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## Getting Divorced and Filing Bankruptcy — Deciding Who Gets What?

Divorce and bankruptcy are each complex matters that deal with sensitive issues and emotions. The interplay between divorce and bankruptcy is a virtual legal and emotional roller coaster for those involved.

In Pennsylvania, the term "equitable distribution" is the legal term for the process of dividing the marital assets and marital debts. In theory, "equitable distribution" provides that each spouse receives his or her fair share, regardless of whose name is on the actual title to any of the property involved. Equitable distribution is the core issue in most divorce cases.

### Marital Assets and Marital Debts

Marital assets include property and income of the marriage. Real estate, furniture, vehicles, retirement accounts and investments are examples of marital assets. Property may be considered a marital asset even if it was acquired in only one spouse's name as long as it was acquired during the marriage and was not acquired through the use of the spouse's non-marital assets. The non-marital value of an asset is excluded from the equitable distribution process. Non-marital property includes property that a spouse brought into the marriage, gifts to a spouse, other than from the other spouse, and inheritances received by one party during the marriage.

In addition to dividing property, most divorcing couples have to divide marital debt. Marital debt includes debts that were acquired by the parties after the marriage and before the date of separation, such as mortgages, loans, credit card debt and taxes. Similar to marital assets, a debt can be a marital debt even if only one spouse contracted for the debt as long as the debt was incurred during the marriage.

### Impact of Bankruptcy

Problems can arise when divorce and bankruptcy collide. In particular, when property acquired during the course of the marriage is held in only one spouse's name, and that spouse files for bankruptcy protection before the state court enters a final judgment in the parties' divorce, the non-debtor spouse's interests in that property and in joint debt are far from certain.

Essential to any bankruptcy proceeding is a determination as to what property is property of the "estate." Property of the estate in bankruptcy is divided and paid among the creditors. Pennsylvania follows the law that even though a debtor's debts may potentially be discharged in bankruptcy, property interests are not dischargeable through bankruptcy. The mere filing of a bankruptcy does not divest a non-filing spouse of marital property interests, which are determined by a state court in equitable distribution proceedings, not a bankruptcy court.

The bankruptcy court does not, and will not provide a distribution of the marital property interests, but rather bankruptcy courts defer to state courts and state law to determine the respective property rights and divide the property "in kind" in accordance with state law. "In kind" means dividing the existing property without the requirement that future moneys be paid over time or at a later date. The state court has the ability to exercise its exclusive right of equitable distribution of all of the marital assets in-kind regardless of a bankruptcy being filed.

A non-debtor spouse's pre-petition equitable distribution right to in-kind relief survives the debtor's bankruptcy. Even if the bankruptcy might discharge one spouse of a legal obligation to repay, the state court can shift an existing asset to the non-bankrupt spouse to see that spouse is not strapped with the entire debt. It is, however, important for the non-filing spouse to retain a lawyer and go into the bankruptcy court to hold up any discharge of debt until the state court can consider equitable distribution. The intent of this law is to protect the non-debtor spouse's rights in the marital property. Bankruptcy cannot be used as a "sword" to diminish the non-debtor spouse's marital property rights.

If you are confronted with a bankruptcy by a spouse while in the middle of divorce, the best advice is to be active and early in the bankruptcy to preserve all of your rights to equitable distribution. \*

*For more information on divorce matters involving bankruptcy, contact Kim Oakes at MacDonald, Illig, Jones & Britton LLP at 814/870-7715 or koakes@mjib.com.*