A Lawyer's View on Asset Division in Divorce

A Lawyer's Eye View of Asset Division in Divorce

Many divorcing spouses in Indiana are surprised by the truth of the old adage, "What's yours is mine and what's mine is yours." This is because when you marry in Indiana without a premarital agreement all the property that you bring into the marriage and acquire during the marriage, regardless of the source, is considered marital property at the time of divorce.

Thus, when a divorce lawyer looks at the job of property distribution, he/she generally analyzes how to advise the client or try the case to the court in terms of four questions.

The first question is whether something is actually property. For example, in Indiana a personal injury claim, which has not been settled at the time of divorce, is not considered property; however, the money-received form a personal injury settlement prior to dissolution of marriage usually is considered marital property. Also, licenses to practice medicine, law and other professions are not considered property.

The second question asks whether the property is of the marriage. In other words, should it be excluded from the marital estate because of an enforceable premarital agreement, because the property right does not mature until after the divorce or, in some cases, after the divorce lawsuit was filed? For example, stock options and pensions, which vest after divorce usually, are not considered property, but those that vest before divorce are considered marital property.

The third question is the valuation issue. It asks what the assets are worth. The parties can agree to the value of any particular asset even if they don't agree to distribution. More complex assets, however, may require the opinion of valuation experts such as real estate appraisers, accountants, actuaries or business evaluators. Because the opinions of experts can differ, valuation issues often impede settlement and result in divorce litigation.

The fourth issue is how to divide the property. This is probably the most frequent cause of divorce litigation. Without an agreement, Indiana law says that each spouse should get an even share of the property unless one of the spouses can establish good reason why he/she should get more.

The spouse advocating for more than half the property must convince the court that it is just and reasonable to give him/her more because one or more circumstances favors him/her. Those factors may include greater contributions to marital property; receipt of inheritances or gifts; dissipation or unusual disposition of assets by the other; lower earning ability; financial condition at divorce; and others.

A Lawyer’s View on Asset Division in Divorce (cont.)

Determining the value of property and whether to ask the court for more than 50 percent require experienced divorce counsel. Because even the most experienced family law attorney cannot predict with certainty the outcome of a trial, they usually will attempt to negotiate a settlement or request mediation before advising a client to take a risk of trial. For example, suppose the husband proposes what appears to be a "fair" fifty-fifty distribution of property. However, based on the opinion of the expert he hired, he places what seems to be an unrealistically low value on an asset that he wishes to keep. He then seeks more of the remaining property. The wife's expert, however, advises her that the asset is worth much more. On paper the husband's offer may seem fair, but in reality, if all the other assets are valued appropriately, his "half" may be more if his expert's opinion is unrealistic.

Whether to try the case or settle requires a careful "cost-benefit" analysis involving the strength of witnesses, the various likely court decisions and the amount of attorney's fees to have a trial.