

Determining How “Separate” Property and Debt Will be Distributed

By Deanna Jensen, Jensen & Leiberan

When negotiating the division of property and debt in a divorce or dissolution of a domestic partnership, often the parties disagree fiercely about which items should be considered in the division between them, and which should not. Examples of such items may include:

- An item of some value, or perhaps sentimental value only, brought into the marriage by one of the parties
- An inheritance or gift to one party prior to the marriage or during the marriage
- An inheritance that is about to vest at the time of dissolution
- Payments from a trust account established by a parent or relative of one of the parties
- Funds from the sale of property prior to the marriage used during the marriage to purchase other personal or real property
- Rental properties brought into the marriage
- Retirement funds, military pensions and other benefits, or social security benefits that are the result of only one party’s labor and contributions
- Vested and Unvested Stock Options and Restricted Stock Units
- Intellectual property and royalties
- Artwork created, books authored, and other creations by one party
- Heirlooms and antiques brought into the marriage
- A business, either wholly owned by one of the parties or an interest in a business
- A college loan incurred prior to or during the marriage by only one party
- A debt incurred prior to the marriage
- An award from a lawsuit filed by one of the parties prior to or during the marriage that names only one party as the plaintiff, or a lawsuit resulting in debt that names only one of the parties as a defendant

The list can go on and on. When disagreements arise over the distribution of assets and debt, you need the assistance and advocacy of an experienced attorney to help

determine how the court is likely to view the distribution between you and your partner. Are these assets and debts in or out of the distribution? Or perhaps partially in and partially out? How do you arrive at the value of an asset and where do you find an expert if the value is not obvious?

There is a rebuttable presumption that everything acquired during the marriage or registered "domestic partnership," regardless of who acquired it, is property subject to distribution between the parties (with the notable exception of Social Security Benefits, the distribution of which is determined by federal law). However, the fact that a party owned something prior to the marriage or registered "domestic partnership" does not take property out of the division. The court throws everything into a pile: pre-marital, post-separation, and marital assets and debts. The court then looks at the circumstances related to each one of the items in dispute before deciding whether or not to include it for purposes of distribution between the parties, ~~it or some portion of it,~~ after all other legal principles are applied, the court still may determine that although a particular asset or debt would ordinarily be ruled out of the distribution, is divided because it would be unjust and inequitable to do so, in.

delete

For example:

1. A party received a significant inheritance or gift before the parties ever met, can prove by testimony and evidence that the giver had no intention to benefit the other party with the gift or the increase in the value of the gift, and the recipient of the gift maintained sole ownership throughout the relationship with the other party.

The court might very well consider the gift to be the separate property of the party to whom it was given. The value of that separate property would then drop out of the marital estate and not be included in the calculations when determining an equitable division of assets and debt.

2. On the other hand, suppose that the party who received the gift retained sole possession, but the parties talked regularly about the inherited fund comprising a significant portion of their retirement monies. And, suppose the fund increased significantly in value during the marriage or partnership.

Suppose further that the party who did not receive the gift, relying on the representations by the other party, chose not to contribute to retirement and instead used that money that would have gone to retirement to benefit the family.

Under those circumstances the court can find that it would be just and equitable in all the circumstances to include either the increase in value or all of the gift as part of the distributable property. Why? First, during the parties' relationship the increase in the value of a separately held asset is usually considered property acquired during the marriage or partnership and subject to distribution. Second, on these facts, the court could find that the party who did not receive the gift had

forgone contributions to retirement relying on the discussions about the inheritance being shared, and therefore it would be just and equitable that the gift be shared with that disadvantaged party.

In such cases and many others, asking the right questions and calling the right witnesses at trial can be crucial to how the court determines what you are and are not entitled to when the marital estate is divided. Knowing the law on such disputed items can also be crucial to settlement.