

Dividing Property in Divorce

A Place to Start - when going to Court without an Attorney

A Publication of the Legal Advice & Referral Center
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ABOUT THIS MATERIAL:

Before filing or responding to a case, we urge you to consult with an attorney. If there is no way for you to hire an attorney, call Legal Advice & Referral Center at 1-800-639-5290. LARC can help you find sources of assistance, or provide you with advice and counsel over the telephone. In some cases LARC can refer your case to the Pro Bono Program of the New Hampshire Bar Association. Pro Bono tries to get volunteer attorneys to represent low income people for free. However, once your case is filed it is MUCH harder for Pro Bono to convince a volunteer to help. If you want to be considered for this service, please call LARC before you file.

If you must proceed without an attorney, please read this before you file. If you choose to use these materials to help you appear pro se, you do so at your own risk. These materials are no substitute for legal advice or representation.

Avoid hasty decisions! No matter how anxious you are to be done with your marriage, the long term effects of the divorce must be carefully considered. Married people and parents have rights that will be affected forever by a divorce order. Just because you can complete the forms necessary to get the process started DOES NOT MEAN that you understand the process or the issues that will face you.

DIVIDING PROPERTY IN DIVORCE

This material applies to divorces only. When two people who are not married own property together, and then split up, they must file a Petition to Partition if they want a judge to divide their property. When two people are married, their assets and debts will be divided as a part of the divorce process.

Please read this section carefully if you are involved in or contemplating a divorce. There are many very important aspects of property divisions, and the consequences of poor or good orders are far-reaching.

What does “PROPERTY” mean?

When we talk about a property division, we are talking about the division of all the assets and debts of both parties.

Assets include:

real estate
bank accounts
investment accounts, retirement accounts, IRAs, CDs, pensions
cars, snowmobiles, campers, motorcycles
jewelry, antiques, artwork
or anything else of value that either spouse owns

Debts include:

mortgages, promissory notes
credit card debt
personal loans
car loans, or other installment loans
tax debts or other unpaid taxes

How does property get divided in a divorce?

In any divorce case, the Judge is required to make orders that equitably divide the **marital property**. This raises two questions:

- A. What is considered **marital property**?
- B. What is an equitable division?

Marital Property:

To begin with, everything owned by either spouse is considered to be marital property. All of the assets (see above) and debts (see above) of either spouse are considered in making a property settlement. Each spouse must complete a Financial Affidavit. A financial affidavit is a sworn statement that details all of the income and property and debts of each person. Each person has to sign a statement that their affidavit is complete, and falsifying a financial affidavit can give rise to the penalties of perjury. **(See more about Financial Affidavits in the Child Support materials.)**

Once all of the property has been disclosed, so everyone knows what there is, then either party can begin to claim that certain things are not marital. Specific items of property (or debt) may be determined not to be marital property based on when it was acquired and how it was acquired. Each parties' proposed final orders will include a proposed property settlement, and each will have the chance to try and convince the judge that their proposal is equitable under the circumstances.

If the parties cannot agree to a property settlement then the Judge will have to make an order dividing the property.

How does the judge divide everything up?

The judge is required to make an equitable division of property. The judge will assume that an equal division is equitable, unless one of the parties can show that an equal division would be unfair. The law allows the judge to make some other division when s/he finds that an equal division would be inappropriate or inequitable.

There are many factors that a judge will consider when making a property division:

- (a) The duration of the marriage.
- (b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party.
- (c) The opportunity of each party for future acquisition of capital assets and income.
- (d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of any minor children in the custody of said party.

- (e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.
- (f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties.
- (g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home.
- (h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party and any interruption of either party's educational or personal career opportunities for the benefit of the other's career or for the benefit of the parties' marriage or children.
- (i) The expectation of pension or retirement rights acquired prior to or during the marriage.
- (j) The tax consequences for each party.
- (k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.
- (l) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:
 - (1) Caused substantial physical or mental pain and suffering; or
 - (2) Resulted in substantial economic loss to the marital estate or the injured party.
- (m) The value of any property acquired prior to the marriage and property acquired in exchange for property acquired prior to the marriage.
- (n) The value of any property acquired by gift, devise, or descent.
- (o) Any other factor that the court deems relevant.

What about our house?

In many, if not most, divorces, the greatest single item of property is the parties' home. Managing the division of the home can be the hardest element of working out a property settlement. Whether one party wants the house, but may not be able to afford it; or both parties want it, this issue is full of complications.

As a part of the property division, the first question regarding the house will be its worth. This question is looking to find out what the **equity** in the home is. The equity is the amount of money the house is worth after all of the debts connected to the house have been paid.

For example: if a home is valued on the market at \$300,000 and the parties owe \$200,000 then they have \$100,000 in equity – the difference between the value and the debt.

In this case, the marital property would have to include the \$100,000 in equity, and any equitable division of the property would have to allocate that equity to one or the other, or it would need to be divided.

In most cases this means that either:

- a) one party gets the house and has to pay the other \$50,000; or,
- b) the house is sold and each gets one half of the net proceeds.

This might seem simple, but the complications are always in the details. A spouse who is selling his/her share will generally insist that the other refinance the mortgage so that s/he will no longer be listed on the debt. If the spouse trying to keep the house cannot get a new mortgage alone, s/he might not be able to keep the house.

WORDS OF CAUTION

Joint Debt:

No matter what a divorce decree says – if one spouse stops paying on a joint debt, the other spouse will still be liable for the debt. The creditor is not a party to the divorce, so a divorce court cannot alter the creditors rights.

Bankruptcy:

After a divorce, one spouse may choose to file bankruptcy. If this happens she or he may not be required to pay certain obligations that were ordered in the divorce. If the other spouse's name is listed on any of those debts, s/he may end up being stuck with them unless s/he files for bankruptcy also.

Foreclosure:

If the mortgage on a marital home is not paid for some time the parties run the risk having their home go into foreclosure. No matter how difficult the relationship between the divorcing spouses, it is in both of their best interests to prevent foreclosure. At a foreclosure auction property never sells for what it is worth. After the sale, the parties might still owe the bank money. A foreclosure will have devastating effects on the parties credit rating. If either wants to buy real estate in the future, they should make a serious effort to avoid foreclosure.