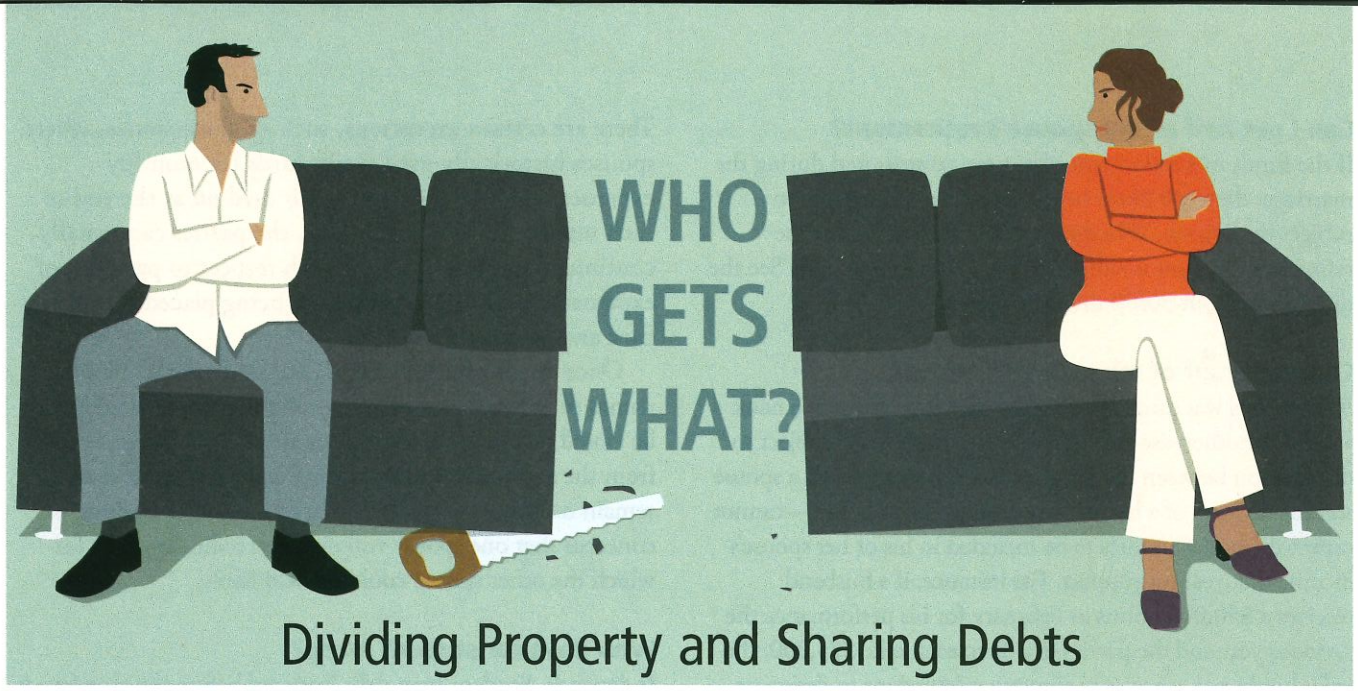


Dividing Property and Sharing Debts

When does property get divided?

Property usually gets divided once the parties have reached an agreement on how they will divide their property. If an agreement cannot be reached between the parties, the court will render a decision identifying the property to be divided, assigning a value to the property, and designating how and when assets will be divided.

With that said, even if an agreement has not been reached on the division of all assets or the court has not yet made a final determination as to the distribution of assets, parties will often decide to sell or liquidate certain assets pending a final resolution. For instance, the parties may have certain bills to be paid, such as college tuition, medical bills, or other big-ticket expenses, which require accounts to be liquidated. Likewise, the parties may decide to sell an asset such as a home neither wishes to retain and distribute the proceeds while the divorce is pending.

What property gets divided?

In most states, property acquired by the parties during the marriage is divided. For instance, if you and your spouse purchased a home, opened a bank account, or bought a car while married those assets would be considered marital property subject to division.

Note that title to property is typically not dispositive. Thus, if you opened a savings account in your name alone and deposited funds from your paycheck every two weeks into the account, the account will likely be considered marital property subject to division between both parties even though you did not add your spouse's name to the account. The key question to ask is, when was the asset acquired.

Are there rules defining what marital property is and specifying whether it is divisible in a divorce?

Yes. Most states have laws defining martial property and outlining the means by which it will be divided upon divorce.

What about an inheritance?

Inheritances in most states are considered the separate property of the spouse receiving the inheritance and not considered marital assets subject to division upon divorce. Of course, the inheritance must retain its "separateness." In other words, if a spouse inherits $25,000 and deposits the monies into a bank account in his or her own name, these monies will remain with the spouse who inherited the funds.

Problems arise where spouses comingle their inheritance assets with joint marital assets. If a spouse deposits that same $25,000 into a joint account with his or her spouse, those funds can lose their "separateness," and an argument can be made that the intent was to use the funds for marital expenses or contribute the funds to the marital estate, thus making them subject to division at the time of the divorce.

Will I get a 50/50 division?

It depends. If you live in a state that distributes assets according to a "community property" statute, then yes, marital assets are divided equally between the parties. Other states have "equitable distribution" statutes, meaning that assets are divided in a fair and equitable manner based upon a review of factors set forth in a state's equitable distribution statute. For example, in an equitable distribution state, the court will consider such factors as the length of the marriage, the value of the property, the age and health of the parties, each party's income, and the income and property each spouse brought into the marriage.

Can I get back the money my parents gave us?

If the money has been spent, then it is not likely your spouse will have to repay you. If the money is in a bank account or was used to purchase another asset, it will be considered an asset of the marriage subject to division with your spouse.

Can I get half of my spouse's retirement?

If the funds in a retirement plan were contributed during the marriage, they will likely be considered marital property subject to division. Whether you will receive half of the retirement account is subject to the laws of your state. See the discussion about 50/50 division, above.

Can I get half of my spouse's bonus?

If the bonus was earned during the marriage and is in a bank account or otherwise still available, it is most likely subject to distribution between the spouses. Note, however, that a spouse seeking division of a bonus—especially a hefty bonus—cannot expect the bonus monies to be included in his or her spouse's income that year for support. For instance, if a husband receives a $50,000 bonus in February for his performance the previous year and the parties decide to each take $25,000, the wife should not expect any alimony calculations to designate the $50,000-bonus monies as income to her husband, as that would result in an unfair "double dip."

Who gets the jewels?

Personal property, such as jewels, purchased during the marriage are marital assets subject to division. Often times, the spouse, who used or wore the jewelry, will keep it, but that spouse may be required to compensate the other spouse for a portion of the jewelry's value. If the recipient spouse cannot afford to compensate the other spouse, the jewelry may need to be sold and the sales proceeds distributed between the spouses.

Who gets club memberships?

Some clubs have written rules governing divorce situations. If it is a family membership and both parties wish to remain members of the club, one spouse may be able to maintain the family membership and the other may have to get their own individual membership. If there is a monetary value to the club membership (i.e., a bond), then the value of the club membership will be included in the marital estate.

Can I empty the bank account?

You can, but it may cost you. Funds in bank accounts are marital property subject to division. If one party drains the bank account, the court could order the funds to be paid back and then "frozen" until the case is over. Also, some states place "restraints" on marital property, meaning that, while a divorce action is pending, neither party can deplete or otherwise dissipate marital assets such as bank accounts. It is important to know the law of the jurisdiction before depleting a marital bank account.

Can credit cards be cut off?

Yes. During the pendency of a divorce, courts typically do not like to see spouses incurring additional debt that will need to be paid off once the divorce is finalized. There are certain exceptions, such as, for instance, where spouses historically used credit cards for monthly expenses and then paid the credit card off at the end of each month. In those situations, the parties can usually continue their past practices with respect to payment of expenses even if the expenses are being placed on a credit card and then paid off.

Once the divorce is finalized, any credit cards in joint names or with spouses named as additional card holders will be closed or, at the very least, one spouse will be removed from the account. Most courts will not allow spouses to remain on the same credit card account due to obvious concerns that one spouse will rack up credit card debt for which the other spouse could be held liable.

Who pays for student loans?

It depends. Student loan debt incurred before the marriage is generally not considered marital debt. If the loan was incurred during the marriage, the court will likely look to how the funds were used and who benefited from the funds. For instance, if the parties used student loan funds to pay martial bills such as the mortgage, there will likely be responsibility on both parties to share in the debt. A court will also look to whether the degree obtained benefited the marriage. If a spouse obtained loans for medical school and went on to become a successful doctor with a lucrative practice enhancing the parties' lifestyle, a court may be inclined to have both parties contribute to repayment at the time of the divorce.

Can my spouse make me sell the house?

Potentially. Homes acquired during the marriage are marital property. If neither party can afford to maintain the home post divorce, a court can order the sale of the property. Likewise, if one party wishes to remain in the property after the divorce but is unable to compensate the other party for his or her share of the equity in the home, a spouse could force the sale.

Does the custodial parent always get the house?

Not always. It is true that there may be viable reasons for the custodial parent to remain in the home, such as continuity for the children; preventing further disruption in the children's lives; and proximity to school, friends, and the community for the benefit of the children. However, there are numerous reasons a custodial parent may not retain the house. The custodial parent may not be able to afford the expenses associated with the home after the divorce. The custodial parent may not qualify to refinance or otherwise assume any mortgage associated with the home in order to remove the noncustodial parent's name from the mortgage. The noncustodial parent may operate a business through the property and may need to retain the home in order to continue to operate the business.

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

Probably not. If you intend to keep the home, you will likely be responsible for any upgrades or repairs to the home. Of course, if you will be receiving alimony, the alimony award can include funds for maintenance and repairs to the home.

How can I figure out the "equity" in our home to buy out my spouse's share?

The equity in the home is normally determined by ascertaining the fair market value of the home and reducing the value by any mortgages, home equity loans, or other encumbrances on the property. For example, if the fair market value of your home is $500,000 and the mortgage balance is $200,000, there is $300,000 in equity in your home. Some states also reduce the fair market value by broker's commissions, real estate taxes, and other closing costs that would be incurred if the home were to be sold.

I guaranteed my spouse's business debt—how do I get out of it?

This may be difficult. Lenders are not typically willing to release a guarantor from a debt without the debt being paid in full. If there are no means to pay the outstanding debt, the business-owning spouse should be required to take full responsibility for the loan, which would include making all payments in a timely fashion and indemnifying the other spouse in the event of a default.

Must I pay the balance of my spouse's car lease?

Not typically. The spouse retaining the vehicle should be responsible for any remaining lease payments.

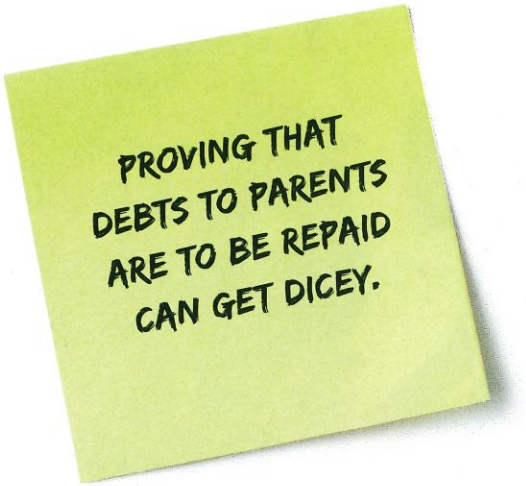
Can I make my spouse buy me a new car because I drive the kids around more and my car is shot?

You may be entitled to an unequal division of assets to allow you to purchase a new vehicle. If there are bank accounts or other funds subject to division, you could request an unequal split to free up funds for a vehicle.

Another possible way to have your spouse pay for a vehicle is to build a car payment into your demand for alimony or spousal support. If you are seeking alimony, the amount of the weekly or monthly payment you request should include funds for a car payment.

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

There are a number of ways to remove your name from various debts such as mortgages, credit cards, and car loans. The cleanest way is to pay the debt off with other assets. If that is not possible, the spouse retaining the asset associated with the debt should be required to remove the other spouse's name. For instance, a spouse retaining a home can refinance the mortgage to remove the other spouse's name.



Am I responsible for tax debts?

Yes. If you and your spouse filed joint tax returns during the marriage, taxes due to the IRS or any state or local government are the responsibility of both of you. The only exception may be if one party purposefully failed to pay taxes without the knowledge or consent of the other party, reported income improperly, and/or claimed inappropriate deductions or credits. The IRS allows tax payers to seek relief from liability in these situations. Spouses should consult with an accountant or a tax lawyer to learn whether you would qualify for relief under the Internal Revenue Code.

My parents loaned us money—who must repay it?

Any debt, including loans from parents, acquired during the marriage is usually considered marital debt and both parties will have a responsibility to repay it. Proof of any debt must be submitted to the court. This is where debts to parents get dicey. Parents often lend children funds for the purchase of a new home or other necessities without formalizing the repayment terms in a written agreement. Parents believe their children and spouses will repay in good faith.

This leads to disputes, as one spouse may contend there was no loan but funds given were a gift with no repayment required. Conversely, parents may give their child and spouse funds during the marriage with no expectation of repayment until a complaint for divorce is filed. Now, what all parties knew was a gift becomes a loan in order to squeeze funds from one party.

Under either scenario, a party contending a loan was made must provide proof of the debt. Evidence of the loan can include signed agreements such as a promissory note or other documents setting forth the amount due, terms of repayment, and interest. Other proof can include evidence of monthly repayments such as canceled checks and an amortization schedule.

The bottom line is that evidence must be presented proving the existence of a loan in order to have a spouse ordered to contribute to repayment. FA