

## **EQUITABLE PROPERTY DIVISION – WHAT IS EQUITABLE?**

### **5. Introduction**

Ohio is an equitable distribution state, meaning that the marital estate shall be divided equitably. *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609, 635 N.E.2d 308. In making a division of marital property, the court shall consider all of the following factors:

- (1) The duration of the marriage;
- (2) The assets and liabilities of the spouses;
- (3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;
- (4) The liquidity of the property to be distributed;
- (5) The economic desirability of retaining intact an asset or an interest in an asset;
- (6) The tax consequences of the property division upon the respective awards to be made to each spouse;
- (7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;
- (8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;
- (9) Any other factor that the court expressly finds to be relevant and equitable.

O.R.C. § 3105.171(F)(1)-(9).

### **6. O.R.C. § 3105.171 – Distribution of Property**

O.R.C. § 3105.171 governs the distribution of property in a divorce. O.R.C. § 3105.171 provides as follows:

(C)(1) Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section.

While O.R.C. § 3105.171 states that “equal division” of the marital property is a proper “starting point” for the distribution, the final distribution is only required to be “equitable,” as determined by the trial court after consideration of the parties’ awards of

separate property. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 95, 518 N.E.2d 1197. “An unequal property division does not, standing alone, amount to an abuse of discretion. Equitable need not mean equal.” *Id.*

Prior to making an equitable distribution of property, the trial court must determine whether particular property is marital or separate in nature and then make a distribution of the property. O.R.C. §3105.171(B). As a general principle, the division of marital property is required to be equal. O.R.C. §3105.171(C)(1). If an equal division of marital property would be inequitable to the parties, the court must divide the marital property in a manner that it deems equitable. *Id.*

Separate property is property that a spouse acquired an interest in before the marriage. O.R.C. § 3105.171(A)(6)(a)(ii). Separate property not subject to property division includes inheritances, property owned before the marriage, passive income or appreciation acquired from separate property during the marriage, property acquired after a legal separation, property excluded by an antenuptial agreement, personal injury awards, and gifts given to only one spouse. O.R.C. § 3105.171(A)(6)(a)(i)-(vii).

Marital property is real or personal property that is currently owned by either or both spouses and that was acquired by either or both spouses during the marriage. O.R.C. § 3105.171(A)(3)(a)(i). Any property acquired during the marriage is presumed marital unless it can be demonstrated that it is separate. *Kampf v. Kampf* (May 3, 1991), Ashtabula App. No. 90-A-1503, 1991 WL 70785, \*3.

## **7. Broad Discretion**

The Ohio Revised Code provides that the classification and distribution of assets in a divorce case are within the discretion of the trial court. *See* O.R.C. § 3105.171. Ohio case law corroborates that rule. For instance, in *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319, 432 N.E.2d 183, the Supreme Court of Ohio stated as follows:

“This court has long recognized that trial courts are vested with broad powers in determining the appropriate scope of property awards in divorce actions. As was stated in the recent case of *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355 421 N.E.2d 1293, “[b]oth R.C. 3105.18, which provides that the trial court may divide property as it deems equitable, and past case law require that the trial court have broad discretion in arriving

at an equitable property division.’ This court further noted in *Cherry* that ‘[a] reviewing court may modify or reverse a property division, [only] if it finds that the trial court abused its discretion in dividing the property as it did.’”

Thus, an appellate court may not substitute its judgment for that of the trial court, absent evidence that the court abused its discretion. *See, e.g., Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295, 480 N.E.2d 1112.

#### **8. Date of Valuation**

A domestic relations court that determines an action for divorce is required by O.R.C. § 3105.171(B) to order the parties’ marital property divided equitably between them. Marital property includes any property, real or personal, acquired by either spouse “during the marriage.” O.R.C. § 3105.171(A)(3)(a)(i). Therefore, the date on which the marriage terminates *de jure* ordinarily is controlling of a court’s decision when it determines and divides marital property.

In *Berish*, the Supreme Court held that, when dividing the parties’ rights in a jointly owned asset, a domestic relations court may apply an exception to the *de jure* termination date to decide when a marriage ends. 69 Ohio St.2d at 320-321.

“In order to do equity, a trial court must be permitted to utilize alternative valuation dates, such as the time of permanent separation or de facto termination of the marriage, where reasonable under the facts and circumstances presented in a particular case. In this fashion, the trial court will have the necessary flexibility to exercise its discretion in making truly equitable awards consistent with legitimate expectations of the parties.”  
*Id.* at 321.

The rule of *Berish* is now provided by statute. O.R.C. § 3105.171 requires the equitable division of property acquired during marriage and states, at Division (A)(2):

“ ‘During the marriage’ means whichever of the following is applicable:

“(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

“(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital

property. If the court selects dates that it considers equitable in determining marital property, 'during the marriage' means the period of time between those dates selected and specified by the court."

O.R.C. § 3105.171(A)(2).

The determination as to when to apply a valuation date other than the actual date of divorce is within the discretion of the trial court and cannot be disturbed on appeal absent a demonstration of an abuse of discretion. *Gullia v. Gullia* (1994), 93 Ohio App.3d 653, 666, 639 N.E.2d 822.

#### **5. Division of Debts**

All of the parties' debts should be specifically listed in the divorce decree or separation agreement and the party liable for each must be specified. It is best to allocate debts to the party whose name the debt is in. In the case of joint debts, it may be best to pay off the debts with marital assets if at all possible. If this is not possible, other safeguards will need to be built in to protect against default, late payment, bankruptcy or death of the obligated spouse. Of course, full disclosure and indemnification provisions must be included.

Where one party is refinancing a mortgage in the name of both spouses, be sure that the party who is seeking to be relieved of liability for the note does not sign over his/her interest in the collateral before the refinancing is complete. Do not be the attorney who has his or her client sign a quit claim deed to the marital residence only to find that the mortgage was not being paid promptly or was not paid at all so that the former spouse ends up having to pay off a mortgage or bankrupt the debt for a piece of property he or she no longer owns.

In *Elliott v. Elliott*, 2005-Ohio-5405, the Fourth District Court of Appeals observed that an equitable division of property under R.C. 3105.171(F)(2) requires the consideration of both assets and liabilities, and that, as with the division of assets, the starting point for division is equality, but the end point must be equitable. Because allocation of marital debt is "inextricably intertwined" with the division of marital property, the same factors must be considered as in the division of assets.

In considering the division of liabilities, the court may consider debt payments made by the parties during the pendency of the divorce. Here, the trial court did not err by considering the \$14,595.87 that the husband paid pursuant to the temporary orders, and ordering him to pay an additional \$5,622.58, resulting in 36% of the marital debt. In view of the fact that temporary orders issued by a court pursuant to Civ. R. 75 are interlocutory, a court's may consider the amount expended by the parties pursuant to the temporary orders when fashioning its final order of equitable property division.

The appellate court upheld the trial court's unequal allocation of marital debt for the following reasons:

1. Wife was awarded a far greater share of the parties' liquid assets;
2. Husband did not know about some of the marital debt wife had incurred;
3. During the marriage, wife was in charge of the marital finances and took care of paying the bills; and
4. Wife generally had possession of the credit cards and made most of the charges.