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Family Law Issues in Agriculture: Equitable Distribution

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Equitable distribution ("ED") is the allocation of the marital estate in a divorce. Importantly, not all states are equitable distribution states; instead, states like Texas and California are community property states. The majority of states are equitable distribution states, but it is important to confirm this with a licensed attorney in the applicable jurisdiction.

In way of background, property in a marriage fits into one of three buckets: two separate (or nonmarital) property buckets and the marital property bucket.

Spouse 1 Bucket	Marital Bucket	Spouse 2 Bucket

Prenuptial or postnuptial agreements can help identify what are in the various buckets. Absent a nuptial agreement, the definition of what fits in each bucket can vary from state-to-state and can change overtime.

The concept of "equitable distribution" means "fair and just" distribution--not "equal distribution." It is a common misconception that people in a divorce split property 50/50. How marital property is divided can be set forth in the nuptial agreement, if applicable (e.g., 50/50, pro rata based on income, or some type of agreed-upon equation or division). If there is no contractual agreement on how to divide the marital state, then equitable distribution states set forth factors that the court is to consider when determining the fair division of assets. Trial courts have broad discretion on making this determination. Some judges have certain tendencies with equitable distribution (i.e., some are more attracted to 50/50 splits than others).

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This Fact Sheet discusses a simple 4 step analysis: (1) identification of separate property; (2) identification of marital property; (3) valuation of property; and (4) equitable distribution of marital assets.

Step 1: Identification of Separate (or Nonmarital) and Marital Property

The first step in the analysis is to divide property in the three buckets. Again, the law can vary somewhat from state to state on what property fits into each bucket, and there can even be sophisticated nuances in some areas in the same jurisdiction. Here are a few examples of property that is in the separate property bucket:

1. Gifts (except for joint gifts or wedding gifts);
2. Inheritance (except if in joint name);
3. Premarital property; and,
4. Property from a personal injury award (excluding lost wages).

Keep in mind that the definition of property is broad. It can include intellectual property (e.g., trademarks), business interests, retirement/ pensions, animals, farm equipment, etc. The most overlooked property in a farm or ranch divorce is the business itself.

As a caveat, separate property can transfer to the marital property bucket if funds are commingled or they are in joint name. This is called transmutation. For example, if a premarital piece of farm equipment was sold and deposited into the joint bank account, then those monies are now part of the marital bucket. That said, some states allow for “separate property credits.”

> If Farmer John had premarital farmland that was sold during the marriage and $50K of the proceeds were used as a down payment on a marital residence in joint name, then Farmer John may have a claim to get his $50K down payment back on a dollar-for-dollar basis.

Income and appreciation of separate property muddy the waters. States vary significantly in this area, and some jurisdictions look into whether the non-titled spouse had either active or passive involvement in the appreciation or whether the appreciation was strictly due to market forces.

Importantly, the person claiming separate property has the burden of proof. For example, if Farmer Jane had a $200K retirement account at the time of the marriage and it increased to $500K during the marriage, Farmer Jane would need to prove that the value at the date of the marriage was $200K. It is difficult to obtain documentation more than 7 years of age by subpoena to financial institutions, so hopefully Farmer Jane kept good records and can find this statement. If she cannot, then Farmer Jane can hire an actuary to do a sophisticated analysis with the known statements. The point is this: if Farmer Jane wants to keep the $200K premarital property (plus any appreciation thereof, depending on her state), then she has to do the work to find the proof.

A word on debt – it too fits into these same three buckets. If one person comes to the marriage with student loan debt or a mortgage on premarital property, then it is considered separate debt. When people walk down the aisle, their debt liability does not get "cut in half" as some people may assume. Although states differ in this regard, as a general rule, spouses are jointly and severally liable for debt during the marriage only. It is not unusual for people to think they are no longer responsible for the debt of their spouse once they "separate"; unfortunately for some, that is not always the case. Of course, they may have wasteful dissipation claims or equitable arguments once divorce papers are filed, but parties should keep this in mind during the divorce.

Step 2: Identification of Marital Property

The work in this analysis is pulling out the separate property. Everything that does not fit into a separate property bucket is considered party of the marital bucket. These lists should be detailed and may include grain inventory, farm equipment inventory, and livestock. Marital debt and prepaid expenses should also be on this list.

Step 3: Valuation of Property

Property should then be valued, if appropriate. This is where appraisers can be used to appraise real property, farm equipment, art, or other valuable items. It may be difficult to find a livestock appraiser, but auctioneers may feel comfortable in doing so.

Do not forget to value the business. Business evaluators should be used to value the farm/ranch/agri-business itself; in doing so, typically 5+ years of tax returns, bank statements, and other financial records are reviewed. If a farming enterprise has several entities, then each needs to be valued separately (e.g., sole proprietorship, family partnership, trucking company, restaurant).

Crops in the ground are difficult to value but are absolutely considered an asset for a farm divorce.

Step 4: Equitable Distribution of Marital Property

The last and final step in the analysis is to decide how to divide the marital bucket fairly and equitably. There is a myriad of factors that are considered with this determination, often enumerated in the state statute. Some factors such as the "length of the marriage" may be weighed more heavily than other factors such as contribution to the marital estate, tax consequences, spousal support, etc. Courts look at the totality of the circumstances in deciding what is fair.

The longer the marriage, the more courts will lean towards a 50/50 split in equity. Even with long marriages, courts may decide to deviate and give one spouse more or less depending on the facts and circumstances. For example, the court may credit one spouse if the other spouse wastefully dissipated marital assets by gambling, drug or alcohol abuse, frivolous purchases, etc. Courts may also give more than 50% of the estate to a spouse with significantly less earning power than the other spouse.

Keep in mind that families do not have to liquidate assets in order to divide property. One spouse may keep the farmland, farm equipment, and cows, while the other gets the retirement, investment property, and farm vehicles, depending on the arithmetic. Spouses can "buy" each other out or negotiate long-term payment plans for farm business interests.

Furthermore, spouses can also decide not to break up the farm and keep it intact; in this scenario, the divorcing spouses remain business partners. Language should be carefully crafted on paying distributions to the owners, responsibilities of each owner and buy-out provisions in case one or both ex-spouses decide to go their separate way in business.

There are no hard and fast rules with equitable distribution. Unfortunately, there are the shades of grey with equitable distribution that make divorce litigation expensive. After all, no two families are the same and neither are their asset distributions. To keep costs down, parties are encouraged to cooperate with discovery and consider Alternative Dispute Resolution (ADR) such as mediation or arbitration for economic issues.

For more information:

Cari B. Rincker et al., ONWARD AND UPWARD: GUIDE FOR GETTING THROUGH NEW YORK DIVORCE AND FAMILY LAW ISSUES (2015) available at https://www.amazon.com/Onward-Upward-Getting-Through-Divorce/dp/0692556540

Cari B. Rincker, "I'm Talking About the Big D and I Don't Mean Dallas" (May 2019), available at https://www.slideshare.net/rinckerlaw/im-talking-about-the-big-d-family-law-issues-in-agriculture

American Academy of Matrimonial Lawyers, Online Book store, available at https://aaml.org/store/ListProducts.aspx?catid=704530