

## Property Division

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### I. Overview

**§15.1** Property division in Michigan follows the rule of equitable distribution. While there is no requirement that property awards to each party be precisely equal, there is a presumption that the division 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 property. The most frequently cited list of considerations is the source of the property, contribution toward its acquisition, the number of years of married life, the needs of the parties, the needs of the children, the earning power of the parties, and the cause of the divorce. This list is not exhaustive, and the court may consider any other factors it finds to be relevant in a given situation. While 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 as a punitive basis for an inequitable result.

Courts most frequently depart from the 50-50 model of property division in short-term childless marriages that have had few economic consequences to the parties; in cases in which there is significant separate property (as discussed below); or in cases in which one party has greater need. In short-term marriages, courts often return the parties' premarital property to them but often divide between them the assets that were accumulated during the marriage. In longer-term marriages or those in which the parties have changed their positions in reliance on the marriage, such as by having

children or sacrificing career or educational progress, courts are less likely to try to return the parties to their premarital status.

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, irrespective of when the parties cohabited or separated. Even property received after a judgment may be marital if it was earned before the divorce.

Parties frequently claim that certain separate property is not part of the marital estate and should therefore not be counted when adding up the shares that make up the roughly congruent division. 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. For many years, Michigan caselaw followed two schools of thought on separate property. The prevailing line of cases requires that, before sharing in separate property, a party must show either that he or she contributed to its acquisition, appreciation, or preservation or that a share of the asset is necessary for his or her suitable support (or the support of children in his or her care). Recent caselaw makes it clear that the contribution in question need not be contribution to a specific asset but may be contribution to the marriage as a whole, such as assuming the role of child-raiser or homemaker. The other line of cases, now overruled by implication, permitted a court to divide separate property based on the same general equitable principles followed in any property division. Although the prevailing authority now limits courts’ discretion to invade separate property, it still leaves broad authority for courts to do so when the fact situation justifies such an approach.

Because the value of parties’ property may fluctuate over time as assets are consumed, accumulated, appreciated, depreciated, or even hidden or dissipated, courts have discretion to value the marital estate at the time of separation, filing, trial, judgment, or some other appropriate date. 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, should require parties to bear alone the consequences of unreasonable or dishonest unilateral action, and should discourage parties from gamesmanship such as deferring or accelerating 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 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 such 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. While 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, the poorer 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 impact of a debtor spouse's possible bankruptcy. Many divorce-related debts can survive bankruptcy if the judgment is properly negotiated and drafted.

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 many other death benefits, particularly employer-provided life insurance or other Employee Retirement Income Security Act of 1974 (ERISA) plans. A well-drafted divorce judgment 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. While assigning property values and listing who gets what are part of this exercise, the greater challenges often lie in identifying what there is to be divided in the first place, in allocating debts and cash flows, and in designing a mix of assets and liabilities that is practical, enforceable, and represents a fair division of all of the economic incidents of the marriage.

## II. Statutory Provisions

**§15.2** The jurisdiction of courts in divorce cases is statutory. 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 awards of property:

- 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 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.”
- 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, or a 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, 552.18 govern the distribution of Michigan state pensions in divorces granted after June 13, 1985. *See Sommerville v Sommerville*, 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. Antenuptial Agreements

**§15.3** Antenuptial (premarital) agreements are becoming increasingly popular as divorce rates climb and second marriages become more common. Couples use antenuptial agreements to define their respective property rights on the death of a spouse, to protect inheritance rights of children from previous marriages, to preclude a divorcing spouse’s potential claim to property the other spouse brought to the marriage, and to avoid controversy if a divorce occurs. Michigan statutes have long