Property Division -

Six Steps to Achieve a Successful Distribution of Property

Dividing the "things" of the marriage is a very important ingredient of a successful divorce. Whether the couple has only a few wedding gifts, a car, and loads of debts to divide or five million dollars of marital property, the task is the same: dividing the things of the marriage partnership.

The steps followed by mediators are always the same:

- 1. What property do you have? (Listing on the screen)
- 2. What is its value? (Seeking agreement about values using documents or appraisers)
- 3. Do you understand what your options and choices are? (Create understanding)
- 4. Will you divide it equally or unequally? (What is their standard of fairness?)
- 5. Who gets what? (Distributing the property into each of their columns on chart)
- 6. Do the totals on each column meet the couple's standard of fairness? (Is there a need to exchange some money in order to equalize?)

In the mediation room, the mediator serves as the guide. Some people will come to mediation having already worked out most of their property division, while others will not have a clue about what to do. It works best to always follow the same steps, regardless of how much work the couple has done outside of mediation. Even if they have already divided their property, they need to tell you how they have done it so you can reflect it in their agreements.

STEP ONE - WHAT PROPERTY DO YOU HAVE?

Start by taking an inventory of all property and making lists on the screen. Couples beginning mediation will have completed the financial questionnaire as an organizing tool. (A sample for you to use is reproduced in the client workbook). In the questionnaire, the categories of property are organized into eleven areas that encompass virtually all types of property:

- 1. Bank Accounts
- 2. Loans made to others during the marriage
- 3. Investments (stocks, bonds, etc.)
- 4. Real estate
- 5. Cash value of life insurance
- 6. Business, corporate or partnership interests
- 7. Autos, boats, motorcycles, snowmobiles, etc.
- 8. Pension, profit sharing, IRAs and other retirement accounts
- 9. Miscellaneous household goods, furnishings and other items
- 10. Debts and liabilities
- 11. Tax refunds or taxes owing

STEP TWO - WHAT IS ITS VALUE?

When gathering information in the legal system, one of the first steps in a lawsuit is to "discover" the other side's case. This begins by sending out interrogatories asking the same questions that are asked in the mediation questionnaire. Formal interrogatories, which must be answered in writing, can cost anywhere from a couple hundred dollars to several thousands of dollars in fees to complete and to review. Although interrogatories can produce information about the couple's assets, an easier and more cost-effective way to do this is to simply exchange the information in front of the mediator.

When dividing assets, one of the main goals of the mediator is to make sure the exchange is being done fairly and completely. Throughout the process, the mediator will make a written record on the screen of the assets disclosed, together with photocopies of the back up documents that verify the numbers disclosed. At the same time, a discussion about values takes place so that when the mediator puts the numbers up, there is either mutual agreement about the value, or a notation is made to pursue further homework on valuing that particular asset.

Let's take a look at the categories of property that will most likely be at issue in all divorces, with particular emphasis on the documentation that must accompany the above steps of identification, valuation, fairness, and actual division.

Bank Accounts

Liquid cash is important at this critical time in the unhooking process, as there will be new costs associated with the divorce. Bank accounts are as good a category as any to start with. The basic task is to find out what bank accounts exist and how much is in the accounts. This data is then listed on the screen for the couple to see in front of them as the mediator continues to ask additional questions about their understanding of the amounts in the accounts and whether they have begun to separate their accounts. Most American couples live from pay check to paycheck. There is usually little asset value to most checking accounts unless the accounts require minimum balances. If the couple lists savings accounts or money market accounts that have significant balances, the mediator will ask them if they anticipate any immediate problems about use of money and "grabbing" of money that is in the bank accounts. In those cases where a great deal of mistrust exists, the mediator may ask if they want to convert joint savings accounts and joint money market accounts into dual signature accounts so the money will not be subject to any "grabbing." (This is certainly less offensive than the advice of some attorneys who urge a client to withdraw all of the money from any joint savings and keep from the other either to be spent or for safe keeping.)

At a minimum, by signing the rules of mediation, they will have agreed with each other not to dissipate their joint assets, including liquid cash, without first discussing the withdrawal and seeking agreement from the other. If they do not yet have separate checking accounts, the mediator may ask when they intend to start keeping separate accounts, because when they are using their own separate accounts, they will have established some boundaries and not be so worried what the other is spending from their joint accounts.

From the liquid cash, (if any), there may be a need to fund the extra start-up costs (damage deposit of new apartment, moving charges, phone installation and a host of other new expenses) of two households where there was formerly one. Some couples who have lived apart for some time or are in high conflict, may find it necessary, for purposes of building trust, to exchange their canceled checks and bank records from their personal accounts, not only for helping each other see where their money is going but to remove the fear that one of them has been mishandling money. A good way to open this subject is to ask, at the end of listing the bank accounts, whether either of them has any need to review past bank records, canceled checks or other verification documents.

High conflict problems faced by a mediator:

"I can't trust him, how do I know he is telling the truth?"

Mediator Response: You may not really know. However, unless the two of you own a bar or a restaurant with large volumes of cash moving across the table each night, almost every financial transaction creates a paper trail. Would you like to hire a neutral C.P.A. to help complete a detailed review of all records for the past several years? Tax returns are good place to start. Not many people will lie on their tax returns to just to gain an advantage in their divorce.

"When I moved out we had more money in that account."

Mediator response: Would it be useful for each of you to exchange canceled checks and bank statements for the past year so both of you can see how the other has been spending money.

"My attorney told me I need to have a temporary hearing so that he can't control all the money."

Mediator response: One option for the two of you may be a call to your personal banker on the speaker phone right now and start the process of changing joint accounts into dual signature accounts, then any money taken from the accounts will require the consent of both of you. That way, you will not fear that he will control all the money. This can be done immediately, whereas a temporary hearing will not be held for several weeks. What other ways would help you with this concern? Additionally, as soon as the budget session is completed, you should have a temporary agreement about the exchange of support. Then, Sylvia, you will not have to ask Doug for money each month and Doug, you will not have to wonder if you have given enough.

Loans to Others & Accounts Receivable

This category of property is often overlooked by couples who decide they want to settle their own divorce around the kitchen table. When money is loaned to friends or relatives, or perhaps to the family business, couples are really depleting the value of their entire marital estate. Therefore, when the money is repaid, it is joint money. Fortunately, or perhaps it should be unfortunately, most couples have the reverse of this. That is, they have mostly debts, which means they went to the bank and borrowed, rather than playing banker themselves and loaning money.

Another way money owed to the marriage partnership becomes important is if a couple has previously sold property by contract for deed or as it is called in some states a land contract. Any marital asset that has been sold and where the buyer is paying to the marriage monthly or yearly payments must be considered a property asset and therefore part of the valuation process.

Ask the couple to provide documents relating to the loan because a copy of the document outlining loan repayment terms needs to be attached to the final mediation agreement. If the loan is verbal or a friendly loan to a colleague or relative, try to see if they agree as to whether the debt is likely to be paid and whether it will some day be converted to actual cash. If the loan is truly speculative, or it is doubtful that the friend or relative will repay the loan, language can be inserted into the final decree that calls for division of the money "if, as and when" received.

High conflict problems faced by a mediator:

"She loaned the money to her malingering brother, she can get it back."

Mediator response: We're only listing the property. Let's wait until later to determine how you will divide all the property assets. Besides, if it is unlikely that the loan will ever be repaid, then it is not worth anything as a marital asset.

"He has severance pay that he is receiving from his last job, shouldn't that be listed as a property asset?"

Mediator response: That's a good question, on the one hand it is a fixed property asset, on the other hand, if he hasn't found another job that is the money the two of you are living on. Perhaps you should both decide how it should be treated.

"Shouldn't we really be counting the crops in the field as a property asset that will be worth something this fall?"

Mediator response: Doug, how do you think the crops should be treated? Are they part of your income available for support, or should you look at them as a fixed property asset?

Stocks, Bonds, Mutual Funds & Other Investments

This category of property can be difficult for some people to understand. New mediators and some spouses who have never managed the family finances have trouble understanding some of the more unusual types of investment such as real estate investment trusts, treasury strips, stock margin accounts, municipal bonds