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**Equitable Distribution**

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## **EQUITABLE DISTRIBUTION**

### **By Sandy T. Fox, Esquire**

#### **I. Overview**

Pursuant to *Fla. Stat. §61.075 (2016)*, in a proceeding for dissolution of marriage, in addition to all other remedies available to a court to do equity between the parties, or in a proceeding for disposition of assets following a dissolution of marriage by a court which lacked jurisdiction over the absent spouse or lacked jurisdiction to dispose of the assets, the court shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors, including the factors set forth in *Fla. Stat. §61.075(1)(a)-(j)*.

#### **II. Jurisdiction**

**A. Subject Matter Jurisdiction:** The Court must have subject matter jurisdiction to do equitable distribution.

**B. Personal Jurisdiction:** The Court must have personal jurisdiction to do equitable distribution.

**C. In Rem:** The Court must have in rem jurisdiction over property located in Florida but adjudicate interests in property outside of the state if it has personal jurisdiction over the parties.

#### **III. Date for Defining Assets and Liabilities as Marital**

The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. *Fla. Stat. §61.075 (7)*. Assets acquired by one spouse after filing a petition for dissolution of marriage are ordinarily deemed to be nonmarital. *Beers v. Beers*, 724 So.2d 109 (Fla. 5th DCA 1998). Once an asset has been determined to be nonmarital, that asset may not be awarded to the non-owner spouse as equitable distribution unless there has been agreement to the contrary. *Abernethy v. Abernethy*, 670 So.2d 1027 (Fla. 5th DCA 1996). A trial court's allocation of an asset as marital or non-marital for purposes of equitable distribution is reviewed de novo. *Puskar v. Puskar*, 29 So.3d 1201 (Fla. 1st DCA 2010); *see also Cilenti v. Cilenti*, 192 So.3d 673 (Fla. 2d DCA 2016).

#### **IV. Date of Valuation Assets and Liabilities**

The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require. *Fla. Stat. §61.075 (7)*. Choosing a valuation date of assets in dissolution actions is determined on a case by case basis, depending upon the facts and circumstances thereof. There is no presumption that one date should be used as opposed to another. *Perlmutter v. Perlmutter*, 523 So.2d 594 (Fla. 4th DCA 1987).

#### **V. Marital Asset Presumption**

All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as nonmarital assets or liabilities are presumed to be marital

assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities. The presumption is only for evidentiary purposes in the dissolution proceeding and does not vest title. Title to disputed assets shall vest only by the judgment of a court. **Fla. Stat. §61.075 (8).**

#### **VI. Alimony Considerations in Equitable Distribution**

Equitable distribution is addressed prior to alimony. **See Fla.Stat. §61.08(2)(d)** (enumerating equitable distribution as a factor in determining alimony); **see also Hodge v. Hodge**, 129 So. 3d 441 (Fla. 5th DCA 2013) (trial court erred in failing to consider the equitable distribution of income-earning assets for purposes of making alimony award.)

#### **VII. Special Equity Abolished**

Special equity is abolished. All claims formerly identified as special equity, and all special equity calculations, are abolished and shall be asserted either as a claim for unequal distribution of marital property and resolved by the factors or as a claim of enhancement in value or appreciation of nonmarital property. **Fla.Stat. §61.075 (11).**

#### **VIII. Treatment of Marital vs Non-Marital Assets and Liabilities**

The Court shall set apart to each spouse that spouse's nonmarital assets and liabilities and not include such nonmarital assets and liabilities in the equitable distribution. **Fla.Stat. §61.075 (1).**

##### **A. Marital Assets and Liabilities Defined**

1. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.

2. The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

3. Interspousal gifts during the marriage.

4. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs. **Fla.Stat. § 61.075(6)(a)(1).**

##### **B. Non-Marital Assets and Liabilities Defined**

1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities;

2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;

3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;

4. Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities; and

5. Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed the forgery or having affixed the unauthorized signature. **Fla.Stat. § 61.075(6)(b)(1-5).**

### **C. Engagement Rings/Wedding Rings**

Engagement rings are non-marital property. Wedding ring is marital property.

### **D. Comingled Assets**

Non-marital assets commingled with marital assets may lose their separate nature and be subject to equitable distribution. *Pfrenge v. Pfrenge*, 976 So. 2d 1134 (Fla. 2d DCA 2008). Occurs when non-marital property becomes so intermingled with marital property that the non-marital property is no longer traceable, and is incapable of being specifically identified as non-marital property. Burden of proof is on party seeking an award of the asset. *Fla. Stat. § 61.075(6)(a)(3)*. Cash: instantaneously commingled.

### **E. Marital Assets and the Gift Presumption**

Gifts from one spouse to another during the marriage should be treated as marital assets subject to equitable distribution. *Fla. Stat. §61.075(6)(c)*. The burden of proof to overcome the gift presumption shall be by clear and convincing evidence. *Fla. Stat. §61.075(6)(a)(4)*.

### **F. Factual Findings Required**

In any contested dissolution action wherein a stipulation and agreement has not been entered and filed, any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment based on competent substantial evidence with reference to the factors. *Fla. Stat. §61.075 (3)*. Absent factual findings, a trial court's decision may be overturned. *Jalileyan v. Jalileyan*, 4 So.3d 1289 (Fla. 4th DCA 2009); *see also Thomas v. Martinello*, 196 So.3d 1279 (Fla. 4th DCA 2016).

## **IX. Distribution Governed by Agreement**

Depends on language of the agreement. Determined on a case by case basis.

## **X. Distribution of Particular Types of Property**

### **A. Credits and Setoffs Pertaining to the Sale of the Marital Property**

A party is not entitled to any credits or setoffs upon the sale of the marital home unless, the parties' settlement agreement or final judgment equitably distributing assets or debts specifically provides for certain credits or setoffs. *Fla. Stat §61.077*.

### **B. Distribution of Retirement Plans Upon Dissolution of Marriage**

All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital assets subject to equitable distribution. *Fla. Stat §61.076*. Qualified Domestic relations Order ("QDRO") may be necessary.

### **C. Qualified Domestic Relations Orders ("QDROS")**

QDROs entitle a spouse, former spouse, child or other dependent to receive benefits payable under the participant-spouse's ERISA retirement plan. Employee Retirement Income Security Act of 1974 ("ERISA") plans are divisible.

### **D. QDRO Tax Implications**

The alternate payee, rather than the plan participant, incurs the tax liability for the distribution in the tax year in which it is received. Benefits must be included in the gross income of the alternate payee, unless they are deemed to be tax-free because of the alternate payee has "rolled-over" the benefits to another qualified plan.

## **E. Determining Portion of Pension Subject to Equitable Distribution**

Only pension benefits accrued during the marriage are subject to equitable distribution. **Fla. Stat §61.076(1)**.

## **F. Individual Retirement Accounts**

IRA accrued during the marriage are subject to equitable distribution. Beneficiary designations: IRA designation prevails over a contrary MSA.

## **G. Military Retirement Benefits:**

Subject to equitable distribution. **Fla. Stat §61.076**. However, **see Brathwaite v. Brathwaite**, 58 So.3d 398 (Fla. 1st DCA 2011) (trial court in dissolution of marriage action could not, as part of its equitable distribution of marital assets, award wife half of husband's military retirement benefits; a portion of such benefits accrued before the parties' marriage, and only the portion that accrued during the marriage was a marital asset subject to equitable distribution.)

## **H. Disability Benefits**

Disability benefits are not a marital asset subject to equitable distribution as they are considered personal to the employee. **Kay v. Kay**, 988 So. 2d 1273 (Fla. 5th DCA 2008). However, may be considered for purposes of alimony

## **I. Life Insurance**

Includes "cash value". Term policies with no cash value are not subject to equitable distribution. **See Mondello v. Torres**, 47 So. 3d 389 (Fla. 4th DCA 2010).

## **J. Leave Balances**

Case law is unclear. Compare **Purpura v. Kelly**, 913 So.2d 110 (Fla. 1st DCA 2005) (full amount of husband's accrued leave time was a marital asset subject to equitable distribution in dissolution of marriage proceeding, and thus wife was entitled to award of one half of the value of such leave time when such amounts became payable to husband) with **Abdnour v. Abdnour**, 19 So.3d 357 (Fla. 2d DCA 2009) (husband's sick leave was not marital asset subject to equitable distribution.)

## **K. Social Security Replacement Plans**

At least some social security replacement plans are distributable as marital assets. **Johnson v. Johnson**, 726 So.2d 393 (Fla. 1st DCA 1999).

## **L. Profit Sharing Plans**

May be subject to equitable distribution. Court must consider six factors under **Moon v. Moon**, 594 So. 2d 819 (Fla. 1st DCA 1992)

## **M. Marital Corporation**

A corporation should be added as a party to the dissolution of marriage proceedings if transfer of the corporate assets is requested by a party. A corporation is subject to equitable distribution but if it is not joined, the Court does not have the power to order a transfer of corporate assets. **Keller v. Keller**, 521 So.2d 273 (Fla. 5th DCA 1988). Valuation of corporation must also be considered.

## **N. General Partnerships:** Uniform Partnership Act must be considered

**O. Goodwill Issues:** Only enterprise goodwill and not person goodwill may be included in an equitable distribution scheme. *Held v. Held*, 912 So.2d 637 (Fla. 4th DCA 2005).

**P. Book of Business**

Caselaw differs. *See Alpha v. Alpha*, 885 So.2d 1023 (Fla. 5th DCA 2004) (Evidence was sufficient to support finding that no part of former husband's insurance business was a pre-marital asset, although his book of business commenced eight years before marriage, he was servicing 2,039 policies at that time, and he was servicing 2,430 policies at time of dissolution of marriage.)

**Q. Distribution of Stock Options Upon Dissolution of Marriage**

Stock options are marital assets subject to equitable distribution. *Griffing v. Griffing*, 722 So.2d 979 (Fla. 5th DCA 1999). *See* Reuben A. Doupe, Ruberg, Parry, and the Classification of Unvested Stock Options, 81 Fla. B.J. 10 (2007) for steps for calculation of the marital and non-marital portions of employment-related stock options.

**R. Worker Compensation Benefits/Personal Injury Claims:** *See Weisfeld v. Weisfeld*, 545 So. 2d 1341 (Fla. 1981) for outline on how to address.

**XI. Treatment of Appreciation of Assets**

Marital assets and liabilities includes the enhancement in value and appreciation of non-marital assets resulting either from efforts of either party during the marriage or from the contribution or expenditure thereon of marital funds or other forms of marital assets, or both. *Fla. Stat §61.075(6)(a)1(b)*. Examples: real estate, investment accounts, business interests. *See Kaaa v. Kaaa*, 58 So.3d 867 (Fla. 2011).

**XII. Tax Issues**

**A. Tax considerations of assets as part of equitable distribution**

Purpose is to achieve the most equitable result in distributing assets upon dissolution. If taxable event occurs due to equitable distribution, court must take into account resulting tax consequences.

**B. Consideration of Capital Gains Tax As Part of Valuation of A Business**

Party who wants trial court to consider tax consequences must present evidence of tax consequences.

**C. Accounts receivable tax issues:** May be considered a marital asset.

**XIII. Dischargeability of Debt in Bankruptcy**

See Bankruptcy Abuse Prevention And Consumer Protection Act of 2005. Domestic Support Obligations ("DSO") are not dischargeable. Distinction between Chapter 7 and Chapter 11 Bankruptcies as to what is included as DSO.

## **2016 EQUITABLE DISTRIBUTION CASES**

***Keurst v. Keurst***, No. 2D14-6028, 2016 WL 6036681 (Fla. 2d DCA October 14, 2016): In reversing the lower court, the District Court of Appeal, Second District, held that the trial court was required to consider statutory factors in ordering unequal distribution of proceeds from sale of marital home and in ordering equitable distribution of condominium owned by parties.

***Wilkinson v. Wilkinson***, No. 5D14-4285, 2016 WL 6023919 (Fla. 5th DCA October 14, 2016): On grant of clarification, the District Court of Appeal held that inconsistencies and computational errors in trial court's oral and written rulings warranted reversal of the equitable distribution portion of the judgment.

***Lostaglio v. Lostaglio***, 199 So.3d 560 (Fla. 5th DCA 2016): Reversed and remanded to lower court for reconsideration of the equitable distribution scheme in light of the trial court's failure to credit husband with the \$15,000 partial distribution made to wife during the dissolution proceedings, the failure to account for the \$48,000 balance on the marital home's equity line of credit, and the failure to relieve wife of the liability associated with the marital home.

***Sweeney v. Sweeney***, 41 Fla. L. Weekly D1997 (Fla. 2d DCA August 31, 2016): Reversed and remanded for the lower court to strike provision which awarded wife twice applied marital tax credits and adjust the equitable distribution scheme accordingly.

***Shaver v. Shaver***, 41 Fla. L. Weekly D1945 (Fla. 2d DCA August 24, 2016): Substantial competent evidence existed to support trial court's determination that \$3,550,000 of the value of husband's business represented personal goodwill that constituted nonmarital property not subject to equitable distribution.

***Ridings v. Ridings***, 198 So.3d 1128 (Fla. 4th DCA 2016): It is reversible error for a trial court in divorce action to simply indicate that marital liabilities are to be equally divided without identifying each specific liability and without identifying which spouse is responsible for each.

***Nguyen v. Nguyen***, 41 Fla. L. Weekly D1865 (Fla. 1st DCA August 11, 2016): Remand was required with regard to trial court's equitable distribution of former husband and wife's rental income; distribution did not account for evidence of expenses associated with rental properties, trial court's order provided no explanation for certain allocations, and some of trial court's figures for rental income were incorrect.

***Buckalew v. Buckalew***, 197 So.3d 148 (Fla. 4th DCA 2016): The lower court's equitable distribution scheme was an abuse of discretion based upon three errors; (1) court failed to clearly identify any of the assets and liabilities in the equitable distribution scheme as marital or non-marital; (2) court failed to ascribe a value to two other real estate parcels; and (3) there was no competent substantial evidence in the record to corroborate the trial court's valuation of property, credit card debt and student loan debt.

***Sherlock v. Sherlock***, 199 So.3d 1039 (Fla. 4<sup>th</sup> DCA 2016): When a party receives an asset in equitable distribution that will result in immediate investment income, that income should not be excluded for purposes of determining alimony.

***Holaway v. Holaway***, 197 So.3d 612 (Fla. 5th DCA 2016): Wife was not entitled, as part of equitable distribution in dissolution proceeding, to post-valuation profits from husband's ownership interests in corporations that operated restaurants, where income generated after valuation was passive.

***Serbousek v. Lucas***, 191 So.3d 539 (Fla. 5th DCA 2016): Trial court's failure to make a finding on the value of the debts, such that appellate court could not determine whether trial court effectuated its stated intent to distribute the marital assets equally required remand for clarification of factual findings.

**Mills v. Mills**, 192 So.3d 515 (Fla. 5th DCA 2016): Loan obtained by husband against marital home was a nonmarital liability of husband where husband admitted that he forged wife's signature on application.

**Ketcher v. Ketcher**, 188 So.3d 991 (Fla. 1st DCA 2016): Trial court had authority to order husband to obtain and maintain life insurance policy to secure court-ordered obligation to pay joint credit card debt as part of distribution of marital assets and debts in divorce proceeding. However, the amount of the life insurance policy must be related to the extent of the obligation being secured.

**Witt-Bahls v. Bahls**, 193 So.3d 35 (Fla. 4th DCA 2016): Appreciation of stock of company for which husband worked and that husband had purchased prior to marriage was not due to active effort and, therefore, was not a marital asset subject to equitable distribution upon dissolution of marriage.

**Abramovic v. Abramovic**, 188 So.3d 61 (Fla. 4th DCA 2016): Trial court could not order wife to make an equalizing payment to husband as part of equitable distribution of marital assets and liabilities upon dissolution of marriage as record revealed wife did not have ability to make such a payment.

**Neiditch v. Neiditch**, 187 So.3d 374 (Fla. 5th DCA 2016): Wife's testimony from her personal knowledge as to premarital balance constituted competent, substantial evidence that \$15,000 of wife's retirement fund was a nonmarital asset, and amount in wife's retirement fund in excess of the premarital \$15,000 would be treated as a marital asset.

**Miller v. Miller**, 186 So.3d 1128 (Fla. 4th DCA 2016): Reversed for trial court's reconsideration of equitable distribution of the parties' assets and liabilities which did not include a specific finding that the former wife engaged in intentional misconduct during the dissolution proceedings which resulted in the dissipation of marital assets.

**Marquez v. Lopez**, 187 So.3d 335 (Fla. 4th DCA 2016): Trial court was required to make findings as to the value of vehicles, contents of marital home, and business as there was some conflict in valuations presented at trial.

**Coleman v. Bland**, 187 So.3d 298 (Fla. 5th DCA 2016): Reversed and remanded to trial court for reconsideration of the proper disposition of marital portion of husband's pension where over the course of ten years, the payout of the marital portion of the pension was not of a de minimis value.

**Pierre v. Pierre**, 185 So.3d 1264 (Fla. 4th DCA 2016): Without the appropriate findings, District Court of Appeal, Fourth District, was unable to determine whether a reasonable person could conclude that the trial court's disposition of assets and liabilities was not arbitrary, fanciful, or unreasonable. Reversed and remanded for trial court's failure to make specific written findings regarding the valuation of the assets and liabilities it distributed.

**Salituri v. Salituri**, 184 So.3d 1250 (Fla. 4th DCA 2016): On equitable distribution, trial court made numerous errors including (1) trial court failed to value all assets and debts; (2) trial court incorrectly found that husband's corporation was not a marital asset; (3) trial court failed to take into consideration \$15,000 car lien; (4) trial court erroneously ordered property to be sold when husband's father owned 50% of the unit; and (6) trial court erroneously ordered partition of the marital home depending on outcome of foreclosure appeal and no pleading seeking partition.