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New marriage act makes five key changes to property distribution

With the adoption of the new Illinois Marriage and Dissolution of Marriage Act this year, several changes have been implemented affecting both the characterization and valuation of marital and nonmarital property in divorce cases.

This article addresses five of the most significant changes in the law.

1. Post-filing efforts is now a factor in the division of marital property.

Section 503(d)(1)(iii) now explicitly allows courts to take into account whether a party's contribution to an acquisition, its increase or decrease in value of to the marital (or nonmarital) property is after the commencement of a proceeding for dissolution of the marriage.

As a limited example, a party who contributes to his or her retirement account during the pendency of a lengthy divorce case could make the argument that he or she should be entitled to a disproportionate share of that account, or the marital estate depending on the circumstances, due to his or her post-filing "efforts" without a corresponding marital contribution by the other spouse which resulted in the increase in value to the account.

The same argument could be made by a business owner who owns and works at a nonmarital business which increases in value during a lengthy divorce case.

The result of this new provision is that there may be an increase in litigation over whether one party is delaying the proceeding in order to be able to make an argument that he or she has made a greater contribution after post-filing.

This provision may also discourage nonearning spouses from drawing out the case to allow the marital estate to increase in value, since now the other spouse will be able to request, and the court will have the discretion to consider, a party's post-filing efforts which result in the increase in value to the marital estate.

Of course, in the case of the nonfinancially contributing homemaker, the fact that his or her marital efforts continue depending on circumstances may also be considered, but the amendment could lead to a more disproportionate division.

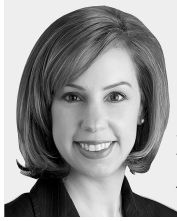
2. The concept of "property acquired in contemplation of marriage" is eliminated.

New language in Section 508(a) provides that property acquired prior to the marriage that would otherwise be nonmarital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

This language essentially nullifies a string of prior case law decisions declaring that it is possible that a residence purchased in one party's name prior to the marriage, but then inhabited by the couple during the marriage as their primary residence, can be deemed to be marital property because it was purchased in contemplation of marriage.

This scenario often occurs when one party's credit did not enable him or her to qualify for a mortgage, so the other party was the purchaser-mortgagee in the transaction. Last year, a court could consider the facts surrounding the purchase of the home at trial, such as who located it, who went on the walk-throughs, who worked with the broker and how close in time did the purchase occur in relation to the marriage in order to determine whether the house was purchased in contemplation of marriage and, therefore, marital property.

MODERN FAMILY



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Under the new statute, the residence will now be deemed to be the nonmarital property of the party in which title is held if the purchase was made prior to the marriage from his or her separate property.

Now, there is no presumption of marital property ... if there is proof the transfer was done for estate or tax planning purposes ...

The argument may exist that the marital estate has a right of reimbursement for the mortgage payments made during the marriage if the payments were made from marital funds, i.e. employment earnings and not nonmarital income. The home's owner may counter that the nonowner spouse enjoyed the right to live in the residence during the marriage and, therefore, no reimbursement should be allowed.

3. Transfers for estate planning purposes now specifically carved out as a vehicle to rebut the presumption for the conversion of nonmarital property into marital property.

Section 503(b)(1) states that all property acquired by a spouse after the marriage and before a judgment for dissolution of marriage is entered is presumed to be marital property. This includes nonmarital property transferred into a form of co-ownership between spouses or transferred to another spouse who retains title in his or her own name.

Now, there is no presumption of marital property to overcome if there is proof the transfer was done for estate or tax planning purposes or for other reasons that establish that the transfer was not intended to be a gift to the other spouse. It may be beneficial for estate-planning attorneys to keep records of the reason for such transactions in the event a divorce would occur. However, it is always best, whenever possible, to keep nonmarital property in the spouse's sole name and separate from any marital assets.

4. Date of valuation is now within the court's discretion.

Prior to Jan. 1, the trial court was required to value each asset as of the date of judgment for dissolution of marriage. Now, under Section 503(f), the trial court may utilize the date of trial or such other date as agreed upon by the parties or ordered by the court within its discretion.

The new language will enable parties to utilize agreed upon dates to value complex assets,

such as businesses, whose exact valuation date at the entry of judgment cannot be determined in "real time" given the amount of time is takes for companies to issue financial statements and business valuators to analyze those records and perform their valuations.

While this new language will allow the parties to agree to utilize certain dates for valuation that are not the date of judgment, it does not address the issue of fluctuating values after the close of proofs but before entry of judgment. It also does not address what would happen if any asset substantially changes value after an agreed upon valuation date, but prior to the start of trial.

5. The appointment of financial experts as the court's witness.

This entirely new section allows the court to seek the advice of financial experts or other professionals on a regular basis and is akin to the often-used expert in cases involving parental decision-making and parenting time (formerly known as custody and visitation). The court may now appoint a financial expert to give advice in writing on financial issues in the case.

The parameters of such appointments are found in Section 503(l), including that counsel may examine as a witness any professional consulted by the court. Such experts are subject to subpoena for purposes of discovery and trial; the court shall allocate the cost of the expert between the parties; and the allocation of the cost is subject to reallocation.

This provision may reduce the number of experts that provide competing opinions on financial issues if the court wants to appoint its own neutral expert.

While the changes to the marriage act are sweeping, in reality, much of the new language codifies both the existing case law and the practice norms that had been in effect over the last several years.

The Illinois Appellate Court will likely be called to rule on the new provisions over the next several months and years, and it is important for practitioners to stay on top of this constantly evolving new set of statutes.