**DIVISION OF PROPERTY IN DOMESTIC CASES - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am still Tain Kell.*

We tell you all the time that we struggle to identify episode topics that 1) we know something about; and 2) you might find interesting or helpful.

*The first one in that list is the hardest for us – finding stuff we know something about is always a struggle.*

And we are not trying to repeat ourselves too often – but the reality is that we began this adventure we call the Good Judge-Ment Podcast 5 years ago.

*And with the way the law changes, there are times we need to revisit a topic or something within a larger topic that we already addressed in a prior episode.*

So in preparing for today’s recording session, I went back to a list that Tain and I brainstormed a few years ago and worked through the topics we addressed and those we had not yet addressed and found a topic that had been suggested by a loyal listener some time ago.

*Yeah, we are sorry for the delay – but we are getting to it eventually! Today’s topic is* ***DIVISION OF PROPERTY IN DOMESTIC RELATIONS CASES****. So, without further adieu, let’s get into today’s topic.*

To be perfectly clear, we plan to discuss some topics in today’s episode dealing with the division of property – so we are not planning to touch on alimony or any child issues

But understand that the division of debt encompasses things like division of pots and pans, furniture, etc. but it also addresses division of retirement accounts, property that is pledged as security for debt, unsecured debt and other less obvious sub-topics

In a topic as broad as “property division,” there are factual scenarios that can arise that would make a huge impact in the outcome of the case.

We cannot (and are not trying to) discuss all of the different factual scenarios that might arise and address how those would impact a division of property

Instead, we plan to discuss issues from a 1,000 foot perspective and not try to get into the weeds of factual scenarios that could impact property division

When we lead NJO, we talk to new judges about domestic relations law over a couple of days and we essentially break the sessions down into two large categories – adult issues and children issues

There are a couple of overarching principles that judges care about that dictate some of what we do in the context of property division in a divorce case:

* Do you want to see this order again (like on a contempt action)?
* Try to divorce these folks in every sense of the word – not only legally and romantically – but financially as well
	+ Don’t let them have their credit tied up with their ex for decades
	+ So think about issues such as time to refinance the debt and what to do if the party who is awarded the property cannot qualify for a new loan
	+ Order parties to execute deeds, title documents, etc. as a part of your order!
	+ If you want to award that home to one party, include language in the order that requires the party to refinance the secured debt within \_\_\_ months. If the refinance is not completed by that date, then what?
		- But what if the spouse living in the home does not want to list it, or will not clean it up so it can be effectively shown to potential buyers, or sets a ridiculous asking price that would never be paid for the home?
		- You decide whether these are the types of people that need such an order, with that level of detail (who picks the real estate agent, etc.)

Which brings us to a sidetrack that we need to address early in this episode

(For new listeners, consider this to be your fair warning. Wade and Tain often get sidetracked during episodes of the Good Judge-Ment Podcast. We would apologize, but if happens too often – the apologies would take over the episodes)

Parties frequently present judges with uncontested divorce agreements that potentially create future problems for the parties

Judges do not want to reject settlement agreements but – occasionally – there are situations where we do not have any choice. The agreement presented has issues that are obvious and problematic

First – judges are authorized to reject settlement agreements *Gravley v. Gravley*, 278 Ga. 897 (2005) (“When incorporating a settlement agreement into a final judgment of divorce, thereby making the settlement agreement the judgment of the court, the trial court has the discretion to approve or reject the settlement, in whole or in part.”)

I do not think judges look to reject settlement agreements but there are certain obvious problems that the judge looks for because he/she has been “burned” on them in the past

Frequently, lawyers present settlement agreements to resolve the divorce and when the contempt actions start to be filed a year or so later, the lawyer who prepared the settlement agreement is no longer involved with the parties – leaving the judge to clean up the lawyer’s mess!

Second – Parties frequently want to get through their divorce and become hyper-focused on one issue or topic without even appreciating the potential problems with other topics.

For example, if the parties are arguing over custody and visitation, they will often not even pay attention to the details of the settlement agreement relating to real estate or division of debt

If we are being honest, the parties may not even understand some of the hidden pitfalls that exist in the context of property division

The reason this sidetrack comes up here is because we ask judges if they are sure they want to see this particular order again in the future.

When a judge rejects a settlement agreement, it is not to be a jerk. Just understand our name is on an order that is enforceable with contempt powers. If the order is incomplete or creates a situation that almost begs for future contempt actions, we want to resolve those issues now – not kick the can down the road.

Ok, back to our primary topic.

Georgia charges judges to make an “equitable division” of property – but that does not mean an “even” division of property

Other states are known as “community property” states – Georgia is not one of those states! (See *Moore v. Moore*, 249 Ga. 27 (1982))

Equitable division of property means that division of property should be “fair” – not necessarily “even” (*ZEKSER*, 293 Ga. 366 (2013); *DRIVER*, 292 Ga. 800 (2013)–NUMEROUS OTHER CASES).

That means that the conduct of the parties during the marriage should be considered when making an equitable division of property

And how the couple obtained the property also matters

We could have an entire episode on the details regarding “separate” property, “comingling” and other issues relating to whether property should be considered “marital property, subject to division.”

For the purposes of today’s episode, understand that if one of the spouses obtained property – even during the time that person was married – that property may be considered separate property, not subject to division

And title to the property is not determinative as to whether the property is separate or marital *Coe*, 285 Ga. 863 (2010).

This concept of separate property requires an analysis that has become known as the “source of funds rule.”

Succinctly stated, the source of funds rule says that if the source of the property was non-marital, that property should not be included in the marital estate, subject to division as part of the divorce

But there are exceptions to that broad statement of the rule – and those exceptions are typically very fact-specific.

If the topic of separate property arises, there is a list of cases which address this topic - *THOMAS*, 259 Ga. 73 (1989); *HORSLEY*, 268 Ga. 460 (1997); *Armour*, 288 Ga. 50 (2010); *Sullivan*, 295 Ga. 24 (2014); *Stonewall*, 368 Ga. App. 292 (2023).

There is another “fun fact” that can impact a decision relating to marital property vs. separate property – it is frequently referred to as “comingling”

As a very simplistic description, imagine you inherit money from your parent while married and you put the money in a joint account with your spouse – that can be considered “comingling” – converting the separate, non-marital property into a part of the marital estate, subject to division

Separate property can be comingled  ***Calloway-Spencer v. Spencer*, 355 Ga. App. 743, 744-745 (1), 845 S.E.2d 715 (2020)**. And it possible that a single item of property can be partially pre-marital, separate property and some portion of that same property can be considered marital. (Id.) See ***LERCH*, 278 Ga. 885 (2005**); ***COE*, 285 Ga. 863 (2010); *FLESCH,* 301 Ga. 779 (2017);** Also see ***THOMAS*, 259 Ga. 73 (1989)**; ***ARKWRIGHT*, 284 Ga. 545 (2008**); ***HALPERN*, 256 Ga. 639 (1987**); ***MORROW*, 272 Ga. 557 (2000**)

The impact of comingling is that separate property can be converted into marital property if the separate property was comingled with marital assets

**NOTE:** Be aware of the holding in *Mbatha v. Cutting*, 356 Ga.App. 743 (2020) if you ever have property (particularly real property) that was originally obtained in another state or country.

As a practice point for both lawyers and judges: If you have issues relating to separate property, please provide the judge a list prior to trial that describes the property (i.e. the Home on Greene Street, investment account with Fidelity) so the judge can start making his/her own list of property that is the separate property of each spouse and the property that is considered marital, subject to division

“In order to divide marital property on an equitable basis, a trial court must first classify property as marital or non-marital.” *Stonewall v. Stonewall*, 368 Ga. App. 292, 294 (2023) – a prepared list that describes the property in contest helps the judge keep the different arguments “straight” during the hearing

To be clear, separate property is NOT subject to division – only truly marital property is subject to division

Have the parties identify the issues to be resolved in each hearing. If the parties have property that they failed to bring to your attention and the decree is silent on those issues, the law says they are each left where they were before the litigation as to that unscheduled property **(*FLETCHER*, 143 Ga. App. 404 (1977)**.

Let’s move to the topic of bank accounts, retirement plans and other “accounts”

Too often, lawyers expect judges to become accountants and perform complex financial analysis of an account during a divorce

There’s a reason we became lawyers and not scientists – and it usually goes back to our disdain for math

It is possible that a party had an investment account, 401(k) or other account prior to the marriage and kept that account after the marriage

If the account-holder is arguing that some or all of the account is a separate asset (not subject to division), the burden is on that party to prove whether and how much of the account was separate property (***Flesch v. Flesch*, 301 Ga. 779 (2017)**)

All too often, a party will introduce an account statement that pre-dates the date of marriage and urge the judge to find that sum represented on the account statement to be non-marital property

To be clear, following that suggestion is actually a bit disingenuous. Market fluctuations that naturally occur may suggest that the $50,000 that was in the account prior to the marriage should now total $80,000 – or $30,000 – all depending upon the way the account assets were invested

If it matters to you, invest in an expert to establish what the current value is of the account. We understand that, occasionally, it does not make financial sense to invest in an expert

But if you do not present the judge with sufficient evidence to support your argument, do not get angry when the judge does not reach the result you wanted

Also, please be aware that military retirement has changed dramatically in recent years. If you have a case involving military retirement, be prepared to do some additional research on those recent changes

Judges, know that you are going to be required to make factual findings in a military case – such as the date the soldier/spouse entered the military, the date of marriage, the date of separation, the soldier’s pay grade, etc that you do not have to do in other types of cases.

 Judges-put that burden on the parties!

Note there are special rules as to a state employee’s retirement benefits (they are subject to equitable division but are not assignable via a QDRO or otherwise – the non-employee spouse will have to collect his/her share directly from the retiree–***BRYANT*, 216 Ga. App. 737 (1995)**.

Employees of the railroad also have some “different” types of retirement plans. ***LANIER*, 278 Ga. 881, 883 (2005); *STANLEY*, 281 Ga. 672 (2007)**

What is a QDRO? (Qualified Domestic Relations Order)

First rule about QDRO’s – lawyers – PLEASE get the form from the plan BEFORE going to trial – if you make even the slightest modification to their form, the plan will reject the QDRO

A QDRO allows a court to make an equitable division of an account that has pre-tax dollars being invested. If the judge wants to divide a pre-tax account with a non-participant spouse, failure to do so via a QDRO can cause HUGE tax problems for the parties

It is a good practice for the court to order a division via QDRO in a particular dollar figure or a percentage of the value as of “X” date. Don’t make an award of “one-half” or “34%” without including an “as of” date. Then order one party or the other to present a QDRO approved by the plan administrator for execution by the court.

Let’s discuss Wade’s favorite topic- division of personal property and pets

Lawyers – please understand that despite how lovable a collie is, at the end of the day, the dog is chattel – personal property. We do not allow visitation plans with big screen televisions, so do not get involved with visitation with Lassie

 Your judges will appreciate your efforts

 Bubby the dog

Another practice point here – make lists of a description of personal property if you are going to ask the judge to divide furniture, etc.

And please make sure your clients are aware that they could go out and buy a new television or sofa for less money than they are going to spend having lawyers argue about it in court

 And personal property is not worth what you paid for it 10 years ago!

Seriously, this is an area where you can use a Special Master under U.S.C.R. 46

 Particularly true when you have “collections” or unique personal property

Or a high asset case where the parties have unique interests in unique kinds of property – like collectable cars, lots of rental property, interests in a number of closely held corporations, oil wells, etc. ***NATIONSTAR MORTG. LLC v. BRUNT*, 330 Ga. App. 202 (2014)**

Division of debt can be an incredibly difficult area of property division

Unfortunately, some divorcing couples have more debt than either could ever pay

We spent a bunch of time early in this episode urging you to divorce the parties in every possible manner

But what do you do when you recognize that neither party can pay the debts they already incurred?

One thing is to have the divorce decree fashioned in a way that sells everything to apply to the debt

Again, to our judge listeners – sometimes people present their case to you in a way that simply cannot be “fixed.” So don’t try to fix it.

You may be forced into a situation where you order parties to pay certain debts that they cannot simply go pay off

When that happens, remember to restrict use of the credit card so that if it cannot be refinanced, at least the party responsible for that debt cannot continue to run up debt that is ultimately going to come back to the other party

This is probably a good time to remind our listeners of another “fact” that should be self-apparent.

You cannot order a creditor to forego its rights that were created prior to the divorce – Chase Bank or Wells Fargo are not parties to the action.

 So the judge cannot order the creditor to do or not do anything!

You can order one spouse to be responsible for a debt or to refinance the debt in a way that removes the other party from responsibility for the debt

But understand that if the “responsible party” spouse does not make the payments, your decree cannot prevent Chase Bank from going after the other spouse for payment

And that brings us to the final point we wanted to touch on today – bankruptcy

If the parties are already in a bankruptcy when they file, the trial judge should pause the proceedings until one party or the other obtain a “lift of stay” from the bankruptcy court

We don’t want to get into detail on bankruptcy law, but understand that when a bankruptcy is filed, an automatic stay is entered by the bankruptcy court – which prevents parties and creditors from taking certain actions

Until that stay is “lifted,” the stay applies to the court attempting to divide marital assets, set alimony and child support, etc.

Again, we can hear the listeners well-versed in bankruptcy law screaming at their devices, wanting us to give more detail. Not our lane! There is a stay that should be lifted prior to proceeding with divorce – end of our disclaimer on this point!

The reason we wanted to touch on bankruptcy here is to make this point – if you order a spouse to take on a certain debt and that spouse files bankruptcy, the judge cannot hold the party in contempt for failing to pay the debt that was discharged in bankruptcy ***MCGAHEE*, 280 Ga. 750 (2006)**

Example #4,530 of why the judge should attempt to divorce the parties in every sense of the word as part of the divorce – even if it means selling the marital residence that both parties are attached to in order the pay creditors

**CONCLUSION**

1. Divorce parties in every sense of the word
	1. Titles, deeds, deadline to refinance, etc.
2. Judges – insist the parties prove their case. Not your job or even within your particular skill set
3. Lawyers – even though it would be more expedient to allow the parties to figure out details such as who pays which bill and when, please try to convince them to fight it out now and not kick the can down the road
4. Thanks for listening and remember that we post outlines of these podcasts on our website, goodjudgepod.com

**MUSIC TRIVIA**

Once again, we come to that portion of our episode that some of you seem to really like – music trivia. So, Tain, take it away.

Today, we are going to venture back into Wade’s world of funk and soul music. There was once an incredibly talented band known as the Commodores which won Grammy’s and had a BUNCH of chart topping hits. This monster band of the late 1970’s and 1980’s were led by an artist who went on as a solo to create his own catalog of monster hits, Mr. Lionel Richie. The Commodores released their first album in 1974. They had hit after hit during their time at Motown Records which they left in 1986. Today’s trivia is going to deal with the Commodores and their former leader/founder, Lionel Richie.

If you think you do not know much about the Commodores, let me name some of their hits – I bet you know them better than you thought. *Brick House* and *Too Hot to Trot* were their songs which charted in 1977. *Three Times a Lady* was their biggest hit. Richie sang *Easy*, and the Commodores sang *Sail On*. But they won a Grammy for the song *Nightshift* after Lionel Richie left the band.

First question – the Commodores where a group of guys who originally met at what college in 1968? (Multiple Choice) Was it:

Grambling University

University of Alabama

Tuskegee Institute

Howard University

**A: “C” Tuskegee Institute**

Lionel Richie had a monster hit with the song *Lady* that her performed as a duet with another soft rock icon. This song rocked the pop charts in 1980. Who sang *Lady* with Richie?

**A: Kenny Rogers**

In 1981, Richie also had another monster duet but, this time, with a female star when they released the song *Endless Love.* The female singer was the lead singer for the Supremes. Name her.

**A: Diana Ross**

Ok these last few questions may have been too easy for a music trivia icon such as Tain Kell. So let’s step it up a bit.

Lyrics from *Brick House.* In the song, the Commodores sing:

*Cause she’s a brick house*

*She’s mighty-mighty, just lettin’ it all hang out*

*She’s a brick house*

*How can she lose with the stuff she use*

*36-24-26 oh \_\_\_\_ \_\_ \_\_\_\_\_\_ \_\_\_\_\_\_\_\_*!

**A: OH WHAT A WINNING HAND**

Final question – again, a multiple choice. The Commodores had a few #1 hits on the US Pop chart but some of their famous songs just missed the #1 spot. Which of the following songs from the Commodores DID NOT hit #1? Hint- Pick 2 and only 2.

1. *Brick House*
2. *Three Times a Lady*
3. *Still*
4. *Easy*

**A: “a” and “d” were NOT #1’s. *Brick House* reached #5 and *Easy* reached #4.**

Have a great day and don’t leave candles burning when you leave the house. It is dangerous!