

# Who Gets What?

## Dividing property and sharing debts



**H**ow assets and liabilities are divided in divorce proceedings is similar from state to state. However, notable differences exist. Thus, you may need to supplement the following answers and guidelines with specific information from your lawyer.

### ■ When does property get divided?

Depending on the state, a division of assets and liabilities may take place as part of the divorce or dissolution of marriage proceeding. In some states, a separate equitable distribution or property division proceeding will be related to, but distinct from, the process. In addition, courts may become involved in the division of assets between parties who were never married.

### ■ What property gets divided?

In most states, a statute defines the categories of assets and liabilities to be divided by the parties to a divorce or property division proceeding. Most states will distribute all assets and liabilities acquired during the marriage as a result of “marital efforts” or “marital action.” Generally this means assets that were acquired from the active effort of either spouse during the marriage. Some states include assets that were obtained during the

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marriage, regardless of their source. Other states include the appreciation in value of any asset owned by either party before the marriage. A few states have the power to divide all assets and liabilities of either spouse, regardless of when or from what source they were obtained. Finally, some states cannot distribute assets or liabilities that are titled solely in the name of one spouse, but they generally are considered in the division of property.

### ■ Are there rules identifying what is marital property and thus divisible in a divorce?

Yes, but they vary from state to state. The following general rules apply in most states. Check with your lawyer to find out whether local variations apply to your case.

The property and financial obligations or debts each party brought to the marriage, and which continue to be identifiable at the time of divorce, will be considered separate property.

Property and liabilities received during the marriage as a gift or inheritance from someone other than a spouse, and which continue to be identifiable at the time of divorce, will be considered separate property.

Property and liabilities designated as nonmarital in a premarital or prenuptial agreement, which continue to be identifiable at the time of divorce, will be considered separate property.

Generally all assets and liabilities that do not fall into the above categories will be subject to division and distribution by the court.

### ■ What about an inheritance?

Inheritances are treated as nonmarital property in most states. In a few states, the court has the power to divide any asset of either party, including inheritances. Some states treat the original inheritance as separate property and not subject to division, but any appreciation in value during the marriage is marital.

### ■ Will I get a 50/50 division?

In most states, an equal division of the marital estate or something close to equal is presumed or preferred unless a court specifically identifies facts that make such a distribution unfair. Some states require an equal division without further analysis. Note, however, that even if an equal division is required, the parties may not walk away from the marriage with equal assets because one may have separate property in addition to marital property.

In states where an equal division is not mandated or the court is required to come up with a division that is “equitable” or fair but not necessarily equal, the facts that might justify an unequal division include the following:

- Each spouse’s contribution to the marriage, including the care and education of the children and services as a homemaker;
- Economic circumstances of the parties;
- Length of the marriage;
- Career interruptions or educational opportunities of either party;
- Contribution of one spouse to the career or educational opportunity of the other;
- Desirability of retaining an asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party;
- Contribution of each spouse to acquiring, enhancing, and producing income or the improving of or incurring liabilities to

by giving exclusive use and possession of the home to another party;

- The intentional dissipation, waste, depletion or destruction of marital assets;
- Any other factors that would affect an equitable and fair division between the parties.

### ■ Can I get half of my spouse’s retirement?

The simple answer is that the nonworking spouse usually can obtain a share of the other party’s retirement if that retirement was accumulated during the marriage. Retirement benefits that were earned before the marriage or that will be earned after the marriage are not subject to division.

If the nonworking spouse wants part of a retirement plan or benefit, this usually can be accomplished through a qualified domestic relations order (QDRO), without tax consequences until payments begin.

### ■ Can I get half of my spouse’s bonus?

This depends on when the bonus was earned. If the bonus was earned during the marriage, it is likely to be divided, even if it will not be received until after the divorce. Future bonuses generally will not be divided, but may be considered as part of the recipient’s income for calculating alimony or child support.

Can I get back the money my parents gave us?



**The key words here are “gave us.”** If money was given to both of you, it is a joint asset and likely to be divided as any other asset. If it was given solely to you, state gift and inheritance rules will apply.

both marital and nonmarital assets;

- Desirability of retaining the marital home as a residence for a dependent child or any other party when equitable to do so or in the best interest of the child or that party, and when maintaining the residence until some future date is financially feasible. In making this determination, the court may consider first whether remaining in the marital home would be in the best interest of the child and, if not, whether other equities would be served

### ■ Who gets the jewels?

This will depend in part on whose jewels they are and when they were received. In many states, gifts made from one party to the other will remain with the recipient. Similarly, a gift received before the marriage generally is not subject to division, except in the few states discussed above. Note, however, that if gold, gemstones, or the like were purchased for investment purposes, they may be joint assets subject to distribution.

### ■ Who gets club memberships?

Most clubs have written rules governing divorce situations. Many memberships do not allow both parties to continue in the club after the marriage ends. If the husband is the named member, he likely will get the membership. If the membership is joint, check club rules. If the membership has a monetary value and was obtained during the marriage, that value will be included in the marital estate.

### ■ Can I empty the bank account?

Yes, you may do so if your name is on the account and no restrictions limit withdrawals. However, this may not be a good idea. Empty an account, and the war is on. If you are dependent on the other person for support, this may backfire. Taking a portion of the account for emergencies often is sensible. In addition, at the beginning of a divorce, court orders may govern such things. Do not violate court orders.

The court sometimes can award exclusive use and possession of the house until the children reach majority or for some other fixed period.

### ■ Can credit cards be cut off?

Yes. The spouse who holds the card can cancel or freeze the account, unless a court orders otherwise. A spouse who is a mere signer does not have control. In addition, most credit card companies will not close the account until outstanding balances are paid. It is a good idea to establish credit by having at least one credit card in your name should a separation or dissolution occur.

### ■ How can credit cards be cut off?

If you are concerned about the other party's abuse of your credit cards, take the following steps: (1) cancel the card, (2) restrict the use of the card to you alone, (3) request new cards in your name only, or (4) set credit limits to reduce your risk of significant harm. Call your credit card company immediately to institute these changes and

## Who pays for student loans?



### If the loans predate the marriage, then the borrower generally

pays for them. If incurred during the marriage, the loans likely will be treated as a marital debt. You may argue to the court that the loan benefits the other party without a distribution impact and that the debt should go to that person even if it creates an unequal distribution.

### ■ Can my spouse make me sell the house?

If the house is titled jointly, the answer is probably no. But the court can order the house sold as part of a distribution. In some states, a second count must be added to the lawsuit to accomplish this. If the home is titled solely in the name of one party, that party may control the sale of the asset. But in most states, your homestead or property rights will prevent your spouse from selling it without your consent.

follow their rules. The company phone number is generally on the back of the card and on your statements.

### ■ Can I fix up the house and make my spouse pay for it because I want to keep my home?

Not unless the court so orders. However, such expenses may be included in settlement negotiations. If the house needs repairs and your spouse is unwilling to pay for them, make sure your lawsuit specifically pleads this and asks for additional relief. The court may address the issue of emergency repairs during the divorce. This generally is limited to real emergencies, such as broken pipes, and not to cosmetic or decorating projects.

### ■ Does the custodial parent always get the house?

Not always, but when children are small and sufficient finances are available to retain the house, this is likely to occur, at least for a time.

### ■ **How can I figure “equity” in our home to buy out my husband’s share of the house?**

The first step is to determine the current fair market value of the house. Sometimes spouses are able to agree on a value they both think is fair. In other instances, you may need to have a qualified residential real estate appraiser value your home. If you want to keep the house, you will want a low appraisal figure and your spouse will want a high figure. Because all appraisals are estimates, that may be the hardest part. Some folks agree on a single appraiser, others select their own and negotiate any differences in value, or have the two appraisers select a third appraiser. Once you have a fair market value figure to work with, subtract the mortgage balance and any other liens on the property. The result is the equity.

### ■ **I guaranteed my spouse’s business debt, how do I get out of it?**

The loan must be refinanced or the lending institution must release the co-signer from liability. This often can be accomplished by the primary borrower working with the lender.

### ■ **Must I pay the balance on my spouse’s car lease?**

Be careful if your name is on the lease. You could be held liable if your spouse fails to make payments, no matter who gets the car. Your liability to the leasing company is dependent on your signed contract. Leasing companies do not readily grant releases. This issue will be part of the division of property and support case.

### ■ **Can I make my spouse buy me a new car because I drive the kids around and my car is shot?**

You could ask for this relief and include it in your distribution and support claims. The court will not order this type of direct relief, except in unusual circumstances. If it is important to you, negotiate it as part of your agreement.

### ■ **How can I get my name off the mortgage, credit cards, or car loan?**

In each instance, the loan or credit obligation must be refinanced or the lending institution must release you from liability. This cannot be accomplished directly as a result of the divorce or property division process. Nevertheless, divisions are frequently negotiated, requiring one party to assume the debt and hold the other harmless.

If the debt is assigned to your spouse he or she would have to reimburse you if you are forced to pay part of the debt.

### ■ **Am I responsible for tax debts?**

As far as the IRS is concerned, you are responsible for taxes if you signed a joint return. However, if the liability arises from circumstances about which you had no knowledge (*i.e.*, failure to pay business-income-related taxes) a special rule called the “Innocent Spouse Doctrine” could exempt you. If you are in such a situation, speak to a lawyer or CPA with special tax knowledge to make sure you qualify. The court also can divide tax liabilities. But, if the other party gets the debt and doesn’t pay, you may be held liable by the IRS. You would have to seek payment from your spouse or ex-spouse through an enforcement suit.

### ■ **My parents loaned us money. Who must repay it?**

The written loan agreement will govern, and usually the court will follow it. If there is no written agreement, you may have an argument brewing over whether the money was a loan or a gift. Gather the evidence you can to prove it was a loan if you expect it to be repaid. If you prove it was a loan for marital purposes during the marriage, it will be counted in the distribution of assets, regardless of whom is assigned to repay the debt. In title theory states, the person the loan was made to will be responsible for the repayment.

### ■ **If my spouse or former spouse goes bankrupt, am I responsible for joint debts?**

Yes, unless you also discharge the debts in bankruptcy. Keep in mind that this applies only to joint debts. You will not be responsible for debts in the name of your spouse or former spouse, even if they were incurred during the marriage. **FA**