

15

Property Division

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- I. Overview §15.1
- II. Statutory Provisions §15.2
- III. Agreements Concerning Property
 - A. Prenuptial Agreements §15.3
 - B. Postnuptial Agreements §15.4
 - C. Settlement Agreements §15.5
 - D. Mediation and Agreements for Alternative Dispute Resolution §15.6
- IV. Property Subject to Division in Divorce
 - A. Overview §15.7
 - B. Marital Property
 - 1. In General §15.8
 - 2. Earnings During the Marriage or Replacements for Earnings
 - a. In General §15.9
 - b. Delayed Receipts and Deferred Compensation §15.10
 - 3. Definition of *During the Marriage* §15.11
 - C. Separate Property
 - 1. In General §15.12
 - 2. Premarital Property §15.13
 - 3. Property Inherited or Gifted During Marriage §15.14
 - 4. Appreciation or Income Traceable to Separate Property §15.15
 - 5. The Contribution Test §15.16
 - 6. The Insufficiency Test §15.17
 - 7. Commonly Encountered Issues for Separate Property Cases
 - a. The Marital Home §15.18
 - b. Commingling §15.19
 - c. Unequal Use of Funds or Reliance §15.20
 - 8. Techniques in Dealing with Separate Property Cases §15.21
 - D. Property Concealed or Placed Outside the Marital Estate §15.22
 - E. Specific Types of Property
 - 1. Worker's Compensation and Social Security Awards §15.23
 - 2. Social Security Retirement Benefits §15.24
 - 3. Causes of Action and Injury Awards §15.25
 - 4. Stock Plans and Stock Options §15.26
 - 5. Vacation and Sick Time §15.27

- 6. Job Seniority §15.28
- 7. Professional or Advanced Degrees §15.29
- 8. Undergraduate Degrees §15.30
- 9. Pensions
 - a. In General §15.31
 - b. Retiree Health Benefits §15.32
- 10. Permanent Resident Alien Status §15.33
- 11. Income Tax Benefits
 - a. Dependency Exemptions §15.34
 - b. Tax Refunds, Credits, and Loss Carryovers §15.35
 - c. Joint Returns §15.36
- F. Debts
 - 1. General Considerations §15.37
 - 2. Frequently Encountered Debt Issues §15.38
- V. Valuation
 - A. In General §15.39
 - B. Date of Valuation §15.40
 - C. Specific Types of Property
 - 1. Closely Held Business Interests §15.41
 - 2. Professional Practices §15.42
 - 3. Retirement Benefits and QDROs §15.43
 - 4. Other Employment Benefits §15.44
 - D. Transaction Costs
 - 1. In General §15.45
 - 2. Taxes §15.46
 - 3. Sales Commissions §15.47
 - E. Interest on Judgments and Awards §15.48
- VI. Standards for Awards
 - A. Overview §15.49
 - B. Guidelines for What Is Equitable §15.50
 - C. Duration of the Marriage §15.51
 - D. Contribution §15.52
 - E. Need for Support §15.53
 - F. Conduct of the Parties and Fault §15.54
- VII. Bankruptcy
 - A. Overview §15.55
 - B. Practical Considerations §15.56
- VIII. Enforcement
 - A. Enforcement Measures
 - 1. In General §15.57
 - 2. Execution §15.58
 - 3. Garnishment §15.59
 - 4. Receivers §15.60
 - 5. Other Enforcement Methods §15.61
 - 6. Contempt §15.62
 - B. Exempt Property §15.63

C. Life Insurance, Attorney Fees, and Other Aids to Enforcement §15.64

D. Planning for Enforcement and Security Devices §15.65

IX. Divorce and Estate Planning Considerations §15.66

Forms

15.1 Clause Incorporating Property Settlement Agreement into Judgment of Divorce

15.2 Retention of Jurisdiction to Enforce Settlement Agreement Clause in Judgment of Divorce

15.3 Property: Cure Provision

15.4 Attorney Fees for Enforcement of Judgment Clause in Judgment of Divorce

15.5 Constructive Trust Clause in Judgment of Divorce

15.6 Antibankruptcy Clause in Judgment of Divorce

15.7 Execution and Delivery of Instruments Clause in Judgment of Divorce

15.8 Life Insurance as Security Clause in Judgment of Divorce

15.9 Statutory Life Insurance Provision in Judgment of Divorce

I. Overview

§15.1 In Michigan, division of marital property follows the rule of equitable distribution. Although there is no requirement that property awards to each party be precisely equal, there is a presumption that the division of marital property (as contrasted with separate property) will be roughly congruent. If a court departs from this presumption of congruence, it must explain its reasons clearly.

Caselaw establishes a list of factors that courts should consider in dividing marital property. The most frequently cited are (1) the length of the marriage, (2) the needs of the parties, (3) the needs of the children, (4) the earning power of the parties, (5) the source of the property, (6) where the contributions toward property acquisitions came from, and (7) the cause of the divorce, including fault in the breakdown of the marriage. This list is not exhaustive, and the court may consider any other factors it finds to be relevant in a given situation. Although a court need not weigh every factor in each case, it is error to base a property settlement solely on one factor without consideration of others. Fault, in particular, has a limited role; although it is still a consideration in property division, it may not be used punitively for an inequitable result.

In the past decade, the law surrounding awards of separate property has departed from the equitable division factors that govern marital property. Separate property claims typically involve assets that a party owned before the marriage, gifts or inheritances, assets received after separation or filing, or assets or appreciation traceable to those items. It is now well established that separate property is awarded to its owner unless the nonowner spouse can meet one of two statutory tests by proving that he or she “contributed to its acquisition, improvement, or accumulation,” MCL 552.401, or that, absent a division of the separate property, the marital estate would be insufficient for his or her “suitable support,” MCL

552.23. Much of property division practice focuses on determining what is or is not separate property and applying the statutory tests. Although the prevailing authority now limits the courts' discretion to invade separate property, it still leaves broad authority for courts to do so when the facts of the situation justify such an approach. Courts continue to exercise broad discretion in interpreting these factors to the point that separate property division now has its own body of law that parallels—but does not follow—the equitable division law that has long been applied to marital property.

Before dividing property, courts and lawyers face the task of identifying what is to be divided. In the past, parties argued over whether marital property included premarital assets acquired during periods of cohabitation or property received after separation or filing the divorce. It is now established that for purposes of identifying what is “marital,” the marriage begins with the wedding and continues until a judgment of divorce, regardless of when the parties cohabited or separated. Even property received after a judgment may be marital if it was earned before the divorce.

Courts have discretion to value the marital estate at the time of separation, filing, trial, judgment, or on any other appropriate date because the value of the parties' property may fluctuate over time as assets are consumed, accumulated, appreciated, depreciated, or even hidden or dissipated. Courts should choose a valuation date that encourages rational economic behavior. The date chosen should permit the parties to share fairly in the benefits of their mutual reasonable actions while requiring parties to bear alone the consequences of unreasonable or dishonest unilateral action, such as gamesmanship to defer or accelerate income or spending to gain a strategic advantage.

Lawyers must be able to assess the value of the parties' assets. This is necessary to help the client evaluate what is fair in a negotiated settlement or to prove the value in court if the case becomes contested. Expert opinions are not legally required, but with complex or valuable assets, especially business interests, an appraisal is typically needed. In calculating value, courts may take into account the costs of the sale, including tax consequences, if a sale is likely to occur. However, courts are not required to take these transaction costs into account, and the party seeking credit for these costs has the burden of proving them. Lawyers must understand and carefully consider the tax consequences of any property division, with the assistance of experts if necessary. This is an area ripe for malpractice.

Debts are generally treated as negative assets in a property settlement, but they are also highly relevant to support issues because they have a direct effect on the parties' cash flow. Although a divorce judgment may require one or the other party to pay a given debt, the judgment is not binding on third-party creditors. If a client's name is on a debt, he or she is still potentially liable to the third-party creditor for that debt if the other party does not pay it. Lawyers must be particularly alert to this risk when one spouse assumes a debt bearing the other spouse's name, including joint debts.

Property division and support issues are closely related. If a party needs support, a divorce settlement can address this need by awarding that party more than

half of the assets. If the parties have substantial assets but limited income, this is sometimes a better approach than spousal support. If parties are entitled to have comparable standards of living after a divorce, such as in longer-term marriages or those with children, one party should not be required to consume his or her property settlement simply to achieve the same standard of living that the other party can support out of income alone, without dipping into the property award.

The divorce lawyer's job is not done once he or she has negotiated a property settlement or litigated a favorable result. The judgment must be enforceable. If a settlement includes deferred obligations, including an assumption of joint debts, drafters should give careful thought to appropriate security and enforcement devices. These may include liens, awards of attorney fees for enforcement, life insurance, interest provisions, rights of offset, and many other tools. Lawyers should also plan for the effect of a debtor spouse's possible bankruptcy.

Divorce lawyers should consider the effect of the divorce on a client's estate plan. By statute, a divorce revokes will provisions leaving property to spouses and terminates many life insurance beneficiary interests, but the divorce will not automatically cut off an ex-spouse's claim to certain important death benefits, particularly employer-provided retirement or life insurance plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). A well-drafted divorce judgment and sound follow-up practices can avoid many pitfalls in this area.

In negotiating, litigating, or drafting property divisions, the lawyer's goal is to account for and apportion all of the parties' property interests in a way that best meets the needs of the parties in a given case. Although assigning property values and creating property distribution lists are part of this exercise, the greater challenges often lie in identifying what property there is to be divided in the first place. Then, debts and cash flows need to be allocated by designing a mix of assets and liabilities that is practical, enforceable, and represents a fair division of all of the financial effects of the marriage.

II. Statutory Provisions

§15.2 Courts have no inherent power to award spousal support or property in the absence of statutes conferring that power. *Ritzer v Ritzer*, 243 Mich 406, 220 NW 812 (1928); *Perkins v Perkins*, 16 Mich 162 (1867). A court with jurisdiction over a divorce must dispose of related matters, including property division. *Engemann v Engemann*, 53 Mich App 588, 219 NW2d 777 (1974).

The following statutes govern property awards:

- MCL 552.19. The court may restore to either party property that has come to the other "by reason of the marriage" or may make a money award in lieu of restoration.
- MCL 552.401. The court may award one spouse property owned by the other if it appears "equitable under all the circumstances of the case" and the claiming spouse contributed to its "acquisition, improvement, or accumulation."

- MCL 552.23. A court may award one spouse a “just and reasonable” share of the other spouse’s separate property if the marital property awarded to the recipient is “insufficient for the suitable support” of that party and any children in his or her custody.
- MCL 552.101(1). The court must make a provision “in lieu of the dower of the wife in the property of the husband, which shall be in full satisfaction of all claims that the wife may have in any property that the husband owns or may own in the future or in which he may have any interest.” It is unclear how dower will be affected by the U.S. Supreme Court’s decision in *Obergefell v Hodges*, ___ US ___, 135 S Ct 2584 (2015), holding that states must issue marriage licenses to same-sex couples and recognize same-sex marriages performed in other states. The Michigan Law Review Commission will be reviewing the statutes affected by the Supreme Court’s decision and making recommendations to the legislature.
- MCL 552.101(2)–(3). Each decree of divorce must determine all rights of a spouse to the proceeds of any life insurance policies on the life of the other spouse in which the spouse was the named beneficiary. A divorce judgment automatically terminates a spouse’s designation as the beneficiary of an insurance policy on the life of the other spouse unless the judgment specifies otherwise.
- MCL 700.2807. A divorce or an annulment revokes a will provision naming the former spouse as a beneficiary, personal representative, trustee, or holder of a special power of appointment unless the will specifically provides otherwise. Remarriage to the same spouse revives these provisions.
- MCL 38.40, .559, .1057, .1346, .1643, .2308. These statutes provide for the consideration of public pension plans by the trial court when awarding spousal support or property. MCL 38.1643 and 552.18 govern the distribution of Michigan state pensions in divorces granted after June 13, 1985. *See Somerville v Somerville*, 164 Mich App 681, 417 NW2d 574 (1987).
- MCL 552.18, .101. Vested and unvested interests in pension, annuity, or retirement plans accrued for service during the marriage are subject to division. In every divorce or separate maintenance judgment the court must provide for the disposition of vested and unvested interests in retirement plans.
- MCL 552.103. The court may award jointly owned real estate to either party or may order it sold and the proceeds distributed to either party.
- MCL 552.20–.21. The court may order property awards to be paid to a trust for the benefit of a party or the children.
- MCL 552.22. The court may require either party to disclose his or her property interests under oath.

III. Agreements Concerning Property

A. Prenuptial Agreements

§15.3 Prenuptial (also called antenuptial or premarital) agreements are becoming increasingly popular as divorce rates climb and second marriages