PROPERTY DISTRIBUTION

1. BUSINESS VALUATION IN DIVORCE

Dividing a business owned by one spouse can add a level of complexity to a divorce. If a court decides the business is considered marital property, the value of the business must be determined and divided between the parties.

In a community property state, the value may be subject to a 50-50 split. In other states, the value of the business will be subject to equitable distribution by which the court will examine certain factors to determine a fair division, such as, (1) whether one party owned the business prior to the marriage; (2) contributions that each party made to the business during the marriage; and (3) whether there are any third parties that have an interest in the business.

2. DIVIDING A BUSINESS AFTER DIVORCE

The first step in dividing a business is to determine an accurate valuation of the business. It is important to find a qualified business appraiser to conduct this valuation.

It is advisable that each party retain their own business valuation expert, particularly if one party wants to keep the business by buying out the other's interest. Alternatively, the parties may share the cost of choosing an independent expert and agree to be bound by the expert’s valuation.

It is not advisable to rely on a business valuation prepared by the other party or his or her expert. There have been many instances when the value of a business is understated for the purpose of divorce only to increase substantially in value once the divorce has been completed.

3. DECIDING THE VALUE OF A BUSINESS

Business valuation is conducted in the same manner whether it is performed for the purpose of marital dissolution as it is when buying, selling, or refinancing a business. In preparing a business valuation, the expert will examine the financial records of the business, including:

A. Profit and loss statements over a certain period of time;

B. Assets, such as equipment, inventory and real property;

C. Liabilities;

D. Cash flow;

E. Overhead; and

F. Customer good will.

The expert will also look at external factors, such as the type and location of the business, and economic conditions and trends that may affect future profitability.

After reviewing all pertinent information, the expert will determine a fair market value for the business, which is the amount of money a buyer would be willing to pay to take it over, and the future earning potential of the business. If independent experts were retained, and they have properly evaluated the business using comparable methods, the value that they place on the business should be within the same range.

4. AFTER THE BUSINESS VALUATION

Once the business valuation is completed, the parties must decide how they want to deal with the business. For example, the business can be sold and the proceeds divided between the parties or the parties can decide to continue to operate the business jointly following their divorce.

If one party wants to keep the business and the other party does not, the party who wants to keep the business can buy out the other by compensating him or for the value of the interest in the business or by giving that party equal value in other marital property, such as the marital home.

If you or your spouse has a business at the time of the divorce, consult with an experienced attorney about dividing it before you take action.

5. HIDING ASSETS IN A DIVORCE

Imagine that you win crores of rupees in a lottery. Your spouse did not have a ticket. A month after you win, you file for divorce. You never disclose that you won the money or the amount of your winnings. Well over a year after the divorce, your former spouse receives a letter offering a lump sum payout for the lottery winnings. Your former spouse goes back to court. They ask, and are awarded by the judge, not just a share of the winnings but the entire amount. This is a true story of what happened to a wife who failed to disclose her lottery winnings in her divorce proceedings.

6. DUTY TO DISCLOSE ASSETS

In a divorce proceeding that involves a dispute over property, both parties have a duty to disclose their assets and debts. This allows the court to understand how to divide property, and award spousal support and attorney's fees. The court takes this obligation very seriously.

The court require that in a divorce involving a dispute over property, both parties disclose their assets. Many courts also require that both parties provide an estimated value of non-monetary assets. If the parties cannot put a value on their assets, the court asks that the parties give their opinions on whether the asset belongs to one person or is shared marital property. If both parties have not made proper disclosures, most courts will not even allow the parties to obtain a judgment based on a marital settlement agreement.

7. DIVIDING HOME IN DIVORCE

Either because of economic constraints or emotional ties to a house, many divorcing couples no longer want the home they purchased during their marriage. In such a case, the divorce process will have to divide the equity the parties have built in the home.

A. CALCULATING HOME EQUITY

To divide home equity in a divorce, the first step is to calculate the equity by getting the currently appraised value of the house by a qualified residential real estate appraiser, and subtracting the mortgage and any other liens on it. Be sure that the appraisal considers any additions or enhancements made to the home or property that will increase the value of the home. Before dividing home equity, the divorcing parties need to get an appraisal that evaluates the proper value of the home at the time of the divorce. After the sale of the house, the parties will need to figure out how the equity is split. How much each spouse gets will depend on the source of the money that was used to purchase the home.

B. DIVIDING THE EQUITY

During the course of a marriage, any property the couple acquires during the marriage is considered joint property. Generally, if the house was purchased with joint property funds during the marriage, the house would be considered joint property because the source of the funds determines the character of the item. When the house is considered joint

property, each spouse would have a one half interest in the house and would have a one half interest in the equity. However if the house stands in the name of one spouse the other cannot claim any right over the same.

If one party receives the house as separate property, however, then there may be no division of the home equity. Property is only considered separate if it was acquired before the marriage, during, after the marriage with the self acquired funds of the spouse or as part of an inheritance or gift to one spouse and not the other. It is highly likely that a marital home acquired during the course of a marriage is separate property, so the two parties may not split the equity of the home equally.

The spouses can agree to an unequal division of joint property; a spouse can receive more than half the joint property pursuant to an agreement with the other spouse. The agreement should be in writing to avoid future potential legal disputes. Any agreement for an unequal division of property can be overturned by a judge if the division is not fair and equitable for both parties.

C. WHEN ONE PARTY WANTS THE HOUSE

If one party is interested in buying the home from the other party, the two will need to negotiate the appropriate sale price. The two sides would have to negotiate a fair split of commissions, taxes during the divorce, and other costs associated with the sale.

In addition, the buyer of the home would most likely wish to buy out the other party with a lower appraisal, while the seller would clearly prefer a higher appraisal. Since appraisals are just estimates of the value of the home, selecting an appraisal or an appraisal value may be the most difficult part of the process. One way to eliminate this problem is to select two appraisers, and then pick a number mid-way between the appraisal provided by each appraiser. This way, neither party is affected by an overly high or low appraisal value. Some parties may choose to select three appraisers, and take the median appraisal value.

8. BANKRUPTCY AFTER DIVORCE

Unfortunately, bankruptcy laws allow the debts of your former spouse to be viewed as debt that belongs to you. There are several ways that these bankruptcy laws can affect you if your spouse files for bankruptcy after your divorce.

A. DEBT REMAINING IN BOTH SPOUSE'S NAMES

If you and your spouse co-signed for debt during the marriage, bankruptcy laws allow creditors to turn to you for that debt, even if your divorce decree says that the debt belonged to your spouse alone. You can attempt to convince the creditors that you are not responsible for the debt by showing them the divorce decree, but the fact remains that if your name has not been formally removed from the debt through a refinance or restructuring process, you may be required to pay. You could find your credit damaged if you don't.

B. JOINT DEBT

When a debt is incurred during a marriage, even if you weren't responsible for it, any property that was "formerly joint property" can be considered an asset and used to settle the joint debt. If your ex-spouse files a petition for bankruptcy, under bankruptcy law, the creditor can reach any "formerly joint property" that you received in the divorce settlement to collect on a joint debt.

C. PREVENTING LIABILITY FOR DEBT AFTER DIVORCE

Unfortunately, creditors are likely to pursue you for payment after your spouse’s bankruptcy. This could shift the debt to you. If this happens to you, you will want to contact an experienced attorney as soon as you can to find out what options you may have to protect yourself from responsibility for your former spouse's debts.

D. DEBTS INCURRED AFTER SEPARATION

In many cases any new debts incurred by one of the spouses after a couple has decided to separate are considered to be the responsibility of both spouses, but courts may make a different determination, depending on the circumstances of the debt.

E. DEBT LIABILITY DEPENDS ON THE NATURE OF THE DEBT

In general, all debts incurred jointly to provide for marital expense or to benefit the children of the marriage continue to be the responsibility of both spouses even after separation. These include expenses for food, rent, mortgage and education.

In addition, if the separated spouses agree to take out a loan in both of their names, both spouses will continue to be liable for the debt even after a divorce is final.

F. DEBTS INCURRED AFTER SEPARATION

However, debts incurred after separation that are not for marital expenses and are only in one spouse's name are usually considered the debt of that spouse. This is true even if a creditor may have relied on joint marital assets to secure a loan or line of credit. This is intended to prevent one spouse from running up huge debts after separation and forcing the other spouse to accept liability since the debts were incurred before a divorce.

If, for example, one spouse goes on a spending and gambling spree in Goa and acquired huge debts, a court will most likely find that this debt is the sole responsibility of the spouse who incurred it, even if the spouse used marital assets (such as the family home) to secure the loan that paid for the spree.

G. DEBT LIABILITY DEPENDS ON THE NATURE OF THE SEPARATION

Whether one or both spouses can be held liable for debts after separation can also depend on how a state recognizes separation. This generally has to do with the length or permanence of the separation and/or the intent and conduct of the spouses during this period. A few states allow a legal separation and will not recognize a separation for debt assignment purposes until the legal paperwork has been filed.

Other states recognize a separation when spouses are living separate and apart. This usually means more than just living in separate homes. Some states also require that at least one spouse does not intend to repair the marriage, and conduct during separation supports this intent.

This conduct element has been very important to some courts. For example, a husband and wife decide to separate and the husband moves out, but then moves into his girlfriend's house without telling his wife. He tells his girlfriend and his friends that he intends to file for divorce, but at the same time, he still spends some weekends and holidays at his own home and often has dinner with the family.

He also maintains to his wife that he wants to work on the marriage. During this time, the wife takes out a loan to buy an expensive car, using the marital assets to secure the car loan. The husband files for divorce a month later and asks the court to assign the debt of the sports car to the wife, even though the creditors relied on the marital assets when approving the loan.

Courts often decline such a request, even though the spouses were living separately and the husband intended to end the marriage, because his conduct with his wife did not reflect this intent. The court in this situation may find that the spouses were not living separate and apart, and assign the car debt to both parties since it was incurred before divorce.

H. DIVIDING UP DEBT IN A DIVORCE

In addition to the property acquired during the marriage, the marital debt is divided upon divorce. Dividing the debt upon divorce determines who is responsible to repay the debt.

I. WHERE BOTH SPOUSES CO-SIGNED

If both spouses co-signed for a debt, both spouses will probably be held to "joint and several liability" for the debt. "Joint and several liability" means that each spouse is responsible for the entire debt, but also the spouses are jointly responsible for the debt. When a joint and several liability is divided, the debt is attributed to both spouses. Often, however, one spouse is made responsible for the entire amount of the debt. This is generally offset by an "equalization" payment; that is, the spouse who pays the debt receives more property in the settlement than the spouse who is left free from the debt.

9. HEALTH INSURANCE COVERAGE AFTER A DIVORCE

There are many issues that arise during a divorce, and health insurance can be one of the biggest and most important. The cost of health insurance and health care can be astronomical, and sometimes it may even be impossible to get new healthcare coverage if you are dropped from your carrier and if you have a pre-existing condition. As such, if you and your kids are on your spouse's insurance and you are getting a divorce, it is imperative you know what will happen to your health coverage after the divorce.

A. HEALTH INSURANCE COVERAGE FOR THE KIDS AFTER DIVORCE

After your divorce, the kids should remain on your spouse's policy. They are still dependents and the divorce doesn't change that, so they will remain covered. If your spouse is currently paying co-pay or a portion of the premiums in order to have the child or children covered, you may wish to have a provision written into your divorce settlement or agreement that requires him or her to continue to pay that premium and provide such coverage. That way, your kids will be protected and it will

be clear and in writing that the children's other parent does and always will have the legal responsibility to provide them with health care.

If your spouse provides health insurance, this provision is likely to ultimately reduce the amount of child support you receive, or increase the amount of support you are required to pay.

B. HEALTH INSURANCE COVERAGE FOR YOU AFTER DIVORCE

Coverage for you becomes a bit trickier. Once the divorce is finalized and becomes legal, you will no longer be considered a dependent of your husband. This means that if you were covered under his policy and his employer was paying or subsidizing the premiums, you no longer will be covered. You may generally remain on the coverage through insurance cover for a set period of time, but will have to begin to pick up paying the entire cost of insurance. You will need to consider having provisions for dealing with this built into to the divorce settlement agreement as well. For example, you may have the agreement state that your husband will keep you on his coverage through insurance cover for a set period of time and/or that he will have to continue paying the premiums for you during that time.

10. EFFECT OF DIVORCE ON WILLS, TRUSTS, AND ESTATE PLANS

Divorce is a permanent legal action that affects more than just a couple’s relationship status. One area affected by divorce is the couple’s estate planning including wills, trusts, and other estate planning tools. Estate planning is the process of preparing and describing what will happen to all of a person's assets should he pass away.

A. DIVORCE AND WILLS

If a couple made a will while married and then divorced without changing the will, the will is still the guiding instrument should either person pass away. So, if a wife left everything to her ex-husband while they were still married, then it would still pass to her ex-husband. Therefore, if an ex-spouse dies after a divorce without changing the will, gifts in the will in favor of the remaining ex-spouse would be distributed according to alternative dispositions in the will. While the person’s intent can and likely would be challenged by the remaining family, the confusion can tie up the probate for an unnecessary amount of time.

Either way, it is not unlikely that the intent of the deceased party will not be followed where a divorce and then a death occurs prior to changing the will. The best way to ensure assets are properly transferred after a divorce is to simply redraft a fresh will. Because this is a second drafting of a will, it is important to include a revocation clause in the will specifying that the previous will is revoked. It is advisable that all copies of the old will are destroyed. Once the new will is drafted and signed, it becomes the only legally binding will that will direct any and all inheritances.

B. DIVORCE AND TRUSTS

Trusts are a complicated matter even without divorce. The type of trust established and the intent of the trust will dictate whether the trust must be entirely revoked and redrafted or whether it can simply be updated. If the trust created by a couple was an irrevocable living trust, then it cannot be changed—regardless of the divorce. An irrevocable living trust is a trust where all the assets are transferred and all control signed over to the trustee immediately. The reason is that the trust has already gone into effect and the trustee is in charge of the trust.

In most cases, irrevocable trusts set up by married couples are meant to benefit the children. If this is still the intent and neither party has access to the trust, then there is no harm done. In the event that either party has access to the trust and may abuse that access, the court may grant instructions specifying that the trust is closed to the parties and that only the beneficiaries may benefit from it. This document is then given directly to and honored by the trustee.

If the trust is revocable, meaning the couple still has control over the trust assets, then the couple can amend the trust with their desired terms or dissolve the trust and remove the assets. If the trust is dissolved, then the assets must be listed in the couple's divorce papers and any applicable income taxes paid. Trusts and inheritances designated to a specific spouse from another's will or trust will go to the designated person. If both people were listed, then the inheritance must be included in the marital assets and divided equally.