

NAVIGATING THE FORK IN THE ROAD:  
FAIRLY DIVIDING ASSETS AND LIABILITIES

A. Identifying and Handling Assets Acquired Before the Marriage

Notwithstanding the broad equitable powers the courts have in Connecticut, it is imperative to identify all assets, joint, individually held, held jointly with any third parties, and/or assets held in trust with a party as a beneficiary. Interrogatories, Requests for Production and Depositions are the primary methods used for identifying assets (see enclosed sample of Interrogatories).

The exact nature and/or complexity of your efforts will be largely governed by the knowledge each party has of the other's financial circumstances, the parties' financial abilities to pay for specific discovery efforts, and the level of candor and cooperation provided by the opposing party and his or her counsel.

While informal exchanges of information and/or documentation are used in an effort to be more economical and quicker, since the information is generally not provided under oath, there may be a greater risk of omissions or inaccuracies. Further, there is no available recourse if informally requested materials are not provided in a timely fashion.

## Sample Interrogatories to Identify Premarital Assets and Liabilities

### ► Premarital Assets

#### 6-52.

Set forth with specificity exactly what assets you claim that you came into this marriage with, including the following:

1. a description of the asset;
2. the amount of the asset in question;
3. the fair market value of said asset at the time of your marriage;
4. what became of the asset subsequent to your marriage.

#### 6-53.

Set forth with specificity exactly what assets you claim that your spouse came into this marriage with, including the following:

1. a description of the asset;
2. the amount of the asset in question;
3. the fair market value of said asset at the time of your marriage;
4. what became of the asset subsequent to your marriage.

#### 6-54.

Do you have records reflecting the assets which you came to the marriage with?

#### 6-55a.

Did either you or your spouse have any assets having a value of more than \$X at the time of your marriage?

#### 6-55b.

If so, for each asset state:

1. a brief description;
2. the approximate value;
3. the disposition (whether by gift, sale, or other means);
4. the person or persons to whom disposed;
5. the date of disposition;
6. those assets still in your possession.

**6-56.**

Prior to your marriage to your husband/wife, did you make any oral or written agreements with husband/wife regarding either the acquisition or disposition of joint assets?

**6-57a.**

On the date of your marriage, did you owe any debts and/or have any liabilities for a cumulative amount in excess of \$2500.

**6-57b.**

If yes, for each such debt or liability, please state

1. the name and address of the person and/or entity to which each such debt or liability was owed;
2. what was the nature, type or kind of such debt or liability;
3. the amount owed on the date of your marriage with respect to each such debt or liability;
4. the reason for such debt or liability (e.g. car loan, student loan, etc.);
5. if such debt or any portion thereof remains due and owing, please state the current outstanding balance owed;
6. if such debt is no longer due and owing, the source of the funds that were used to satisfy such debt or liability.

**6-58a.**

On the date of your marriage, did your spouse owe any debts and/or have any liabilities for a cumulative amount in excess of \$2500.

**6-58b.**

If yes, for each such debt or liability, please state

1. the name and address of the person and/or entity to which each such debt or liability was owed;
2. what was the nature, type or kind of such debt or liability;
3. the amount owed on the date of your marriage with respect to each such debt or liability;
4. the reason for such debt or liability (e.g. car loan, student loan, etc.);
5. if such debt or any portion thereof remains due and owing, please state the current outstanding balance owed;  
if such debt is no longer due and owing, the source of the funds that were used to satisfy such debt or liability.

B: Distinguishing Between Community and Separate Assets

Connecticut is an all property state and does not have a statutory definition of “marital property”, nor does it have a statutory concept known as “separate property.” *Coppila v. Farinc*, 50 Conn. Supp. 11, 13 (2006).

Connecticut General Statute section 46b-81 (copy enclosed) authorizes Connecticut courts to “assign to either husband or wife all or any part of the estate of the other,” at the time of entering a decree annulling or dissolving a marriage or for legal separation. This statute does not provide any distinctions or limitations based upon title or form of ownership. The assignment of property is not limited to assets which are held in joint names by the parties. Further, assignment is not limited to property acquired during the marriage or any other particular period of time. The statute also does not distinguish assets based upon how the asset was acquired. For example, an asset inherited by a spouse or received as a gift is not excluded from distribution.

The foregoing having been said, Connecticut General Statute section 46b-81(c) affirmatively requires the court to “consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estate.” So, timing and manner of acquisition (inheritance/gift) are relevant and should be presented to the court.

The one exception to the foregoing is if the parties have entered into a prenuptial and/or antenuptial agreement. Antenuptial settlements are defined in Black’s Law Dictionary (6<sup>th</sup> Edition 1990 Page 85), as “contracts or agreements between a man and women before marriage, but in contemplation and generally in consideration of marriage, whereby the property rights and interest of either the prospective husband or wife, or both of them, are determined, or where property is secured to either or both of them, or to their children.” An antenuptial agreement is a type of contract and must, therefore, comply with ordinary principles of contract law.

The Connecticut Premarital Agreement Act passed into law in 1995. It governs all premarital agreements *signed* on or after October 1, 1995. It supersedes the common law application of McHugh v. McHugh, 181 Conn. 482, which was decided in 1980.

The McHugh decision confirmed that antenuptial agreements are *generally* enforceable; however, is limited to the issue presented, distribution of certain property in case of divorce or dissolution. McHugh did not address the validity of the premarital agreement dealing with a) spousal support; b) assets and liabilities brought into the marriage; or c) receipt of assets during the marriage by way of gift or inheritance.

The McHugh decision set forth three conditions that need to be satisfied for a pre-1995 antenuptial agreement to be enforceable:

1. The contract was validly entered into;
2. Its terms do not violate statute or public policy; and
3. The circumstance of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice.

The Connecticut Premarital Agreement Act can be found at Connecticut General State Statutes (CGS) 46b-36a to 46b-36j. “Property” as used in this context is defined as “an interest, present or future, legal or equitable, vested or contingent, in real or personal property, tangible or intangible, including income and debt” (CGS 46b-36b(2)).

Connecticut General Statute section 46b-36c requires that a premarital agreement “shall be in writing and signed by both parties” and “shall be enforceable without consideration.” It should be noted that “The signature of the party seeking the enforcement of the terms of the contract is not a necessity. So long as he performs his obligations under the contract, his signature is superfluous from a practical point of view...The certainty of enforceability purpose of the statute is achieved when the person who is disavowing the validity of the document has signed it intelligently and willingly” (Dornemann v. Dornemann, 48 Conn. Supp. 502 (2004)).

The Premarital Agreement Act, Connecticut General Statute section 46b-36d(a)(1)-(9) sets forth an extensive but not exhaustive itemization of the permissible contents of a premarital agreement. Parties to a premarital agreement may contract with respect to:

1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
2. The right to buy, sell, use or transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
3. The disposition of property upon separation, marital dissolution, death or the occurrence or nonoccurrence of any other event;
4. The modification or elimination of spousal support;
5. The making of a will, trust, or other arrangement to carry out the provisions of the agreement;
6. The ownership rights in and disposition of the death benefit from a life insurance policy;
7. The right of either party as a participant or participant's spouse under a retirement plan;
8. The choice of law governing the construction of the agreement; and
9. Any other matter, including their personal rights and obligations.

However, none of the provisions may be in violation of public policy or of a statute imposing a criminal penalty (CGS 46b-36d (b)). Additionally, there are specific limitations on provisions related to children. The right of a child to support may not be adversely affected by a premarital agreement (CGS 46b-36d(c)). Thus, the parties may not contractually reduce or eliminate either parent's child support obligations. Further, to the extent the parties to a prenuptial incorporate provisions concerning the care, custody and visitation or other provisions affecting a child, such provisions are subject to judicial review and modification (CGS 46b-36d (c)).

Premartial agreements may be amended or revoked, only by a written agreement signed by the parties (CGS 46b-36f). As with the original agreement, the amended agreement or revocation is enforceable without consideration (CGS 46b-36f).

A permartial agreement is not enforceable if:

1. It was not executed voluntarily (CGS 46b-36g(a)(1)); or

2. The agreement was unconscionable when it was executed or when enforcement is sought (CGS 46b-36g(a)(2)); or
3. Before execution of the agreement, a party was not provided a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party (CGS 46b-36g(a)(3));  
or
4. A party was not offered a reasonable opportunity to consult with independent counsel (CGS 46b-36g(a)(4)).

Under the Act the party opposing enforcement of the prenuptial agreement bears the burden of proving the statutory bars to enforcement (CGS 46b-36g(a)). McHugh places the burden of proof on the party seeking to enforce the agreement.

The court in Fitzgerald v. Fitzgerald, 169 Conn. 147 (1975) suggested that the existence of a premarital agreement does not preclude an order of temporary alimony even if such agreement includes a provision in which the parties have waived alimony or otherwise limited his/her claim to alimony. The court in Fitzgerald further indicated that in deciding motions for temporary alimony and/or child support, it is not necessary to determine the enforceability of the premarital agreement but rather issues relating to enforceability of the agreement should be determined at the trial on the merits of the dissolution action.

### C. Division of Marital Assets

As indicated in section B heretofore, Connecticut General Statute section 46b-81 does not define “property” nor does any other relevant statutory section.

Black’s Law Dictionary (6<sup>th</sup> Edition 1990) page 1095, defines “property” as the term “commonly used to denote everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest and includes real and personal property, easements, franchises, and incorporeal hereditaments.”

Nothing in the legislative history of 46b-81 indicates an interest to narrow the plain meaning of property from its ordinary broad and comprehensive scope. “Interpreting the term property broadly is also consistent with the purpose of equitable distribution statutes generally” Krafick v. Krafick, 234 Conn. 783 (1995).

Notwithstanding the court’s broad interpretation there are limits. The terms “estate” and “property,” as used in CGS section 46b-81, are read to mean presently existing interests, Tyc v. Tyc, 40 Conn. App. 562 (1996) not a mere expectancy. Rubin v. Rubin 204 Conn. 224 (1987), An expectancy is only the bare hope of succession to the property of another. It has no attribute of property and the interest to which it relates is at the time nonexistent and may never exist. The defining characteristic of an expectancy is that “its holder has no enforceable right to his beneficence”, Krafick.

The following is a sample of assets the courts in Connecticut have found to be property for distribution purposes:

1. Reality: Real estate subject to distribution is not limited to a marital home, but may include vacation homes, (including time shares), agricultural holdings, undeveloped land, commercial buildings and the like. Even if neither party has an outright fee simple interest in the property, there may be other interests in realty (a leasehold interest, mortgage, or a reversionary interest) which are relevant for distribution purposes.

2. Bonus Income: A bonus received and placed into a bank account was treated as property, not income, Chammah v. Chammah, Docket Number FA-95-145944-S (Supp. Court Stamford 07/11/97).
3. Family Business: Siracusa v. Siracusa, 30 Conn. App. 560 (1993).
4. Employment Lawsuit: Smith v. Smith, 249 Conn. 265 (1999).
5. Personal Injury Award: Lopiano v. Lopiano, 247 Conn. 356 (1998), Raccio v. Raccio, 41 Conn. Supp. 115 (1987).
6. Inheritance: Rubin v. Rubin, 7 Conn. App. 735 (1986) rev'd, 204 Conn. 224 (1987), Jackson v. Jackson, 17 Conn. App. 431 (1989), Karen v. Parciak-Karen, 40 Conn. App. 697 (1996).
7. Future Worker's Compensation Benefits: Tyc v. Tyc, 40 Conn. App. 562 (1996).
8. Franchise Ownership: Cagianello v. Cagnielo, FA-01-0076560-S (Rockville January 24, 2003) (summarized at 9 Conn. Ops. 194).
9. Insurance Policy: Gallo v. Gallo, 184 Conn. 36 (1981), Kulmacz v. New York Life Insurance Company, 39 Conn. Supp. 470 (1983).
10. Pension Benefit: Chammah – see above.
11. Personal Property: Szilagyi v. Szilagyi, 3 Conn. App. 25 (1984).
12. Stock Options: Walker v. Walker, 2 Conn. Ops. 620 (Hartford 1996).

Once an asset has been determined to be property within Connecticut General Statutes section 46b-81 the second stage of analysis is valuation. The significance and complexity of the valuation process will vary from case to case depending upon the particular assets involved. For example, if the only assets accumulated by the parties are bank accounts, investment or brokerage accounts, 401ks, life insurance with a cash value and the like, the value can easily be determined by obtaining the most recent statement.

While there may be several different values for most assets including “book value” or “replacement value”, for purposes of a dissolution action it is the fair market value which is defined as “the price that would probably result from fair negotiations

between a willing seller and a willing buyer” Turgeon v. Turgeon, 190 Conn.269(1983), that is important to the court.

Though many clients will want to argue that the date for valuation of assets should be set as of the date of separation, or the date the dissolution action was filed or some other time period, and courts in other jurisdictions do so, the case law in Connecticut is clear-valuation is as of the date judgment is entered. This is true even when the parties have been separated for a long period of time prior to the dissolution. Zern v. Zern, 15 Conn.App.292 (1988). This having been said, statutorily the court still needs to “consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.” (C.G.S. Section 46-b-81(c))

Appraisals are routinely utilized as evidence for the value of real property, business, professional practices, personal property, antiques, collectibles and the like. When selecting an expert appraiser careful attention should be given to locate one with specific experience valuing the asset in dispute and if possible within the geographical area the case is to be presented. The appraiser’s education, employment history and experience, as well as, prior court room experience (previously being found as an expert by the court) likely will have a significant impact upon the weight the court places on the expert’s opinion.

The Connecticut courts have decided, Simons v. Simons, 244 Conn. 158(1998) that a professional license or degree is not an asset which may be valued or divided in a dissolution action. Connecticut courts; however, have distinguished the professional license or degree from a professional practice which can be valued and divided.

When valuing a professional practice or other closely held business the following factors should be taken into consideration:

1. Value of capital accounts;
2. Accounts receivable;
3. Work in progress;
4. Value of tangible property; and
5. Goodwill.

In establishing the value of a business interest, one can not rely solely on the business' present income, expenses, assets and liabilities. It is appropriate and recommended to:

1. Review the business' past performance.
2. Compare the financial history of this business with that of similar business to determine if any patterns exist, positive or negative, in the larger industry.
3. Look at the number of clients or suppliers a business depends upon (one major client or supplier can dramatically effect a business' income or expenses).
4. The degree of risk associated with a business venture of this type (risky ventures may be less marketable).
5. The general economic conditions presently existing in the immediate area, state and region.
6. The economic outlook or trends for the immediate area, state or region.
7. The number and strength of competitors.
8. The capacity of a business to generate income (look beyond the net income figure indicated on the tax returns).
9. The dividend paying capacity of the business.
10. The existence of buy-sell agreements.

If the party to the dissolution action holds only a minority share in a business venture it is likely his or her interest will be discounted because a minority holder has little to no opportunity to exercise any control over business decisions, operations or the like thus reducing the marketability of the shares. See Siracusa v. Siracusa, 30 Conn. App. 560 (1993) for a detailed discussion of discounting a minority holding.

#### D. Division of Retirement Benefits Including QDROs

Pension benefits and retirement plans are property within the definition of 46b-81 and thus may be considered and assigned by the court when fashioning a property settlement Krafick v. Krafick, 234 Conn. 783 (1995). While Krafick dealt specifically with a vested pension, the Supreme Court noted that similar results were reached by other jurisdictions concerning unvested pensions and did not disagree with such a conclusion. Pension benefits have been distinguished from a mere expectancy, such as an inheritance, because a pension represents a contractual right to income payments in the future.

An interest in an employer sponsored pension or retirement plan generally can be divided into two categories, defined contribution plans and defined benefit plans. A defined contribution plan is one in which an employee or employer on the employee's behalf makes fixed periodic contributions. A defined benefit plan is one which the employee is entitled to a fixed benefit at retirement; however, it is not fixed by the amount of contributions made but generally a formula (i.e. percentage of three best annual earnings) is utilized.

While most employers will provide you a statement which reflects the annual or monthly retirement benefit at retirement age, or document which provides the formula to be used and necessary information to calculate the benefit, an actuary or other expert is generally needed to reduce that benefit to its present value if an "offset" method is being contemplated. An offset method requires the court to determine the present value of the pension benefits, decide the percentage to which the nonemployee spouse is entitled to, and award other property to the nonemployee spouse as an offset to the pension benefits to which he or she is otherwise entitled. This only works if there are enough other assets to distribute to the nonemployee spouse.

A time rule is sometimes applied in dividing assets including pensions. This approach reflects the view that a distinction is necessary in some instances between benefits earned entirely during the marriage and those attributable in part to premarital employment efforts. A similar approach is used when benefits are awarded as an

inducement for future services. The purpose of such is to recognize and credit the employee spouse for premarital and/or post dissolution employment efforts, without depriving the nonemployee spouse a share of the asset earned during the marriage.

When a time rule is applied, the distinction between pension benefits earned during the marriage and those earned through premarital or future service is made by multiplying the total benefit by a “coverture fraction”. The numerator of that fraction is the number of years married. The denominator of the fraction is the total number of years employed. The resulting portion of the total benefit represents the amount earned during the marriage.

By way of example, if it is known that the employee spouse has been employed for 20 years as of the date of the dissolution which has resulted in a monthly pension benefit of \$1,000; however, he has only been married 12 years the time rule would apply as follows:

$$\text{\$1,000/month} \times \frac{\text{12 years of marriage}}{\text{20 years of employment}} = \text{\$600/month earned during marriage}$$

The court then can award a portion of the monthly benefit to the nonemployee spouse via a percentage or specific dollar amount.

Once the court determines that the nonemployee spouse should receive a percentage or specific dollar award from the pension plan, the court then will likely order this division/assignment be made via a Qualified Domestic Relations Order (QDRO). In other words, the court orders that, upon maturity, a fixed percentage or dollar amount of the pension be distributed to each spouse. Once divided, each party’s share will continue to increase in value, tax free, until distribution.

Yet another method available to the court in determining the division of pension benefits is to “reserve jurisdiction” until benefits have matured. Once matured, the trial court will determine the proper share to which each party is entitled and divide the benefit accordingly. This method allows a court to base its distribution upon actual benefit payment figures rather than assumptions and variables.

#### F. Insurance and Inheritance Issues

Parties are often ordered to maintain life insurance coverage on their own lives, naming the spouse and/or children as beneficiary in order to secure alimony and child support obligations, including those associated with post majority education. Generally, no transfer of actual ownership of the policy is involved and the requirement to maintain the policy and beneficiary designations terminate when the alimony and/or support obligation ends. There are however other types of orders concerning life insurance that are in the nature of property distributions.

The most significant provisions of an insurance policy, when considering division of assets are the cost surrender value and potential for borrowing against the policy. Certain types of policies also provide future monthly income payments in addition to death benefits. If any of these three features exist the court can assign the rights or entitlements to a party pursuant to Connecticut General Statutes section 46b-81.

There are also issues with inheritances that have been received by a spouse. In North v. North, 183 Conn. 35 (1981) the court ruled that Connecticut General Statutes section 46b-81 authorizes broad powers on the court including the power to assign one spouse in a dissolution property which the other spouse received through inheritance. The North, 183 Conn. At 39-40, decision also stated “Although a party may have received property through inheritance, assigning such property to the other spouse does not violate section 46b-36”, which provides that neither spouse acquires as a result of the marriage any right to or interest in the property of the other.

Notwithstanding the court’s authority to distribute an inheritance, as with any asset, the court must consider the statutory criteria set forth in section 46b-81. when dealing with inheritance the last factor articulated in section 46b-81 “...the contribution of each of the parties in the acquisition, preservation or appreciation in value...” may take on more meaning. In the case of Murphy v. Murphy, 2001 Conn. Super. LEXIS 3103 (2001) the court found that where the noninheriting party does not contribute, acquire, enhance, maintain or use any of the inheritance for marital purposes, then the inherited money (assets) should not be distributed upon divorce.

Similarly, in Tedford v. Tedford, 1994 Conn. Super. LEXIS 362 (Conn. Super. 1994) the trial judge referee did not allow inherited money to be distributed upon divorce when husband did not play a part in the acquisition, and wife maintained the accounts separately since receiving it and husband made no contributions to the accounts.

The Murphy and Tedford decisions are a trial court decision and not necessarily a result which is uniformly required.

G. Alimony

Connecticut General Statutes section 46b-82 (enclosed) authorizes the Superior Court to order either of the parties to pay alimony in addition to, or in lieu of a division of property. An award of alimony is viewed as being based upon a continuing duty of one divorced spouse to support the other. The trial court has broad discretion in determining the type, duration and amount of the alimony award.

In determining whether alimony shall be awarded, the duration and amount, the court is obligated to consider the following factors:

1. length of marriage;
2. the causes for the dissolution of the marriage;
3. age of the parties;
4. health of the parties;
5. station of the parties;
6. occupation;
7. amount and sources of income;
8. vocational skills and employability of the parties;
9. estates of the parties;
10. needs of each of the parties;
11. the award, if any, which the court may make pursuant to section 46b-81 (property/asset division);and
12. in the case of a parent to whom the custody of the minor children has been awarded, the desirability of such parent's securing employment.

While the court's obligation to consider all of the statutory criteria is mandatory, the court is not required to give equal weight to each one. In addition, no single criteria is preferred over the others. Accordingly, careful trial preparation is necessary to demonstrate clearly to the trial judge why particular criteria are (or are not) significant in any given case.

In addition to being authorized by Connecticut General Statute 46b-82 to enter an award of alimony, the trial court is authorized to "direct that security be given therefore

on such forms as the court may deem desirable, including an order to either party to contract with a third party for periodic payments or payment contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless, by a preponderance of the evidence, such insurance is not available to the party, the cost is prohibitive or the party is uninsurable.

#### H. Dividing Debt – Who is liable?

The courts in Connecticut have read Connecticut General Statutes 46b-81 to authorize it to impose the satisfaction of debts or liabilities on either party or jointly notwithstanding the fact that the statute fails to contain any specific reference to debts or liabilities. Beede v. Beede, 186 Conn. 191 (1982) citing Schmidt v. Schmidt, 180 Conn. 184 (1980).

Factors the court have found appropriate to consider in assigning responsibility for debts include:

- a. Fault, Clement v. Clement, 27 Conn. App.364 (1992);
- b. Which party insisted upon incurring the debt, Schmidt supra;
- c. When was the debt incurred; in Leo v. Leo, 197 Conn. 1 (1985), the court imposed debts incurred by wife after parties' separation to be wife's sole responsibility. Though there is no requirement that post separation debts will be the sole responsibility of the spouse incurring the debt, as the court will consider if the debt was incurred for reasonable family needs as opposed to personal purposes such as vacation; and
- d. Is there an asset that accompanies the debt? If there is, which spouse is retaining the asset? In such cases, frequently he/she who retains the asset retains the debt.

Furthermore, a party may be ordered to pay debts even if that party does not have liquid funds available, where there are "other potential sources of income" (i.e. sale of assets). Russo v. Russo, 1 Conn. App. 604 (1984)