

THE HIGHWAY THROUGH THE GREAT DIVIDE: DEALING WITH SEPARATE PROPERTY IN DIVORCE

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When people begin their journey through a divorce, they typically want to know as much as possible about what property they will retain at the end of the day. Every family law practitioner has likely experienced at least one version of the following scenario: at an initial client interview, the discussion turns to the breakdown of the parties' assets. The potential client says, "I've worked my fingers to the bone for the past twenty years, and my spouse has never earned a paycheck. My 401(k) is mine, and I shouldn't have to split it up!" It can be quite a shock for that potential client when he or she is told that it doesn't matter who actually earned the income and contributed to the retirement account during a marriage, as "[e]ach spouse shall be considered to have contributed equally to the production and acquisition of marital property;" instead, the potential client's retirement account is a marital asset to be divided at the time of a divorce. Ohio Revised Code § 3105.171(C)(2).

Marital property includes "[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;" "[a]ll interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;" and "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." O.R.C. § 3105.171(A)(3). Simply, when a couple gets divorced,

whatever they have in the way of assets at the time of the divorce is considered marital property by default. Marital property is divided equally between the spouses, unless the equal division would be inequitable, in which case the court will divide in whichever way it determines to be equitable. O.R.C. § 3105.171(C)(1).

However, as you explain the definition of marital property to that prospective client, his or her interest may be piqued by the reference to separate property: assets that are not split when the marriage terminates and are instead kept free and clear by one of the spouses. Separate property takes many forms: it can be an inheritance by one spouse, property acquired by a spouse prior to the marriage, passive income and appreciation from separate property during the marriage, property excluded by a prenuptial agreement, and a gift of real or personal property made during the marriage proven by clear and convincing evidence to have been given to only one spouse, among other things. O.R.C. § 3105.171(A)(6)(a).

For example, when a party inherits stocks from his aunt during the marriage, and the stocks were never commingled or listed in his wife's name, such stock is separate property. *Southworth v. Southworth*, 8th Dist. Cuyahoga NO. 73525, 1998 Ohio App. LEXIS 6239 (Dec. 24, 1998). If a party can demonstrate he had a certain amount of cash at the outset of the marriage, and that the cash existed in accounts with balances which never dropped below the original amount throughout the marriage, such funds are premarital and separate. *Wyum v. Wyum*, 8th Dist. Cuyahoga No. 70317, 1997 Ohio App. LEXIS 797 (Mar. 6, 1997). Real property purchased with funds given to a party by her mother is that party's separate property. *Schwarzer v. Schwarzer*,

8th Dist. Cuyahoga No. 58688, 1991 Ohio App. LEXIS 2769 (June 13, 1991).

In each of these examples, if the parties had not taken the necessary steps to demonstrate why the property in question was separate, such property would likely have been determined to be marital and divided between the parties. "The party seeking to establish an asset as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Matic v. Matic*, 11th Dist. Geauga CASE NO. 2000-G-2266, 2001 Ohio App. LEXIS 3360, at *6 (July 27, 2001), citing *Peck v. Peck* (1994), 96 Ohio App. D 731, 734, 645 N.E.2d 1300. In some cases, the parties may stipulate to certain property being separate; for instance, if one spouse inherited \$20,000 from his or her parent during the marriage but lacks the necessary documentation to trace the asset to its origin, the other spouse may not want to fight over its separate nature and will just agree that those funds are off the table. Otherwise, the spouse with the burden of proof must establish all the links in the chain between the asset at the time of the divorce and its separate source by the greater weight of the evidence.

Even if an asset is acquired separately, if the asset grows in value during the marriage, that increase in value could be considered a marital asset at the time of a divorce. If a party inherits \$100,000 during the marriage, and keeps those funds separate in an interest-bearing account, any interest gained on the original amount is still separate, as such appreciation is not due to the efforts of either spouse. However, if a spouse owns a business prior to the marriage, and the business increases in value during the marriage while the owner spouse plays a pivotal role in the management of the business, any increase in

value of the business during the marriage is a marital asset to be divided between the parties in the event of a divorce. See *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 1998-Ohio-403, 696 N.E.2d 575.

After listening to your comprehensive overview of Ohio’s separate property law, the potential client tells you that the down payment on the marital home can be traced back to his or her premarital savings. Would that be considered a separate property interest? Of course, that all depends. O.R.C. § 3105.171(A)(2)(b) allows the court to select dates of marriage that the court “considers equitable in determining marital property.” In a case where the parties lived together for six years before the formal date of the marriage, were engaged during that entire time, and shared expenses which allowed the husband to accrue savings to use toward the down payment on the eventual marital residence, the court found that it was equitable to decide that the *de facto* marriage date was when the parties became engaged and moved in together, thereby allowing the accrued savings toward the down payment to be a marital asset. *Bryan v. Bryan*, 8th Dist. Cuyahoga No. 97817, 2012-Ohio-3691.

Even when a party successfully satisfies his or her burden to demonstrate that certain property is indeed separate, it is still possible for the other spouse to be awarded a portion of such property. When a party was found to have “systematically siphoned” cash from his business, converting the cash to gold which was “allegedly given to a friend to be used to purchase real estate in Serbia,” the court found that the other party was entitled to a distributive award of the husband’s separate assets or a greater award of marital property to make up for the husband’s dissipation and concealment of marital property pursuant to O.R.C. § 3105.171(E)(3). *Haslem v. Haslem*, 133 Ohio App.3d 257, 260, 727 N.E.2d 928 (8th Dist.1999).

For many domestic relations clients, their divorce is the first time they experience the legal system. Family law practitioners are tasked with helping their clients better understand the legal side of a divorce. Guiding a client through the nuances of marital and separate property at the time of a divorce is one of the most critical pieces of this process.



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