

Equitable Distribution

Jodi Furr Colton, Esq.
Marissa J. Pullano, Esq.

BRINKLEY MORGAN
Attorneys at Law

Equitable Is Not Necessarily Equal, But Presumption Is Equal Distribution

- Section 61.075, *Florida Statutes*: (1) defines marital (and nonmarital) assets and liabilities; (2) establishes a presumption of equal division of all marital assets and liabilities; and (3) provides criteria for accomplishing an equitable distribution.
- ***Franklin v. Franklin***, 988 So.2d 125 (Fla. 2d DCA 2008)(deviation from equal distribution must be justified by the trial court).

First Step: Identify & Classify Assets

- Determine the character of the asset
  - Marital § 61.075(6)(a)1-4
  - Nonmarital § 61.075 (6)(b) 1-5
  - A little bit of both





Classification of Assets – Bright Line Rule §61.075 (7)

The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is:

- the earliest of the date the parties enter into a valid separation agreement,
- such other date as may be expressly established by such agreement, or
- **the date of the filing of a petition for dissolution of marriage.**

First Step: Classify Assets

What are Marital Assets? § 61.075(6)(a)1-4

1. "Marital assets and liabilities" include:

   a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.

   b. The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

   c. Interspousal gifts during the marriage.

   d. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.

First Step: Classify Assets

What are Marital Assets (cont.)? §61.075(6)(a)1-4

2. All **real property** held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital. [i.e. THE GIFT PRESUMPTION]

3. All **personal property** titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital. [i.e. THE GIFT PRESUMPTION]

4. The burden of proof to overcome the gift presumption shall be by clear and convincing evidence.

First Step: Classify Assets

What are Non-Marital Assets? §61.075 (6)(b) 1-5

1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities;

2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;

3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;

4. Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities; and

5. Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed the forgery or having affixed the unauthorized signature. In determining an award of attorney's fees and costs pursuant to s. 61.16, the court may consider forgery or an unauthorized signature by a party and may make a separate award for attorney's fees and costs occasioned by the forgery or unauthorized signature. This subparagraph does not apply to any forged or unauthorized signature that was subsequently ratified by the other spouse.

Commingled Assets

***Pfrengle v. Pfrengle*, 976 So.2d 1134 (Fla. 2d DCA 2008):** money is fungible—mixing nonmarital monies into marital account or marital monies into nonmarital account creates a marital asset. Tracing nature of money cannot occur due to fungible nature of money.



Gift Presumptions as to Transfer of Real and Personal Property

Wife loans $200,000 to friend from non-martial Smith Barney account. Husband and Wife also loan marital money to friend.

Both loans are repaid and are deposited into Wife's separately titled marital account.

Three months later the exact amount of non-marital loan is then transferred from the marital account to the non-marital Smith Barney Account.

Loan repayment did not make Smith Barney account marital.

Mondello v. Torres, 47 So. 3d 389 (Fla. 4th DCA 2010)

Valentine v. Van Sickle

Husband's check for settlement of a personal injury claim was received in Husband's absence.

Wife opened joint account and deposited money.

Parties utilized account to pay off auto loans and other marital bills.

Appellate court held that the fact that the account was in joint names did not change the classification from nonmarital.

Valentine v. Van Sickle, 42 So. 3d 267, 277 (Fla. 2d DCA 2010)

Siegel v. Siegel

Husband received gifts from his mother and deposited them into a separate account.

No marital money was comingled in the account.

Husband's statements that he would use the non-marital account for retirement and daughter's wedding were not controlling.

Maintaining separate account in his individual name was sufficient to maintain non-marital classification.



Siegel v. Siegel, 967 So. 2d 349(Fla. 3d DCA 2007)

Retirement Plans

Value of nonmarital interests in retirement plans as of the date of marriage and the enhancement in value of the nonmarital portion are nonmarital assets.

Horton v. Horton, 62 So.3d 689 (Fla. 2d DCA 2011).



Appreciation from Marital Efforts or Funds





The enhancement in value and appreciation of non-marital assets resulting from the efforts of either party or from the contribution of marital funds to the asset or expenditure of marital funds.

Kaaa Concept

Appreciation of Non-Marital property from market conditions = Passive Appreciation.

BUT, conversion of Non-Marital to Marital happens when:

1. Marital funds are used to pay debt, and/or
2. The non-owner spouse contributes marital effort or funds.



What Do You Do with Improvements and Mortgage Paydown?

"In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the **fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage**….*the value of this marital asset should be reduced, however, by the unpaid indebtedness marital funds were used to service."*



The *Kaaa* Calculation

Calculation to determine what portion of appreciation should be classified as marital – in the absence of improvements.



Sample Document List to Prepare *Kaaa* Calculation

1. Appraisal of the property at DOM;
2. Appraisal of the property at valuation date (may be at filing or another date);
3. Documents supporting the amount of indebtedness at date of marriage;
4. Documents supporting the amount of indebtedness at valuation date;
5. Documents supporting the fair market value of any improvements made to the property.

Following *Kaaa*

Weymouth v. Weymouth, 87 So.3d 30 (4th DCA 2012):

- Prenuptial that fails to waive rights in appreciation does not shelter appreciation of mortgaged property from *Kaaa* analysis.



Enhancement in Marital Assets

What Does NOT count under Section 61.075(6)(a)1.b.:

- Taxes
- Association Fees
- Repairs
- Maintenance
- Non-value improving improvements
  - None of the above transmute a nonmarital asset to a marital asset, as no "enhancement in value or appreciation" results due to those contributions **under current law**.

- Does this make sense?
- Do mortgage payments enhance value?
- What is the difference?

What About a Business?

***A Very* Fact intensive inquiry…**

Orloff v. Orloff, 67 So. 3d 271 (Fla. 2d DCA 2011): premarital business started in another state does not become marital asset simply because re-incorporated in Florida.



Conlan v. Conlan, 43 So. 3d 931 (Fla. 4th DCA 2010): LLC formed *during the marriage* with nonmarital funds is a nonmarital asset. Because Husband did not contribute marital labor to the LLC, enhancement was also nonmarital.

What Are You Equitably Distributing?

Stock of a corporation may be a marital asset, but the assets of the corporation are not.

Keller v. Keller, 521So.2d 273(Fla. 5th DCA 1988): car owned by the business can't be distributed to the Wife

Mathes v. Mathes

Husband and Wife owned a Florida corporation.

Corporation was not joined as a party.

Trial court removes Husband from business and Wife ordered to run company.

Court sets salaries, orders disbursements, orders corporation sold, and appointed an attorney for the corporation.

All without jurisdiction of the company.



Mathes v. Mathes, 91 So. 3d 207 (Fla.2nd DCA 2012)

What are you equitably distributing?

Non-owner spouse should receive her share of the value of the business to be paid "on such terms and conditions as the trial court determines are reasonable", but not the stock itself

"it creates the intolerable situation of these erstwhile mates being required to operate a business together"

Novak v. Novak, 429 So. 2d 414, 414 (Fla. Dist. Ct. App. 1983)

Is Joinder Necessary?

"Although a court may order a husband to transfer stock to his wife without joinder of the corporation as a party, where the **husband's intimacy with the corporation makes the wife's actions against them inextricably intertwined**, the court should not dismiss the corporation."

Hoecker v. Hoecker, 426 So. 2d 1191 (Fla. Dist. Ct. App. 1983)

But note*… Partnerships are different. See ***Schiller v. Schiller*, 625 So.2d 856 (Fla. 5th DCA 1993): court cannot award one spouse's interest in a partnership to the other spouse.

Second Step: Value the Marital Assets

As of When?

"The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is **just and equitable under the circumstances**. **Different assets may be valued as of different dates**, as, in the judge's discretion, the circumstances require."

Fla. Stat. §61.075(7)

Second Step: Value the Marital Assets

When?

- Dates of Separation
- Filing
- Trial
- Alternative Dates



Valuation Dates

- ***Kumar v. Kumar***, 84 So.3d 399 (Fla. 2d DCA 2012).
  - Active appreciation of assets: date of filing.
  - Passive appreciation of assets: date of final hearing.
  - Room for creative arguments – file motion.

Valuing Assets

How?

- Appraisals
- Book Value
- Lay Witnesses
- Business Valuation Expert



Step Three: Distribute the Assets

§ 61.075(1):

[T]he court shall … begin with the premise that the distribution should be equal, unless there is a justification for an **unequal distribution** based on all relevant factors, including:

Equal / Unequal Distribution

(a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.
(b) The economic circumstances of the parties.
(c) The duration of the marriage.
(d) Any interruption of personal careers or educational opportunities of either party.
(e) The contribution of one spouse to the personal career or educational opportunity of the other spouse.
(f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
(g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties.
(h) The desirability of retaining the marital home as a residence for any dependent child…

Dissipation of Marital Assets

§ 61.075(1):

(i) The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.

(j) Any other factors necessary to do equity and justice between the parties.

Gentile v. Gentile

Fourth District Court described dissipation:

"…as a situation where one spouse uses marital funds for his or her own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown."

Gentile v. Gentile, 565 So. 2d 820 (Fla. 4th DCA 1990)

Dissipation of Marital Assets

- ***Roth v. Roth***, 973 So.2d 580 (Fla. 2d DCA 2008).
  - The misconduct necessary to support inclusion of dissipated assets in an equitable distribution scheme does not include mismanagement or "simple squandering" of marital assets in a manner of which the other spouse disapproves.

Dissipation Only Results From Intentional Misconduct



"…to include a dissipated asset in the equitable distribution scheme, there must be evidence of the spending spouse's **intentional dissipation or destruction of the asset**, and the trial court must make a specific finding that the dissipation resulted from **intentional misconduct**."

Roth v. Roth, 973 So. 2d 580 (Fla. 2d DCA 2008)

Depletion of Marital Assets

Tummings v. Francois, 82 So.3d 955, 958-59 (Fla. 2d DCA 2011).

- Wife's employment bonuses cannot be properly included as marital assets absent specific findings that bonuses had been depleted by the wife during the dissolution proceedings and such depletion constituted intentional misconduct.
- Had the trial court made specific findings when it declared the employment bonuses marital assets, such findings would have been error as wife's final financial affidavit showed that wife's monthly expenses outweighed her income without even considering the litigation expenses wife was ordered to pay.

How Far Back Can You Go?

Courts may consider dissipation more than two years before the petition was filed.

"the two-year time period set forth in subsection 61.075(1)(i) **does not bar** a trial court from considering, as any 'other factor,' dissipation of marital assets which occurs **prior to the two year period preceding the filing of the petition for dissolution."**



Monticello v. Monticello, 967 So. 2d 390 (Fla. 4th DCA 2007) and Beers v. Beers, 724 So. 2d 109 (Fla. 5th DCA 1998)

How Do You Prove Dissipation?

Evidence in the record for Trial Court:

1. Sexually explicit e-mails and photos exchanged between the husband and the woman, whom the husband described as his "translator";
2. E-mails between the husband and a travel agent in Belarus; and
3. Husband's financial records, which detailed extensive travel and gift expenses for him and his mistress.



Rabbath v. Farid, 4 So. 3d 778 (Fla. 1st DCA 2009)

Evidence Of Dissipation

- **Travel and Meals – Request Credit Cards**
- **Hotel Records**
- **Gifts**
- **Checks to Girlfriend or Family Members**
- **Cash – How do you prove use of cash?**





Interim Partial Equitable Distribution

Section 61.075(5), *Florida Statutes*

- The court ***shall***:
  - Identify and value the marital and nonmarital assets subject to the motion for interim partial distribution;
  - Set apart those nonmarital assets and liabilities;
  - Provide for a partial distribution of those marital assets and liabilities;
  - Give appropriate credit for any interim partial distribution in the final allocation of said assets and liabilities between the parties; and,
  - Make **specific findings** that the interim partial distribution will not cause inequity or prejudice to either party as to any claim for support or attorney's fees.

Interim Partial Equitable Distribution

Section 61.075(5), Florida Statutes

- Relief only available upon "**good cause**," meaning "extraordinary circumstances that require an interim partial distribution" and explanation why the matter should not be deferred until the final hearing.
- Requesting party must submit **sworn motion**.
- The court may enter an interim order prior to the final distribution of marital and nonmarital assets and marital and nonmarital liabilities.

Equalizing Payments

§ 61.075(10), Fla. Stat. -- permits the court to order the payment of a "balancing" or "equalizing" payment:

> To do equity between the parties, the court may, in lieu of or to supplement, facilitate, or effectuate the equitable division of marital assets and liabilities, **order a monetary payment in a lump sum or in installments paid over a fixed period of time.**



Bishop v. Bishop

A lump sum equalizing payment to accomplish equitable distribution is "properly awarded only when the evidence reflects a justification for such an award and the ability of the paying spouse to make the payments **without substantially endangering his or her economic status**."



Bishop v. Bishop, 47 So. 3d 326 (Fla. 2d DCA 2010)

Posner v. Posner

Final Judgment provided Wife to pay equalizing payment of $85,413 at $100 per month. Court reversed and ordered a more expeditious payment of the equalization payment. The Court suggested methods for payment :

1. A shorter payout period, including a lump sum payment after a few years;
2. Payment from the sale of the Wife's various assets; or
3. Allowing the amount to be reduced to judgment, so Husband could collect it from the Wife's assets.

Posner v. Posner, 39 So. 3d 411 (Fla. 4th DCA 2010)

Tax Consequences

- ***Tradler v. Tradler***, 2012 WL 5373446 (Fla. 2d DCA 2012) (trial court errs in failing to consider the tax consequences of the equitable distribution when presented to the Court); *Nicewonder v. Nicewonder*, 602 So. 2d 1354 (Fla. 1st DCA 1992).
- ***Hornyak v. Hornyak***, 48 So. 3d 858 (Fla. 4th DCA 2010) (trial court did not need to consider tax consequences of equitable distribution of retirement accounts where liquidation not imminent).

Burdens of Proof

Section 61.075(6)(a)1.d.2, 3, (8), *Florida Statutes*.

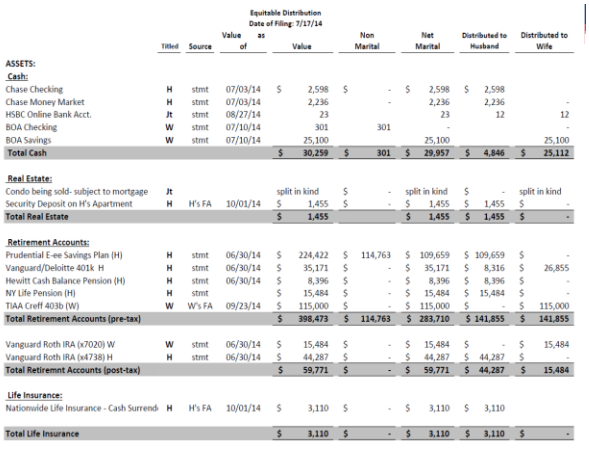
- Burden of proof is on the party claiming that an asset acquired during the marriage is nonmarital.
- Party claiming appreciation of nonmarital asset is marital has burden of proof. ***O'Neill v. O'Neill***, 868 So. 2d 3 (Fla. 4th DCA 2004).
- Once marital component to appreciation of nonmarital asset is shown, party claiming any portion is nonmarital has burden of proof. ***O'Neill***, supra (must demonstrate that appreciation due to market forces or other nonmarital source).

Competent Substantial Evidence Required

- ***Simmons v. Simmons***, 979 So. 2d 1063 (Fla. 1st DCA 2008): trial court has no duty to make findings of value for marital assets if the parties have not presented any evidence of value.

Contempt

- Payments of lump sum alimony to accomplish equitable distribution are not enforceable by contempt. ***Pipitone v. Pipitone***, 23 So.3d 131 (Fla. 2d DCA 2009).
- Acts required to be performed to accomplish equitable distribution **are** enforceable by contempt. ***Roth v. Roth***, 973 so.2d 580 (Fla. 2d DCA 2008). Execution of documents; delivery of personal property, etc.



Equitable Distribution
Date of Filing: 7/17/14

	Titled	Source	Value as of	Value	Non Marital	Net Marital	Distributed to Husband	Distributed to Wife
ASSETS:								
Cash:								
Chase Checking	H	stmt	07/03/14	$ 2,598	$ -	$ 2,598	$ 2,598	
Chase Money Market	H	stmt	07/03/14	2,236	-	2,236	2,236	-
HSBC Online Bank Acct.	Jt	stmt	08/27/14	23		23	12	12
BOA Checking	W	stmt	07/10/14	301	301	-		-
BOA Savings	W	stmt	07/10/14	25,100		25,100		25,100
Total Cash				**$ 30,259**	**$ 301**	**$ 29,957**	**$ 4,846**	**$ 25,112**
Real Estate:								
Condo being sold- subject to mortgage	Jt			split in kind	$ -	split in kind	$ -	split in kind
Security Deposit on H's Apartment	H	H's FA	10/01/14	$ 1,455	$ -	$ 1,455	$ 1,455	$ -
Total Real Estate				**$ 1,455**		**$ 1,455**	**$ 1,455**	**$ -**
Retirement Accounts:								
Prudential E-ee Savings Plan (H)	H	stmt	06/30/14	$ 224,422	$ 114,763	$ 109,659	$ 109,659	$ -
Vanguard/Deloitte 401k H	H	stmt	06/30/14	$ 35,171	$ -	$ 35,171	$ 8,316	$ 26,855
Hewitt Cash Balance Pension (H)	H	stmt	06/30/14	$ 8,396	$ -	$ 8,396	$ 8,396	$ -
NY Life Pension (H)	H	stmt		$ 15,484	$ -	$ 15,484	$ 15,484	$ -
TIAA Creff 403b (W)	W	W's FA	09/23/14	$ 115,000	$ -	$ 115,000	$ -	$ 115,000
Total Retirement Accounts (pre-tax)				**$ 398,473**	**$ 114,763**	**$ 283,710**	**$ 141,855**	**$ 141,855**
Vanguard Roth IRA (x7020) W	W	stmt	06/30/14	$ 15,484	$ -	$ 15,484	$ -	$ 15,484
Vanguard Roth IRA (x4738) H	H	stmt	06/30/14	$ 44,287	$ -	$ 44,287	$ 44,287	$ -
Total Retiremnt Accounts (post-tax)				**$ 59,771**	**$ -**	**$ 59,771**	**$ 44,287**	**$ 15,484**
Life Insurance:								
Nationwide Life Insurance - Cash Surrend	H	H's FA	10/01/14	$ 3,110	$ -	$ 3,110	$ 3,110	
Total Life Insurance				**$ 3,110**	**$ -**	**$ 3,110**	**$ 3,110**	**$ -**

	Titled	Source	Value as of	Equitable Distribution Date of Filing: 7/17/14 Value	Non Marital	Net Marital	Distributed to Husband	Distributed to Wife
Automobiles:								
2007 Honda CRV (H)	H	KBB		$ 5,000	$ -	$ 5,000	$ 5,000	
2014 Lexus 350 (W) - Lease	W	KBB		n/a	-	n/a	n/a	n/a
Total Automobiles				**$ 5,000**	**$ -**	**$ 5,000**	**$ -**	**$ -**
Personal Property:								
Furniture & Furnishings	Jt			split in kind		split in kind	split in kind	split in kind
W's Engagement Ring	Jt			$ 15,000	15,000			
W's Jewlery	Jt			split in kind	-	split in kind	split in kind	split in kind
Total Personal Property				**$ 15,000**	**$ 15,000**	**$ -**	**$ -**	**$ -**
TOTAL ASSETS				**$ 453,297**	**$ 130,064**	**$ 323,232**	**$ 195,553**	**$ 182,451**
LIABILITIES:								
TOTAL LIABILITIES				**$0**	**$ -**	**$0**	**$ -**	**$ -**
TOTAL NET WORTH				**$ 453,297**	**$ 130,064**	**$ 323,232**	**$ 195,553**	**$ 182,451**
			BALANCING PAYMENT				**($33,937)**	**$33,937**
							$ 161,616	$ 216,387

Questions?



Jodi F. Colton, Esq.
Jodi.Colton@brinkleymorgan.com



Marissa J. Pullano, Esq.
Marissa.Pullano@brinkleymorgan.com

BRINKLEY MORGAN
Attorneys at Law

www.BrinkleyMorgan.com