

# Equitable Distribution

Podcast # 6 of 9

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“Equitable distribution” is the division of the marital assets and liabilities between the parties. The equitable distribution of the marital assets and liabilities is fundamentally a three step process.

1. The assets and liabilities acquired during the marriage must be identified.
2. The assets and liabilities must be evaluated either by review of the account statements or other documentation, the use of appraisers or the utilization of a forensic accountant; and
3. The method and respective percentages of the distribution must be determined.

Unlike several other states (most notably California), New Jersey is not a community property state. In community property states the assets and liabilities are divided equally regardless of any other circumstances. New Jersey is an “equitable distribution” state meaning that the assets and liabilities acquired during the marriage must be “equitably” distributed between the parties.

What is “equitable” under the facts and circumstances of a particular case is not simply a subjective determination of fairness or equity. If it were, almost every person would argue that “equitable” means that they should receive a higher percentage of the assets! They would argue that because of their perceptions as to why the marriage ended, their perceptions as to their work efforts during the marriage and their general sense of “being victimized” justifies them receiving a higher percentage of the assets.

Those factors are, however, largely irrelevant and the specific statutory factors which must be considered are:

- (a) the duration of the marriage;
- (b) the age of the parties;
- (c) the physical and emotional health of the parties;
- (d) any income or property brought into the marriage by each of the parties;
- (e) the standard of living established during the marriage;
- (f) any written agreements made by the parties either before or during the marriage;
- (g) the economic circumstances of each party at the time the division of the property becomes effective;
- (h) the income and earning capacity of each party;
- (i) each party’s educational background, training and employment skills, work experience, absence from the job market;
- (j) parties’ respective custodial responsibilities for the children of the marriage;
- (k) the contribution of each party to the education training and the development of the earning power of the other party;
- (l) each party’s contribution to the acquisition or dissipation of the marital

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- assets including
- other parties' contribution as a home maker;
  - (m) the tax consequences of the proposed distribution;
  - (n) the value of the property or asset;
  - (o) the need of the parent who has physical custody of a child to own or occupy the marital residence;
  - (p) the debts and liabilities;
  - (q) the need to create a trust or other fund for foreseeable medical, educational expenses;
  - (r) the extent to which either party deferred achieving their career goals.

You should familiarize yourself with each of these factors. If there are facts or circumstances in your case which you feel relate to any of the factors, you must call them to the attention of your attorney. As your case progresses, your position with regard to the distribution of the assets must focus upon an analysis of these factors; not your own feelings as to what is "equitable."

If your case is ultimately decided by a Judge, the Judge's decision will include a specific analysis of each factor and its relevancy to the facts of your case. Therefore, in order to have some projection as to what a Judge may decide, you must analyze your case in the context of these factors.

It is also important to consider that not all assets must be divided in the same percentages. It is entirely possible that some of the assets in a case could be divided equally while others, because of the relevancy of any one or more of these factors, may be distributed other than equally.

For example, it is not unusual that the value of a small business or professional practice may not be divided equally between the parties. The person operating the business or professionally engaging in the practice may receive a higher percentage of the value. In some instances, the person with specific needs for certain assets such as the household furnishings to maintain a home for the children may receive all or substantially all of the household furnishings.

Thus, it is not only important that all of the marital assets and liabilities be considered, but that each asset be individually analyzed.

There are also assets which may not be subject to equitable distribution and will be retained by one of the parties. Assets which are received by one of the parties by way of a gift from a third party, inherited assets or assets which are owned prior to the marriage may remain the property of the person who received, inherited or owned the assets prior to the marriage.

If there are such assets, the question then becomes whether any increase in their value during the marriage is distributable. If the increase in value is solely as a result of increased market conditions or inflation, it usually will not be subject to equitable distribution. If the increase in value is the result of the efforts of one or both of the parties, it generally will be subject to equitable distribution.

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For example, if one of the parties owned a home at the time of the marriage and that home was renovated or improved by the parties' work efforts and/or financial investment during the marriage, the increase in value resulting from those improvements may be subject to marital distribution. If, on the other hand, the pre-owned asset was a bank account which increased in value solely as a result of interest on the account, the increase in value may not be subject to equitable distribution.

If an inherited, gifted or prior owned asset is placed into joint names, sold or transferred into another asset which is then placed in joint names, it may lose its status as an exempt asset and be converted into an asset subject to marital distribution.

It is impossible to discuss all of the alternatives which may exist regarding prior owned, gifted or inherited assets in a particular case, but the point to emphasize is that you must inform your attorney that such assets exist so as to allow them to analyze the particular circumstances surrounding those assets, and advise you as to what if any part of the value of that asset may be exempt from or included in the marital distribution. In terms of valuing the assets, some assets are very simple to value, others much more complex and the majority somewhere in between simple and complex.

Bank accounts, stock brokerage accounts, 401(k) accounts or other accounts are easily valued by simply obtaining the most recent account statement. Small businesses and professional practices are very complex and difficult to evaluate. Their value can only be determined through the opinion of a competent forensic accountant who will examine the financial statements, income tax returns and nature of the business or practice and can then provide an expert opinion as to its value.

Many assets may not be as simple as account statements nor as complex as small businesses, but may require the use of an expert or competent appraiser to determine their value. For example, a competent appraiser may have to be engaged to render an opinion as to the value of a home. Actuaries or pension experts may be engaged to offer similar opinions as to the value of pension or retirement accounts and sometimes there are collectibles, art objects or other personal property of sufficient value to warrant retaining an appraiser as to their value.

Again, it is impossible to discuss all of the alternatives as to the valuation of the assets which may be subject to equitable distribution. What is, however, important, is to know that you have the right to see the account statements or to obtain other competent expert opinion as to the value of the assets and you should never settle a case without at least a reasonable level of due diligence to document and determine the value of the assets being distributed.



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