

## THE EVOLUTION OF THE DIVISION OF PROPERTY IN DISSOLUTION ACTIONS

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### Introduction

The legal principles related to marital property division demonstrate assumptions about the extent to which spouses are economic actors in the marital partnership. The trend of legal decisions relating to division of property in divorces is moving rapidly in the direction of recognizing that marriages are rarely long-term partnerships in the 21<sup>st</sup> century. Many divorces in current times may be the second or third of one or both of the parties and the marriages are often for periods of less than ten years or much shorter periods. The societal tenets originally underlying the economic theory of partnership of marriages is being overcome by a society in which the divorce rate for first marriages continues to rise (and the durations become shorter) and the divorce rate for second marriages is as high as eighty percent.

While the theory of economic partnership continues to be the guide for determining equitable allocation of partnerships, courts are recognizing that often the efforts of one of the partners prior to the marriage are simply bearing fruits during a marriage and that such fruits are not necessarily a result of contributions of the spouse. Court decisions are reflecting a move away from the traditional 1/3 to 1/2 splits of marital property that prevailed when divorces resulted after long-term partnerships entailing substantial contributions by one spouse in favor of the career success of the other. Courts have awarded ten to twelve percent of the marital estate in cases of short marriages and limited contributions.

Court decisions are also recognizing that partners sometimes actively deplete the marital estate rather than contribute to the marital estate. In such instances, courts are expressing a lack of sympathy about the absence of a marital estate and deeming it unnecessary in such instances to award a settlement from the separate assets of a partner whose assets have been diminished by the expenditures of a partner spouse.

Finally, premarital agreements have become common. The trend is to defer to such agreements as long as such agreements are valid. Premarital agreements are particularly helpful in identifying premarital assets and assisting in defining non-marital and marital assets.

## **DIVISION OF PROPERTY**

Under Neb. Rev. Stat. §42-365, the equitable division of property is a three step process. The first step is to classify property as marital or non-marital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the marital estate between the parties.

### **Excluding Property From the Marital Estate**

#### **The Premarital Agreement**

If the parties entered into a valid premarital agreement, the premarital agreement will serve as the starting point in identifying premarital assets. In addition, such an agreement may define marital and non-marital assets. Such an agreement may be particularly helpful by addressing income from non-marital assets and appreciation of non-marital assets. As long as the premarital agreement is not unconscionable, the terms of the premarital agreement should control the classification and division of the property to the extent provided under the agreement.

#### **Non-marital Assets**

The property division system does not require that spouses share in the economic fruits of property that was owned by one of the parties prior to the marriage. Property owned or acquired at the time of the marriage is non-marital property. *Heald v. Heald* 259 Neb 604 (2000). To the extent property can be identified, it is typically set off to the person who brought the property to the marriage. *Tyler v. Tyler*, 253 Neb. 209 (1997). An exception to the rule may apply if the spouse made a significant contribution to the improvement or operation of the property. The burden of proof to establish the property is non-marital remains with the person making the claim. *Shearer v. Shearer*, 270 Neb 178 (2005). The burden of proof to establish contribution is with the person claiming contribution. *Id.*

#### **Property Acquired by Inheritance or Gift**

Property acquired by inheritance or gift is ordinarily set off to the individual receiving the inheritance or gift. This is true regardless of when the individual received the inheritance or gift. An exception applies if the spouse made a contribution to the property. Contributions do not necessarily result in treatment of the property as marital property. Instead, a court might determine that the spouse should receive a return of his or her contribution or its economic equivalent. *Tyler*.

#### **Income From Non-Marital Property**

The national trend favors considering income from non-marital property as non-marital. While income from non-marital property may be considered in awarding alimony, non-marital income should generally be set aside as non-marital if the use of the income can be traced.

### Increase In Value of Non-Marital Property

To the extent of an increase in value of non-marital property, the appreciation remains a non-marital asset and the entire asset should be set off as a non-marital asset. An exception would apply if it can be shown that the increase in value was a direct result of a contribution from the spouse. The value of the property that becomes marital should be limited to the extent that it reflects the contribution. That is, if property is worth \$80,000 prior to marriage and the spouse contributes \$20,000 at a time that the property is worth \$100,000, then the spouse has an interest in 20%.

### Pensions

Contributions to pensions before marriage or after dissolution are not assets of the marital estate and not subject to division. *Priest v. Priest*.

### Tracing Non-Marital Assets

If a premarital asset is used to purchase a different asset during the marriage, that asset must be traced back to its origins. If property can be traced to its origins as premarital property, such property should be set off. *Quinn v. Quinn*, 13 Neb. App 155 (2004). Tracing begins with demonstrating that property was initially separate property. A premarital agreement may establish premarital assets as separate assets and may define how the character might be changed during marriage. For example, a premarital agreement might specify that income from separate assets and appreciation of separate assets remain separate assets. In the absence of a premarital agreement, documents such as income tax returns, gift tax returns, inheritance tax filings or other documents sufficient to demonstrate prior acquisition and ownership can establish property as premarital.

Once a specific property is established as separate premarital property, the next step is to trace the asset during the term of the marriage to overcome any presumption that the property was converted or transmuted to marital property. As related to tracing of property, transmutation refers to a change in character of the property from non-marital to marital or vice versa. Property can be transmuted by agreement, by retitling, by interspousal gift or by use.

### Effect of Commingling

The fact that commingling takes place does not prevent an allocation of property as non-marital. To the extent that the original non-marital asset can be identified, it is to be set aside to the spouse. In the case of a contribution of marital funds to a non-marital asset, it must be shown that the contribution of marital funds enhanced the value of the asset. *Hughes v. Hughes*, 14 Neb. App. 229. Some courts have applied the following formula: “the present value of a non-marital asset used in the acquisition of marital property is the proportion that the net equity or contribution at the time of the acquisition bore to the

value of the property at the time of purchase multiplied by the value of the property at the time of separation.”

### Joint Titling of Property

The fact that property is titled jointly does not preclude a court from determining that property is non-marital. *Schuman v. Schuman*, 265 Neb 459. The court may look behind the titling to determine that equities.

### Dissipation of the Marital Estate

Courts are increasingly recognizing that a spouse’s dissipation of marital estate should be considered in determining property awards. *Schrier v. Schrier*, A-05-817, December 5, 2006. In *Schrier*, the court stated that the absence of a marital estate was due to the funding of lifestyle choices made by the parties. The court noted that the spouse who had “participated in the lifestyle enjoyed by the parties during the marriage, including an expensive home, travel, and house cleaning services, cannot now complain that the funds used to support that lifestyle have dissipated.”

### Grace Award

In some circumstances, non-marital assets are considered in the division of assets, even without contribution from the other spouse. Typically, such an award might be made in a long-term marriage where little or no marital estate accumulated. *Grace v. Grace* 221 Neb. 695 (1986).

### The One Third to One Half Rule

Historically, courts awarded one half to one third of the marital estate to a spouse. The division is based on the **net** marital estate and must account for any marital debts, including built in tax liabilities. The current trend is moving away from the one third to one half rule, especially in those instances where the duration of the marriage was short-term or where there is little contribution on the part of one spouse.

In *Davidson v. Davidson*, the court awarded twelve percent of the marital estate to the wife. The court noted that most of the marital estate accumulated during the marriage of 38 months was a result of the husband’s efforts to establish his career prior to the marriage. The court noted that although the wife had contributed to the marriage by providing social support and tutoring assistance to the husband’s college aged son, the wife was well educated and capable of finding employment.

### Date For Valuation of Property

The appropriate date to use for valuing marital assets requires that the selected date bear a rational relationship to the property valued. *Walker v. Walker*, 9 Neb. App. 694 (2000).

In Gohl v. Gohl, 13 Neb. App. 685, it was determined that the trial court's adoption of a valuation date over two years old was an abuse of discretion.

### Payment of Alimony

Nebraska Revised Statutes §42-365 states, in part:

“When dissolution of a marriage is decreed, the court may order payment of such alimony to one party by the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. “

Some of the considerations applied to determine a division of property and an award of alimony may overlap but the purpose of the two are different. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is rehabilitative in nature and is intended to provide continued support for one party by the other where the supported party may have interrupted career opportunities for the marriage or other circumstances make the payment of alimony appropriate.