

This, That, And The Kitchen Sink: Dividing It All Up After A Marriage Ends

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The end of a marriage is often filled with stress, tension, and clouded judgment. What are your rights when it comes to dividing up the "stuff" after separation and how do you get the process started? What is separation? What is equitable distribution? What are my rights? Understanding and navigating separation and equitable distribution will lessen the stress associated with the end of a marriage.

When Can I File for a Legal Separation?

When people think of divorce, they often think of separation as the beginning of the divorce process. However, most people don't know what "separation" legally means and often ask: "When can I file for legal separation."

Before a husband and wife can enter into a binding agreement or file an action requesting a distribution of property rights arising out of marriage, North Carolina law requires them to "separate." This means that they must physically separate and live separate and apart under their own roofs for a period of one year. There is no requirement to file any paperwork or take any legal action to denote separation. But sleeping in separate beds or using separate bathrooms won't do; the parties must actually live separate and apart.

The "date of separation" is the date on which the parties begin living separate and apart, with at least one spouse intending to cease the marital relationship. It is an important date because it not only is the beginning of the required one-year waiting period to obtain a divorce in North Carolina, but it also is the date on which the parties can take action to divide and distribute the property they acquired during the marriage. Yes, you really do have to wait a year and a day from the date of separation to even ask a court to grant you a divorce. However, while waiting for that divorce, it is possible for you to resolve all of the issues incident to divorce, including division of the property. Really, the only thing a divorce judgment gives you is the ability to go and get married again!!

What is Equitable Distribution and How Will Our Property be Divided and Distributed?

The division of property acquired during the marriage can be achieved one of two ways: If the parties can agree on the division, they can enter into a Separation and Property Settlement Agreement detailing the specific terms of the property division. If, on the other hand, the issues are contentious, either party can file a lawsuit that asks a court to divide the property between the spouses.

But in either situation, the guiding principle is that there be an equitable distribution of the property. North Carolina law presumes that an equal distribution is an equitable distribution. To that end, the presumption is that each spouse is entitled to one-half of the net marital property. Marital property is defined generally as real or personal property that was acquired by either or both spouses during the course of the marriage and prior to the date of separation which is still in existence on the date of separation. However, property that was acquired by gift or inheritance by one of the spouses and property received in exchange for property

owned by either of the spouses prior to the marriage is not included in the definition of marital property. In determining how the marital property will be divided, the parties should take into account its fair market value, the outstanding amount of debt, and, ultimately, the net value of the property secured by debt.

While an equal division of marital property is presumed to be equitable, there are numerous factors that a court can consider which would allow an unequal division of the net marital estate with one spouse receiving more than 50% and the other spouse receiving less than 50%. The factors include, but are not limited to, the number of years the parties have been married, their age and health, the tax consequences of the distribution, the parties' expectation of rights in retirement or a pension that is not marital property, efforts by the parties to preserve marital property, actions taken by the parties to waste or neglect marital property, and the need of a parent with custody of one or more children to retain the marital residence.

How Is the Value of Our Property and Debts Determined for Purposes of Equitable Distribution?

Certain assets such as bank accounts are easily valued by obtaining statements which reflect the balance of the accounts on the date of separation. Other assets such as pensions, real property, and interests in a business, to name a few, can be difficult to value and require the assistance of an expert to determine their fair market value. An appraiser should be utilized to determine the present value of a pension. Likewise, an appraiser can be used to determine the fair market value of real property. Depending on the characterization of the real property as commercial or residential, marsh land, or undeveloped property, different appraisers with different expertise may be required.

Generally, the most difficult asset to value is a business interest owned by one or both of the parties. In valuing a business interest, an expert must determine what a willing buyer would pay for that interest in an arms-length transaction between a buyer and seller. Because of the complexity of valuing a specific business interest, you should ensure that the person employed to perform the business valuation has the appropriate credentials and expertise in the industry involved.

How Can I Prevent Having to go Through This Again if I Ever Decide to Remarry?

Many people believe that Premarital Agreements are only for the rich and famous and that they are inherently unfair to one side. The reality is that a Premarital Agreement is an important and essential tool in planning for your future and preventing lengthy litigation if a marriage is unsuccessful. Premarital Agreements can define what property is each spouse's separate property and what will be considered marital property. These agreements can protect family business interests and property acquired prior to the marriage and can clearly delineate what each party will be entitled to receive upon the dissolution of the marriage. The agreement can contain the parties' waiver of their right to make an equitable distribution claim and set out a framework and timeline for determining the value and distribution of their assets. Further, potential spouses can waive their rights to seek spousal support from the other if the marriage ends prior to death. At the end of the day, making the decision to enter into a Premarital Agreement can prevent the headache that often accompanies heartbreak.

Conclusion

Knowing and understanding separation, equitable distribution, and your rights can help make a trying time manageable. Being prepared for what lies ahead can make the journey easier to navigate.

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