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# Legal Matters®

## What happens to a personal injury settlement or judgment in a divorce?

Let's say you were injured in an accident and successfully held the responsible party accountable, either in a judgment or a settlement. If you then get divorced, does your soon-to-be ex get to share in the proceeds? And if so, how much of it does he or she get?

The answer depends on a variety of factors.

First, different states divide up property in different ways. Some are "community property" states where all assets and debts acquired during a marriage are split equally between spouses. This may include components of a personal injury settlement or award.

Others are "equitable distribution" states where the court inventories all property, assets and debts acquired during a marriage and determines whether, based on principles of fairness and equity, particular assets are "separate" property that an individual spouse gets or "marital" property that gets divided. With respect to a PI case, some components of an award may be considered marital property subject to equitable division or separate property the injured spouse keeps.

For example, "non-economic" damages — like money for pain and suffering, emotional distress, loss of enjoyment of life, or the impact of disfigurement or loss of a limb or a body function — will likely be deemed separate property that your spouse doesn't share in. After all, that was meant to compensate you personally.

On the other hand, if your spouse asserted his or her own claim for "loss of consortium" (in other words, the harm they may have suffered due to the



deprivation of love, affection and/or sexual relations resulting from your injury), that's something your spouse probably gets to keep and doesn't have to share with you, depending on what kinds of harm the award covers.

Meanwhile, "economic damages," such as medical expenses, property loss, and either loss of income due to the injured spouse's inability to work or the uninjured spouse's increased caretaking responsibilities, are typically considered marital property. That's because they represent losses suffered by both spouses that otherwise impacted the overall value of the marital estate.

However, let's say the injured spouse is permanently disabled and part of the economic damages represent the costs of ongoing care. The uninjured

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## Military pension can be divided in divorce, court says



The Supreme Court of Virginia recently ruled that a divorce court could divide a husband's military retirement pay between him and his wife as part of a property settlement agreement.

At the time of their divorce, Michael and Lee Ann Yourko negotiated an agreement about

how Michael's military retirement would be divided.

The divorce court then entered as part of the final divorce decree an "MPDO" (military pension division order) entitling Lee Ann to 30 percent of Michael's "disposable" military retirement pay.

Specifically, the MPDO stated that based on Michael's retirement pay, with a deduction for disability compensation, Lee Ann's share would be \$1,200 a month.

Meanwhile, the Defense Finance Accounting Service computed Michael's disposable retirement pay to be \$844 a month with the remainder constituting disability pay, giving Lee Ann a share of about \$250

a month, nearly \$1,000 less than what was stated in the MPDO.

Michael asked the court to amend the MPDO, claiming it represented a miscalculation and that Lee Ann indeed was only entitled to the \$250 a month that the DFAS had computed.

A trial judge threw out the case. The state Court of Appeals, however, reversed in Michael's favor, ruling that federal law preempts, or overrides, state laws on issues involving division of military retirement benefits and that federal law doesn't allow someone to waive military pay to compensate an ex-spouse.

But the state Supreme Court reversed again, ruling that the original agreement between Michael and Lee Ann represented an enforceable contract. The court also ruled that the federal law in question did not apply here since Michael wasn't waiving any of his benefits — he was receiving his pension first and then paying part of it to Lee Ann.

Do you have a military pension and are curious about how it might be split up in a divorce? Contact a divorce attorney in your area to learn more.

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## Bringing up the idea of a prenup with your soon-to-be-spouse

A prenuptial agreement (also known as a premarital or antenuptial agreement) that lays out in detail before the marriage what each spouse is entitled to in the event of a divorce can be very helpful to anyone bringing in significant assets they wish to protect.

They're also helpful to spouses with children from earlier relationships whose inheritances they wish to protect, and those who expect to receive a sizeable inheritance at some point that they wish to safeguard against divorce.

Still, a prenup can be an awkward thing to raise to your betrothed amid the excitement of an upcoming wedding. After all, nobody wants to go into marriage thinking that it might fail. So how do you bring it up?

First, don't procrastinate. By raising it early instead of springing it on your partner at the last minute, you both have the opportunity to be represented by separate attorneys looking out for each of your interests.

You'll also have more time to deal with complex financial issues that either of you may bring to the table instead of rushing through it as a deadline approaches.

Meanwhile, if you start the process early, the final agreement is less likely to be deemed void by a judge on grounds of unconscionability (meaning its terms are so unfair that it "shocks the court's conscience") or duress (meaning your spouse was strong-armed into it and it doesn't represent their free will).

Additionally, you should raise the possibility of a prenup at a time when both of you are in a positive state of mind as opposed to in the context of an argument.

And when you do bring it up, you should be completely honest about why you think it's a good idea. This kind of frankness can set the stage for a stronger, more open and honest marriage going forward.

Finally, you should view a prenuptial agreement as part of a partnership. If you seek to dictate the terms, you could be putting your marriage on shaky ground before it starts, sending a message that your partner's needs and aspirations are unimportant to you. Instead, treat your partner as an equal. Hopefully, being able to have a productive, positive, honest and tactful prenup conversation is a good sign that you may never need to use it.

# How marriage and divorce could impact your student loans

The cost of a college education and beyond has skyrocketed over the past several decades, forcing many to take out costly loans to finance their degrees.

This raises an interesting issue of what happens when one or both members of a divorcing couple are saddled with student debt. Does each spouse simply take their own debt with them into their post-divorce life as “separate property?” Or might the debt be divided between them as “marital property?”

The applicable analysis is highly fact-specific and depends in large part on when the debt was incurred, what the parties expected and/or agreed on at the time (if relevant), who benefitted from the degree in question, the length of the marriage, and any other number of factors.

For example, if one member of a couple took out student loans to finance a medical degree or an MBA and did so before the couple married, that debt is probably the sole responsibility of the spouse who took on that debt, even if the couple was already living together and planning a future together when the decision was made, and the other spouse benefited from the first spouse’s increased earning power as a result of that credential.

But if the debt is incurred during marriage, it can get complicated.

Let’s say one spouse takes on debt for an advanced degree after they’re already married, and both members of the couple expect to enjoy the rewards. It’s not unfathomable that a court — in determining the marital estate — might somehow divide the debt between them.

Similarly, if parts of the student loans were used to pay the couple’s living expenses, such as groceries,



rent or day care, a court might decide they should share in the debt.

Additionally, the debt might be subject to division if the spouse who sought the degree used it to start a business that then gainfully employed the other spouse.

Meanwhile, if loans were used solely for educational expenses such as books and tuition, a court might view it as that spouse’s sole separate debt. And if the student spouse did not ultimately use the degree to obtain employment in that field or up their earning capacity, a court might view it as a separate debt.

If a court does ultimately decide that student loans are part of the marital estate, some states will divide it equally and other states will divide it equitably based on what seems most fair to both parties.

Interested in learning more about how your state’s laws might treat student debt in a divorce? Talk to an attorney where you live.

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## *What happens to a personal injury settlement or judgment in a divorce?*

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spouse will not likely be involved in that care following the divorce, so it’s possible that a court may view such damages as separate property.

The timing of the award or settlement can also play a role. If you were already separated when the PI case was resolved, your soon-to-be ex may still be able to share in the proceeds since the date of the divorce judgment, and not the date of separation, is usually the operative date

that marital assets stop accruing. But if the case resolves after the final divorce decree is issued, your settlement is likely to be deemed separate property.

Of course, these are general principles subject to the unique laws and policies of your state and the unique facts of your own situation. To get a more specific answer about what’s likely to happen in your case, you should speak to a family law attorney where you live.



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## Bar on transfer of marital home may not be enforceable



A recent case from the Massachusetts Appeals Court underscores that while it's possible to incorporate a lot of things into a separation agreement, courts do not take kindly to provisions that unreasonably tie up property forever.

In the case in question, husband Omar Bonilla and wife Rose Najera bought a home together after they got married. They lived in the home for a

decade until Bonilla moved out.

Eventually, with Najera still living in the home, the couple entered into a formal separation agreement.

In many cases, the separation agreement — which lays out how spouses will handle such issues as property division, debt, who lives in the marital home, child custody, and child support until the divorce is final — is incorporated directly into the final divorce judgment. But in this case, the couple's separation agreement survived as an independent contract. It also stated that the couple's house could be sold or transferred only by their "mutual agreement," made

parties equally responsible for expenses, and made the agreement binding on both parties' estates.

Five years after the divorce, Bonilla sought to partition (divide up) the property so it could be sold, with both he and Najera splitting the proceeds.

A Probate & Family Court judge ruled that because of the separation agreement, the home couldn't be sold without Najera's consent.

But the Appeals Court reversed the judgment.

First, the court said that co-owners of a piece of property may restrict themselves from asserting a right to partition it, but such an agreement has to be reasonable.

Here, the court said, the restriction was unreasonable because it had no potential endpoint and because law and public policy disfavor agreements that tie up property in perpetuity.

If you're pondering separation and you're wondering about more specific limitations on what it can or can't do, speak to a family law attorney where you live.