

Money Secrets Divorce Attorneys Wish You Knew

If you get married before the age of 50, there's around a 50/50 chance you're going to end up divorced. So best be prepared. Our divorce experts tell us the financial facts you may not know.

By Lauren Cahn

EQUITABLE DISTRIBUTION VERSUS COMMUNITY PROPERTY

Any divorcing couple can agree on any division of marital property, says Mitchell. However, before you make a settlement proposal, it helps to understand your best and worst-case scenarios if you went to court. That begins with knowing whether you live in an "equitable distribution" versus "community property" state. In equitable distribution states (all states except Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), a judge would divvy up your marital property based on "equitable" principles. In community property states, marital property is divided 50/50.

WHAT ARE "EQUITABLE" PRINCIPLES?

In equitable distribution states, judges are guided by either statute or case law or a combination of

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both. According to Mitchell, some of the typical factors a judge may consider include:

- duration of the marriage
- age and health of the spouses
- what each spouse brought to the marriage in terms of assets and education
- if there are children and how custody is divided
- earnings potential of each spouse
- the form of the assets and how liquid they are (real estate may be more liquid than stocks; cash is the most liquid)
- whether either spouse attempted to hide assets
- any other factor the court expressly finds to be a just and proper consideration

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BUT YOU DON'T HAVE TO LEAVE IT UP TO THE JUDGE

If you're in an equitable distribution state, understanding how a judge determines what's "equitable" in your case is an important starting point, but it's far from the final word on the matter. That's why you should seek advice from a lawyer at the outset, says Mitchell, even if you intend to settle out of court or engage in alternative dispute resolution (an ADR), one of the options couples can take to avoid going to court. Mitchell points out that this is true whether you're in an equitable distribution state or a community property state.

TRY TO SETTLE OUT OF COURT

"Settling out of court will always save you on court costs and legal fees, plus you will avoid the stress and uncertainty of going to court," points out Mitchell. In addition, "negotiated settlements have a higher rate of satisfaction and compliance because both parties have had the opportunity to help shape the agreement." The traditional settlement method is the one whereby each spouse retains a separate attorney, with the possibility of 'seeing each other in court' always remaining out there, explains Rhonda E. Ores, a partner at New York's Fox Rothschild LLP.

ADR

Ores gave Reader's Digest a simple breakdown of the most popular forms of ADR for divorce cases (in addition to a traditional settlement, as noted above).

- **Mediation:** A neutral third party facilitates negotiation, but can't give legal advice or advocate for either spouse.
- **Arbitration:** This is a form of private dispute resolution that eliminates many of the costs and delays inherent in courtroom cases.
- **Collaborative law:** Each spouse retains a separate attorney, but everyone agrees to use cooperative techniques rather than adversarial strategies and litigation (but in the event the parties can't come to an agreement, they'll need to retain new attorneys).

AIM TO KEEP IT PEACEFUL

"The more that anger comes into play, the more expensive and heart-wrenching the divorce process will be," advises Dror Bikel, managing partner of Bikel and Schanfield in New York City, who has more than 30 years of experience representing clients in high conflict divorces. Sure, you're going to disagree about a lot of things (and that's leaving aside custody issues—a major source of conflict in many divorces). But you'll be best off if you control your anger, even as you hash out what may or may not be equitable and what may or may not constitute marital property.

IF YOU OWN IT, OWN UP

Determining what constitutes "marital property" requires each spouse to identify—on penalty of perjury—what they consider to be both marital property and their own separate property. What neither spouse should EVER do is to try to hide assets of any kind, says Georgia matrimonial attorney, Randall Kessler. One lottery winner tried to do just that, and it backfired to the tune of a million bucks.

DON'T EVEN THINK ABOUT A SWISS BANK ACCOUNT

One way people try to keep assets from appearing as "marital property" is by funneling funds offshore. This is a bad idea, says Bikel, who's had some experience catching up with those who try such nonsense. Some people try to divert assets from the "marital property" by taking cash out of a business or by "giving" that money to a friend, Bikel adds. Neither is illegal, per se, but become illegal if you fail to disclose it under oath.

PETRIMONY

Remember: hiding assets = bad. But there are still many creative yet fully legal ways to hash out the financial terms of a divorce. For example, while "petrimony" is not recognized as a legal concept (and Kessler says that the mere mention of it will earn you the side-eye by New York State judges), considering the expenses of keeping the family pet is something divorcing couples should factor in when determining how much money they need to live

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on as they move forward with their lives. "You can contract for anything you want as long as it isn't illegal," explains divorce attorney Rebecca Zung.

UNDERSTAND THE DIFFERENCE BETWEEN SPOUSAL VERSUS CHILD SUPPORT

Money is money, right? So then it shouldn't matter if it comes from your ex in the form of spousal versus child support, right? Nope.

"When you receive spousal support, it's taxable income, and when you receive child support, it's not taxable income," says legal and financial analyst Jeff White of fitsmallbusiness.com. Who wouldn't want to receive more money in non-taxable income, right? At the same time, spousal support payments are tax-deductible by the spouse making the payments, while child support payments are not. Although this becomes a battleground for some divorcing couples, it also provides wiggle room in settlement negotiations.

ONE LUMP OR TWENTY-TWO?

Spousal support can be paid as a lump sum or in payments over time. Similarly, spousal support can be front-loaded and decrease over time. There are logistical reasons for choosing how you want to allocate spousal support, including tax consequences. Divorcing couples should review these possibilities with their attorneys and their financial advisors.

OTHER FORMS OF WIGGLE ROOM

"There's no shortage of ways spouses can negotiate the terms of spousal support," Kessler points out. For example, the receiving spouse may have room to negotiate a higher dollar amount on the condition that the amount decreases in the event of a change in financial circumstances of either spouse. The paying spouse may wish to terminate support in the event the other spouse begins cohabitating with another partner. The spouse receiving support may be able to negotiate that if the cohabitation ends, the spousal support will resume. In any event, it's important to keep your individual needs in mind as you negotiate. ■