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What should we do about the house? Divorcing spouses often assume that they must sell the marital home and that the sale must be completed before the divorce can be finalized. Neither of these assumptions is accurate. In fact, there are a number of options for allocating, dividing, or disposing of the family home.

A sale of the property is the option that will immediately terminate joint ownership of a home. Any agreement calling for such a sale should contain specific details about who will reside in the home pending the sale, how the mortgage and other costs associated with the home will be paid pending the sale, and how decisions will be made about such things as listing price or adjustments, acceptance, rejection or counter-proposals with respect to offers.

In some families, it may make sense to defer the sale of the home either for a fixed period or until some future events, such as a child's graduation from high school. Similarly, in a depressed or falling housing market, the parties may believe that a future sale will be financially beneficial. Agreements that call for an approach that delays the sale need to be specific and detailed, as often unforeseen circumstances arise, such as who is responsible for repairs. It is important that both partners fully understand what they have negotiated and what they are responsible for.

Transfer to one party

In a divorce, the residence can be transferred to one spouse. Depending on how much equity there is in the home, a party expecting to retain the

residence should have a plan to refinance and "buy out" the other spouse's interest or expect that he or she will receive other assets in exchange for the residence. If the hope is that one party will retain a jointly titled residence, keep in mind that such a transfer does not remove the other party from any mortgages or other encumbrances. Further, the lender, and not the parties or the divorce court, has the power to determine what conditions must be met to refinance or otherwise transfer the loan to the party retaining it.

In some circumstances it may make economic sense for both parties to vacate the home and to rent it for a period of time. If that is an option, details regarding property management responsibilities, repairs, rent collection, mortgage payments, and the like will need to be addressed. It also will be necessary to address, if, when, and under what circumstances the property may be disposed of in the future.

Dividing pensions

Misconceptions are common when it comes to options for dealing with pensions and retirement accounts in a divorce case. For example, it is not the case that an employee spouse must retain retirement accounts and does not have to share pension benefits accumulated during the marriage. Similarly, it also is false that the division of an IRA or other retirement-type account in connection with a divorce results in taxes and penalties to the divorcing parties.

A number of common options are available for dealing with IRAs, 401(k)s, and other pension and retirement accounts in a divorce. Through a qualified domestic relations order (QDRO), the divorce court may direct the pension plan administrator to pay directly to the nonemployee spouse an appropriate share of retirement benefits as they become payable to the employee spouse. Typically, under such an arrangement, the nonemployee spouse receives either a specified dollar amount, which may be payable in installments or in a lump sum, depending on the retirement plan terms, or a specified fraction of each monthly pension payment. Commonly, such an arrangement preserves the benefits payable to the nonemployee spouse, even if the employee spouse dies first.

If the retirement benefit involves what is called a "defined benefit plan," there is not a specified account with a fixed dollar amount set aside for the employee spouse prior to retirement. Instead, the employee's potential retirement benefit is defined based on a formula specified in the retirement plan. Typically, such formulas calculate the monthly retirement benefit based on such things as the employee's years of service under the plan and his or her average highest earnings. Such plans provide statements indicating the amount of potential future retirement benefit, which the employee has earned as of a particular date. Using that information, it is possible to determine the present value of the future retirement benefit, thus assigning a value to the plan. This can be formulated even though the benefit itself may not become payable for many years.

In some cases, it makes sense to determine the present value figure of a defined benefit plan and allocate the retirement benefit to the employee spouse using that present value figure, and then allocate other assets to the nonemployee spouse as a set off. However, keep in mind that while such an approach is frequently attrac-

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CAN I KEEP IT? MUST WE SPLIT IT?

BY **MELISSA NEEDLE**

tive to the nonemployee spouse, who may be more interested in current assets rather than potential future benefits, often there are not enough assets to make such an offset possible. In those situations, an arrangement that allows for the nonemployee spouse to receive a benefit, "if, as, and when" the employee spouse receives a benefit may be a more realistic approach to dividing defined benefit plans.

With IRAs, 401(k)s, and other similar accounts, it is relatively simple to determine present value by looking at the most recent account statement. The division or allocation of such accounts frequently begins with the premise that each party will retain his or her own IRAs or other similar retirement accounts. If that does not result in an equal division of the marital retirement benefits (or such other appropriate percentage allocation as negotiated, a tax-free transfer of funds from one account to another is a relatively simple process to achieve the appropriate allocation. In fact, funds transferred from an IRA or 401(k) in one spouse's name to an IRA or 401(k) in the other spouse's name is a tax-free and penalty-free transfer.

There is no hard and fast requirement that retirement accounts or benefits accumulated during a marriage must be divided equally. Specific facts in your case may suggest that a division of retirement benefits in some proportion other than fifty-fifty is appropriate. For example, you may desire to receive or retain a lesser share of the retirement accounts in exchange for a greater share of some other assets, such as the marital home.

What about our debt?

Just as income and assets must be divided, so must debts incurred during the marriage. Typically, such division is not limited to debts in joint names. Frequently, during a marriage, spouses incur debt in their individual names for the sake of convenience, credit ratings, or other reasons. This does not mean, however, that the party who is named on the obligation must be left with the debt without some offset or other consideration in the overall financial picture.

Houses, cars, and other assets that have a formal title are frequently encumbered directly by the loan that was used to fund the purchase. Generally, the party who receives the asset also receives the associated debt and is responsible for its payment. However, such an arrangement is not mandatory. In some financial circumstances, it may be appropriate to consider contribution to the mortgage payment, car payment, or other debt associated with an asset allocated to the other party. It may be appropriate to establish a time frame within which the party receiving the asset is required to refinance the mortgage, car loan, or the like so that the liability no longer remains in both names. Keep in mind that a refinance may be unfavorable financially if it results in a higher interest rate and, in fact, may not even be possible if the party retaining the asset does not have sufficient income or other resources to qualify for a loan solely in his or her own name.

Credit cards

In some cases, a fair result requires division of the credit card bills or other debt in proportion to the parties' incomes or in some other percentage. Further, the allocation of debt sometimes provides a means of equalizing the property division. For example, if a party receives assets of greater value, his or her net settlement will be reduced if the spouse also receives a greater share of the debt.

The parties have the power to allocate between themselves responsibility for repayment of a debt. However, that allocation is not binding on the credit card company or other lender. What this means from a practical standpoint is that if a credit card is in joint names and one spouse assumes sole responsibility for repayment of the card as part of the divorce, the credit card company may still pursue a collection against either spouse in the event of nonpayment.

However, this is not the case with respect to credit card obligations or other debts incurred in the name of only one spouse. In that instance, the credit card company or other lender typically cannot pursue a collection action against anyone other than the account holder, even if the other party was made responsible for some or the entire obligation in connection with a divorce.

Most credit card companies refuse to allow an account to be closed until any outstanding balance is paid off. What this means from a divorce standpoint is that if there is a substantial credit card balance and no immediate means to pay it off in a lump sum, the account must remain open until it has been paid. Typically, the parties can freeze the account so that no new charges can be incurred. However, if there is not sufficient income or other financial resources to pay off the credit card, in some cases the only option is for both parties to share in making the monthly payments in some fashion.

Such an approach is not ideal because it requires continued economic interaction after the divorce. Further, if such an arrangement is contemplated, terms must address what happens if one party pays off his or her share and the other does not. It will also be important to address what will happen in the future if late payment or nonpayment occurs by either or both spouses. The best protection is to arrange to pay the balance on any credit card in full prior to the settlement. FA

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