

# Divorce and the Professional: Division of Property and Business Interests

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If you own a business, by yourself or with others, how will it be affected by a divorce? Will your spouse get an interest in it? What about stock options? If you own any, will your spouse gain an interest in those? Likewise with shares of stock, are they impacted by divorce?

The questions are simple to ask but the answers are complicated. It may seem self-serving to say so, but you should get a lawyer. And not just any lawyer. Your business lawyer probably won't do. Nor will your brother-in-law. Nor will the person you met at a cocktail party who is an expert because he got a divorce two years ago. You need a lawyer who specializes in this field. This area of the law has become so arcane that it is virtually impossible to dabble in divorce law. And don't even think about self-help. Take a look at the equitable distribution statute applicable to your state (in Virginia, it is section 20-107.3). If it's like Virginia's, it probably reads like "Beowulf." You *must* have legal advice from an attorney who has considerable experience in this particular field in your state.

### How States Divide Marital Property

Virtually all the states divide marital property following either community property law or equitable distribution law. The majority of states are *not* community property states. In community property states, marital property is generally divided equally. There are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

This discussion is focused upon equitable distribution ("e.d.") law. There are two reasons for this: 1) Most states are e.d. states and 2) I practice in Virginia, an e.d. state, and that's the law I know.

### What is Considered Marital Property?

When the court is deciding how to divide marital property, it has to go through a process. First, the court has to determine what property is separate and what property is marital. Usually, marital property is all property acquired during the marriage. It doesn't matter whether the property is in your name, your spouse's name or jointly owned. If it was acquired during the marriage, it will usually be presumed to be marital. Yes, there can be exceptions. (The law is full of exceptions. If there weren't exceptions to every rule, you might not need lawyers, and we'd be out of business.)

If the property is inherited or received by gift from someone other than your spouse, it can be considered separate property. You have to be very careful with inherited or gifted assets to make sure they are kept separate and not commingled in any way with marital assets.

## Divorce and the Professional: Division of Property and Business Interests (Cont.)

Marital property can, and often does, include a lot of things that you may not have considered. For example (you're going to hate this), your pension, your 401(k), your IRA, your stock options, your company stock, your securities portfolio, and (are you ready?) your ownership interest in your business. If any or all of the foregoing were acquired during your marriage, they are probably marital property and subject to division if you divorce.

### Determining the Value of Assets

Under Virginia e.d. law, if the particular asset is in the sole name of either the husband or the wife, and not joint with the other spouse, the court will determine the value of the asset, but the court cannot order that the asset itself be transferred. Instead, the value of the marital asset is determined and then the share that each spouse would be entitled to. The spouse who owns the asset in his or her sole name can then transfer part of the asset or pay cash in lieu of that adjudicated marital share. The effect, of course, is to avoid the unwanted husband sitting in the board meeting of his wife's business.

Again, *this law may vary from one state to another*, so it is imperative that you consult with counsel in your jurisdiction.

### Stock Options & Bonuses

Court determinations regarding stock options, company stock and bonuses can be complicated. Options, for example, can be granted during the marriage but may not vest or be exercisable until after the divorce or the separation. It is critical to know whether stock options, bonuses or whatever were granted for prior service or intended to assure future tenure. If the prior service was during the marriage, in Virginia at least, the options or bonuses are likely to be treated as marital. That which is marital is subject to equitable distribution. The language in your stock option plan or the resolutions of your board of directors can be crucial in determining the whys and wherefores of your options. Again, that is in Virginia. You will have to check with your attorney about the law where you live.

What is more, courts generally must decide your case as of the day you walk into court. So what is a stock option that is not exercisable until two years from now worth? That adds another level of complexity to these cases. It is often necessary to hire an expert to ascertain the present value of your options.

### "Hybrid Property"

Just in case things are not already complicated enough, some states allow for the concept of "hybrid" property. This is property that is part marital and part separate. An example:

Suppose you owned a house in your sole name before you were married. After you marry, you sell your separate house and put the proceeds into a marital home. That can be hybrid – part marital, part separate. In Virginia, the court will divide only the marital part between the divorcing spouses. If you can show the court the paper trail proving the separate contribution to the marital house, that part will be treated as separate property. The separate part of the property is not divisible by a divorce court.

### Conclusion

Do not think that money you earned during the marriage by the sweat of your brow, while your spouse was eating bonbons or playing golf, is somehow your separate money. If it was earned during the marriage, it is marital. Even if every penny that went into the purchase of the marital home or the purchase of the stock portfolio was from your sole earnings. If the dollars were earned during the marriage, the property purchased with them is marital. And even if your investment portfolio grew to the zillions it is worth today due entirely to your very clever strategy, and your sole efforts, if it was acquired during the marriage from marital earnings or marital cash (do I have to tell you?), it's marital.

## Divorce and the Professional: Division of Property and Business Interests (Cont.)

The statute is titled “*equitable* distribution.” So where is the equitable part, you ask? Once the court has determined what property is marital, in an equitable distribution state, the judge will divide the marital property fairly. But it will be what the law considers fair and may not be what you consider fair. You have to count on your spouse getting a share of virtually everything (except inheritances) acquired during your marriage.