The maintenance is paid to the spouse with limited resources and with temporary child custody.

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