

► FAMILY LAW

Mine, Yours and Ours: Identifying and Dividing Marital Property in an Action for Divorce, Separate Maintenance or Annulment

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More often than not, lawyers who practice family law in the state of Kansas spend a significant amount of their time counseling divorce clients on the legal distinctions between “marital property” and “separate property.” Undoubtedly, an even larger portion of their time is dedicated to correcting a divorce client’s misconceived notions related to who owns what property and how Kansas courts divide property in a divorce action.

Prior to the filing of a divorce petition, a husband and wife typically own some property separately and some property jointly. For example, when a couple gets married, it is not unusual that the couple might already own their own separate vehicles and have separate retirement accounts through their places of employment. Further, the husband and wife may own certificates of deposit, IRAs or other financial accounts in their sole and separate names prior to their marriage. After their marriage, they may jointly acquire additional automobiles, a house, an interest in a timeshare, and may create joint financial accounts.

The general rules regarding the nature of ownership of property held by married individuals are found in K.S.A. § 23-201(a), K.S.A. § 23-202, and K.S.A. § 23-204. K.S.A. § 23-201(a) states that property brought into the marriage or received after the marriage by gift or inheritance, except a gift from the other spouse, remains the person’s separate property and is not subject to disposal by the person’s spouse or liable

for the spouse’s debts. Moreover, K.S.A. § 23-202 allows married persons to convey their real and personal property; and K.S.A. § 23-204 permits married persons to carry on any trade or business, perform any labor or services, and keep those particular earnings as his or her separate property. Thus, either a husband or wife may own their own business during a marriage and may retain the income earned from that separate business, labor or service as his or her separate property. The person can dispose of that income as he or she desires, whether by investing it, spending it or wasting it.

However, the nature of sole and separate property changes upon the filing of an action for divorce, separate maintenance or annulment. K.S.A. § 23-201(b) provides in pertinent part that upon the filing of an action for divorce, spousal maintenance or annulment, *all* property, regardless of when or how acquired or how titled, becomes marital property subject to division by the divorce court. In other words, once a Petition for Divorce, Separate Maintenance or Annulment is filed, all property owned by the parties, whether that that property is owned by the parties individually or jointly with any other person or entity, becomes marital property subject to being divided by the court in the action for divorce, separate maintenance or annulment.

The filing of an action for divorce, separate maintenance or annulment creates this unique category of

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property, if marital property, and gives each spouse an undetermined “common ownership” in this marital property which vests at the time of the commencement of the action for divorce, separate maintenance or annulment. Until the marital property is ultimately divided by the court at the conclusion of the action for divorce, separate maintenance or annulment, each spouse maintains his/her undetermined “common ownership” in the marital property.

In many cases, locating and identifying all of the marital property subject to division by the court can be a challenge. Nevertheless, once all of the marital property is identified and located, it must then be divided by the court at the conclusion of the action for divorce, separate maintenance or annulment.

There are a number of factors that a court must consider in making a division of marital property owned by the parties. K.S.A. 60-1610(b)(1) sets forth the factors the court must consider as follows:

1. the age of the parties;
 2. the duration of the marriage;
 3. the property owned by the parties;
 4. their present and future earning capacities;
 5. the time, source and manner of acquisition of property;
 6. family ties and obligations;
 7. the allowance of maintenance or lack thereof;
 8. dissipation of assets;
 9. the tax consequences of the property division upon the respective economic circumstances of the parties;
 10. and such other factors as the court considers necessary to make a just and reasonable division of property.
- While it is true that in many cases

Kansas courts divide the marital property equally between the parties, that is not the law in Kansas. As one can see from the factors listed above, Kansas is an “equitable distribution state.” As one can imagine, in a case where one party has dissipated marital assets, the court can take that fact into consideration in making an unequal division of property in favor of the other spouse.

Further, where one spouse has received significant gifts or has inherited property from his or her family, the court can take that into consideration and set such property aside to that spouse, rendering another “unequal” division of property between the parties. Likewise, when the parties marry late in life and one spouse has accumulated a significant pension or 401(k) account as of the time of marriage, the court can, using the equitable factors set forth above, set the portion of the pension or 401(k) plan earned prior to the marriage aside to that spouse before dividing only the portion that was accumulated during

the marriage.

There are certainly many more factors which can lead a court to deviate from an “equal” division of property in an action for divorce, separate maintenance or annulment.

As the reader can see, under Kansas law, married persons can own property separate and apart from their spouse and can convey such property with or without the consent of their spouse. They may commingle their property with their spouse or keep it separate. However, no matter how the property of spouses is managed during the marriage, once a petition for a divorce, separate maintenance or annulment is filed, all of the property of the spouses, no matter how it is titled or how it has been held, becomes marital property subject to being divided by the court in such an action. Although an equal division of property may and often does result, such is not always the case when equity and the equitable factors set forth in K.S.A. 60-1610(b)(1) dictate otherwise. ▲

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