

Divorce and the Pennsylvania Family Farm
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Introduction

Divorce can be a complex process. Legal issues and division of property are often compounded by emotions and personal attachments to assets. This article is intended to serve as a basic primer on Pennsylvania divorce law, and how a divorce can affect a family farm. Also included are some broad suggestions to prevent a family farm from collapsing in the wake of a divorce. Specific facts vary for each divorce and division of property or a family business. Therefore, parties to a divorce action should consult attorneys.

a) Grounds for Divorce in Pennsylvania

Under the Pennsylvania Code, Title 23, section 3301, there are four different types of divorce, including fault, mental disorder, consensual no-fault divorce, and unilateral no-fault divorce. Occasionally these categories will overlap, thereby allowing a party to bring a divorce action on more than one ground.

First, a party can sue on a fault-based theory. This means that the divorcing party alleges that his or her spouse's specific actions are the reason for the divorce action. To successfully divorce under this theory, a party must show that he or she is "innocent and injured", and must prove one of six fault grounds, including desertion, adultery, cruel or barbarous treatment, bigamy, another spouse's being convicted of a crime and sentenced to two or more years incarceration, or indignities, which is the most frequently used charge. In addition to the proving one of the six fault grounds by a preponderance of the evidence, the

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divorcing party must show that he or she is “innocent and injured”, but need not be wholly free from fault².

Second, a party can sue for divorce on the theory that his or her spouse has a mental disorder. The divorcing party must show that his or her spouse has been institutionalized for 18 months or more, with no reasonable prospect of being discharged within 18 months.

The third ground is called “consensual no-fault divorce.” In this instance, both spouses agree that marriage is irretrievably broken, and neither spouse is specifically at fault. Irretrievably broken is similar to “irreconcilable differences”, and means that if this allegation is made, a court will hold a hearing to determine if there is a reasonable hope for reconciliation between the parties. If not, the court will grant the parties a divorce. However, if a court finds that there is a reasonable prospect of reconciliation, it will order the hearing to be postponed so that both parties can attend marital counseling in an effort to save the marriage.

The fourth ground is called “Unilateral no-fault divorce”. The requirement that the parties must live separate and apart for at least two years makes this type of divorce different from consensual no-fault divorce. Again, as in consensual no-fault divorce, a defendant contests that marriage is irretrievably broken, and the presiding court holds a hearing to determine the prospects for reconciliation. If the court determines that there is a reasonable prospect of reconciliation, the judge can order a continuance for up to four months, during which time the spouses will attend counseling sessions.

b) Doctrine of Equitable Distribution (ED)

Under Title 23, section 3502(a) of the PA Divorce Code, a trial court is empowered to divide, distribute, or assign equitably the marital property between parties upon request of

2. Pa. Family Law Prac. & Proc. § 10-2 (5th ed.)

either party. “At the request of either party” means that in the beginning of the divorce proceedings, at least one party must ask for equitable division of the marital assets. If neither party chooses to ask for equitable distribution during the divorce proceedings, then the claim is lost and cannot be raised. Although rare, a court may bifurcate or split the proceedings to deal with either the divorce or the ED claim one at a time.

i) *What is Marital Property?*

Marital Property includes all property acquired by either party during the marriage, including any increase in value prior to the date of final separation of certain non-marital property acquired pursuant to the categories of property listed below. An example of increase in property value would be payments made to annuity from the time of marriage until the parties’ final separation.

Division of Property Owned by Third Parties

In some cases, a farm and its assets may be owned by a Limited Liability Company (LLC) or Partnership (LLP), by a corporation, or by some other variant. Depending on the type of organization a farm is run by, property owned by third party organizations at the time of divorce is generally not divisible, especially where corporations and LLCs are concerned.

Sole proprietorships generally aren’t considered separate entities, and their assets are treated as any other asset when dividing marital property

Corporations – Even if a stockholder owns all or a majority of the shares of stock, that doesn’t make him and the corporation one and the same. Full legal title is in the corporation itself.

Partnerships – In most states, a partnership is an entity capable of owning property. Generally, partnership assets aren't subject to division upon divorce. However, the members party to the divorce can have their interests divided.

Trusts – like corporations, can own property in its own name (in the name of the trust).

Irrevocable trusts – If a trust is irrevocable, it's similar to a corporation. Can't be terminated by anything but an agreement among all beneficiaries. Interest in the trust is divisible.

Revocable trusts – Similar to ITs, but can be destroyed by the person who settles out (or ends) the trust (unfettered discretion).

In the case where only one spouse is an owner of a corporation or member of an LLC, and the other is not, several outcomes are possible. First, a court could award the non-owner spouse a cash payment based on the owner-spouse's interest in the company. Alternatively, the court could award the non-owner spouse a share of the other spouse's interest in the venture.

The overall value of the marital estate will include the value of the third-party assets, and the parties interests in that entity can be divided as marital property.

ii) *What isn't Marital Property?*

- 1) Any property acquired before the marriage date
- 2) Property excluded by a valid agreement entered into before, during, or after marriage.
- 3) Property acquired by gift (except shared between spouses), by bequest, devise, or descent (inheritance).

- 4) Property acquired after the final separation of parties.
- 5) Property sold before the date of the final separation.
- 6) Mortgage or other encumbered property if done before the date of final separation.
- 7) Settlement payments awarded outside dates of marriage (no matter when the payments are actually made)

iii) *What is the reasoning behind Equitable Distribution?*

The doctrine of equitable distribution is meant to provide for a relatively smooth transition between married and divorced living, and in turn minimize the negative effects of a divorce. Moreover, the Pennsylvania legislature wanted to ensure that each spouse would be recognized for his or her contributions to the endeavors undertaken during the marriage. More often, courts are recognizing the homemaking and child-rearing duties of the stay-at-home spouse as invaluable to the marital relationship, and they are being considered as tangible contributions to the marital assets. Courts reason that the bread-winning spouse would not be free to earn a suitable income to support the household without the contributions of the stay-at-home spouse.

When a claim for equitable distribution (ED) is raised, (which will almost certainly happen when family assets include a farm), a court will divide parties' assets based on several statutory factors discussed below. In dividing up and assigning marital property, the trial court will do so without regard to marital conduct. Thus, even if a divorce action is brought under a fault-based theory, a trial court will not look to the specific actions of either divorce party to determine what percentage each gets, but will apply the statutory factors listed below to reach an outcome. It is difficult to predict what percentage of an estate each party

will be awarded in any given case, because trial courts have broad discretion in fashioning ED awards, and the facts of individual cases tend to be very different.³

iv) *Distribution of Marital Property*

After the trial court has determined which property is marital property and valued that property, it will divide the property according to the factors listed in 23 Pa.C.S.A. § 3502. Those eleven factors are:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.

3. *Lyons v. Lyons*, 401 Pa.Super. 271, 585 A.2d at 42.

(10) The economic circumstances of each party at the time the division of property is to become effective.

(10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.

(10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.

(11) Whether the party will be serving as the custodian of any dependent minor children.

In ED cases, the property is often not divided up equally⁴. Where the marital property includes a business operated by one or both spouses, the length of marriage is especially important, as well as which spouse will have primary custody of children. Generally, a court will aim to leave both spouses on equal footing.

CASE EXAMPLE: The case of *Fonzi v. Fonzi*⁵ illustrates how a claim for equitable distribution might be decided where the marital assets include a company. In *Fonzi*, the company in question was a trucking and shipping company, but could just as easily been a farming operation.

One of the important points of contention in *Fonzi* was whether an award to the wife of 50% of the marital estate was excessive. The husband's attorneys argued that his extensive employment and income earning efforts should earn him considerably more than half of the marital estate. The trial court, however, agreed with the divorce Master, who held that Mrs. Fonzi had contributed substantially to her husband's success by shouldering the entire burden of child-rearing and forgoing her own career opportunities, thus allowing Mr.

4. *Platek v. Platek*, 309 Pa.Super 16, 454 A.2d. 1059 (1982).

5. *Fonzi v. Fonzi*, 430 Pa.Super. 95, 633 A.2d 634 (1993).

Fonzi to focus his efforts on the success of his trucking company. This holding reinforces the notion that homemaking and child-rearing duties are seen as defensibly valuable contributions to the marital estate for purposes of dividing assets.

c) Exercising Control Over the Outcome

Parties wishing to dictate property division upon divorce have the power to draft an agreement that will direct a divorce master to assign marital property according to the parties' own wishes. These divorce agreements can be created before, during, or after the marriage. In a situation which requires currently or soon-to-be married spouses to address the sensitive issue of divorce, it may be more legally sound and less emotionally jarring for the spouses to have a neutral third party (i.e. an attorney) draft an agreement rather than create one themselves. Parties to a divorce are certainly within their rights to reach and draft an agreement themselves outside the presence of an attorney.

In the instance of a third party-owned farm at stake in a divorce action, a divorce clause should be included in the third party's operating agreement⁶. Such a clause should outline the division of property or interest in the event of a member or shareholder's divorce. Such a clause might allow one party to retain control of his or her interest, and the other party to receive some form of compensation. In the past, courts have chosen to leave one spouse's interest in a company or partnership intact, and award the other spouse a cash payment based on the value of that company's assets^{7,8}. This line of reasoning is based on

6. For more information on farms run by third-party companies, visit the Agriculture Law Center's Agriculture Business publications page at https://www.dsl.psu.edu/centers/agpubs/Agricultural_Business.cfm.

7. 18 J. Am. Acad. Matrim. Law. 375 (2003), Division of Third Party Property in Divorce Cases.

8. *In re Marriage of Babb*, 576 P.2d 599, 30 Or.App. 581 (1977).

the notion that it is generally a smart idea to remove parties from joint decision-making duties and control of operations to reduce potential conflicts⁹.

d) Conclusion

The somber nature, gravity, and sensitivity of the divorce issue shouldn't prevent action. However unpleasant divorce planning may be, it's relatively quick and painless when compared with the alternative: a drawn-out legal battle straining assets and emotions to the breaking point. With careful planning and preparation, a family farm can survive a divorce intact; more importantly, so can the parties.

⁹ *Id.*