

## **ASSET AND LIABILITY DIVISION AND SPOUSAL MAINTENANCE**

In Oklahoma, debt division and property division in divorces are mandated by 43 O.S. §121. Section 121 provides that:

When a divorce is granted, the wife shall be restored to her maiden or former name if she so desires. The Court shall enter its decree confirming in each spouse the property owned by him or her before marriage and the undisposed of property acquired after marriage by him or her in his or her own right. Either spouse may be allowed such alimony out of real and personal property of the other as the court shall think reasonable, having due regard to the value of such property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall, subject to a valid antenuptial contract in writing, make such division between the parties as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to be paid such sum as may be just and proper to effect a fair and just division thereof. The court may set apart a portion of the separate estate of a spouse to the other spouse for the support of the children of the marriage where custody resides with that spouse.

Therefore, by statute, our courts are required to award separate property (that which is acquired prior to the marriage or after the marriage by gift or inheritance) to the party who owns such property, and to divide property which was jointly acquired during the marriage in a just and reasonable manner. Case law indicates that our court's division of jointly acquired assets must be "equitable", and while "equitable" does not mean exactly 50-50, it means as close to down the middle as is practical under the circumstances. *Teel v. Teel* 766 P.2d 994 (Okla. 1988).

### **A. THE USE OF PRENUPTIAL CONTRACTS.**

Prenuptial contracts are more often than not used today to alter the outcomes that might occur in the application of our rules of property and debt division and spousal support to a couple who are seeking a divorce. Such contracts are no longer the province of the rich, but have become common among all kinds of couples for a variety of reasons. Prenuptial contracts are becoming more common, because divorce is more common. People's expectations about marriage and the likelihood of the endurance of the marriage have changed dramatically in the last fifty years. Without commenting on those causes or the desirability of same, we must recognize that we live in a different culture than our parents and their parents.

A contract entered into in contemplation of marriage ( the consideration for which is the marriage itself) is frequently referred to as an antenuptial agreement, a prenuptial agreement or a premarital agreement. The use of such contracts and their applicability have changed with time. At this writing, prenuptials are used to settle the parties rights incident to divorce and death.

While this article will not discuss how our courts determine the validity of an antenuptial contract, it should be generally noted such contracts are interpreted like any other contract in law, and are subject to the defenses generally available in contract disputes. Also, to be valid, an antenuptial contract must be predicated on a full, fair and frank disclosure of assets and liabilities by each party. In re Cobb's Estate, 1956 OK 299, 305 P.2d 1028.

Prenuptial agreements are used to set aside to each spouse the separate property of that spouse. The mandate of 43 O.S. §121 requires the same outcome. However, a prenuptial agreement can be used to insure that such separate property is clearly identified as such and will cut down on legal fees that might otherwise have been spent in doing discovery as to assets and liabilities.

The mere fact that an antenuptial agreement makes no provision or an unfair provision for one or the other spouse does not render the agreement unenforceable. Matter of Estate of Burgess, 1982 OK CIV APP 22, 646 P.2d .

Prenuptial agreements are also used to eliminate potential risks of alimony and attorney's fees in divorce actions. Custody and child support matters may be addressed in a prenuptial contract, but courts are not likely to enforce such provisions because they are viewed as against public policy.

Prenuptial agreements may also be used to affect inheritance rights or rights incident to the death of one of the spouses. For example, the right to inherit property from a deceased spouse when there is no will, as provided for by our statutes of Descent and Distribution, is barred by the waiver of any claim to the property of the other party in a prenuptial contract.

In Oklahoma, a spouse who dies having executed a will which gives his or her surviving spouse less than what is provided for by the Descent and Distribution statutes may elect to "take against the will", and take his or her statutory share of the estate. However, a spouses right to elect to "take against the will" can be and will be waived if the surviving spouse has agreed to release any interest in the property of the other in a valid antenuptial contract.

## **B. What is a "community" asset subject to the Court's equitable power to divide and what is "separate" property that is not divisible in a divorce action.**

In the Matter of Hardaway, 1994 OK 30, 872 P.2d 399, the Supreme Court of the State of Oklahoma provides us with a convenient and concise definition of separate property. In Hardaway, the Court states that separate property is:

1. property owned by a spouse prior to marriage, which retained its separate status during the marriage because it was maintained as separate property;
2. gifts to one spouse from a third-party during the marriage and gifts from one spouse to the other spouse during the marriage;
3. inheritances received by one spouse during the marriage, which is maintained as separate property (no gifts/no commingling);
4. an exchange during the marriage, of property in which the owning spouse exchanges separate property for other separate property;
5. the owning spouse's purchase of other property with his or her separate funds during the marriage;
6. compensation received by one spouse for a personal injury suffered by that spouse.

Separate property owned by one spouse in a marriage can become community property or joint property if separate property is commingled with joint property. For example, if one spouse inherits \$100,000 from a relative during the marriage, such funds will remain the separate property of the inheriting spouse, unless or until that spouse puts the funds in a "joint" account, and thereby commingles it with joint funds. While on a legal and theoretical basis, Oklahoma has never expressly adopted transmutation of separate property as a valid legal doctrine (see, *Marshall v. Marshall*, 1961 OK 86, 364 P.2d 891) our courts generally give validity to this doctrine.

In Oklahoma, "there is a presumption that property purchased during coverture is property acquired by the joint efforts of husband and wife". *Matter of Estate of Hardaway*, 1994 OK 30, 872 P.2d 398. This presumption is refutable however.

As provided for by 43 O.S. § 121, title is not determinative of whether property is separate or joint. The determination of whether property acquired during the marriage is separate or joint depends upon the source of the property, or more simply stated, upon the manner in which the property is acquired. *Longmire v. Longmire*, 1962 OK 219, 376 P. 2d 273.

Property which is acquired during the marriage as a result of industry, economy or business ability is jointly acquired property subject to the equitable division required under 43 O.S. § 121. *Collins v. Oklahoma Tax Commission*, 1968 OK 148, 446 P.2d 290. Thus, any property earned by sweat during the marriage is joint property. Likewise, passive income, such as dividends or interest income arising out of property owned prior to the marriage, is separate property.

A personal injury or worker's compensation award is to the extent it compensates a victim for an injury to the person is separate property. If a part of such award is for loss of earnings or services of an injured spouse, that part is joint property. *Taylor v. Taylor*, 1992 OK CIV APP 22; 827 P.2d 911.

A spouse can also acquire what is called an interest in "joint appreciation of value" in the other spouse's separate property when that spouse expends efforts, skill or money to

the other spouse's separate property. *Moyers v. Moyers*, 1962 OK 146, 372 P.2d 844. The facts of *Moyers* might be useful as an illustration of this point. In *Moyers*, the wife had acquired an electric company prior to the marriage. The company had very little value prior to the marriage. After the marriage, both spouses jointly managed the company, and the husband was active in management and operations, frequently in absence of his wife. The company was sold during the marriage for \$15,000, and the wife claimed that the money was her separate property. The Court held that "it is clear from the record that the enhancement in value of this business and profits therefrom were not effected through normal appreciation or ordinary course of events occurring during the coverture, but by application of joint efforts and skill of both parties who participated together in the business venture. We, therefore, hold that both the increase in value of the wife's business from the time of their marriage to the point of sale in 1952, as well as the profits realized therefrom, were attributable to the joint industry of the spouses, and should be treated as jointly acquired property of the marriage."

### **C. DIVISION OF RETIREMENT BENEFITS.**

A pension acquired by either spouse or both spouses during a marriage, will, in absence of a valid antenuptial to the contrary, be subject to the Court's equitable power to fairly and equitably divide the marital estate. Therefore, any retirement benefits which are earned during the marriage are subject to equitable division. When a retirement benefit is acquired entirely after the date of marriage, it is entirely subject to division. However, when part or all of a retirement benefit was acquired by a spouse prior to the marriage, that benefit is separate property of the acquiring party.

When a retirement benefit is both separate and joint, i.e., acquired partly before the marriage and partly after the marriage, the case of *Thielenhaus v. Thielenhaus*, 1995 OK 22, 890 P.2d 925 tells our courts how to divide the benefit. *Thielenhaus* holds that when the court is dividing a mixed retirement benefit (partially marital and partially separate) that the court must (1) determine the value of the spouse's separate interest in such benefit on the date of the marriage; (2) set aside that value to the acquiring spouse as separate property; (3) determine how much interest has accrued on the acquiring spouse's separate share of such benefit from the date of the marriage to the date of the divorce or separation; (4) set aside to the acquiring spouse all interest that accrued on his or her separate share of the benefit from the date of the marriage to the date of separation or divorce; and (5) award the non-acquiring spouse one half of the remaining jointly acquired benefit.

Domestic Relations Orders are used to divide pensions. A "Qualified Domestic Relations Order" is an order which divides a retirement benefit that has been qualified or approved by the plan administrator.

### **D. Continued Health Care Benefits for Dependent Children and Former Spouses.**

In a divorce action involving children, assuming that some dependent insurance coverage is available to one or both spouses, the Court will order one or both parents to provide health insurance for their dependents. If one spouse is ordered to maintain a health insurance policy for the benefit of the children, that spouse will be given credit for the cost of said insurance in the Child Support Computation. 43 O.S. § 118, 11., a., b., c. Where a parent is required by a court or administrative order to provide health care coverage which is available through an employer doing business in this state, pursuant to 43 O.S. § 118.2, **“the employer is required:**

1. To permit the parent to enroll under family coverage any child who is otherwise eligible for coverage without regard to any enrollment season restrictions;
2. If the parent is enrolled but fails to make application to obtain coverage of the child, to enroll the child under family coverage and to deduct the cost of the coverage from the employee’s wages, unless the employer currently pays for the cost or portion of dependent coverage, upon application by the child’s custodial person, .....
3. Not to disenroll or eliminate coverage of a child unless the employer is provided satisfactory written evidence that:
  - a. the court order is no longer in effect,
  - b. the child is or will be enrolled in comparable coverage which will take effect no later than the effective date of disenrollment, or
  - c. the employer has eliminated family health coverage for all of its employees.”

Health insurance coverage for a former spouse may in some cases be ordered to be maintained by the other spouse following a divorce. Such cases are unusual and fact dependent. If the spouse for whom coverage is ordered to be provided is covered by a group policy such coverage can be continued after a divorce with a COBRA policy.

### **E. Equitable Property Division.**

Title 43 O.S. § 121 is quoted in full at the beginning of this article, and this statute is the beginning for all discussions of property division in the State of Oklahoma. Said statute provides in pertinent part that “as to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall, subject to a valid antenuptial contract in writing, make such division between the parties as may appear just and reasonable...”

“Just and reasonable” as provided in the statute means an equitable or fair division, but the phrase is not synonymous with “equal”. *Teel v. Teel*, 1988 OK 151, 766 P.2d 994.

Each and every case presents its own unique property and/or debt division issues. Some are quite simple, others are enormously complex. Whatever the size of the estate, there are certain well identified factors which affect an “equitable” distribution of property. This section of the article will attempt to set forth some of those factors for consideration.

As noted previously, Oklahoma is an “equitable” division state. This does not mean fifty-fifty. “The marital estate need not necessarily be equally divided to be an equitable division because the words ‘just and reasonable’ in §121 are not synonymous with ‘equal’. Gray v. Gray 1996 OK 84 922 P.2d 615.

Needs of one spouse or the other may be important in alimony awards, but they are not relevant at all to an equitable distribution of property. Durfee v. Durfee 1969 OK 465, 465 P.2d 161.

Conduct during the marriage which increases the value of separate property is relevant in determining “joint appreciation of value”, but otherwise has no bearing on property division. Oklahoma is not a “fault” state. Thus, either spouse’s conduct which causes or tends to cause the break up of the marriage has no impact on property division. So “equitable” is not necessarily “fair” under these circumstances.

“In determining what constitutes an equitable division of jointly acquired property, the paramount consideration involves a determination of the extent of each party’s rights in the property, and their efforts or contributing factors to acquisition of the property.” Wood v. Wood, 1969 OK 195, 465 P.2d 161. In other words, an equitable division of jointly acquired property requires that we look to the relative contributions of each spouse during the marriage in deciding who gets what and how much.

An interesting and related concept is what the author refers to as the “millstone” case. In the case of Moyers v. Moyers, 1962 OK 146, the Supreme Court of Oklahoma states:

“If it should develop in the trial of the cause that the accumulations have been due to [the wife’s] economy, industry, frugality and sturdy virtues which have been a stay to the home and constant guard of the accumulations, and at the same time it should develop that the husband has not been frugal, has not been industrious, has not been sagacious, but, on the contrary has spent much of his money in riotous living, in gambling, drinking or associations truant to his marriage vows, it would not be equitable to the wife, under these circumstances, that the husband should be given half of their property.”

This case strongly suggests that some element of “fault” might justify a disproportionate award of property or debt to the party in fault. The author has tried in his practice to use this case numerous times, and the courts generally ignore this case and the issue of fault.

Appellate courts rarely if ever modify property awards as being unequitable. The trial court is given great deference in making these awards. And, of course, the most difficult task for the trial court in dividing the estate is to divide the parties personal property. Most of the time, trial court’s will determine the value of these items and try to divide them equitably on the basis of values established at the time of trial. However, the author has read one case where the Supreme Court of Oklahoma approved of a Judge in Wagoner dividing the parties personalty, when he ordered that the parties and their lawyers go out into the hall, and using one of the parties list of property, each

person would pick one item and the other would pick another, until all items on the list were spoken for.

## **F. Spousal Maintenance.**

Spousal maintenance in Oklahoma is called alimony. There are two types of alimony: (1) temporary (*pendente lite*) and (2) permanent. Temporary alimony is designed to cushion the blow of separating couples, so that one party is not left without any means of support during the pendency of a divorce case. Permanent alimony is designed to equalize the impact of divorce on the parties, to rehabilitate the spouse who's got little or no earning power, and to cushion the impact of the transition from married to single. 43 O.S. §121 provides in pertinent part that "either spouse may be allowed such alimony out of real and personal property of the other as the court shall think reasonable, having due regard to the value of such property at the time of the divorce. Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable..."

The single most important case in Oklahoma on the issue of alimony is *Bowman v. Bowman*, 1981 OK CIV APP 71, 639 P.2d 1257. *Bowman* makes clear that need must be demonstrated by the party seeking alimony, and that the party seeking alimony must also demonstrate that the other party has the ability to pay alimony. However, the holding of *Bowman* that is critical today is that "support alimony should not be awarded at all, unless the underlying basis for the award has some rational connection to the marriage itself." *Id.* at 1262

The *Bowman* court goes on to note that since the abrogation of fault as a basis for alimony, "a wife's need has become the primary, if not sole criterion as a basis for an alimony award. We hold that the need must also be rationally connected to the marriage itself. If the need arises out of or is aggravated by the marriage itself or some event connected to the marriage; i.e., illness, postponement of education, or any other cause rationally connected to the marriage, then it qualifies as a "basis" on which alimony should be properly granted where the circumstances of the parties otherwise justify an award of alimony."

In *Bowman*, in footnote 8, the Supreme Court noted that "the following cases reflect the myriad of criteria the supreme court has approved as circumstances the court can consider in awarding alimony:

1. the wife's loss of the right of inheritance from the husband, *Harden v. Harden*, 182 Okl. 364, 77 P.2d 721 (1938);
2. the expectation of a future inheritance of the husband, *Mathews v. Mathews*, 186 Okl. 245, 96 P.2d 1054 (1939); *Jupe v. Jupe*, 1947 OK 2,175 P.2d 976, 198 Okl. 100;
3. the husband's present ability to pay, *Jupe v. Jupe*, *supra*;

4. the wife's contribution to the husband's accumulation, *DeRoin v. DeRoin*, 1947 OK 123, 179 P.2d 685, 198 Okl. 430;
5. whether the marriage was one of affection or convenience, *Dobry v. Dobry*, 1950 OK 180, 220 P.2d 698, 203 Okl. 327;
6. the earning capacity of the husband, *Funk v. Funk*, 1957OK 320, 319 P.2d 599;
7. the wife's condition and means, *Eisenreich v. Eisenreich*, 1958OK 61, 323 P.2d 723;
8. duration of the married life and the ages of the parties, *Hughes v. Hughes*, 1961OK 112, 363 P.2d 155;
9. the wife's health, *Henley v. Henley*, 1967 OK 115, 428 P.2d 258;
10. any future increase in the value of land, *Johnston v. Johnston*, 1968 OK 47, 440 P.2d 694;
11. the wife's opportunity for employment, *Fitzer v. Fitzer*, 1969 OK 132, 460 P.2d 888;
12. the wife's ability to obtain gainful employment, *Kennedy v. Kennedy*, 1969 OK 180,461 P.2d 614;
13. the mode of living to which the wife had become accustomed during the marriage, *Dowdell v. Dowdell*, 1969 OK 155, 463 P.2d 948;
14. the probability of the husband's ability to progress financially, *Conrad v. Conrad*, 1970 OK 1, 471 P.2d 892;
15. the earning capacity of the wife, *Conrad v. Conrad, supra*;
16. the wife's ability to make a living before the marriage, *Conrad v. Conrad, supra*;
17. the conduct of the parties, *Kirkland v. Kirkland*, 1971 OK 98, 488 P.2d 1222;
18. the wife's education, *Kirkland v. Kirkland, supra*;
19. the age of the children and the need to maintain a home for them, *Price v. Price*, 1971 OK53, 484 P.2d 532;
20. the parties' station in life before the divorce, *Herndon V. Herndon*, 1972OK 134, 503 P.2d 545."

No one can, in the space remaining to the author, discuss all of the complexities of an alimony case, nor how to present the best alimony case for your client. The foregoing, however, generally and correctly summarizes the law on alimony and the factors that are or may be considered in making an alimony award.