

Divorce Laws Regarding Property Division in Illinois

Divorce laws regarding property division in Illinois do not presume that property will be divided 50 / 50. Illinois is not a "community property state – it is an "equitable division" state. Illinois law requires property to be divided equitably, not according to a specified formula. Many divorce cases are resolved by the court – or settled by the parties – with 60 / 40 or 70 / 30 splits and some even allocate ALL marital property to one spouse.¹ The court looks to certain factors set out in the law when considering the division of marital property. The court is prohibited, by law, from considering "marital misconduct" in property division and the division of debts. So, notwithstanding the fact that your spouse may have engaged in several affairs and destroyed the relationship, the property will still be divided fairly without acknowledging the damage done by those deeds.

Each of the factors the court must consider are listed below. Remember that roughly 95% of all cases are settled, so call our office to work with an attorney who understands all the factors and is familiar with their application in court – you'll get a much better settlement than simply settling for 50 / 50.

Contribution: The court must consider the extent to which each party contributed "in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property... ." It stands to reason that the party who brought in most of the income during the marriage, should leave with most of the assets when it's over. Each case is determined based on its own facts and circumstances. Courts take this seriously and seemingly add up pennies. Decisions allocating fractions of percentages are not uncommon – 59.5% : 40.5% in one well-known case.² Some attorneys have argued that if the parties have enough income to get by and have no real need, then all marital property should be divided strictly according to the proportionate contribution of each party. That's wrong. The court looks to more than just contribution alone – it is only one factor that must be considered in light of all the others.³ Work with a lawyer who is familiar with the case law and how the element of "contribution" fits in with all of the other factors considered by the court.

Homemaker Contribution: Illinois courts look at marriages as "joint enterprises." They think of marriages like business partnerships. These businesses takes in money, spend money, and keep themselves going. One partner may go to work every day to bring in the money while the other partner stays home all day to keep house and rear children. Under Illinois law, the contributions of a homemaker can be considered to be substantial and can be considered on equal footing with monetary contributions.

On the other hand, the homemaker contribution is not a sure-thing. In some cases (no children, lousy homemaker) it is, perhaps, the weakest argument in a good attorney's arsenal when it comes to property division. Several cases have concluded that little or no property award should be made where there are no children and where the homemaking essentially went undone.⁴ It is also true that in some cases where the homemaking and child rearing were shared roughly equally, the homemaker contributions of each spouse tended to cancel each other out.⁵ Again, this is not a sure thing and you should work with a knowledgeable attorney to maximize your settlement or trial position.

There is no formula in the law for determining how much the "homemaker contribution" is worth – each case is decided on its own unique set of facts and circumstances. The homemaker contribution argument has to be adequately prepared and properly presented – the court will not assume it and build in an automatic award. That means that if the "homemaker contribution" issue is present in your case, you should work with a knowledgeable and experienced attorney, familiar with the long line of cases that interpret Illinois' homemaker contribution awards and who can prepare – or prepare to defend against – the argument.

Value of Property Assigned: Although the law doesn't say so specifically, the word "assigned" refers to the value of the **non-marital** property assigned to each spouse. If one spouse has significant non-marital assets, the court may find justice in awarding a disproportionate share of the marital assets to the other spouse. Similarly, the spouse with a sizeable non-marital estate may be saddled with a disproportionate share of the marital debt. Because there is no formula for these types of allocations, you should work with a good divorce attorney who is familiar with all current case law.

Duration of the Marriage: This factor serves dual purposes: in long marriages it operates as sort of a multiplier of the homemaker contribution; in short marriages it works to prevent gold-diggers from marrying millionaires one day and divorcing them the next in an effort to acquire a big piece of wealth.

In marriages of long duration where one spouse may have sacrificed a lifetime career for the benefit of the children and home, the homemaker contributions tend to carry a heavier weight in the court's division of property.

Conversely, in marriages of short duration, where there probably aren't any children and there hasn't been the opportunity to make much of a home and the correlating sacrifices have not yet been made, the argument for the homemaker contribution is severely undercut. Many courts facing short-marriage situations will simply assign to each party the property they brought to the marriage and be done with it. The classic case is one where, shortly after the marriage, one spouse sells his pre-marital home and rolls the proceeds over into the down-payment on a new house and puts the title in the names of both spouses. That makes the house, presumably, marital property. If a divorce is filed soon thereafter, he may lose a lot of that money and the other spouse may gain a lot (tens of thousands of dollars) just for being alive and married on the day of the closing. That's not fair – and that is precisely what the "duration of the marriage" factor seeks to prevent.

Relevant Economic Circumstances: Under Illinois Law, the court has the power to allocate property to achieve substantial equity between the parties. To do so, the court must consider the economic circumstances of each spouse. One may have a secure career and guaranteed future while another may be unemployed or unemployable. Courts sometimes (but not always) allocate more property to the less financially secure party as a way of affording them some additional, albeit nominal, security.⁶

Prior Marriages: This rarely comes up, but if a spouse receives child support or maintenance from a prior divorce, or if one party has additional obligations to children from a prior marriage, the court may consider that when dividing property in the present marriage.

Agreements: Prenuptial and post-nuptial agreements can be very flexible and very enforceable. Some agreements identify as non-marital property specific property that may or may not eventually be owned by one of the parties. Some agreements even go so far as to exclude all – that's right, ALL – property acquired during the marriage from being identified as "marital" and instead treat all property as the non-marital property of the acquiring party.⁷

Most Prenuptial agreements stay away from the "everything I acquire is mine and everything you acquire is yours" strategy and, instead, prescribes how certain assets will be distributed upon the possible dissolution of the marriage. The most common items dealt with are cash, homes, and businesses.

Situational status: In dividing up property, courts will also look to their own awards of custody, visitation, child support, and maintenance. It may be that one party needs the house more than the other. Perhaps a particular vehicle is more useful to one than the other. Courts take these issues into consideration when dividing property.

Custody: The court must take into account its custody award when making its property division. Sometimes a parent awarded custody will receive a larger share of the marital estate to help defray the added costs of caring for the children. In some situations it makes sense to try to keep the kids in the home and, therefore, the custodial parent should be awarded the home as part of the property division. Illinois law contains specific provisions addressing this situation.⁸ Other provisions in the law give the court the power to let the custodial parent stay in the home for a given time⁹ – like, until the children enroll in college – and then give the home to the non-custodial parent or sell it and divide the proceeds.

If you want to keep the home – regardless of whether you'll be the custodial parent or even irrespective of whether you have children – work closely with an attorney who is familiar with divorce law regarding property division in Illinois and the cases interpreting it.

Maintenance: Prior to 1993, the court could award maintenance only if the property division could not achieve financial equity between the parties. Illinois law has changed since then and today a court is freer to make an award of maintenance on top of a disproportionate property division. Nevertheless, courts like finality in divorce cases. They do not like to see the parties come back a few years later to have another fight. If a court has the option of making a disproportionate property division that will obviate the need for maintenance, it may make such an award. By doing so the court eliminates maintenance and thereby eliminates the chance for something to go wrong in the future. All too often those required to pay maintenance fail to pay the correct amount, fail to pay on time, or fail to pay at all. Recipients take actions that warrant a premature termination of maintenance. New circumstances befall one party that may warrant a modification, suspension, or termination of maintenance. All of these uncertainties can be removed by a disproportionate property division and a denial of maintenance.

Regardless of your objective – obtaining or denying maintenance or an equal or disproportionate property award –

you should work with an attorney who knows the law and the cases to help maximize your settlement and trial potential.

Future Income: Illinois law directs judges when dividing property in a divorce to consider "the reasonable opportunity of each spouse for future acquisition of capital assets and income." In this day and age, most marriages see both spouses working. It is rare to encounter a lifelong stay-at-home Mom / housewife. At most, some Moms and Dads will put their careers on hold for a few years while children are in infancy but, after that, resume their place in the workforce. Generally, most spouses earn about what their partner earns although men tend to earn more than women. In higher income brackets, however, the disparity in incomes becomes more pronounced and the stay-at-home spouse becomes much more common.

A great disparity in the incomes of the parties at the time of divorce may warrant a disproportionate division of property. Generally, the court looks to long-term income trends when making such determinations. Don't count on that reasoning, though. A particularly good year for you before the divorce may come back to hurt you when the court begins to divide property. A shrewd opposing counsel would try to argue that your recent income (the last, GOOD year) is the better measure of your ability as opposed to the previous years when you were still building your business, practice, career, client base, etc. Your own attorney, of course, would have to show the court that the last, GOOD year was merely a fluke; an aberration from your usual, lower, annual income. Work with a good attorney – these cases can rely more on persuasive ability than hard facts.

The "future income" component is not limited to long-term future income, either. Temporary unemployment has been used successfully to obtain a larger share of the marital estate; and some spouses have been suspected of arranging their own unemployment status at just the right time to maximize their share of the property division.

Again, work with an attorney who knows the "ins" and "outs" of this area of the law – it could make a huge difference in the outcome of your case.

Taxes: Benjamin Franklin noted that "in this world nothing can be said to be certain, except death and taxes." Illinois' divorce law acknowledges this fact and instructs judges to consider the tax consequences of the property distribution in any contested divorce. Your divorce attorney must also be a good tax attorney. A miscalculation regarding taxes could cost you your entire property award. It is not uncommon, for example, for a spouse to be awarded stock or other investments in lieu of cash – only to learn later that to convert the stock to cash, she'll have to pay upwards of 50% in taxes and penalties.

Taxes impact not just property transfers, but also come into play when considering awards of maintenance and child support. Even an agreement where the custodial parent will remain in the house until the children finish school, followed by the sale of the home, carries with it significant tax considerations (who gets to write off the mortgage interest? Who pays the capital gain on the appreciation earned during the custodial parent's tenancy? etc.).

Most attorneys cannot handle all of these calculations rolled together into one case. Divorce attorneys – whose practices are concentrated in domestic relations matters – have invested in sophisticated computer programs that can perform an analysis of the tax ramifications on any proposed settlement. If your situation involves any appreciable asset base, be sure to work with an attorney who is equipped to, and capable of, evaluating and educating you about all of the tax ramifications of your case.

This article was written by the law office of Cowell Taradash, P.C., whose attorneys are familiar with the latest court decisions, recent changes in the law and even the tendencies of many judges. We can help. Contact us at 866.987.6723 or info@illinoisdivorce.com.