

750 ILCS 5/503: Disposition of Property and Debts

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(a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

It is clear that inherited property, and property acquired in exchange for inherited property, is non-marital. Gifts can be more difficult to classify. Interspousal transfers of property may be gifts, or they may be simply a change in the title. The court is required to determine whether the transfer was accompanied by donative intent. Courts have found such transfers to be gifts when there is clear and convincing evidence overcoming the presumption that property acquired during the marriage is marital¹. When there is a valid reason for the transfer however, courts have found that the transfer was not intended to irrevocably gift the property to the other spouse. For example, if property is transferred to a spouse as part of an estate plan the property remains marital². Intent to irrevocably transfer the property to the spouse is necessary to overcome the presumption that property acquired during the marriage is marital.

Property transferred from a parent to a child is presumed to be a gift, but when such transfer occurs during the marriage the presumption that "all property acquired during the marriage" is marital cancels out the first presumption, and the court is free to determine whether the transfer was a gift to the marriage or to the individual, again considering the intent at the time of transfer.

(2) property acquired in exchange for property acquired before the marriage;

If title to the pre-marital property is maintained separately, then the property acquired remains non-marital. The party claiming the property is non-marital must prove by clear and convincing evidence that the new property was acquired in exchange for non-marital property.

(3) property acquired by a spouse after a judgment of legal separation;

¹ IRMO Weiler (1994), 258 Ill. App. 3d 454

² IRMO Davis (1991), 215 Ill. App. 3d 763

So we know that a legal separation stops the accumulation of marital property, even though the parties are still “married.” If however the parties are merely physically separated, any property acquired by either party during that separation is still marital property. This is true regardless of the length of separation³, though when dividing the marital estate the court may consider the “contribution” of each to the acquisition of that property during the separation.

(4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement;

A pre-marital agreement can designate certain property as non-marital. The procedural and substantive requirements of such an agreement are contained in the Premarital Agreement Act 750 ILCS 10/1. The drafting of such an agreement should meticulously conform to the statute. Since the agreement contemplates the marriage of the parties, the marriage is considered sufficient consideration for the agreement and no other specific consideration is required.

A post-nuptial agreement must be analyzed differently, but the case of Tabassum v Younis (2007) 377 Ill. App. 3d. 761 found that “forebearance” from filing a divorce case constituted sufficient consideration to support the agreement to give the residence to the wife as her non-marital property.

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

The exception here is primarily for the purpose of damage or injury claims, where one of the parties is the insured or suffers damage which is compensated initially by the marital estate.

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

This is the essential definition of non-marital property. It specifically identifies as non-marital all property acquired before the marriage. The statute has also eliminated the

³ IRMO Morris (1994) 266 Ill. App. 3d 277, where the parties were separated 20 years out of the 22 year marriage, and Husband won the lottery during the 20 year separation. When the trial court awarded the winnings to the husband because of the long separation the appellate court reversed, finding the property was still marital.

exception for property acquired in contemplation of marriage. Property acquired before the marriage, but “in contemplation of marriage” now remains non-marital property.

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

Reimbursement is the preferred mechanism for resolving issues as to the classification of property. As detailed in subsection (b), reimbursement can be made from the marital estate, or by a lien against non-marital property.

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section;

Again, the statute requires reimbursement rather than a change in the classification of the property. Issues may arise when a spouse is employed by a non-marital business, and the allegation is made that the value of that non-marital business has increased substantially during the marriage as a result of the efforts of the spouse as an employee during the marriage. The analysis should start with whether that spouse was adequately compensated during the marriage for those efforts. If so, the appreciation in the value of the non-marital business may remain non-marital.

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

This section deals with income from non-marital property. Again, the issue of whether the income derived from non-marital property during the marriage continues to be classified as non-marital may depend upon the quantity and quality of any personal efforts of a spouse during the marriage. Is the spouse otherwise adequately compensated? Is the effort substantial? Does the spouse simply cash the rent checks received from the non-marital rental property, or does he or she make all repairs, visit the property daily, devote substantial uncompensated efforts to the non-marital property?

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

This is a change in prior law; in the past “contemplation of marriage resulted in the property being marital property.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.

This is the responsibility of counsel to enforce. You are entitled to receive from the court the identification, classification and valuation of all of the assets (the significant ones) in a divorce case. But it is also your responsibility to present the court with evidence as to each of those elements.

One of the many heated battles in divorce is the division of property. In the absence of an agreement, courts must decide what property constitutes marital property and non-marital property under subsection (a). Non-marital property is assigned to the appropriate party and then marital property is equitably divided amongst the parties.

What type of property is marital property under subsection (b)?

Subsection (b)

(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes, non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift.

If any property is acquired during the course of the marriage, it is presumed to be marital. The burden rests on the side arguing that it is non-marital and this burden must

be overcome by a standard of clear and convincing evidence. Prior to the January 1, 2016 revisions of the IMDMA, there was no delineated standard of proof. The “clear and convincing” standard was added to the law at that time.

Ways to argue that a piece of property is non-marital is to make a claim that it falls within the exception of subsection (a) or to make a showing that property was co-owned for an estate planning or tax purpose. There is a catch-all “for other reasons” but there still needs to be some strong evidence that the property was not a gift to the other spouse.

(b)(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans and accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment for dissolution of marriage or legal separation or declaration of invalidity of marriage are presumed to be marital property. A spouse may overcome the presumption that these pension benefits are marital property by a showing through clear and convincing evidence that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

The division of retirement account benefits is treated the same way as the division of any other type of marital property in subsection (b)(1) with a clear and convincing standard. The exception of subsection (a) still apply, however, we no longer see the exception of estate planning. The division of the acquired benefit in the plan is done through a QDRO and subject to the Illinois Pension Code.

(b)(3) For purposes of distribution of property under this Section, all stock options and restricted stock or similar form of benefit granted to either spouse after the marriage and before a judgment for dissolution of marriage or legal separation or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that stock options or restricted stock or similar form of benefit were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options and restricted stock or similar form of benefit between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options and restricted stock or similar form of benefit may not then be determinable and that the actual division of options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time that the option is exercisable.

Stock ownership is presumed to be marital property as is other type of property acquired during the course of the marriage in subsection (b)(1) or retirement accounts in subsection (b)(2). The stock can be shown to be non-marital if it fits within one of the exceptions of subsection (a). Recognizing that the value of stocks/options may be difficult to determine, the Court provides guidance as to how to arrive at an appropriate division.

(b-5) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term, life, universal life, or other form of life insurance policy,

and whether or not that value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for the premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

Life insurance policies, and the benefits thereof can be deemed marital property and are subject to division, including an affirmative obligation to pay for a plan's premium.

If property is deemed to be marital, then the Court must allocate the assets in an equitable manner.

Subsection (c)

(c) **Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:**

(c)(1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

When this occurs, the contributing estate has to be reimbursed by the estate receiving the contribution. The factors giving rise to a reimbursements are as follows:

- the contribution is retraceable by clear and convincing evidence;
- was not a gift; or
- in the case of a contribution of personal effort of a spouse to non-marital property, the contribution must be significant and result in substantial appreciation on the non-marital property.

The scenario most often seen in divorce cases are when a non-marital contribution is made into the marital estate. Generally, a spouse will contribute non-marital resources into a marital account. Without good record keeping the non-marital money loses its identification and will be deemed marital in nature. Good record keeping will overcome this but the burden is "clear and convincing."

(c)(2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

The reverse is, a contribution from marital into non-marital is also addressed by the statute. Marital property can be transmuted into non-marital property when a non-marital asset is substantially improved, or acquired with marital money. The scenario most often seen in divorce cases is one where one spouse purchased a home prior to the marriage, but shortly after the marriage, the parties move in to the residence and eventually pay off the mortgage together- with joint efforts and marital funds.

Subsection (d)

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It shall also divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

Illinois is not a community property state. Property is divided in a manner that is equitable, not necessarily equal⁴, and according to the statute, in a "just proportion". While the Court is to explain its allocation, it is not required to delineate which factors

⁴ *In re Marriage of Walker*, 386 Ill.App.3d 1034 (Ill. App. 4th Dist. 2008) (affirming 59.7/40.3 division).

weighed more heavily nor why in its explanation.⁵ Either party's wrongdoing, morals, ethics, or blameworthiness is not to be considered when the Court makes its allocation. Rather the Court is to look to the following factors:

(1) each party's contribution to the acquiring, preservation, increase or decrease in the value of the marital or non-marital property, including (i) any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501; (ii) contribution of a spouse as homemaker or to the family unit; and (iii) whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage.

A party's contribution to property is necessarily considered, whether it is monetary or working as a homemaker so that the other spouse could obtain an education, advance in their career, etc. The Courts tend to view a marriage like a business partnership in the sense that it doesn't matter what skill a particular partner contributes, rather, together they for the good of the whole ensure that the entity prospers. A stay at home spouse may clean the home, rear the children, handle the bills, etc. There is no formula for determining what a "homemaker's value" is worth. Rather it is based on the particular facts and circumstances of that case.

In addition to what a party contributed to the marriage, what they have spent from the marital funds is also considered a factor.

Prior to when the revised IMDMA came in to effect in January of 2016, subsection (iii) did not exist. This language was added in order to ensure that a spouse did not suddenly begin to contribute to property for the sole purpose of acquiring more during the termination of the marriage.

(2) the dissipation by each party of the marital property, provided that a party's claim of dissipation is subject to the following conditions;

Dissipation is when one spouse wastes marital money on a non-marital purpose. Dissipation is covered in greater details in subsection (d) of the statute. Courts do not like to go back further than three years, and they certainly will not go back more than five years, because it is assumed the other party knew or should have known the dissipation was occurring and/or it was prior to the breakdown of the marriage.

For example, if your spouse has a shopping addiction and you've been married twenty years, you cannot go back twenty years and allege they have been engaging in dissipation the entire time and you now take issue with it. The purpose of this provision

⁵ *Id.* at 1042-44.

is to stop parties from irresponsibly spending marital funds after they have checkout of the marriage for their own purposes.

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) a certificate or service of notice of intent to claim dissipation shall be filed with the clerk of court and be served pursuant to the applicable rules'

(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage.

A relatively recent development that practitioners must necessarily be aware of is that if you are going to make a dissipation claim, you need to serve proper and timely notice. It cannot be alleged for the first time at trial. Essentially, you should be aware of the following:

- Formal notice of the claim must be filed with a Certificate of Service, at a minimum, sixty days prior to trial or thirty days after the close of discovery (whichever is later)
- That notice should include:
 - o When the marriage began to breakdown.
 - o Identification of the marital property alleged to have been dissipated.
 - o When the dissipation occurred.

(3) the value of the property assigned to each spouse;

The Court will take into account ALL of the property designated to each spouse. This means that a spouse's non-marital property will be factored into the equation of what division of marital property is equitable. For example, the Court has the discretion to decide that if one spouse has received a substantial inheritance, they may be saddled with a greater portion of the marital debts and a lesser allocation of marital property.

(4) the duration of the marriage;

This factor is a given. Spouses who may have been homemakers in a long-term marriage, and are now at a retirement age with little education, have lost greater opportunities in the workforce and have lesser earning capacity moving forward. In the converse, a low-income spouse who has been married for just a few weeks to a wealthy spouse, should not be entitled to a large share of the wealthy partner's property for an

extremely short-term marriage. They did not lose that many opportunities, nor did they likely contribute a great deal to the financial earnings of the marriage.

(5) Relevant economic circumstances of each spouse

The Court will compare the economic circumstances of a spouse when determining the equitable distribution of marital property and debt. By way of example, when advocating on behalf of the economically disadvantaged spouse, who has primary physical care of the children, one might highlight the necessity of awarding that spouse the marital residence and/or the only family vehicle, in order to care for the children.

(6) Rights and obligations from prior marriages

This primarily relates to prior orders for child support, maintenance, college contribution and the like. Certainly, prior court-ordered financial obligations for one spouse will affect that spouse's ability to meet new financial obligations, therefore the courts rightly consider same.

(7) Prenups/Postnups

Prenuptial and postnuptial agreements are enforceable in Illinois. And as long as a contracted agreement between the parties is valid, not unconscionable and enforceable, a court will consider the provisions pertaining to each spouse's ownership of marital property upon a divorce.

(8) Age, health, occupation, employability, etc.

Similar to the arguments made in hearings on maintenance, courts will consider factors enhancing or impeding a spouse's ability to earn income. In all fairness a spouse who has a work history of relatively lower paying jobs, or one who was primarily a homemaker might be able to make an argument that he or she should receive more of the marital assets because their chances of being able to earn income in the future are substantially lower than the other spouse, whereas the other higher-earning spouse, will, overtime, be able to recoup.

(9) the custodial provisions for any children;

When there are minor children, the court has discretion to adjust the distribution in amount or type of award. Since the parent having "custody" (or primary allocation of parenting time) may have increased support obligations, the court may increase the property awarded to that spouse and award that spouse a greater share of the marital property. When there are minor children the court typically considers the award of the marital residence to the party having a greater allocation of parenting time. This would give the children the opportunity to remain in the community and environment with which they are most familiar, and thereby minimize the disruption to the children caused by the divorce. If it is impossible or impractical to award the residence outright to the "custodial" parent, the court may enter a contingent award, allowing that parent to

remain in the residence for a fixed period of time, or until a child reaches a certain age, often coinciding with a change in schools.

(10) whether the award is in lieu of or in addition to maintenance;

In many cases it is impossible to separate maintenance from the property award. In principle, courts should attempt to structure a judgment to promote finality and separate the parties as completely as possible. To accomplish this end a court may award a disproportionate share of the marital property to the party that has a lesser earning potential, or has contributed to the marriage in non-monetary ways. But it appears that the philosophy of maintenance awards evolves over time and is often location-dependent. The changes to the maintenance statute evidence a clear preference for maintenance awards today. While in certain cases, given the length of a marriage, the age of the parties, and the size of the marital estate it will be appropriate to substitute a greater percentage of income-producing or other property in lieu of maintenance, in most cases the maintenance statute will be utilized and the division of marital property will be in a narrower range.

(11) the reasonable opportunity of each spouse for future acquisition;

The relative earning capacity of the parties is an important factor in deciding the distribution of marital property, although again this factor is closely intertwined with maintenance. In the quest for finality (in an appropriate case) an award of the lion's share of the marital estate to a spouse with lesser earning potential can offset the ability of the other spouse to more quickly accumulate future assets. Often one spouse has the potential to "earn back" assets awarded to the other spouse over time. In such a case a court may consider awarding a larger share of the marital estate to the party with less opportunity for future acquisition.

(12) the tax consequences of the property division;

The recent changes to the statute have put to rest the long-standing debate about whether a court could order "unallocated support" but the consideration of tax consequences in the division of property remains. The award of pre-tax assets to one party (usually retirement funds) must take into account the tax consequences attached to that property. Tax consequences that are self-created, or are not required by the judgment, may be treated differently however. If one party unnecessarily liquidates a retirement account to offset a cash award to the other party in a judgment, the tax consequence of that transaction is voluntary. Of course, counsel and the court should ensure that whenever possible transfers of property in a divorce are non-taxable.