

# Key Issues to Consider Prior to a Divorce: Alimony and Distribution of Marital Property

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## **Alimony**

Clients often inquire about whether they will be obligated to pay alimony after a divorce. The answer is always: it depends. Alimony is a periodic payment by one spouse to the other that is ordered during a divorce. Over the years, alimony has moved away from being viewed as “punishment” and instead is now seen as “rehabilitative”—its purpose is to allow each spouse to become fully independent and self-supporting. In addition, because alimony is viewed as a tool to make each spouse self-supporting, courts will generally not award alimony unless it is necessary.

Whether or not a court will award alimony depends on the circumstances of each case. What is clear, however, is that if the parties have executed a valid separation agreement that includes alimony or support payments, it will be honored by the courts. Thus, parties should be very careful to ensure that they are completely comfortable with the amount of support and how long they will be obligated to pay or receive this amount, before they sign a separation agreement. Often times, it may be more prudent to reserve this issue until the court process begins, to allow the judge to decide whether or not alimony will be awarded.

Maryland law recognizes a few types of “alimony.” First, “alimony pendente lite” may be awarded to cover the time after a spouse files for divorce until the divorced is finalized. The goal is to allow the parties to maintain their status quo until the court can decide the issue fully. It must be requested by one spouse after the divorce is filed. Second, “rehabilitative alimony” may be awarded by a court after the divorce to allow one spouse to become self-supporting. The payment is temporary (though courts, in rare cases, may order alimony for up to 10 years or more), and is tied to a period of time to allow the spouse to become independent, such as time to complete schooling, acquire a new job skill or relocate to a new community. Finally, “indefinite alimony” is an extremely rare award to a spouse that simply cannot become self-sufficient because of their age, illness or a disability. Even if the spouse can become self-sufficient, “indefinite alimony” can also be awarded if the spouse’s respective standards of living are “unconsciously disparate” because of an exceedingly large difference in incomes. In modern times, alimony is no longer limited solely to the wife; a husband may seek and receive alimony if the circumstances permit. Moreover, if alimony is awarded, the paying spouse retains the right to ask the court to reconsider the award in the future if circumstances have changed.

To determine whether alimony is appropriate and if so what amount should be awarded, courts consider a variety of factors, such as:

- The length of the marriage;

- Each spouse's respective financial situation during the marriage and after the divorce, i.e. income after the divorce, entitlement to retirement income, share of marital property, etc.;
- The time necessary to allow a spouse to become self-supporting, if necessary;
- Each spouse's respective standard of living during the marriage;
- Each spouse's monetary and non-monetary contributions during the marriage; and
- Each spouse's financial needs.

### **Distribution of Marital Property: What Property is Split and How?**

As part of a divorce, the marital property must be divided between the spouses. The division of marital property is a complex process, and depends largely on state law and the discretion of the divorce court. Because the division of marital property is often a complex process, it is always advisable for the parties to amicably work out the division of their property before the divorce, either informally or in a written separation agreement. Not only will each party have more control over the outcome, it will save time in court and reduce legal fees. If the parties cannot agree, the court will be charged with dividing the marital property, which requires three steps: (1) First, determine what is "marital property;" (2) Second, determine how much the marital property is worth; and (3) Third, determine each spouse's share of the property.

#### *What is Marital Property?*

With a few important exceptions, all property that is acquired during the marriage is considered "marital property." This includes houses, cars, bank accounts, pensions, retirement plans and accounts, furniture, appliances, and other tangible property. The most important exception is if one spouse receives a gift or inheritance specifically for them, it is not marital property, *provided* that the spouse does not, in turn, gift, title or otherwise share that inheritance with the other spouse. Similarly, if one spouse owns property before getting married and has not gifted, titled, or otherwise shared this property with their spouse after getting married, this property also remains non-marital property. Since there is a presumption that all property between the spouses is marital, in a divorce, the burden is on the spouse to show that the property is non-marital and should not be divided. This burden can be extremely difficult to meet if the property is commingled with other clear marital property, such as in a joint bank account. Finally, it should be noted that property may actually be partially marital property and partially non-marital property. For example, if a wife receives an inheritance but deposits it into a joint marital bank account, the husband may be entitled to a share of that inheritance. Similarly, if a husband owns a home before getting married, but pays off the mortgage using income earned while he is married, part of that home has become marital property, and the wife would have an interest in this home regardless of whether the wife is on the title or the mortgage.

#### *The Valuation of Marital Property*

During a divorce, the parties must provide current and accurate information about the marital and non-marital property, including its estimated current value. Each party will be able to review the estimated values and object to the values if they disagree. If one party fails to fully

disclose information about property they own, the other spouse may compel this information to be released through discovery.

### *Division of Marital Property*

After marital property has been identified and valued, the final process for the court is to fairly divide the property between the spouses. Many clients assume that all property will be split evenly, 50% to each spouse. While this is a good general rule, it is not necessarily always the case. Maryland has adopted an “equitable distribution” law, whereby the court has the power to review all of the circumstances in the case and determine what percentage of the marital property should belong to each spouse. Thus, unlike a “community property” state that must divide all property evenly, Maryland courts have flexibility to change the distribution when appropriate, so that one spouse keeps more than the other.

In Maryland, a court will review a variety of factors to determine the equitable distribution of marital property, such as:

- Each spouse’s contribution to the well-being of the family, including monetary income and non-monetary contributions, such as raising children and maintaining the home;
- Each spouse’s financial situation during the marriage and after the divorce;
- The reasons and circumstances contributing to the end of the marriage;
- The length of the marriage;
- Each spouse’s age, physical and mental health; and
- How and when the marital property was acquired, and whether alimony is awarded.

Ultimately, based on these factors and the circumstances of the case, the court must determine how to fairly and equitably split the marital property. In most cases, this will likely mean an even split, 50% to each spouse. But where the circumstances permit, a court may alter the percentages.

When the court has determined the equitable distribution, the marital property is divided and given to each spouse. For financial accounts, it is fairly simple to divide the account according to the court’s percentages. For other property, such as a house or car, actual division may be difficult or sometimes impossible. In that case, the court will order a monetary award to the spouse who does not keep the property that reflects their marital interest in the property. When a monetary award is necessary, the court has a few options. The court may simply order the payment of money to the other spouse. The paying spouse must then use his or her own funds to pay the monetary award. Although the court cannot divide non-marital property, the paying spouse may have no other alternative than to use non-marital property to satisfy the award. For example, if the court orders a monetary award of \$15,000 to the wife for her interest in a boat purchased with marital funds, the husband may need to use the equity in his home he owned prior to the marriage to pay to the wife, even if that home is non-marital property. To account for a monetary award, the court may also order that property be sold and the proceeds divided. While the court cannot change the title on property, it can order a sale. For example, if the court determines that a home is marital property, but only the husband is on the title, the court may order the husband to sell the home and give the wife part of the proceeds of the sale.

Finally, in rare cases, Maryland courts may permit the court to award exclusive use and possession of “family use personal property” to the spouse in custody of a minor child or children. “Family use personal property” may include the family home, a car, and furnishings. The goal is to ensure that the children have a stable environment after the divorce. This type of award can only extend for three years after the divorce, and must be in the best interests of the children. After the three years, the marital property will then be divided pursuant to the divorce.

### *Special Note about Military Retirement Plans*

Pension and retirement plans and accounts are marital property, even if owned by one spouse only, if the spouse contributed to such a plan or account during the marriage. Like other marital property, the court must determine how the plan or account is divided between the parties. Military retirement plans are no exception to this rule. Under federal law, each state may treat a military retirement plan as marital property, and divide the military retirement plan after a divorce. Like many states, Maryland law treats a military retirement plan like other marital property, and will divide it after a divorce. In general, Maryland courts will use the following formula to determine the proper division of a military retirement plan:

First, figure out: (1) How many years the spouses were married while one spouse was in the military; and (2) How many years the military spouse served, in total (this would include service time before and after the divorce, if any).

Second, divide Number (1) above by Number (2) above. The resulting percentage is the marital share of the military retirement plan, or the amount of the plan that was earned while married. The court may generally only divide the marital share of a military retirement plan, and cannot divide the portion of the military retirement plan earned before or after the marriage.

Third, award each spouse an equal share of the *marital share* of the military retirement plan. In some cases, this award will be equal to 50% of the military retirement plan, but if the servicemember has service time before the marriage or after the divorce, the non-military spouse will likely receive less than 50%.

Example: SFC Sue Smith just retired after 24 years of service time, and has filed for divorce. She was in the Army for 12 years before getting married, and has been married to her husband, John Smith for the past 12 years until she just retired. The marital share of SFC Smith’s military retirement plan is 50% (SFC Smith served for 24 years and was married for 12 years (  $12 / 24 = 50\%$  )). The court will then split the *marital share* equally. Thus, Mr. John Smith will only get 25% of the military retirement plan (one-half of the 50% marital share) while SFC Smith will keep the remaining 75%.