

## **The Division of Inherited Property Upon Divorce**

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Clients often express concern over how a child's inheritance would be treated in the event that the child were later divorced, and work with us to structure their estate plans to safeguard the inheritance from exposure to an ex-spouse's claim. Under the Massachusetts statute governing the division of assets in a divorce, there are 18 separate factors to apply in making the division. In the 1980's when this statute was new, a judge would usually follow the bloodline when dividing gifted and inherited assets. In recent years though courts have moved away from this automatic transference by bloodline and have begun to look at how the assets were treated by the couple. The catch phrase is, "to what extent were the assets woven into the fabric of the marriage." The court will look at how the asset affected the couple's lifestyle. Did they leave it in a savings account and never touch it? Did they use it to pay college tuitions or to buy a second home? Need is also an important factor. A court would consider whether there are other assets and whether the non-inheriting party has needs that cannot be met from marital assets other than the inherited property.

A related question is how an anticipated rather than an actual inheritance will impact the division of property. If the parents of the divorcing parties are young and in good health, the disposition of their estate as memorialized in their estate plans will probably have little effect on the division. On the other hand if the parents are wealthy and older or in poor health, it may be a factor that is considered in the child's divorce.

Parents are understandably surprised to learn that their assets may be ‘discovered’ as part of the child’s divorce proceedings. In a 1991 case, the Massachusetts Supreme Judicial Court found that the divorcing couple was entitled to the discovery of the parents’ estate plans. The extent of the discovery will vary from case to case, but reasonable compromises such as having the parents sign an affidavit stating their net worth and describing their estate plan are often acceptable.

If a divorcing couple is basing their division of property in part upon an anticipated inheritance, it is very important to carefully craft the divorce agreement so that the parties’ intentions at the time of the divorce will be carried out. A recent case points out the traps awaiting the unwary divorce lawyer. The Dwights were divorcing at a time when there was no money from which the husband could pay alimony. Mr. Dwight’s parents were still alive and the parties anticipated that Mr. Dwight would receive a substantial inheritance from his parents. In their divorce agreement, the wife made no present claim for alimony but it was agreed that in the event that the husband’s financial situation improved due to a his anticipated receipt of the inheritance, she could bring an independent action for alimony. When Mr. Dwight’s father died, he left his estate in three shares, one for each child. Mr. Dwight’s sisters received their shares outright while Mr. Dwight’s share was left in trust for his lifetime. The trust was for the benefit of Mr. Dwight and his issue, and distributions from the trust were discretionary on the part of the trustee.

Mrs. Dwight filed a claim for alimony based on Mr. Dwight’s receipt of a “substantial inheritance.” Mr. Dwight argued that he did not receive a substantial inheritance but merely became one of several beneficiaries (himself and his children) of a

spendthrift trust, that he could not compel distributions, and that this was not the equivalent of actual receipt of any property. Therefore, he argued, he should not be required to pay alimony. The court rejected Mr. Dwight's argument and found that the trust was a substantial inheritance within the meaning of the divorce agreement.

While this decision actually contravenes many well established trust principles, it seems to be a fair result based upon the particular facts. Regardless of your opinion of the outcome, the case is a clear example of how carefully a divorce agreement must be drafted. If the divorce agreement covers assets that have been or may be inherited, it would be appropriate to have your estate planning attorney review it to ensure that the language of the agreement will carry out the intended purposes of the divorcing parties. In cases where the disposition of an inheritance is a major concern to a client or to the child of a client, serious consideration should be given to a prenuptial agreement. And, in spite of the Dwight case, leaving property in a lifetime spendthrift trust for a child can provide significant protection for inherited assets.