

Yours, Mine, & Ours: What Can I Expect If My Assets Were Used to Acquire Our Assets?

By: Hottell Family Law Group.

If you are like most people, you thought your marriage would last forever. For that reason, you did not completely segregate your separate assets from your marital assets¹. Now you are divorcing, and you may want the court to award you the equity in the home you owned prior to your marriage (even though principal was paid down during your marriage); the retirement account that you started before your marriage (even though contributions were made during your marriage); or, the money you alone inherited during your marriage (even though you used it to pay down the mortgage on the home you own with your spouse). In Virginia, an asset that was acquired or maintained with a blend of separate and marital funds is referred to as hybrid property. This article will explain how Virginia courts divide the value in hybrid property and what evidence you can gather to help your attorney trace out your separate contributions and increase the amount of your settlement or award.

In Virginia, the most widely used method of apportioning the value of hybrid property, including but not limited to real estate and civilian retirement accounts, is based upon what is referred to as the Brandenburg formula, which focuses on the parties' respective monetary contributions to the asset. Brandenburg is the method used most often, and although it is followed in the vast majority of cases, it is not appropriate for every case. For example, if a party makes a large contribution to an asset just before the parties' separation, then a division based only upon the amount of contributions, e.g., Brandenburg, may not be fair. A competent attorney should review the facts of your case and recommend the method of apportionment most beneficial to your specific circumstances.

The Brandenburg formula compares the total amount of a spouse's separate contributions to an asset to the total amount of the parties' marital contributions to the same asset. Imagine a fraction. The denominator (bottom number) in the fraction is the amount of the total contribution to the property from every source, including separate and marital funds. The numerator (top number) in the fraction is the amount of an individual spouse's separate contribution to the property. The numerator is divided by the denominator to arrive at a percentage representing that spouse's separate share of the value in the asset. The following example illustrates how the Brandenburg formula works in practice:

Susan purchased a home several years before she married John. When the parties married, Susan's home was worth \$400,000, and she owed \$300,000 on her mortgage. After marrying, the parties moved into Susan's home. She even added John's name to the title!² The parties' marriage lasted twenty years. They used their wages to pay down the mortgage, and at the time of their separation they owed only \$75,000. The home has appreciated in value, and is currently appraised at \$600,000.

The court must decide how to divide the \$525,000 worth of equity in the home (\$600,000 - \$75,000 = \$525,000). Susan made a separate contribution of \$100,000 by paying the mortgage principal down before the parties married (\$400,000 - \$300,000 = \$100,000). This number goes on the top of the fraction. Thus, $\$100,000/X$. Wages earned by either party during the marriage are marital, so the parties made a marital contribution of \$225,000 ($\$300,000 - \$75,000 = \$225,000$). The total contribution is \$325,000 ($\$100,000$ separate funds + $\$225,000$ marital funds = $\$325,000$). This number goes on the bottom of the fraction. Thus, $\$100,000/\$325,000$. \$100,000 divided by \$325,000 yields 30.8%. Susan's separate share is \$161,700 ($.308 \times 525,000$). The remaining equity is marital, and will be divided equitably between the parties.³ Assuming, for the sake of example, that the court divides the marital share equally (50/50), then Susan will receive \$343,350, and John will receive \$181,650.

In real world cases, especially those involving long marriages, application of the Brandenburg formula can be difficult because documents may be lost and a party may not recall essential information like what the property was worth on the date of marriage or whether the other spouse, who handled the family finances, ever refinanced the property and took cash out. It is more difficult in these cases to meet the burden of tracing out your separate contribution for the court. Your burden is to present evidence that persuades the judge that the contributions you claim to have made were more probably than not actually made. This is referred to as preponderant evidence. If you do not meet your evidentiary burden, then the asset will be considered 100% marital. Therefore, it is imperative to retain an attorney who understands the case law surrounding tracing and will conduct thorough discovery, including issuing subpoenas to title companies, banks, and mortgage lenders.

If you believe that you may be entitled to a separate share of the value in hybrid property, then you should collect the following documents and schedule a consultation with a competent domestic relations attorney:

For hybrid real estate

1. HUD-1 Settlement Statement for the purchase of your home.
2. HUD-1 Settlement Statements for each and every refinance of your home.
3. An appraisal, tax assessment, and statement of mortgage balance as close to the date of your marriage as possible.
4. An appraisal, tax assessment, and statement of mortgage balance as close to the date of your separation as possible.
5. If principal was paid down during the marriage with funds that you acquired before your marriage, an account statement or other document reflecting the location and balance of the funds on the date of your marriage; account statements or other documents reflecting that the funds were maintained separately; a cleared check, checkbook register, account statement, or other document reflecting the withdrawal of the funds from your account for pay down; and, statements from your mortgage lender or other documents reflecting that the funds withdrawn were actually used for pay down.

6. If principal was paid down during the marriage with inherited funds, a will, accounting of the decedent's estate, or other document reflecting your inheritance; account statements or other documents reflecting where you held the inherited funds; a cleared check, checkbook register, account statement, or other document reflecting the withdrawal of the funds from your account for pay down; and, statements from your mortgage lender or other documents reflecting that the funds withdrawn were actually used for pay down.

For a hybrid financial account

1. Documents reflecting the balance in the account on the date of your marriage.
2. Documents reflecting each and every contribution to the account from the date of your marriage through the present.
3. Documents reflecting each and every withdrawal from the account from the date of your marriage through the present.

Thank you for taking the time to read this article. You are now one step ahead of most individuals who are considering a divorce. You should now know whether you may have a separate interest in any hybrid property and what documents you should begin gathering. By gathering and organizing documents for your attorney, you will save yourself attorney's fees.

This article is intended to discuss the topic of retracing separate contributions to hybrid assets in general terms, and is not intended as specific legal advice. Each case has distinct issues that may not fit the general rule. You should retain the services of a competent domestic relations attorney to discuss the specific issues in your case.

¹For a complete discussion about separate, marital, and hybrid property classifications read "Now That My Spouse and I are Separated How Does that Affect My Money and Other Assets?" by Christopher Malinowski, Esq.

²To the extent that re-titled property is retraceable by the preponderance of the evidence, and was not intended as a gift, the property retains its original classification. Therefore, Susan's share of the equity in the home is not impacted by her decision to add John's name to the title unless she intended it to be a gift.

³For a complete discussion of how the court determines equitable distribution of marital assets read "Now That My Spouse and I are Separated How Does that Affect My Money and Other Assets?" by Christopher Malinowski, Esq.