

# EQUITABLE DISTRIBUTION

## *What's Not Included*

By K. Dean Kantaras

**D**ETERMINING WHAT ASSETS are part of the “marital pie” to be sliced up and divided between parties to a dissolution case is sometimes difficult. The equitable distribution statute, and the case law interpreting it, requires that judges determine which assets owned by the parties are marital and which are not. Lawyers and litigants have spent an incredible amount of time and money on these issues.

Most of the disputes arise when one or both of the parties come into the marriage owning assets, whether they are substantial in value or not, or when one of the spouses has received assets as a gift from someone other than their spouse. Normally, the gift is created when one of the spouses inherits assets during their marriage. This distinction is important, as by statute, a gift can only be excluded from marital assets if it comes from someone other than a spouse, since gifts between spouses are specifically included in the marital assets.

An issue that is frequently litigated in an equitable distribution is whether there has been a dissipation or waste of assets. However, the fact that assets have been used, or dissipated, does not automatically mean those assets, or their value, will be included in the marital estate for equitable distribution purposes. For example, if a spouse can prove that the other party has used marital assets to buy gifts for a paramour or to travel with that other person, it is likely the courts will require the spouse who spent those assets to account for them. Therefore, if money was used or other assets are sold and the proceeds used for such purposes, the marital estate may be deemed to include the total of the dissipated assets, and that total equally divided. The spouse who used the funds would receive less than one half of what is left, as that is the equitable thing to do.



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At times, these situations may not be so clear. On occasion, a spouse may use significant marital assets to pay off marital debt. Generally, it is the husband who does so, and it is the wife who claims she wasn't consulted and knew nothing about what the husband was doing. She then argues that, since she didn't agree, those assets or their value should be included in the marital estate and that she should receive one-half of the value. Generally, the courts hold that if the assets were spent or used for marital purposes, they are deemed to no longer exist for equitable distribution purposes and will not be accounted for in the division of assets. In other words, if no misconduct is involved in the use or dissipation of those assets, they will not be accounted for. This is particularly true if the assets are used to reduce items such as a home loan, as such payments result

in no real change in the value of the marital assets. In considering the issue of misconduct and dissipation of assets, trial judges will try to determine if a spouse has used those assets for his or her own benefit and for purposes unrelated to the marriage during a period when the marriage is in the process of an irretrievable breakdown.

Usually, the courts will not punish the mismanagement or bad judgment in the use of assets, unless they find the dissipation was done intentionally or maliciously. Even when a husband cashed in an IRA and used the proceeds to pay his own living expenses and support obligations, the court ruled there was no misconduct. In another case, the court ruled that using his assets to pay attorney's fees and for living expenses was not wrong.

The use of assets as they relate to the resulting marital assets available for equitable distribution are often difficult to decipher, but it is the court's responsibility to do so, as they are directed by the statutes. ■■■

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