

FAMILY LAW UPDATE

“WHAT’S MINE IS MINE” (THE SEPARATE ESTATE)

In a divorce, the court divides the marital estate between the wife and husband. The marital estate consists of all of the assets and liabilities which the parties have accumulated during the marriage by their joint efforts. As a general rule, a party's separate estate is not divided between the spouses. A party's separate estate typically consists of assets or liabilities which one party acquired or incurred before the marriage, or gifts and inheritances which one party receives during the marriage.

If a party's separate estate is not mixed or “commingled” with marital assets, those separate estate assets or liabilities will not, as a general rule, be included in the marital estate for distribution to the other spouse. To the extent that a party's separate estate has been mixed or commingled with the marital assets or has increased in value during the marriage by the “active” efforts of a spouse, that asset or its

appreciation in value after commingling will become a part of the marital estate subject to division between the spouses. The general rule that the separate estate will not be divided between the spouses is subject to three exceptions.

The first exception to the general rule that the court will not invade one spouse's separate estate is based upon the court's statutory authority to award to a spouse a portion of the other party's separate estate if the marital assets are “insufficient for the suitable support and maintenance of the other spouse and any children in his or her care.” The court determines whether the marital assets are insufficient. If the marital assets are insufficient, the court can invade the separate estate.

The second exception to the general rule arises when a spouse has contributed during the marriage to the acquisition,

improvement or accumulation of the other spouse's separate estate. This exception is also based on the statutory authority of the court. If one's separate estate has appreciated in value and that appreciation is due to the “active” efforts of the owner of the separate estate, the appreciation in value from the date of the marriage may be included in the marital estate for distribution to the non-owner spouse. The underlying rationale is that while the owner of the separate estate increased the value of this asset by his or her individual efforts, the other spouse also contributed to the increase in value by his or her discharge of their marital duties which in turn allowed the party owning the asset the opportunity to focus their efforts on increasing its value.

“Passive” appreciation of an asset in one's separate estate does not become part of the mari-



tal estate. An example of passive appreciation is when there has been an increase in the value of a publicly traded stock during a marriage. The increase is not attributable to any individual skill or effort on the part of the spouse owning the stock and, therefore, the non-owner spouse cannot be said to have made any contribution to the appreciation by the discharge of his or her marital duties.

The third exception to the general rule occurs when an asset of a separate estate has been commingled with an asset of the marital estate during the marriage. This can occur by titling a separate estate asset in the names of both spouses (as by a deed to real estate previously owned by one party before the marriage), by

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“WHAT’S MINE IS MINE” (CONTINUED)

adding a spouse’s name to a bank account or certificate of deposit, or by using an asset from one’s separate estate (or some portion of it) to acquire a joint marital asset. The longer the period of time that elapses between the date of commingling and

the date of divorce, the less likely the court is to “return” that portion of the separate estate to the party who contributed it to the marital estate. In such circumstances, the court is more likely to treat the commingled asset as part of the marital

estate subject to division between the parties. The court can also take into account the financial contribution of the respective spouses to the commingled asset when it fashions the property settlement.

CUSTODY — PARENTAL FITNESS

The trial court properly concluded that the father was not “fit” as the proposed custodial parent in his petition to change custody because of the father’s unmarried cohabitation, the lack of any certainty in the permanence of his

relationship and that he had already fathered two other children out of wedlock. Unmarried cohabitation, standing alone, is not sufficient to constitute immorality under the “moral fitness” inquiry under the best interest of the child

factors but unmarried cohabitation is appropriate for the court’s consideration when evaluating the fitness of a parent. *Patson v. Spengler*, Mich. App. No. 266213 (June 20, 2006).

SEPARATION AGREEMENT — ENFORCEABILITY

Absent fraud, duress or mistake, a party’s separation agreement which divides marital property is a valid enforceable contract. Public policy favors upholding property agreements negotiated by the parties when divorce

or separate maintenance is imminent. The court will not rewrite or abrogate an unambiguous agreement negotiated and signed by consenting adults. When the parties freely enter into an agreement to divide their property as they see fit,

the court will not redraft the agreement or rule in a manner that allows either party to avoid his or her contractual obligations. *Lentz v. Lentz*, Mich. App. No. 257898 (July 6, 2006).



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