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Shepherding you safely through difficult family transitions!

DIVORCE IN NEW YORK – THE SUBSTANTIVE ISSUES

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TABLE OF CONTENTS

THE SUBSTANTIVE ISSUES IN DIVORCE. 1
Grounds. 1
Equitable Distribution of Marital Property. 2
Real estate 3
Businesses. 3
Pensions. 4
ERISA. 4
QDRO. 4
defined contribution plans. 4
defined benefit plans. 5
QDRO Survivorship benefits 5

THE SUBSTANTIVE ISSUES IN DIVORCE

Most divorces involve several if not all of the following issues with varying degrees of complexity. That's why parties need a skilled lawyer to shepherd them through the process (*see* Choosing the Right Lawyer and The Qualities of a Superior Lawyer).

Grounds: On October 12, 2010, New York's no-fault divorce law, DRL § 170(7), became effective. Since that date any spouse can demand a divorce on the grounds that the marriage has "broken down irretrievably for a period of at least six months." As a practical matter, therefore, a spouse can now obtain a divorce simply by asking for it and the prior required grounds need not be worried about.

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Before October 12, 2010, to get a judge to award a judgment of divorce a spouse had to prove that the other spouse treated them in a "cruel and inhuman manner," DRL § 170(1), that the other spouse abandoned them, DRL § 170(2), the other spouse was imprisoned for three or more years, DRL § 170(3), or that the other spouse committed adultery, DRL § 170(4). Though there were two other grounds (living separate and apart pursuant to either a separation agreement or a judgment of separation, DRL §§ 170(5) & 6, respectively), these grounds were typically of no use to a spouse trying to escape a bad marriage because in order to satisfy these provisions they had to either obtain the consent of their spouse to get a separation agreement, or had to prove the grounds of DRL §§ 170(1)-(4) in order to get a judgment of separation. Thus, there was usually no benefit to pursue these grounds over pursuing an outright divorce and the only people suing for separation were religious people who had a religious objection to divorce. Enacting the no-fault divorce provision eliminated the need for a nasty trial full of recriminations and blame and though it made marriages less stable or permanent, it gives people their agency so that they don't have to remain in marriages that are no longer working for them, even if they cannot prove any grievous misbehavior by their spouse.

Equitable Distribution of Marital Property: When a couple divorces they must, of course, divvy up their property.

In New York, anything owned by a person before they married continues to be that person's "separate property," and that person gets to keep it after the divorce.

Anything earned or acquired from the date of the couple's marriage until the date the divorce action is commenced by either spouse is presumed to be "marital property" and is subject to "equitable distribution." The law does not say "equal distribution" but instead "equitable" distribution. "Equitable" means "in a fair manner." Nevertheless, caselaw establishes that in a "long term marriage" (seven years or longer), the distribution would presumptively be 50/50.

Whose fault it is that the marriage failed is generally not considered by the New York courts when distributing couples' marital property. So if a party had an affair, they still get their full share of the marital property. (In order to have their equitable distribution reduced, a party's misdeeds had to have been so egregious as to "shock the conscience of the court." Unfortunately, our courts' consciences are not easily shocked. Attempted murder might do it, but allowing a husband to believe that a child was really his was held by the majority of the Court of Appeals not to be so egregious as to warrant a financial penalty.)

The are several exceptions to the "all property acquired during the marriage is marital property" rule. Inheritances or gifts received by one spouse from someone other than their spouse is separate property. Gifts given from one spouse to the other is, however, marital. (The engagement ring, typically given before the marriage, is separate property as it is a pre-marital conditional gift.) Also any monies received on account of a personal injury settlement is the separate property of the injured spouse.

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If a party's separate property increased in value (appreciated) during the marriage, the appreciation might be separate or marital depending on what caused the appreciation. If the asset was a "passive asset" and appreciated because of market forces and not due to any efforts of the spouses, then the appreciation is separate as well and goes entirely to the spouse in whose name the asset is titled. If, however, the appreciation occurred in whole or in part because of the active efforts of one of the spouses, then the non-titled spouse might have a claim to a portion of the appreciation.

Of course this "standard vanilla" regime could be changed for a couple by either a prenuptial agreement (also known as an antenuptial agreement) or a postnuptial agreement (*see* Prenuptial Agreements. If the parties agreed (in a valid agreement) that certain property would be separate or marital, or would belong to one person or the other, their agreement would control. Courts generally allow people to make choices and agreements about their lives and will honor those choices and agreements even if, in retrospect, they were ill-advised. (Thus, someone entering into a prenuptial agreement waiving all rights to marital property must make sure to maintain their own career lest, at the end of the marriage, they are left without any assets and with no marketable skills.)

There are, however, times that agreements can be set aside. Spouses, for example, owe a fiduciary duty to one another. If one took undue advantage of the other, that should be discussed with a skilled lawyer to determine whether the agreement can be set aside and vacated (*see* The Attributes of a Skilled Lawyer). Similarly, if an agreement was obtained through fraud, coercion, or duress, that might form a basis to set the agreement aside. If an agreement was not executed with the requisite formality required by New York State law, the agreement is a nullity. If you suspect that any one of these conditions exist, you should consult a skilled lawyer.

Real estate is subject to the above rules. It should be analyzed by determining whether it is separate or marital. If separate, did it appreciate during the marriage and if so, was the appreciation passive or due to the active activities of one spouse or the other?

Moreover, if one spouse contributed separate-property money to the purchase or improvement of even jointly-purchased real estate, that spouse is entitled to an origination credit for the separate property contribution to the marital asset. (For some reason never clearly explained by the caselaw, the origination credit doctrine applies only to real estate and not to bank accounts or other assets.)

Businesses: These same rules apply to any businesses owned by the parties. The difficulty with a businesses is determining its value and determining whether one or more of the business owners have been extracting income in the guise of business expenses. Sometimes forensic accountants must be engaged to analyze the books and records, particularly the claimed expenses, to determine what the business' owners true income really was and the real world value of the business.

Moreover, the valuing of businesses is its own highly-involved, intricate specialty. There are several different "types" of value (fair market value, fair value, investment value, and

intrinsic of fundamental value); different premises of value (as a going concern, as an assemblage of assets, in an orderly disposition, or at a forced liquidation); there is acquisition value, book value, going-concern value, enterprise value, strategic (or synergistic) value, or transaction value. When a business must be valued, the valuator must select the approach to use (income approach, market approach or asset-based approach) and, within each approach, the procedure to be used. The selection of one rather than another can mean a substantial difference in the ultimate value accorded to the business. Good valuators utilize multiple approaches and then reconcile their results to ensure their reliability and accuracy.

Pensions: Pensions earned during the marriage are, of course, marital property. Pensions, however, pose their own unique challenges both in valuing them and in dividing them.

After the 1929 stock market crash and the resulting suicides of many people who lost their entire fortunes, Congress realized that it needed to protect people's retirement benefits even from the people themselves. Eventually Congress passed the Employee Retirement Income Security Act ("ERISA"). The act sets criteria for pension plans. If a pension plan "qualifies" under ERISA, then contributions to the plan and all the income it generates remain tax free until the benefits are withdrawn. However, to be so qualified, the plan participants (the employees) cannot withdraw from their accounts prior to retirement without incurring stiff penalties. Moreover, there are "anti-alienation" provisions that prevent people from "investing" their retirement benefits at Aqueduct or other racetracks. These anti-alienation provisions, however, prevent a person from transferring retirement benefits to a spouse. As federal law, ERISA supersedes state law and, therefore, ERISA supersedes a state-court judge's ability to order a pension plan to distribute funds to an ex-spouse.

There is, however, a carve out to ERISA's anti-alienation provision. ERISA permits the distribution of pension benefits but only: (a) through an order; (b) issued in a domestic relations matter; (c) that is "qualified" by the pension plan's administrator. This is known as a "QDRO," a qualified, domestic relations order. Thus, the plan administrator gets to sit in review of a state court judge's order to determine whether the judge's order is qualified under the rules of the plan. If the current actuarial value of the total benefits ordered distributed by the Court to the participant and the participant's spouse exceeds, even by one penny, the actuarial value of the benefits the participant was entitled to, the plan administrator can reject the Court's order as unqualified. (N.B., nobody else in the world who is subject to a court's jurisdiction gets to ignore a judge's order but, because of the Supremacy Clause of the United States Constitution, a plan administrator has cover under the protection of ERISA to disregard a judge's order if the administrator deems the Order not qualified.) If the administrator deems the order qualified, the administrator implements it. (It is therefore often the practice to ask the plan to pre-approve a proposed order so that the judge does not sign an order that is later deemed not qualified.)

In broad terms, there are two types of pension plans, "defined contribution plans" and "defined benefit plans." In defined contribution plans, whatever the pension participant contributed to the plan is in the participant's account. The participant gets routine statements that

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list the benefits in the account. To see the current value of the pension, one need only look at the statement. The account, *i.e.*, the benefits the participant is entitled to, is fixed and, therefore, can be easily divided. If the participant's spouse is entitled to, say, one-half of the benefits, a QDRO needs to be prepared transferring one-half of the participant's account to an account in the spouse's name.

There are, however, also defined benefit plans. In a defined benefit plan the participant will receive, upon retirement, certain benefits that might be tied to the participant's final earnings and the years in service. It might, therefore, perhaps be one-third of the participant's average income in the last three years of employment, and continues from the date of retirement until the participant's ultimate death.

Because there is no way to know right now what the participant's ultimate benefits will actually be, the benefits can't be accurately divided. Moreover, the ultimate payout will be based on the actuarial tables' prediction of how long the participant is expected to live.

Moreover, the participant's spouse is only entitled to share in that portion of the pension that was earned while the participant was accruing pension benefits during the marriage. If the participant started working prior to the marriage and might continue working after the divorce, the participant's spouse should not share in the pension benefits that accrued in those periods. Distributing the benefits in such instances is often accomplished is by utilizing the formula outlined by the New York State Court of Appeals in its seminal case *Majauskas v. Majauskas*, 61 NY2d 481(1984). There the court said that the participant's spouse should get 50% of the benefits multiplied by a fraction the numerator of which is the time that the participant was married and accrued pension benefits, over a denominator which is the entire time the participant worked and accrued pension benefits.

To illustrate, if a person worked at a bank for 30 years in total, and in ten of those years was married to the spouse, the spouse would be entitled to receive one-half of the pension benefits x 10/30, or 1/2 x 1/3 x (benefits). 1/2 x 1/3 = 1/6 (or .16), so the spouse would be entitled to 16% of the benefits the participant ultimately receives. A QDRO could then be prepared directing the plan administrator to pay 16% of each pension distribution to the participant's ex-spouse.

QDRO Survivorship benefits – as stated above, when no survivorship benefits are selected, pensions benefits are actuarially set to be paid out over the lifetime, *i.e.,* until the death, of the participant. The pension benefits are divided to reflect the participant's actuarial lifetime. The actuarial tables, of course, consider the participant's age and sex.

When selecting survivorship benefits, a participant can usually select whether the participant wants all of the benefits to cease upon the participant's death, or whether the participant wants a surviving spouse to continue receiving benefits after the participant's death. Extending a spouse's receipt of benefits beyond the participant's death obviously requires a recalculation and adjustment based on the actuarial tables' prediction of the spouse's longevity and,

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if expected to live longer, reduces the benefits paid while the participant is alive so that sufficient pension benefits exist for the lifetime of the last-to-survive spouse.

There is a dispute among attorneys about who should bear the cost for the selection of joint-survivorship benefits. Many practitioners and even some courts have taken the position that the participant's surviving spouse must be protected into old age and therefore the participant should be required to designate joint survivorship benefits, and the costs of that selection shared by the both of them.

The better reasoning however is that the participant's spouse alone should bear the cost of that designation. This is demonstrated by the following logic: If benefits are paid for only the participant's life, and the participant's spouse receives 50% of every benefit check, when the participant dies and the checks stop, the spouse will have received 50% of the participant's benefits–exactly what that spouse was entitled to. If the spouse would like to continue receiving benefits after the participant's death, she should not be able to claim a greater-than-50% share of the pension benefits. Rather, her monthly benefits should be reduced so that when her payments cease, the total of all such payments only amount to 50% of the total benefits paid out. Any reduction in monthly benefits incurred to pay for the joint-survivorship-death benefits are because the spouse's anticipated benefits are going to be spread out over a longer period of time and, therefore, the cost thereof should be borne by that spouse alone. As an example, the participant's spouse may have the choice of getting $500/month for 5 years, or $250/month for ten years. The $250/month reduction is not a reduction in the spouse's benefits, it is the payout of the same benefits but extended over a longer period of time. Thus any reduction in benefits caused by the selection of joint-survivorship benefits should not be imposed only upon the participant's spouse and not on the participant. That is the only fair result!

Determining the present value of future benefits is its own specialty and we have firms with whom we work so that we properly protect our clients and calculate benefits accurately.

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