

Frequently Asked Questions

How does the court divide property?

The court characterizes property in essentially two ways: Community Property, which is treated the same way as Jointly Held Property, and Separate Property. Generally, the presumption is that all of the property acquired after date of marriage but before an action for dissolution is filed and served is Community Property. Any property owned by a spouse before the marriage or acquired during the marriage by gift or inheritance along with any increase in value, rents, profits or proceeds in that property is Separate Property. Community Property is nearly always divided equally between the parties at dissolution. With a few very limited exceptions Separate Property is awarded to the owner spouse.

Seems simple enough, but issues arise where the two types of property are mixed together in some fashion. For an example, if husband has been working at Intel for 20 years and has been contributing to a 401(k) during that entire period, but has only been married for 10 of those years, some of the money in the 401(k) is premarital and as a result Separate Property and some would be post marital and as a result Community Property. Ordinarily an attorney, perhaps a specialist in dividing retirement accounts would look at the statements from date of marriage and determine the premarital portion as well as the earnings, or increases in value on that portion. That would be Separate Property. Any contributions made to the 401(k) either by husband or by his employer after date of marriage but before the date of service would be characterized as Community Property and generally divided equally. Since taxes have not been paid on the 401(k) contributions, the amounts would not be divided in cash but instead the non-earning spouse's share would be rolled over into some type of retirement vehicle such as an IRA. In our example, she would be free to take the money out of the newly created IRA but would pay any taxes and penalties associated with the withdrawal.

Generally, most other types of property such as bank accounts or other non-retirement investment accounts are looked at the same basic way. Premarital Contributions or contributions from gift or inheritance during the marriage are Separate Property while contributions during the marriage are deemed Community. Personal property would be treated the same way. If you brought your dog into the marriage, it's yours after the divorce. Homes are a little different. If you own a home prior to the marriage, no mortgage payments are paid on the property and no improvements are done during the marriage, then the home is the separate property of the owning spouse. If payments are made on the mortgage during the marriage or improvements are made on the home during the marriage, there may be what we call a Community Lien against the separate residence. The amount of the Community Lien would be divided equally. An experienced attorney can calculate the Community Lien using a moderately complicated formula and present an understandable case to the court. Assets such as stock options and bonuses awarded but paid out in the future are much more complicated, and whether they are community or separate depend upon a number of factors far too numerous to mention here. Again

the term we use is called comingling of assets which can be difficult to unravel for laymen but not that difficult for an experienced attorney to sort out in the settlement process or at trial.

An even more complicated issue is dividing a business. The party that operated the business generally gets the business and the other party gets one-half of the value. Every business has a value. It may be one dollar or it may be \$10 million. If it was started after the marriage and is not the product of gift or inheritance, it would be characterized as community and divided equally. Even if the business was started before the marriage, there may be growth in the business that is community that must be valued and divided. Valuing a business is complicated. There are a number of different cases that discuss different methodologies in valuation and why one may be preferred over others. Seminars covering hours and even days are put on every year to discuss the nuances of business valuations. If you are dividing a few items of furniture, save yourself a bunch of money and download the forms available at the Superior Court Self-Help Center. If you are dividing a business that needs to be valued, hire an attorney experienced in issues of business valuation. The difference between the values provided by two different business appraisers may differ by literally a thousand percent. If you have a heart attack, don't scrimp on a heart surgeon. If you have business valuation issues, don't scrimp on an attorney.

What happened to custody?

Sep 25, 2013

In the 1979 movie *Kramer vs Kramer*, the movie culminates in a court room scene with mother played by Meryl Streep facing off against father played by Dustin Hoffman. The court hears testimony and then makes it's decision. Mom gets custody, Dad gets visitation. Mom was the winner and Dad was the loser and as a further humiliation, he was awarded the opportunity to visit his own child. The Arizona legislature in a change of law effective January 1, 2013, made the decision that nobody should be a winner or loser when it comes to their child. The legislature also decided that the term visitation may be applicable when your mother-in-law shows up for a long weekend, but it is an inappropriate term when defining the time that a parent spends with his or her children.

The new law does away with the term "Custody" and instead substitutes two concepts, first is Decision-Making and second is Parenting Time. While the terms may seem simple enough, they can be more complicated in how they apply to a specific situation. The legislature defined four areas of decision making for children. The areas are Health, Religion, Education and Personal Care. In each area the court can designate one parent to make decisions or may decide that decisions in a particular area or in all areas be made jointly by the parties. My experience has been that in the vast majority of cases, courts decide the decisions should be made jointly. The analysis is that each parent brings a unique viewpoint

and set of experiences which will help guide the child through life. There are some important exceptions to this general rule. First in some cases, the level of conflict and the lack of communications between the parents is so problematic that the parents cannot make decisions together. In that type of case the court probably will designate one of the parties as decision-maker. The other important exception would be the existence of some limitations on one party's ability to make decisions. These exceptions would include drug abuse, alcohol abuse, physical abuse or mental health issues. If you are concerned about the other party's ability to make good decisions regarding your child because of these serious limitations, you need an attorney that can flesh out the facts and present a compelling and reasoned argument that joint decision-making is not in your child's best interest. The evidence presented may be positive drug tests, criminal convictions, testimony regarding physical abuse and mental health records. If the safety of your child is at issue, you need to present the most compelling case possible.

How does the court determine parenting time?

Sep 25, 2013

Again, a recent change in the law affects the court's treatment of Parenting Time. Obviously the overriding factor in determining Parenting Time is the best interests of the child. That mandate has been in place for some time, however, the legislature in another change effective January 1, 2013 decided that when determining the issue of Parenting Time, the Court shall "ensure that the minor child has substantial, frequent, meaningful and continuing contact" with both parents "unless the court finds after a hearing that Parenting Time would endanger the child's physical, mental, moral or emotional health."

My experience has been that since the change in the law, the beginning point for most courts in determining Parenting Time is to divide the time between the parents equally. There are a number of different schedules that the court can consider for equal time. One schedule that is currently in vogue is commonly referred to as the two – five – five – two schedule. In this schedule one party gets Monday and Tuesday, the second party gets Wednesday and Thursday and the weekend period is alternated. Another schedule that the court may consider provides that each of the parents exercise parenting time three days one week and four days the next. Such factors as work schedules, travel schedules and the distance the parties live away from each other impact the schedule that works best for the parents and the child

Obviously, as set forth in the statute, there are exceptions to this beginning point of equal parenting time. The same factors that would justify limiting the party's decision-making may also limit the party's Parenting Time. Again, in a contested Parenting Time case, the court would consider evidence of alcohol abuse, drug abuse, spousal abuse and mental health issues in determining an appropriate Parenting

Time schedule. If these issues affect the safety of the child, the court may even limit Parenting Time to be supervised until the parent addresses the limiting issues to ensure that the child is safe in his or her care. Every parent believes that the safety of their Children is paramount. If there are problems that limit the other party's ability to properly supervise and protect the child, the facts supporting the problems need to be presented to the court in an organized and compelling fashion.

How does the court determine child support?

Sep 25, 2013

Courts use a statewide formula to determine child support. It is based upon the incomes of the parties, the time-sharing schedule in days per year, costs of supporting other children not common to the relationship as well as other out-of-pocket costs such as the cost of health insurance for the child and child care. In looking at parenting time, the guidelines specifically define quarter day, half day and full day in determining the parenting time adjustment. Generally the out-of-pocket cost of health insurance as well as the child care costs are straightforward concepts without too much chance of ambiguity. The factor that generally creates the most litigation is the issue of income. The child support guidelines, which are found as an appendix to the Child Support Statute spend 14 lines defining income. If a parent is salaried or hourly and working 40 hours a week at full income capacity then the determination of income is straightforward. In the event the party is self-employed, underemployed, or his or her income varies substantially from year to year, then the analysis is much more difficult. If the court makes a finding that a parent is unemployed or working below earning capacity without good reason, the court may impute what it considers to be the reasonable income to that parent. Evidence to prove this would include evidence of prior income before the preceding, personnel records or anything that would tend to prove the party is intentionally attempting to depress his or her income in order to avoid paying an appropriate amount for child support. In cases involving self-employed parties, sometimes the analysis is more difficult. Generally, the courts take the position that gross receipts are provisionally viewed as income. It is the burden of the self-employed party to prove reasonable and necessary business expenses as an offset against gross receipts. While tax returns may be an appropriate place to start, people aren't always as honest as they should be in such reporting. Often it is necessary to look beyond tax returns in determining true income and as a result appropriate child support. In larger cases, it may require the work of skilled forensic accountants to accurately determine income. However, not everyone has the money to pay for such resources. In that case, it is often the job of the attorney to look carefully at the financial documents, accurately determine income and then persuade the court as to the accuracy of the determination. This requires an attorney who has experience examining such financial records and presenting an organized and convincing presentation to ensure that the other party pays his or her fair share of child support.