GUIDE 4

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KING @ LAW'S DIVORCE GUIDE SERIES

The Division of Property and Debt (Equitable Distribution)

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1 Introduction

Which spouse's name is on an account or title isn't usually important

Many people mistakenly assume which spouse's name is on an account or title determines which spouse will own that property or debt in a divorce. You may be anticipating that the only property to be divided is anything with both spouses' names on it, such as joint bank accounts. However, that is not how the law is setup.

The law sees marriage as a joint venture between two equal partners. Most property or debt the spouses acquired during the marriage is actually owned by this joint venture called marriage. Your car title or bank account won't list "marriage of _____" as the owner. However, the law provides rules to determine what property or debt is "marital" and therefore needs to be divided.

For example, if one spouse saved $1 million during the marriage and the other spouse had $0, the $1 million would most likely need to be divided; $500,000 to each spouse. The $1 million being in a bank account under only one spouse's name doesn't impact the right of the other spouse to their half of it.

If you want to pursue equitable distribution in court, you have to file that lawsuit before a judge or clerk signs a divorce decree.

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2 List and Value

List property and debt as of the separation date

The first step is for both spouses to list all of the property and debt they had as of the date of separation and the value of each item. The list should include things like houses, cars, retirement accounts, pensions, credit cards, jewelry; even things like business interests or intellectual property. Feel free to use my spreadsheet template to create your list.

HURDLES

- Cooperation
- Date of Separation
- Values

Cooperation

In most cases, neither spouse will have access to all of the information and records necessary to complete the list. You'll need cooperation from your spouse. If your spouse does not cooperate voluntarily, you will need to go to court.

Any lawsuit for equitable distribution automatically triggers a requirement for extensive financial information and records from both spouses. If your spouse does not comply with the court's mandatory disclosures, they can be sanctioned by the court or even sent to prison eventually.

However, it may be more convenient to persuade your spouse to cooperate voluntarily if you can. Chapter 3 of my guide on divorce negotiations covers how to invite your spouse to structured negotiations that include disclosing financial records. If your spouse talks to a lawyer, their lawyer will likely recommend voluntary disclosures.

Date of Separation

Your list should be a snapshot of all of the property or debt either spouse owned as of the date of separation. The date of separation is the day one spouse moved out intending never to cohabitate with their spouse again.

Often, the spouses do not agree on what the date of separation was. This can make it impossible to put together a proper list. If the separation date is contested or ambiguous, the concept is covered in more depth in chapter 1 of my guide on simple, uncontested divorce decrees.

Values

Generally, you'll need to list the value of a property or debt as of the date of separation. For example, for checking accounts, credit cards, mortgages, or car loans, you'll need statements covering the date of separation to figure out what the balance was on that day.

However, you'll need a current value for things like real estate or investments, where values fluctuate due to market conditions. For these types of assets, you'll need to look at the value as of the separation date, and any gains or losses on the property/debt that existed at the time.

For example, say on the date of separation your spouse had $1 million in a 401k. Two days after separation, your spouse won $1 million gambling that they added to the account. Then, the entire account grew 20% by time you both start collaborating on the list.

The total value of the account would now be $2.4 million. However, only the $1 million that was in the account prior to the separation date, and the increase in value of that $1 million portion are marital. In this simplified example, $1.2 million would be the marital value.

Value Disputes

Disputes regarding the value of something are common. The more valuable something is that one spouse is keeping, the more money is owed to the other spouse to balance to a 50/50 division.

The most obvious solution in most cases is for both spouses to agree on an appraiser and split the costs of an appraisal. This works well for homes or jewelry.

In other cases, the value of something cannot be determined and is a matter for negotiation. For example, say you have a right to half of your spouse's pension. However, you'd have to wait 20 years for your spouse to retire before you get your share of that pension. Instead, you might accept a much lower value to get your share as up-front cash.

In the pensions example, it's common for a spouse to accept a fraction of the amount of money in the pension in order to get cash up-front.

Don't worry if some value disputes cannot be resolved. Each spouse can bring their own spreadsheet with their alleged values to negotiations or court.

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3

3 Categorizing

Categorize property as marital, separate, or divisible.

Once you have a list of property and debt, you need to categorize each item on the list as "marital," "separate," or "divisible." I'll explain how to identify each category in this chapter.

CATEGORIES

- Marital
- Separate
- Divisible

Some property or debt may have multiple components. For example, a bank account may include $100 that is "separate" and $900 that is "marital." You can include each component on the list separately. You and your spouse may disagree on how to categorize each item. However, you can each create your own accounting to bring to negotiations or court.

Marital Property

Any asset earned by either spouse after the marriage date and before the separation date is marital property unless the asset was acquired through a gift or inheritance.

Additionally, any debt acquired between these dates is marital if the debt benefited the marriage. For example, a car loan or mortgage benefited the marriage, if the car or house is marital. However, student loans for a spouse that hasn't graduated yet will only benefit that spouse's future prospects and didn't benefit the marriage.

In most cases, most of the property and debt of both spouses is "marital property" owned by the marriage, especially if they were married for a long time.

Separate Property

Separate property is property or debt that is considered owned by one of the spouses individually, rather than the marriage. Separate property includes:

- "Premarital property" that the spouse owned prior to the marriage and brought with them into the marriage.
- "Post-marital property" that the spouse earned after the date of separation.
- Exceptions to marital property, such as inheritance, gifts, or anything identified as separate property in a prenup, if applicable.
- Once marital property is distributed to a spouse, it is then called that spouse's "separate property."

In some cases, someone may have separate property that has been mixed in with marital. For example, money from an inheritance might be added to a joint account. Then, money from the joint account may be spent on bills. This makes it unclear whether the money being spent on bills was marital or the inheritance.

This is what we refer to as "tracing". So long as you can track the origin of the money back to the inheritance, it can still be claimed as separate property.

Divisible Property

Divisible property is when marital property or debt gains or loses value after the date of separation, but before property and debt are distributed among the spouses. If that gain or loss in value is caused by passive market conditions (e.g. the stock or housing markets), the gain or loss needs to be divided among the spouses, just like marital property. This also applies to things like fees or interest.

For example, say a house was worth $200,000 when one of the spouses moved out, but the house lost $50,000 in value by time the spouses started negotiating a separation agreement. Generally, in most cases, both spouses would share the $50,000 loss equally.

However, lets say the house gained $50,000 in value but this was caused by one spouse's labor after separation, not passive market conditions. That spouse would claim the $50,000 in value belongs to them.

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4 Distribution

50/50 is the general rule for marital and divisible

Generally, marital and divisible property will be divided 50/50 between the spouses. Courts are not required to divide it 50/50, but they start from an assumption that 50/50 is fair.

DISTRIBUTION

- Who takes what
- 50/50 exceptions
- Distributive

This doesn't mean you need to get a chainsaw to cut your couch in half to split it. Rather, each spouse needs to leave the marriage with the same total net-value of marital property as the other.

In most cases, one spouse will take more property than the other. After all, it's difficult to make things exactly even, especially if one spouse wants to keep the house. A "distributive award" is what we call the cash payment used to make things even.

For example, lets say the only marital property is two cars that were purchased during the marriage. The husband wants to keep his $50,000 Tesla and the wife wants to keep her $10,000 Honda Civic. It's impossible to make an even distribution of two cars of different value.

The total value of both cars is $60,000, so each spouse needs to leave the marriage with $30,000 in net value. If the husband keeps his $50,000 Tesla, but pays the wife a distributive award of $20,000. That will balance things to $30,000 for each spouse. That's $50k - $20k for the husband and $10k + $20k for the wife.

Who Takes What

This process largely makes it arbitrary which spouse takes what property or debt, because it all balances out in the end. If one spouse wants to keep a lot of expensive things, they will need to pay the other spouse half the cash value of the things they take.

However, often there are items both spouses want, or that neither spouse wants. This can usually be resolved by selling the items neither spouse wants and auctioning the items both spouses want to the spouse willing to attribute a higher value to it.

Spouses often negotiate a deal where each spouse keeps their retirement account or pension, then balances the division of property in other ways. That's because employer-based retirement accounts require a court order to divide. Often the spouses negotiate a tax-free, up-front cash value that is substantially less than the money in the account.

50/50 Exceptions

The court starts from an assumption that a 50/50 distribution is fair, but that assumption is not absolute. There are extraordinary situations where you might be going to court asking for more than 50%. For example, if your spouse is a coke addict that spent all of your savings on gambling right before the separation date.

However, the more routine adjustments are for when a spouse paid for something after the separation date that should have been split or paid by the other spouse. For example, say the spouses were sharing a car after separation, but only one spouse was paying the associated gas and insurance bills. That spouse might ask for compensation for the bills the other spouse should have chipped-in on.