



## His or Hers?

### Untangling Separate Assets from Marital Assets

I felt like Harrison Ford, bullish and courageous, when I was victorious in my somewhat novel and imaginative argument. Turns out, I was merely riding the wave on the cutting edge of a legal issue that I had not created nor could I take credit for.

The cutting edge had to do with how much premarital money can be untangled from a retirement or investment account that has been funded, in part, by monies earned during a marriage.

My client saved funds in retirement accounts to last her entire lifetime. After she married later in life, she continued investing more funds into her accounts. With her divorce, the courts would typically determine the value of the account at the time of marriage and subtract that amount from the balance of the account at the time of divorce. So, if a retirement account was worth \$50,000 at the time of marriage, and the account was valued at \$100,000 at the time of divorce, generally the court would set aside \$50,000 as non-marital money, and the balance of the account,

\$50,000, would be divided between the two spouses as a marital asset.

But what about my client's earnings on her non-marital investments generated, through stock splits and market gains, during the marriage? She did not want to fork over 50 percent of those earnings to her divorcing spouse. Through a detailed argument, I asked the court to untangle all of my client's premarital money, including all of its earnings, and set them aside entirely for my client. This would leave a much smaller sum invested during the marriage to be divided between my client and her spouse.

Legal authority for this theory was sparse, but it had trickled down from Appellate Courts in 1982, 1990 and in 2006. But, it had not come down clearly enough to stop the courts, in general, from using a blunt sword to divide retirement accounts and largely ignore earnings on premarital assets. Judges rely, at least in part, on the lawyers to tell them the law, the nuances, the trends, the support and proof of the theories. But, I'm pretty sure that judges have their own way of knowing things as well.

In the end victory was mine, but I soon learned that I could not entirely take credit for claiming this victory—our trial judge probably knew we were on the cutting edge of this issue all along. Indeed, he was likely way ahead of me the whole time. He knew what was coming down the pike. I think he was aware that Appellate Courts were heading in the direction of taking a more detailed look at retirement growth before dividing the accounts.

A few months after this case was over, the case of *Thompson v. Thompson* came down from the Utah Court of Appeals. In *Thompson*, the husband was initially denied any appreciation on his premarital contributions to his 401(k) by the trial court. The trial court followed the formerly general practice of setting aside the initial value of the retirement account at the time of marriage to the owner spouse and dividing the balance as marital property between the parties. The husband appealed. Citing a case from 1990, the husband urged the Court of Appeals to overturn the trial court's decision and they did. Following a very small lead that started close to 1990, the Court of Appeals held that the husband was entitled to his initial investment and all appreciation on this investment that had accrued during the marriage.

Justice Oliver Holmes, Jr. once said, "This is not a court of justice young man; this is a court of law!" The legal system is not always fair nor is it always right. Laws are not static, solid things that can be consistently relied upon by anyone. Laws evolve and change. But issues not previously honed and sharpened, can become cutting edge and used to your advantage. It's fortunate (and fun) for the lawyer to be on the right side of the cutting edge, and even better for the grateful client, even if victory was likely from the beginning. **UB**

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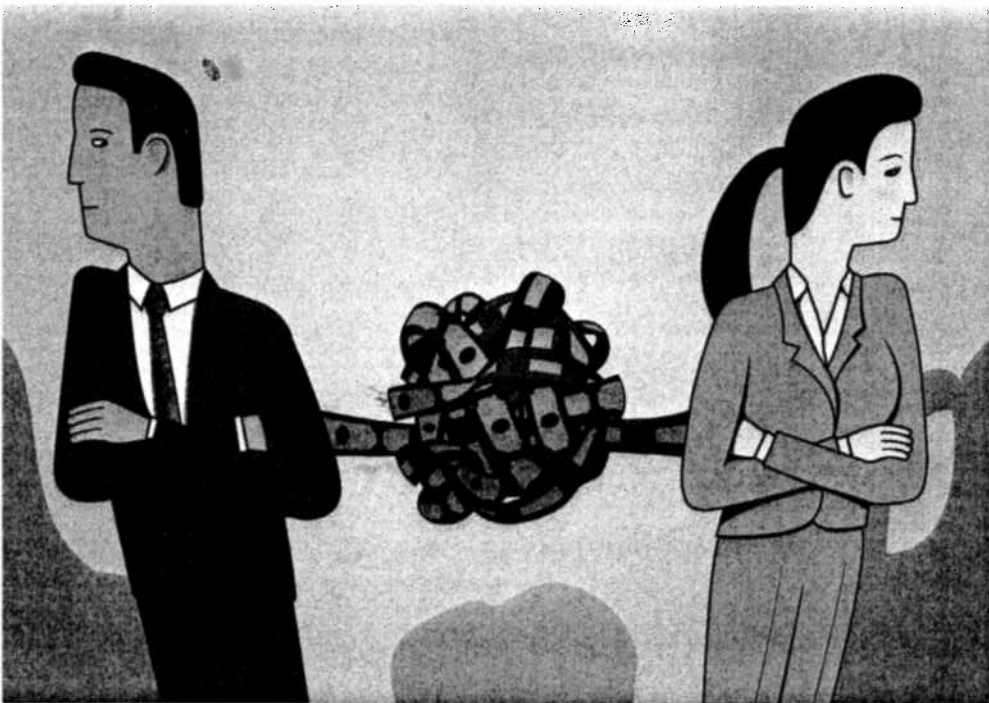


Illustration by Ryan Taylor