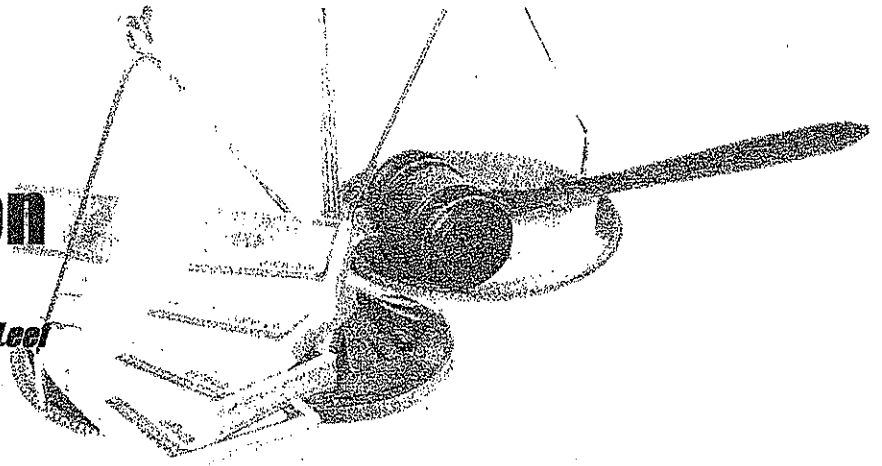


# Property Division

Mastering the Complicated Dance

by J. Leef



A contested divorce may bring to mind child custody battles, parenting plans and support calculations. However, in today's world of later marriages, multiple marriages, and couples postponing children until careers are established, the basic issue of property division is once again the issue de jure in divorce court. Statutes and case law certainly provide a plethora of guidance in the matter of asset and debt division, and a review of the rules shows there are enough steps in this area to keep even the most skillful attorney on his or her toes.

The statutory authority for the division of property is found at Neb. Rev. Stat. § 42-365.

"When dissolution of a marriage is decreed, the court may order...division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.... The purpose of a property division is to distribute the marital assets equitably between the parties."

The Nebraska Supreme Court has determined that the equitable division of property is a three step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the

net marital estate between the parties in accordance with the principles contained in § 42-365. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W. 2d 42 (2004). As easy as this three step process may sound, the challenge for the attorney performing it is in the intricacies of each step. As is often the case, the apparently simple first step—classifying the parties' property as marital or nonmarital—can be the most difficult.

## Step One: The Golden Rules of Marital v. Nonmarital

An accurate determination of marital property versus non-marital property may substantially affect a client's finances. Assume, for example, a client enters a marriage with \$100,000, then accumulates an additional \$100,000 during the marriage. If the court sets aside the first \$100,000 to our client as nonmarital assets, then divides the second \$100,000 between the parties, our client receives \$150,000 (assuming an equal division of the marital assets), as opposed to the court dividing the entire \$200,000 equally, leaving our client with \$100,000—the same amount she came in with. In determining whether property is marital or nonmarital, the court has given us two basic premises: 1) As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000); and 2) With respect to separate property, whether inherited, gifted or premarital, if it can be identified, it is typically set off to the inheriting spouse, the spouse donee of the gift, or the spouse who brought the property into the marriage. *Tyler v. Tyler*, 253 Neb 209, 570 N.W.2d 317 (1997). Again, these basic rules seem simple. However, long-term marriages usually

### J. Leef

J. Leef is a graduate with honors from Washburn Law School in Topeka, Kansas, and has been practicing law for 18 years. A partner at Sonntag, Goodwin & Leef in Sidney, J. devotes a majority of her practice to family and juvenile law.

## PROPERTY DIVISION

mean that any premarital funds of the parties have been commingled, and in marriages made later in life, sizable premarital assets brought by each party are often added to by both parties during the marriage. In these situations, there are no clear lines between marital and nonmarital property and even the most sure-footed attorney may stumble. Fortunately, there is case law to guide us in making this kind of division.

### The Burden of Proof

When determining whether property is marital or nonmarital, the burden of proof to show that property is nonmarital remains with the person making the claim. *Malin v. Loynachan*, 15 Neb.App.706, 736 N.W.2d 390 (Neb.App.2007); *Gangwish v. Gangwish, Id.* The Nebraska Court has addressed both the situation where nonmarital assets are used to add value to assets of the marriage, as well as when marital assets are added to one party's nonmarital property. In order to prevail in keeping nonmarital property separate from the marital estate, there must first be a clear identification of the nonmarital asset used. See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). Nonmarital property may remain nonmarital even if the title of the property is changed from one party to both parties. *Medlock v. Medlock*, 263 Neb. 666, 642N.W.2d 113 (2002). Likewise, if funds can be traced directly from nonmarital property through several transactions, the same may still be nonmarital property. Documentary evidence, rather than mere testimony is usually required. See *Quinn v. Quinn*, 13 Neb App 155, 689 NW 2d. 605 (2004); *Gramm v. Gramm*, 9 Neb. App. 944, 624 NW 2nd 42 (2001). *Olsen v. Olsen*, 13 Neb App 265, 693 NW 2d 572 (2005). However, it is unlikely that the Court would support the proposition that documentary evidence is required in all instances in order to meet the burden of proof regarding premarital property. See *Rogman v. Rogman* A-1-265 Court of Appeals November 2011 not designated for publication

Once the nonmarital asset has been identified, in the case of purported enhancement of a marital asset, it must be proved that such expenditures increased the value of the marital asset. For inherited money expenditures to be set aside as nonmarital property, it is insufficient to simply show the amount of the expenditures because it is elementary that cost or expenditure does not equate with value. *Hughes v. Hughes*, 14 Neb.App. 229, 706 N.W.2d 569 (Neb.App. 2005). In *Hughes*, the Court looked at nonmarital assets that were used to pay various expenses for a cabin purchased during the marriage. Because there was no evidence that these expenses were for improvements or increased the value of the cabin, the Court found those expenditures could not be set aside as nonmarital property from the value of the cabin. Where there is commingling of marital property and inherited funds, it is necessary that there be proof of the monetary effect of the inherited money

expenditures on the value of the marital asset before it can be concluded that the party claiming the nonmarital property be set aside has carried his or her burden of proof. *Hughes v. Hughes, Id.*

### The Van Newkirk Exception: Marital Contributions to Nonmarital Assets

If the proponent of nonmarital assets meets his burden, the burden shifts to the party who wants to include the nonmarital property in the marital estate to show why the nonmarital property should be included. Again, it is time for the astute attorney to show his or her fancy footwork.

The most frequently employed exception, sometimes referred to as the *Van Newkirk* exception, allows nonmarital property to be included in the marital estate "where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage." *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988). See *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (Neb. 1997) citing *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). Nebraska case law provides guidance in determining what the party wanting to include the nonmarital property must provide. In this scenario, the person claiming the nonmarital property should be included in the marital estate must show both the value of the contributions and that the contributions were significant. Significant contributions must be direct contributions to the preservation of the property's value or increase in the property's value. *Walker v. Walker*, 9 Neb App 834, 622 NW 2d 410 at 416 (2001). Occasional contributions of a spouse to a farmer-rancher, where the spouse would help with branding, dehorning, calving and weed burning do not meet this burden. See *Applegate v. Applegate*, 219 Neb. App 532, 365 N.W. 2d 394 (1985). Emphasis should be placed on decision-making powers, as well as regular participation that preserves or increases the assets value.

### Step Two: The Valuation of Marital Assets

Once the nonmarital property is set aside and the marital property is determined, a value must be placed on those marital assets and debts. At this stage, the parties are usually discussing two important issues: 1) the type of asset or debt and 2) the date of valuation. With so many different types of assets and debts, the savvy attorney should search case law to determine if the higher courts have provided guidelines regarding a certain asset type. In 2011, the Nebraska Court of Appeals provided detailed guidance regarding valuation of a closely held corporation, holding that such valuation should consider

## PROPERTY DIVISION

the taxable gain on the business only when the sale or liquidation is reasonably certain to occur in the near future or that the property division of the court will, in effect force a party to sell his or her business in order to meet the obligations imposed by the Court. See *Shuck v. Shuck*, 18 Neb App 867, A-10-170 (NECA) January 25, 2011. An in depth look at valuation of corporate stock has also been done by the Nebraska Court. See *Olson v. Olson* 13 Neb App 365, 693 N.W.2d 572 (2005). As to the date of valuation, there is no 'hard and fast' rule concerning valuation dates so long as the selected date bears a rational relationship to the property to be divided and the selected date is reviewed for a abuse of discretion. *Mybra v. Mybra* 16 Neb App 920, 756 N.W.2d 528 (2008).

Crucial to the valuation stage, most district court rules require parties to prepare a combined property statement for trial, and also often require any amendments be made at least ten days before trial. (See Rules of District Court of Ninth Judicial District 9-21(B) (rev 2010.)) While these joint property statements usually include both the husband's and the wife's proposed valuation of assets and debts, the value on the property statement may be listed as unknown by either party, provided there is sufficient evidence that the other party was aware that the values of those assets and debts were going to be contested. *Halousta v. Halousta*, 7 Neb. App. 730, 743; 585 N.W.2d 490, 501 (1998). Given the volatile nature of many investments, this option may be of assistance to your client.

### Step Three: Calculating and Dividing the Net Marital Estate

Once you have two-stepped and three-stepped your way through classifying marital and nonmarital property and valuing the marital assets, it is tempting to relax during the final dance of calculating and dividing the net marital estate. However, to do so could cost your client dearly. The purpose of a property division is to distribute the marital assets equitably between the parties. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of the case. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W. 2d 898 (2002); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503(2004). Here is where the statutory considerations "the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities" come into play. Each of these considerations may be applied to convince the Court why your client should receive the larger 2/3-1/3 division set out in *Gibilisco*. In addition, there are three primary exceptions left to consider which allow you to increase or decrease a party's share when taking

the last step of calculating and dividing the net marital estate.

### The Grace Rule

The Grace rule is an exception that allows property determined to be nonmarital in Step One to again be brought back into the marital estate for purposes of making a cash award in this final Step Three. *Grace* awards are used to compensate for the inadequacy of the marital estate--when the long-time married couple has not acquired property, such as a house, that a couple "with above average assets, would be expected to acquire." *Grace v. Grace*, 221 Neb. at 701, 380 N.W.2d at 285. The Nebraska Court of Appeals describes it as follows:

The inadequacy of the marital estate in cases of this nature involve a typical fact pattern where the wife devotes herself to running the household and caring for the children and where the husband's labors are devoted to a family farming or ranching corporation in which he owns stock, usually owned prior to the marriage or gifted solely to him during the marriage. Hence, under our cases, the stock is treated as the husband's separate property. Additionally, in the typical situation where the issue arises, the husband receives a rather nominal cash salary in exchange for his labor devoted to his family's farm or ranch, but also receives such things as housing, utilities, vehicles, fuel, beef, use of the corporation's land for his livestock herd, etc. As a result of the low cash earnings of the husband, the couple often has an inconsequential marital estate. *Charron v. Charron*, 16 Neb. App. 724, 730; 751 N.W.2d 645, 650 (2008).

*Grace* awards are not strictly limited to agriculture situations, although such would be the most common. *Shuck v. Shuck*, Neb App 867, A-10-170 (NECA) January 25, 2011. Nebraska courts have discussed *Grace* awards in detail in both *Walker and Shunk*. *Id.* The use of a *Grace* award has resulted in cash awards equaling 6.7% of the nonmarital property in *Grace*, to slightly less than 25% of the nonmarital property in *Walker*.

### Dissipation of Assets

This exception allows one party's share of the marital assets to be reduced by the amount of assets that can be shown to be dissipated by that party. Dissipation of marital assets is generally defined as 'one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.' *Harris v. Harris*, 261 Neb 75, 87, 621 N.W.2d 491, 501 (2001), quoting 24 Am. Jur 2d, Divorce and Separation secv 560 (1998). Again, the person claiming that assets were dissipated has the burden to prove his or her claim. To do so, the claimant must successfully prove three things: 1) that the spouse used up the property; 2) that the property was used for a selfish purpose unrelated to the marriage, and 3) that such use occurred when

## PROPERTY DIVISION


an irretrievable breakdown of the parties' marriage was occurring. The parties' marriage must be undergoing an irretrievable breakdown during the time period that one party allegedly dissipated assets. *Malin v. v. Loynachan*, 15 Neb.App.706 at 709, 736 N.W.2d 390 (Neb.App. 2007). The *Malin* Court found that [Even if] one party was spending assets on a third party, that fact, in and of itself, was insufficient to allow the Court to conclude that an irretrievable breakdown of the parties' marriage was occurring. *Malin v. Loynachan*, 15 Neb.App.706 at 711, 736 N.W.2d 390 (Neb.App. 2007).


### The Dead Beat Spouse Exception

In 1999, the Nebraska Court of Appeals found that just as a court dividing the marital estate may take into account that both parties have contributed substantially to the marital estate, a court's division may also consider that the growth of the marital estate can be traced to one spouse and one party through indolence or neglect, chose to make only minimal beneficial


contributions to the marital estate. See *Mathew v. Palmer*, 8 Neb. App 128, 589 NW 2d 343 (1999). See also *Thompson v. Thompson* 18 Neb App 363, 782 NW 2d 607(2011) This exception may be used to justify your client is entitled to the still equitable but more favorable 2/3-1/3 division of the marital assets. *Thompson v. Thompson* 18 Neb App at 376.

### Conclusion

Only after carefully choreographing your way through the three steps of classifying property as marital or nonmarital, valuing the marital property and calculating the net marital estate can the nimble footed attorney at last sit down to rest. What begins as a three step process quickly turns into a dance worthy of the lawyer version of Fred Astaire and Ginger Rogers - or the Black Eyed Peas, depending upon your generation. It is only with skill, perseverance and particular attention to the right combination of steps that you can achieve the perfect dance of property division for your client. 



## Mary Kay Hansen Law & Mediation, PC LLO



**Helping Nebraskans with family law mediation and  
Social Security Disability services.**

1045 Lincoln Mall, Ste. 200  
Lincoln, NE 68501-5536

402-477-0230  
866-381-3288

[mkhansenlaw.com](http://mkhansenlaw.com)  
[lincolndisabilitylawyer.com](http://lincolndisabilitylawyer.com)

