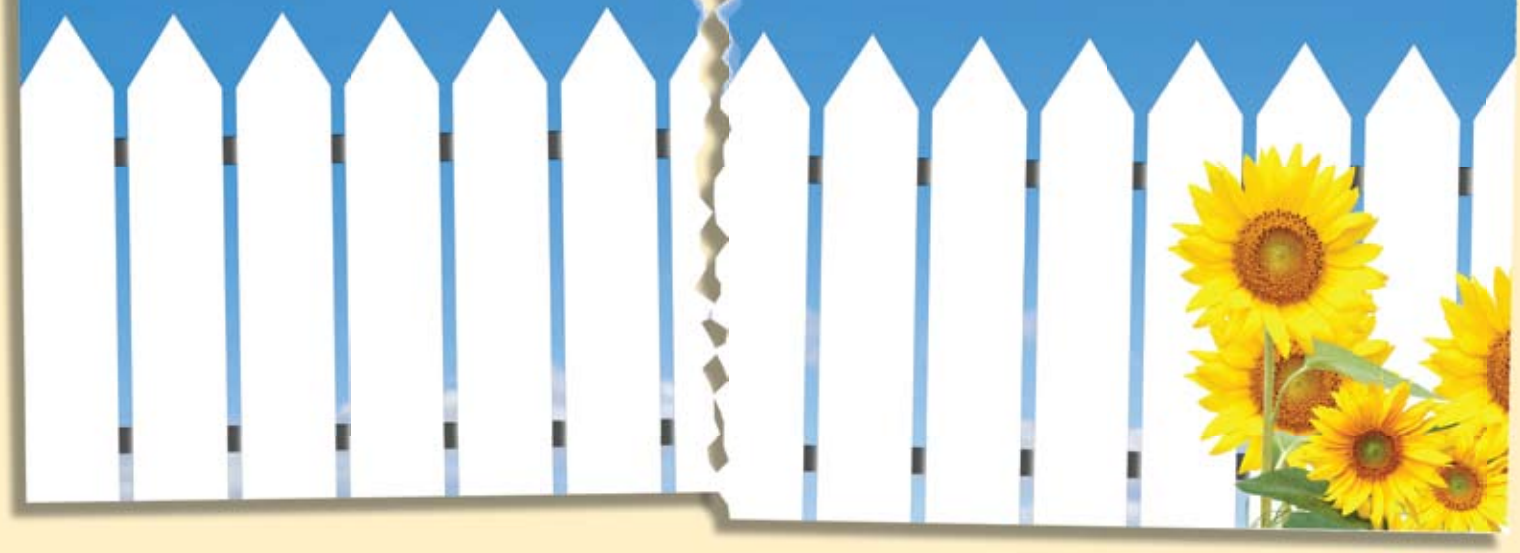
Equal is Not Necessarily Equitable when Distributing Marital Property

By Mark A. Snover and James D. Moriarty



In a divorce case, is a 97/3 percent division of the marital assets contrary to Michigan law? How about a 70/30 percent division? The answer for both is no—depending on the facts, of course.

These authors reviewed numerous opinions seeking to glean insight into those situations in which the appellate courts have found it appropriate to award one spouse a greater portion of the marital estate than the other.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained."[1]

The Michigan Supreme Court requires that a trial court consider the following when determining a marital property division: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity.[2] "There may even be additional factors that are relevant to a particular case."[3] "The determination of relevant factors will vary depending on the facts and circumstances of the case."[4]

The *Sparks* Court recognized that "the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance."[5]

In *Berger v Berger,* the trial court awarded 70 percent of the marital estate to the wife, supporting its award by finding:

> that the parties' marriage lasted 10 years; each party enjoyed good physical and relatively sound mental health; both parties have the ability for meaningful employment; at the time of the divorce, [husband] earned substantially more a year than [wife] ($120,000 versus $22,000); both parties contributed to the acquisition of the marital estate; [husband] was the family's primary financial supporter while [wife] worked part-time and was the children's primary child-care provider; and [wife] also supported the family financially when [husband] became unemployed, which permitted purchasing the marital home.[6]

Fast Facts

Marital property distribution doesn't need to be equal to be equitable.

No Michigan statute or any caselaw precludes an outright substantial deviation from numerical equality in dividing marital property.

Poor conduct related to financial decisions during a marriage seems to be the most widely accepted reason for deviating from numerical equality in property divisions.

In addition to the above factors, the trial court also used the husband's extramarital affair to justify its 70/30 division. Evidence at trial showed that:

> [w]hile [husband] viewed the affair as an old one-night stand, [the paramour] testified about several incidents of intimate touching over a period of a year and a half culminating on some occasions in intercourse or oral sex. These incidents occurred in the marital home while [she] was employed as a nanny from 1999 to 2000.... [She] also testified that when she returned to the Berger household in 2004, [husband]'s comments and touching again became "too friendly," making her feel uncomfortable. The [trial] court found "the unique nature of this extra-marital affair"—i.e., seducing the children's nanny, [wife]'s cousin, in the marital home—demonstrated extraordinarily poor judgment and lack of insight about the effect his conduct could have on everyone in the household....[7]

Despite the disparity in the parties' respective incomes and the husband's affair, the Court of Appeals concluded:

> for two reasons that the trial court erred in deviating from a congruent division of the marital property to the extent it did....Just as in *Sparks,* [*supra,*] where the plaintiff's sexual infidelity did not justify a 75/25 division of marital property, we conclude that here, because fault is the only true justification for the huge divergence from congruence, the trial court assigned this one factor disproportionate weight.[8]

Additionally, the Court of Appeals found that the tenor of the trial court's comments suggested its property division was intended to punish the husband for his affair with the nanny, which the trial court found particularly egregious. The Court of Appeals noted that:

> In dividing the marital estate, "a judge's role is to achieve equity, not to 'punish' one of the parties.[9]" Here, the record indicates the trial court was more intent on imposing punishment than in equitably apportioning the marital property.[10]

For the combined reasons, "th[e] Court [of Appeals] [wa]s left with the firm conviction that the trial court's dispositional ruling dividing the marital property, with [wife] receiving 70 percent and [husband] receiving 30 percent, was inequitable."[11] The Court of Appeals remanded the case to the trial court for the purpose of achieving a division of property that was fair and equitable.

The *Berger* Court did not reject a 70/30 division; rather, it rejected the trial court assigning disproportionate weight to the husband's fault in having an extramarital affair. Michigan appellate courts have not given us a clear expression of what would automatically trigger disproportionate splits, since doing so would likely be contrary to the *Sparks* Court's mandate to consider all of a case's facts. Recently, however, the Court of Appeals held that Michigan law permits substantial deviations from numerical equality in marital property divisions.

Indeed, as shown below, the *Washington* Court explicitly held that a 70/30 marital property division does not necessarily mean it is inequitable simply because it is a substantial deviation. Michigan law permits substantial deviations, but the facts of the case will always dictate where those deviations, substantial or slight, will apply.

In *Washington v Washington,* a party complained on appeal that the arbitrator's award, a 70/30 division, was so lopsided that it was, among other things, contrary to Michigan law.[12] The *Washington* Court framed the claimed error as requiring it to determine whether the division of property was contrary to Michigan divorce law.[13] The Court noted that "[t]he goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances."[14] "However, an equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution."[15] After its review, the *Washington* Court held that "an unequal division in the range of 70 percent to 30 percent is not contrary to Michigan law as long as it is based on appropriate criteria."[16] The *Washington* Court further held that "there is no Michigan statute or caselaw that precludes outright a substantial deviation from numerical equality in a property distribution award."[17] Accordingly, the *Washington* Court found no error where:

> The arbitrator recognized the foregoing principles of Michigan divorce law and applied that law to the facts as he found them.... [T]he opinion and award reveal[ed] that the arbitrator addressed the unequal award by stating that "[wife] dissipated assets both through credit card spending and the use of the home equity, at an unreasonable rate, and well beyond that at which [husband] dissipated assets." He concluded that it was difficult to determine the exact amount of [wife]'s unreasonable spending, but that it was "well in excess of $100,000" and that the award, therefore, was equitable.[18]

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Further, as in *Berger, supra,* the complaining party:

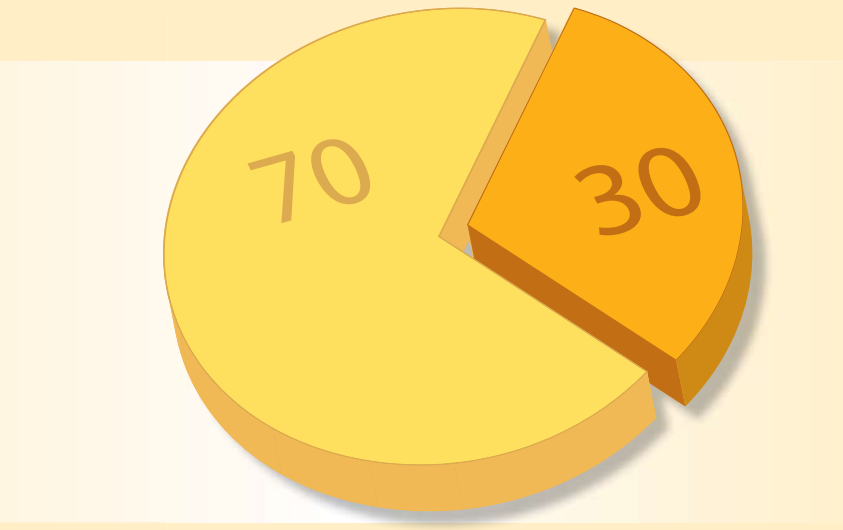
> [A]rgue[d] that the arbitrator misapplied the factor of fault in the property award. For example, [wife] argue[d] that the arbitrator put too much weight on her own conduct and not enough on [husband]'s conduct. Although the arbitrator concluded that [wife]'s reckless spending justified in part an unequal property division, fault is clearly a proper factor to consider in the division of marital property.[19]

The *Washington* Court continued, "This is particularly true in a case like this where, unlike in *Berger,* the fault was directly related to the parties' assets and debts."[20] Indeed, even Justice Levin, who believed that with respect to marital property divisions "the introduction of evidence concerning marital fault reintroduce[d] the evil sought to be remedied by the enactment of no-fault divorce[,]"[21] that, in his view, a "judge may also properly consider that one of the parties squandered family money when deciding upon the division of what is left of family property."[22]

The most extreme example of a disproportionate split that these authors found was the case of *Jackson v Jackson*.[23] The wife in *Jackson* conspired with her paramour to kill her husband. She acted on that plot by making coffee with D-Con rat poison in it for her husband, for which she was convicted of attempted murder. The Court of Appeals upheld awarding 97 percent of the marital estate to the husband.

Michigan appellate courts have found a multitude of factors to be important in approving disproportionate splits, including broken premarital promises (rather than using a mathematical formula in achieving an equitable resolution, the court awarded a party a cash payment);[24] emotional abuse 60/40;[25] conduct related to substance abuse 60/40;[26] greater financial contributions of a party to the marital estate 55/45;[27] needs of one of the parties 65/35;[28] financial misconduct related to an affair 60/40;[29] and attempts to conceal marital assets (wife $400,000; husband $117,000).[30]

The *Hanaway* Court held that fault is an element calling for a subjective response.[31] Just as fault is an element calling for a subjective response, it is likely that many of the cases that would support a deviation from numerical equality would also require a subjective response. ■



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FOOTNOTES

1. *Berger v Berger,* 277 Mich App 700, 716–717; 747 NW2d 336 (2008) (citing *McNamara v Horner,* 249 Mich App 177, 188; 642 NW2d 385 (2002)).
2. *Sparks v Sparks,* 440 Mich 141, 159–160; 485 NW2d 893 (1992).
3. *Id.*
4. *Id.*
5. *Id.* at 158.
6. *Berger,* 277 Mich App at 719–720.
7. *Id.* at 713–714.
8. *Id.* at 721.
9. *Sands v Sands,* 442 Mich 30, 36–37; 497 NW2d 493 (1993).
10. *Berger,* 277 Mich App at 722.
11. *Id.* at 721–722.
12. *Washington v Washington,* 283 Mich App 667, 673; 770 NW2d 908 (2009).
13. *Id.*
14. *Id.* (citing *Berger v Berger,* 277 Mich App 700, 716–717; 747 NW2d 336 (2008)).
15. *Id.* (citing *Berger v Berger,* 277 Mich App 700, 717; 747 NW2d 336 (2008) and *Ackerman v Ackerman,* 163 Mich App 796, 807; 414 NW2d 919 (1987) (A property award "need not be equal, it need only be equitable.")).
16. *Id.* (citing *Berger v Berger,* 277 Mich App 700, 718–722; 747 NW2d 336 (2008)).
17. *Id.* at 673.
18. *Id.* at 674.
19. *Id.* at 675–676 (citing *McDougal v McDougal,* 451 Mich 80, 89; 545 NW2d 357 (1996); *Berger, supra* at 717).
20. *Id.* at 676.
21. *Sparks, supra* at 164 (Levin, J., dissenting).
22. *Id.* at 177 (Levin, J., dissenting).
23. *Jackson v Jackson,* 2008 WL 441608, at *1, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2008 (Docket No. 271917).
24. *Gubin v Lodisev,* 197 Mich App 84; 494 NW2d 782 (1992).
25. *Oriedo v Nyabul-Oriedo,* 2010 WL 1629079, at *7, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2010 (Docket No. 288432).
26. *Welling v Welling,* 233 Mich App 708, 710; 592 NW2d 822 (1999).
27. *Uygur v Uygur,* 2006 WL 1568845, at *8, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2006 (Docket No. 258207).
28. *Kenbeek v Kenbeek,* 2008 WL 2938554, at *1, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2008 (Docket No. 277359).
29. *Ostermann v Ostermann II,* 2009 WL 80412, at *2, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2009 (Docket No. 278786).
30. *Donahue v Donahue,* 134 Mich App 696, 703; 352 NW2d 705 (1984).
31. *Hanaway v Hanaway,* 208 Mich App 278, 297; 527 NW2d 792 (1995).