

Property Division: The Law Offices of Jackie Kong

Question: What types of property can be divided in a divorce case

Answer: The following types of property can be divided in a divorce case:

- Financial institution accounts, such as deposit accounts *and* brokerage accounts
- Retirement benefits from the Federal Government, State of Hawaii, private employers, and individual retirement accounts ("IRAs")
- Real property, which is real estate
- Closely held businesses, such as professional practices *and* locally owned businesses
- Interests in larger businesses, such as shopping centers

Question: What is the general framework for dividing property in a divorce case

Answer: There are two types of property in a divorce case: marital separate property and marital partnership property.

Marital separate property is not divisible in a divorce case, although it is considered when determining the post-divorce financial condition of the owner spouse. Only property that falls within one of the following categories qualifies as marital separate property:

- Property covered by a premarital agreement
- Property covered by an agreement made during marriage
- Property covered by an agreement made in contemplation of divorce; and,
- Property that meets the following criteria:
 - Acquired after date of marriage by gift or inheritance;
 - Earmarked as the owner spouse's sole property (never titled in the non-owner spouse's name);
 - Maintained with other than marital income; and,
 - Major repairs and capital improvements were funded with other than marital assets

For example, in order for real property/real estate to qualify as *marital separate property* it has to have been:

- Acquired after date of marriage by gift or inheritance in one spouse's sole name
- Monthly mortgage payments were made with rental income from the real property, not with either spouse's earnings from employment

- Major repairs and capital improvements were funded by a mortgage or home equity line of credit secured by the real property, not with individual or joint savings accounts opened during marriage

Marital partnership property is:

- Divisible in a divorce case
- All property that is not marital separate property
- Categorized and generally awarded as follows –
 - **Category 1:** Equity of premarital property determined as of date of marriage, which is generally awarded 100% to owner spouse
 - **Category 2:** Appreciation/increase in equity of premarital property *from* date of marriage *to* time of divorce, which is awarded 50% to owner spouse and 50% to non-owner spouse
 - **Category 3:** Equity of property acquired after date of marriage by gift or inheritance determined as of date of acquisition which is awarded 100% to owner spouse
 - **Category 4:** Appreciation/increase in equity of gifted/inherited property *from* date of acquisition *to* time of divorce, which is awarded 50% to owner spouse and 50% to non-owner spouse
 - **Category 5:** Equity of all other property determined as of time of divorce, which is generally awarded 50% to each spouse regardless of whether property is titled in one spouse's name or both spouses' names

Note: If premarital property or gifted/inherited property no longer exists at time of divorce, then the owner spouse is awarded Category 1 or Category 3 equity amount (whichever applies). Because the property no longer exists at time of divorce, there is no appreciation in equity.

Also note: If premarital property or gifted/inherited property has decreased in equity *from* date of marriage or date of acquisition by gift/inheritance *to* time of divorce, then the owner spouse is awarded decreased time of divorce equity. Because property decreased in equity during the marriage, it would be unfair to award higher date of marriage equity or higher date of acquisition equity (whichever applies).

For example, if at date of marriage a spouse owned a condo in his sole name which was worth \$250,000 and had an outstanding mortgage balance of \$200,000, and at time of divorce the spouse continued to own the condo in his sole name and it was now worth \$450,000 and now had an outstanding mortgage balance of \$300,000 (because the original

mortgage was refinanced to pull out money), then the categorizations and calculations of awards would be as follows:

- Category 1 equity of premarital property determined as of date of marriage:
 $\$250,000 - \$200,000 = \$50,000$ (Category 1 award)
- Equity of premarital property determined at time of divorce: $\$450,000 - \$300,000 = \$150,000$,
- Category 2 appreciation/increase in equity of premarital property from date of marriage to time of divorce: $\$150,000 - \$50,000 = \$100,000$ (Category 2 award)

At time of divorce the owner spouse would receive $\$50,000$ (Category 1 award) + $\$50,000$ (1/2 of Category 2 award) = $\$100,000$. The non-owner spouse would receive $\$50,000$ (1/2 of Category 2 award).

Note: The total of what the owner spouse would receive ($\$100,000$) and what the non-owner spouse would receive ($\$50,000$) equals the equity of premarital property determined at time of divorce ($\$150,000$)

Also note: The categorizations and calculations of awards for gifted/inherited property are done the same way using the date of acquisition equity (instead of the date of marriage equity)

The general framework for dividing property in a divorce case is as follows:

1. Add time of divorce net worth of all marital partnership property/property in existence at time of divorce that does not qualify as marital separate property
2. Subtract Category 1 award, and award it 100% to owner spouse
3. Subtract Category 2 award, and award it 50% to each spouse
4. Subtract Category 3 award, and award it 100% to owner spouse
5. Subtract Category 4 award and award it 50% to each spouse
6. What remains is category 5 equity that is generally awarded 50% to each spouse, unless there are compelling circumstances that warrant a different result - for example, disparate (more than 50%) property division in lieu of post-divorce alimony
7. All debts that are not secured by property (for example, financial institution personal loans, credit card debts, debts owed to people) are generally awarded to the spouse in whose name they are titled and/or for whose benefit they were incurred.