

IS YOUR PROPERTY MARITAL OR SEPARATE?

By: Willem H. Gravett, Esq.

New York Law distinguishes between marital and separate property. This distinction becomes critically important in the event of a divorce when the Judge has to divide the marital estate.

Separate property does not get divided in a divorce. This includes assets that each of the spouses owned prior to the marriage, or that each of them receives after the marriage as a gift from a third party, or through inheritance.

Marital property, on the other hand, consists of all other assets, including employment income that spouses acquire after marriage. Marital property must be divided in a divorce.

The seemingly clear distinction between marital and separate property is anything but. By answering the questions on the next page, you will see just how easily the line can become blurred.

Check the appropriate box to indicate whether the following assets become marital property or remain separate property during marriage and in the event of divorce.

Asset		Marital	Separate
1.	Your engagement ring?		
2.	The 5-carat diamond necklace that your mother gave you that had previously belonged to your grandmother?		
3.	The 5-carat diamond necklace that your husband gave you on your 10 th anniversary?		
4.	Your pre-marital bank account into which you deposited your paycheck and from which you paid bills before the marriage?		
4A.	Your pre-marital bank account - After the marriage, you continue to deposit you paycheck into this account and to pay your share of the household bills from this account?		
5.	Your pre-marital stock portfolio (in your sole name containing stocks and bonds that you bought before the marriage)?		
5A.	Your pre-marital stock portfolio - After the marriage, you continue to actively manage the account?		
5B.	Your pre-marital stock portfolio - After the marriage, your spouse gives you investment advice?		
5C.	Your pre-marital stock portfolio - After the marriage, your spouse makes other non-monetary contributions, such as performing home-making tasks that allow you to actively manage the account?		

Asset		Marital	Separate
6.	You inherit a beach cottage from your parents after the marriage?		
6A.	You inherit a beach cottage from your parents - your spouse asks that, as a sign of your trust, love, and commitment, you take title of the cottage in both your names?		
6B.	You inherit a beach cottage from your parents - you take title in your sole name, but years later you decide to add a pool house to the property and your spouse does the work?		
6C.	You inherit a beach cottage from your parents - you take title in your sole name, but years later you decide to add a pool house to the property and your spouse pays to have the work done?		
6D.	You inherit a beach cottage from your parents - you take title in your sole name, but years later you decide to add a pool house to the property and your spouse performs home-making tasks to allow you to do the work or to pay to have the work done?		

For the answers, see the next page . . .

Marital / Separate		Explanation
1.	Separate	An engagement ring is a conditional gift. The condition is the marriage. Once the marriage takes place, the condition is fulfilled, and the ring becomes the separate property of the wife.
2.	Separate	Gifts to one of the spouses from third parties are that spouse's separate property.
3.	Marital	Gifts between spouses during the marriage (so-called "inter-spousal" gifts) are marital property to be divided in a divorce.
4.	Separate	An asset that one spouse owned before the marriage remains that spouse's separate property.
4A.	Marital	A spouse's income after marriage is marital property. By depositing marital property into your separate property account, you have commingled marital and separate property, and the account will most likely be considered marital property to be divided in a divorce.
5.	Separate	An asset that one spouse owned before the marriage remains that spouse's separate property.
5A. 5B. 5C.	Marital	The appreciation of your separate property stock portfolio after the marriage, due in part to your active efforts and/or due in part to the direct or indirect contributions of your spouse, will most likely be considered marital property to be divided in a divorce.
6.	Separate	An asset that one spouse inherits after marriage is that spouse's separate property.
6A.	Marital	In a divorce, your spouse can claim that the nature of the asset has been transmuted from separate property into marital property, because taking title in joint names indicates that you meant to make a gift to your spouse. And, as we've seen, gifts between spouses during

		the marriage are marital property.
6B.	Marital	The appreciation – the value that was added to the beach cottage by the direct or indirect contributions of your spouse to the pool house – will most likely be considered marital property to be divided in a divorce.
6C.		
6D.		

As you can see, life happens. Time goes by. And before you realize it, what started as your separate property when you got married has become marital property, either in whole or in part.

Untangling this mess in divorce court is stressful, time-consuming, and expensive.

Fortunately, a Smart-Nup can simplify this process. With a Smart-Nup, you and your partner can opt out of the Law’s definition of separate property and define for yourselves what will be considered each of your separate property.

For example, you can avoid these problems by saying in your Smart-Nup that your separate property will forever remain your separate property:

- no matter if your separate property asset is later converted into some other kind of asset;
- no matter if your separate property by accident becomes commingled with marital property later on;
- no matter who has physical possession of your separate property asset, or who uses it;
- no matter whether your separate property asset somehow gets commingled with your spouse’s separate property asset;
- no matter if your spouse directly contributes to the maintenance or appreciation of your separate property asset; and
- no matter if your spouse indirectly contributes to the maintenance or appreciation of your separate property asset by nurturing your family life, social life, or business success.

In short, you can agree that each of your separate property will under no circumstances become marital – thereby eliminating the potential problems of commingling and transmutation (see 4A. and 6A. above).

You can also agree that any post-marital appreciation of your respective separate property will remain each of your separate property. By doing so, you eliminate the possibility of your partner claiming in divorce that he/she contributed, either directly or indirectly, to the appreciation of your separate property during the marriage and therefore should share in the appreciation (see 5A. and 6B. above).