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Assets Exempt From Equitable Distribution Upon Divorce

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Parties often have assets before entering into a marriage or acquire exempt assets such as gifts or inheritance during the marriage. There are many different scenarios concerning the disposition of premarital and exempt assets upon divorce.

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Family Court is a court of equity. The results at time of divorce may differ from the parties' expectations.

If the couple has a prenuptial agreement these pre-marital assets will be clearly identified. Terms will be written usually to exempt them along with interest, passive gain or income. These will be exempt from equitable distribution upon divorce.

If there is no prenup and the asset is co-mingled in most but not all cases, and put into jointly titled property, it can lose all or part of its exemption from equitable distribution.

If the asset principal is never co-mingled, it will remain exempt from equitable distribution except; however, income earned off this exempt asset may be considered for calculation of child support or alimony.

The party who claims that the property acquired during the marriage is exempt from equitable distribution has the burden of proving it. PROOF OF INTENT is required. This concept of intent sometimes requires testimony in court.

Weiss v. Weiss, 226 N.J. Super. 281, (1988), was a case in which a house was purchased in the husband's name before marriage and title was never changed. Upon divorce, the court ruled notwithstanding the title that it was subject to equitable distribution. The evidence showed that there was in implied contract based on their statements to each other during their engagement and the wife participated in its upkeep before and after the date of the marriage.

In *Winer v. Winer,* 241 N.J. Super. 510, 527 (App. Div. 1990), a condominium bought prior to the marriage by defendant husband with money from his inheritance but which was occupied by the couple for approximately a year and one

half after the marriage was found to be purchased in specific contemplation of marriage and upon divorce was subject to equitable distribution.

An asset earned during cohabitation is not subject to equitable distribution but can be claimed under the theory of unjust enrichment.

In *Thiem v. Aucoin-Thiem*, 227 N.J. 269 (2016), the court ruled that part of the husband's Closing Bonus earned during the parties' cohabitation was subject to constructive trust based upon Aucoin's claim of unjust enrichment. During their cohabitation, the couple had a daughter. Thiem worked extraordinarily long hours while Aucoin cared for their child. Thiem acknowledged her sacrifice during the cohabitation. They married and divorced fourteen months later. The trial court granted equitable distribution of the marital portion of the Closing Bonus. The wife claimed that she should also get a portion of the Closing Bonus earned during their cohabitation. She based her claim upon unjust enrichment. To prove a claim for unjust enrichment a Plaintiff must demonstrate that the Defendant received a benefit and that it would be unjust for the Defendant to retain that benefit without compensation to the Plaintiff. In the event that the court finds unjust enrichment it may impose a constructive trust in the asset where necessary. Aucoin-Thiem's efforts in raising their child during their cohabitation enabled Theim to concentrate on his career. Aucoin was entitled to a percentage of Theim's Closing Bonus.

In another example, *Dotsko v. Dotsko*, 24 N.J. Super. 688, a husband received two separate gifts of $10,000 each on December 28, 1985. One gift was from his father, the other from his aunt. His father then gave him another gift of $10,000 on January 1, 1986. He deposited the first two gifts into a joint checking account shared with his wife. He withdrew the exact funds ($20,000 plus interest) eighteen days later and deposited all of the gifts in a CD in his own name. The trial court found that the $20,000 was an interspousal gift because he deposited the money into a joint account with his wife. This was reversed.

N.J.S.A. 2A:34-23 provides that: Property real, personal or otherwise legally or beneficially acquired during the marriage by either party by way of gift, devise or intestate succession shall not be subject to equitable distribution except that interspousal gifts shall be subject to equitable distribution.

Proof of a gift requires unequivocal donative intent on the donor's part, actual or symbolic delivery of the gifts subject matter, and the donor's absolute and irrevocable relinquishment of ownership. *In re Dodge*, 50 N.J. 192, 216. See *Pascale v. Pascale*, 113 N.J. 20, 29 (1988) citing from *Dotsko v. Dotsko*, 244 N.J. Super. 668, 674 (1990).

The trial judge in *Dotsko* relied only upon the fact that the two gifts were placed in a joint account by the husband and found this was an interspousal gift. On appeal, the court concluded that monies deposited into a joint account for eighteen days is insufficient to overcome the evidence of the husband's and grantor's intent. The father's two separate $10,000 gifts made one in 1985 and the other in 1986 was made to avoid gift tax consequences for exceeding the limit for a gift in one year to one person. He could have given two gifts of $10,000 to husband and wife each separately in 1985. This shows that only one gift was intended for the married son. The son waited until he got the second gift in the next year. When he withdrew the money from the joint checking account and opened up his CD account, he withdrew the exact amount of interest earned on the money. He met his burden with evidence showing that there was no donative intent. He used the joint account to only temporarily hold the money. He did not intend to make an interspousal gift by merging cash and checks in the joint account over the holidays while waiting for the new gift in the new year.

The value of exempt gifts also can exclude income and interest for the purposes of equitable distribution. See *Wadlow v. Wadlow*, 200 N.J. Super. 372 (App. Div. 1985). Here, the wife's parents established a security account that was never intended to be marital property. The wife's father managed to increase its value substantially. The original amount was not only immune from equitable distribution, the increase derived was also immune.

> … the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse. *Painter v. Painter*, 65 N.J. Super. 196, 214.

The interest on passive exempt assets is not subject to equitable distribution. *Scavone v. Scavone*, 230 N.J. Super. 482.

In another case, during the course of a divorce, a husband received an inheritance from his aunt. He used the money to purchase a house for himself that was twice the value of the marital home. The court imputed interest on the inheritance because the husband invested in a non-income producing asset and the purchase increased his lifestyle. *Stiffler v. Stiffler*, 304 N.J. Super. 96. *Stiffler*, Id., and *Aronson v. Aronson*, 245 N.J. Super. 354, are several cases in which income from an asset, exempt from equitable distribution, may be considered for an alimony award. In *Stiffler*, the Court held that although Plaintiff's ex-husband could purchase a new home with his inheritance to replace the marital home, in calculating alimony for Defendant ex-wife the court would impute to him the interest income he would have earned on that portion of the inheritance used to buy a home more than twice the value of the marital home as that purchase increased his lifestyle.

The problem of how much income should be imputed has been the subject of Appellate review. In *Overbay v. Overbay,* 376 N.J. Super. 99, the issue involved amount of interest the court imputed based on a 7.9 percent rate of return on the wife's inheritance of $1.14 million. On remand the trial court was to determine whether it was appropriate to impute additional income from the wife's inheritance comparable to a prudent use of investments and then decide the reasonable amount of additional income to be imputed to her.

Some relevant comments that followed from the Appellate Division were that in imputing income on investments, there should be a prudent balance between investment risk and investment balance and that one should not risk losing her inheritance or need to invade principal.

Miller v. Miller, 160 N.J. 408, was a post-judgment alimony modification case in which the husband became ill, was terminated from his job, and could not pay the high alimony originally agreed to. The court reduced his alimony and ruled that income should be imputed from the husband's investments based upon the average five-year historical return on A-rated, long-term capital bonds. The court listed several concepts bearing on its holding.

> 7. That it will be difficult for the courts to compute income from different types of investments is no reason to bar the value of that claim if it is otherwise established. *Miller*, Id.

In *Aronson v. Aronson*, 245 N.J. Super. 354 (1991), a defendant husband made a post-judgment application based on changed circumstances to reduce his alimony obligation to his former wife. He failed to meet his burden of establishing that he made a meaningful effort to improve his income status and his motion was denied.

A clause in the parties' settlement agreement stated, "there shall be no reduction in support to plaintiff should plaintiff become gainfully employed and defendant shall not apply for any reduction in support should such event occur." The judge read this to mean that this was a bar to considering Plaintiff's inheritance as a changed circumstance for purposes of modification of the agreement. The parties had not taken a position in this agreement as to Plaintiff's future inheritance.

The Appellate Court said there is "nothing about the Plaintiff's inheritance income which entitled it to insulation from a *Lepis* motion. The Trial Judge should make thorough analysis of the parties' financial circumstances in light of Plaintiff's receipt of inheritance income in an amount which exceeds Defendant's annual alimony payments and should determine the extent to which, if at all, this obvious change in Plaintiff's circumstances warrants a modification of Defendant's obligation."

In a particular case it is reasonable to impute income from all or part of an inheritance for child support. Children have the right to support from their parents at the level of the parents' standard of living to which they have grown accustomed. *Connell v. Connell*, 313 N.J. Super. 426. Here, interest income of 8%, obligor's income from an inheritance received by the father post-judgment, was ordered for the child support. The father received his inheritance, bought a house, a boat, and a vehicle, investing his inheritance in non-income producing assets. The wife moved for an increase in child support and for a college fund for the children. The husband moved for a reduction due to loss of employment. The trial court also erred by extrapolating the guidelines figures above the extreme income threshold at the time. The appropriate method was to apply the guidelines up to the threshold and the excess for a supplemental award upon consideration of the statutory factors listed in *N.J.S.A.* 2A:34-23. Currently the threshold is $187,200.00 net.

The reasoning in *Aronson* and *Stiffler* was applied in *Connell v. Connell*, 313 N.J. Super. 426 (1998), to include income from inherited funds. The court addressed investing in non-income producing asset:

> … the alimony statute does not prohibit a spouse from doing what he will with his inheritance. Indeed, the spouse can go and lose it all at the racetrack… a matrimonial court may look to an inheritance, and its potential to earn income, in its calculation of an award of alimony. If this were not so, future litigants would have a perfect blueprint for evading *Aronson*, Id. At 102, citing in *Connell* at 433.

When an interest percent is imputed, the interest figure must have some relationship to an established investment alternative. The record in *Connell* had failed to provide a sufficient basis for the use of an 8% interest rate.

Another source of potentially exempt income is a Trust fund which can be considered for alimony and child support if the beneficiary has control over access to the Trust funds. If the beneficiary has no ability to independently take funds from the Trust, no matter the value of the Trust, it cannot be included for calculating alimony or child support. Where grantors created a Trust stating that the beneficiary shall not be permitted under any circumstances to compel distributions of income and/or principal prior to the time of final distribution, the Trust money is not available for child support or alimony calculation. *Tannen v. Tannen*, 416 N.J. Super. 248.

The Court will not substitute its discretion for what the grantors have stated in the Trust.

> To the extent that income is generated by a dependent spouse's inheritance or by any other asset, that income is crucial to the issue of that spouse's ability to contribute. This is true whether the spouse chooses to actually receive the income or whether, at his or her option, it is plowed back into the inheritance. The issue is not the actual receipt of the funds but access to them. So long as the spouse has the ability to tap the income source,… whether he or she actually obtains the cash in hand is inconsequential. *Aronson v. Aronson*, 245 N.J. Super. 354 at 364-365 citing from *Tanner* at 268.

In conclusion, attorneys must unravel a variety of situations affecting assets and income that can influence the future standard of living of the parties and their children upon divorce.

Further, the imputed rate of return on non-income producing assets needs a justifiable basis and may require an expert's opinion.

WHO GETS WHAT?

1. If a client sold a pre-marital business and never co-mingled income and assets but invested the proceeds in the stock market and lost, it may not be dissipation of marital assets but what about lost income for alimony or child support?

2. If a husband deposited pre-marital funds into a joint account and it was left for over 15 years, but the wife never knew about it, is this exempt from equitable distribution?

3. If a wife's parents gifted a marital home which was titled as tenancy by the entirety, does she have a right to offset the amount of the gift against her husband for equitable distribution?
4. The parties have no children before marriage and lived together in an apartment. They moved on the day of closing into a house purchased by the wife in her own name. The husband had poor credit. A year later they married and lived there as a family for six years. They are going to be divorced. The wife refuses to concede any equitable share to the husband. The husband claims he is entitled to an equal share.

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