

# P E N N S Y L V A N I A LAW WEEKLY

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## **THROUGH A LENS DARKLY**

### **The pervasive effects of the economy on divorce are yet to be revealed**

By Dorothy K. Phillips And Sydney Coutts Mason  
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The deteriorating economy has become the lens through which we view everything in these difficult days and it has changed our perspective.

There have been many articles in the news recently about the economy's effect on divorce. Money troubles can place tremendous stress on a relationship, making some people feel it is impossible for them to stay together. But the troubles that many couples are experiencing in today's financial climate are also making it extremely difficult for them to break apart.

On a very basic level, breaking up is more expensive than staying together because where there was once one household, now there must be two. If there is a shared child-custody arrangement, the expenses for each household are even higher, as each residence must provide enough space and supplies for the children. This may be more difficult for couples to manage in these times, especially if one or both of them is unemployed. Therefore, the media has focused on couples who are putting off divorce because they feel they simply can't afford to do so. However, deciding not to divorce is not a remedy. The couple needs to find a way to coexist in the same household, without making each other or their children miserable.

#### **Value of the Assets**

The couple who decides to go forward with divorce must determine what the economy has done to the value of the marital assets. Historically, the most valuable asset was the marital home. A common method of distribution was to award the home to one spouse who would borrow against the property to compensate the other for his or her share of the property. Often one spouse has a retirement asset that can be awarded to offset the value of the equity in the house. Alternatively, the parties could sell the home and divide the net proceeds. In the past year, values for both of these significant assets have plummeted. The parties may now find they actually owe more on the mortgage than the property could sell for in this current depressed real estate market. These difficult times create a harrowing situation for the court, which bears the responsibility for formulating a fair and equitable distribution of the marital assets.

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Courts usually rely upon real estate appraisals to set a fair market value for real property in the marital estate. Appraisals generally use recent sales of comparable properties in the area to come up with a value. But with so few sales occurring, the possibility of such appraisals is limited due to a lack of sales and, thus, a lack of "comps." The court is then forced to place a market value on the property in a market which many economists argue is broken. Therefore, a reasonable fair market value by historical use of comps is not possible. Banks recently succeeded in arguing it was unfair to require them to use current market values in all cases. Similarly, in the context of equitable distribution, it seems clear that courts are going to have to come up with some means of valuing real property which will satisfy the Divorce Code's policy of accomplishing economic justice between the parties.

Beyond the question of valuing the property for purposes of equitable distribution, the court and the parties will have to deal with the practical implications of this market as well. If a couple owes more on their house than it is currently worth, how to treat that situation to perform economic justice?

The parties may decide that the best course of action is to hold on to the property, hoping that market values will rebound in the future. A common situation is where one spouse wants to keep residing in the home with the children. Assuming the mortgage payment is affordable for the parties, one solution could be to put off the division of the value of the house. It may be possible to hold on to the property for a number of years, usually until the last child completes school, with the expectation that the property will be sold at the end of that time and the proceeds divided in a specified manner. The benefit of this option is that the parties do not have to risk the value of their investment in the property in the current market. On the other hand, one drawback is that they would have to wait to realize the proceeds. They would have to continue to work together to ensure that the mortgage and property taxes were paid. Also, the party not residing in the property would have to trust that the party in the home would continue to maintain it appropriately.

Once a divorce decree is granted, the fiction of the marital "tenants-by-the-entireties" ends and the parties become tenants-in-common by operation of law. Creditors of either party of a married couple cannot reach tenancy-by-the-entireties property. As to property owned as tenants-in-common, judgment creditors of one party could encumber that party's ownership interest in the property. A judgment creditor could also file for partition and force the sale of the property. Therefore, exercising this option is not always a safe or wise choice.

Further, holding on to a home until the real estate market "comes back" is not a realistic option for parties who are already experiencing financial difficulties. If one spouse is unemployed or has experienced a reduction of income, the parties may not be able to afford to continue to make mortgage payments. One can envision a situation where a house has become a money pit, requiring exorbitant maintenance expenditures.

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What was once their showplace of a home, something that felt totally appropriate when the family unit was intact, may now seem an unsupportable extravagance. An intact family may be willing to be house poor — to pay too large a proportion of their income on house payments and maintenance expenses — for a variety of reasons. However it makes little sense for a couple getting divorced to do so.

In this situation, the parties could try to sell the home in the current market, understanding that they may end up owing money rather than realizing any proceeds from the sale. They are far better advised to negotiate a short-sale for the property, in which case they would make a deal with their mortgage lender to sell the property for less than the property is worth. The lender would then take all the proceeds and mark the loan paid. Another option would be to allow the bank to foreclose on the property. Alternatively, the parties could declare bankruptcy. All of these options would have adverse effects on the parties' credit ratings. A short-sale might even result in a tax bill from the IRS, as forgiveness of debt may be considered taxable income.

It is therefore conceivable that some parties could become divorced and receive little more than a share of the furnishings from the house, reduced retirement accounts and the family dog, yet still satisfied that they did not get saddled with further debt.

## After the Smoke Clears

So you thought your divorce settlement was safe because you finalized it last year, before the economy really went sour. Think again. Sure, you may have dealt with the issue of distributing the marital home, but what about continuing obligations, such as alimony, child support and pay-outs of equitable distribution amounts?

Many have lost jobs, or are earning less, thereby affecting their ability to pay support and/or alimony. Pay-outs for equitable distribution may not be possible. The poor economy has affected the ability to pay for extras for children, such as private school and camp. A party who has been ordered to pay for support cannot discharge the obligation by filing for bankruptcy: in general, domestic support obligations are excepted from discharge in bankruptcy. The current language of 11 U.S.C. § 523(a) provides, in pertinent part:

"(a) A discharge under ... this title does not discharge an individual debtor from any debt ... (5) for a domestic support obligation; ... (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit."

In Pennsylvania, a party may seek modification of a court-ordered amount of alimony "upon changed circumstances of either party of a substantial and continuing nature." In addition, a

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parent may seek a change in a child support order upon a showing of a substantial change in circumstances.

Significant changes in income may qualify as a material change in circumstances thereby warranting a reduction of child or spousal support. Pursuant to Pa. R. C. P. 1910.16-2(d), a voluntary reduction of income generally will have no effect on a support obligation. But the rule does allow for a support reduction when the income reduction is not voluntary: "[A]ppropriate adjustments will be made for substantial continuing involuntary decreases in income, including but not limited to the result of illness, lay-off, termination, job elimination or some other employment situation over which the party has no control." Pa. R. C. P. 1910.16-2(d)(2).

Even when a parent has lost his or her job involuntarily, he or she cannot go without income indefinitely. Domestic Relations Offices will attach unemployment payments to pay support orders. It is expected that the unemployed party will seek a new job that would pay an appropriate income based on his or her situation, or risk being assigned an earning capacity:

"Ordinarily, either party to a support action who willfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity."

Of course, when the Pennsylvania Support statute and Rules of Civil Procedure became law, this downtrodden economy could not have even been imagined. People today have never experienced such a "recession" as is happening now. Courts will continue to face an increase in the number of petitions for modification as the unemployment rate continues to rise. In evaluating these petitions, courts will need to determine whether that party made realistic efforts to find reasonable substitute employment. In an economy where one sees news stories of former CEO's who are delivering pizzas and of attorneys who have been laid off tending bar, the question of what is "reasonable" is going to have to change. Expenses for which parents were ordered to pay because they were a customary part of the family's lifestyle — such as summer camps and private schools — may need to be eliminated to formulate an order that is more appropriate to the parents' present income.

Beyond the question of ongoing support obligations, it is conceivable that we may see some parties attempt to challenge the finality of property settlement agreements. In a case out of New York, a partner in a law firm is seeking to reopen his 2006 property settlement agreement, under which he paid \$2.7 million in cash to his spouse so that he could keep the parties' investments (\$5.4 million) with Bernard L. Madoff Investment Securities. The husband had so much confidence in the Madoff fund at the time of the parties' divorce that he was willing to buy out his spouse's share of the investments.

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If the New York court allows this case to proceed, it will open the door for many similar suits, truly muddying the waters for many former spouses who thought their divorces were a "done deal" and that their lives were financially secure. Perhaps Lasik is necessary to correct the economic ills of divorce court. •

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